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Update of Selected Studies in Transportation Law, Volume 8, Section 1: Civil Rights and Transportation Agencies

This digest, a part of the *Selected Studies in Transportation Law* series, was prepared under NCHRP Project 20-06, "Legal Problems Arising Out of Highway Programs," for which the Transportation Research Board (TRB) is the agency coordinating the research. Under Topic 23-06, Larry W. Thomas, The Thomas Law Firm, Washington, D.C., prepared this digest by updating the most recent version also written by Larry W. Thomas. The opinions and conclusions expressed or implied in this digest are those of the researchers who performed the research and are not necessarily those of the Transportation Research Board; the National Academies of Sciences, Engineering, and Medicine; or the program sponsors. The responsible program officer is Gwen Chisholm Smith.

Background

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of specific problems in highway law. The NCHRP Legal Research Digest and the Selected Studies in Transportation Law (SSTL) series are intended to keep departments up-to-date on laws that will affect their operations.

Foreword

This digest analyzes federal laws and regulations as they affect transportation agencies in their business practices, construction of facilities, hiring, and services provided to the public. Specifically, the digest discusses:

- The constitutionality of the U.S. DOT's disadvantaged business enterprise (DBE) program applicable to public contracting and judicial precedents since *Adarand Constructors, Inc. v. Pena* (*Adarand III*).
- Disparate impact cases that have arisen out of the location of highways and related projects and the effects of Section 601 of Title VI of the Civil Rights Act of 1964 and § 602 of Title VI.
- The constitutional and statutory authority for § 1983 actions based on the authority of Congress to enforce the Fourteenth Amendment to the U.S. Constitution.
- The statutory and regulatory framework for claims under the Age Discrimination in Employment Act (ADEA).
- Title VII of the Civil Rights Act of 1964 as a proscription of disparate treatment by employers in hiring, including pattern-or-practice discrimination, promotions, suspensions, and terminations.
- The Americans with Disabilities Act (ADA) and the prohibition of discrimination in employment, in providing public services, and in providing accommodations to individuals with disabilities, including those who use wheelchairs.
- The First Amendment to the U.S. Constitution, specifically state Adopt-a-Highway programs and free speech in the workplace.

The digest will be useful to transportation lawyers, state and federal civil rights transportation officers, private civil rights attorneys, civil rights groups, students, administrators, and researchers of civil rights in transportation.

Volume 8: Transportation Law and Government Relations, Selected Studies in Transportation Law covers civil rights and transportation agencies, transportation and the United States Constitution, Indian transportation law, and motor vehicle law. Volume 8 may accessed at: http://www.trb.org/Publications/Blurbs/159372.aspx.

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CONTENTS

UPDATE OF SELECTED STUDIES IN TRANSPORTATION LAW, VOLUME 8, SECTION 1: CIVIL RIGHTS AND TRANSPORTATION AGENCIES

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A. INTRODUCTION

This section revises and updates *Selected Studies in Transportation Law, Transportation and Government Relations Volume 8, Section I*. entitled *Civil Rights and Transportation Agencies*, which was written by this author and published in 2007.

Subsection B discusses decisions by the United States Supreme Court and lower courts on the constitutionality and requirements of the federal laws and regulations that apply to the U.S. Department of Transportation's (U.S. DOT) program for disadvantaged business enterprises (DBEs) in public contracting, and discusses other issues relating to affirmative action programs or policies.

Subsection C analyzes Title VI of the Civil Rights Act of 1964 and whether there are actionable rights under the disparate impact regulations, for example, that prohibit discrimination in the location of highway projects.

Subsection D analyzes whether states and state agencies, including transportation agencies, as well as their officials, may be sued under 42 U.S.C. § 1983 for alleged violations of civil rights laws that prohibit discrimination based on age, disability, race, gender, national origin, or religion.

Subsection E analyzes discrimination claims under the Age Discrimination in Employment Act (ADEA).

Subsection F analyzes Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment.

Subsection G analyzes the Americans with Disabilities Act of 1990 (ADA), which prohibits discrimination against individuals with disabilities by employers, including transportation agencies; by public entities, including those that provide public services, including transportation services; and by owners or operators of public accommodations that provide transportation services.

Subsection H discusses First Amendment issues affecting transportation agencies, such as claims by certain groups and/or individuals who want to have their logos on state license plates. Subsection H also discusses whether public employees have the right of free speech in the workplace.

Subsection I, entitled Summary and Conclusions, reviews some of the primary issues that the section analyzes regarding civil rights and transportation agencies.

B. AFFIRMATIVE ACTION, PUBLIC CONTRACTING, AND TRANSPORTATION DEPARTMENTS

1. Introduction

This subsection discusses the constitutional, statutory, and regulatory framework of affirmative action programs that prohibit discrimination by transportation agencies in the awarding of public contracts. B. 2.a. provides a brief overview of significant cases prior to the Supreme Court's decision in 1995 in *Adarand v. Pena* (*Adarand III)*.[1] B. 2.b. discusses the constitutional, statutory, and regulatory requirements that apply to transportation agencies and DBEs in public contracting and the impact of the United States Supreme Court's decision in *Adarand III*. B. 2.c through 2.f. discuss, respectively, the U.S. DOT's DBE regulations promulgated by the Department in 49 C.F.R. part 26, specific amendments to the DBE regulations since 2006, and the regulations in effect as of 2018. B. 2.g. and 2.h. discuss cases deciding facial and as-applied challenges to the constitutionality of the U.S. DOT DBE program. B. 2.i. analyzes the Airport Concession Disadvantaged Business Enterprise (ACDBE) regulations and several relevant decisions on ACDBE programs at airports. B. 3. discusses judicial decisions on state and local affirmative action programs.

B. 4, 5, and 6. analyze the regulations and judicial precedents regarding the evidence needed to prove the compelling interest requirement before implementing a DBE program, the factors that apply to the narrow tailoring requirement, and the evidence needed to satisfy the narrow tailoring requirement. B. 7. addresses whether states have to make a separate showing that there is a compelling interest for a DBE program before implementing one.

B. 8. analyzes other issues that arise in challenges to DBE programs, such as standing, mootness, sovereign immunity, and qualified immunity. B. 9. discusses the relationship of federal DBE requirements to state constitutional provisions, such as when a state constitutional provision prohibits affirmative action by government programs or policies.

B. 10. and 11. address, respectively, affirmative action in hiring and promotions and the constitutionality 0of affirmative action in university admission policies.

[1] Adarand Constructors, Inc., v. Pena, 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed.2d 158 (1995). (*Adarand III*). *Adarand III* is cited in more than 1,000 cases as of the date of this report.

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

*a. Cases and Developments Pre-*Adarand III

This segment of the report addresses judicial decisions prior to *Adarand III* on the constitutionality in public contracting in the transportation industry of the use of race-based classifications for minority business enterprises (MBEs) and of gender-based classifications for business enterprises owned by women. Although earlier regulations and cases referred to minority business enterprises and business enterprises owned by women as MBEs, women WBEs (women business enterprises), FBEs (female business enterprises), or M/WBEs (minority and women enterprises), the affected business enterprises are referred to collectively in this report as disadvantaged business enterprises (DBEs).

Federal laws mandating non-discrimination in federal public contracting have a common origin in President Franklin D. Roosevelt's 1941 Executive Order 8802.[2] Executive Order 11246[3] issued in 1965, by President Lyndon 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,*[4] 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."[5] 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 public contracting and employment.

Section 8(a) of the Small Business Act (SBA) of 1953, 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.[6] In 1980, the United States Supreme Court in *Fullilove v. Klutznick*[7] indicated that such programs would pass constitutional muster. The *Fullilove* Court upheld a federally mandated 10 percent set-aside program for minority-owned businesses under the Public Works Employment Act of 1977.[8] Six justices voted to uphold the MBE provision in § 103(f)(2) of the Public Works Employment Act of 1977.[9]

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

> [A]ny 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.[10]

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."[11]

In 1989, in *Richmond v. J.A. Croson Co.,*[12] the U.S. Supreme Court struck down a municipal plan that required prime contractors to whom the city of Richmond, Virginia, awarded construction contracts to subcontract at least 30 percent of the dollar amount of the contract to one or more minority business enterprises.[13] The district court had upheld the Richmond

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[2] Reaffirming Policy of Full Participation in the Defense Program by All Persons Regardless of Race, Creed, Color, or National Origin and Directing Certain Action in Furtherance of Said Policy, 6 Fed. Reg. 3109 (June 27, 1941).

[3] 30 Fed. Reg.12, 319 (Sept. 28, 1965).

[4] 442 F.2d 159 (3rd Cir. 1971), *cert. den.* Contractors Assn. of Eastern Penn. v. Hodgson, 404 U.S. 854, 92 S. Ct. 98, 30 L. Ed.2d 95 (1971).

[5] *Id.* at 177.

[6] *See* Robert J. Dilger, SBA's "8(a) Program": Overview, History, and Current Issues, p.5. C.R.S. Report 7-5700, R44844 (updated Sept. 12, 2018). 15 U.S.C. § 637(a)(1)(c) (2018) presently states:

> It shall be the duty of the Administration and it is hereby empowered, whenever it determines such action is necessary or appropriate … (c) to make an award to a small business concern owned and controlled by socially and economically disadvantaged individuals which has completed its period of Program Participation as prescribed by section 636(j)(15) of this title, if—
>
> (i) the contract will be awarded as a result of an offer (including price) submitted in response to a published solicitation relating to a competition conducted pursuant to subparagraph (D); and
>
> (ii) the prospective contract awardee was a Program Participant eligible for award of the contract on the date specified for receipt of offers contained in the contract solicitation….

[7] 448 U.S. 448, 100 S. Ct. 2758, 65 L. Ed.2d 902 (1980) (overruled in 1995 by *Adarand III* where inconsistent with *Adarand III*).

[8] Pub. L. No. 95-28, 91 Stat. 116.

[9] The MBE provision required:

> [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, 100 S. Ct. at 2762, 65 L. Ed.2d at 908.

[10] *Id.* at 491-92, 100 S. Ct. at 2781, 65 L. Ed.2d at 933.

[11] *Id.* at 507, 100 S. Ct. at 2789, 65 L. Ed.2d at 943.

[12] 488 U.S. 469, 109 S. Ct. 706, 102 L. Ed.2d 854 (1989).

[13] *Id.* at 486, 109 S. Ct. at 718, 102 L. Ed.2d at 877.

Plan in all respects. The United States Court of Appeals for the Fourth Circuit initially affirmed the District Court's holding,[14] but the Supreme Court vacated and remanded the case to the Fourth Circuit[15] for further consideration in light of the Court's decision in *Wygant v. Jackson Board of Education.*[16] On remand, the Fourth Circuit reversed and remanded the case to the district court on the ground that the ordinance was invalid under the Equal Protection Clause.[17] On the city's later appeal, the Supreme Court noted probable jurisdiction.[18]

As discussed below, in *Croson*, a clear majority of the Court agreed that the Richmond Plan had two defects. One defect was the failure to make specific findings on the market to be addressed by the remedy; the other defect was the failure to limit the scope of the remedy by having only generalized findings of discrimination in the relevant market.[19] 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.[20]

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.[21] In *Croson,* the city had adopted a five-year plan in 1983 requiring that non-minority business enterprise contractors awarded a contract by the city had to subcontract at least 30 percent of the dollar amount of the contract to one or more MBEs.[22] 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 Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts."[23]

The city stated that the plan was remedial in nature and that it was for the purpose of increasing participation by MBEs in public contracts.[24] The plan, which permitted a waiver of the 30 percent set-aside requirement in exceptional circumstances, established procedures for contracts to be let by the city under the terms of the plan.[25] Statistics presented at a public hearing prior to the plan's adoption showed that, although 50 percent of the city was African American, between 1978 and 1983, only 0.67 percent of the city's prime contracts had been awarded to MBEs.[26] Prime contractors attending the hearing had virtually no MBEs within their "membership."[27] However, there was no direct evidence of racial discrimination in public contracting by the city or its prime contractors.[28]

To meet the 30 percent set-aside requirement when bidding on the project, the appellee J.A. Croson Co. (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 an increase in the contract price.[29]

The 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.[30] The evidence offered in support of the city's plan amounted only to a "generalized assertion" of past discrimination.[31]

> 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.[32]

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 § 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.[33] The Court held that the city could not support the compelling interest requirement for its race-based plan, because the city's

[14] Richmond v. J. A. Croson Co., 779 F.2d 181 (4th Cir. 1985).

[15] 478 U.S. 1016, 92 L. Ed 2d 733, 106 S Ct 3327 (1986).

[16] 476 U.S. 267, 106 S. Ct. 1842, 90 L. Ed.2d 260 (1986) (reversing the Sixth Circuit's decision that the respondent's layoff policies were constitutional, because the policies were not sufficiently narrowly tailored to achieve even a compelling state purpose and did not satisfy the demands of equal protection of the law).

[17] Richmond v. J. A. Croson Co., 822 F.2d 1355 (4th Cir. 1987).

[18] Richmond v. J. A. Croson Co., 484 U.S. 1058, 108 S. Ct. 1010, 98 L. Ed.2d 976 (1988).

[19] Richmond v. Croson, 488 U.S.469, 498, 109 S. Ct. 706, 724, 102 L. Ed.2d at 854, 884-85 (1989).

[20] *Id.* at 507, 109 S. Ct. at 729, 102 L. Ed.2d at 890.

[21] *Id.* at 477, 109 S. Ct. at 713, 102 L. Ed.2d at 871.

[22] 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.1,109 S. Ct. at 713, n.1, 102 L. Ed.2d at 872, n.1 (citation omitted).

[23] *Id.* at 478, 109 S. Ct. at 713, 102 L. Ed.2d at 871.

[24] *Id.* at 478, 109 S. Ct. at 713, 102 L. Ed.2d at 872.

[25] *Id.* at 479, 109 S. Ct. at 714, 102 L. Ed.2d at 873.

[26] *Id.* at 479-80, 109 S. Ct. at 714, 102 L. Ed.2d at 873.

[27] *Id.* at 480, 109 S. Ct. at 714, 102 L. Ed.2d at 873.

[28] *Id.* at 480, 109 S. Ct. at 715, 102 L. Ed.2d at 873.

[29] *Id.* at 483, 109 S. Ct. at 716, 102 L. Ed.2d at 875.

[30] *Id.* at 485, 109 S. Ct. at 717, 102 L. Ed.2d at 876.

[31] *Id.* at 498, 109 S. Ct. at 724, 102 L. Ed.2d at 855 (citing *Wygant*, 476 U.S. 267 (1986)).

[32] *Id.* at 499, 109 S. Ct. at 724, 102 L. Ed.2d at 885.

[33] *Id.* at 504, 109 S. Ct. at 726, 102 L. Ed.2d at 888.

evidence was deficient.[34] An analysis of whether the city's plan was narrowly tailored was nearly impossible as the plan had not been linked to discrimination.[35] Moreover, the city had not considered race-neutral means to effectuate the ends sought, and the 30 percent quota was not based on sound reasoning.[36]

> The 30% quota cannot in any realistic sense be tied to any injury suffered by anyone.... [37] 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."[38]

> [T]he 30% quota cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing.[39]

Thus, the Court rejected the claim that the program was narrowly tailored to remedy the effects of prior discrimination.[40]

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*.[41] However, prior to *Adarand III*, in 1990 in *Metro Broadcasting, Inc. v. Federal Communications Commission,*[42] overruled by *Adarand III* as discussed below, the Supreme Court held:

> 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 benign racial classification employed by Congress.[43]

Although the Court in *Metro Broadcasting* 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, the Court 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 the promotion of broadcast diversity was an important governmental objective and that the policies were substantially related to an important governmental interest, thus passing a constitutional challenge.[44]

In sum, as the United States Court of Appeals for the Tenth Circuit would declare in 2000, "[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."[45] Since the publication of the report in 2006, however, the law appears to have become more settled and consistent.

*b. Cases and Developments Post-*Adarand III

The Supreme Court's decision in *Adarand III* and its progeny illustrate how the legal landscape has changed, beginning with the standard of review that must now be applied to affirmative action programs. In brief, the Supreme Court has created three standards of constitutional 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. Whether the standard of strict scrutiny applies depends on whether a party discriminated against belongs to a discrete and insular group. The Court in *Adarand III* rejected 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 a strict scrutiny analysis, 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 and DBEs owned by women, the courts continue to apply an intermediate standard of scrutiny, which is discussed in part B. 4.c. of this report.

In *Adarand III,* the issue concerned §§ 8(a) and 8(d) of the Small Business Act.[46] The Supreme Court described the regulations promulgated pursuant to the foregoing statutes as "complex, cumbersome, and changing…."[47] Indeed, the regulations changed in the course of the *Adarand* cases. There are seven *Adarand* decisions, the issues and dispositions of which are summarized in a table in this part of the report.

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 (Mountain Gravel). After being awarded the contract, Mountain Gravel solicited bids from sub-contractors for a guardrail-portion of the contract and awarded the bid to the Gonzales Construction Company. Gonzales was certified as a small business that was controlled by socially and economically disadvantaged individuals. Mountain Gravel awarded the subcontract to Gonzales over the low bidder, Adarand Con-

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[34] *Id.* at 505-06, 109 S. Ct. at 728, 102 L. Ed.2d at 889-90 (additionally noting that absolutely no evidence was presented of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo or Aleut persons). *Id.*, 488 U.S. at 506,109 S. Ct. at 728, 102 L. Ed.2d at 890.

[35] *Id.* at 507, 109 S. Ct. at 729, 102 L. Ed.2d at 890.

[36] *Id.* at 507, 109 S. Ct. at 729, 102 L. Ed.2d at 890-91.

[37] *Id.* at 499, 109 S. Ct. at 725, 102 L. Ed.2d at 885.

[38] *Id.* at 500, 109 S. Ct. at 725, 102 L. Ed.2d at 886 (citation omitted).

[39] *Id.* at 507, 109 S. Ct. at 729, 102 L. Ed.2d at 891.

[40] *Id.* at 507-08, 109 S. Ct. at 729, 102 L. Ed.2d at 891.

[41] *Adarand III*, 515 U.S. 200, 222, 115 S. Ct. 2097, 2110, 132 L. Ed.2d 158, 178 (1999).

[42] 497 U.S. 547, 110 S. Ct. 2997, 111 L. Ed.2d 445 (1990).

[43] *Id.* at 564-65, 110 S. Ct. at 3008-09, 111 L. Ed.2d at 462-63 (citations omitted).

[44] *Id.* at 566-69, 110 S. Ct. at 3009-11, 111 L. Ed.2d at 464-65.

[45] Adarand Constructors, Inc. v. Slater, 228 F.3d 1147, 1161 (10th Cir. 2000) (*Adarand VII*).

[46] *Adarand III*, 515 U.S. at 207-08, 115 S. Ct. at 2103, 132 L. Ed.2d at 169.

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

structors, Inc. (Adarand), which challenged the outcome in the courts.[48]

The terms of the prime contract provided that Mountain Gravel 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 at issue in the *Adarand* case. The law required that the clause 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."[49]

In *Adarand III*, the Supreme Court addressed the issue of the constitutionality of a *federal* affirmative action plan for only the third time.[50] Overruling *Metro Broadcasting,*[51] supra, the Court vacated and remanded the Tenth Circuit's decision in *Adarand II* and held 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 that is less restrictive 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 means employed were narrowly tailored to achieve that interest.[52]

Following the Supreme Court's remand in *Adarand III*, the federal district court in Colorado in *Adarand IV*[53] stated that, contrary to the Court's pronouncement that the application of the strict scrutiny standard of review is not "fatal in fact" to an affirmative action program, the district court could not envisage a race-based classification that was narrowly tailored.[54] Thus, because the SCC was not sufficiently narrowly tailored to pass strict scrutiny, the district court granted Adarand's motion for a summary judgment and enjoined the defendants from administering, enforcing, soliciting bids for, or allocating any funds under the SCC program.

Although recognizing that its opinion on whether there was a compelling governmental interest for the SCC program was *obiter dicta,*[55] the district court stated 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.[56]

The Tenth Circuit in *Adarand V*,[57] because Colorado had modified its DBE regulations (see Table), vacated the district court's judgment and remanded it with instructions to dismiss. In *Adarand VI*,[58] the Supreme Court, holding that the case against the federal government was still viable, reversed and remanded.

In *Adarand VII*,[59] 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 the SCC program and the DBE certification program were not constitutional as they were structured in 1997. 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.[60]

The Tenth Circuit in *Adarand VII* noted that the only significant change in regard to the transportation appropriations statutes was the addition of both § 1003(b) of the Intermodal Surface Transportation Efficiency Act (ISTEA),[61] and § 1101(b)(6) of the Transportation Equity Act for the 21st Century (TEA-21),[62] requiring the Comptroller General to conduct a study and report to Congress on several aspects of the DBE program.[63] Moreover, the court stated that the regulations implementing

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[48] Adarand Constructors, Inc. v. Skinner, 790 F. Supp. 240 (D. Colo. 1992) (*Adarand I*).

[49] *Adarand III*, 515 U.S. at 205, 115 S. Ct. at 2102, 132 L. Ed.2d at 167-68 (quoting 15 U.S.C. §§ 687(d)(2), (3)).

[50] *Id.* at 256, 115 S. Ct. at 2126, 132 L. Ed.2d at 200; *see* Metro Broadcasting, Inc. v. Federal Communications Commission, 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 then percent of federal funds for local public works be used to procure services or supplies from minority business enterprises).

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

[52] *Adarand III*, 515 U.S. at 237-38, 115 S. Ct. at 2118, 132 L. Ed.2d at 188-89.

[53] Adarand Constructors, Inc. v. Slater, 965 F. Supp. 1556, 1561 (D. Colo. 1997) (*Adarand IV*).

[54] *Id.* at 1561.

[55] *Id.* at 1570. "Obiter dictum" is defined by Black's Law Dictionary (10th edition) as a judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential, although it may be considered persuasive.

[56] *Id.* at 1573.

[57] Adarand Constructors, Inc. v. Slater, 169 F.3d 1292, 1296 (10th Cir. 1999) (*Adarand V*). ("After issuance of *Adarand IV*, Adarand filed suit against state officials challenging Colorado's use of DBE guidelines in administering federally assisted highway programs. Colorado subsequently modified its DBE regulations to eliminate the presumption of social and economic disadvantage for racial and ethnic minorities, and to condition the social disadvantage branch of its DBE inquiry solely on the applicant's certification that he or she is socially disadvantaged.")

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

[59] *Adarand VII*, 228 F.3d 1147 (10th Cir. 2000).

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

[61] Pub. L. No. 102-240, 105 Stat. 1914, 1920-22 (1991).

[62] Pub. L. No. 105-178, 112 Stat. 107, 114-15 (1998).

[63] *Adarand VII*, 228 F.3d at 1192.

the affirmative action programs, because of the Surface Transportation and Uniform Relocation Assistance Act (STURAA),[64] ISTEA, and TEA-21, had undergone the most substantial change of any of the regulations, particularly to meet the narrow tailoring requirement established by the Supreme Court in *Adarand III*.[65]

In the course of the *Adarand* decisions, seven principal changes occurred regarding implementation between the old and new regulations, which may be described briefly as follows: (1) the presumption of economic disadvantage was automatically rebutted for an individual with a net worth above $750,000 without a requirement of further proceedings;[66] (2) quotas were explicitly prohibited in allocating subcontracts to DBEs and set-asides were limited to extreme circumstances;[67] (3) DBE participation goals could not be made in a specific area until extensive requirements had been met;[68] (4) race-neutral means had to be employed wherever possible to meet the highest feasible portion of the overall DBE participation goals;[69] (5) individuals not presumed socially disadvantaged could prove their status by a preponderance of the evidence; (6) recipients had to make certain that DBEs were not saturated in one particular type of work so as to preclude non-DBE firms from participating;[70] and (7) recipients could seek waivers and exemptions to ensure that the programs were not applied more broadly than permissible.[71]

In *Adarand VII,* the Tenth Circuit held that the government had demonstrated a "strong basis in evidence" that supported "its articulated, constitutionally valid, compelling interest,"[72] which Adarand had not rebutted. 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."[73] 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."[74] Adarand failed to meet its burden of demonstrating that the affirmative action program was unconstitutional.[75] The revised law was sufficiently narrowly tailored and, thus, constitutional. Although the 1996 SCC program was insufficiently narrowly tailored, the SCC program was no longer used in direct federal procurements; its defects had been "remedied" by TEA-21 and the regulations applicable to the federal-aid program.[76]

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, because the contractor had shifted its challenge from the DBE regulations to the statutes and regulations that pertained to direct procurement for highway construction on federal lands. The Court also 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.[77]

[64] Pub. L. No. 100-17, 100 Stat. 132 (1987).

[65] *Adarand VII*, 228 F.3d at 1193 (citing Participation by Disadvantaged Business Enterprises in Department of Transportation Programs, 64 Fed. Reg. 5096 (Feb. 2, 1999).

[66] Id. at 1193. *See* 13 C.F.R. § 124.104 (2000) (conforming SBA recertification of economic disadvantage with 49 C.F.R. § 26.67(b)(1) (2000)). As amended, the regulation in 49 C.F.R. § 26.67(a)(2)(i) (2018) now sets a maximum net worth of $1.3 million, and states, "You must require each individual owner of a firm applying to participate as a DBE, whose ownership and control are relied upon for DBE certification, to certify that he or she has a personal net worth that does not exceed $1.32 million."

[67] *Adarand VII*, 228 F.3d at 1193 (citing 49 C.F.R. §§ 26.43(a)-(b)).

[68] *Id.* (citing 49 C.F.R. § 26.45).

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

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

[71] *Id.* (citing 49 C.F.R. § 26.15).

[72] *Id.*, at 1174-75.

[73] *Id.* at 1176.

[74] *Id.* at 1174.

[75] *Id.* at 1176.

[76] *Id.* at 1179, 1186-7; *See also*, 49 C.F.R. § 26.51, *et seq.*

[77] *Adarand VI*, 534 U.S. 103, 122 S. Ct. 511,151 L. Ed.2d 489 (2001).

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. 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 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.	(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 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.	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 *cert*.

continued

Table 1. Continued

Citation	Issue(s) Presented	Holding(s)	Disposition
	(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.	(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 *Adarand Constructors, Inc., v. Pena,* 965 F.Supp. 1556 (D. Colo. 1997).	(1) Whether the race-conscious SCC program violated the Constitution, as well as the Civil Rights Act of 1964, 42 U.S.C. § 2000d, under the standard of strict scrutiny.	(1)(a) In considering whether the SCC program 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.	The district court granted Adarand's motion for summary judgment and enjoined the defendants from administering, enforcing, soliciting bids for, or allocating any funds under the SCC program. Adarand appealed.

continued

Table 1. Continued

Citation	Issue(s) Presented	Holding(s)	Disposition
		(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.	
Adarand V *Adarand Constructors, Inc., v. Slater,* 169 F.3d 1292 (10th Cir. 1999).	(1) Whether the SCC program was sufficiently narrowly tailored to serve a compelling governmental interest as to survive strict scrutiny.	(1) After *Adarand IV*, Colorado modified its DBE regulations and eliminated 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.	The Tenth Circuit vacated the district court's judgment and remanded 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.

continued

Table 1. Continued

Citation	Issue(s) Presented	Holding(s)	Disposition
Adarand VII *Adarand Constructors, Inc., v. Slater,* 228 F.3d 1147 (10th Cir. 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"[78] as now construed by the Court to be a part also of the Due Process Clause of the Fifth Amendment. However, "the burden rests with the Government to demonstrate that Congress had a strong basis in evidence to create this remedial program."[79] 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.'"[80]

c. TEA-21, SAFETEA-LU, and the DBE Regulations

Post-*Adarand III*, and similar to § 105(f) of the Surface Transportation Act of 1982, § 1101(b) of TEA-21 required that at least 10 percent of funds be made available for any program under titles I, III, V of the Act for the benefit of DBEs.[81] After September 30, 2003, there were numerous extensions of TEA-21.[82] TEA-21 and regulations pursuant thereto did "not establish a nationwide DBE program centrally administered by the U.S. DOT. Rather, the regulations delegated to each State that accepts federal transportation funds the responsibility for implementing a DBE program that comports with TEA-21."[83] In 1999, the U.S. DOT promulgated regulations with requirements that applied to DBEs in U.S. DOT-assisted contracts.[84] As discussed in B. 2.g. and h. of this report, the courts have upheld the DOT's DBE regulations.[85]

In 2005, Congress enacted the *Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users* (SAFETEA-LU).[86] SAFETEA-LU reauthorized the U.S. DOT's DBE program through fiscal year 2009 with some changes,[87] such as the increase in the limit on gross receipts for eligible small

[78] Rothe Dev. Corp. v. United States DOD, 324 F. Supp.2d 840, 843 (W.D. Tex. 2004) (*Rothe IV*), *affirmed in part and vacated in part by, remanded by, in part,* Rothe Dev. Corp. v. DOD, 413 F.3d 1327 (Fed. Cir. 2005) (*Rothe V*), (citing *Fullilove*, 448 U.S. at 480, 100 S. Ct. at 2758, 65 L. Ed.2d at 902 (1980).

[79] *Rothe IV*, 324 F. Suppp.2d at 842.

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

[81] Transportation Equity Act for the 21st Century, Pub. L. No. 105–178, § 1101(b)(1), 112 Stat. 107 (1998).

[82] On July 30, 2005, President Bush signed a twelfth extension (H.R. 3512, P.L. 109-42) that was to expire on August 14, 2005; *see FHWA Reauthorization of TEA-21*, https://www.fhwa.dot.gov/reauthorization/extension.htm (last accessed on Jan. 7, 2019) showing all renewals prior to July 30, 2005.

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

[84] *See* U.S. DOT, *Disadvantaged Business Enterprise*, https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise (last accessed Jan. 7, 2019). *See also*, Office of Small and Disadvantaged Business Utilization, https://www.transportation.gov/osdbu/ (last accessed on Jan. 7, 2019).

[85] *See also*, B.2.e. and f. of this report discussing, respectively, amendments to U.S. DOT's DBE regulations since 2006 and the Department's DBE regulations in effect as of 2018.

[86] Pub. L. No. 109-59, 119 Stat. 1156 (2005).

[87] *See* SAFETEA-LU § 1101(b).

businesses to $19,570,000.[88] SAFETEA-LU included three additional sections pertaining to race and DBE programs.

The courts have had to address whether to proceed in cases when new or amended regulations were promulgated in the midst of pending challenges to affirmative action programs. Part B. 8.b of this report discusses cases that have decided whether a pending case has become moot because of the suspension or termination of a DBE program or intervening changes in the program.

For example, 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 law. 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,"[89] as well as to consider "the statutory and regulatory framework in its prior stages as well."[90] As the court stated, "STURAA, ISTEA, and TEA-21, the transportation appropriation statutes at issue in this case, incorporate the presumption of disadvantage from SBA § 8(d)."[91]

d. Post-SAFETEA-LU: MAP-21 and the FAST Act

In 2012, the *Moving Ahead for Progress in the 21st Century* legislation (MAP-21)[92] replaced SAFETEA-LU that had expired in 2009 but that was extended several times until MAP-21.[93]

On December 4, 2015, President Barack Obama signed the *Fixing America's Surface Transportation Act* (FAST Act).[94] The Federal Highway Administration (FHWA) explains that "[t]he FAST Act continues programs designed to foster the training and development of surface transportation-related workforces and to support [DBEs],"[95] but the FAST Act does not change the manner in which the FHWA administers the Disadvantaged Business Enterprises Supportive Services Program. The FAST Act includes a "sense of the Congress" statement that requires the U.S. DOT to take steps to assure state compliance.[96]

As the U.S. DOT explains,

> [t]he DBE program was reauthorized by Congress several times since its inception; most recently in the [FAST Act]. Section 1101(b) of the Act describes Congress's findings regarding the continued need for the DBE program due to the discrimination and related barriers that pose significant obstacles for minority and women-owned businesses seeking federally-assisted surface transportation work. The Act further provides, that, except to the extent the Secretary of Transportation determines otherwise, not less than 10% of the amounts made available for any program under Titles I, II, III and VI of the Act and 23 U.S. Code 403, shall be expended with DBEs.[97]

Information on the current DBE program may be found on the U.S. DOT website,[98] which provides information on services and programs available to small businesses in the transportation sector, including disadvantaged and women-owned business enterprises.

Principally, however, the DBE program "is a legislatively mandated USDOT program that applies to federal-aid highway dollars expended on federally-assisted contracts issued by USDOT recipients such as State Transportation Agencies."[99]

e. The U.S. DOT's Amendments to the DBE Regulations since 2006

Before discussing the DBE regulations in 49 C.F.R. part 26, as of September 2018, in part B. 2.f of this report, this part summarizes some of the U.S. DOT's amendments to the regulations since the report was first published in 2006.[100]

On April 3, 2009, the U.S. DOT published a final rule[101] stating that, under the statutes governing the department's DBE program, firms are not considered small business concerns and are, therefore, ineligible as DBEs once their average annual receipts over the preceding three fiscal years reach specified dollar limits;[102] that the U.S. DOT has amended the size limits or gross receipts caps to ensure that small businesses' opportunity to participate in the Ddepartment's DBE programs remains unchanged after taking inflation into account;[103] and that the final rule provides for an inflation adjustment of size limits on small businesses participating in the DOT's DBE programs.[104]

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[88] SAFETEA-LU § 1101(b)(1)(a).

[89] *Adarand VII*, 228 F.3d 1147, 1158 (10th Cir. 2000).

[90] *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.

[91] *Id.* at 1160.

[92] Pub. L. No. 112-141, 126 Stat. 405 (2012).

[93] For a summary of MAP-21's provisions, *see Moving Ahead for Progress in the 21st Century Act (MAP-21)*, https://www.fhwa.dot.gov/map21/summaryinfo.cfm (last accessed on Jan. 7, 2019).

[94] Pub. L. No. 114-94, 129 Stat. 1312 (2015).

[95] FHWA, *Fixing America's Surface Transportation Act,* https://www.fhwa.dot.gov/fastact/factsheets/workforcedbefs.cfm (last accessed on Jan. 7, 2019).

[96] American Road & Transportation Builders Association, *Fixing America's Surface Transportation Act,* at 11 (2015), http://www.artba.org/newsline/wp-content/uploads/2015/12/ANALYSIS-FINAL.pdf (last accessed on Jan. 7, 2019).

[97] Transportation.gov., U.S. Department of Transportation, *Disadvantaged Business Enterprise (DBE) Program*, https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise (last accessed on Jan. 7, 2019).

[98] *See e.g. Id.*

[99] FHWA Disadvantaged Business Enterprise (DBE) Program, https://www.fhwa.dot.gov/civilrights/programs/dbe/ The FHWA DBE program requirements are now found at https://www.fhwa.dot.gov/civilrights/programs/dbess.cfm (last accessed on Jan. 7, 2019).

[100] *See also*, Transportation.gov, U.S. Department of Transportation, *DBE Laws, Policy, and Guidance,* [hereinafter DBE Laws, Policy, and Guidance], https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise/dbe-laws-policy-and-guidance (last accessed on Jan. 7, 2019).

[101] Disadvantaged Business Enterprise Program; Inflationary Adjustment, 74 Fed. Reg. 15,222 (April 3, 2009) (codified at 49 C.F.R. parts 23 and 26).

[102] 49 C.F.R. § 26.65 (2018).

[103] 49 C.F.R. § 23.33(a) (2018).

[104] 49 C.F.R. § 23.33(c) (2018).

On January 28, 2011, the department published a final rule[105] on improvements to the administration of the DBE program by increasing accountability for recipients with respect to meeting overall goals,[106] modifying and updating certification requirements,[107] adjusting the personal net worth (PNW) threshold for inflation,[108] providing for expedited interstate certification,[109] adding provisions to foster small business participation,[110] improving post-award oversight,[111] and addressing other issues.

On October 2, 2014, the U.S. DOT issued a final rule[112] amending the DBE program regulations to improve implementation by revising the uniform certification application and reporting forms;[113] creating a uniform personal net worth form;[114] collecting data required by MAP-21 on the percentage of DBEs in each state;[115] strengthening the certification-related program provisions, which include adding a new provision authorizing summary suspensions under specified circumstances;[116] and modifying several other provisions such as overall goal setting[117] and good faith efforts.[118]

f. The U.S. DOT DBE Regulations as of 2018

The DBE program has several objectives, including the assurance of "nondiscrimination in the award and administration of DOT-assisted contracts in the Department's highway, transit, and airport financial assistance programs."[119] The requirements in part 26 apply to "[a]ll FHWA recipients receiving funds authorized by a statute to which this part applies...."[120] Discriminatory actions that are forbidden include those 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."[121] The regulations are intended "[t]o create a level playing field on which DBEs can compete fairly for DOT-assisted contracts"[122] and "[t]o ensure that the Department's DBE program is narrowly tailored in accordance with applicable law...."[123]

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 . . . who a recipient finds to be a socially and economically disadvantaged individual on a case-by-case basis."[124] 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."[125] In the regulations, the term "you" refers to "a recipient."[126]

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."[127] A firm not presumed to be a DBE may apply for DBE certification.[128] 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;"[129] ownership "must be real, substantial, and continuing, [and] going beyond pro forma ownership of the firm...."[130]

Under the law, Congress presumes that the firms that are more likely to be economically disadvantaged are firms owned by minorities or women.[131] However, unlike earlier affirmative action programs, the current "program … takes race into consideration as only one factor."[132] Although certain groups are presumed to be DBEs, the "regulations are designed to increase the participation of non-minority DBEs",[133] in that nonminorities that are not presumed to be socially disadvantaged

[105] Disadvantaged Business Enterprise: Program Improvements, 76 Fed. Reg. 5,083 (Jan. 28, 2011) (codified at 49 C.F.R. part 26).

[106] 49 C.F.R. §§ 26.45, 26.51, and 26.53 (2018).

[107] 49 C.F.R. §§ 26.71, 26.73, 26.83, and 26.85 (2018).

[108] 49 C.F.R. § 26.67(a)(2)(i) (2018).

[109] 49 C.F.R. § 26.85 (2018).

[110] 49 C.F.R. § 26.39 (2018).

[111] 49 C.F.R. § 26.37(b) (2018).

[112] Disadvantaged Business Enterprise: Program Implementation Modifications, 79 Fed. Reg. 59,566 (Oct. 2, 2014) (codified at 49 C.F.R. Part 26).

[113] 49 C.F.R. part 26, Appendix F (2018).

[114] 49 C.F.R. part 26, Appendix G (2018).

[115] 49 C.F.R. § 26.11(e) (2018).

[116] 49 C.F.R. § 26.88 (2018).

[117] 49 C.F.R. § 26.45(c) (2018).

[118] 49 C.F.R. § 26.53 (2018).

[119] 49 C.F.R. § 26.1(a) (2018). *See also*, 49 C.F.R. §§ 26.3(a)(1)-(3) (2018). 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.

[120] 49 C.F.R. § 26.21(a)(1) (2018). *See* §§ 49 C.F.R. 26.21(a)(2) and (3) (2018), respectively, regarding FTA recipients (certain assistance exceeding $250,000; excluding transit vehicle purchases) and FAA recipients (certain grants exceeding $250,000).

[121] 49 C.F.R. § 26.7(a) (2018). Subsection (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."

[122] 49 C.F.R. § 26.1(b) (2018).

[123] 49 C.F.R. § 26.1(c) (2018). *See also*, §§ 26.1(d)-(h) (2018) for other stated objectives.

[124] 49 C.F.R. § 26.5 (2018).

[125] *Id.*

[126] *Id.*

[127] 49 C.F.R. § 26.5(2)(vii) [last subsection (2) of § 26.5] (2018).

[128] 49 C.F.R. §§ 26.61, 26.65, and 26.67 (2018).

[129] 49 C.F.R. § 26.69(b) (2018).

[130] 49 C.F.R. § 26.69(c)(1) (2018). *See also*, § 26.71 (2018)

[131] *Rothe IV*, 324 F. Supp.2d 840, 857 (W.D. Tex. 2004).

[132] *Id.*

[133] *Adarand VII*, 228 F.3d 1147, 1183 (10th Cir. 2000).

are allowed to prove by a preponderance of the evidence their right to participate in the DBE program.

Section 26.5 of the regulations 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."[134] 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."[135] A recipient of federal funds must use race-neutral means before resorting to race-conscious means to remedy discrimination. That is, a recipient

> must meet the maximum feasible portion of [its] overall goal by using race-neutral means of facilitating race-neutral DBE participation. Race-neutral DBE participation includes any time a DBE wins a prime contract through customary competitive procurement procedures or is awarded a subcontract on a prime contract that does not carry a DBE contract goal.[136]

Race-neutral means include but are not limited to "[a]rranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate participation by DBEs and other small businesses and by making contracts more accessible to small businesses[] by means such as those provided under § 26.39;"[137] "[p]roviding assistance in overcoming limitations such as inability to obtain bonding or financing (e.g., by such means as 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);"[138] providing "technical assistance and other services;"[139] and as otherwise specified in the regulations. A recipient "must establish contract goals to meet any portion of [its] overall goal [that it does] not project being able to meet using race-neutral means."[140]

The law "employs a race-based rebuttable presumption to define the class of beneficiaries and authorizes the use of race-conscious remedial measures...."[141] 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."[142]

Under federal law, a state must set a DBE utilization goal that "reflect[s] [its] determination of the level of DBE participation [it] would expect absent the effects of discrimination."[143] The goal is "undifferentiated" in that it must encompass all minority groups.[144] Part C of the regulations addresses the role of the statutory 10 percent goal in the DBE program. As the regulations state:

> (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.[145]

Although there are several steps in the process of setting the recipient's DBE program goal, § 26.45 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.[146]

As § 26.43(a) warns, a recipient "[is] not permitted to use quotas for DBEs on DOT-assisted contracts subject to this part."[147] 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."[148]

Prior law had given rise to ill-defined goals upon which remedial measures were based.[149] However, as one court has observed:

> *[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

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[134] 49 C.F.R. § 26.5.

[135] *Id.*

[136] 49 C.F.R. § 26.51(a) (2018).

[137] 49 C.F.R. § 26.51(b)(1) (2018).

[138] 49 C.F.R. § 26.51(b)(2) (2018).

[139] 49 C.F.R. § 26.51(b)(3) (2018).

[140] 49 C.F.R. § 26.51(d) (2018).

[141] Northern Contracting, Inc. v. Illinois Department of Transportation, No. 00 C 4515, 2004 U.S. Dist. LEXIS 3226, at *86 (N.D. Ill. March 4, 2004).

[142] *Adarand VII*, 228 F.3d 1147, 1177 (10th Cir. 2000) (citations omitted).

[143] 49 C.F.R. § 26.45(b) (2018).

[144] *See* 49 C.F.R. § 26.45(h) (2018) (stating "overall goals must provide for participation by all certified DBEs and must not be subdivided into group-specific goals").

[145] 49 C.F.R. §§ 26.41(a)-(c) (2018).

[146] 49 C.F.R. § 26.45(b) (2018).

[147] 49 C.F.R. § 26.43(a) (2018).

[148] 49 C.F.R. § 26.43(b) (2018). For the required steps in the goal-setting process, *see*, Id. §§ 26.45(c)-(g) (2018).

[149] *Adarand VII*, 228 F.3d 1147, 1182 (10th Cir. 2000) ("[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" *id*, prior to the new regulations promulgated in 1999.)

> 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." ... In addition, goal setting must involve "examining all evidence available in [the recipient's] jurisdiction." … Such evidence may include census data and valid disparity studies. … 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. … When submitting a goal, the recipient must include a description of the methodology and evidence used….[150]

Important provisions on 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....[151]

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.[152]

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....[153]

Importantly, the regulations provide that:

> (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.[154]

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",[155] 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 [a recipient has] 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 [sic] that non-DBEs are not unfairly prevented from competing for subcontracts.[156]

Notwithstanding the DBE program's requirements, recipients are allowed to apply for an exemption from any provision of Subpart A.[157] A recipient may "apply for a waiver of any provision of Subpart B or C of [part 26] including, but not limited to, any provisions regarding administrative requirements, overall goals, contract goals or good faith efforts."[158]

g. Facial and As-Applied Constitutional Challenges to DBE Programs

DBE programs have been challenged for being facially unconstitutional and/or for being unconstitutional as-applied. Hence, this part of the report analyzes cases in which the courts have held whether a DBE program was facially unconstitutional, or, if facially constitutional, whether the program was unconstitutional as applied. For example, in *Western States Paving Co. v. Washington State Department of Transportation*,[159] the Ninth Circuit held that Washington state's DBE program was facially constitutional. However, for the reasons discussed in the next part B. 2. h. (1) of this report, the program was unconstitutional on as-applied basis.[160]

A more recent case involving both a facial challenge and multiple as-applied challenges is *Geyer Signal, Inc. v. Mn. DOT*,[161] decided by a federal district court in Minnesota in 2014.

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[150] *Id.* (citations omitted) (emphasis supplied).

[151] 49 C.F.R. § 26.51(e) (2018).

[152] 49 C.F.R. §§ 26.51(f)(1) and (2) (2018).

[153] 49 C.F.R. §§ 26.53(a)(1) and (2) (2018).

[154] 49 C.F.R. §§ 26.47(a) and (b) (2018).

[155] 49 C.F.R. § 26.33(a) (2018).

[156] 49 C.F.R. § 26.33(b) (2018).

[157] 49 C.F.R. § 26.15(a) (2018).

[158] 49 C.F.R. § 26.15(b) (2018).

[159] 407 F.3d 983 (9th Cir. 2005).

[160] In 2006, in Western States Paving Co. v. Wash. State DOT, No. C 00-5204 RBL, 2006 U.S. Dist. LEXIS 43058, at *10 (W.D. Wash. June 23, 2006), the district court, in its decision on remand, held that the plaintiff's claims for injunctive relief were moot, because WSDOT had terminated the "unlawful" DBE program that had been at issue in the litigation.

[161] No. 11-321 (JRT/LIB), 2014 U.S. Dist. LEXIS 43945 (D. Minn. March 31, 2014).

The plaintiffs Geyer Signal, Inc. (Geyer Signal) and its owner Kevin Kissner brought facial and as-applied constitutional challenges to the U.S. DOT's DBE program and the Minnesota Department of Transportation's (MnDOT) implementation of the federal program. The U.S. DOT and the FHWA intervened. The plaintiffs alleged that the DBE program unfairly discriminated against Geyer Signal because of its white male ownership and that the DBE program was unconstitutional on its face and as implemented by MnDOT. The principal issue was whether there was an "overconcentration" of DBEs "within discreet work areas,"[162] such as the type of work Geyer Signal performed.

The district court stated that

> [t]he heart of Plaintiffs' claims in this case is that the DBE Program and MnDOT's implementation of it are unconstitutional because the impact of curing discrimination in the construction industry is overconcentrated in particular sub-categories of work. Because DBEs are, by definition, small businesses, Plaintiffs contend … [the DBEs] lack the financial resources and expensive equipment necessary to conduct such work.[163]

The court explained that in 2005, National Economics Research Associates Inc. (NERA) conducted a study for MnDOT on which the Department based its annual, aspirational DBE goal of 15.3 percent for fiscal year 2009. However, the DBE participation rate actually achieved for that fiscal year was 3.6 percent.[164] For fiscal years 2010 through 2012, based on federally approved methods, MnDOT set its DBE aspirational, participation goal at 8.7 percent but achieved an actual DBE participation of 5.6 percent in 2010, 7.6 percent in 2011, and 6.6 percent in 2012.[165]

For fiscal years 2013 to 2015, the University of Minnesota Roy Wilkins Center studied MnDOT's contracting market and recommended aspirational goals based on its findings.[166] The 2013-2015 Goals Report "used two methods to detect market discrimination and found discrimination against DBEs in MnDOT contracting."[167] The Goals Report, prepared by Samuel Myers, found a base goal of 8.2 percent that, when adjusted for discrimination, yielded an overall goal for DBE participation of 11.4 percent.[168] The Goals Report recommended that 2.8 percent of the aspirational goal be met through race-neutral means and that contract goals yield the remaining 8.6 percent.[169]

MnDOT "monitors its DBE Program for overconcentration within discreet work areas . . . … but did not determine that overconcentration existed in the type of work done by Geyer Signal, Inc.…"[170] The plaintiffs' expert, Carl Hubbard (Hubbard), however, argued that "there was no statistically significant discrimination against DBEs based upon the data in the 2013-2015 Goals Report",[171] and "that a goal of 4.38 percent DBE participation would be appropriate."[172] Hubbard argued that overconcentration existed in the areas of traffic control and trucking; that there were more DBEs working in the plaintiffs' area than in other construction fields; that "DBE businesses in the traffic control area of work receive[d] 37 percent of the contract dollars awarded to firms in the traffic control market;" that "the percentage of contracts awarded to DBE firms in the traffic control market was 23.6 percent, which exceeded the overall 20.9 percent of contracts awarded to DBE subcontractors in MnDOT construction as a whole;" and that "traffic control work makes up 3.2 percent of MnDOT dollars that are subcontracted[] but makes up 8.8 percent of total DBE subcontracting dollars….'"[173]

Thus, the plaintiffs argued that "DBEs only compete in certain small areas of MnDOT work, such as traffic control, trucking, and supply—but the DBE goals that prime contractors must meet are spread out over the entire contract. Prime contractors are forced to disproportionately use DBEs in those small areas of work."[174] The plaintiffs argued that MnDOT's DBE Program was not narrowly tailored "'because it means that any DBE goals are only being met through a few areas of work on construction projects—burdening non-DBEs in those sectors and not alleviating any problems in other sectors.'"[175]

The court addressed, first, the plaintiffs' facial challenge to the constitutionality of the federal DBE statute. A facial challenge requires a plaintiff to establish that there is no set of circumstances under which a program would be constitutional.[176] The plaintiffs argued that Congress, when reauthorizing the DBE program, relied on evidence that had "'nothing to do with any discrimination in actual contracting' such as discrimination in lending."[177] The court, however, held that the plaintiffs failed to establish "that Congress lacked a substantial basis in the evidence to support its conclusion that race-based remedial action was necessary to address discrimination in public construction contracting."[178] The evidence of discriminatory barriers to entry for DBEs, as well as of discrimination in existing public contracting, was sufficiently strong for Congress to reauthorize the DBE Program.[179] Thus, on the issue of the government's compelling interest, the court granted a summary judgment in favor of the federal defendants.[180]

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[162] *Id.* at *20.

[163] *Id.* at *31 (citation omitted).

[164] *Id.* at *18.

[165] *Id.*

[166] *Id.* at *18-19.

[167] *Id.* at *19. "The first method computed the percentage difference in contract amounts that cannot be explained by relevant characteristics of the firm, the contract, or the industry. … The second method separately estimated the contract amounts to DBEs and non-DBEs and computed the amount that DBEs would have received had they been treated like equally situated non-DBEs." *Id.* (citations omitted).

[168] *Id.*

[169] *Id.*

[170] *Id.* at *20 (citation omitted).

[171] *Id.* at *19-20 (citations omitted).

[172] *Id.* at 20.

[173] *Id.* at *22 (citations omitted).

[174] *Id.* at *32 (citation omitted).

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

[176] *Id.* at *34.

[177] *Id.* at *37 (citation omitted).

[178] *Id.* at *38 (citation omitted).

[179] *Id.* at *40.

[180] *Id.* at *42.

As for whether the U.S. DOT's DBE program was narrowly tailored, the court relied on the decisions of "[n]umerous federal courts" that had held that the Department's DBE program is narrowly tailored.[181] The plaintiffs argued that the program was not narrowly tailored, because: "[i]f the recipients use overall industry participation of minorities to set goals, yet limit actual DBE participation to only defined small business[es] that are limited in the work they can perform, there is no way to avoid overconcentration of DBE participation in a few, limited areas of MnDOT work…."[182] However, for a plaintiff to succeed on a facial challenge, the plaintiff has to "establish that the overconcentration it identifies is unconstitutional and that there are no circumstances under which the DBE Program could be operated without overconcentration."[183]

The court held that the DBE program took "into account, when determining goals, that there are certain types of work that DBEs may never be able to perform because of the capital requirements."[184] Moreover, "even if the DBE Program could have the incidental effect of overconcentration in particular areas …[,] the DBE Program facially provides ample mechanisms for a recipient of federal funds to address such a problem."[185] For example, "a recipient retains substantial flexibility in setting individual contract goals and specifically may consider 'the type of work involved, the location of the work, and the availability of DBEs for the work of the particular contract.'"[186] The court held that the plaintiffs' facial challenge failed "[b]ecause the DBE Program provides numerous avenues for recipients of federal funds to combat overconcentration…."[187]

There was one other facial challenge in *Geyer Signal*. The plaintiffs attacked the DBE program on the basis that it was facially, unconstitutionally vague because of the absence of any definition of the term "'reasonable' for purposes of when a prime contractor is entitled to reject a DBE['s] bid on the basis of price alone."[188] The court ruled that the plaintiffs could not maintain a facial challenge for vagueness, because their constitutional challenge was not based on the First Amendment.[189] The court could only judge the DBE statute "'on an as-applied basis.'"[190] On the plaintiffs' facial claim for vagueness, the court granted the federal defendants' motion for summary judgment.

Next, regarding MnDOT's implementation of the U.S. DOT's DBE program, the plaintiffs brought three as-applied constitutional challenges: MnDOT failed to have evidence of discrimination in its public contracting that supported the implementation of a DBE program, failed to set appropriate goals for DBE participation, and failed to respond to overconcentration of DBEs in the traffic control industry.[191]

As for the first as-applied challenge—a failure to have evidence of discrimination—the court relied on the Eighth Circuit's analysis in *Sherbrooke Turf, Inc. v. Minn. DOT*[192] that addressed federal and state responsibilities.

> "[T]o be narrowly tailored, a national program must be limited to those parts of the country where its race-based measures are demonstrably needed. To the extent the federal government delegates this tailoring function, a State's implementation becomes critically relevant to a reviewing court's strict scrutiny." … To show that a state has violated the narrow tailoring requirement of the Program, a challenger must demonstrate that "better data was available" and the recipient of federal funds "was otherwise unreasonable in undertaking [its] thorough analysis and in relying on its results."[193]

The plaintiffs' expert argued that MnDOT's expert, Samuel Myers (Myers), "measured discrimination in both prime and subcontracting markets, instead of solely in subcontracting markets."[194] However, it did not matter to the district court that Myers's data were "'susceptible to multiple interpretations…."[195] It was the plaintiffs' burden to present "affirmative evidence … that no discrimination exists in Minnesota's public contracting,"[196] which the plaintiffs failed to do. Because DBEs also compete for prime contracts, Meyers's measurements of the availability of DBEs in the relevant market and of discrimination in both prime and subcontracting markets were appropriate "mechanisms for goal setting."[197]

The second as-applied challenge was that MnDOT's goal setting was inappropriate. MnDOT responded, in part, that any goals that existed prior to the present goals in effect from 2013-2015 were moot; therefore, the plaintiffs could only seek prospective injunctive and declaratory relief under 42 U.S.C. § 1983.[198] The court held that, although it only needed to address the challenge to the 2013-2015 goals, the plaintiffs failed to demonstrate that there was a genuine issue of material fact on which to challenge MnDOT's "narrow tailoring as it relate[ed] to goal setting."[199]

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[181] *Id.* For example, the courts have found "that the Program 'place[s] strong emphasis on the use of race-neutral means to increase minority business participation in government contracting,' offers 'substantial flexibility' to states implementing the Program, ties goals for DBE participation to the relevant labor markets through its flexible goal setting processes, and minimizes its race-based nature by directing its benefits 'at all small businesses owned and controlled by the socially and economically disadvantaged.'" *Id.* at *42-43 (citations omitted).

[182] *Id.* at *43-44 (citation omitted).

[183] *Id.* at *44.

[184] *Id.* at *45.

[185] *Id.* at *46.

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

[187] *Id.* at *49.

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

[189] *Id.* at *49-50.

[190] *Id.* at *50 (citation omitted).

[191] *Id.* at *51.

[192] 345 F.3d 964 (8th Cir. 2003), *cert. denied,* Gross Seed Co. v. Dep't of Transp., 541 U.S. 1041, 124 S. Ct. 2158, 158 L. Ed. 2d 729 (2004), and *cert. denied,* Sherbrooke Turf, Inc. v. Minn. DOT, 541 U.S. 1041, 124 S. Ct. 2158, 158 L. Ed. 2d 729 (2004).

[193] *Geyer Signal, Inc.,* 2014 U.S. Dist. LEXIS 43945, at *51-2 (citation omitted).

[194] *Id.* at *52.

[195] *Id.* at *53 (citation omitted).

[196] *Id.*

[197] *Id.* at *53 (citations omitted).

[198] *Id.* at *54-5.

[199] *Id.* at *58.

The plaintiffs' third as-applied challenge was that there was an unconstitutional overconcentration of DBEs in the traffic control market. The Myers study found no "statistically significant overconcentration of DBEs in Plaintiffs' type of work."[200] The court ruled that it would be unreasonable to require MnDOT, because of a challenge by a single business, to adjust its calculations.[201] Moreover, the plaintiffs "provided no authority for the proposition that the government must conform its implementation of the DBE Program to every individual business'[s] self-assessment of what industry group they fall into and what other businesses are similar."[202]

In sum, the court granted the federal and state defendants' motions for summary judgment and dismissed the plaintiffs' amended complaint with prejudice.

In an Illinois case, *Midwest Fence Corp. v. U.S. Dep't of Transp.*,[203] decided in 2016 by the Seventh Circuit, the plaintiff Midwest Fence Corporation (Midwest Fence) challenged the federal and state programs that benefited DBEs. Midwest Fence sued the U.S. DOT, the Illinois Department of Transportation (IDOT), and the Illinois State Toll Highway Authority (Tollway). The plaintiff, a specialty contractor that focused its business on guardrails and fencing, was not a DBE and usually bid on projects as a subcontractor. The Seventh Circuit held that the defendants' DBE programs could "survive an equal protection challenge only if the defendants show that their programs serve a compelling government interest and are narrowly tailored to further that interest."[204]

In brief, the Seventh Circuit held that the federal DBE program was facially constitutional; that it "serves a compelling government interest in remedying a history of discrimination in highway construction contracting;" that the program "provides states with ample discretion to tailor their DBE programs to the realities of their own markets;" and that the program "requires the use of race- and gender-neutral measures before turning to race- and gender-conscious ones."[205] The court emphasized that

> [t]he federal program provides a framework for states to implement their own programs. States establish their own goals for DBE participation in federally funded transportation projects by (1) determining the relative availability of DBEs "ready, willing and able" to participate in those projects; and (2) examining local conditions to adjust the base figure if necessary.[206]

The court held that the IDOT and Tollway programs passed strict scrutiny: the "defendants have established a substantial basis in evidence to support the need to remedy the effects of past discrimination in their markets, and [their] programs are narrowly tailored to serve that remedial purpose."[207]

Pursuant to state law, Illinois adheres to the federal program both for federally funded and state-funded projects.[208] However, race- and gender-neutral initiatives had not enabled IDOT to achieve its participation goal of 22.77 percent; thus, IDOT set individual contract goals on many contracts. As the federal regulations require, IDOT sets goals on contracts that have subcontracting possibilities.[209] The individual contract goals were not rigid, because prime contractors may obtain contracts even if they are unable to meet DBE participation goals. The lowest bidder could be awarded a contract, if the bidder met the DBE goal, or if IDOT determined that the bidder had made good faith efforts to satisfy the goal.[210] As for the Tollway, it received no federal funding, but its DBE program mirrored IDOT's.[211]

Midwest Fence challenged the constitutionality of the Tollway's program on its face and as-applied. Because Midwest Fence did not challenge the national compelling interest for IDOT's DBE program, the court focused on whether the federal program was narrowly tailored.[212] A preliminary issue was whether Midwest Fence could maintain an as-applied challenge to the federal program or whether the claim against the U.S. DOT was limited to a facial challenge.[213] The court held that the district court did not err when it considered the plaintiff's claims against the U.S. DOT as only a facial challenge to the federal regulations.[214] A state, on the other hand, is the correct party to defend a challenge to the state's implementation of the DBE program.[215]

On the issue of narrow tailoring, the court agreed with the Eighth, Ninth, and Tenth Circuits that had held that the federal DBE program is constitutional on its face.[216] The court, moreover, agreed with the district court's analysis of the factors set forth by the Supreme Court in *United States v. Paradise,*[217] referred to as the "*Paradise* factors."[218] For example, the district court found that the federal DBE regulations "allow for significant and ongoing flexibility."[219] Although the federal program provides for a national aspirational goal of 10 percent of funds for DBEs, a recipient is not required to set overall or contract goals at the level of 10 percent or any other percentage.[220]

> Rather, the regulations prescribe a process for setting a DBE participation goal that focuses on information about the specific market …

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[200] *Id.*

[201] *Id.* at *59.

[202] *Id.*

[203] 840 F.3d 932 (7th Cir. 2016), *cert. denied,* Midwest Fence Corp. v. DOT, 137 S. Ct. 2292, 198 L. Ed.2d 724 (June 26, 2017).

[204] *Id.* at 935 (citations omitted).

[205] *Id.* at 936.

[206] *Id.* at 936 (citation omitted).

[207] *Id.*

[208] *Id.* at 937.

[209] *Id.*

[210] *Id.*

[211] *Id.* at 938.

[212] *Id.* at 941.

[213] *Id.* "A facial challenge ordinarily requires a plaintiff to show there is no set of circumstances under which the challenged statutes or regulations can operate constitutionally." *Id.* (citation omitted).

[214] *Id.* at 942.

[215] *Id.*

[216] *Id.*

[217] 480 U.S. 149, 107 S. Ct. 1053, 94 L.Ed.2d 203 (1987).

[218] *Id.* at 171, 107 S. Ct. 1067, 94 L. Ed. 2d 233.

[219] *Midwest Fence Corp.,* 840 F.3d at 943 (stating that the *Paradise* factors "allow for significant and ongoing flexibility") (*id.* at 943).

[220] *Id.*

> that is intended to reflect "the level of DBE participation you would expect absent the effects of discrimination." … The regulations thus instruct states to set their DBE participation goals to reflect actual DBE availability in their jurisdictions, as modified by other relevant factors like DBE capacity.[221]

The court responded to Midwest Fence's claim that the DBE program burdened third parties and was overinclusive by emphasizing that "the regulations include mechanisms to minimize the burdens the program places on non-DBE third parties."[222] For example, states may "take steps to address overconcentration of DBEs in certain types of work if the overconcentration unduly burdens non-DBEs to the point that they can no longer participate in the market."[223] In addition, contractors unable to meet a DBE goal "can still be awarded [a] contract if they have documented 'good faith efforts to meet the goal….'"[224]

The court did agree that "[t]he DBE program can impose a disproportionate burden on small, specialized non-DBE subcontractors, especially when compared to larger prime contractors with whom DBEs would compete less frequently."[225] However, the court concluded that the "potential for a disproportionate burden" did not render the program facially unconstitutional; rather, "[t]he constitutionality of the program depends on how it is implemented."[226] The court tacitly agreed with the U.S. DOT that "the federal program 'explicitly contemplates [DBEs'] ability to compete equally by requiring States to report DBE participation as prime contractors and makes efforts to develop that potential.'"[227] The federal DBE program satisfies strict scrutiny because, on its face, the program is narrowly tailored.[228]

The court likewise rejected Midwest Fence's void for vagueness claim, namely "that the federal regulations are unconstitutionally vague as applied by IDOT."[229] Midwest Fence argued that the regulations fail to specify the kind of good faith efforts that a contractor must make to qualify for a waiver of the DBE contract goal set by a state.[230] However, the court was satisfied that the federal program "allows a bidder to use 'good business judgment' to decide whether it should select a DBE for subcontracting; it cannot rely exclusively on the existence of 'some additional costs' to reject the DBE…."[231] In part, because of the program's flexibility and the availability of waivers, the court rejected the plaintiff's argument that the regulations "create[] a *de facto* system of quotas because contractors believe they must meet the DBE goal in their bids or lose the contract."[232]

Turning to Midwest Fence's equal protection challenge and whether the state defendants had a compelling interest for their programs, the court held, as other courts have, that "a state agency is entitled to rely on the federal government's compelling interest in remedying the effects of past discrimination to justify its own DBE plan for highway construction contracting."[233]

Because the Tollway did not receive federal funding during the relevant period, and because not all of IDOT's contracts were federally funded, the court considered whether IDOT and the Tollway had established a strong basis in evidence to support their programs for state- and Tollway-funded contracts. A DBE availability study performed for IDOT in 2004 by National Economic Research Associates had "yielded a DBE availability of 22.77% across all projects."[234] Mason Tillman Associates performed a full disparity study, published in 2011, for IDOT that found that DBEs were significantly underutilized as prime contractors, as well as subcontractors.[235] The court concluded that IDOT, as well as the Tollway, had a strong basis in evidence to adopt their DBE programs.[236]

Based on an analysis of the *Paradise* factors, supra, the Seventh Circuit held that both IDOT's and the Tollway's DBE programs were narrowly tailored. For example, IDOT and the Tollway make "front-end waivers" available for a contractor that has made good faith efforts to comply with the DBE goal.[237] The court rejected Midwest Fence's claim that a combination of the agencies' grant of a low number of waivers, "coupled with contractors' fears of having a waiver denied and thereby losing a contract, shows the system is a *de facto* quota system."[238]

The court did recognize that Midwest Fence had make a "troubling" argument that prime contractors' and subcontractors' share of the burden of the DBE program was disproportionate. Although there were disparities in both the prime and subcontracting markets,[239] Midwest Fence did not present any evidence to substantiate its "largely theoretical" theory "that subcontractors were being frozen out of the market or bearing the entire burden of the DBE program…."[240] If Midwest Fence had presented such evidence, then quite likely a trial would have been required "to determine at a minimum whether IDOT and the Toll-way were adhering to their responsibility to avoid overconcentration in subcontracting."[241]

Another case against IDOT, also raising facial and as-applied constitutional challenges is *Dunnet Bay Construction Co. v.*

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

[222] *Id.*

[223] *Id.*

[224] *Id.* at 944 (citation omitted).

[225] *Id.*

[226] *Id.*

[227] *Id.* at 945 (citation omitted).

[228] *Id.* at 946.

[229] *Id.* at 947.

[230] *Id.*

[231] *Id.* at 948 (citation omitted).

[232] *Id.*

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

[234] *Id.* at 949.

[235] *Id.* at 949.

[236] *Id.* at 950. For example, to show a basis for its program, the Tollway relied primarily on a 2006 NERA study that was limited to the Tollway's contracting market area. *Id.*

[237] *Id.* at 954.

[238] *Id.*

[239] *Id.* at 955.

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

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

Borggren,[242] decided in 2015 by the Seventh Circuit. Dunnet Bay Construction Company (Dunnet Bay), owned and controlled by two white males, sued IDOT and its then-Secretary Gary Hannig in his official capacity for race discrimination and denial of equal protection under 42 U.S.C. §§ 1981 and 1983; Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d; and § 5 of the Illinois Civil Rights Act of 2003, 740 ILCS 23/1-5.[243]

Dunnet Bay, which engaged in general highway construction, was prequalified to bid and work on IDOT projects and competed for federally assisted highway construction contracts awarded by IDOT. In order to receive federal-aid funds for highway contracts, IDOT had to have a DBE program that complied with federal regulations to receive federal-aid funds for highway contracts. The DBE regulations require states to

> set an overall goal for DBE participation in federally assisted contracts. … That 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 [federal]-assisted contracts" and "must reflect [the state's] determination of the level of DBE participation [one] would expect absent the effects of discrimination." … A state "must meet the maximum feasible portion of" its overall DBE participation goal through race-neutral means, using contract goals to meet any portion that is not projected to be met with race-neutral means.[244]

IDOT placed considerable emphasis on meeting its DBE goals; for example, in November 2009, IDOT officials and personnel made it clear that "DBE participation was a top priority and that goal modifications were not favored."[245]

At issue in the *Dunnet Bay* case was a resurfacing project for a portion of the Eisenhower Expressway. In January 2010, "IDOT issued a revised invitation for bids for a January 2010 letting with a new DBE participation goal [for the contract] of 22%."[246] Dunnet Bay submitted the lowest bid but did not meet the DBE goal.[247] IDOT informed Dunnet Bay that it had not made good faith efforts to meet the DBE goal and later denied Dunnet Bay's request for a waiver.

Importantly, the district court had found that IDOT did not exceed its authority under the federal regulations and that Dunnet Bay's challenge to the DBE program failed under *Northern Contracting, Inc. v. Illinois.*[248] In that case, a case in which the Seventh Circuit had held that, absent a showing that the state exceeded its authority, a state's DBE program is protected from a constitutional challenge.[249] One problem for Dunnet Bay was that its bid was about 16 percent or $1.3 million over the program estimate.[250] The court held that not only did IDOT's refusal to award the contract redress any injury to Dunnet Bay, but also that in the second letting of the contract, even though Dunnet Bay met the DBE goals, its bid was not the lowest bid.[251]

As discussed in part B. 8.a. of this report, Dunnet Bay lacked standing, but the court proceeded to hold that, even if Dunnet Bay had standing, IDOT was entitled to summary judgment. First, Dunnet Bay did not show that IDOT acted with discriminatory intent so as "to establish an equal protection claim under the Fourteenth Amendment…."[252] Second, Dunnet Bay's Title VI and § 1981 claims failed for the same reason, because the plaintiff failed to produce any evidence, let alone allege, that it was treated less favorably than another contractor because of its two owners' race.[253]

Importantly, the court held that a state is "'insulated'" from a constitutional challenge on whether its program is narrowly tailored to achieve a compelling interest, "'absent a showing that the state exceeded its federal authority.'"[254] Dunnet Bay did not identify

> any part of the regulations that IDOT allegedly violated by reevaluating and then increasing its DBE contract goal, by expanding the geographic area used to determine DBE availability, by adding pavement patching and landscaping work into the contract goal, by including items that had been set aside for small business enterprises, or by any other means by which it increased the DBE contract goal.[255]

h. Other Judicial Decisions on the Constitutionality of the U.S. DOT's DBE Program

(1) Judicial Decisions prior to 2006

This part of the report discusses several cases decided prior to 2006 on the constitutionality of the U.S. DOT's DBE program and on a state's implementation of the laws and regulations. The decisions include *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation,*[256] *Northern Contracting, Inc. v. State of Illinois*,[257] and *Western States Paving Co. v. Washington State Department of Transportation*.[258] As discussed in part B. 2.g. of this report, in *Western States Paving Co*., the Ninth Circuit held that the federal DBE program was not facially unconstitutional, but Washington state's implementation of the program was unconstitutional as-applied.

In 2003, in *Sherbrooke Turf,* supra, decided by the United States Court of Appeals for the Eighth Circuit, two nonminority contractors had filed separate actions in Minnesota

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[242] 799 F.3d 676 (7th Cir. 2015), *cert. denied,* Dunnet Bay Constr. Co. v. Blankenhorn, 137 S. Ct. 31, 196 L. Ed. 2d 25 (2016).

[243] *See* part B. 8.a of this report regarding Dunnet Bay's lack of standing.

[244] *Dunnet Bay,* 799 F.3d at 680 (citations omitted).

[245] *Id.* at 682.

[246] *Id.*

[247] *Id.* at 683-84.

[248] 473 F.3d 715, 721 (7th Cir. 2007).

[249] *Id.* at 721; *Dunnet Bay,* 799 F.3d at 688.

[250] *Dunnet Bay,* 799 F.3d at 692.

[251] *Id.* at 695.

[252] *Id.* at 696 (citation omitted).

[253] *Id.* at 691.

[254] *Id.* at 697 (citations omitted).

[255] *Id.* at 698.

[256] 345 F.3d 964 (8th Cir. 2003), *cert. denied,* Gross Seed Co. v. Dep't of Transp., 541 U.S. 1041, 124 S. Ct. 2158, 158 L. Ed. 2d 729 (2004), *cert. denied,* Sherbrooke Turf, Inc. v. Minn. DOT, 541 U.S. 1041, 124 S. Ct. 2158, 158 L. Ed. 2d 729 (2004).

[257] No. 00 C 4515, 2004 U.S. Dist. LEXIS 3226 (N.D. Ill. March 3, 2004).

[258] 407 F.3d 983 (9th Cir. 2005), *cert. denied* by City of Vancouver v. Western States Paving Co.126 S. Ct. 1332, 164 L. Ed.2d 49 (2006).

and Nebraska, respectively, one by Sherbrook Turf, Inc. against MnDOT, and one by Gross Seed Company against the Nebraska Department of Roads challenging the federal DBE statute and the DBE program as implemented in Minnesota and Nebraska.

The Eighth Circuit rejected the plaintiffs-appellants Sherbrooke Turf's and Gross Seed's argument that, when Congress enacted TEA-21, "Congress had no 'hard evidence' of widespread intentional race discrimination in the contracting industry...."[259] Moreover, the Eighth Circuit held that Sherbrooke Turf and Gross Seed "failed to present affirmative evidence that no remedial action was necessary [on the theory that] minority[-]owned small businesses enjoy non-discriminatory access to and participate in highway contracts."[260] The court held that there was a strong basis in evidence to support Congress's conclusion that race-based measures were necessary for the reasons stated by the Tenth Circuit in *Adarand VII*.[261] The court rejected Sherbrook Turf's and Gross Seed's argument that the state transportation agencies in Minnesota and Nebraska had to "independently satisfy the compelling interest aspect of strict scrutiny review."[262]

In 2004, in *Northern Contracting,* decided by a federal district court in Illinois, the plaintiff Northern Contracting, which was owned 100 percent by a white male, regularly bid on subcontracts for federal-aid highway prime contracts awarded to 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."[263] 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...."[264] The court granted the federal defendants' motion for summary judgment but denied the state defendants' and plaintiffs' motions for summary judgment.

The district 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, regarding, *inter alia*, 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 DBE program.[265]

In 2005, in *Western States Paving,,* supra, Western States Paving Co., 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 a 14 percent minority participation on the project on which the plaintiff submitted a bid. The prime contractor rejected Western States Paving Co.'s bids, in one case choosing a bid that was $100,000 less than that of the minority-owned firm that was selected.[266] As discussed in part B. 2.g. of this report, the Ninth Circuit addressed whether TEA-21 was facially unconstitutional and/or whether it was unconstitutional as-applied in the state of Washington.

Western States Paving Co. argued that "'TEA-21's minority preference program [was] a violation of equal protection under the Fifth and Fourteenth Amendments of the U.S. Constitution, either on its face or as applied by the State of Washington."[267] A Washington federal district court held that TEA-21's minority preference program was both constitutional on its face and as-applied. The district court held also that the state of Washington did not have "to demonstrate that its minority preference program independently satisfied strict scrutiny."[268] As for the as-applied constitutional ruling, the Ninth Circuit reversed. In short, because of the absence of 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."[269]

In 2006, in *Western States Paving Co. v. Wash. State DOT,*[270] the district court, in its decision on remand, recognized that an exception to the mootness doctrine exists when an activity "is 'capable of repetition, yet evading review.'"[271] Nevertheless, the court held that the plaintiff's claims for injunctive relief were moot, because WSDOT had terminated the DBE program in question.[272]

(2) Judicial Decisions since 2006

Part B. 2.g. of this report, discussed facial and as-applied constitutional challenges to DBE programs that are equally relevant to this part of the report inasmuch as the courts in *Geyer Signal*, *Midwest Fence*, and *Dunnet Bay*, discussed in part B. 2.g., held that the DBE programs were not unconstitutional on either ground. Although this subsection of the report discusses cases since 2006 challenging the U.S. DOT's DBE program, parts B. 4.

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

[260] *Id.* at 970.

[261] *Adarand VII*, 228 F.3d 1147, 1167-76 (10th Cir. 2000).

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

[263] Northern Contracting v. State of Illinois, No. 00 C 4515, 2004 U.S. Dist. LEXIS 3226 at *3 (N.D. Ill. March 3, 2004).

[264] *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.

[265] Northern Contracting, Inc. v. State of Illinois, No. 00 C 4515, 2005 U.S. Dist. LEXIS 19868 (N.D. Ill. Sept. 8, 2005).

[266] Western States Paving Washington State Dept. of Transportation, 407 F.3d 983, 987 (9th Cir. 2005).

[267] *Id.*

[268] *Id.* at 988.

[269] *Id.* at 1003.

[270] No. C 00-5204 RBL, 2006 U.S. Dist. LEXIS 43058 (W.D. Wash. June 23, 2006).

[271] *Id.* at *11 (citation omitted).

[272] *Id.* at *10.

to B. 8. of this report separately analyze in more detail specific issues raised in the following cases.

In *GEOD Corp. v. New Jersey Transit Corp.*,[273] decided in 2010 by a federal district court in New Jersey, the plaintiffs alleged that New Jersey Transit (NJ Transit) discriminated against them by "designing and implementing an affirmative action program that uses race, ethnicity, national origin and sex as criteria in selecting subcontractors and consultants for its construction projects in New Jersey."[274] The plaintiffs were white males who owned more than 51 percent of GEOD Corp. (GEOD). GEOD's business included aerial photography, topographic mapping, surveying, and other services for prime contractors and subcontractors for NJ Transit.[275] The company's main competitors were certified DBEs owned by sub-continent Asian companies. The court dismissed the complaint against all defendants except NJ Transit as to which there was a genuine issue of material fact on whether NJ Transit's method to determine its DBE goals during 2010 was "sufficiently narrowly tailored, and thus constitutional."[276]

Both TEA-21 and its successor SAFETEA-LU incorporated the definitions in the Small Business Act for a "small business concern" and for "socially and economically disadvantaged individuals."[277] As the court explained, the U.S. DOT regulations required recipients of U.S. DOT funding that are awarding prime contracts exceeding $250,000 in funds allocated under TEA-21 to establish a DBE program.[278] TEA-21 required "that 'not less than 10 percent of the amounts made available for any program under Titles I, III, and V of this Act … be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals.'"[279] The DBE regulations set the procedure for determining a recipient's goals for DBE participation.[280] After the goals are set, the maximum feasible part of the goals must be met by the use of race-neutral means. For example, three of the race-neutral means specified in 49 C.F.R. § 26.51(b) are:

> (1) Arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBE[s], and other small businesses . . .;
>
> (2) Providing assistance in overcoming limitations such as inability to obtain bonding or financing . . .; [and]
>
> (3) Providing technical assistance and other services….[281]

A recipient must project the percentage of its goal that will be met by race-neutral means and set contract goals for any portion of the overall goal that will not be fulfilled by race-neutral means.[282]

As a recipient of federal funds, NJ Transit had a DBE program as provided in 49 C.F.R. § 26.21, *et seq*. Its Office of Business Diversity established DBE goals for contracts with subcontracting possibilities prior to the solicitation of a bid.[283] As part of its goal setting, NJ Transit contracted with the University of Minnesota as its DBE consultant. Dr. Samuel L. Myers, Jr. (Myers), an economist, was the principal investigator and led the research on the effect of discrimination on NJ Transit's public contracting.[284]

A study prepared for fiscal years 1995 to 2000 found that "Asian DBEs were not underutilized, while Hispanic DBEs, Black DBEs, and Women Business Enterprises (WBEs) were all underutilized"[285] and that the "discrimination occurred against DBEs during the pre-qualification process and in the number of contracts that are awarded to DBEs."[286] Dr. Myers also calculated the availability of DBEs in NJ Transit's geographical market and for the industries with which NJ Transit contracts. Myers determined NJ Transit's base goal and the percentages of the goal that could be accomplished by race-neutral and race-conscious methods.[287] NJ Transit's race-neutral DBE goal for fiscal year 2010 was 11.94 percent, and its race-conscious goal was 11.84 percent.[288]

The court recognized that under the applicable law "racial classifications must serve a compelling governmental interest and must also be narrowly tailored to further that interest."[289] In a previous summary judgment decision, the court held that, as to the compelling interest requirement, NJ Transit was entitled to rely on the federal government's compelling interest in enacting TEA-21 and in promulgating regulations to implement it.[290] Thus, the issue was whether NJ Transit's DBE program was narrowly tailored.

The court agreed, first, with the Seventh Circuit's "holding in *Northern Contracting, Inc. v. Illinois*[] that 'a challenge to a state's *application* of a federally mandated program must be limited to the question of whether the state exceeded its authority.'"[291] Second, the court agreed with the Eight Circuit's holding in *Sherbrooke Turf* that "for a race-based program to be narrowly tailored 'a national program must be limited to those parts of

[273] 746 F. Supp.2d 642 (D. N.J. 2010).

[274] *Id.* at 644 (citation omitted).

[275] *Id.*

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

[277] *Id.* at 645 (citation omitted).

[278] *Id.*

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

[280] *Id.* at 646-7.

[281] *Id.* at 647 (citation omitted).

[282] *Id.* at 647-8 (citing 49 C.F.R. §§ 256.51(c) and (d)).

[283] *Id.* at 648. N.J. Transit's Office of Business Diversity determines the areas of DBE participation and establishes a DBE participation for "specific portions" of contracts "that are conducive to DBE participation." *Id.* at 651.

[284] *Id.* at 648.

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

[286] *Id.* at 649 (citation omitted). The consultant used the DOT's regulations' three-step process to establish N.J. Transit's DBE goal. *Id.*

[287] *Id.* at 650.

[288] *Id.* at 651.

[289] *Id.* at 652 (citation omitted).

[290] *Id.*

[291] *Id.* (citation omitted) (emphasis supplied).

the country where its race-based measures are demonstrably needed.'"[292]

Of the 11 arguments that the plaintiffs presented why NJ Transit's DBE program was not narrowly tailored, one argument was that the program included, in the category of DBEs to which a percentage of subcontracts had to be awarded, racial or ethnic groups for which there was no evidence of past discrimination.[293] The plaintiffs argued that NJ Transit's DBE program was over-inclusive, because it included Asians, a group that had not suffered discrimination in NJ Transit's market.[294] In addressing GEOD's argument, the court stated that there was evidence in the record that discrimination did exist against Asian DBEs in the New Jersey geographical area.[295]

The plaintiffs' arguments, however, were mostly about whether NJ Transit had "presented 'demonstrable evidence of the availability of ready, willing, and able DBEs' as required by 49 C.F.R. § 26.45."[296] GEOD argued that NJ Transit had focused its program on sub-contractors when NJ Transit's expert had "identified 'prime contracting' as the area in which NJ Transit procurements evidence[d] discrimination."[297] The court found, however, that NJ Transit had "attempted to break larger contracts up in order to make them available to smaller contractors and continues to do so when logistically possible and feasible to the procurement department."[298]

The court ruled that Dr. Myer's data and regression analysis were not unreliable and that other methods would not yield more accurate results.[299] The court held that, "[e]ven if this court utilized the as-applied narrow tailoring inquiry set forth in *Western States Paving*, NJ Transit's DBE program would not be found to violate the United States Constitution as it is narrowly tailored to further a compelling governmental interest."[300]

i. Airport Concession Disadvantaged Business Enterprise Regulations

(1) Amendments of the ACDBE Regulations since 2005

The Airport Concession Disadvantaged Business Enterprise regulations in 49 C.F.R. part 23 are similar to the U.S. DOT's regulations in 49 C.F.R. part 26 that apply to DBEs and U.S. DOT-assisted contracts. Unlike U.S. DOT-assisted contracts and DBEs, ACDBEs may specialize in car rentals or restaurants located in or around airport facilities and are subject to standards for business size as determined by the Secretary of Transportation.

On March 22, 2005, the U.S. DOT issued a final rule that revised and updated its ACDBE regulations in 49 C.F.R. part 23 that are authorized by 49 U.S.C. § 47107(e)(8).[301] The final rule addressed issues such as goal setting, personal net worth and business size standards, and the counting of ACDBE participation by car rental companies.[302]

On April 2, 2007, the U.S. DOT issued a final rule that adjusted the dollar and size limits used to define small businesses for the ACDBE program. The size limits were amended so that small businesses' opportunity to participate in the ACDBE program would remain unchanged after taking inflation into account.[303]

On April 1, 2010, the U.S. DOT issued a final rule removing the "sunset" provision from its rule governing the ACDBE program.[304]

On June 20, 2012, the U.S. DOT issued a final rule that amended the department's ACDBE regulations to conform them in several respects to the DBE rules for highway, transit, and airport financial assistance programs.[305] The Final Rule amended small business size limits to ensure that the opportunity for small businesses to participate in the ACDBE program remained unchanged after taking inflation into account;[306] provided an inflationary adjustment in the personal net worth cap for owners of businesses seeking to participate in DOT's ACDBE program;[307] and suspended, until further notice, future use of the exemption of up to $3 million in an owner's assets used as collateral for financing a concession.[308]

(2) Judicial Decisions involving ACDBEs

A case decided in 2008 by the United States Court of Appeals for the District of Columbia Circuit, *Grove, Inc. v. U.S. Department of Transportation*,[309] illustrates how a complex business ownership may make it quite difficult to determine who the owners are of an alleged disadvantaged business, whether the owners of the business qualify as socially and economically disadvantaged individuals, and/or whether the contributions by socially and economically disadvantaged owners to acquire their ownership interests are real and substantial.

In *The Grove*, the plaintiff sought a reversal of the U.S. DOT's final decision denying The Grove's eligibility to participate in the federal ACDBE program at Seattle-Tacoma International Airport (Airport).

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[292] *Id.* at 653 (citation omitted).

[293] *Id.*

[294] *Id.*

[295] *Id.* at 656.

[296] *Id.* at 654.

[297] *Id.* at 656 (citation omitted).

[298] *Id.* at 656-7 (citation omitted).

[299] *Id.* at 654-5.

[300] *Id.* at 657.

[301] Participation by Disadvantaged Business Enterprises in Airport Concessions, 70 Fed. Reg. 14,496 (March 22, 2005).

[302] *See* DBE Laws, Policy, and Guidance, ¶ 12, *supra* note 100.

[303] *See id.* ¶ 10. The Final Rule also adjusted the dollar limits used to define small businesses for the U.S. DOT's DBE program that applies to state and local highway, transit, and airport recipients of DOT financial assistance.

[304] *See id.* ¶ 6; 49 C.F.R. § 23.7 (2018).

[305] *See id.* ¶ 3; 49 C.F.R. § 23.33 (2018).

[306] *See id.*

[307] 49 C.F.R. § 23.3 (2018).

[308] *Id.*

[309] 578 F. Supp.2d 37 (D. D.C. 2008).

As the court explained,

> [u]nder 49 U.S.C. § 47107(e), the Secretary of Transportation may approve an airport development project grant application provided the airport operator assures that at least ten percent of the businesses selling consumer products or services to the public are small businesses owned and controlled by socially and economically disadvantaged individuals. A firm seeking to be part of that ten percent must apply for certification for each airport at which it wishes to operate a concession from the appropriate state agency.[310]

The founders of The Grove claimed to be disadvantaged individuals whose ownership qualified The Grove for participation in 1987 as a disadvantaged business under the ACDBE program. By 1999, The Grove's owners were Mrs. Michelle Dukler (51 percent) and Star Foods (49 percent), the latter company being owned by Mrs. Dukler's husband and another person.[311] Even though Star Foods had assumed responsibility for substantial debts of The Grove and made a total contribution to its capital of $6.8 million, Star Foods was still only a 49 percent minority owner. Mrs. Dukler purchased her 51 percent interest in The Grove via a number of complex transactions,[312] including two promissory notes made by Mrs. Dukler secured with personal assets that were represented to have a total value of more than $2.6 million.[313]

In Washington state, the state agency that certifies ACDBE applicants is the Office of Minority and Women's Business Enterprises (the Washington Office).[314] After the Washington Office denied The Grove's application on five grounds, The Grove appealed to the U.S. DOT, which reviewed the denial on three of the grounds:[315] whether Mrs. Dukler's contribution of capital in The Grove was "real and substantial;" whether Mrs. Dukler's unencumbered assets exceeded the $750,000 personal net worth limit; and whether The Grove was so intertwined with Star Foods that The Grove did not operate as an independent business.[316] On appeal, The Grove argued that the U.S. DOT's denial of The Grove's certification was arbitrary and capricious under the Administrative Procedure Act and that the U.S. DOT violated The Grove's Fifth Amendment right to equal protection under the laws.[317]

Under 49 C.F.R. § 26.89, two grounds on which the U.S.DOT does not need to affirm a state's certification decision is when, based on the entire administrative record, the U.S. DOT determines that the state decision is not supported by substantial evidence, or when the Department does not uphold the decision based on grounds not specified in the decision.[318]

The plaintiff sought a review by the District of Columbia Circuit of the U.S. DOT's final decision denying The Grove's eligibility for the ACDBE program.

> A firm is eligible for the [ACDBE] Program as long as "(1) [it] is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and (2) [its] management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it."[319]

Critically important to the court's review was that "the firm seeking certification has the burden of demonstrating, by a preponderance of the evidence, that it meets the requirements concerning group membership or individual disadvantage, business size, ownership, and control."[320] Furthermore, "[a] firm seeking certification must demonstrate, among other things, that '[t]he contributions of capital or expertise by the socially and economically disadvantaged owners to acquire their ownership interests [were] real and substantial.'"[321]

Although the U.S. DOT decided that the source of Mrs. Dukler's funds used to acquire her interest was "ambiguous," the court held that the regulations "clearly contemplate the use of borrowed funds by disadvantaged individuals"[322] to acquire a firm. In reaching its decision, the court rejected various arguments made by the Department.[323] First, the court rejected the Department's objection to Mrs. Dukler's promissory note for which she pledged over $2.6 million in assets, including real property, antiques, and other assets.[324] In part, the Department had objected because it was not clear which items were owned solely by Mrs. Dukler. However, the court ruled that the promissory note did not present a problem, even if all items used to secure the note were jointly owned, because Mrs. Dukler's husband had "irrevocably renounce[d] and transfer[red] all rights"[325] of ownership in the Grove.

Second, the department had objected on the basis that a contribution of $2.6 million for a 51 percent interest in The Grove was "not substantial when compared to the size of The Grove and the capital contributions made by Star Foods."[326] However, in 2003, the year prior to Mrs. Dukler's purchase of her 51 percent interest in The Grove, the department had considered The Grove's gross profit of more than $3 million when the operating margin in 2003 was only approximately $357,000, and the net after taxes was only slightly more than $190,000.[327] The department had given "no reason why gross profit should be used in calculating the value of a company as opposed to operating margin or net income. With no clear rationale, such a valuation

[310] *Id.* at 40.
[311] *Id.* at 38-39.
[312] *Id.* at 39.
[313] *Id.*
[314] *Id.* at 40.
[315] *Id.*
[316] *Id.*
[317] *Id.*
[318] *Id.* at 41.
[319] *Id.* (quoting 49 C.F.R. § 26.5).
[320] *Id.* at 42 (citing 49 C.F.R. § 26.61(b)).
[321] *Id.* (quoting 49 C.F.R. § 26.69(e)).
[322] *Id.*
[323] *Id.* at 42-43.
[324] *Id.* at 43.
[325] *Id.*
[326] *Id.* at 44.
[327] *Id.*

method is unreasonable."[328] The court held that the department's conclusion that Mrs. Dukler's contribution was not real and was not supported by substantial evidence.[329]

Another question was whether Mrs. Dukler's net worth exceeded the $750,00 limit, (now $1.32 million as amended in 2012), in 49 C.F.R. § 23.35.[330] The department had excluded in its calculation of net worth the $2.6 million note, a liability, made by Mrs. Dukler. The court ruled that the liability in the form of the note had to be used when calculating Mrs. Dukler's personal net worth; thus, the department's conclusion that Mrs. Dukler's net worth exceeded $750,000 was not supported by substantial evidence.[331]

The third issue was whether The Grove was an independent business as the regulations require. The regulations provide that "'[i]n determining whether a potential DBE is an independent business, you must scrutinize relationships with non-DBE firms, in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources.'"[332] The court agreed that "the Department may rely on historical events so long as they continue to affect the status and circumstances of the firm as of the date of the decision being appealed" and that "Star Foods' capital contributions are highly relevant to the question of The Grove's independence."[333] For example, after its purchase of a 49 percent share of The Grove for $1.32 million, Star Foods made more than $5.2 million in additional capital contributions, part of which was an assumption of certain debts of The Grove, without any increase in Star Foods' percentage of ownership.[334] Based on a Loan and Security Agreement showing that Star Foods and Georgia's Grove were affiliates of The Grove, the court agreed with the department's conclusion that The Grove had not met its burden of demonstrating that it was an independent business.[335] Accordingly, the court held that there was substantial evidence in the record that supported one of the grounds for the U.S. DOT's denial of The Grove's application for certification.[336]

The court also ruled on The Grove's equal protection claim—the allegation that it had "been 'singled out' for invidious discrimination…."[337] Although the court agreed that "'class of one'" equal protection claims are cognizable, a plaintiff must prove that the plaintiff was intentionally treated differently than others similarly situated and that there was no rational basis for such different treatment.[338] Nevertheless, the court held that the department had "*many* good reasons" to scrutinize The Grove's application, including the complexity of Mrs. Dukler's $2.6 million capital contribution, her net worth, and The Grove's relationship with Star Foods.[339] Thus, on The Grove's equal protection claim, the court held that The Grove did not meet "its burden of showing [that] the Department scrutinized its application without a rational basis."[340]

The next case illustrates another issue that has arisen in connection with socially and economically disadvantaged business enterprises: whether a recipient is monitoring and enforcing its ACDBE program. Under 49 C.F.R. § 23.29, a recipient

> is required under the ACDBE program to, inter alia, "take necessary action to ensure, to the maximum extent practicable, that at least 10 percent of all businesses at the airport selling consumer products or providing consumer services to the public are small business concerns (as defined by regulations of the Secretary) owned and controlled by a socially and economically disadvantaged individual (as defined in section 47113(a) of this title)." 49 U.S.C. § 47107(e)(1). Grant recipients must also "implement appropriate mechanisms to ensure compliance" with a comprehensive regulatory scheme "by all participants in the program." 49 C.F.R. § 23.29.[341]

Grant recipients are required to establish a monitoring and enforcement mechanism "to 'verify that the work committed to ACDBEs is actually performed by the ACDBEs' … and that 'ACDBEs are actually performing the work for which credit is being claimed….'"[342]

The issue in *Young v. Fed. Aviation Admin.*[343] was whether the Pittsburgh International Airport (Airport Authority) had monitored and enforced its ACDBE program. The plaintiff's company, Salutations, Inc., owned 20 percent of Paradies-Pittsburgh, L.L.C. (Paradies-Pittsburgh), a joint venture that operated stores at the airport. Young filed a complaint with the FAA that alleged that the Airport Authority failed to monitor Paradies-Pittsburgh properly under the ACDBE program; however, the FAA found that the Airport Authority "did not violate 49 C.F.R. § 23.29 because it 'never counted/used Salutations, Inc. as either an ACDBE or DBE.'"[344]

The Third Circuit held that the FAA correctly concluded that the Airport Authority did not violate 49 C.F.R. § 23.29.

> When the joint venture began in 2001, Salutations and Paradies-Pittsburgh were not certified as ACDBEs. Salutations obtained that certification in 2013, but Young did not apply to have Paradies-Pittsburgh qualified as an ACDBE. Therefore, the Airport Authority did not impose ACDBE regulatory requirements on Salutations or Paradies-Pittsburgh. ... [T]he FAA did not act arbitrarily and capriciously in determining that the Airport Authority was not required to monitor the terms of the joint venture pursuant to the ACDBE program.[345]

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328 *Id.*

329 *Id.*

330 *See* Department of Transportation: Airport Concessions Disadvantaged Business Enterprise: Program Improvements, 77 Fed. Reg. 36,924, 36,931 (June 20, 2012).

331 *The Grove,* 578 F. Supp.2d at 45.

332 *Id.* 45-6 (quoting 49 C.F.R. § 26.71(b)(1)).

333 *Id.* at 46.

334 *Id.* at 39, 46.

335 *Id.* at 47.

336 *Id.*

337 *Id.* (citation omitted).

338 *Id.* (citation omitted).

339 *Id.* at 48 (emphasis in original).

340 *Id.*

341 Young v. Fed. Aviation Admin., 662 Fed. Appx. 186, 188 (3rd Cir. 2016).

342 *Id.* (citations omitted).

343 662 Fed. Appx. 186 (3rd Cir. 2016).

344 *Id.* at 188.

345 *Id.* at 189 (citation omitted).

The court rejected Young's claim that § 23.29 broadly "'applies to all minority partners/ACDBEs at every airport that accepts federal funding.'"[346] Young argued that the "ACDBE regulatory requirements applied to Salutations after it was certified in 2013, even though the Airport Authority did not rely on Salutations for purposes of its ACDBE goals."[347] The court held that the FAA's determination was not "'plainly erroneous or inconsistent with the regulation,'"[348] because "requiring [the] monitoring of ACDBEs for which no credit is claimed would not serve to 'verify that the work committed to ACDBEs is actually performed by the ACDBEs.'"[349] Young also argued that the FAA's position meant that grant recipients could satisfy ACDBE goals by "using businesses that do not meaningfully participate in commercial operations"[350] at the airport. The court held that, on the contrary, "'the regulations safeguard against this possibility by directing grant recipients to 'count only ACDBE participation that results from a commercially useful function.'"[351]

Finally, Young's allegation that the Airport Authority discriminated against him when it denied him the opportunity to bid or to review an unpublished bidding request was insufficient to establish a *prima facie* case of racial discrimination.[352]

Another ACDBE case is *Hill v. County of Sacramento*,[353] decided by a California federal district court in 2010. The plaintiff sued the defendants Sacramento County (County) and the Sacramento County Airport System (SCAS), as well as some employees of the county. Hill alleged that, because of her African American race, the defendants prevented her from being able to continue operating her Java City food and beverage concession at the Sacramento County International Airport (Sacramento Airport). She alleged that the defendants did not comply with federal regulations requiring them to promote socially and economically disadvantaged business concessionaires' participation at the airport.[354] The county owns and operates the airport while SCAS, a county department, is responsible for operating, maintaining, and developing the airport. SCAS out-sources most of the airport's food and beverage concessions to HMSHost Corporation (Host).[355]

The court noted that "[t]he County receives federal funding for the Sacramento Airport and, therefore, SCAS is required to implement"[356] an ACDBE program at the airport pursuant to 49 C.F.R., Part 23. The ACDBE program "is intended to promote participation of business owners who are both 'socially and economically' disadvantaged in the operation of airport concessions."[357] The plaintiff was DBE-certified under the ACDBE program.

In October 1998, Hill began operating her Java City concession at the airport after entering into a sublease with Host. Hill's agreement was set to expire on July 31, 2009.[358] In 2006, following an evaluation of its largest contracts, SCAS learned that its concessions were performing below industry standards for airports of comparable size and amount of traffic. To improve performance, SCAS decided to upgrade the concession offerings to increase sales and revenue. At first, Host planned to "reconcept" the plaintiff's concession to a Starbucks Coffee concession.[359] Host attempted to buy out the plaintiff's lease, but the plaintiff rejected Host's offers. Ultimately, Host began operating a Java City food and beverage concession where the plaintiff's Java City concession had been located.[360]

The plaintiff alleged, *inter alia*, that she was subjected to racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d), and the Equal Protection Clause of the California Constitution.[361]

On the plaintiff's claim under the Equal Protection Clause of the Fourteenth Amendment, Hill had to "'show that the defendants acted with an intent or purpose to discriminate against [her] based upon membership in a protected class. . . [a] requirement . . . only be satisfied through specific evidence tending to 'show [that] some invidious or discriminatory purpose underlies the policy.'"[362] However, the court held that the county had satisfactorily explained its business decision on non-racial grounds not to renew the plaintiff's concession agreement.[363]

As for the plaintiff's Title VI claim, the title only applies to intentional discrimination. Accordingly, Hill's claim failed for the same reasons that her equal protection claim failed.

Finally, the plaintiff's state constitutional claim failed as well, because "California's 'constitutional guarantee of equal protection is substantially similar to that contained in the United States Constitution. Federal and state analysis of equal protection claims is substantially the same.'"[364]

In a Memorandum opinion, the Ninth Circuit affirmed the district court's decision.[365]

Another case involving the non-renewal of an airport concession agreement is *Airport Mart, Inc. v. Westchester County,*[366] decided by a state court in New York. The case arose because of Westchester County's (County) decision, pursuant to a FAA

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

[347] *Id.* (citation omitted) (footnote omitted).

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

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

[350] *Id.*

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

[352] *Id.* at 189-90.

[353] No. 2:09-cv-01565-GEB-GGH, 2010 U.S. Dist. LEXIS 115097, (E.D. Cal. March 31, 2010), aff'd, 466 Fed. Appx. 577 (2012).

[354] *Id.*

[355] *Id.* at *2-3.

[356] *Id.* at *4 (citation omitted).

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

[358] *Id.* at *3.

[359] *Id.* at *5.

[360] *Id.* at *9.

[361] *Id.*

[362] *Id.* at *10 (citations omitted).

[363] *Id.* at *12.

[364] *Id.* at *15-16 (citation omitted).

[365] Hill v. County of Sacramento, 466 Fed. Appx. 577, 579 (9th Cir. 2012).

[366] 2015 N.Y. Misc. LEXIS 2885 (N.Y. Sup. Ct. 2015).

regulation, not to renew a concession agreement it had made with Airport Mart, Inc. (Airport Mart). In a written agreement in April 2006, Airport Mart and the County agreed that Airport Mart would lease, occupy, and use approximately 134 square feet of space on the first floor of the main terminal building at the Westchester County Airport to operate a news, gift, and sundries concession.

In December 2011, the County informed the plaintiff by letter that the FAA regulations on airport concession agreements restricted the County from exercising the renewal option in Airport Mart's lease.[367] The plaintiff argued that County officials and airport management personnel had assured Airport Mart that the concession agreement would continue and that the County was aware of Airport Mart's investment of approximately $0.5 million in the leased premises.[368] In its December 2011 letter, the County also notified Airport Mart that the County would publish a Request for Proposals (RFP) in May 2014 to solicit business proposals for a newsstand and coffee shop concession for the space then occupied by Airport Mart.[369] The County instructed Airport Mart to vacate the premises by July 15, 2015. Although apparently not germane to the court's decision, prior to the completion of the RFP process, the Port Authority of New York and New Jersey (Port Authority) certified Airport Mart as an ACDBE and as a member of the Port Authority's MWBE program.[370]

The County argued that the question of whether it had met its goal for ACDBE participation was of no concern to Airport Mart, because the County had the authority to select an appropriate concession vendor for the space.[371] According to the court,

> the County made it abundantly clear that it would be adhering to FAA regulations governing concession agreements in airports, that upon expiration of the current five-year agreement, the Leased Premises would be placed out for RFP bids from other businesses, and that Airport Mart should take this into consideration before moving forward with its plans to add additional concession space and executing the Second Amendment….[372]

The court held that Airport Mart's decision to expand and improve the space it leased, when there was no guarantee that its agreement would be renewed, was "a business risk it elected to undertake."[373]

[367] *Id.* at *4-5.

[368] *Id.* at *6.

[369] *Id.* at *7-8.

[370] *Id.* at *8.

[371] *Id.* at *14.

[372] *Id.* at *19-20. The court held that, because the parties' agreement had an integration clause, the agreement barred the introduction of extrinsic evidence that would vary the terms of the agreement; that, in the absence of a special relationship between the parties, there was no claim for negligent misrepresentation; that the plaintiff had no claim for unjust enrichment; and that the doctrine of estoppel did not apply against the county. *Id.* at *16-18.

[373] *Id.* at *22.

3. State and Local Affirmative Action Programs

a. Judicial Decisions prior to 2006

This part of the report discusses cases prior to 2006 in which plaintiffs challenged state and local DBE programs applicable to public contracting on constitutional grounds. Part B. 3.b. of this report, discusses cases decided since 2006.

In *Engineering Contractors Association of South Florida Inc. v. Metropolitan Dade County,*[374] six trade associations, whose members regularly performed work for the county, challenged three substantially identical affirmative action programs enacted between 1982 and 1994 that Dade County administered for Black Business Enterprises (BBEs), Hispanic Business Enterprises (HBEs), and Women Business Enterprises (WBEs).[375] The programs had participation goals of 15 percent, 19 percent, and 11 percent, respectively, for each group.[376] Any contract over $25,000 funded in part by the county required that every reasonable effort had to be made to achieve the participation goal, including set asides, subcontractor goals, project goals and bid preferences, as well as selection factors.[377] Each year, the county commission had to decide whether to renew the affirmative action program.[378]

The district court found that the affirmative action plan did not meet the "strong basis in evidence"[379] requirement for BBEs and HBEs, nor could the court find that the affirmative action program was narrowly tailored to serve a compelling governmental interest. As for the WBE program, there was a lack of probative evidence to support the county's rationale for implementing a gender preference program, and the gender-based plan was not substantially related to an important government interest.[380]

The United States Court of Appeals for the Eleventh Circuit affirmed the district court's holding that the programs violated the Equal Protection Clause.[381] The appeals court held that, even if it were assumed that the county had established a strong basis in evidence for the programs, the county's programs for BBEs and HBEs were not narrowly tailored. The county had implemented race- or ethnicity-conscious measures without even considering or trying alternatives or race-neutral measures.[382] 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."[383]

[374] 122 F.3d 895, 900-01 (11th Cir. 1997).

[375] *Id.* at 900.

[376] *Id.* at 900-01.

[377] *Id.* at 901.

[378] *Id.*

[379] *Id.* at 902.

[380] *Id.*

[381] *Id.* at 929.

[382] *Id.* at 926-27.

[383] *Id.* at 929.

In *Concrete Works of Colorado, Inc. v. City and County of Denver*,[384] a case with a long history, Concrete Works of Colorado, Inc. (CWC) challenged the constitutionality of an affirmative action ordinance enacted by the City and County of Denver (Denver). Although Denver enacted the first version of the law in 1990 and twice since then, the essential elements remained unchanged. A federal district court in Colorado granted a summary judgment in favor of Denver, but the United States Court of Appeals for the Tenth Circuit reversed and remanded the case for trial.[385] In 2000, after the remand and a bench trial, the district court entered judgment in favor of CWC on its claims for injunctive and declaratory relief and enjoined Denver from enforcing the ordinance.[386]

In 2003, after Denver's appeal, the Tenth Circuit held that Denver could use its spending powers to remedy private discrimination if it identified the discrimination with particularity as required by the Fourteenth Amendment.[387] The court rejected CWC's attacks on Denver's disparity studies and held that "evidence of marketplace discrimination can be used to support a compelling interest."[388] Based on Denver's evidence of discrimination in the market place, as well as how Denver's use of its spending powers had benefited private discrimination, Denver demonstrated that it was a "'passive participant in a system of racial exclusion practiced by elements of the local construction industry.'"[389] Denver showed that there was a "'strong link'" between its "'disbursements of public funds for construction contracts and the channeling of those funds'" because of private discrimination.[390]

The court rejected CWC's arguments, for example, that the "disparities shown in the studies may be attributable to firm size and experience rather than discrimination;"[391] that the studies did not control for "firm specialization;"[392] or that the studies were unreliable because they were "not a measure of only firms *actually* bidding on City construction projects."[393] The court acknowledged the "extensive evidence" in the record of Denver's compelling interest in remediating discrimination against both MBEs and WBEs.[394] The court held that the Denver plan was narrowly tailored, upheld its constitutionality, and reversed and remanded the case to the district court with instructions to enter judgment for Denver.[395]

In several other cases decided prior to 2006, the courts did not uphold the constitutionality of a DBE program. For example, in 2001, in *Builders Ass'n of Greater Chicago v. County of Cook,*[396] the Seventh Circuit found that there was no evidence that the prime contractors on the county's projects were discriminating against minorities. Inasmuch as the county was unaware of any such discrimination, the county failed to establish the premise for a racial remedy. In any event, the county's affirmative action program went further than was necessary to eliminate the evil against which it was directed. The Seventh Circuit held that the county's affirmative action program was unconstitutional.[397]

Another example of an unconstitutional local affirmative action plan for public contracting is *Association for Fairness in Bus., Inc. v. New Jersey.*[398] In 2000, a federal district court in New Jersey granted the plaintiff a preliminary injunction in an action challenging the constitutionality of the minority set-aside provisions of the New Jersey Casino Control Act.[399] The Act provided that each casino licensee had to have a goal of expending 15 percent of the dollar value of its contracts for goods and services with minority and women's business enterprises. The court ruled, *inter alia,* that

> 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.[400]

The court granted the plaintiff's motion for a preliminary injunction that enjoined the statutes' provisions for the implementation of the program.[401]

b. Judicial Decisions since 2006

This part of the report discusses several cases decided since 2006 in which the courts upheld the constitutionality of a state or local DBE program.

In 2010, in *H.B. Rowe Co. Inc. v. Tippett*,[402] decided by the United States Court of Appeals for the Fourth Circuit, the plaintiff H.B. Rowe Co. Inc. (Rowe) challenged North Carolina statute § 136-28.4. The statute required prime contractors "to engage in good faith efforts to satisfy participation goals for minority and women subcontractors on *state-funded projects*."[403] First enacted in 1983, North Carolina's statute promoted "the use of 'small,

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[384] Concrete Works of Colorado, Inc. v. City & County of Denver, 823 F. Supp. 821 (D. Colo. 1993) (*Concrete Works I*).

[385] Concrete Works of Colorado, Inc. v. City & County of Denver, 36 F.3d 1513, 1530-31 (10th Cir. 1994) (*Concrete Works II*).

[386] Concrete Works of Colorado, Inc. v. City & County of Denver 86 F. Supp.2d 1042, 1079 (D. Colo. 2000) (*Concrete Works III*).

[387] Concrete Works of Colorado, Inc. v. City & County of Denver, 321 F.3d 950 (10th Cir. 2003) (*Concrete Works IV*), *cert. denied with dissent,* 540 U.S. 1027, 124 S. Ct. 556, 157 L. Ed.2d 449 (2003).

[388] *Id.* at 976.

[389] *Id.* at 958 (citation omitted).

[390] *Id.* at 977 (quoting *Adarand VII*, 228 F.3d at 1167-8).

[391] *Id.* at 980.

[392] *Id.* at 982.

[393] *Id.* at 983.

[394] *Id.* at 990.

[395] *Id.* at 983.

[396] 256 F.3d 642 (7th Cir. 2001).

[397] *Id.* at 647-48.

[398] 82 F. Supp.2d 353 (D. N.J. 2000).

[399] NJSA 5:12-A-6.

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

[401] *Id.* at 364.

[402] 615 F.3d 233 (4th Cir. 2010).

[403] *Id.* at 236 (emphasis supplied).

minority, physically handicapped and women contractors' in State construction projects."[404] The legislature amended the statute in 1989 and 1990 "to set specific participation goals on State transportation construction contracts, first for minority-owned businesses (10 percent) and then for women-owned businesses (5 percent)."[405] The North Carolina statute "mirrored" the federal DBE program.[406] The North Carolina DOT "promulgated and implemented regulations … titled 'Minority Business Enterprise and Women Business Enterprise Programs for Highway and Bridge Construction Contracts'…."[407]

The court followed the United States Supreme Court's decision in *City of Richmond v. J.A. Croson Co*.[408] In *Croson*, the Court "recognized that '[i]t is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.'"[409] However, "to remedy such discrimination through race-conscious measures, a governmental entity must identify with 'some specificity' the racial discrimination it seeks to remedy and present a 'strong basis in evidence for its conclusion that remedial action [is] necessary.'"[410]

In 1993, a national research and consulting firm, MGT of America (MGT), commissioned by the North Carolina General Assembly, conducted a study that "concluded that North Carolina minority and women subcontractors suffered from discrimination in the road construction industry and were underutilized in State contracts."[411] In October 2002, when the North Carolina DOT sought bids on a road relocation project, the department set participation goals of 10 percent and 5 percent, respectively, for minority and women subcontractors. Rowe's bid included a 6.6 percent participation for women subcontractors but included no minority subcontractor participation. The department rejected Rowe's low bid, "because Rowe failed to demonstrate good faith efforts to attain the pre-designated levels of minority participation on the project."[412] Rowe alleged "that the statute and the defendants' actions in administering the Program violated Rowe's rights under the Equal Protection Clause of the Fourteenth Amendment…."[413] Challenging the constitutionality of § 136-28.4 on its face and as-applied, Rowe sought a declaratory judgment that the statutory scheme was invalid, an injunction against its continued administration, and compensatory and punitive damages.[414]

In 2004, MGT prepared and issued its third study of subcontractors' participation in North Carolina's highway construction industry. Afterwards, the legislature amended § 136-28.4 to "require[] that the Department, 'to the extent reasonably practicable, incorporate narrowly tailored remedies identified in the [2004] Study;'"[415] to require that the department

> "'establish annual aspirational goals, not mandatory goals, … for the overall participation in contracts by disadvantaged minority-owned and women-owned businesses … [that] shall not be applied rigidly on specific contracts or projects; [to] set 'contract-specific goals or project-specific goals … for each disadvantaged minority-owned and women-owned business category that has demonstrated significant disparity in contract utilization' based on availability, as determined by the study;'"[416] and to define a minority as "'only those racial or ethnicity classifications identified by [the] study … that have been subjected to discrimination in the relevant market-place and that have been adversely affected in their ability to obtain contracts with the Department;'"[417] to "require[] the Department to reevaluate the Program over time and respond to changing conditions" and "conduct a study similar to the 2004 study at least every five years;"[418] and to include a sunset provision, which the legislature extended to August 31, 2010.[419] One aspect of the state's DBE program that remained unchanged was that a prime contractor that did "not meet project-specific goals may still demonstrate compliance by making good faith efforts to solicit minority and women subcontractors."[420]

The district court rejected the defendants' contention that the 2006 amendments to the statute had mooted Rowe's case.[421] The court dismissed Rowe's claims against the department and individuals sued in their official capacity on the ground of sovereign immunity and dismissed claims against individuals sued in their individual capacities on the ground of qualified immunity.[422] The district court allowed the case to proceed on Rowe's claims for declaratory and injunctive relief against some defendants under the *Ex parte Young* doctrine.[423] Rowe appealed after the district court upheld the constitutionality of North Carolina's DBE statute.

The Fourth Circuit affirmed the district court's judgment in part, reversed it in part, and remanded. The appellate court recognized that all racial preferences, including those intended to benefit minority groups, are subject to strict scrutiny.[424] To justify a race-conscious measure, a state must identify discrimination, public or private, with some specificity and have a "'strong basis in evidence'"[425] to conclude that remedial action is required. Before deciding that remedial action is necessary, a "state need not conclusively prove the existence of past or present racial

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[404] *Id.* (quoting N.C. Gen. Stat. § 136-28.4).

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

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

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

[408] 488 U.S. 469, 493-94, 109 S. Ct. 706, 722, 102 L. Ed.2d 854, 882 (1989).

[409] *H.B. Rowe Co. Inc.*, 615 F.3d at 237 (citation omitted).

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

[411] *Id.*

[412] *Id.* at 237-38.

[413] *Id.* at 238.

[414] *Id.*

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

[416] *Id.* at 238-39 (citations omitted).

[417] *Id.* at 239 (citation omitted).

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

[419] *Id.*

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

[421] Id. at 240. *See* discussion of dismissal based on mootness in part B. 8.b. of this report.

[422] *See* discussion of the court's decision on sovereign immunity and qualified immunity in B. 8.c. and d. of this report.

[423] *H.B. Rowe Co., Inc.*, 615 F.3d at 240.

[424] *Id.* at 241.

[425] *Id.* (citations omitted) (some internal quotation marks omitted).

discrimination…."[426] "[A] state may meet its burden by relying on 'a significant statistical disparity' between the availability of qualified, willing, and able minority subcontractors and the utilization of such subcontractors by the governmental entity or its prime contractors[,] … 'corroborated by significant anecdotal evidence of racial discrimination.'"[427] Of course, to satisfy the requirement of strict scrutiny "the state statutory scheme must … be 'narrowly tailored' to serve the state's compelling interest in not financing private discrimination with public funds."[428]

In *Rowe*, the Fourth Circuit outlined in some detail the state's statistical evidence of discrimination, including the disparity evidence and regression analysis, supporting the enactment of North Carolina's DBE statute. The data established the underutilization only of African American and Native American subcontractors.[429]

As Rowe was unable to show that the 2004 study's availability estimate was inadequate,[430] the court rejected Rowe's assertion that "MGT's availability estimate insufficiently accounted for the qualifications and willingness of minority subcontractors to perform state-funded subcontracts."[431] Also not persuasive was Rowe's claim that "alternative disparity evidence in the 2004 study disproves the existence of discrimination."[432] Instead, the court found that the state's evidence for the 1991-1993 period, when the DBE program was suspended, showed that there was a "very significant decline in utilization of minority and women subcontractors—nearly 38 percent—[that] surely provides a basis for a fact finder to infer that discrimination played some role in prime contractors' reduced utilization of these groups during the suspension."[433]

The state's anecdotal evidence (a telephone survey, personal interviews, and focus groups) corroborated the 2004 study's findings.[434] The court found that the anecdotal data was not flawed, as claimed by Rowe, because the "anecdotal evidence simply supplements statistical evidence of discrimination."[435]

Thus, the state "presented a 'strong basis in evidence' for its conclusion that the minority participation goals were necessary to remedy discrimination against African American and Native American subcontractors."[436] Moreover, the state's "data powerfully demonstrate[d] that prime contractors grossly underutilized African American and Native American subcontractors in public sector subcontracting during the study period."[437] The state "met its burden of producing a 'strong basis in evidence' for its conclusion that minority participation goals were necessary to remedy discrimination against African American and Native American (but not Asian American or Hispanic American) subcontractors."[438]

The state had narrowly tailored its program to achieve the state's demonstrated compelling interest based on an analysis of five factors identified by the court:

> (1) the necessity of the policy and the efficacy of alternative race neutral policies; (2) the planned duration of the policy; (3) the relationship between the numerical goal and the percentage of minority group members in the relevant population; (4) the flexibility of the policy, including the provision of waivers if the goal cannot be met; and (5) the burden of the policy on innocent third parties.[439]

The Fourth Circuit was satisfied that the 2004 study detailed numerous race-neutral measures and that the state had undertaken most of the race-neutral alternatives identified in the state's regulations.[440] Indeed, as Rowe had failed to identify any "viable race-neutral alternatives that North Carolina ha[d] failed to consider,"[441] a race-conscious remedy was required. The duration of the program was narrowly tailored to ensure that the program endured "'only until … the discriminatory impact has been eliminated.'"[442] The program's participation goals were related to the percentage of minority subcontractors in the state's relevant markets, and the program's flexibility was "a significant indicator of narrow tailoring."[443] For example,

> [t]he Program contemplates a waiver of project-specific goals when prime contractors make good faith efforts to meet those goals. … Good faith efforts essentially require only that the prime contractor solicit and consider bids from minorities. The State does not require or expect the prime contractor to accept any bid from an unqualified bidder, or any bid that is not the lowest bid.[444]

The program, moreover, was not overinclusive, a term referring to a program's "'tendency to benefit particular minority groups that have not been shown to have suffered invidious discrimination….'"[445] Rowe failed to show that the program placed a substantial burden on prime contractors or that the program was overinclusive.[446]

As for its gender-conscious remedy, the statute did not survive the Fourth Circuit's intermediate scrutiny analysis. In fact,

> [t]he 2004 study's public-sector disparity analysis demonstrated that, unlike minority-owned businesses, women-owned businesses won far more than their expected share of subcontracting dollars during the study period. In other words, prime contractors substantially overutilized women subcontractors on public road construction projects.[447]

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

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

[428] *Id.* at 242 (citation omitted).

[429] *Id.* at 245.

[430] *Id.* at 246.

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

[432] *Id.* at 247.

[433] *Id.* at 247-8 (citation omitted).

[434] *Id.* at 248.

[435] *Id.* at 249 (citation omitted).

[436] *Id.* at 250.

[437] *Id.*

[438] *Id.* at 251.

[439] *Id.* at 252 (citation omitted). *See* discussion in part B. 5 of this report of factors applicable to the narrow tailoring requirement.

[440] *Id.*

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

[442] *Id.* at 253 (citation omitted) (some internal quotation marks omitted).

[443] *Id.*

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

[445] *Id.* at 252 (citation omitted).

[446] *Id.* at 254.

[447] *Id.*

The evidence did not show the underutilization of women subcontractors, and the state "failed to present any anecdotal evidence indicating that women subcontractors successfully bidding on State contracts faced private-sector discrimination."[448] Although the court did not find that the state's DBE program was constitutional as it applied to women, as well as Asian American and Hispanic American subcontractors, the remainder of the state's program was constitutional and could "stand" on its own.[449]

In 2016, in *Kossman Contr. Co. v. City of Houston*,[450] decided by a federal district court in Texas, the plaintiff Kossman Contracting, Co. (Kossman) challenged the constitutionality of Houston's Minority Business Enterprise Program for Construction Contracts (2013) that established percentages of its construction contracts as goals to be awarded on the basis of race or gender.

Houston's expert, NERA Economic Consulting (NERA), examined the past and present status of MBEs and WBEs, collectively referred to in the opinion as "MWBE" or "M/WBE," in the geographic and product markets of the city's construction contracts. NERA defined the relevant market area for Houston's construction contracts, as well as extracted data from the city's records on its construction contracts.[451] NERA used a "custom census" approach, a multi-step process, to verify the ownership of all MWBE and non-MWBE firms to calculate their availability in Houston's market area.[452] Because Dun & Bradstreet data did not identify all MWBEs, NERA used lists from public and private entities and other methods.[453] NERA concluded that the availability of MWBEs for construction contracts with the city was 34.73 percent when "weighted for award amounts."[454]

As for its disparity analysis,

> [t]he NERA Study … combined the statistical evidence of MWBE availability in the defined market area with Defendant's construction contract records from the prior five and one-half years to determine whether there was "statistical evidence of disparities in the public sector construction contracting activities supported by" the defendant.[455]

NERA found that there was a statistically significant adverse disparity for African Americans, Asians, MBEs as a group, and MWBEs as a group, but there were not "statistically significant disparities for Hispanics, Native Americans, and non-minority women…."[456] Nevertheless, there was a "significant statistical disparity in [the] utilization of Hispanic-owned businesses in the unremediated, private sector…."[457] NERA opined that the utilization of Hispanic-owned businesses would decline "precipitously" if the group were excluded from the program.[458] In support of its opinion, NERA observed that when non-minority women were excluded from the city's remedial program in 2009, their utilization declined from 10.14 percent by dollars awarded to 5.01 percent by dollars awarded.[459]

The NERA study also used anecdotal evidence, including a survey of business establishments, a random survey of a sample of MWBE and non-MWBE firms, and "business-experience group interviews."[460] The anecdotal evidence, which supported NERA's statistical conclusions,[461] showed that there had been "business discrimination against MWBEs … in the geographic and industry markets for Defendant's awarding of construction contracts…."[462] NERA recommended that Houston "continue and augment the then-current preferential program with neutral and race-and gender-based measures."[463]

As a result of the NERA study, Houston adopted an ordinance, effective July 1, 2013, that set an MWBE annual goal of 34 percent for the city's construction contracts.[464] As summarized by the court,

> [t]he 2013 Program places initial responsibility on each department to determine those construction contracts that are goal-oriented contracts and those that are regulated contracts. A goal-oriented contract is defined as one in excess of $1,000,000 for which competitive bids are required and with significant subcontracting potential in fields in which there are sufficient known [minority/women small business enterprises (MWSBE)]. A regulated contract is defined as one for which competitive bids are not required, that is not covered by national MBE/WBE programs, and that has significant subcontracting potential in fields in which there are sufficient known MWSBEs or is a type for which sufficient known MWSBEs have represented the ability to perform the prime contract service so as to be able to bid competitively.[465]

Other favorable aspects of the 2013 Program cited by the court were: "[g]oals are set on a contract-by-contract basis based on availability of MWBEs for each NAICS code and on divisibility of contract elements;"[466] "[t]he 2013 Program … allows administrative flexibility in the application of the MWSBE provisions through waivers;"[467] and "[o]ther options are built into the 2013 Program."[468]

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[448] *Id.* at 255.

[449] *Id.* at 257.

[450] No. H-14-1203, 2016 U.S. Dist. LEXIS 37708 (S.D. Tex. Feb. 16, 2016), *adopted by, motion granted by, summary judgment granted, in part, summary judgment denied, in part by, objection overruled by* Kossman Contr. Co. v. City of Houston, No. H-14-1203, 2016 U.S. Dist. LEXIS 36758 (S.D. Tex., Mar. 22, 2016).

[451] *Kossman Contr. Co.*, 2016 U.S. Dist. LEXIS 37708, at *3. The court noted that NERA used regression analysis, a term that refers to a method of analyzing statistics by examining the correlation between two or more variables in a mathematical model by determining the line of best fit through a series of data points. *Id.*

[452] *Id.* at *5 (footnote omitted).

[453] *Id.* at *5-6.

[454] *Id.* at *6-7.

[455] *Id.* at *8 (footnote omitted).

[456] *Id.* (footnote omitted).

[457] *Id.* at *9.

[458] *Id.*

[459] *Id.* at *10.

[460] *Id.* (footnote omitted).

[461] *Id.*

[462] *Id.* at *10-11.

[463] *Id.* at *11-12 (footnote omitted).

[464] *Id.* at *14.

[465] *Id.* at *15-6 (footnotes omitted).

[466] *Id.* at *16 (footnote omitted).

[467] *Id.* at *17 (footnote omitted).

[468] *Id.* at *18.

The district court observed that "'[c]ombating racial discrimination is a compelling government interest.'"[469] However, "[t]he targeted discrimination need not be the work of the governmental entity itself; evidence of passive participation in the discriminatory awarding of public contracts may establish a compelling interest in remedial action."[470] The disparity studies were "'probative evidence of discrimination because they ensure that the relevant statistical pool of qualified minority contractors is being considered.'"[471] Nevertheless, a "governmental entity is not required to conclusively prove existence of discrimination to establish a strong evidentiary basis."[472] A challenger to an affirmative action program must provide "'credible, particularized evidence,' such as contrasting statistical data, testimony or documentation of neutral justifications for the statistical results, or proof that the disparity study results are flawed or insignificant."[473]

The court held that NERA's evidence justified the 2013 Program's utilization goals for Black American, Asian-Pacific American, and subcontinent Asian American businesses.[474] The court also agreed that there was "evidence of significant statistical adverse disparity in the utilization of Hispanic-owned businesses in the unremediated, private sector [that met] Defendant's prima facie burden of producing a strong evidentiary basis for the continued inclusion of businesses owned by Hispanic Americans."[475] However, "[t]he utilization goal for businesses owned by Native Americans [was] not supported by a strong evidentiary basis."[476] On the other hand, "[t]he precipitous decline in the utilization of WBEs after WBEs were eliminated and the significant statistical disparity [that existed] when WBEs did not benefit from preferential treatment provide a strong basis in evidence for the necessity of remedial action."[477] The court dismissed the plaintiff's objection to the combination of data on prime contractors and subcontractors as "nothing more than a vacuous criticism."[478]

Houston, therefore, had "a strong basis in evidence to support a remedial program," which included a sufficient "variety of race-neutral remedies … to satisfy the requirements of narrow tailoring."[479] Moreover, the 2013 Program's flexibility and duration and its 34 percent annual goal, adjusted slightly to remove the over-inclusiveness of Native-American-owned businesses, satisfied the narrow tailoring requirement.[480] Finally, the 2013 program did not impose an unreasonable burden on third persons.[481] The district court approved the magistrate judge's recommendation that the plaintiff's motion for summary judgment be granted regarding the exclusion of Native-American-owned businesses from the annual goal and granted the defendants' motion for summary judgment on all other issues discussed herein.[482]

4. Evidence Required to Satisfy the Compelling Interest Requirement

a. 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."'[483] Both prongs and the sub-issues arising under each prong are discussed in this and the next part of this report.

First, when racial classifications are used 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'…."[484] Second, the court must elucidate the standards required to evaluate the government's evidence of a compelling interest.[485] Third, the government's interest must be sufficiently strong to meet the government's initial burden of demonstrating that there is a compelling interest.[486] Finally, the party challenging the government program must meet its "ultimate burden of rebutting the government's evidence…."[487]

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."[488] Congress's assessment of the validity of the evidence that Congress relied upon is entitled to some deference, but Congress's decision to implement a program is subject to judicial scrutiny.[489] Since the passage of TEA-21 and the promulgation of the U.S.

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[469] *Id.* at *49 (citation omitted).

[470] *Id.* at *50 (citation omitted).

[471] *Id.* at *51 (citation omitted) (some internal quotation marks omitted).

[472] *Id.* at *53 (citation omitted).

[473] *Id.* at *53-4 (citation omitted).

[474] *Id.* at *61.

[475] *Id.* at *62.

[476] *Id.* at *63.

[477] *Id.*

[478] *Id.* at *63-4.

[479] *Id.* at *67-8.

[480] *Id.* at *68-9.

[481] *Id.* at *69.

[482] When approving the magistrate judge's report and recommendation, the district court judge overruled all of the plaintiff's objections and approved the report and recommendation but provided also that the "defendant is PERMANENTLY ENJOINED from enforcing its Minority and Women Owned Business Enterprise program with respect to Native-American-owned businesses until such time as defendant establishes sufficient evidence of discrimination against Native-American-owned businesses in its construction contracts." Kossman Contr. Co. v. City of Houston, No. H-14-1203, 2016 U.S. Dist. LEXIS 36758, at 16-17 (S.D. Tex. March 22, 2016).

[483] *Adarand VII*, 228 F.3d 1147, 1164 (10th Cir. 2000) (citation omitted).

[484] *Id.*

[485] *Id.*

[486] *Id.*

[487] *Id.*

[488] *Id.* at 1165.

[489] *Rothe IV,* 324 F. Supp.2d 840, 853 (2004). *See also*, *Rothe III*, 262 F.3d 1306, 1322 n.14 (2001).

DOT's 1999 DBE regulations, several courts have considered whether the evidence considered by Congress was sufficient. Nevertheless, the courts have held "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."[490] Congress, thus, unlike the states, may "redress the effects of *society-wide* discrimination...."[491]

On the other hand, generalized congressional statements about the existence of racial discrimination are not enough "to demonstrate a strong basis in the evidence" but "must be considered when determining Congress's intent."[492] When Congress reauthorized the DBE program in 2003,[493] there were "more than fifty documents and thirty congressional hearings on minority-owned businesses prepared in response to the Supreme Court's *Adarand* decision"[494] that were entitled to some deference and constituted valid evidence. In addition, 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."[495] Congress 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."[496]

Even so, the question is "how much evidence is necessary in order for Congress to use this power [to] create a nationwide program."[497] It is not necessary that Congress make specific findings on 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,"[498] as was argued unsuccessfully in the *Rothe* case. That is, Congress only has to consider "broad categories to provide information on the prevalence of discrimination."[499] 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."[500]

[490] *Adarand VII*, 228 F.3d at 1165 (citation omitted).

[491] *Id.* (emphasis supplied).

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

[493] The program was reauthorized in 1998 by TEA-21.

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

[495] *Id.*

[496] *Id.* at 850.

[497] *Id.* at 847.

[498] *Id.* (citing *Fullilove*, 448 U.S. at 515-6 n.14, 100 S. Ct. at 2794 n.14, 65 L. Ed.2d at 948 n.14).

[499] *Id.*

[500] *Id.* at 860.

b. Requirement of a "Strong Basis in Evidence"

(1) Judicial Decisions prior to 2006

The courts have addressed the evidence that states must have to support each state's implementation of a DBE program. Typically, based on studies of the availability of DBEs in the relevant public contracting market and of discrimination against DBEs in the market, states have shown that a strong basis in evidence exists to implement a DBE program.

The question of whether the government has 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."[501] Before establishing a DBE program, the government must demonstrate that there is a compelling interest for a program; there must be "'identified discrimination;'" and there must be specific "evidence of past or present discrimination."[502] There must be "a strong basis in evidence to conclude that remedial action was necessary.…"[503] As the United States Court of Appeals for the Tenth Circuit explained in 2003 in *Concrete Works of Colorado, Inc. v. City and County of Denver,*[504] supra, 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."[505]

With respect to TEA-21 and the 1999 regulations in effect at the time of the *Adarand VII*, *Sherbrooke Turf*, *Northern Contracting,* and *Western States Paving Co.* cases, supra, the courts 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.'"[506] 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."[507] Strong evidence is that "'approaching a prima facie case of a constitutional or statutory violation,' *not* irrefutable or definitive proof of discrimination."[508] The government's burden can be met "without conclusively proving the existence of past or present racial discrimination."[509]

[501] Concrete Works of Colorado v. City of Denver, 321 F.3d 950, 958 (10th Cir. 2003) (citation omitted).

[502] Northern Contracting v. Illinois, No. CC 00 C 4515, 2004 U.S. Dist. LEXIS 3226 *89 (N. D. Ill, March 4, 2004) (citation omitted).

[503] *Id.* at *90 (citation omitted).

[504] 321 F.3d 950 (10th Cir. 2003), *cert. denied with dissent*, 540 U.S. 1027, 124 S. Ct. 556, 157 L. Ed.2d 449 (2003).

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

[506] *Northern Contracting*, 2004 U.S. Dist. LEXIS 3226, at *100 (citation omitted).

[507] *Id.* at *121.

[508] *Concrete Works of Colorado*, 321 F.3d at 971 (citation omitted) (emphasis in original).

[509] *Id.* at 958 (citing *Concrete Works of Colorado II*, 36 F.3d at 1522).

In *Western States Paving Co.*,[510] supra, the Ninth Circuit held that with respect to public contracting the federal government had demonstrated "a compelling basis for classifying individuals according to race...."[511] Moreover, the state of Washington did not have to "demonstrate an independent compelling interest for its DBE program."[512]

In *Concrete Works of Colorado*, supra, with respect to Denver's affirmative action program, although Denver submitted evidence of discrimination against each group included in its ordinances, Denver did not have "to show that each group suffered equally from discrimination."[513] Instead, "Denver's only burden was to introduce evidence which raised the inference of discriminatory exclusion in the local construction industry and link[] its spending to that discrimination."[514]

Not all government defendants are able to meet the compelling interest requirement. For example, in *Builders Ass'n of Greater Chicago v. County of Cook,*[515] supra*,* 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 county's remedy went further than was necessary to eliminate the evil against which it was directed.

Similarly, in *Association for Fairness in Bus., Inc. v. New Jersey,*[516] supra, 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 minority and women's business enterprises. 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."[517]

(2) Judicial Decisions since 2006

Several courts since 2006 have had to decide whether race-conscious and gender-conscious remedies in a DBE program are supported by a strong basis in evidence. For example, in 2013, in *Associated Gen. Contractors of Am. v. Cal. Dep't of Transp.*,[518] decided by the Ninth Circuit, the appellant Associated General Contractors of America (AGC) sought declaratory and injunctive relief against the California Department of Transportation (Caltrans) and its officers. AGC claimed that Caltrans's 2009 DBE program unconstitutionally provided race- and sex-based preferences on certain transportation contracts to African American-, Native American-, Asian-Pacific American-, and women-owned firms.

As the Ninth Circuit recounted, SAFETEA-LU, enacted in 2005, authorized the U.S. DOT to distribute funds to states for transportation-related projects and directed the Secretary of Transportation to ensure that 10 percent of funds distributed to states and municipalities were expended on DBEs.[519] Although the regulations define "'disadvantaged business enterprises' as small businesses owned or controlled by 'socially and economically disadvantaged' individuals[,] … [there] is a [rebuttable] presumption that African Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, and women are socially and economically disadvantaged."[520]

The Ninth Circuit cited its 2005 decision in *Western States Paving Co.*, supra*,* that struck down Washington state's DBE program because it was not narrowly tailored.[521] In *Western States Paving Co*., the court used a two-prong test to resolve whether a DBE program was narrowly tailored: (1) a state had to demonstrate the presence of discrimination in its transportation contracting industry, and (2) any remedial program had to apply to minority groups that had actually suffered discrimination.[522]

As for the Caltrans program at issue, Caltrans had commissioned a disparity study by BBC Research and Consulting (BBC) to ascertain whether there was evidence of discrimination in California's contracting industry.[523] First, when BBC collected data on the availability of DBEs in public contracting in California's transportation industry, BBC found that minority- and women-owned businesses should have received 13.5 percent of contract dollars in federally assisted contracts administered by Caltrans.[524]

Second, BBC conducted research on statistical disparities by race and gender. The firm found "substantial statistical disparities for African American, Asian-Pacific, and Native American firms;" for example, "African Americans received only 15 percent of the contract dollars that one would expect, given their availability."[525] As for the utilization of women-owned firms for

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[510] Western States Paving Co. v. Washington State DOT, 407 F.3d 983 (2005).

[511] *Id.* at 993.

[512] *Id.* at 997.

[513] *Concrete Works of Colorado*, 321 F.3d at 971.

[514] *Id.*

[515] 256 F.3d 642 (7th Cir. 2001).

[516] 82 F. Supp.2d 353 (D. N.J. 2000).

[517] *Id.* at 359.

[518] 713 F.3d 1187 (9th Cir. 2013).

[519] *Id.* at 1190. The court summarized the essential regulations that require each state receiving federal funds to implement a DBE program that complies with federal regulations. *Id.*

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

[521] *Id.*

[522] *Id.* at 1191.

[523] The court explained that a "[d]isparity analysis involves making a comparison between the availability of minority- and women-owned businesses and their actual utilization, producing a number called a 'disparity index.' An index of 100 represents statistical parity between availability and utilization, and a number below 100 indicates underutilization. An index below 80 is considered a substantial disparity that supports an inference of discrimination. *Id.* (citation omitted).

[524] Associated Gen. Contractors v. Cal. Dep't of Transportation 713 F.3d 1187, 1191-92 (9th Cir. 2013). Although the firm examined 10,000 transportation-related contracts between 2002 and 2006, during that period there were race-conscious goals for federally funded contracts but not for state-funded contracts.

[525] *Id.* at 1192.

some categories of contracts, the BBC study also found substantial disparities.[526] Although Asian-Pacific and Native Americans earned less than one-third and two-thirds, respectively, of contract dollars, BBC did not find substantial disparities for Asian-Pacific and Native Americans in every subcategory of contract.[527]

Third, Caltrans and BBC collected anecdotal evidence through twelve public hearings, letters from business owners and trade associations, and interviews of 12 trade associations and 79 owners or managers of transportation firms.[528] The court held that the anecdotal evidence did not need verification. Rather, the court ruled that the anecdotal evidence only needed to support Caltrans's statistical data that demonstrated a pervasive pattern of discrimination.[529]

Based on the statistical data and corroborating anecdotal evidence,

> Caltrans concluded that it had sufficient evidence to make race- and gender-conscious goals for African American-, Asian-Pacific American-, Native American-, and women-owned firms. Caltrans adopted the recommendations of the disparity report and set an overall goal of 13.5% for disadvantaged business participation. Caltrans expected to meet one-half of the 13.5% goal using race-neutral measures.[530]

Caltrans's program, as submitted to and approved by the U.S. DOT, included 66 race-neutral measures, a number subsequently increased to 150.[531]

In the district court, AGC limited its case to an as-applied challenge to the constitutionality of Caltrans's DBE program and, thereafter, appealed the district court's decision upholding the constitutionality of Caltrans's program. During the appeal, pursuant to 49 C.F.R. § 26.45(f)(1)(i), Caltrans commissioned a new disparity study to update its program.[532] Based on the study, Caltrans expanded the DBE program to include Hispanic Americans and set an overall goal of 12.5 percent of which 9.5 percent would be achieved through race- and gender-conscious measures.[533]

The Ninth Circuit held, first, that Caltrans's program satisfied strict scrutiny under the "framework" for an as-applied challenge as set forth in *Western States Paving Co*., supra.[534]

Second, Caltrans did not have to demonstrate independently a compelling interest for its DBE program, because the state's program was based on the compelling, nationwide interest identified by Congress when it enacted the DBE legislation.[535]

Third, Caltrans's program satisfied the two-prong test, identified previously, of strict scrutiny. Caltrans's program was supported by substantial statistical and anecdotal evidence of discrimination in public contracting in California's transportation contracting industry.[536] The court held, contrary to AGC's claim, that Caltrans's program met the strict scrutiny test, because it was not necessary for the disparity study to identify individual acts of deliberate discrimination.[537] Likewise, the court rejected AGC's arguments that the 2007 disparity study had inconsistent findings, *i.e.,* that the study's results varied depending on whether the contracts at issue were prime contracts or subcontracts,[538] and rejected AGC's contention that Caltrans had to set separate goals for DBE participation on construction and engineering contracts.[539]

As the Ninth Circuit framed the issue, it

> is not whether Caltrans can show underutilization of disadvantaged businesses in *every* measured category of contract. Rather, Caltrans can meet the evidentiary standard required by *Western States* if, looking at the evidence in its entirety, the data show substantial disparities in utilization of minority firms suggesting that public dollars are being poured into "a system of racial exclusion practiced by elements of the local construction industry."[540]

The study showed that for women-owned firms there was a substantial disparity that raised an inference of discrimination that was sufficient for Caltrans to include all women-owned firms in its affirmative action program.[541]

As for the second prong of the narrow tailoring test, Caltrans's program was limited to minority groups that had suffered discrimination.[542] The court rejected AGC's contention that prior to implementing its program Caltrans had to "evaluate race-neutral measures."[543] The court, stating that "narrow tailoring only requires 'serious, good faith consideration of workable race-neutral alternatives,'"[544] noted Caltrans's inclusion of 150 race-neutral alternatives.

Finally, AGC could not collaterally attack the federal program because Caltrans applied its program to federally funded and state-funded contracts. Indeed, the court stated that the federal regulation in 49 C.F.R. § 26.45 requires that goals be set for "mix-funded contracts."[545]

c. Evidence Required for a Race-Conscious versus a Gender-Conscious DBE Program

The DBE regulations applicable to recipients of federal aid for highway, transit, and airport projects apply 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

[526] *Id.*
[527] *Id.*
[528] *Id.*
[529] *Id.* at 1198.
[530] *Id.* at 1192-93.
[531] *Id.* at 1193.
[532] *Id.*
[533] *Id.*
[534] *Id.* at 1195.
[535] *Id.* at 1195-96.
[536] *Id.* at 1196.
[537] *Id.* at 1197.
[538] *Id.*
[539] *Id.* at 1199.
[540] *Id.* at 1197 (citation omitted) (emphasis in original).
[541] *Id.* at 1198.
[542] *Id.*
[543] *Id.* at 1199.
[544] *Id.* (citation omitted).
[545] *Id.* at 1200.

race- or ethnicity-based program, "'there must be a strong basis in evidence' to support the conclusion that remedial action is necessary."[546] 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 for a gender-conscious program is that it must be "probative evidence" that is also "sufficient."[547] Although such language may be imprecise and "beg the question," the standard to be applied, apparently, will have to "draw meaning from an evolving body of case law."[548]

In more recent cases, the courts have held that gender classifications still "trigger intermediate scrutiny."[549] The Fourth Circuit stated in 2010 in *H.B. Rowe Co. Inc. v. Tippett*,[550] supra, that the courts continue to apply the intermediate scrutiny test to statutes that classify on the basis of gender. A defender of a DBE statute or program that classifies individuals on the basis of gender must show

> "at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives." … Of course, intermediate scrutiny requires less of a showing than does "the most exacting" strict scrutiny standard of review.[551]

Although the Supreme Court has established a strong basis in evidence requirement for race-conscious measures subject to strict scrutiny, according to the Fourth Circuit, the courts are working "'without an analogous evidentiary label from the Supreme Court' for gender-conscious programs. ... Our sister circuits, however, provide guidance in formulating a governing evidentiary standard. These courts agree that such a measure 'can rest safely on something less than the strong basis in evidence required to bear the weight of a race- or ethnicity-conscious program.'"[552]

> In defining what constitutes "something less" than a "strong basis in evidence," the courts, … agree that the party defending the statute must "'present[] sufficient probative evidence in support of its stated rationale for enacting a gender preference, i.e., … the evidence [must be] sufficient to show that the preference rests on evidence-informed analysis rather than on stereotypical generalizations.'"[553]

d. Use of Statistical and Anecdotal Evidence of Discrimination

(1) Introduction

Congress had to have "a strong basis in evidence" before enacting a race-based remedial program.[554] Since the Supreme Court's decision in *Adarand III,* Congress has had "a burden to statistically document the need for a race-based program."[555] As discussed in the part IB.4.c. of this report, a gender-conscious DBE program may "'rest safely on something less than the strong basis in evidence required to bear the weight of a race- or ethnicity-conscious program.'"[556]

The U.S. DOT's DBE regulations and judicial precedents authorize and approve, respectively, the use of disparity studies.[557] As one source explains, "[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 a 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."[558] 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 those qualified MBE/WBE firms that are available to do the work in the given arena or field that you need for your project."[559]

In *Adarand VII,* the court considered disparity studies undertaken by state and local governments "to assess the dis-

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[546] Engineering Contractors v. Metropolitan Dade County, 122 F.3d 895, 906 (11th Cir. 1997) (quoting Ensley Branch, NAACP v. Seibels, 31 F.3d 1548, 1566 (11th Cir. 1994)).

[547] *Id.* at 910.

[548] *Id.*

[549] Midwest Fence Corp. v. United States DOT, 84 F. Supp.3d 705, 719 (N.D. Ill. 2015), aff'd, Midwest Fence Corp. v. United States DOT, 840 F.3d 932 (7th Cir. 2016); *See also*, Kossman Contracting, Co. v. City of Houston, No. H-14-1203, 2016 U.S. Dist. LEXIS 37708, (S.D. Tex. Feb. 16, 2016) (holding that gender-based programs must be justified on the basis of intermediate scrutiny), adopted by, motion granted by, summary judgment granted, in part, summary judgment denied, in part by, objection overruled by Kossman Contr. Co. v. City of Houston, No. H-14-1203, 2016 U.S. Dist. LEXIS 36758 (S.D. Tex., Mar. 22, 2016); Quine v. Beard, No. 14-cv-02726-JST, 2017 U.S. Dist. LEXIS 65276 (N.D. Cal. April 26, 2017) (stating that "[t]he application of intermediate scrutiny requires the government to show that its gender classification is substantially related to an important governmental interest" [and requires] "an exceedingly persuasive justification") (citation omitted)), affirmed in part and vacated in part by, reversed by, in part, remanded by, in part Quine v. Kernan, 741 Fed. Appx.358 (9th Cir. 2018); and Associated Gen. Contractors of Am., Inc. v. Cal. Dep't of Transp., 713 F.3d 1187, 1195 (9th Cir. 2013) (stating that gender-conscious programs must be supported by an exceedingly persuasive justification and be substantially related to the achievement of that underlying objective).

[550] 615 F.3d 233 (4th Cir. 2010).

[551] *Id.* at 242 (citations omitted).

[552] *Id.* (citations omitted) (some internal quotation marks omitted).

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

[554] *Rothe IV*, 324 F. Supp.2d 840, 842 (W.D. Tex. 2004). When 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).

[555] *Id.* at 850.

[556] *H.B. Rowe Co. Inc.*, 615 F.3d at 242 (citations omitted) (some internal quotation marks omitted).

[557] *See* 49 C.F.R. § 26.45 (2018).

[558] Indiana Department of Administration, Minority and Women Business Enterprise Division, Statistical Analysis of Utilization Study for State of Indiana Contracts between January 1, 2004, and April 15, 2005 (May 5, 2005).

[559] Michael B. Cook, Cynthia C. Dougherty, Jeanette L. Brown, Application of Minority and Women-Owned Business Enterprise Requirements in the Clean Water and Drinking Water State Revolving Fund Programs, United States Environmental Protection Agency, Memorandum, SRF 99-03 (Nov. 5, 1998).

parity, if any, between availability and utilization of minority-owned businesses in government contracting."[560] The court stated that "the existence of evidence indicating that the number of minority DBEs would be significantly (but unquantifiably) higher" was "relevant to the assessment of whether a disparity is sufficiently significant to give rise to an inference of discriminatory exclusion."[561]

(2) Judicial Decisions prior to 2006

The courts have dealt with whether an affirmative action program was supported by a strong basis in the evidence of past or current discrimination.[562] In *Rothe IV,* 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."[563] The evidence "conclusively demonstrate[d] that Asian-Americans, as well as other minorities, were not competing at a national level because of discrimination."[564] In another case involving denial of promotions to Chicago police officers, 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.[565]

In deciding whether Denver's DBE plan was constitutional, the court reviewed statistical evidence from as early as 1989. In 1997, the city 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…."[566] The resulting "study used a more sophisticated method to calculate availability than the earlier studies...."[567] 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."[568]

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....[569]

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."[570] 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.[571]

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.

> In setting its overall goal for the FY2005 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.[572]

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

> IDOT commissioned [National Economic Research Associates, Inc., (NERA) a Chicago-based consulting firm] 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.[573]

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."[574]

The statistical and anecdotal evidence is not always held to be sufficient. In *Engineering Contractors Association of South Florida Inc. v. Metropolitan Dade County,*[575] the plaintiffs' principal objection to the county's evidence was that the disparities had a neutral explanation—the size of the firms.[576] The appellate court agreed with the district court that the statistical and anecdotal evidence together was still an insufficient evidentiary

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[560] *Adarand VII*, 228 F.3d 1147, 1172 (10th Cir. 2000).

[561] *Id.* at 1174.

[562] *See* discussion of the strong basis in evidence requirement in part B. 4.b of this report.

[563] *Rothe IV*, 324 F. Supp.2d 840, 859 (W.D. Tex. 2004).

[564] *Id.*

[565] Majeske v. City of Chicago, 218 F.3d 816, 820 (7th Cir. 2000).

[566] *Concrete Works of Colorado, Inc.* 321 F.3d 950, 966 (10th Cir. 2003).

[567] *Id.*

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

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

[570] *Id.* at 990.

[571] *Id.* at 994 (emphasis added).

[572] Northern Contracting v. Illinois, No. 00 C 4515, 2005 U.S. Dist. LEXIS 19868, at *20, (N.D. Ill. Sept. 8, 2005), *aff'd*, 473 F.3d 715 (7th Cir. 2007).

[573] Id. at *22-23. 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.

[574] *Id.* at *23.

[575] 122 F.3d 895 (11th Cir. 1997).

[576] *Id.* at 916.

foundation.[577] Of course, without statistical evidence, "anecdotal evidence is not enough to sustain a race-based remedial program."[578] Because of the lack of evidence to support the program, the court affirmed the district court's decision, thus finding the program to be unconstitutional.[579]

Likewise, in *Association for Fairness in Bus., Inc. v. New Jersey,*[580] supra, 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."[581]

(3) Judicial Decisions since 2006

Several parts of this report discuss in some detail the statistical and anecdotal evidence that the courts have found to be acceptable when plaintiffs have challenged the constitutionality of DBE programs. Part B. 2.g. discussed the evidence that the defendants successfully developed and used to support their DBE programs in *Midwest Fence Corp. v. U.S. Dep't of Transp.*,[582] *Dunnet Bay Construction Co. v. Borggren,*[583] and *Geyer Signal, Inc. v. Mn. DOT.*[584] In the three cases, the Seventh Circuit and a federal district court in Minnesota held that the defendants' DBE programs were not unconstitutional either facially or as-applied.

Part B. 2.h.(2). discussed *GEOD Corp. v. New Jersey Transit Corp.*[585] in which a federal court in New Jersey held that NJ Transit's statistical and anecdotal evidence established the need to implement a DBE program for its public contracting.

Part B. 3.b. discussed the use of statistical and anecdotal evidence in *H.B. Rowe Co. Inc. v. Tippett,*[586] supra, in which the Fourth Circuit upheld the constitutionality of North Carolina's DBE statute that applied to its public contracting. In *Kossman Contr. Co. v. City of Houston*,[587] discussed in part B. 3.b., a federal district court in Texas rejected, with one exception, a constitutional challenge to Houston's Minority Business Enterprise Program for Construction Contracts that established percentages of its construction contracts as goals to be awarded on the basis of race or gender.

Part B.4. b. discussed *Associated Gen. Contractors of Am. v. Cal. Dep't of Transp.*[588] The Ninth Circuit upheld the constitutionality of Caltrans's DBE program, in part, because Caltrans had sufficient statistical and anecdotal evidence to make race- and gender-conscious goals for African American-, Asian-Pacific American-, Native American-, and women-owned firms.

5. Factors Applicable to the Narrow Tailoring Requirement

a. 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.'"[589] Nevertheless, the law must be narrowly tailored. Rigid numerical quotas are not permitted, precisely because they are not narrowly tailored.

Although the courts identify and/or describe the factors somewhat differently, there appear to be four to seven factors that the courts commonly consider in deciding whether a DBE statute or program 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 duration of the relief;

(5) the relationship of the stated numerical goals to the relevant labor market;

(6) the impact of relief on the rights of third parties; and

(7) the over-inclusiveness or under-inclusiveness of the racial, ethnic, or gender classification.[590]

b. Race-Neutral Means

(1) Judicial Decisions prior to 2006

Narrow tailoring means that a program "discriminates against whites as little as possible consistent with effective remediation."[591] Reliance first on race-neutral means is impor-

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[577] *Id.* at 926.

[578] *Rothe IV*, 324 F. Supp.2d 840, 851 (W.D. Tex. 2004). In *Engineering Contractors*, most of the county's statistical evidence was post-enactment evidence. 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." *Engineering Contractors*, 122 F.3d at 912.

[579] *Engineering Contractors*, 122 F.3d at 929.

[580] 82 F. Supp.2d 353 (D. N.J. 2000).

[581] *Id.* at 359.

[582] 840 F.3d 932, 940 (7th Cir. 2016), *cert. denied*, Midwest Fence Corp. v. DOT, 137 S. Ct. 2292, 198 L. Ed.2d 724 (2017).

[583] 799 F.3d 676 (7th Cir. 2015), *cert. denied*, Dunnet Bay Constr. Co. v. Blankenhorn, 137 S. Ct. 31, 196 L. Ed. 2d 25 (2016).

[584] No. 11-321 (JRT/LIB), 2014 U.S. Dist. LEXIS 43945 (D. Minn. March 31, 2014).

[585] 746 F. Supp.2d 642 (D. N.J. 2010).

[586] 615 F.3d 233 (4th Cir. 2010).

[587] No. H-14-1203, 2016 U.S. Dist. LEXIS 37708 (S.D. Tex. Feb. 16, 2016), *adopted by, motion granted by, summary judgment granted, in part, summary judgment denied, in part by, objection overruled by* Kossman Contr. Co. v. City of Houston, No. H-14-1203, 2016 U.S. Dist. LEXIS 36758 (S.D. Tex., Mar. 22, 2016).

[588] 713 F.3d 1187 (9th Cir. 2013).

[589] *Adarand VII*, 228 F.3d 1147, 1164 (10th Cir. 2001) (citations omitted) (some internal quotation marks omitted).

[590] *See Rothe IV*, 324 F. Supp.2d at 840, 841 (W.D. Tex. 2004); Dallas Fire Fighters Ass'n v. City of Dallas, 150 F.3d 438, 441 (1998); H.B. Rowe Co. Inc. v. Tippett, 615 F.3d 233, 252 (4th Cir. 2010); Dynalantic Corp. v. U.S. Department of Defense, 885 F. Supp.2d 237, 283 (2012); and Kossman Contracting, Co. v. City of Houston, No. H-14-1203, 2016 U.S. Dist. LEXIS 37708, at *51 (S.D. Tex. Feb. 16, 2016).

[591] Northern Contracting, Inc. v. Illinois, No. 00 C 4515, 2004 U.S. Dist. LEXIS 3226 at *123 (N. D. Ill. March 4, 2004) (quoting Majeske v.

tant to demonstrate that an affirmative action program for public contracting is narrowly tailored. Since *Adarand III,* prior to the implementation of a plan with its race-based presumptions of disadvantage, the government must show that it adequately considered "race[-]neutral alternative remedies."[592]

The Tenth Circuit has emphasized that the U.S. DOT's regulations instruct recipients to meet the maximum feasible portion of their overall goal of facilitating DBE participation by using race-neutral means.[593] There are "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."[594]

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'"[595] and "prohibit the use of quotas and severely limit the use of set asides."[596] 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;"[597] "recipients may obtain waivers or exemptions from any requirement;"[598] and "[r]ecipients are not required to set a contract goal on every U.S. DOT-assisted contract."[599] 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."[600]

In its 2004 opinion in *Northern Contracting*, the district court dismissed the case against the federal defendants but found that there was an issue of fact as to whether IDOT's program was narrowly tailored. In 2005, the district court upheld IDOT's DBE program. Regarding IDOT"s provision for race-neutral means, "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."[601] 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."[602]

(2) Judicial Decisions since 2006

The case of *Kossman Contracting, Co. v. City of Houston,*[603] supra, involved an equal protection challenge to Houston's Minority and Women Owned Business Enterprise (MWBE) program. Kossman argued that the MWBE program was not narrowly tailored, because Houston failed to show that race-neutral alternatives had been tried, evaluated, and found to be insufficient and that the program placed an undue burden on specialty trade contractors, such as Kossman, who work in more specialized areas of large construction projects.[604]

The court ruled that a study commissioned for Houston provided substantial evidence for finding that race-neutral alternatives were insufficient.[605] In spite of Houston's race-neutral alternatives, the study found consistent adverse disparities for MWBEs.[606] There was a strong basis in evidence that a remedial program was necessary to address discrimination against MWBEs.[607] The city was not required to exhaust every possible race-neutral alternative before instituting the MWBE program.[608]

The court held that the MWBE program was not an "undue burden" on Kossman or similarly situated companies.[609] On the other hand, the court permanently enjoined Houston from enforcing its MWBE program with respect to Native-American-owned businesses until such time as the city established

City of Chicago, 218 F.3d at 820 (7th Cir. 2000)).

[592] *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 he SCC." *Id.*

[593] *Id.* at 1178-9 (citing 49 C.F.R. §§ 26.51(a) and (f) (2000)).

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

> 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). … 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. … Contract goals are considered race-conscious measures.

Id. (citations omitted).

[595] *Northern Contracting, Inc.*, 2004 U.S. Dist. LEXIS 3226, at *127 (citation omitted).

[596] *Id.* at *128 (citation omitted).

[597] *Id.* at *129-30.

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

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

[600] *Id.* at *19-20 (citations omitted).

[601] Northern Contracting v. Illinois, No. 00 C. 4515, ,2005 U.S. Dist. LEXIS 19868. at *44-45, (N.D. Ill. Sept. 8, 2005).

[602] *Id.* at *45.

[603] No. H-14-1203, 2016 U.S. Dist. LEXIS 36758 (S.D. Tex. March 22, 2016).

[604] *Id.* at *11.

[605] *Id.*

[606] *Id.* at *12.

[607] *Id.*

[608] *Id.*

[609] *Id.*

sufficient evidence of discrimination against Native-American-owned businesses in its construction contracts.[610]

c. Program Flexibility and Good Faith Efforts

Another factor the courts consider is a DBE program's flexibility. The 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...."[611] For example, in *Adarand VII*, the court found that the 1996 federal SCC program, as well as the present version of the regulations, met the *flexibility* test.[612]

As for state implementation of the U.S. DOT's DBE program, in 2005, in *Northern Contracting,* regarding the issue of 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."[613]

It should be noted that state recipients have a "non-mandatory, non-exclusive, and non-exhaustive list of actions" for determining whether a bidder made good faith efforts:

> (1) "Soliciting through all reasonable and available means (*e.g.* attendance at pre-bid meetings, advertising and/or written notices) the interest of all certified DBEs who have the capability to perform the work of the contract ... [and] taking appropriate steps to follow up initial solicitations"; (2) "Selecting portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goals will be achieved"; (3) "Providing interested DBEs with adequate information about the plans, specifications, and requirements of the contract"; (4) "Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or contractor"; (5) "Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services"; and (6) "Effectively using the services of available minority/women community organizations; minority/women contractors' groups; local, state, and Federal minority/women business assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of DBEs."[614]

In *C.S. McCrossan Constr., Inc. v. Minn. Dep't of Transp.*,[615] decided in 2013 by a federal district court in Minnesota, the issue was whether McCrossan made good faith efforts to meet MnDOT's goal for DBE participation in a project for the design and construction of an approach to a future bridge. Although McCrossan's proposal received the highest technical score and had the lowest overall bid by more than $5 million, McCrossan's DBE participation was 10.69 percent, rather than the 16.7 percent set by MnDOT. After MnDOT rejected McCrossan's proposal and selected a different contractor, McCrossan challenged MnDOT's decision on the basis that the decision was contrary to federal regulations.

McCrossan argued that MnDOT's DBE program required a different goal-setting method and good faith efforts for a design-build project than for a traditional design-bid-build project.[616] McCrossan's reasoning was that a design-build proposal involves less certainty and greater risk than a design-bid-build project, a level of uncertainty that affected its ability to find DBE contractors.[617] At a reconsideration hearing, MnDOT rejected McCrossan's argument, because McCrossan had not demonstrated good faith efforts to recruit DBEs and did not provide specific evidence of how a proposal for a design-build project affected its ability to find DBE subcontractors.[618]

The court denied McCrossan's motion for a temporary restraining order or a preliminary injunction, stating that there was no likelihood that McCrossan would succeed on the merits. The court held that, because MnDOT's application of part 26's "good-faith-efforts factors"[619] was narrowly tailored, MnDOT did not violate McCrossan's Fourteenth Amendment rights.

d. Under- or Over-Inclusiveness

A program must be assessed for "under or over-inclusiveness of the DBE classification."[620] 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."[621] However, in analyzing whether a DBE program is narrowly tailored, it is not necessary to "inquire into [the extent of] discrimination against each particular minority racial or ethnic group."[622] A program must be evaluated based on 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."[623]

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."[624] 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

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[610] Id. at *15-6. *See also*, Dunnet Bay Constr. Co. v. Borggren, 799 F.3d 676, 680 (7th Cir. 2015) in which the Seventh Circuit held that a state must use contract goals to meet any portion of its goal that is projected will not be met by race-neutral means and that, in setting contract goals, a state should consider factors such as "the type of work involved, the location of the work and the availability of DBEs for the work of the particular contract."

[611] *Adarand VII*, 228 F.3d 1147, 1193 (10th Cir. 2000).

[612] *Id.* at 1180-81.

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

[614] Dunnet Bay Constr. Co. v. Borggren, 799 F.3d 676, 699-700 (7th Cir. 2015) (citations omitted).

[615] 946 F. Supp.2d 851 (D. Minn. 2013).

[616] *Id.* at 855-56.

[617] *Id.* at 856.

[618] *Id.*

[619] *Id.* at 864.

[620] *Adarand VII*, 228 F.3d 1147, 1177 (10th Cir. 2000).

[621] *Id.*

[622] *Id.* at 1185.

[623] *Id.* at 1177 (citation omitted).

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

declaration that the application of the strict scrutiny test is *not* fatal in fact.[625]

An affirmative action program must be directed "specifically at individuals affected by discrimination" with regulations designed "to identify and eliminate individuals who were not disadvantaged and should no longer qualify."[626] Finally, a 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."[627]

The District of Columbia Circuit in *DynaLantic Corp. v. United States DOD,*[628] involving § 8(a) of the SBA, held in 2012 that the plaintiff's over-inclusiveness argument failed for two reasons:

> First, … the government had strong "evidence of discrimination [which] is sufficiently pervasive across racial lines to justify granting a preference to all five purportedly disadvantaged groups" at issue. … Second, unlike the program found unconstitutional in *Croson*, Section 8(a) does not provide that every member of a minority group is disadvantaged. … Admittance to the Section 8(a) program is narrowly tailored because it is based not only on social disadvantage, but also on an individualized inquiry into economic disadvantage. … Specifically, it is limited to small businesses whose owners have a personal net worth of less than $250,000. Any person may present "credible evidence" challenging an individual's status as socially or economically disadvantaged. … Finally, a firm owned by a non-minority may qualify as socially and economically disadvantaged.…[629]

As for the plaintiff's under-inclusiveness argument, the court was "puzzled" by the plaintiff's challenge, because § 8(a) "is designed, in relevant part, to remedy identifiable 'racial or ethnic prejudice or cultural bias,' not gender or religious discrimination. … [A] firm owned by an individual in either of these groups may qualify as socially and economically disadvantaged and thus participate in the Section 8(a) program."[630]

e. Duration of the DBE Program

A DBE program's duration must be limited so that it does not last any "'longer than the discriminatory effects [that they are] designed to eliminate.'"[631]

In *Kossman Contr. v. City of Houston,*[632] supra, a federal district court in Texas found that the duration of Houston's DBE program satisfied the narrow tailoring requirement, because Houston was "committed to use its best efforts to review the [program] at least every five years, a reasonably brief duration."[633] In *DynaLantic Corp.,* supra, the court considered duration as a factor to consider when deciding whether a race-conscious program is narrowly tailored.[634]

f. Burden on Third Parties

In *Adarand VII*, the Tenth Circuit found that the Subcontractor Compensation Clause or SCC program satisfied 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."[635]

In 2016, in *Kossman,* supra, a federal district court in Texas agreed that Houston's DBE program's effect "on third parties [was] not so great as to impose an unconstitutional burden." [636] Likewise, in *Dynalantic Corp.,* supra, the D.C. Circuit held that § 8(a) of the business development program[637] for small businesses owned by individuals who are both socially and economically disadvantaged "takes appropriate steps to minimize the burden on third parties" and "is narrowly tailored on its face."[638]

g. Numerical Proportionality

The courts also have considered the factor of numerical proportionality—for example, "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 existing minority-owned businesses."[639] 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.'"[640] However, the Tenth Circuit in *Adarand VII* 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."[641] In *Northern Contracting,* supra, the court rejected the argument "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."[642]

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

[626] *Rothe IV*, 324 F. Supp.2d 840, 858-59 (W.D. Tex. 2004) (citation omitted).

[627] Northern Contracting, Inc v. Illinois., No. 00 C 4515, 2004 U.S. Dist. LEXIS 3226 *136 (N.D. Ill. March 4, 2004).

[628] 885 F. Supp.2d 237 (D. D.C. 2012).

[629] *Id.* at 286-87 (citations omitted).

[630] *Id.* at 287 (citations omitted).

[631] *Adarand VII*, 228 F.3d 1147, 1177 (10th Cir. 2000) (citation omitted).

[632] No. H-14-1203, 2016 U.S. Dist. LEXIS 37708 (S.D. Tex. Feb. 16, 2016).

[633] *Id.* at *68.

[634] *Dynalantic Corp.*, 885 F. Supp.2d. at 283.

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

[636] Kossman v. City of Houston, No. H-14-1203, 2016 U.S. Dist. LEXIS 37708 *69 (S.D. Tex. Feb. 16, 2016).

[637] 15 U.S.C. § 637(a); 13 C.F.R. § 124.

[638] *Dynalantic Corp.*, 885 F. Supp.2d. at 291.

[639] *Adarand VII*, 228 F.3d at 1181.

[640] *Id.* (quoting *Croson*, 488 U.S. at 507, 109 S. Ct. at 729, 102 L. Ed.2d at 891 (citing *Sheet Metal Workers*, 478 U.S. 421, 494, 106 S. Ct. 3019, 3059-60, 92 L. Ed.2d 344, 399-400 (1986) (O'Conner, J., concurring in part and dissenting in part))).

[641] *Id.*

[642] Northern Contracting, Inc. v. Illinois, No. 00 C 4515, 2004 U.S. Dist. LEXIS 3226, *131-32 (N. D. Ill. March 4, 2004). *See also*, Northern Contracting, Inc. v. Illinois, No. 00 C 4515, 2005 U.S. Dist. LEXIS 19868,

In *Kossman*, supra, the court held that Houston's 34 percent annual goal was proportional to the availability of M/WBEs historically suffering discrimination; thus, the numerical proportionality of the program was narrowly tailored.[643] The D.C. Circuit held in *Dynalantic Corp.*, supra, that an allocation of 5 percent of all federal contracts for minority firms was appropriate and constitutional, because the allocation was based on past discrimination against minorities and the number of available minority contractors.[644]

6. Evidence Required to Satisfy the Narrow Tailoring Requirement

a. Judicial Decisions prior to 2016

This part discusses the type and quality of evidence needed to satisfy strict scrutiny as illustrated by cases in which the courts held that the U.S. DOT's DBE program was based on a compelling governmental interest. Because the courts recognize that the federal program delegates the actual administration of the program to the states, the courts focus their strict scrutiny analysis on whether the states' DBE programs implementing the federal DBE program are sufficiently narrowly tailored to further the government's compelling interest. Although Congress's findings are sufficient evidence to satisfy the compelling interest prong of strict scrutiny, the courts require the states to support their implementation of a DBE program based on evidence that is sufficient to justify the need for DBE program in their state.

To review briefly what is discussed in the previous parts of this report, the regulations define a DBE and permit a rebuttable presumption of social and economic disadvantage based on race.[645] Although the level of DBE-participation is determined by the state, the U.S. DOT's DBE program sets an aspirational goal of 10 percent.[646] In determining the level of DBE-utilization under the regulations, the states must apply a two-step process. First, the state must determine the availability of DBEs within the state and compare it to the availability of non-DBEs. Second, the result may be adjusted upwards or downwards when compared to non-DBE firms available in the state. The comparison is based on the capacity of DBEs to perform the work and on statistical disparity and anecdotal evidence of discrimination against DBEs and the present effect of past discrimination. The process results in a state DBE-utilization goal for the fiscal year.[647]

In 2005, in *Western States Paving Co.,* supra, the Ninth Circuit addressed whether TEA-21 violated the Equal Protection Clause on its face or as applied by the state of Washington.[648] The statute contained race preferences in the distribution of federally funded transportation contracts. Under TEA-21, federal funds were provided to WSDOT. The Department's use of the funds required compliance with a minority utilization provision as discussed below. WSDOT determined that its projects had to obtain a 14 percent minority participation to comply with the requirement. WSDOT rejected a bid submitted by Western States Paving Co. for one project and accepted a higher bid by a minority-owned firm.[649]

The TEA-21 provision in question stated that "except to the extent that the Secretary [of the 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."[650] The U.S. DOT's regulations, supra, stated that the purpose of the preference program was to create a level playing field.

The Ninth Circuit emphasized that Congress did not have to put forth evidence that minorities suffer discrimination in every single contract.[651] 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 transportation contracting industry hinders minorities' ability to compete for federally funded contracts.[652]

Western States Paving Co. argued that WSDOT offered no evidence of discrimination in Washington at all. The department's response was 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.[653]

As for whether WSDOT's program was narrowly tailored, the court required additional evidence to justify WSDOT's application of the plan. In ascertaining the state's DBE utilization goal, because of a lack of supporting statistical or anecdotal evidence of such discrimination, WSDOT had not adjusted its DBE utilization figure for discrimination in the bonding and financing industry for the past or present effects of discrimination. Accordingly, the court held that WSDOT's implementation of its

(N.D. Ill. Sept. 8, 2005) (upholding IDOT DBE program as being narrowly tailored).

[643] Kossman v. City of Houston, No. H-14-1203, 2016 U.S. Dist. LEXIS 37708 *68-69 (S.D. Tex. Feb. 16, 2016).

[644] Dynalantic Corp v. United States DOD, 885 F. Supp.3d 237, 288-89 (D.C.D.C. 2012).

[645] See Western States Paving Co v. Wash. State DOT., 407 F.3d 983, 988-89 (9th Cir. 2005); *See also* 49 C.F.R. §§ 26.1(b), 26.5, and 26.67(b) and (d).

[646] See *Western Paving*, 407 F.3d at 989; *See also*, 49 C.F.R. §§ 26.41(b)-(c).

[647] See *Western Paving*, 407 F.3d at 989; *See also*, 49 C.F.R. §§ 26.45(b)-(f).

[648] *Western Paving*, 407 F.3d at 987.

[649] *Id.*

[650] TEA-21, Pub. L. No. 105-178 § 1101(b)(1), 112 Stat. 107, 113(1998) *See also*, 49 C.F.R. part 26 (2018) (setting forth the specifics of the minority preference program as promulgated by the U.S. DOT).

[651] *Western States Paving Co.*, 407 F.3d. at 992.

[652] *Id.* at 993.

[653] *Id.* at 995-8.

DBE program violated equal protection, because it was not narrowly tailored to further Congress's remedial objective.[654]

In *Northern Contracting, Inc. v. Illinois,*[655] supra, in 2004, a federal district court in Illinois upheld the federal DBE provisions and dismissed the federal defendants; however, an inquiry was required of the state's application of the DBE program to determine whether it was narrowly tailored for purposes of strict scrutiny.[656] Because Northern Contracting sought prospective relief only, the court analyzed the constitutionality of only the most recent IDOT DBE program (2005) to determine whether IDOT's program was narrowly tailored.[657] The court explained that

> IDOT is … 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.*[658]

In ascertaining its DBE-utilization goal, IDOT considered whether DBE-availability was artificially low because of 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 the prior IDOT DBE utilization goal, as well as testimony given at public hearings. All the sources supported the conclusion that past discrimination did lower artificially the availability of DBEs.[659] Thus, the evidence supported IDOT's use of the DBE program; the plan was flexible in its application and had race neutral requirements; and, as the district court held, the program was narrowly tailored as-applied.[660]

b. Judicial Decisions since 2006

Since 2006, numerous courts have addressed the issue of the evidence required to meet the narrow tailoring requirement for a DBE program, such as the U.S. DOT's. For example, in 2007, in *Northern Contracting, Inc. v. Illinois*,[661] supra, the Seventh Circuit held that IDOT's DBE program complied with the equal protection requirements of the Fourteenth Amendment. The program was narrowly tailored to remedy the effects of racial and gender discrimination in public contracting in IDOT's transportation construction market.

In 2010, in *Geod Corp. v. N.J. Transit Corp.*,[662] a New Jersey federal district court held that the state DBE program, which complied with the U.S. DOT's DBE regulations, did not violate the Equal Protection Clause. As implemented, the program was narrowly tailored to further a compelling governmental interest.

7. Whether States Are Required to Make a Separate Showing of Compelling Interest to Implement a DBE Program

a. Judicial Decisions prior to 2006

The previous parts of this report have discussed 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 v. Minnesota DOT* supra.[663] 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*.[664] 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...."[665] 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."[666]

Second, MnDOT and the Nebraska Department of Roads did not have to satisfy independently "the compelling government interest aspect of strict scrutiny review."[667] The court noted that under prior law, (when the 10 percent federal set-aside was more mandatory and *Fullilove* applied, i.e., not strict scrutiny), the Seventh Circuit had held that a contractor could not challenge a grantee state for "'merely complying with federal law.'"[668] Thus, the *Sherbooke Turf* 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.* … 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

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654 *Id.* at 999-1002.

655 No. 00 C 4515, 2005 U.S. Dist. LEXIS 19868, (N. D. Ill. Sept. 8, 2005).

656 *See id.* at *3-4.

657 *Id.* at *18-19.

658 *Id.* at *61 (citations omitted) (emphasis supplied).

659 *Id.* at *27-42.

660 *Id.* at *86-92.

661 473 F.3d 715 (7th Cir. 2007).

662 746 F. Supp.2d 642 (D. N.J. 2010). *See also*, Midwest Fence Corp. v. U.S. Dep't of Transp., 840 F.3d 932, 942 (7th Cir. 2016) (holding that narrow tailoring requires "a close match between the evil against which the remedy is directed and the terms of the remedy").

663 345 F.3d 964 (8th Cir. 2003).

664 *Adarand VII*, 228 F.3d 1147, 1165 (10th Cir. 2000).

665 Sherbrooke Turf v. Minn. DOT, 345 F.3d 964, 969 (8th Cir. 2003).

666 *Id.* at 970.

667 *Id.*

668 *Id.* (citations omitted).

> 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.[669]

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."[670] In short, 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, when challenged, has to show that its implementation of the federal DBE law and regulations is narrowly tailored.[671]

Sherbrooke Turf and Gross Seed argued that the Minnesota and Nebraska DBE programs were not narrowly tailored.[672] However, both states had commissioned studies of their highway contracting markets before adopting overall goals for DBE participation for federally assisted highway projects in fiscal year 2001. Because Sherbrooke Turf and Gross Seed were unable to offer better data, the court ruled that both programs were narrowly tailored.[673] In contrast, in the *Western States Paving Co.*, supra, there was no evidence, statistical or otherwise, of discrimination in the state's transportation contracting industry.[674]

b. Judicial Decisions since 2006

The cases decided since 2006 appear to hold rather consistently that the states must show, when their implementation of a DBE program is challenged, that their state's implementation is supported by convincing statistical and anecdotal evidence and is narrowly tailored.

In 2008, in *South Florida Chapter of the Associated General Contractors v. Broward County,*[675] decided by a federal district court in Florida, the plaintiffs challenged Broward County's issuance of contracts pursuant to the federal DBE program. In ruling on a plaintiff's motion for a preliminary injunction, the court stated that "[t]he threshold legal issue presented" by the plaintiff's motion was whether "all that is required of Defendant Broward County" is for it to comply with the federal regulations.[676] The court concluded that when the county had complied fully with the federal regulations, the county could not be enjoined from carrying out its DBE program. The reason was that such an attack would be an improper collateral attack on the constitutionality of the regulations.

It should be noted that the district court pointed out that the plaintiffs had not challenged the as-applied constitutionality of the regulations but had "focused their challenge on the constitutionality of Broward County's actions in carrying out the DBE program."[677] The court ruled that the sole issue at trial would be to determine whether the defendants had complied fully with the federal regulations in the implementation of the county's DBE program.[678]

In sum, a recipient state "need not establish a distinct compelling interest before implementing the federal DBE program."[679] However, if challenged, "a [r]ecipient's implementation of the federal DBE program must be analyzed under the narrow tailoring [method of] analysis…."[680]

8. Other Issues Arising in Challenges to U.S. DOT's DBE Program

a. Standing

One of the threshold issues is whether a plaintiff has standing to challenge an affirmative action program.

> The 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."[681]

In *Northern Contracting v. Illinois,* supra, a federal district court in Illinois observed that "no uniform picture emerges from the case law regarding [the] standing doctrine in cases involving governmental race or gender-based set-aside programs."[682] Nevertheless, the court held that the plaintiff had standing: the plaintiff had "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."[683]

As for whether associations have standing to challenge DBE programs, in *Engineering Contractors Association of South Florida Inc. v. Metropolitan Dade County,*[684] supra, one of the principal issues was whether the plaintiff had standing. The United States Court of Appeals for the Eleventh Circuit, which held that the challenged enactments were unconstitutional, also held that the plaintiffs had standing as their members regularly performed work for the county.

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669 *Id.* at 970-71 (emphasis supplied).

670 *Id.* at 971 (emphasis in original).

671 *Id.*

672 *Id.* at 973.

673 *See id.*

674 *Id.* at 998, 999.

675 544 F. Supp.2d 1336 (S.D. Fla. 2008).

676 *Id.* at 1338.

677 *Id.* at 1341.

678 *Id.*

679 Northern Contracting, Inc. v. Illinois, No. 00 C 4515, 2004 U.S. Dist. LEXIS 3226, at *138 (N.D. Ill. March 4, 2005).

680 *Id.* at *139.

681 *Id.* at *71-*72.

682 *Id.* at *83.

683 *Id.* at *84-85.

684 122 F.3d 895 (11th Cir. 1997).

> 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....[685]

In *Associated Gen. Contractors of Am. v. Cal. Dep't of Transp.*,[686] supra, the Ninth Circuit stated that for the plaintiff-appellant Associated General Contractors of America (AGC) to establish that it had standing, it must show that:

> (a) its members would otherwise have standing to sue in their own right;
>
> (b) the interests it seeks to protect are germane to the organization's purpose; and
>
> (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.[687]

However, AGC did not have standing, because it did not show that an Association member had suffered "an injury-in-fact that [was] traceable to the defendant [that was] likely to be redressed by a favorable decision."[688] That is, AGC did not identify any members that had been harmed by Caltrans's DBE program.[689] Even if AGC had standing, its appeal, nonetheless, would have failed, because the court proceeded to hold that Caltrans's program was constitutional.[690]

In *Lot Maintenance of Oklahoma, Inc. v. Tulsa Metropolitan Utility Authority*,[691] the defendant, Tulsa Metropolitan Utility Authority (TMUA), argued that Lot Maintenance of Oklahoma, Inc. (Lot Maintenance) had not suffered an injury in fact; that its claim was not fairly traceable to the challenged ordinance; that its injury was not redressable, and, that, therefore, it lacked standing.[692] A federal district court in Oklahoma stated that, for Lot Maintenance to show that it had standing, it would have to "establish that (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of TMUA; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by the relief requested."[693]

Lot Maintenance did allege "an injury in fact, namely that a minority preference contract scheme created a barrier to Lot Maintenance's bid on the Project…. [The] alleged injury is separate and apart from any 'ultimate inability to obtain' the Project."[694] Lot Maintenance's injury was "fairly traceable to the challenged ordinance," and it "suffered its alleged injury when it became subject to a barrier that made it more difficult to receive a government contract than another group."[695] Under the Tulsa ordinance and program, contractors were burdened with "documenting their good faith efforts;" therefore, "any injury resulting from a failure to satisfy that burden [was] fairly traceable to the ordinance and program."[696] Although the company had standing, Lot Maintenance did not allege "that it will bid on another government contract in the relatively near future;" thus, the company could not seek "forward-looking relief" in the case.[697]

In *Midwest Fence Corp. v. DOT,*[698] supra, the Seventh Circuit held that the plaintiff only had to "'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.'"[699] Midwest Fence had standing because it alleged and offered "evidence of lost bids, decreased revenue, and difficulties keeping its business afloat as a result of the DBE program and its inability to compete for contracts on an equal footing with DBEs…."[700] Because IDOT had not set aside any guardrail and fencing contracts under the target market program, there was no evidence that Midwest Fence "ha[d] suffered from an 'inability to compete on an equal footing in the bidding process' with respect to contracts within the target market program."[701] The court upheld the constitutionality of the defendants' DBE programs.

In contrast, in the two cases discussed next, the courts held that the plaintiffs lacked standing. In *Dunnet Bay Construction Co. v. Borggren*,[702] supra, Dunnet Bay lacked standing because the company did not qualify as a small business. Dunnet Bay also did not have "prudential 'standing to vindicate the rights of a (hypothetical) white-owned small business.'"[703] The Sixth

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[685] *Id.* at 906 (citations omitted).

[686] 713 F.3d 1187 (9th Cir. 2013).

[687] *Id.* at 1194 (citations omitted).

[688] *Id.* at (citations omitted).

[689] *Id.* at 1194-95.

[690] *Id.* at 1195.

[691] 16 F. Supp.3d 1316 (N.D. Okla. 2014).

[692] *Id.* at 1318.

[693] *Id.* at 1321 (citations omitted).

[694] *Id.* at 1323-4 (citation omitted).

[695] *Id.* at 1324.

[696] *Id.*

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

[698] 840 F.3d 932 (7th Cir. 2016), *cert. denied*, Midwest Fence Corp. v. DOT, 137 S. Ct. 2292, 198 L. Ed.2d 724 (June 26, 2017).

[699] *Id.* at 940 (citation omitted).

[700] *Id.* However, the court agreed also with the district court that the plaintiff did not have standing to challenge the IDOT "target market program." *Id.* at 940-41. The court explained that the target market program "was set up 'to remedy particular incidents and patterns of egregious race or gender discrimination.' … Under the program, certain contracts may be designated 'target market contracts' to remedy that discrimination. Target market remedial measures can include reserving certain work for performance by minority- or female-owned businesses; implementing formation and bidding procedures that encourage bidding by DBEs; setting separate participation goals for a particular contract or contracts; establishing incentives for achieving those goals; and setting aside particular contracts exclusively for DBEs." *Id.* at 941 (citations omitted).

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

[702] 799 F.3d 676 (7th Cir. 2015), *cert. denied*, Dunnet Bay Constr. Co. v. Blankenhorn, 137 S. Ct. 31, 195 L. Ed. 2d 25 (2016).

[703] *Id.* at 687 (citation omitted).

Circuit also held that, even if Dunnet Bay had standing, the defendants were entitled to summary judgment.

In *Braunstein v. Arizona Department of Transportation* (ADOT),[704] supra, the plaintiff Braunstein sought damages because of Arizona's use of an affirmative action program when awarding a transportation engineering contract in 2005. Braunstein alleged that ADOT's race- and gender-conscious affirmative action program violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act. Of the six firms that bid on the 2005 prime contract, none was a DBE, but all six committed to hiring DBE subcontractors to perform at least 6 percent of the work. Braunstein alleged that "preferences prevented him, as a non-minority business owner, from competing for subcontracting work on an equal basis."[705]

In 2010, the district court dismissed Braunstein's claims for injunctive and declaratory relief on the ground of mootness, because ADOT had suspended its DBE program in 2006. Braunstein was left with claims for damages against the state of Arizona and ADOT under 42 U.S.C. § 2000d and against the defendants whom Braunstein sued in their individual capacities under 42 U.S.C. §§ 1981 and 1983.

The Seventh Circuit in *Braunstein* stated that for a plaintiff to have standing under Article III,

> A plaintiff must show (1) he has suffered an 'injury in fact' that is concrete and particularized and actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.[706]

The term "injury in fact" means "'the inability to compete on an equal footing in the bidding process, not the loss of a contract.'"[707] The district court had held that Braunstein did not have standing to pursue his remaining claims because he had failed to show that ADOT's DBE program had affected him personally.[708] The court's reasoning was that the DBE goal did not preclude Braunstein's opportunity to bid on subcontracting work and that the goal was not an impediment to his securing a subcontract.[709]

The appeals court observed that "Braunstein did not submit a quote or a bid to any of the prime contractors bidding on the government contract;"[710] did "'essentially nothing to demonstrate that he [was] in a position to compete equally' with the other subcontractors;" and "presented no evidence comparing himself with the other subcontractors in terms of price or other criteria."[711] The court concluded that there was "nothing in the record indicating that the DBE program posed a barrier that impeded Braunstein's ability to compete for work as a subcontractor."[712] The Seventh Circuit affirmed the district court's decision that Braunstein did not have standing.

b. Dismissal based on Mootness

When 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, moots the claimant's case, resulting in its dismissal.

In *Rothe IV*, supra, the issue was a preferential price increase or price-evaluation adjustment known as the PEA that was a feature of § 1207 of the National Defense Authorization Act (NDAA) of 1987.[713] 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."[714] The court stated that "a case does not become moot simply because the challenged conduct has temporarily ceased."[715] The court held that, "[b]ecause most of Rothe's claims concerning it's 1998 contract are moot, Rothe can only seek a declaration that the 1207 program, as applied to it in 1998, was unconstitutional. Therefore, … the program, as reauthorized in 1992 and applied in 1998, was unconstitutional…."[716] On the other hand, the program as reauthorized in 2003 was constitutional.[717]

In *Rothe V*, the United States Court of Appeals for the Federal Circuit affirmed the district court's ruling that the suspension of the PEA component of § 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."[718] 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."[719] The Federal Circuit held that a claim may become moot when the contract at issue was directed to the provision of services "over a specific time period that has now passed."[720]

Cases since 2006 have denied or granted a defense motion to dismiss on the ground that a case is moot because of intervening action, such as an amendment to or a suspension or termination of the government DBE program since the initiation of a case

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[704] 683 F.3d 1177 (9th Cir. 2012).

[705] *Id.* at 1183.

[706] *Id.* at 1184 (citation omitted).

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

[708] *Id.* at 1183.

[709] *Id.*

[710] *Id.* at 1185 (stating that Braunstein did not provide "any evidence showing that the Department's DBE program affected him personally or that it impeded his ability to compete for utility location work on an equal basis"). *Id.*

[711] *Id.* at 1186 (citations omitted).

[712] *Id.* at (citation omitted).

[713] Pub. L. No. 99-661, 100 Stat. 3816 (1986) (codified at 10 U.S.C. § 2323).

[714] *Rothe IV*, 324 F. Supp.2d 840, 848 (W.D. Tex. 2004).

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

[716] *Id.* at 854.

[717] *Id.* at 860.

[718] *Rothe V*, 413 F.3d 1327, 1333 (Fed. Cir. 2005).

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

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

challenging the program. For example, in 2013, in *Associated Gen. Contractors of Am. v. Cal. Dep't of Transp.*,[721] supra, Caltrans argued that many issues asserted by the plaintiff/appellant Associated General Contractors of America's (AGC) appeal were moot, but the Ninth Circuit held that the case was not moot. The court reasoned that the new preference program was substantially similar to the prior program that allegedly disadvantaged AGC's members in the same way.[722] The court cited the United States Supreme Court's decision in *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville*,[723] which involved a challenge to a Jacksonville ordinance that established a DBE program applicable to public contracting. The Supreme Court held 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.'"[724]

c. Sovereign Immunity

In 2006, in *Western States Paving Co., Inc., v. Washington State Department of Transportation*,[725] supra, the district court held, on remand, that sovereign immunity barred the plaintiff's §§ 1981 and 1983 claims against WSDOT and its Secretary MacDonald, whom the court determined had been sued in his official capacity. "The Supreme Court has held that Congress did not abrogate the states' Eleventh Amendment sovereign immunity by enacting § 1983, … and that a state, state agencies, or state officials acting in their official capacities are not 'persons' within the statutory language of § 1983."[726]

However, the plaintiff's claim under 42 U.S.C. § 2000d, which "prohibits racial discrimination in programs receiving federal financial assistance, such as the highway construction projects at issue in this case,"[727] did not provide the state defendants with immunity under the Eleventh Amendment. The reason is that "Congress … clearly conditioned the receipt of federal highway funds on compliance with Title VI and the waiver of sovereign immunity from claims arising under Title VI."[728] Even though "[d]iscriminatory intent is an essential element of a plaintiff's claim under Title VI of the Civil Rights Act of 1964,"[729] the § 2000d claim for damages was viable. The court held that "WSDOT's DBE program was not a 'facially neutral' policy. Instead, it was specifically race[-]conscious. Any resulting discrimination was therefore intentional, whether the reason for the classification was benign or its purpose remedial."[730] "'[G]ood intentions' alone are not enough to sustain a supposedly 'benign' racial classification."[731]

d. Qualified Immunity

In *Alexander v. City of Milwaukee*,[732] the Seventh Circuit held that the City Commissioners, who were sued for allegedly discriminatory promotion practices, were not entitled to qualified immunity. There were two questions: "whether a constitutionally protected right has been violated; [and] if we determine that there has been such a violation, … whether this right was clearly established at the time of the violation."[733] The court held that "for the defendants to demonstrate that their actions comport with strict scrutiny, they must demonstrate not only a compelling state interest, but also evidence sufficient to establish that they have narrowly tailored the remedy consistent with that interest."[734] Not only was there no court order directing the city "to increase promotional opportunities for women and minorities," but also the record disclosed "no policy, no set parameters and no means of assessing how race should be weighed with other promotional criteria."[735] "A race-conscious promotion system with no identifiable standards to narrowly tailor it to the specific, identifiable, compelling needs of the municipal department in question cannot pass constitutional scrutiny."[736]

The second issue was whether the law was clearly established during the relevant period, because "[q]ualified immunity protects officials from suit and from liability for civil damages when, *at the time of the challenged action*, the contours of the constitutional right were not so defined as to put the defendant officials on notice that their conduct amounted to a constitutional violation."[737] However, given the Supreme Court's decision in *Croson*, supra, the court stated that it had "little difficulty in concluding that the law was clear."[738] Thus, "[t]he defendants … had fair notice that their actions were outside the permissible bounds of racial preferences at the time that they acted[,]"[739] and, therefore, they were not entitled to qualified immunity. The court held that the Commissioners' actions violated the plaintiffs' constitutional rights, "because their race-conscious promotion plan was not consistent with strict scrutiny…."[740]

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[721] 713 F.3d 1187 (9th Cir. 2013).

[722] *Id.* at 1194.

[723] 508 U.S. 656, 113 S. Ct. 2297, 124 L. Ed.2d 586 (1993).

[724] *Associated Gen. Contractors of Am*, 713 F.3d at 1194 (citation omitted).

[725] No. C 00-5204-RBL, 2006 U.S. Dist. LEXIS 43058, at *10 (W.D. Wash. June 23, 2006).

[726] *Id.* at *29 (citations omitted).

[727] *Id.* at *30.

[728] *Id.* at *30-1.

[729] *Id.* at *35 (citation omitted).

[730] *Id.* at *37 (citation omitted).

[731] *Id.* at *38 (citation omitted).

[732] 474 F.3d 437 (7th Cir. 2007).

[733] *Id.* at 444 (citations omitted).

[734] *Id.* at 445 (citation omitted).

[735] *Id.*

[736] *Id.* at 446.

[737] *Id.* (citation omitted) (emphasis in original).

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

[739] *Id.* at 448.

[740] Id. (citation omitted). *See also*, Moore v. Ferron-Poole, No. 3-14-cv-1540 (WWE), 2016 U.S. Dist. LEXIS 151339 (D. Conn. Oct. 31, 2016) (holding that the defendant had qualified immunity).

e. Injunctive Relief against DBE Programs

In *M.K. Weeden Constr. Inc. v. Montana*,[741] supra, Weeden sought a temporary restraining order and a preliminary injunction. In June 2013, the Montana Department of Transportation (MDT) advertised for bids on a project supported by federal funding to prevent slides in two areas along a highway. Although MDT had established an overall goal of 5.83 percent DBE participation in Montana's highway construction projects, Weeden was the only bidder that did not meet the 2 percent DBE goal for the project. Weeden sought to utilize the good faith exception to the DBE requirement, but a DBE Review Board concluded that Weeden's bid did not comply with the regulations.

First, the court held that Weeden would not suffer irreparable harm absent preliminary relief, in part, because of the company's capacity to secure other highway construction contracts.[742] The "balance of the equities" did not favor Weeden when numerous other bidders were able to meet the DBE requirements.[743] Second, there were "serious questions" regarding the merits of Weeden's equal protection claim.[744]

> A prime contractor such as Weeden is not permitted to challenge MDT's DBE program as if it were a non-DBE subcontractor because Weeden cannot show that *it* was subjected to a racial or gender-based barrier (that it could not possibly meet) in its competition for the prime contract. In this case, Plaintiff Weeden was not deprived of the ability to compete on equal footing with the other bidders….[745]

Third, even assuming that Weeden had standing, the MDT presented significant evidence of the underutilization of disadvantaged businesses that supported a narrowly tailored race- and gender-preference program.[746] The MDT was not required to have "evidence of discrimination in every single segment of the highway construction industry before a preference program can be implemented."[747] The court cited the Ninth Circuit's decision in *Associated General Contractors v. California Dept. of Transportation*,[748] supra, as being particularly relevant, because the court held "that California's DBE program need not isolate construction from engineering contracts or prime from subcontracts to determine whether the evidence in each and every category gives rise to an inference of discrimination."[749]

Lastly, Weeden's claim failed because the company did not have a protected property right under Montana law in a contract that was not awarded to it.[750]

In *C.S. McCrossan Constr., Inc. v. Minn. Dep't of Transp.*,[751] supra, decided by a federal district court in Minnesota, McCrossan moved for a temporary restraining order and a preliminary injunction pending a decision on its claims.[752] The court denied the motion, because, for several reasons, McCrossan could not demonstrate irreparable harm: McCrossan's action for damages was sufficient to protect the competitive bidding system's integrity;[753] any injury or loss McCrossan sustained was not irreparable, because any injury or loss was compensable in money damages;[754] and, in any event, MnDOT had retained the right to reject all proposals it received.[755]

The court, nevertheless, proceeded to address McCrossan's likelihood of success on the merits of its claim and found that there was none. First, MnDOT had informed proposers of the department's intent to use U.S. DOT's part 26 DBE requirements to evaluate a proposal, and because McCrossan had not objected, it had waived any objection.[756] Second, the DBE regulations required MnDOT to set a DBE participation goal for the contract.[757] The DOT's commentary to § 26.53(e) advises that for design-build contracts, "the normal process for setting contract goals does not fit the contract award process well. … In these situations, the recipient *may* alter the normal process.'"[758] The two other companies submitting proposals did meet MnDOT's goal for DBE participation.[759] Third, MnDOT did not reject the proposal because McCrossan failed to meet the DBE goal. Rather, McCrossan failed to make (and document) good faith efforts to achieve the goal.[760] The court did not agree with McCrossan's argument that "'forcing prime contractors to negotiate with subcontractors before submitting their proposals will inevitably lead to the unethical behavior of bid shopping … or bid chopping.'"[761] McCrossan could have negotiated with a DBE subcontractor "in good faith without divulging the solicited bids or the prices.'"[762] Lastly, MnDOT's application of part 26's good-faith efforts factors was narrowly tailored to meet a compelling government interest that did not violate McCrossan's Fourteenth Amendment rights.[763] MnDOT's requirement that

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741 No. CV 13-49-H-CCL, 2013 U.S. Dist. LEXIS 126286 (D. Mont. Sept. 4, 2013).

742 *Id.* at *8.

743 *Id.* at *8-9.

744 *Id.* at *9.

745 *Id.* at *10-11 (emphasis in original).

746 *Id.* at *11.

747 *Id.* (citation omitted).

748 713 F.3d 1187 (9th Cir. 2013).

749 *M.K. Weeden Constr. Inc.*, 2013 U.S. Dist. LEXIS 126286, at *12 (citation omitted).

750 *Id.* at *13.

751 946 F. Supp.2d 851 (D. Minn. 2013).

752 One issue in the case concerned abstention. The court concluded that it was justified in abstaining from hearing the case because of a pending action before the Minnesota Court of Appeals and the fact that the federal and state proceedings "overlap[ed] to a substantial degree" and "'state judicial review … ha[d] not yet been completed.'" *Id.* at 866 (citation omitted).

753 *Id.* at 858.

754 *Id.* at 859.

755 *Id.* at 860.

756 *Id.* at 862.

757 *Id.*

758 *Id.* at 863 (citation omitted) (emphasis in original).

759 *Id.*

760 *Id.*

761 *Id.* at 863-64 (citation omitted) (some internal quotation marks omitted).

762 *Id.* at 864 (citations omitted) (some internal quotation marks omitted).

763 *Id.*

good faith efforts be made was simply the department's attempt to comply with federal law, which the courts have held comport with their strict scrutiny review.[764]

9. Relationship of Federal DBE Requirements to State Constitutional Provisions

In California, several cases have addressed the issue of the relationship of the federal DBE requirements and an amendment to the state's constitution that prohibits governmental affirmative action except in a narrow instance.

In 2004, in *C&C Construction, Inc. v. Sacramento Municipal Utility District,*[765] the Sacramento Municipal Utility District (SMUD) appealed a summary judgment in favor of the plaintiff contractor C&C Construction, Inc. (C&C) for declaratory and injunctive relief. The contractor alleged that the district's affirmative action program violated Article 1, § 31(a) of the California Constitution, an amendment that resulted from a voter-initiative. SMUD conceded that its affirmative action program discriminated in favor of minorities but argued that the program fell within Cal. Const. art. I, § 31(e)'s exception for measures required to maintain eligibility for the receipt of federal funds. The trial court found that SMUD 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 § 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 the California Supreme Court had held that "a municipal contracting scheme that requires preferential treatment on the basis of race or gender violates" Article 31(a).[766] However, Article 31 included an exception that stated: "Nothing 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."[767]

The Superior Court of Sacramento County had ruled in favor of C&C's demand for declaratory and injunctive relief, because the court held that the program violated the California Constitution, art. 1, § 3(a). An 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."[768] The studies did not assess race-neutral methods. The appellate court stated 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."[769] However, "[s]ection 31 allows no compelling interest exception."[770] The only exception is the one permitting 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."[771] SMUD was unable to show that its affirmative action program was required as a condition to maintaining its eligibility for federal funds. The court reviewed various federal laws, including those pertaining to the U.S. DOT. In every instance, the court found no federal law that required SMUD to use race-based measures.

The court held that "the governmental agency must have substantial evidence that it will lose federal funding if it does not use race-based measures and must narrowly tailor those measures to minimize race-based discrimination."[772] The court pointed out that SMUD did not "study whether race-neutral programs would suffice,"[773] nor did SMUD prove that there were any federal laws concerning the distribution of federal money to the states that required race-based measures.[774] "[T]he disparity studies were designed to determine whether the Supreme Court decision in *Croson* permitted race-based affirmative action;"[775] 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."[776]

In sum, to discriminate based on race, a state entity must have substantial evidence that it will lose federal funding if it did not use race-based measures. Moreover, any such measures have to be narrowly tailored to minimize race-based discrimination. 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 com-

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[764] *Id.* Other considerations discussed in the opinion also did not weigh in favor of McCrossan's requested relief. *Id.* at 864-65.

[765] 122 Cal. App.4th 284, 18 Cal. Rptr.3d 715 (2004), *review denied by, request denied by, C & C Constr. v. Sacramento Mun. Util. Dist.*, 2004 Cal. LEXIS 12012 (Dec. 15, 2004).

[766] *Id.* at 291, 18 Cal. Rptr.3d at 718 (citing *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal.4th 537, 565, 101 Cal. Rptr.2d 653, 12 P.3d 1068 (2000)).

[767] Cal. Const. art. I, § 31(e).

[768] *C&C Construction*, 122 Cal. App.4th at 292, 18 Cal. Rptr.3d at 718.

[769] *Id.* at 293, 18 Cal. Rptr. 3d at 719.

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

[771] *Id.* at 297, 18 Cal. Rptr. 3d at 722.

[772] *Id.* at 298, 18 Cal. Rptr. 3d at 723.

[773] *Id.* at 300, 18 Cal. Rptr. 3d at 724.

[774] *Id.* at 310, 18 Cal. Rptr. 3d at 732.

[775] *Id.*

[776] *Id.* at 311, 18 Cal. Rptr. 3d at 733.

plaint alleging that the district's affirmative action program violated Article 31(a) of the California Constitution.[777]

In 2010, the Supreme Court of California decided *Coral Constr. Inc. v. City & Cnty. of San Francisco*.[778] The plaintiff/respondent Coral Construction, Inc. (Coral) challenged the City and County of San Francisco's (the City) law requiring preferential treatment for women and minorities in the awarding of city contracts. At issue, once again, was Article I, § 31 of the California Constitution that forbids a city from awarding public contracts to discriminate or grant preferential treatment based on race or gender. As the court stated, "[h]ere, a city whose public contracting laws expressly violate section 31 challenges its validity under the so-called political structure doctrine, a judicial interpretation of the federal equal protection clause."[779]

In a series of ordinances over a period of 26 years, the City had awarded public contracts on a preferential basis to MBEs and WBEs. In 1989, the Ninth Circuit held the City's 1984 ordinance violated both the federal Equal Protection Clause and the City's charter by giving preferences based on race. After the Supreme Court's decision in *Croson*, supra, the City enacted a new ordinance that eliminated set-asides but retained bid discounts and other preferences for MBEs and WBEs.

As previously noted, in the November 1996 election, voters approved Proposition 209, which added § 31 to article I of the state Constitution. Section 31 provides that the state, including its political subdivisions, "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."[780]

The next year, 1997, the Ninth Circuit held that § 31 did not violate the federal Equal Protection Clause as interpreted "in the political structure cases."[781] In 1998, based on new findings, the City adopted an ordinance that kept bid discounts for MBEs and WBEs and that required prime contractors to use MBE and WBE subcontractors at levels set by the City's Human Rights Commission or to make good faith efforts to do so by targeting MBEs and WBEs.

In 2000, the California Supreme Court held in *Hi-Voltage Wire Works, Inc. v. City of San Jose*[782] that § 31 "does not tolerate … race- and gender-conscious preferences [that] the equal protection clause does not *require* but merely *permits*."[783]

After Coral commenced its action in 2001, the City in 2003 reenacted the 1998 ordinance without significant changes. The City's Board "found that 'the race- and gender-conscious remedial programs authorized by [the MBE/WBE] Ordinance continue to be necessary to remedy discrimination against minority- and women-owned businesses in City prime contracting and subcontracting.'"[784]

For example, the City's "2003 statistical studies showed that MBE's and WBE's continued 'to receive a smaller share of certain types of contracts for the purchases of goods and services by the City than would be expected' based on their availability. … The studies also showed, however, that MBE's and WBE's received a larger share of other types of contracts."[785] Furthermore, "[i]n comparison, non-MBE/WBE firms were slightly overused in most areas of City contracting, significantly overused in a few areas, and substantially overused only in prime contracts for architecture and engineering (by 40 percent) and prime and subcontracts for telecommunications (by 10 percent and 23 percent, respectively)."[786]

Depending on the level of MBE/WBE participation, the 2003 ordinance provided for bid discounts that ranged from 5 to 10 percent.[787] In their bids, prime contractors had to demonstrate that they had made good-faith efforts to use MBE/WBE subcontractors.[788] The trial court held that the 2003 ordinance violated § 31 but that § 31 did not violate the political structure doctrine. The appellate court affirmed in part, reversed in part, and remanded for an adjudication of the City's claim that the federal Equal Protection Clause required the ordinance.

The Supreme Court of California court addressed, first, whether § 31 violates the political structure doctrine.[789] Section 31 "was intended to 'eliminate state and local government affirmative action programs in the areas of public employment, public education, and public contracting to the extent these programs involve preferential treatment based on race, sex, color, ethnicity, or national origin.'"[790] Section 31 "prohibits race- and gender-conscious programs [that] the federal equal protection clause *permits* but does not *require*."[791] Section 31 "categorically prohibits discrimination and preferential treatment. Its literal language admits no 'compelling state interest' exception" but "poses no obstacle … to race- or gender-conscious measures *required* by federal law or the federal Constitution."[792] "'A core purpose' of the clause was to '"do away with all governmentally imposed discrimination based on race,' … thus ultimately

[777] *Id.* at 303, 18 Cal. Rptr. 3d at 727.

[778] 50 Cal.4th 315, 235 P.3d 947, 113 Cal. Rptr. 3d 379 (2010).

[779] *Id.*, 50 Cal.4th at 320, 235 P.3d at 952, 113 Cal. Rptr. 3d at 284 (citations omitted).

[780] *Id.*, 50 Cal.4th at 321, 235 P.3d at 953, 113 Cal. Rptr. 3d at 285 (citation omitted).

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

[782] 24 Cal.4th 537, 12 P.3d 1068, 101 Cal. Rptr. 2d 653 (2000).

[783] *Coral Construction, Inc.*, 50 Cal.4th at 322, 235 P.3d at 953, 113 Cal. Rptr. 3d at 286.

[784] *Id.*, 50 Cal.4th at 323, 235 P.3d at 954, 113 Cal. Rptr. 3d at 286 (citation omitted).

[785] *Id.*, 50 Cal.4th at 324, 235 P.3d at 954, 113 Cal. Rptr. 3d at 287 (citation omitted).

[786] *Id.*, 50 Cal.4th at 324, 235 P.3d at 955, 113 Cal. Rptr. 3d at 287.

[787] *Id.*

[788] *Id.*

[789] *Id.*, 50 Cal.4th at 326, 235 P.3d at 956, 113 Cal. Rptr. 3d at 288.

[790] *Id.*, 50 Cal.4th at 326-7, 235 P.3d at 956, 113 Cal. Rptr. 3d at 289 (citation omitted) (some internal quotation marks omitted).

[791] *Id.*, 50 Cal.4th at 327, 235 P.3d at 957, 113 Cal. Rptr. 3d at 290 (emphasis in original).

[792] *Id.*

helping to create 'a political system in which race no longer matters….'"[793]

The City cited the political structure doctrine for its argument that § 31 violated equal protection of the laws. The California Supreme court relied on *Hunter v. Erickson*,[794] in which the United States Supreme Court held that "'the [city] may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size.'"[795] Likewise, in *Washington v. Seattle Sch. Dist. No. 1,*[796] the state's voters had amended "the state's constitution to prohibit busing for the purpose of desegregation, while still allowing busing for most of the other reasons for which pupils were already being transported…."[797] The United States Supreme Court held that the state constitutional provision violated equal protection, because it "'remove[d] the authority to address a racial problem—and only a racial problem—from the existing decisionmaking body, in such a way as to burden minority interests.'"[798] In short, "'the Fourteenth Amendment … reaches a political structure that treats all individuals as equals, … yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation.'"[799]

In *Coral*, the City argued that the political structure doctrine

> straightforwardly invalidates section 31 because that provision uses the racial (or gender-based) nature of an issue (i.e., preferences) to structure governmental decisionmaking, in the sense that groups that seek race- or gender-based preferences in public contracting, employment and education must first overcome the obstacle of amending the state Constitution, while groups that seek preferences on other bases (e.g., disability or veteran status) need not.[800]

The Supreme Court of California did not find the City's argument persuasive. The court observed that "the Sixth and Ninth Circuits have concluded [that] the political structure doctrine does not invalidate state laws that broadly forbid preferences and discrimination based on race, gender and other similar classifications."[801] In *Coral*, the California Supreme Court held that "[n]othing in *Hunter* … or *Seattle* supports extending the political structure doctrine to protect race- or gender-based preferences that equal protection does not require."[802] Indeed, the court held that "[i]nstead of burdening the right to equal treatment, section 31 directly serves the principle that 'all governmental use of race must have a logical end point.' … [A] 'core purpose' of the equal protection clause is to 'do away with all governmentally imposed discrimination based on race….'"[803]

Next, the California Supreme Court addressed the "federal funding exception" in § 31(e), which 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.'"[804] The court agreed with the appellate court "that the relevant federal regulations do not require racial preferences and that the City has not, in any event, made a sufficient factual showing of past discrimination to trigger any obligation under the regulations."[805]

Finally, the court addressed the City's "federal compulsion argument," an argument that "the federal equal protection clause (U.S. Const., 14th Amend.) requires the 2003 ordinance as a remedy for the City's own discrimination."[806] On this issue, the court agreed with the appellate court's remand of the case for a determination of whether the evidence supported the City's decision to adopt the 2003 ordinance.[807]

> While the parties have not brought to our attention any decision ordering a governmental entity to adopt race-conscious public contracting policies under the compulsion of the federal equal protection clause, the relevant decisions hold open the possibility that race-conscious measures might be required as a remedy for purposeful discrimination in public contracting.[808]

For the city to prevail, it would have to

> show that triable issues of fact exist on each of the factual predicates for its federal compulsion claim, namely (1) that the City has purposefully or intentionally discriminated against MBE's and WBE's; (2) that the purpose of the City's 2003 ordinance is to provide a remedy for such discrimination; (3) that the ordinance is narrowly tailored to achieve that purpose; and (4) that a race- and gender-conscious remedy is necessary as the only, or at least the most likely, means of rectifying the resulting injury.[809]

In October 2012, while the *Coral* case was on remand from the California Supreme Court, the City enacted legislation that effectively repealed the 2003 ordinance.[810] During the pendency of the litigation, in 2006, the City adopted alternate legislation that instituted race- and gender-neutral public contracting procedures.[811] The Court of Appeals for the First Appellate District agreed with the trial court that the pending case was moot.[812] The 2003 ordinance could not be revised, because it would be

[793] *Id.*, 50 Cal.4th at 327-28, 235 P.3d at 957, 113 Cal. Rptr. 3d at 290 (citations omitted).

[794] 393 U.S. 385, 89 S. Ct. 557, 21 L. Ed.2d 616 (1969).

[795] *Coral Construction, Inc.*, 50 Cal.4th at 328-29, 235 P.3d at 958, 113 Cal. Rptr. 3d at 291 (citation omitted).

[796] 458 U.S. 457, 102 S. Ct. 3187, 73 L. Ed.2d 896 (1982).

[797] *Coral Construction, Inc.*, 50 Cal.4th at 329, 235 P.3d at 958, 113 Cal. Rptr. 3d at 291 (citation omitted).

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

[799] *Id.* (citations omitted) (some internal quotation marks omitted).

[800] *Id.*

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

[802] *Id.*, 50 Cal.4th at 330, 235 P.3d at 959, 113 Cal. Rptr. 3d at 292.

[803] *Id.*, 50 Cal.4th at 332, 235 P.3d at 960 (citations omitted), 113 Cal. Rptr. 3d at 294.

[804] *Id.*, 50 Cal.4th at 333, 235 P.3d at 961, 113 Cal. Rptr. 3d at 294 (citation omitted).

[805] *Id.*

[806] *Id.*, 50 Cal.4th at 335, 235 P.3d at 962, 113 Cal. Rptr. 3d at 296.

[807] *Id.*

[808] *Id.*, 50 Cal.4th at 337, 235 P.3d at 963, 113 Cal. Rptr. 3d at 298 (citations omitted).

[809] *Id.*, 50 Cal.4th at 337-38, 235 P.3d at 964, 113 Cal. Rptr. 3d at 299.

[810] Coral Constr., Inc. v. City & Cnty. of San Francisco, 2016 Cal. App. LEXIS 5767, at *20-1 (2016) (citation omitted).

[811] *Id.* at *21 (citation omitted).

[812] *Id.* at *39.

based on stale findings. The City would have to have and analyze new data based on current circumstances, and, thereafter, the courts would have to consider the specifics of the evidence before deciding "the viability of any federal compulsion claim."[813] The appellate court rejected all of Coral's arguments why the case remanded by the California Supreme Court was not moot.

10. Affirmative Action in Hiring and Promotions

a. Judicial Decisions prior to 2006

Although not involving affirmative action in public contracting, this part of this report discusses two cases that reached different outcomes on the constitutionality of the use of affirmative action in hiring and promotions. Part F of this report analyzes Title VII of the Civil Rights Act of 1965.

In *Dallas Fire Fighters Association v. City of Dallas, Texas*,[814] 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. The Dallas Fire Department's (DFD) promotional system dealt with several factors: examination scores at each level of rank, conduct-issues, and race- and gender-considerations.[815] Race and gender factored into the promotional process in an attempt to increase minority and female representation in the fire department over non-minority, male firefighters, even though the latter group scored higher than females or minority candidates.[816] Finding both constitutional and statutory violations, the district court granted summary judgment in favor of the Dallas fire fighters.[817]

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."[818] The level of discrimination did not rise to the level of showing that a compelling governmental interest existed in remedying the present effects of past discrimination.[819] Dallas pointed to several features of the promotional plan that weighed in favor of its constitutionality. For example, (1) only qualified individuals were promoted; (2) the DFD used banding of test scores to ensure that the beneficiaries of the out-of-rank promotions were equally qualified to those whom they passed over; (3) the affirmative action plan under which the promotions were made lasts only five years; (4) the affirmative action-promotions to a rank would cease when the manifest imbalance in the rank was eliminated; and (5) only 50 percent of annual promotions to a rank could be made under the affirmative action plan.[820]

The court held that the foregoing features were "not enough to overcome the minimal record evidence of discrimination that is sufficient to support only the use of less intrusive alternative remedies."[821] 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 the standard requires.[822]

On the other hand, the appointment of an African American to deputy chief was not based on the affirmative action policies and was permissible under Title VII.[823] 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."[824] The court found that the African American was appointed for more reasons than just his race and that no rights of non-minorities were barred absolutely or unnecessarily trammeled.[825]

In 2000, in *Majeske v. City of Chicago*,[826] a case decided by the Seventh Circuit, 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. [827] The candidates that scored in the top 17 percent in each group took the written test for promotion.[828] The court accepted the city's persuasive statistical and anecdotal evidence of past discrimination by the city; stated that the remedying of such discrimination was a compelling governmental interest that justified the defendant's affirmative action plan; and held that the city's plan on promotions was narrowly tailored. The Seventh Circuit affirmed the district court's decision that the affirmative action plan was constitutional.[829]

b. Judicial Decisions since 2006

In the two cases discussed in this subjection, in one case, the court held that the city could be held liable for its minority- and gender-based promotion policy, whereas in the other case, a failure to promote was not a pretext for discriminatory action.

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[813] *Id.* at *31.

[814] 150 F.3d 438 (5th Cir. 1998).

[815] *Id.* at 440.

[816] *Id.*

[817] *Id.*

[818] *Id.* at 441.

[819] *Id.*

[820] *Id.* at 441 N13.

[821] *Id.*

[822] *Id.* at 442.

[823] *Id.* at 442-43.

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

[825] *Id.* at 442-43.

[826] 218 F.3d 816 (7th Cir. 2000).

[827] *Id.* at 818.

[828] *Id.*

[829] *Id.* at 820, 826.

In 2007, in *Alexander v. City of Milwaukee*,[830] also decided by the Seventh Circuit, 17 current and former members of the police force, all white males, of Milwaukee brought an action against the city and other defendants. The plaintiffs alleged that the defendants discriminated against them through promotion practices that favored women and minorities in violation of Title VII, 42 U.S.C. § 2000e, *et seq*. and 42 U.S.C. §§ 1981 and 1983. The case concerned a series of 41 promotions from the rank of lieutenant to captain between 1997 and 2003; however, because the city had no written procedures, "[t]he process for selecting nominees for promotion in the relevant period was ill-defined…."[831]

In 1996, Joan Dimow, a researcher on the staff of the Fire and Police Commission (FPC) and Kenneth Munson, Executive Director of the FPC, had prepared a report in which they found that there were "'no affirmative action goals for promotion;'" "white men were under-represented at the rank of captain and higher, at just over forty-four percent, while their proportion in the entire department was nearly fifty-three percent;" and "African-Americans were … over-represented."[832]

The court noted that "[o]f the forty-one persons promoted to the rank of captain during the relevant period, … at least some women and minorities were promoted more quickly than white males, with four promoted during their one-year probationary periods in the rank of lieutenant."[833] The 17 plaintiffs "were not promoted despite, in many cases, having seniority to a female or minority lieutenant selected for promotion."[834]

First, the court held that the Commissioners were not entitled to qualified immunity. As for the city's liability, "[t]he basis for municipal liability under § 1983 is that the municipality [must have] sanctioned or ordered, through official policy, the unlawful discriminatory conduct in issue."[835] There may be liability even for "single actions of municipal employees, if those employees had final policy making authority for the municipality.…"[836] Furthermore, the court stated that it did not need to decide "whether Chief Jones is a policy maker, thus making the City liable under § 1981 and § 1983 for his actions. The City remains liable for his actions under the respondeat superior theory of liability embraced by Title VII."[837]

The court affirmed the district court on the issue of liability but reversed on the issue of damages.

In 2016, in *Moore v. Ferron-Poole*,[838] decided by a federal district court in Connecticut, the plaintiff alleged that the defendant Astread Ferron-Poole denied the plaintiff a promotion to Social Work Supervisor in the Connecticut Department of Social Services (DSS) because of the plaintiff's race and age in violation of the Equal Protection Clause of the Fourteenth Amendment. As summarized by the court,

> DSS is required by state law to develop and implement an affirmative action plan. Goals are established each year through a formula developed by the Connecticut Human Rights and Opportunities ("CHRO") and set forth in its regulations. … To comply with CHRO regulations and state law, DSS must demonstrate a good faith effort to meet the hiring and promotional goals in its affirmative action plan. Goal candidates need only meet the minimum requirements of the position.[839]

Both the plaintiff and the defendant were African American women. In granting a summary judgment in favor of the defendants, the court assumed that the plaintiff

> met her burden on the *prima facie* case of discrimination. However, as an asserted legitimate justification for her hiring decision, defendant asserts that she selected the Hispanic candidate, who was rated equally with plaintiff and who satisfied the affirmative action hiring goals. The record evidence fails to establish an inference that this justification is a pretext for defendant's discriminatory animus against plaintiff. *Defendant's selection advanced the affirmative action goals in compliance with the statutory mandate*….[840]

Moreover, the plaintiff's credentials were "not so superior to that of the selected candidate so as to raise an inference of a discriminatory selection."[841] In addition, the district court found that the defendant had qualified immunity.[842]

11. Constitutionality of Affirmative Action in University Admission Policies

Although not involving a federal or state DBE program, cases on universities' use of affirmative action in their admission policies must be noted as they involve important rulings by the Supreme Court on affirmative action and are cited in non-university affirmative action cases.

In *Regents of Univ. of Cal. v. Bakke,*[843] supra, the Supreme Court held in a plurality opinion that diversity is a compelling governmental interest for the purpose of strict scrutiny analysis. Although the Court avoided limiting diversity solely to education, there is no holding, as yet apparently, that diversity is a permissible compelling governmental interest in the realm of public contracting.

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[830] 474 F.3d 437 (7th Cir. 2007).

[831] *Id.* at 439.

[832] *Id.* at 441 (citation omitted) (footnote omitted).

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

[834] *Id.* at 442.

[835] *Id.* at 448 (citation omitted). The court noted that "Section 1981, like § 1983, also requires a plaintiff to demonstrate an official policy or custom in order to allow for municipal liability." *Id.* (citation omitted).

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

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

[838] No. 3-14-cv-1540 (WWE), 2016 U.S. Dist. LEXIS 151339 (D. Conn. Oct. 31, 2016).

[839] *Id.* at *2.

[840] *Id.* at *5-6 (emphasis supplied).

[841] *Id.* at *6 (citations omitted).

[842] Id. at *6-7 (*stating* that "[a]t the time relevant to this action, it was objectively reasonable for defendant to believe that her selection of the Hispanic candidate, who was equally qualified and also an affirmative action goal candidate, was legitimate and not discriminatory." *Id.* at *7-8. *See also*, Humphries v. Pulaski County Special Sch. Dist., No. 4:06-cv-606-DPW, 2011 U.S. Dist. LEXIS 49543, at *25 (E.D. Ark. April 28, 2011), in which the plaintiff alleged that the District's affirmative action policies served as vehicles for racial discrimination in hiring; however, the court dismissed the claim because the plaintiff's allegations were too ambiguous.

[843] 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed.2d 750 (1978).

In *Grutter v. Bollinger,*[844] decided by United States Supreme Court in 2003, the Michigan Law School had denied admission to Grutter, a well-qualified, white female. Grutter alleged that the law school discriminated against her through its admission policy that considered race as one of many factors in the application process.[845] 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 that are derived from having a diverse student body. Michigan Law School based its affirmative action policy on Justice Powell's opinion in *Bakke*, which permitted race-consideration as long as it 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, the race of the applicant, or other types of diversity, such as life experience and socio-economic background. In attempting to attain a critical mass of minority students, the plan placed substantial weight on these latter considerations in the admissions process.[846]

The Court found student diversity to be a compelling governmental interest, fulfilling one of the prongs for the strict scrutiny analysis; nevertheless, the means for achieving that interest must be narrowly tailored. The Michigan Law School did not set a number of minority students sought by the law school.[847] Rather, 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.

The Court also considered the context and relevant differences of the affirmative action plan, principles derived from *Gomillion v. Lightfoot*[848] and *Adarand III,*[849] 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....[850]

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.[851] The Court did not require a policy of exhaustion of race-neutral alternatives for the university's policy to accord 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.[852] 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.[853] In light of the 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.[854] The Court relied on evidence from numerous businesses, such as General Motors and 3M, 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.[855]

In *Gratz v. Bollinger,*[856] also decided by the Supreme Court in 2003, 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.[857]

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 socio-economically disadvantaged group; attendance at a high school with a predominantly under-represented minority population; or under-representation in the unit

[844] 539 U.S. 306, 123 S. Ct. 2325, 156 L. Ed.2d 304 (2003).

[845] *Id.* at 339, 123 S. Ct. at 2344, 156 L. Ed.2d at 339.

[846] *Id.* at 319, 123 S. Ct. at 2334, 156 L. Ed.2d at 326.

[847] *Id.* at 318-19, 123 S. Ct. 2333, 156 L. Ed.2d 326.

[848] 364 U.S. 339, 81 S. Ct. 125, 5 L. Ed.2d 110 (1960).

[849] 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed.2d 158 (1995).

[850] *Id.* at 228-29, 115 S. Ct. at 2113, 132 L. Ed.2d at 182 (emphasis in original).

[851] *Grutter*, 539 U.S. at 339, 123 S. Ct. at 2344, 156 L. Ed.2d at 339.

[852] *Id.* at 341, 123 S. Ct. at 2345-46, 156 L. Ed.2d at 340-41.

[853] *Id.* at 342-43, 123 S. Ct. at 2346, 156 L. Ed.2d at 342.

[854] *Id.* at 343, 123 S. Ct. at 2347, 156 L. Ed.2d at 342.

[855] *Id.* at 386, 123 S. Ct. at 2369, 156 L. Ed.2d at 369.

[856] 539 U.S. 244, 123 S. Ct. 2411, 156 L. Ed.2d 257 (2003).

[857] *Id.* at 275-76, 123 S. Ct. at 2430, 156 L. Ed.2d at 272.

to which the student was applying.[858] The Admissions Review Committee could flag an application if it did not pass the initial screening but showed promise.[859]

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.[860] 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."[861] The applicants must be placed on the same footing for consideration but doing so does not mean according them the same weight.[862]

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 dealt with the issue of affirmative action plans in higher education.[863] In 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.[864] 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.[865]

The *Bakke* decision arguably provided clear insight concerning the answer to the above question, but the Court's jurisprudence did not provide much insight on 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.[866] Additionally, numerous higher educational 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."[867]

In 2016, in *Fisher v. University of Texas*,[868] the Supreme Court considered whether the race-conscious admissions program at the University of Texas was lawful under the Equal Protection Clause. After describing previous programs at the University, the Court discussed how, after the Court's decision in *Grutter*, supra, the University undertook a year-long study of its admissions policy to achieve a diverse student body. The University's new policy was not identical to the one the Court considered in *Grutter*, in which the Court upheld the University of Michigan Law School's system of holistic review.

The approach at the University of Texas differed in part because of the Top Ten Percent Law, a Texas statute that "guarantees college admission to students who graduate from a Texas high school in the top 10 percent of their class."[869] As a result of the state statute, up to 75 percent of the University's freshman class is filled through the plan, leaving a 25 percent portion that is

> to be admitted based on a combination of [a student's] AI [Academic Index] and PAI [Personal Achievement Index] scores. Now, however, race is given weight as a subfactor within the PAI. The PAI is a number from 1 to 6 (6 is the best) that is based on two primary components. The first component is the average score a reader gives the applicant on two required essays. The second component is a full-file review that results in another 1-to-6 score, the "Personal Achievement Score" or PAS. The PAS is determined by a separate reader, who (1) rereads the applicant's required essays, (2) reviews any supplemental information the applicant submits (letters of recommendation, resumes, an additional optional essay, writing samples, artwork, etc.), and (3) evaluates the applicant's potential contributions to the University's student body based on the applicant's leadership experience, extracurricular activities, awards/honors, community service, and other "special circumstances."[870]

The category "special circumstances" includes an applicant's race.[871]

After "the essay and full-file readers have calculated each applicant's AI and PAI scores, admissions officers from each school within the University set a cutoff PAI/AI score combination for admission, and then admit all of the applicants who are above that cutoff point."[872] The court found that "although

[858] *Id.* at 255, 123 S. Ct. at 2419, 156 L. Ed.2d at 272.

[859] *Id.* at 256-57, 123 S. Ct. at 2419, 156 L. Ed.2d 272.

[860] *Id.* at 271, 123 S. Ct. at 2428, 156 L. Ed.2d at 282.

[861] *Id.* at 273-74, 123 S. Ct. at 2429, 156 L. Ed.2d at 283.

[862] *Id.* at 294, 123 S. Ct. at 2440, 156 L. Ed.2d at 296.

[863] *See* Grutter v. Bollinger, 539 U.S. 306, 123 S. Ct. 2325, 156 L. Ed.2d 304 (2003); *see also*, Gratz v. Bollinger, 539 U.S. 244, 123 S. Ct. 2411, 156 L. Ed.2d 257 (2003).

[864] *Grutter*, 539 U.S. at 322, 123 S. Ct. 2335, 156 L. Ed.2d 328 (stating the question as one being "[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); and Smith v. University of Wash. Law School, 233 F.3d 1188 (9th Cir. 2000) (holding that diversity is a compelling state interest).

[865] *Grutter*, 539 U.S. at 328, 123 S. Ct. 2411, 156 L. Ed.2d 257 (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*).

[866] 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*.

[867] *Id.* at 331, 123 S. Ct. 2340, 156 L. Ed.2d 334 (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").

[868] 136 S. Ct. 2198, 195 L. Ed.2d 511 (U.S. 2016).

[869] *Id.* at 2205, 195 L. Ed.2d at 518.

[870] *Id.* at 2206, 195 L. Ed.2d at 519.

[871] *Id.*

[872] *Id.* at 2207, 195 L.Ed.2d at 519.

admissions officers can consider race as a positive feature of a minority student's application, there is no dispute that race is but a 'factor of a factor of a factor' in the holistic-review calculus."[873]

Fisher, the petitioner, was not in the top 10 percent of her high school class; thus, she was evaluated for admission through a holistic, full-file review; however, the Admissions Office rejected her application. Fisher alleged "that the University's consideration of race as part of its holistic-review process disadvantaged her and other Caucasian applicants[] in violation of the Equal Protection Clause."[874] In *Fisher I,* the district court granted the University a summary judgment; the United States Court of Appeals for the Fifth Circuit reversed; and the Supreme Court granted *certiorari* and vacated the Fifth Circuit's judgment. Without remanding to the district court, the Fifth Circuit determined on remand "that the program conformed with the strict scrutiny mandated by *Fisher I*" and again affirmed the entry of a summary judgment for the University.[875] The Supreme Court granted *certiorari* and affirmed the Fifth Circuit in a 4-3 decision with 2 dissents.

Justice Kennedy's opinion noted that the Court in *Fisher I* confirmed, *inter alia*, that

> "the decision to pursue 'the educational benefits that flow from student body diversity' … is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper." … Once … a university gives "a reasoned, principled explanation" for its decision, deference must be given "to the University's conclusion, based on its experience and expertise, that a diverse student body would serve its educational goals."[876]

In *Fisher II*, which upheld the constitutionality of the university's admissions policy, first, Justice Kennedy wrote that "the compelling interest that justifies consideration of race in college admissions is not an interest in enrolling a certain number of minority students. Rather, a university may institute a race-conscious admissions program as a means of obtaining 'the educational benefits that flow from student body diversity.'"[877] The Court found that "in first setting forth its current admissions policy, the University articulated concrete and precise goals."[878]

Second, the Court agreed with Fisher that "a university bears a heavy burden in showing that it had not obtained the educational benefits of diversity before it turned to a race-conscious plan."[879] However, "[b]efore changing its policy the University conducted 'months of study and deliberation, including retreats, interviews, [and] review of data, … and concluded that '[t]he use of race-neutral policies and programs ha[d] not been successful in achieving' sufficient racial diversity at the University.…"[880]

Third, contrary to Fisher's argument that the consideration of race had only a "'minimal impact' in advancing the [university's] compelling interest," the record showed that the consideration of race had had "a meaningful, if still limited, effect on the diversity of the University's freshman class."[881]

Finally, Fisher did not propose any workable alternatives to the University's approach.[882]

The Court held that the University had "met its burden of showing that the admissions policy it used at the time it rejected petitioner's application was narrowly tailored."[883]

12. Conclusion

Part B. 9 of the report analyzes the constitutionality of the federal U.S. DOT DBE laws and regulations, as well as other issues relating to affirmative action programs and policies. Since the publication of the original report in 2006, it appears that the laws, regulations, and judicial decisions on DBE programs have become more uniform and consistent.

Post-*Adarand III*,[884] in the matter of race-based classifications in the field of public contracting, the standard of review that must be applied to a DBE program is one of strict scrutiny. Gender-based classifications continue to be reviewed on the basis of intermediate scrutiny. A DBE program must satisfy a two-prong test: it must serve a compelling governmental interest, and it must be narrowly tailored to further that interest. Congress had a strong basis in evidence to conclude that the U.S. DOT program was necessary to redress private discrimination in federally assisted highway contracting. When a state implements the U.S. DOT's DBE program, the state does not have to satisfy independently the compelling interest required for having a DBE program. However, the application of a *national* program has to be limited to those parts of the country where race- or gender-based measures are demonstrably needed. Part B. 9 discusses relevant cases when there is a constitutional challenge to a DBE program, as well as cases on affirmative action in employment and university admission policies.

C. LAWS PROHIBITING DISCRIMINATION IN TRANSPORTATION PROJECTS

1. Introduction

Subsection C discusses laws that prohibit discrimination in the planning and location of transportation projects. C. 2. analyzes the constitutional and statutory framework, beginning with C. 2.a on Title VI, § 601 of the Civil Rights Act of 1964 and relevant cases the subsection analyzes. C. 2.b. to d. analyze, respectively the disparate impact regulations and the effect of Title VI, § 602 and FHWA guidance on §§ 601 and 602.

As explained in C. 2., an affected individual has no right to bring a private action based on a violation of the disparate im-

[873] *Id.* at 2207, 195 L. Ed.2d at 519-20 (citation omitted).

[874] *Id.* at 2207, 195 L. Ed.2d at 520 (citation omitted).

[875] *Id.* at 2208, 195 L. Ed.2d at 521.

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

[877] *Id.* at 2210, 195 L. Ed.2d at 523 (citations omitted).

[878] *Id.* at 2211, 195 L. Ed.2d at 524.

[879] *Id.* at 2211, 195 L. Ed.2d at 525.

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

[881] *Id.* at 2212, 195 L. Ed.2d at 526 (citations omitted) (some internal quotation marks omitted).

[882] *Id.*

[883] *Id.* at 2214, 195 L. Ed.2d at 528.

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

pact regulations. C. 4. however, explains administrative enforcement remedies and procedures that are available.

2. Constitutional and Statutory Framework

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

Civil rights issues arise when public transportation officials plan highways and related projects that allegedly discriminate against affected minority or ethnic groups. 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."[885]

The Supreme Court has interpreted § 601 as proscribing only "intentional" discrimination.[886] In *Alexander v. Sandoval,*[887] the Supreme Court held, first, that "private individuals may sue to enforce § 601 of Title VI and obtain both injunctive relief and damages,"[888] and, second, that "it is similarly beyond dispute—and no party disagrees—that § 601 prohibits only intentional discrimination."[889] In *South Camden Citizens in Action v. New Jersey Department of Environmental Protection,*[890] a federal district court in New Jersey stated that "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."[891]

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 invidious 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.*[892]

In an earlier case, *Alexander v. Choate*,[893] involving § 504 of the Rehabilitation Act of 1973, as amended,[894] 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 have a disparate impact on individuals with disabilities. Section 504 of the Rehabilitation Act states 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."[895] Although the reduction had more impact on individuals with disabilities, the Court agreed with the state of Tennessee that § 504 reaches only purposeful discrimination.

In *Choate*, the Court noted that in *Guardians Association v. Civil Service Commission of New York City,*[896] the Court had

> 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.*[897]

On the one hand, the Court in *Choate* stated that in cases of discrimination against individuals with disabilities, discrimination is usually the result "not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect."[898] On the other hand, the *Choate* Court, noting that courts of appeals had held that under some circumstances § 504 reaches disparate impact, stated that the Court "assume[d] without deciding that § 504 reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped."[899] The Court, however, rejected the respondents' disparate impact claims, observing that the Court had held in *Southeastern Community College v. Davis*[900] "that § 504 does not impose an 'affirmative-action obligation on all recipients of federal funds.'"[901]

More recently, in *Foster v. Michigan*,[902] decided by the Sixth Circuit in 2014, Bellandra Foster (Foster) and her company BBF

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[885] 42 U.S.C. § 2000d (2018).

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

[887] 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed.2d 517 (2001).

[888] *Id.* at 279, 121 S. Ct. at 1516, 149 L. Ed.2d at 524 (citation omitted).

[889] *Id.* at 280, 121 S. Ct. at 1516, 149 L. Ed.2d at 524 (citation omitted).

[890] 254 F. Supp.2d 486 (D. N.J. 2003).

[891] *Id.* at 495.

[892] 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), http://scholarship.law.upenn.edu/jcl/vol7/iss2/6/ (last accessed on Jan. 7, 2019).

[893] 469 U.S. 287, 105 S. Ct. 712, 83 L. Ed.2d 661 (1985).

[894] Pub. L. No. 93-112, 87 Stat. 355, 394 (codified at 29 U.S.C. § 794).

[895] *Choate*, 469 U.S. at 290, S. Ct. at 714, 83 L. Ed.2d at 665.

[896] 463 U.S. 582, 103 S. Ct. 3221, 77 L. Ed.2d 866 (1983).

[897] *Choate*, 469 U.S. at 292-3, 105 S. Ct. at 716, 83 L. Ed.2d at 666-7 (emphasis supplied).

[898] *Id.* at 295, 105 S. Ct. at 717, 83 L. Ed.2d at 668.

[899] *Id.* at 299, 105 S. Ct. at 719, 83 L. Ed.2d at 671.

[900] 442 U.S. 397, 99 S. Ct. 2361, 60 L. Ed.2d 980 (1979).

[901] *Choate*, 469 U.S. at 300 n.20, 105 S. Ct. at 720 n.20, 83 L. Ed.2d at 671 n.20 (citation omitted).

[902] 573 Fed. Appx. 377 (6th Cir. 2014). *See also*, Southeastern Pennsylvania Transportation Authority v. Gilead Sciences, Inc., 102 F. Supp.3d 688, 701-02 (E.D. Pa. 2015) (dismissing plaintiff's discrimina-

Engineering Services, PC (BBF) brought Title VI and § 1983 claims against the Michigan Department of Transportation (MDOT); Rick Snyder, in his official capacity as the Governor of Michigan; Kirk T. Steudle, in his official capacity as the Director of MDOT; and two former employees of the Michigan MDOT, Victor Judnic (Judnic) and Mark Stuecher (Stuecher). The plaintiffs/appellants alleged that the MDOT employees discriminated against Foster, who is black, and against BBF and retaliated against Foster when she reported their discrimination. Although BBF was certified as a DBE, the case did not concern a federal or state DBE program or its implementation.

In 2010 and 2011, BBF filed complaints with the FHWA in which BBF claimed that MDOT's administration and contract procedures were discriminatory and retaliatory. After an investigation, in October 2011, the FHWA sent MDOT a "Report of Inquiry." The report stated, in part, that "the preponderance of the evidence showed that an MDOT employee willfully removed BBF … from the top place of a consulting construction award so that Ms. Foster's firm would not be considered" and that an MDOT employee acted to cut her service contract in half.[903]

Less than a month after the FHWA report, Foster and BBF brought an action in a federal district court in Michigan. The plaintiffs alleged that Judnic, Stuecher, the state of Michigan, and the MDOT discriminated and retaliated against them in violation of Title VI, 42 U.S.C. § 2000d, and 42 U.S.C. §§ 1981 and 1983, as well as violated Michigan's Whistleblower Protection Act, Mich. Comp. Laws § 15.362. The Sixth Circuit affirmed the district court's dismissal of the action on the defendants' motions to dismiss and later for summary judgment.

On the appellants' Title VI claims, the Sixth Circuit, following precedents in other federal courts of appeals, held that "[a]s a matter of plain language, Title VI does address discrimination on the basis of sex or gender."[904] On the appellants' Title VI claim for race-based discrimination, the court held that the appellants did not plead "any plausible claims of intentional discrimination" under Title VI for race-based discrimination.[905] Furthermore, "[e]ven if Appellants had managed to articulate a plausible claim based on the actions of Judnic or Stueche," Foster and BBF "likely would not be able to establish Title VI liability for MDOT or the State of Michigan under a theory of respondeat superior."[906]

As for the appellants' claims under Title VI for retaliation, first, the district court had found that it was "implausible that Appellants' filing [of] Title VI complaints was causally related to BBF's struggling to secure contracts given that BBF's difficulties preceded its complaints by several years…."[907] Second, the appellants had not alleged any retaliatory action after the date of their complaint to the FHWA.[908] Third, the appellants' official-capacity claims against Judnic and Stuecher were "superfluous,"[909] because the appellants could "only assert Title VI claims against 'the entity … receiving the financial assistance.'"[910] The appellants failed to raise a genuine issue of material fact showing that any of the appellees intentionally discriminated against them on the basis on race or gender.[911]

As stated in *Foster,* § 1983 is the exclusive remedy for constitutional violations.[912] The Equal Protection Clause of the Fourteenth Amendment "'prohibits discrimination by government which either burdens a fundamental right, targets a suspect class, or intentionally treats one differently than others similarly situated without any rational basis for the difference.'"[913] However, the Eleventh Amendment "bars suits against states and state agencies unless a state has waived its immunity or consented to being sued in federal court."[914] As will be discussed in part D. 3.a of this report, neither the state nor MDOT was subject to suit under § 1983, because neither is a "person" under § 1983.[915]

The court also held that the § 1983 claim against the individuals failed regardless of whether the evidence was direct or circumstantial. Foster and BBF did not identify any contracts that were not awarded to them because of an evaluation conducted for a contract or because of Judnic's conduct generally.[916] As for the § 1983 claim against Stuecher, "[a] *prima facie* case of discrimination requires a plaintiff to show that she was treated differently than others outside of the protected class."[917] However, the appellants failed to show that the comparators they identified were similarly situated in terms of experience, qualifications, or size.[918]

b. Disparate Impact Regulations Under Title VI, § 602

Title VI, § 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

tion claim under Title VI, because the plaintiff did not sufficiently plead that the defendant discriminated on the basis of disability or race, and because "[p]rivate rights of action under Title VI itself are available only for allegations of intentional discrimination and not disparate impact").

[903] *Foster*, 573 Fed. Appx. at 384.

[904] *Id.* at 387.

[905] *Id.* at 388.

[906] *Id.* at 389.

[907] *Id.*

[908] *Id.*

[909] *Id.* at 390.

[910] *Id.* at 389-90 (citations omitted).

[911] *Id.* at 390-1.

[912] *Id.* at 391. *See also*, Southeastern Pennsylvania Transportation Authority v. Gilead Sciences, Inc., 102 F. Supp.3d 688, 701-2 (E.D. Pa. 2015) (dismissing plaintiff's discrimination claim under Title VI, because the plaintiff did not sufficiently plead that the defendant discriminated on the basis of disability or race, and because "[p]rivate rights of action under Title VI itself are available only for allegations of intentional discrimination and not disparate impact").

[913] *Foster*, 573 Fed. Appx. at 391 (citation omitted).

[914] *Id.* (citing Will v. Michigan Department of State Police, 491 U.S. 58, 67, 71, 109 S. Ct. 2304, 2312, 105 L. Ed.2d 45, 58 (1989).

[915] *Id.* at 391.

[916] *Id.* at 395.

[917] *Id.* at 396 (citation omitted).

[918] *Id.* at 397.

> 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.[919]

Under Title VI of the Civil Rights Act of 1964,[920] as well as Title VII of the Civil Rights Act of 1968[921] and other statutes and regulations, the U.S. DOT promulgated rules to effectuate Title VI[922] and provided guidelines for FHWA's Title VI compliance program relative to the federal-aid highway program.[923]

The regulations issued pursuant to § 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."[924] As discussed further in this report, the Supreme Court has held that no private right of action exists to enforce the disparate impact regulations and policies.[925] Nonetheless, transportation officials need to be aware of civil rights laws or regulations that are implicated by their decisions on projects and planning.

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…."[926] 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 for proposed highway projects.[927] 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.[928]

Section 21.1 of Title 49 of the C.F.R. states that its purpose "is to effectuate the provisions of title VI of the Civil Rights Act of 1964 … [so] 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."[929] To accomplish the foregoing, 23 C.F.R. part 200 establishes a Title VI compliance program and review procedure.

The 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. The 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.[930]

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.[931]

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

c. Requirements Under Executive Order 12898 (1994)

As seen, 42 U.S.C. § 2000d-1 may operate as a sword against intentional discrimination but not against disproportionate or adverse impact.[932]

On February 11, 1994, President William Jefferson Clinton issued Executive Order 12898 entitled *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*.[933] 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."[934] The Order created an interagency working group, which includes

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[919] Pub. L. No. 88-352, title VI. § 602, 78 Stat. 241 (1964) (codified at 42 U.S.C. § 2000d-1).

[920] 42 U.S.C. §§ 2000d – 2000d-4 (2018).

[921] 42 U.S.C. §§ 2000e – 2000h-6.

[922] 49 C.F.R. part 21 (2018).

[923] 23 C.F.R. § 200.1-200.11 (2018). Title VI requirements for 23 U.S.C. § 402 are covered under a joint FHWA/NHTSA agreement. *See* 23 C.F.R. § 200.3 (2018). 23 C.F.R. part 200 seeks additionally to ensure compliance with 49 C.F.R. part 21 and related statutes and regulations. *See* 23 C.F.R. § 200.7 (2018). In addition, the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Pub. L. No. 91-646, 84 Stat. 1894 (codified at 42 U.S. §§ 4601-4655) "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) (2018).

[924] *See*, *Complaints Investigations Reference Notebook for Civil Rights Personnel, U.S. Department of Transportation, training manual,* https://www.fhwa.dot.gov/download/module3.pdf (last accessed on Jan. 7, 2019).

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

[926] 23 U.S.C. § 109(h) (2018).

[927] 23 C.F.R. § 200.9(a) (2018).

[928] 23 C.F.R. § 200.9(b)(1) (2018).

[929] 49 C.F.R. § 21.1 (2018) (quoting 42 U.S.C. § 2000d (Title VI)).

[930] 49 C.F.R. § 21.5(b)(2) (2018).

[931] 49 C.F.R. § 21.5(b)(3) (2018).

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

[933] Exec. Order No. 12898, 59 Fed. Reg. 7629 (Feb. 11, 1994).

[934] *Id.* § 1-101.

the head of the U.S. DOT.[935] The Order, moreover, required each federal 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.[936]

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 agency-reflection internally that is reviewed by other agencies and the Environmental Protection Agency.[937] The Order does not create a private right of action and is intended solely to improve the internal management of the executive branch.[938]

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.[939]

It appears both that Executive Order 12898 is still in effect and that there have been no additional Executive Orders on environmental justice and the protection of minority and low-income populations.

d. DOT and FHWA Guidance on Title VI, §§ 601 and 602

A U.S. DOT order states that 49 C.F.R. § 21.7(a) requires that all applications for federal financial assistance from the Department must contain Title VI assurances.[940] Each operating administration must secure from applicants for and recipients of federal financial assistance the "Standard DOT Title VI Assurances" attached to the Department's order. The order advises that the "reverter clause" in Appendices B and C should be used only when it is determined that such a clause is necessary to make clear the purposes of Title VI. The assurances may be supplemented by additional paragraphs by the Secretary of the U.S. DOT and by operating administrations that want to expand the assurances to make them more fully applicable to a particular program. Finally, all changes or expansions must be coordinated with the Department's Office of Civil Rights.

The FHWA has provided guidance on Title VI in the agency's publication entitled *Title VI Nondiscrimination in the Federal-Aid Highway Program*.[941]

3. No Private Right of Action Under Disparate Impact Regulations

Although the Supreme Court on several occasions has addressed the scope of Title VI,[942] the Court did not decide until 2001 whether there was a private right of action under Title VI to enforce the disparate impact regulations promulgated under Title VI.[943] There is no private right of action.

In *Alexander v. Sandoval,*[944] the issue was "whether private individuals may sue to enforce disparate impact regulations promulgated under Title VI of the Civil Rights Act of 1964." The plaintiff claimed that Alabama's English-only driver's license examination violated the 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...."[945] 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."[946]

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[935] *Id.* § 1-102.

[936] *Id.* § 1-103.

[937] *Id.* § 1-102.

[938] *Id.* § 6-609.

[939] *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").

[940] U.S. Department of Transportation, Office of the Secretary of Transportation, *DOT Standard Title VI Assurances and Non-Discrimination Provisions*, DOT 1050.2A, https://www.faa.gov/about/office_org/headquarters_offices/acr/com_civ_support/non_disc_pr/media/dot_order_1050_2A_standard_dot_title_vi_assurances.pdf (last accessed on Jan. 7, 2019).

[941] U.S. Department of Transportation, Federal Highway Administration, Desk Reference, FHWA Notice 4720.6, *Title VI Nondiscrimination in the Federal-Aid Highway Program* (undated), https://ftp.dot.state.tx.us/pub/txdot-info/env/toolkit/710-04-gui.pdf (last accessed on Jan. 7, 2019). *See also*, F*HWA Procedures Manual for Processing External Complaints of Discrimination*, (2018), https://www.fhwa.dot.gov/civilrights/programs/finalcomplaintmanual110410.cfm#sec1

[942] *See* Alexander v. Choate, 469 U.S. 287, 293, 105 S. Ct. 712, 716 83 L. Ed.2d 661, 667 (1985); Guardians Ass'n v. Civil Serv. Comm., 463 U.S. 582, 103 S. Ct. 3221, 77 L. Ed.2d 866 (1983); Cannon v. University of Chicago,441 U.S. 677, 99 S. Ct. 1946, 60 L. Ed.2d 560 (1979); and Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed.2d 750 (1978).

[943] *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), [hereinafter Lambert]; 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. Envt' L. J. 321 (1998).

[944] 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed.2d 517 (2001).

[945] *Id.* at 278, 121 S. Ct. at 1515, 149 L. Ed.2d at 523.

[946] *Id.* at 279, 121 S. Ct. at 1515, 149 L. Ed.2d at 523.

First, the Court held "that § 601 prohibits only intentional discrimination."[947] 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."[948] Declaring that such a right must come, if at all, from the independent force of § 602, the Court stated that "we assume for purposes of this decision that § 602 confers the authority to promulgate disparate-impact regulations" but held that the section does not confer a private right to enforce the regulations.[949]

It may be noted that in 1987 Justice O'Connor, on behalf of four Justices in *Wright v. City of Roanoke Redevelopment and Housing Authority*,[950] had stated that the question of "whether administrative regulations alone could create such a right" is "a troubling issue."[951]

The *Sandoval* Court held in 2001 that Congress, as opposed to executive branch-agencies, must create private rights of action to enforce federal law.[952] 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."[953]

The Court pointed out that § 602 authorizes agencies to enforce the regulations by terminating funding or "'by any other means authorized by law.…'"[954] In any case, 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;[955] "[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."[956]

The Supreme Court has taken the *Sandoval* approach to other federal regulations. In 2002, in *Gonzaga University v. Doe,*[957] a case involving the improper or unauthorized release of personal information under the Family Educational Rights and Privacy Act of 1974 (FERPA),[958] the Court held that "the relevant provisions of FERPA create no personal rights to enforce under 42 U.S.C. § 1983."[959] Under FERPA, federal funds for a university "may be terminated only if the Secretary determines that a recipient institution 'is failing to comply substantially with any requirement of [FERPA]….'"[960] According to the Court, 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."[961] The Court said it had "never" held "that spending legislation drafted in terms resembling those of FERPA can confer enforceable rights."[962]

Continuing, the Court stated emphatically that it "reject[ed] the notion that our cases permit anything short of an unambiguously conferred right to support a cause of action brought under § 1983."[963] The statute, not the regulations, must have "rights-creating language" before a claim may be pursued under § 1983, which "'by itself does not protect anyone against anything.'"[964] The Court emphasized that Congress authorized the Secretary of Education to handle violations of FERPA.[965]

Cases decided by federal courts of appeals follow the *Sandoval* and *Gonzaga* decisions. In *South Camden Citizens in Action v. N.J. Dep't of Envtl. Prot.*,[966] 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."[967] The court rejected the Sixth Circuit's contrary view in *Loschiavo v. City of Dearborn*[968] and held that "the EPA's disparate impact regulations cannot create a federal right enforceable through section 1983."[969]

In 2003, in *Save Our Valley v. Sound Transit*,[970] the plaintiff Save Our Valley (SOV), a community advocacy group, challenged the defendant Regional Transit Authority's plan to build

[947] *Id.* at 280, 121 S. Ct. at 1516, 149 L. Ed.2d at 524 (citing *Bakke*, 438 U.S. 265, 98 S. Ct. 2733, 57 L. Ed.2d 750 (1978); Guardians Ass'n v. Civil Serv. Comm., 463 U.S. 582, 103 S. Ct. 3221, 77 L. Ed.2d 866 (1983); and Alexander v. Choate, 469 U.S. 287, 293, 105 S. Ct. 712, 716 83 L. Ed.2d 661, 667 (1985)).

[948] *Sandoval*, 532 U.S. at 285-6, 121 S. Ct. at 1519, 149 L. Ed.2d at 528 (citation omitted).

[949] *Id.* at 286, 121 S. Ct. at 1519, 149 L. Ed.2d at 528.

[950] 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) (*superseded by statute* as stated in McDowell v. Philadelphia Housing Authority, 423 F.3d 233 (3rd Cir. 2005)).

[951] *Id.* at 437, 107 S. Ct. at 777-78, 93 L. Ed.2d at 797.

[952] *Sandoval*, 532 U.S.at 289, 121 S. Ct. at 1521, 149 L. Ed.2d at 530.

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

[954] *Id.*

[955] *Id.*

[956] *Id.* at 293, 121 S. Ct. at 1523, 149 L. Ed.2d at 532.

[957] 536 U.S. 273, 122 S. Ct. 2268, 153 L. Ed.2d 309 (2002).

[958] 20 U.S.C. § 1232(g).

[959] *Gonzaga Univ.*, 536 U.S. at 276, 122 S. Ct. at 2271, 153 L. Ed.2d at 316.

[960] Id at 279, 122 S. Ct. at 2273, 153 L. Ed.2d at 318 (quoting 20 U.S.C. §§ 1234c(a) and 1232g(f)).

[961] *Id.*

[962] *Id.*

[963] *Id.* at 283, 122 S. Ct. at 2275, 153 L. Ed.2d at 321.

[964] *Id.* at 285, 122 S. Ct. at 2276, 153 L. Ed.2d at 322 (quoting Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 617, 99 S. Ct. 1905, 1916, 60 L. Ed.2d 508, 523 (1979)).

[965] *Id.* at 289, 122 S. Ct. at 2278, 153 L. Ed.2d at 325.

[966] 274 F.3d 771 (2001).

[967] *Id.* at 790.

[968] 33 F.3d 548 (6th Cir. 1994).

[969] *South Camden Citizens in Action*, 274 F.3d at 788.

[970] 335 F.3d 932 (9th Cir. 2003).

a light-rail line through the community. SOV argued that the project would "cause disproportionate adverse impacts to minority residents."[971] 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...."[972] The court, however, held that the department's disparate impact regulations go further than the statute they implement by "proscribing activities that have disparate effects on racial groups, even though such activities are permissible under § 601."[973]

The Ninth Circuit held that violations of rights, not violations of laws, give 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 is whether Congress intended to create the particular federal right sought to be enforced.

> 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…." [974]

> The Third, Fourth, and Eleventh Circuits have held that an agency regulation cannot create an individual federal right enforceable through § 1983....[975]

> 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.[976]

In addition, the Ninth Circuit 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."[977] 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 seeks to enforce, the right to be free from racially discriminating effects."[978]

Section 1983 does not itself create any substantive rights but provides a civil remedy for the deprivation of constitutional or statutory rights. Admittedly, "[t]here is virtually no limit on the types of causes of action section 1983 will allow."[979] However, to seek such relief, "a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law*."[980] 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."[981] Finally, the Supreme Court held in *Seminole Tribe of Florida v. Florida*[982] that no relief under § 1983 was available under the *Ex parte Young* doctrine when "Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right...."[983]

In sum, as a federal district court in Pennsylvania stated in 2015 in *SEPTA v. Gilead Sciences, Inc.*,[984] "private rights of action under Title VI are available only for acts of intentional discrimination, not for disparate impact."[985] A Title VI action has to show intentional discrimination based on evidence demonstrating either "discriminatory animus or deliberate indifference."[986] For discriminatory animus, a plaintiff must establish "prejudice, spite, or ill will."[987] For deliberate indifference, "a plaintiff must show that a defendant (1) knew that a harm to a federally protected right was substantially likely and (2) failed to act."[988]

4. Administrative Enforcement Procedures

The regulations in 49 C.F.R. part 21 list the types of discrimination prohibited by any recipient through any program for which federal financial assistance is provided by the U.S. DOT.[989] 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.[990] The Secretary of Transportation must seek the cooperation of a recipient and provide

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[971] *Id.* at 934.

[972] *Id.* at 935.

[973] *Id.* at 948 n.2.

[974] *Id.* at 936.

[975] *Id.*

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

[977] *Id.* at 944.

[978] *Id.*

[979] Rossiter v. Benoit, 88 Cal. App.3d 706, 715, 152 Cal. Rptr. 65, 70 (1979) (claimant sued for mental distress for an arrest for public drunkenness).

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

[981] Lambert, *supra* note 943, at 1246 (2000).

[982] 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed.2d 252 (1996).

[983] *Id.* at 74, 116 S. Ct. at 1132, 134 L. Ed.2d at 278. Moreover, "[e]ven before *Seminole*, it was clear that no § 1983 claim (based on a federal constitutional 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 and Elizabeth J. Norman, *Employment Discrimination Law and Practice* § 10.35, at 630 (2d ed. 2004) (citing Will v. Michigan Dep't of State Police, 491 U.S. 58, 71, 109 S. Ct. 2304, 2312, 105 L. Ed.2d 45 (1989)).

[984] 102 F. Supp.3d 688 (E.D. Pa. 2015) (suit by SEPTA and other plaintiffs against Gilead Sciences, Inc. (Gilead) alleging that Gilead's pricing scheme for the sale of its patented Hepatitis C drugs violated, *inter alia*, § 1557(a) of the Patient Protection and Affordable Care Act). *See also*, S.M. v. Delaware Department of Education, 77 F. Supp.3d 414, 421 (D. Del. 2015).

[985] *SEPTA*, 102 F. Supp.3d at 701.

[986] *Id.*

[987] *Id.*

[988] *Id.*

[989] 49 C.F.R. §§ 21.3 and 21.5 (2018).

[990] 49 C.F.R. § 21.7 (2018).

guidance to the recipient regarding the recipient's voluntary compliance with the regulations.[991]

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...."[992] Section 21.13 identifies the procedures that apply when the Department seeks to terminate financial assistance or refuses 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 for or a recipient of federal funds.[993]

Under Title VI and the regulations, the states must give certain assurances to the U.S. DOT. 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 ninety days[994] and to have an adequately staffed civil rights unit and designated coordinator.[995] 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.[996] After a meeting with the state no later than thirty days after receipt of the report, the state is allowed a reasonable time not to exceed ninety days for voluntary corrective action.[997] 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.[998] The foregoing actions are reviewed by the Secretary of the Department of Transportation for a final determination and appropriate action in accordance with Title 49 of the C.F.R.[999]

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.[1000]

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

The second way that the disparate impact policies are enforced is when a complaint alleging a violation of the policies is filed with the funding agency.[1001] The U.S. DOT's regulations provide that "[a]ny person who believes himself or any specific class of persons to be subjected to discrimination prohibited by this part may by himself or by a representative file with the Secretary [of the Department of Transportation] a written complaint."[1002] 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.[1003] If the investigation results in a finding of non-compliance, then the Secretary must inform the recipient of funds and attempt to resolve the matter informally.[1004] "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,"[1005] then the state's noncompliance may result in the cessation of federal financial assistance and a recommendation to the Department of Justice. The 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.[1006] Not only may there be a hearing,[1007] but also judicial review is permitted for action taken pursuant to Title VI, § 602.[1008]

5. Conclusion

This part of the report discusses disparate impact cases arising out of the location of highways and related projects. Section 601 of Title VI of the Civil Rights Act of 1964 proscribes only intentional discrimination. Although there is no private right of action to enforce the disparate impact regulations promul-

[991] 49 C.F.R. § 21.9 (2018).

[992] 49 C.F.R. § 21.13(b) (2018).

[993] 49 C.F.R. § 21.15(d) (2018).

[994] 23 C.F.R. §§ 200.9(a)(1-4) (2018).

[995] 23 C.F.R. §§ 200.9(b)(1-15) (2018).

[996] 23 C.F.R. § 200.11(a) (2018).

[997] 23 C.F.R. §§ 200.11(b-c) (2018).

[998] 23 C.F.R. §§ 200.11(e) and (f) (2018).

[999] 23 C.F.R. § 200.11(f) (2018).

[1000] U.S. Department of Transportation, *Complaints Investigations Reference Notebook for Civil Rights Personnel*, (undated), at 34-35 https://www.fhwa.dot.gov/download/module3.pdf (last accessed on Jan. 7, 2019).

[1001] 49 C.F.R. § 21.11(b) (2018). *See generally* U.S. DOT Order 1000.12, at V-1 – V-10 (Jan. 19, 1977).

[1002] 49 C.F.R. § 21.11(b) (2018).

[1003] 49 C.F.R. §§ 21.11(a-c) (2018).

[1004] 49 C.F.R. § 21.11(d) (2018).

[1005] 49 C.F.R. § 21.13(a) (2018).

[1006] 49 C.F.R. § 21.13(a) (2018).

[1007] 49 C.F.R. § 21.15 (2018).

[1008] 49 C.F.R. § 21.19 (2018); *see* Title VI, § 603, 42 U.S.C. § 2000d-2 (2018) (outlining judicial review available for actions taken pursuant to § 602).

gated under § 602 of Title VI, federal financial assistance may be refused if a recipient fails to comply with 49 C.F.R. § 21.7. If a funding agency violates Title VI, an affected person may file an administrative complaint.

D. CLAIMS UNDER 42 U.S.C. § 1983

1. Introduction

Subsection D, beginning with D. 2, discusses the constitutional and statutory authority for § 1983 actions based on the authority of Congress to enforce the Fourteenth Amendment to the United States Constitution. D. 2.a. and b. analyze who qualifies as a "person" and may be sued under § 1983 for a violation of the Constitution or laws of the United States. States and state agencies, including state transportation agencies, are not amenable to suit under § 1983 because of the Eleventh Amendment to the Constitution. D. 3.c. discusses when government officials may have absolute or qualified immunity to § 1983 actions.

D. 4.a. and b. analyze the term under "color of state law" and how the term embraces the misuse of power, such as when persons act outside the scope of their authority and discusses the limited circumstances when a private person may be subject to a § 1983 action. D. 3.c. discusses when § 1983 claims may be made for a denial of procedural or substantive due process. D. 4.d. and e. analyze when a public entity, otherwise amenable to a § 1983 action, may be sued for alleged wrongful conduct because of a state-created danger or deliberate indifference or for conduct that is in excess of authority or that constitutes gross negligence. D. 4.f. discusses whether a government supervisor may be held liable for the action of his or her subordinate on a *respondeat superior* theory.

D. 5 explains the necessity of an official policy or custom that violates the Constitution or the laws of the United States as a basis for municipal liability under § 1983.

D. 6. and 7. discuss remedies that are available under § 1983 and the recovery of attorney's fees by a prevailing party.

2. 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:

> Every 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....

The Fifth Circuit has explained that in spite of the "broad reach" of § 1983, the "Supreme Court 'has long recognized that the statute was not meant to effect a radical departure from ordinary tort law and the common-law immunities applicable in tort suits.'"[1009] Furthermore, "because Congress intended § 1983 to be understood in light of common law principles, 'the Court has looked to the common law for guidance in determining the scope of the immunities available in a § 1983 action.'"[1010] Although the common law is used to determine the scope of immunity available under § 1983, the "statute is not 'simply a federalized amalgamation of pre-existing common-law claims, an all-in-one federal claim encompassing the torts of assault, trespass, false arrest, defamation, malicious prosecution, and more.'"[1011] Rather, § 1983 is broader, because "it reaches constitutional and statutory violations that do not correspond to any previously known tort.' … 'But it is narrower in that it applies only to tortfeasors who act under color of state law.'"[1012]

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. As discussed in more detail in part D. 3.a.(1) of this report, states have sovereign immunity under the Eleventh Amendment; thus, the states and their agencies are not amenable to suit or liability under § 1983.[1013] For example, in *Hernandez v. Kiak*,[1014] a federal district court in Pennsylvania stated that "absent express consent by the state in question or a clear and unequivocal waiver by Congress, states are immune from suit in federal court."[1015] The Eleventh Amendment bars actions against departments or agencies of a state that do not exist apart from the state.[1016]

Likewise, state officials acting in their official capacity have immunity from § 1983 actions, but an individual state defendant may be subject to injunctive relief when sued in his or her official capacity.[1017] State officials may be sued for damages for

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[1009] Loupe v. O'Bannon, 824 F.3d 534, 537 (5th Cir. 2016) (quoting Rehberg v. Paulk, 566 U.S. 356, 132 S. Ct. 1497, 1502, 182 L. Ed.2d 593 (2012)).

[1010] *Id.* (citation omitted).

[1011] *Id.* (citation omitted).

[1012] *Id.* (citation omitted).

[1013] Coger v. Connecticut, 309 F. Supp.2d 274, 281 (D. Conn. 2004), *aff'd*, Coger v. State Dep't of Pub. Safety, 143 Fed. Appx. 372 (2d Cir. Conn. 2005); Cummings v. Vernon, No. 95-35460, 1996 U.S. App. LEXIS 11051, (9th Cir. 1996); and Fidtler v. Pa. Dep't of Corr., 55 Fed. Appx. 33 (3rd Cir. 2002).

[1014] No. 3:14-cv-2317, 2016 U.S. Dist. LEXIS 135376, at *14 (M.D. Pa. 2016) (citation omitted).

[1015] *Id.* at *18 (citations omitted).

[1016] *Id.* (citations omitted).

[1017] Little v. Hammond, No. 1:16-cv-107, 2016 U.S. Dist. LEXIS 174032, at 8-9 (W.D. Pa Dec. 16, 2016), *aff'd*, Little v. Hammond, 744 Fed. Appx. 748 (3rd Cir. 2018). *See* Will v. Mich. Department of State Police, 491 U.S. 58, 71 n.10, 109 S. Ct. 2304, 2312 n.10, 105 L. Ed.2d 45, 58 n.10 (1989) (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. 159, 167 n.14, 105 S. Ct. 3099, 3106 n.14, 87 L. Ed.2d 114, 122 n.14. and *Ex parte* Young, 209 U.S. 123, 159-60, 28 S. Ct. 441, 454 (1908)), *but see* National Private Truck Council v. Oklahoma Tax Comm'n, 515 U.S. 582, 588 n.5, 115 S. Ct. 2351, 2355 n.5, 132 L. Ed.2d 509, 517 n.5 (1995) (noting that injunctive or declaratory relief is not authorized under a § 1983 claim dealing with taxes when there is an adequate remedy at law).

constitutional or statutory violations only when they were acting in their individual capacity.[1018] Except in exceptional circumstances, discussed in part D. 4.b of this report, private citizens are not state actors and may not be held liable under § 1983.[1019]

Section 1983 is not itself a source of substantive rights but merely provides a method for vindicating federal rights conferred elsewhere.[1020] Section 1983 does not create a cause of action in and of itself.[1021] 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.[1022] Section 1983 provides a remedy for those who have been deprived of their "'rights, privileges, or immunities secured by the Constitution and laws' of the United States."[1023] Redress under § 1983 is available when an individual "assert[s] the violation of a federal *right*, not merely a violation of federal *law*.'"[1024]

The D.C. Circuit has stated that since the Supreme Court's decision in *Blessing v. Freestone,*[1025] there are three factors the courts consider when determining whether a federal statute gives rise to a federal right:

> [F]irst, "Congress must have intended that the provision in question benefit the plaintiff"; second, "the plaintiff must demonstrate that the right assertedly protected by the statute is not so vague and amorphous that its enforcement would strain judicial competence"; and third, "the statute must unambiguously impose a binding obligation on the States," or, "[i]n other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms."[1026]

According to the D.C. Circuit, however, "'very few statutes are held to confer rights enforceable under § 1983.'"[1027]

The D.C. Circuit's opinion also noted that in *Gonzaga University v. Doe,*[1028] the Supreme Court "'reject[ed] the notion that [its] cases permit anything short of an unambiguously conferred right to support a cause of action under § 1983,'" meaning that "'[f]or a statute to create such private rights, its text must be phrased in terms of the persons benefitted.'"[1029]

A § 1983 claimant must plead two essential elements: "(1) the conduct complained of was committed by a person acting under color of state law; and (2) the conduct deprived the plaintiff of a right, privilege, or immunity secured by the Constitution or laws of the United States."[1030] The term "[a]cting under color of state law requires that the defendant in a § 1983 action have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'"[1031]

As for disparate impact claims, Supreme Court precedents do not support a disparate impact claim under § 1983. Likewise, § 1981 claims, applicable to the protection of rights against impairment by nongovernmental discrimination and impairment under color of state law, also "require a showing of intent rather than disparate impact."[1032] As the Supreme Court stated in *Gratz v. Bollinger,*[1033] supra, "*purposeful discrimination* that violates the Equal Protection Clause of the Fourteenth Amendment will also violate § 1981."[1034]

A state official may not be held liable under § 1983 for the conduct of another person "solely on a theory of *respondeat superior.*"[1035] The imposition of liability in a civil rights action under § 1983 requires that a defendant was personally involved in the alleged wrongdoing.[1036]

Because the states have immunity to § 1983 actions, the principles discussed in this subsection C of this report are derived primarily from cases against municipal and local government agencies that are amenable to suit under § 1983.

[1018] 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, 941-2 (1997) (stating that a suit against a state official in his or her official capacity is a suit against the state); and 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). *See also*, *Little*, 2016 U.S. Dist. LEXIS 174032, (dismissing *pro se* plaintiff's claims under § 1983 against two defendants who were not state actors) and Hernandez v. Kiak, No. 3:14-CV-2317, 2016 U.S. Dist. LEXIS 135376, at *18 (M.D. Pa. Sept. 30, 2016).

[1019] *Little*, 2016 U.S. Dist. LEXIS 174032, at *10. *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).

[1020] Mosely v. Yaletsko, 275 F. Supp.2d 608, 612 (E.D. Pa. 2003) (stating that § 1983 itself does not create a cause of action but rather provides redress for violations of constitutional provisions and federal laws).

[1021] *See* McCann v. Borough of Magnolia, No. 14-170 (JBS/KMW), 2014 U.S. Dist. LEXIS 48040, (D.N.J. April 7, 2014) (stating that § 1983 is not a source of substantive rights and does not provide redress for common law torts and that a plaintiff must allege a violation of a federal right), *aff'd*, 581 Fed. Appx. 125 (3rd Cir. 2014).

[1022] Maine v. Thiboutot, 448 U.S. 1, 5, 100 S. Ct. 2502, 2503, 65 L. Ed.2d 555, 559 (1980).

[1023] Long v. District of Columbia Housing Authority, 166 F. Supp.3d 16, 28 (D. D.C. 2016) (citations omitted).

[1024] *Id.* (citations omitted) (emphasis in original).

[1025] 520 U.S. 329, 117 S. Ct. 1353, 137 L. Ed.2d 569 (1997).

[1026] *Long*, 166 F. Supp.3d at 29 (citation omitted).

[1027] *Id.* (citations omitted).

[1028] 536 U.S. 273, 122 S. Ct. 2268, 153 L. Ed.2d 309 (2002).

[1029] *Long*, 166 F. Supp.3d at 29 (citations omitted) (some internal quotations omitted).

[1030] Hernandez v. Kiak, No. 3:14-cv-2317, 2016 U.S. Dist. LEXIS 135376, at *18 (M.D. Pa. SEPT. 30, 2016 (citation omitted).

[1031] Vazquez v. Surillo-Ruiz, 76 F. Supp.3d 381, 390 (D. P.R. 2015) (citations omitted) (some internal quotation marks omitted).

[1032] Elaine W. Shoben, *Disparate Impact Theory in Employment Discrimination: What's Griggs Still Good For? What Not*?, 42 Brandeis L.J. 597, 603 n.43 (2004). *See* General Building Contractors Association v. Pa, 458 U.S. 375, 389-90, 102 S. Ct. 3141, 3150, 73 L. Ed.2d 835, 849 (1982) (holding that § 1981 may be violated only by purposeful discrimination).

[1033] 539 U.S. 244, 123 S. Ct. 2411, 156 L. Ed.2d 257 (2003).

[1034] *Id.* at 276 n.23, 123 S. Ct. at 2430 n.23, 156 L.Ed.2d at 285 n.23 (emphasis supplied).

[1035] Hernandez V. Kiak, No. 3:14-cv-2317, 2016 U.S. Dist. LEXIS 135376, at *19 (M.D. Pa. SEPT. 30, 2016 (citation omitted).

[1036] *Id.* at *18-9.

3. Meaning of the Term "Person" Under § 1983

a. "Person" under § 1983 and Sovereign Immunity

Although under § 1983 "every person" is potentially liable, a state or state agency is not a person under § 1983[1037] and may not be sued under § 1983 in a state or federal court.[1038] A state official sued in his or her official capacity is not a person subject to suit under § 1983,[1039] but a municipality is a person subject to a § 1983 action.[1040] There are some exceptions to a state's Eleventh Amendment immunity:[1041] a state may consent to suit in federal court,[1042] and a state may be sued when Congress enacts legislation pursuant to § 5 of the Fourteenth Amendment that unequivocally expresses the intent of Congress and that validly abrogates the states' Eleventh Amendment immunity.[1043] However, the enactment of § 1983 creating a cause of action for a deprivation of a person's civil rights under color of state law did not abrogate the states' sovereign immunity under the Eleventh Amendment to the United States Constitution.[1044] 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 Eleventh Amendment protects an un-consenting state and state agencies, but not municipalities, or other units of local government separate and apart from a state, from claims for damages brought by private parties in federal courts.[1045]

In *Alden v. Maine,*[1046] the Supreme Court held in a case involving the Fair Labor Standards Act[1047] that Congress did not have the power to subject a non-consenting state to private suits for damages in the state's own courts. In *Will v. Michigan Department of State Police,*[1048] the Supreme Court held that states do not come within the ambit of § 1983's possible defendants as states 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* [*v. Jordan*, 440 U.S. 332, 99 S. Ct. 1139, 59 L. Ed.2d 358 (1979)]. 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*.[1049]

(1) Immunity of State Transportation Departments to § 1983 Actions

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,[1050] a state transportation department is not subject to suit under § 1983.[1051] In *Manning v. South Carolina Dep't of Highway & Public Transp.,*[1052] the plaintiff alleged that the department and certain

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[1037] A state transportation department is not a person subject to suit under § 1983. Vickroy v. Wisconsin 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. Michigan Dep't of State Policy, 491 U.S. 58, 65-6, 109 S. Ct. 2304, 2309, 105 L. Ed.2d 45 (1989).

[1038] Nichols v. Danley, 266 F. Supp.2d 1310, 1313 (D. N.M. 2003).

[1039] Murphy v. Arkansas, 127 F.3d 750, 754 (8th Cir. 1997).

[1040] Monell v. New York City Dep't of Social Services, 436 U.S. 658, 688-90, 98 S. Ct. 2018, 2034-5, 56 L. Ed.2d 611, 634-5 (1978).

[1041] Beach v. Minnesota, No. 03-CV-862 (MJD/JGL), 2003 U.S. Dist. LEXIS 10856, at *8 (D. Minn. 2003) (citing Quern v. Jordan, 440 U.S. 332, 99 S. Ct. 1139, 59 L. Ed.2d 358 (1979)). *See also*, Williams v. State of Missouri, 973 F.2d 599, 600 (8th Cir. 1992).

[1042] *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) and Parden v. Terminal Railway, 377 U.S. 184, 84 S. Ct. 1207, 12 L. Ed.2d 233 (1964)).

[1043] *Id.* at *7 (citing Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 99, 104 S. Ct. 900, 907, 79 L. Ed.2d 67, 77-8 (1984) and Egerdahl v. Hibbing Community College, 72 F.3d 615, 619 (8th Cir. 1995)).

[1044] Quern v. Jordan, 440 U.S. 332, 345, 99 S. Ct. 1139, 1147, 59 L. Ed.2d 358, 369 (1979) and In re Secretary of Dep't of Crime Control and Pub. Safety, 7 F.3d 1140, 1145 (4th Cir. 1993).

[1045] *Quern*, 440 U.S. at 338, 99 S. Ct. at 1143-4, 59 L. Ed.2d at 365 ("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, 99 S. Ct. at 1149 n.1, 59 L. Ed.2d at 349 n.1) (citation omitted) (Brennan, J., concurring opinion).

[1046] 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." … 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., 527 U.S. at 712-3, 119 S. Ct. at 2246-7, 144 L. Ed.2d at 652 (emphasis supplied).

[1047] Pub. L. No. 78-718, 52 Stat. 1060, (codified at 29 U.S.C. § 201-219).

[1048] 491 U.S. 58, 109 S. Ct. 2304, 105 L. Ed.2d 45 (1989).

[1049] *Id.* at 66, 109 S. Ct. at 2309-10, 105 L. Ed.2d at 55 (emphasis supplied).

[1050] *See* part D. 3.b of this report.

[1051] Vickroy v. Wis. DOT, 73 Fed. Appx. 172 (7th Cir. 2003).

[1052] 914 F.2d 44 (4th Cir. 1990).

of its officials violated the plaintiff's constitutional rights of due process in the course of the department's condemnation of the plaintiff's property.[1053] The court held that neither the department nor its officials acting in their official capacities are persons amenable to suit under § 1983.[1054]

In *Vickroy v. Wis. DOT,*[1055] 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."[1056] The court, although also stating 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. As held in *Toledo, P. & W. R. Co. v. Illinois, Dep't of Transp.*,[1057] such an action lacks federal jurisdiction.

The courts have dismissed § 1983 actions in other kinds of cases against transportation departments and their officials because of the states' immunity under the Eleventh Amendment. In *Gregory v. S.C. DOT,*[1058] the plaintiff and property owner alleged "that the state defendants targeted him and his neighborhood for a systematic undervaluation appraisal because of his race"[1059] when they brought an eminent domain proceeding to acquire property for a bridge project. The court held that the Eleventh Amendment barred the claim.

> 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.[1060]

The court held that "a general jurisdictional grant does not suffice to show [that] Congress abrogated a state's Eleventh Amendment rights…."[1061]

In 2015, in *Caperton v. Va. Dep't of Transp.*,[1062] the plaintiffs alleged that VDOT and two VDOT employees, Heltzel and Babb, violated § 1983 by depriving them of their ability to participate in the procurement process "'in derogation [of] the rights and process'"[1063] in the Virginia Public Procurement Act (VPPA). The court held that the Eleventh Amendment barred the § 1983 claims against VDOT. Although the plaintiffs did not dispute the fact that VDOT is a state agency, they asserted that "their allegations against VDOT are sufficient to invoke the exception to Eleventh Amendment immunity first recognized in *Ex parte Young*, … which 'permits a federal court to issue prospective, injunctive relief against a state officer to prevent ongoing violations of federal law'"[1064] on the basis that the action is not one against the state for purposes of the Eleventh Amendment. The court, held, however, that the exception "applies only to claims against state officials. The Supreme Court has made clear that it 'has no application in suits against the States and their agencies, which are barred regardless of the relief sought.'"[1065]

In 2016, in another case, *Voigt v. Hamm*,[1066] a federal district court in North Dakota held that states and their agencies are not persons within the meaning of § 1983 and are, therefore, immune under the Eleventh Amendment from claims for damages in a § 1983 case. When state officials or employees are sued in their official capacity, the claims against them are treated as claims against the state. Indeed, the Eighth Circuit has instructed that, when a complaint does not specify whether the plaintiff is suing an individual state defendant in his or her official or individual capacity, the complaint is to be interpreted as one alleging only official-capacity claims.[1067]

In sum, the states and government entities that are considered to be an arm of the state are not persons subject to § 1983.[1068] Section 1983 actions for damages against state officers in their official capacity are synonymous with damage claims against the states.[1069]

(2) Liability of Municipalities Under § 1983

Because municipalities are not states, sovereign immunity under the Eleventh Amendment is not available to municipalities.[1070] Critical to a § 1983 claim against a municipality is that "a plaintiff must identify (a) a policy maker, (b) an official policy

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[1053] *Id.* at 46-47.

[1054] *Id.* at 46-48.

[1055] 73 Fed. Appx. 172, 173 (2003), *cert. denied*, Vickroy v. Wis. Dep't of Transp., 540 U.S. 1107, 124 S. Ct. 1061, 157 L. Ed.2d 892 (2004).

[1056] *Id.* at 173-74.

[1057] 744 F.2d 1296, 1297 (7th Cir. 1984) (dismissing the action against the Department for the reason that "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").

[1058] 289 F. Supp.2d 721 (2003), *aff'd*, Gregory v. S.C. DOT, 114 Fed. Appx. 87 (4th Cir. S.C.2004).

[1059] *Id.* at 723.

[1060] *Id.* at 724 (citations omitted).

[1061] *Id.* at 725 (citing Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 111 S. Ct. 2578, 115 L. Ed.2d 686 (1991)).

[1062] No. 3:15 CV 00036, 2015 U.S. Dist. LEXIS 145926 (W.D. Va. Oct. 28, 2015).

[1063] *Id.* at *6 (citation omitted).

[1064] *Id.* at *9 (citations omitted).

[1065] *Id.* (citation omitted).

[1066] No. 1:16-cv-155, 2016 U.S. Dist. LEXIS 93086 (D. N.D. June 24, 2016) (*adopted by, dismissed by, dismissed without prejudice by, in part, motion denied by, objection overruled*, No. 1:16-cv-155, 2016 U.S. Dist. LEXIS 93084 (D. N.D., July 18, 2016)).

[1067] *Id.* at *4 (citations omitted).

[1068] Paulson v. Carter, No. CV-04-1501-HU, 2005 U.S. Dist. LEXIS 10724, at *15 (D. Or. Jan. 6, 2005).

[1069] *Id.* (holding that the Oregon State Bar and its officials acting in their official capacity were not persons within the meaning of § 1983).

[1070] Vazquez v. Surillo-Ruiz, 76 F. Supp.3d 381, 390 (D. P.R. 2015) (citation omitted).

[or custom or widespread practice], and (c) a violation of constitutional rights whose 'moving force' is the policy or custom."[1071] The term official policy for purposes of § 1983 actions means "'[a] policy statement, ordinance, regulation or decision that is officially adopted and promulgated by the municipality's lawmaking officials or by an official to whom the lawmakers have delegated policy-making authority.'"[1072] As stated in *Brown v. United States Postal Inspection Serv.*,[1073] "[t]he official policy must either be unconstitutional or have been adopted 'with deliberate indifference to the known or obvious fact that such constitutional violations would result.'"[1074]

As discussed in subsection C of the report, a policy may be a custom or widespread practice followed by city officials or employees, such that the custom or practice is so common and well-settled that it constitutes a municipal policy.[1075] A municipality's governing body or the responsible official with policymaking authority on behalf of the municipality must have actual or constructive knowledge of the custom or practice.[1076] Ratification of a custom or practice may occur when an authorized policymaker affirms that an employee was following official policy.[1077] Finally, it is a question of law "whether a governmental decision maker has final policymaking authority…."[1078]

A municipality may not be held liable for the acts of its agents on the basis of *respondeat superior*. Liability may be imposed on a municipality only when the "'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.'"[1079]

b. "Person" 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 persons.[1080] A state's sovereign immunity protects 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.'"[1081] When claims are made against defendants in their individual or non-official capacities, the defendants are considered to be persons under § 1983, but their conduct must be connected in some way to a unit of government that is separate from the state to satisfy the state-action requirement.[1082]

State employees sued in their individual capacities may be held liable for damages under § 1983 even when their conduct is related to their official duties.[1083] A defendant's personal involvement is a prerequisite to liability under § 1983, because there is no *respondeat superior* liability under § 1983.[1084] A complaint must allege facts showing that an individual defendant was "personally involved" before a suit may proceed against the individual.[1085]

A private person may be a defendant if he or she has acted in conjunction with a governmental entity.[1086] In *Flores v. Long,*[1087] the plaintiff alleged that officers in the state's public safety department had violated the plaintiff's constitutional rights under the First, Fourth, and Fourteenth Amendments. A federal district court in New Mexico held: "[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."[1088] Under some circumstances a government officer otherwise amenable to suit under § 1983, if his or her conduct did not violate clearly established constitutional rights about which a reasonable official would have known, may be shielded from liability by the doctrine of qualified immunity as explained in part D.3.c o this report

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

(1) Absolute Immunity

There are two types of immunity—absolute and qualified—that may be available under the common law of governmental liability to public officials in § 1983 actions. Absolute immunity is accorded to public officials when a § 1983 claim is judicial, legislative, or prosecutorial in nature.[1089] For example, it is well-settled that judicial officers are entitled to absolute immunity for "'actions taken … within the legitimate scope of judicial

[1071] Brown v. U.S. Postal Inspection Serv., 206 F. Supp.3d 1234, 1245 (S.D. Tex. 2016) (citation omitted).

[1072] *Id.* (citations omitted) (some internal quotation marks omitted).

[1073] 206 F. Supp.3d 1234, 1246 (S.D. Tex. 2016) (citations omitted).

[1074] *Id.* at 1246.

[1075] *Id.*

[1076] *Id.*

[1077] *Id.*

[1078] *Id.* (citation omitted).

[1079] Vazquez v. Surillo-Ruiz, 76 F. Supp.3d 381, 390 (D.P.R. 2015) (citation omitted).

[1080] Johnson v. Bd. of County Comm'rs for County of Fremont, 85 F.3d 489 (10th Cir. 1996).

[1081] Gregory v. S.C. DOT, 289 F. Supp.2d 721, 725 (S.C.D. 2003) (quoting Huang v. Bd. of Governors of Univ. of North Carolina, 902 F.2d 1134, 1138 (4th Cir. 1990)).

[1082] Paulson v. Carter, No. CV-04-1501-HU, 2005 U.S. Dist. LEXIS 10724, at *16 D. Or. Jan. 6, 2005).

[1083] McCoy v. Goord, 255 F. Supp.2d 233, 245 (S.D. N.Y. 2003).

[1084] Voigt v. Hamm, No. 1:16-cv-155, 2016 U.S. Dist. LEXIS 93086, at *5 (N.D. June 24, 2016) (citations omitted), *adopted by, dismissed by, dismissed without prejudice by, in part, motion denied by, objection overruled by,* Voigt v. Hamm, No. 1:16-cv-155, 2016 U.S. Dist. LEXIS 93084 (D.N.D., July 18, 2016).

[1085] *Id.* at *5 (citation omitted).

[1086] Adickes v. Kress & Co., 398 U.S. 144, 152, 90 S. Ct. 1598, 1605-6, 26 L. Ed.2d 142, 151 (1970), *superseded by statute as stated in* Sanchez v. Hartley, 299 F. Supp.3d 1166, 1162 (D. Colo. 2017).

[1087] 926 F. Supp. 166 (D. N.M. 1995).

[1088] *Id.* at 168.

[1089] Borzych v. Frank, 340 F. Supp.2d 955, 963 (W.D. Wis. 2004).

authority;'"[1090] "'[t]he Supreme Court has interpreted § 1983 to give absolute immunity to functions intimately associated with the judicial process.'"[1091]

Consequently, judges are absolutely immune from suits for monetary damages, and such immunity cannot be overcome by allegations of bad faith or malice.[1092] Judicial immunity may be overcome only if a judge has acted outside the scope of his or her judicial capacity or in the "complete absence of all jurisdiction."[1093] When a defendant claims judicial immunity, a court must assess whether an official's function is comparable to that of judges. In other words, the courts consider the function performed rather than the identity of the actor.[1094] When judicial immunity exists, it bars also § 1983 claims for monetary damages against state judges in their individual capacities.[1095]

The doctrine of "[d]erived judicial immunity shields individuals who act pursuant to explicit directions or procedures of a judge, such as a court clerk, a bailiff, or a sheriff involved in judicial process."[1096] Persons exercising quasi-judicial functions have been held to have absolute immunity.[1097] When a person files an order at a judge's direction, the action constitutes a judicial action that is subject to absolute quasi-judicial immunity.[1098]

Similarly, prosecutors have absolute immunity from suits for monetary damages for "initiating a prosecution and in presenting the State's case."[1099] When executive officials are engaged in quasi-prosecutorial functions, they may have absolute immunity.[1100] In *Guttman v. Khalsa,*[1101] an administrative hearing officer and an 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. One case holds that a prosecutor's withholding of exculpatory evidence is a quasi-judicial act protected by absolute immunity.[1102]

(2) Qualified Immunity

When absolute immunity is not available, public officials may have a qualified immunity defense. The courts use a two-part test to determine whether qualified immunity applies. First, a court determines whether the facts alleged show that an official's conduct violated a constitutional right. Second, if a constitutional right were violated, a court must determine "'whether the violation involved a clearly established constitutional right of which a reasonable person would have known.'"[1103]

In *Davis v. Scherer*,[1104] the Supreme Court stated that "[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."[1105] Moreover, "[i]n most instances, qualified immunity is regarded as sufficient to protect government officials in the exercise of their duties."[1106] The general rule of qualified immunity is intended to provide officials the ability within reason to "anticipate when their conduct may give rise to liability for damages."[1107]

> [I]n varying scope, … 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.[1108]

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."[1109]

A defendant is entitled to qualified immunity only if the constitutional right he or she allegedly violated has not been clearly established.[1110] That is, one is not entitled to qualified immunity

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[1090] Anderson v. Richmond County Jail, No. CV 115-168, 2016 U.S. Dist. LEXIS 118543, at *6 (S.D. Ga. Aug. 9, 2016) (citations omitted), *adopted by, dismissed by,* Anderson v. Richmond County Jail, U.S. Dist. LEXIS 118317 (S.D. Ga., Sept. 1, 2016).

[1091] *Id.* at *7 (citation omitted).

[1092] Mireles v. Waco, 502 U.S. 9, 11, 112 S. Ct. 286, 116 L. Ed.2d 9, 14 (1991).

[1093] Allen v. Feldman, No. 03-555-JJF, 2004 U.S. Dist. LEXIS 10330, at *10 (D. Del. June 2, 2004).

[1094] *Borzych*, 340 F. Supp.2d at 963-4.

[1095] Tsabbar v. Booth, 293 F. Supp.2d 328 (S.D. N.Y. 2003), *aff'd*, Tsabbar v. Booth, 115 Fed. Appx. 513 (2d Cir. N.Y., 2004).

[1096] Brown v. United States Postal Insp. Serv., 206 F. Supp.3d 1234, 1251 (2016) (citations omitted).

[1097] Van Horn v. Nebraska 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).

[1098] Brown v. Lowery, No. 16-CV-708-JED-TLW, 2016 U.S. Dist. LEXIS 179438, at *5 (N.D. Okla. Dec. 28, 2016).

[1099] Imbler v. Pachtman, 424 U.S. 409, 431, 96 S. Ct. 984, 995, 47 L. Ed.2d 128, 144 (1976).

[1100] *Id.* at 427, 96 S. Ct. at 993, 47 L. Ed.2d at 142.

[1101] 320 F. Supp.2d 1164 (D. N.M. 2003).

[1102] Douris v. Schweiker, 229 F. Supp.2d 391 (E.D. Pa. 2002).

[1103] Mardis v. Timberlake, 2009 U.S. Dist. LEXIS 109996, at *1, 12 (S.D. Ohio 2009) (citations omitted), *adopted by, summary judgment granted, in part, summary judgment denied, in part by,* Mardis v. Timberlake, No. 1:07cv1005, 2009 U.S. Dist. LEXIS 109993 (S.D. Ohio, Nov. 24, 2009).

[1104] Davis v. Scherer, 468 U.S. 183, 195, 104 S. Ct. 3012, 3019, 82 L. Ed.2d 139, 150 (1984) (holding that held that an employee who sought damages for violation of constitutional or statutory rights could overcome a state official's qualified immunity only by a showing that the claimed rights were clearly established at the time of the state official's conduct).

[1105] *Id.* at 195, 104 S. Ct. at 3019, 82 L. Ed. At 150.

[1106] Borzych v. Frank, 340 F. Supp.2d 955, 963 (W.D. Wis. 2004).

[1107] *Davis*, 468 U.S. at 195, 104 S. Ct. at 3019, 82 L. Ed.2d at 150.

[1108] Scheurer v. Rhodes, 416 U.S. 232, 247-8, 94 S. Ct. 1683, 1692, 40 L. Ed.2d 90, 103 (1974).

[1109] Wyatt v. Cole, 504 U.S. 158, 168, 112 S. Ct. 1827, 1833, 118 L. Ed.2d 504, 515 (1992).

[1110] Doe *ex rel*. Doe v. Hawaii Dep't of Education, 334 F.3d 906, 908 (9th Cir. 2003).

when the contours of the violated right have been defined with sufficient specificity so that a state official had fair warning that the official's conduct deprived a victim of his or her rights.[1111] 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 at issue were clearly established at the time of the conduct.[1112]

A federal district court has stated that

> [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. … "[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."[1113]

The qualified immunity doctrine also "protects government officials who perform discretionary functions from suit and from liability for monetary damages under § 1983."[1114] 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."[1115]

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."[1116] Even when an official's conduct "violates some statutory or administrative provision," the official does not necessarily lose his or her qualified immunity.[1117]

For example, in *Pastore v. Dixon*,[1118] a federal district court in Indiana stated that "'[g]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"[1119] The reason for qualified immunity is to give "'government officials breathing room to make reasonable but mistaken judgments and protects all but the plainly incompetent or those who knowingly violate the law.'"[1120] Likewise, the Seventh Circuit has stated that "qualified immunity does not ... protect 'the plainly incompetent or those who knowingly violate the law.'"[1121]

4. "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 constitutional or statutory rights occur.[1122] The Supreme Court expanded the reach of § 1983 when it decided *Monroe v. Pape*[1123] and did so again in its decision in *Monell v. New York*.[1124] In *Monroe*, the Court held that the term "under color of law" embraces the misuse of power exercised under state law, including when persons acted beyond the scope of their authority. The Court expanded the meaning of the term under color of law in this way because it concluded that § 1983 was meant to "give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position."[1125]

In 1978, in *Monell v. New York,*[1126] the Supreme Court overruled *Monroe v. Pape* insofar as the *Monroe* Court held that local governments were immune from suit under § 1983.[1127] By virtue

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[1111] Myers v. Baca, 325 F. Supp.2d 1095, 1112 (C.D. Calif. 2004). *See also*, Murphy v. Arkansas, 127 F.3d 750, 755 (8th Cir. 1997) (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") (citation omitted)).

[1112] *Davis*, 468 U.S. at 197 104 S. Ct. at 3020, 82 L. ED.2d at 151.

[1113] M.W. v. Madison County Board of Education, 262 F. Supp.2d 737, 744-5 (E.D. Ky. 2003).

[1114] Camilo v. Ramirez, 283 F. Supp.2d 440, 449 (D. P.R. 2003).

[1115] 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) and Mendenhall v. Riser, 213 F.3d 226, 230 (5th Cir. 2000).

[1116] Hernandez v. Texas Dep't of Protective and Regulatory Services, 380 F.3d 872, 879 (5th Cir. 2004) (citing Lukan v. North Forest Indep. Sch. Dist., 183 F.3d 342, 346 (5th Cir. 1999)).

[1117] Beltran v. City of El Paso, 367 F.3d, 299, 308 (5th Cir. 2004) (citation omitted).

[1118] No. 1:15-cv-00892-TWP-DKL, 2016 U.S. Dist. LEXIS 180221 (S.D. Ind. DEC. 30, 2016).

[1119] *Id.* at *10 (citation omitted).

[1120] *Id.* (citation omitted).

[1121] Denius v. Dunlap, 330 F.3d 919, 928 (7th Cir. 2003) (citation omitted); *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).

[1122] Wyatt v. Cole, 504 U.S. 158, 112 S. Ct. 1827, 118 L. Ed.2d 504 (1992).

[1123] Monroe v. Pape, 365 U.S. 167, 172, 81 S. Ct. 473, 5 L. Ed.2d 492 (1961) (citation omitted), *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.

[1124] *Monell*, 436 U.S. at 694-95, 98 S. Ct. 2018, 2038, 56 L. Ed.2d 611, 638.

[1125] *Monroe*, 365 U.S. at 172, 81 S. Ct. 473, 476, 5 L. Ed.2d 492, 497.

[1126] 436 U.S. at 658, 98 S. Ct. 2018, 56 L. Ed.2d 611 (1978).

[1127] *Id.* at 663, 98 S. Ct. at 2022, 56 L. Ed.2d at 619.

of the *Monell* decision, municipal corporations are persons and 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.[1128] 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.[1129]

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."[1130]

In sum, although a municipality or other local governing body is a person and may be sued for monetary, declaratory, or injunctive relief,[1131] they "may only be sued '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.'"[1132] When there is a question whether an individual was a policymaker for a defendant, it has been held that the court decides the issue of who is a policymaker based on state law.[1133]

b. Applicability of § 1983 to Private Actors

Although a private person may be held liable under § 1983 if he or she has acted in conjunction with a government entity, "[m]erely showing a 'relationship' between a private entity and a public entity is insufficient to state a section 1983 claim for relief."[1134] Although in some cases there may be no simple line between state and private actors, the "'principal question … is whether there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself.'"[1135]

In *Lugar v. Edmondson Oil Co.*,[1136] the Supreme Court set forth the standard for determining whether a party 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.[1137]

A federal district court in Utah explained the *Lugar* standard in *Yanaki v. Iomed, Inc.*[1138] Iomed, Inc. (Iomed) filed a complaint against Yanaki alleging that Yanaki had appropriated confidential business information and violated an employment agreement with Iomed. Iomed's attorneys 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 attorneys and government officials who were involved. The district court held that the plaintiff failed to state a § 1983 claim. The district 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.[1139]

In *Yanaki*, the plaintiff did not argue that the action taken was based on a statute that was unconstitutional but rather argued that the search order was unconstitutional. As for the alleged unconstitutional search order, the court held that "the mere involvement of a state court or state law enforcement officer in a private matter does not necessarily constitute state action…."[1140] Another court has held that § 1983 actions are limited to those state court proceedings that are a "complete nullity."[1141]

In *Borrell v. Bloomsburg University*,[1142] the Third Circuit stated that the appeal raised important questions regarding the state action doctrine and the Due Process Clause of the Fourteenth Amendment.[1143] The plaintiff Angela Borrell (Borrell) was a student working at a private hospital in a public university's clinical program. Borrell was dismissed for refusing to take a drug test in violation of hospital policy. In 2007, the Geisinger Medical Center (Geisinger or GMC) partnered with Bloomsburg University to establish the Nurse Anesthetist Program (NAP). Geisinger, a private hospital, operated the clinical training portion of the program for the aspiring nurse

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[1128] *Id.* at 663 n.7, 98 S. Ct. at 2022 n.7, 56 L. Ed.2d at 619 n.7.

[1129] *Id.* at 694-95, 98 S. Ct. at 2037-38, 56 L. Ed.2d at 638 (citation omitted).

[1130] *Id.* at 690 n.54, 98 S. Ct. at 2035 n. 54, 56 L. Ed.2d at 635 n.54.

[1131] 13 Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure § 3573.1.

[1132] Davies v. Trigg County, No. 5:16-CV-00068-TBR, 2016 U.S. Dist. LEXIS 167181, at *27 (W.D. Ky. Dec. 5. 2016) (citation omitted).

[1133] *Id.* at *29 (citing Waters v. City of Morristown, Tenn., 242 F.3d 353, 362 (6th Cir. 2001)).

[1134] Langston v. Hershey Med. Ctr., No. 1:15-CV-2027, 2016 U.S. Dist. LEXIS 158792, at *7 (M.D. Pa. Nov. 16, 2016).

[1135] *Id.* at *7-8 (citation omitted).

[1136] 457 U.S. 922, 102 S. Ct. 2744, 73 L. Ed.2d 482 (1982).

[1137] *Id.* at 937, 102 S. Ct. at 2753-4, 73 L. Ed.2d at 495.

[1138] 319 F. Supp.2d 1261 (D. Utah 2004).

[1139] *Id.* at 1265 (citation omitted).

[1140] *Id.* at 1265 n.8.

[1141] *Id.* at 1266.

[1142] 870 F.3d 154 (3rd Cir. 2017).

[1143] *Id.* at 157.

anesthetists while Bloomsburg, a public university, provided classroom instruction. Arthur Richer (Richer), the director of the NAP was a Geisinger nurse anesthetist, and Michelle Ficca (Ficca) was Bloomsburg's chair of nursing who oversaw the Program's academic component.

By letter dated September 25, 2012, Richer terminated Borrell's participation in the NAP because of her refusal to take a drug test. The letter that both Richer and Ficca signed was printed on joint GMC/Bloomsburg stationery. Richer signed the letter as Director of the NAP, and, when signing the letter, Ficca indicated that she had reviewed the information and agreed with the termination decision.

The primary issue on appeal was whether GMC, Richer, and/or Ficca were liable under § 1983 for denying Borrell due process when she was dismissed from the NAP.[1144] To decide the issue, the court had to determine "whether the conduct of GMC and Richer should be considered state action. 'The Fourteenth Amendment governs only state conduct, not that of private citizens.'"[1145] Borrell's claim was "not cognizable unless she was harmed 'under color of law,' a standard identical to the Fourteenth Amendment's 'state action' requirement."[1146]

As for whether state action existed, the court identified three broad tests: "'(1) whether the private entity has exercised powers that are traditionally the exclusive prerogative of the state; (2) whether the private party has acted with the help of or in concert with state officials; and (3) whether the state has so far insinuated itself into a position of interdependence with the acting party that it must be recognized as a *joint participant* in the challenged activity.'"[1147] There must be "'such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself.'"[1148] The court held that the record established that Richer was authorized to enforce the drug and alcohol policy and did not require any authority from the state to do so.[1149]

As for whether GMC's and Richer's conduct constituted state action, the district court found that Geisinger acted under color of state law, because Geisinger was a willful participant in the NAP, a joint activity.[1150] The appeals court disagreed, stating that "[n]either Bloomsburg nor its agreement with Geisinger played any part in creating the policy enforced in this case.…"[1151] The agreement between Geisinger and Bloomsburg was clear that Geisinger "retained the authority to unilaterally 'exclude a Student from participation in the Clinical Training' if the student doesn't comply with a GMC policy."[1152]

As for the case against Ficca, her signature on the termination letter meant nothing more than her concurrence with Richer's decision; her signature was not enough to constitute state action.[1153] The court also held that Ficca was entitled to qualified immunity, because she did not violate a clearly established constitutional right.[1154] "[W]ithout actual decisionmaking authority, Ficca's edits, suggestions, and participation in the termination letter [did] not amount to a constitutional violation."[1155]

In a § 1983 action, a plaintiff must show that the conduct at issue was caused by state action. The courts have developed a series of tests to aid in deciding whether a private actor has become a state actor for purposes of § 1983. For example, in *Julian v. Mission Community Hospital*,[1156] a California appellate court had to consider when a private party is subject to § 1983. The court stated that, although "'generally not applicable to private parties, a § 1983 action can lie against a private party when he is a willful participant in joint action with the State or its agents;'" but "[f]ederal law governs whether a private party is a state actor.…"[1157] The court observed that the Ninth Circuit had articulated four tests to determine when a private person has acted under color of law: the public function test, the joint action test, the government nexus test, and the government coercion or compulsion test.[1158]

First, "[u]nder the public function test, a private party's conduct constitutes state action when the private party exercises powers that are 'traditionally the exclusive prerogative of the State.'"[1159] Second, "[u]nder the joint action test, 'courts examine whether state officials and private parties have acted in concert in effecting a particular deprivation of constitutional rights.' … 'The test focuses on whether the state has so far insinuated itself into a position of interdependence with [the private actor] that [the private actor] must be recognized as a joint participant in the challenged activity.'"[1160] Third, "[t]he government nexus test asks whether 'there is such a close nexus between the State and the challenged action that the seemingly private behavior may be fairly treated as that of the State itself.'"[1161] Fourth, "under the state compulsion test, the court considers 'whether the coercive influence or significant encouragement of the state effectively converts a private action into a government action.' … 'The Supreme Court has repeatedly held that the mere fact that a busi-

[1144] *Id.* at 160.

[1145] *Id.* (citation omitted).

[1146] *Id.* (citation omitted).

[1147] *Id.* (citation omitted) (emphasis supplied).

[1148] *Id.* (citation omitted).

[1149] *Id.*

[1150] *Id.* at 161.

[1151] *Id.*

[1152] *Id.* (citation omitted).

[1153] *Id.*

[1154] *Id.* at 162.

[1155] *Id.* at 163 (citation omitted).

[1156] 11 Cal. App.5th 360, 218 Cal. Rptr.3d 38 (2017), *modified and rehearing denied by Julian v. Mission* Community Hospital, 2017 Cal. App. LEXIS 465 (Cal. App. 2d Dist., May 23, 2017).

[1157] *Id.* at 396, 218 Cal. Rptr.3d at 70 (citations omitted) (some internal quotation marks omitted).

[1158] *Id.*

[1159] *Id.* at 397, 218 Cal. Rptr.3d at 71 (citations omitted) (some internal quotation marks omitted).

[1160] *Id.* at 398, 218 Cal. Rptr.3d at 72 (citations omitted) (some internal quotation marks omitted).

[1161] *Id.* (citations omitted) (some internal quotation marks omitted).

ness is subject to state regulation does not by itself convert its action into that of the State.'"[1162]

In *Julian,* the appeals court held that the hospital and physician were not state actors for purposes of state or federal constitutional claims.

In *Allocco v. City of Coral Gables,*[1163] the court used three tests that it described as the public function test, the state compulsion test, and the nexus/joint action test to determine whether a private individual or company had become a state actor. 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.[1164] The court noted that "'only in rare circumstances can a private party be viewed as a state actor for section 1983 purposes.'"[1165] The court held that UM did not exercise a "right, privilege, or rule of conduct created by the state."[1166]

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 that have been used to determine whether a private party may be deemed to be a state actor.[1167] However, the court held that the plaintiffs failed to establish under any one of the three tests that UM was a state actor for § 1983 purposes.

c. Section 1983 and Denial of Procedural or Substantive Due Process Claims

It has been stated that because § 1983 created a species of tort liability, the statute is to be interpreted based on the principles of tort liability.[1168] However, the United States 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.[1169] Thus, 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.[1170]

In *DeShaney v. Winnebago County Department of Social Services,*[1171] the Supreme Court held that the Due Process Clause does not transform every tort committed by a state actor into a constitutional violation.[1172] A successful claim for a deprivation of procedural due process requires that a plaintiff show 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.[1173] A substantive due process claim requires a plaintiff to "establish as a threshold matter that he has a protected property interest to which the Fourteenth Amendment's due process protection applies."[1174]

Not all property interests that are 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."[1175] For example, in 2014, in *Gizzo v. Ben-Habib*,[1176] a federal district court in New York court held that a licensing agreement did not give rise to a procedural due process claim and that one defendant's conduct did not abridge a fundamental right for which the plaintiff had a substantive due process claim.[1177]

In *T.I.B.C. Partners, LP v. City of Chester*,[1178] decided by a federal district court in Pennsylvania, the plaintiffs argued that they were deprived of their property in violation of their constitutional rights. The dispute concerned the use of a commercial parking facility in Chester, Pennsylvania. The plaintiffs, referred to as T.I.B.C., owned and operated certain lots for use at events

[1162] *Id.* at 399, 218 Cal. Rptr.3d 72 (citations omitted) (some internal quotation marks omitted).

[1163] 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 University, 62 Fed. Appx. 28 (2d Cir. 2003) and 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).

[1164] *Allocco*, 221 F. Supp.2d at 1323.

[1165] *Id.* at 1373 (quoting Rayburn v. Hogue, 241 F.3d 1341, 1347 (11th Cir. 2001)).

[1166] *Id.* (citation omitted).

[1167] *Id.* at 1374.

[1168] City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 119 S. Ct. 1624, 143 L. Ed.2d 882 (1999). *See also*, Collazo v. Mount Airy No. 1, LLC, No. 3:16-CV-982, 2016 U.S. Dist. LEXIS 139877 *17 (M.D. Pa. May 31, 2016) (stating that the Supreme Court has repeatedly noted that § 1983 creates a species of tort liability and that the common law of torts "defining the elements of damages and the prerequisites for their recovery[] provide[s] the appropriate starting point for inquiry under § 1983 as well") (citation omitted).

[1169] Douglas v. Healy, Nos. 01-CV-7039, 02-CV-2935, 2003 U.S. Dist. LEXIS 4922 at *13 (E.D. Pa. March 3, 2006) (quoting Schieber v. City of Philadelphia, 320 F.3d 409, 417 (3rd Cir. 2003)).

[1170] Hernandez v. Texas Dep't of Protective and Regulatory Services, 380 F.3d 872 (5th Cir. 2004).

[1171] 489 U.S. 189, 109 S. Ct. 998, 103 L. Ed.2d 249 (1989).

[1172] *Id.* at 202, 109 S. Ct. at 1006, 103 L. Ed.2d at 263.

[1173] *Douglas*, 2003 U.S. Dist. LEXIS 4922, at *4. *See* Ferrari v. Count of Suffolk, 845 F.3d 46 (2d Cir. 2016) (holding that the county was not liable under § 1983 for an alleged violation of the plaintiff's procedural due process rights).

[1174] *Douglas*, 2003 U.S. Dist. LEXIS 4922, at *10 (quoting Nicolas v. Pennsylvania State University, 227 F.3d 133, 139-40 (3rd Cir. 2000)). *See* New Vision Photography Program, Inc. v. District of Columbia, 54 F. Supp.3d 12, 34 (D.D.C. 2014) (dismissing the plaintiff's substantive due process claim brought under § 1983, because the plaintiff "failed to state a claim for deprivation of its right to substantive due process").

[1175] *Douglas*, 2003 U.S. Dist. LEXIS 4922, at *11 (quoting Regents of University of Michigan v. Ewing, 474 U.S. 214, 229, 106 S. Ct. 507, 515, 88 L. Ed.2d 523, 535 (1985) (Powell, J., concurring)).

[1176] 44 F. Supp.3d 374 (S.D.N.Y. 2014).

[1177] *Id.* at 391-2.

[1178] No. 14-3697, 2016 U.S. Dist. LEXIS 52010 (E.D. Pa. April 19, 2016), *dismissed* by T.I.B.C. Partners, LP v. City of Chester, No. 14-3697, 2018 U.S. Dist. LEXIS 14162 (E.D. Pa., Jan. 29, 2018).

at PPL Park. The plaintiffs sued the city of Chester, its mayor, and other defendants, alleging that the defendants conspired to cause economic injury to the plaintiffs' parking business. Although the plaintiffs brought two federal causes of action, one under the Racketeer Influence and Corrupt Organizations Act (RICO), 18 U.S.C §§ 1961, *et seq*. and a civil rights procedural due process claim under § 1983, as well as numerous claims under state law, only the § 1983 claim will be discussed.

The plaintiffs' § 1983 claim for a denial of due process under the Fourteenth Amendment was that the defendants illegally deprived the plaintiffs of the lawful use of their business property without due process of law, including, *inter alia*, by "'making illicit payments to the Commissioner of Police [and] falsely imprisoning the Plaintiffs' business customers….'"[1179] The plaintiffs alleged that each defendant agreed with and assisted the other defendants in taking various actions against the plaintiffs and that the city was liable because it failed to train, supervise and discipline its employees adequately.[1180]

The court explained that "[t]he constitutional meaning of 'property' differs considerably between a procedural and a substantive due process claim. For purposes of a procedural due process claim, the meaning is broad: "'[P]roperty interests … are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims to those benefits.'"[1181] In contrast, a substantive due process is more narrow: "'[W]hile property rights for procedural due process purposes are created by state law, substantive due process rights are created by the Constitution,' and 'only fundamental property interests' are protected."[1182]

The court held that the plaintiffs' claim was a procedural due process claim, because "'[l]and-use decisions are matters of local concern, and such disputes should not be transformed into substantive due process claims based only on allegations that government officials acted with improper motives.'"[1183] Furthermore, "'an unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful post[-]deprivation remedy is available.'"[1184] The court held that a failure to provide a pre-deprivation hearing under the Pennsylvania Municipalities Code was not "in and of itself … a constitutional violation;"[1185] "[t]he fact that Defendants' 'actions may have been illegal under Pennsylvania law does not mean that they were unconstitutional under the Due Process Clause.'"[1186]

Except in certain situations, such as when a person is in a 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.[1187] The Due Process Clause of the Fourteenth Amendment "does not transform every tort committed by a *state* actor into a constitutional violation" that is actionable under § 1983.[1188]

As for substantive due process claims that may be made under § 1983, the case of *Paulk v. Ga. Dep't of Transp.*[1189] is an example. Paulk, an African American disabled veteran, and Wilcox, an African American mother of two, lived in the Estes Park Apartments (Estes Park), an affordable housing complex built in 2003 and financed with federal funding. The state of Georgia receives federal financial assistance for certain operations, and a state agency, the Georgia Department of Transportation (GDOT), plans, constructs, maintains, and improves state roads and bridges.

Prior to May 2007, GDOT proposed road improvements to reduce traffic congestion along a state route and perimeter road. The plaintiffs alleged that GDOT used misleading data to claim that the proposed project would not have an impact on Estes Park. In July 2015, GDOT initiated an eminent domain proceeding to take a portion of the Estes Park property. In February 2016, prior to any order in the state court in the eminent domain proceeding, the plaintiffs brought an action in a federal district court in Georgia, *inter alia*, for GDOT's alleged violations of the Fair Housing Act, 42 U.S.C. §§ 3601-19; Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d to 2000d-7; and 42 U.S.C. § 1983.[1190]

First, the court granted the defendants' motion to dismiss the plaintiffs' Title VI claims. The court decided that it did not need to analyze the Title VI and equal protection claims separately:[1191] "'Title VI itself provides no more protection than the equal protection clause—both provisions bar only intentional discrimination.'"[1192] To make an equal protection claim, the government must have engaged in intentional discrimination when classifying and treating an identifiable group of people differently than another group of people.[1193] The plaintiffs failed to demonstrate intentional discrimination.[1194]

Second, the plaintiffs' § 1983 claim against the defendant Commissioner McMurray alleged discriminatory violations of

[1179] *Id.* at *24 (citation omitted).

[1180] *Id.* at *24-25.

[1181] *Id.* at *26-27 (citations omitted).

[1182] *Id.* at *27 (citation omitted).

[1183] *Id.* (citation omitted) (some internal quotation marks omitted).

[1184] *Id.* at *29 (citation omitted).

[1185] *Id.* at *30.

[1186] *Id.* (citation omitted).

[1187] DeShaney v. Winnebago County Dep't of Social Services, 489 U.S. 189, 195, 109 S. Ct. 998, 1003, 103 L.Ed.2d 249, 259 (1988).

[1188] *Id.* at 202, 109 S. Ct. at 1006, 103 L.Ed.2d at 263 (emphasis supplied).

[1189] No. CV 516-19, 2016 U.S. Dist. LEXIS 68235 (S.D. Ga. May 24, 2016).

[1190] *Id.* at *9.

[1191] *Id.* at *31.

[1192] *Id.* (citation omitted).

[1193] *Id.* at *36.

[1194] *Id.* at *37.

the plaintiffs' rights of substantive due process and equal protection under the Fourteenth Amendment.[1195] Substantive due process protects rights that are "fundamental," rights that the Supreme Court has held "'are implicit in the concept of ordered liberty.'"[1196] "Fundamental rights are most, but not all, of the rights enumerated in the Bill of Rights, as well as certain unenumerated rights created by the U.S. Constitution."[1197] Generally, state-created rights do not have substantive due process protection except when "'a person's state-created rights are infringed by a legislative act.'"[1198] Claims based on violations of substantive due process challenges "'that do not implicate fundamental rights are reviewed under the rational basis standard.'"[1199] The court held that the plaintiffs did not have a substantive due process claim, because they could not plausibly argue that the siting of the roadway at issue lacked a rational basis.[1200]

d. State-Created Danger; Deliberate Indifference Doctrine

A plaintiff may bring a § 1983 claim for damages against a municipality, or a local government entity amenable to a § 1983 claim, only when the alleged unlawful action was taken pursuant to a municipal policy or custom, not when the action was an official's random act. In a case based on a state-created danger,

> 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.[1201]

The state actors must have acted in willful disregard for the plaintiff's safety.[1202] Whether action is shocking to the conscience and, thus, arbitrary in the constitutional sense depends on the context. The degree of culpability required to satisfy the exception depends on the circumstances that confronted a person or persons acting on the state's behalf.[1203]

A case applying the "state-created danger" exception, or, alternatively, the "deliberate indifference" standard as a basis for liability under § 1983 is *Connick v. Thompson,*[1204] decided by the Supreme Court, a case in which the plaintiff alleged that the government failed to train its employees properly. The case arose out of a criminal prosecution and the prosecutor's failure to disclose exculpatory evidence to the defense. A key issue was whether Connick, in his official capacity as the Orleans Parish district attorney, could be sued for damages under § 1983 for failure to train his prosecutors adequately on their duty to produce exculpatory evidence and whether the lack of training had caused the nondisclosure, a *Brady* violation, in Thompson's robbery case.[1205] Thomson had the burden of proving both

> (1) that Connick, the policymaker for the district attorney's office, was deliberately indifferent to the need to train the prosecutors about their *Brady* disclosure obligation with respect to evidence of this type and (2) that the lack of training actually caused the *Brady* violation in this case. Connick argue[d] that he was entitled to judgment as a matter of law because Thompson did not prove that he was on actual or constructive notice of, and therefore deliberately indifferent to, a need for more or different *Brady* training.[1206]

To review briefly, although discussed in other subsections of the report, as § 1983 jurisprudence has developed, "local governments are responsible only for 'their own illegal acts;'"[1207] "[t]hey are not vicariously liable under § 1983 for their employees' actions;"[1208] and "[p]laintiffs who seek to impose liability on local governments under § 1983 must prove that 'action pursuant to official municipal policy' caused their injury."[1209]

In *Connick*, the Supreme Court held that "[i]n limited circumstances, a local government's decision not to train certain employees about their legal duty to avoid violating citizens' rights may rise to the level of an official government policy for purposes of § 1983."[1210] However, "a municipality's failure to train its employees in a relevant respect must amount to 'deliberate indifference to the rights of persons with whom the [untrained employees] come into contact.'"[1211] "A pattern of similar constitutional violations by untrained employees is 'ordinarily necessary' to demonstrate deliberate indifference for purposes of failure to train."[1212]

The Court discussed in some detail the legal training and professional responsibility required of attorneys serving as prosecutors[1213] before concluding that "showing merely that additional training would have been helpful in making difficult

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[1195] *Id.* at *31.

[1196] *Id.* at *32 (citation omitted).

[1197] *Id.* (citation omitted).

[1198] *Id.* (citation omitted).

[1199] *Id.* at *33 (citation omitted) (some internal quotation marks omitted).

[1200] *Id.* at *34.

[1201] *See* Douglas v. Healy, Nos. 01-CV-7039; 02-CV-2935, 2003 U.S. Dist. LEXIS 4922, at *12-*13 (E.D. Pa. Feb. 28, 2003) (quoting Brown v. Pa. Dept. of Health Emergency Med. Serv., 318 F.3d 473, 479 (3rd Cir. 2003) (citing Kneipp v. Tedder, 95 F.3d 1199, 1208 (3rd Cir. 1996))).

[1202] Id. at *12 n.2 (citing *Brown*, 318 F.3d at 480-81 (3rd Cir. 2003)). 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 willful disregard to the standard of conduct that "shocks the conscience." *See Brown*, 318 F.3d at 480.

[1203] Schieber v. City of Philadelphia, 320 F.3d 409, 418 (3rd Cir. 2003).

[1204] 563 U.S. 51, 131 S. Ct. 1350, 179 L. Ed.2d 417 (2001).

[1205] *See* Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed.2d 215 (1963).

[1206] *Connick*, 563 U. S. at 59, 131 S. Ct. at 1358, 179 L. Ed.2d at 425.

[1207] *Id.* at 60, 131 S. Ct. at 1359, 179 L. Ed.2d at 426 (citation omitted).

[1208] *Id.* (citations omitted).

[1209] *Id.* (citations omitted).

[1210] *Id.* at 61, 131 S. Ct. at 1359, 179 L. Ed.2d at 426.

[1211] *Id.* at 61, 131 S. Ct. at 1359, 179 L. Ed.2d at 427 (citation omitted).

[1212] *Id.* at 62, 131 S. Ct. at 1360, 179 L. Ed.2d at 427 (citation omitted).

[1213] *Id.* at 66, 131 S. Ct. at 1363, 179 L. Ed.2d at 430.

decisions does not establish municipal liability."[1214] The Court held that Thompson failed to prove deliberate indifference, because Thompson was unable "show that Connick was on notice that, absent additional specified training, it was 'highly predictable' that the prosecutors in his office would be confounded by those gray areas and make incorrect *Brady* decisions as a result. In fact, Thompson had to show that it was *so* predictable that failing to train the prosecutors amounted to *conscious disregard* for defendants' Brady rights."[1215]

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

When government defendants act in excess of their statutory authority they may be subject to liability under § 1983. Gross negligence requires a showing that a defendant acted with the "'absence of slight diligence, or the want of even scant care.'"[1216]

> 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."[1217]

In *Morgan v. Bubar*,[1218] 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.[1219] 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."[1220]

More recently than the *Morgan* case, *supra*, one federal court has held that sovereign immunity does not protect state employees from liability for grossly negligent acts or omissions,[1221] while another district court has held that qualified immunity that may apply to employees of the Commonwealth of Virginia does not extend to torts involving gross negligence or intentional torts.[1222]

f. Non-Liability of Government Supervisors Lacking Personal Involvement

The doctrines of *respondeat superior* or vicarious liability do not apply in § 1983 actions against supervisors, who may not be held liable for the acts of their subordinates: "[f]or a defendant to be liable under § 1983, he or she must have participated directly in the constitutional violation."[1223]

In 2016, in *Hwa Sung Sim v. Duran*,[1224] a federal district court in California held that supervisory personnel are not liable under § 1983 for the actions of subordinate employees based on the doctrines of *respondeat superior* or vicarious liability. The court explained:

> "A supervisor may be liable only if (1) he or she is personally involved in the constitutional deprivation, or (2) there is a sufficient causal connection between the supervisor's wrongful conduct and the constitutional violation." … "Under the latter theory, supervisory liability exists even without overt personal participation in the offensive act if supervisory officials implement a policy so deficient that the policy itself is a repudiation of constitutional rights and is the moving force of a constitutional violation."[1225]

Although "[l]iability may not be premised on the *respondeat superior* or vicarious liability doctrines, … [d]irect participation, however, is not necessary. A supervisory official may be personally liable if she has "actual or constructive notice of unconstitutional practices and demonstrates 'gross negligence' or 'deliberate indifference' by failing to act."[1226]

To hold a supervisor liable under § 1983, a plaintiff must establish that his constitutional rights were violated and that the defendant(s) acted under color of state law. The alleged supervisor must have directed the constitutional violation, or the violation must have occurred with the supervisor's knowledge and consent.

> [T]he 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

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[1214] *Id.* at 68, 131 S. Ct. at 1363, 179 L. Ed.2d at 431.

[1215] *Id.* at 71, 131 S. Ct. at 1365, 179 L. Ed.2d at 433 (citations omitted) (emphasis in original). *See also*, Kavanaugh v. Vill. of Green Island, No. 8:14-CV-01244 (BKS/DJS), 2016 U.S. Dist. LEXIS 180210, at *19 (N.D. N.Y. Dec. 30, 2016) (holding that the plaintiff's allegations were sufficient "to infer a failure to train that amounts to deliberate indifference") (citation omitted) (footnote omitted).

[1216] Simpson v. Commonwealth of Va., No. 1:16 cv 162 (JCC/TCB), 2016 U.S. Dist. LEXIS 95579, at *33 (E.D. Va. July 21, 2016) (citation omitted), *reconsideration denied* by Simpson v. Virginia, No. 1:16cv162, 2016, U.S. Dist. LEXIS 132860 (E.D. Va., Sept. 27, 2016).

[1217] Gedrich v. Fairfax County Dep't of Family Servs., 282 F. Supp.2d 439, 474-5 (E.D. Va. 2003) (citation omitted).

[1218] 2003 Conn. Super. LEXIS 332 (Feb. 10, 2003).

[1219] *Id.* at *10-11.

[1220] *Id.* at *11-12.

[1221] *Gedrich*, 282 F. Supp.2d at 474 (citation omitted).

[1222] Simpson v. Commonwealth of Va., No. 1:16 cv 162 (JCC/TCB), 2016 U.S. Dist. LEXIS 95579, at *26 (E.D. Va. July 21, 2016).

[1223] Hildebrandt v. Ill. Dep't of Natural Res., 347 F.3d 1014, 1039 (7th Cir. 2003).

[1224] No. 1:16-cv-01051-SAB (PC), 2016 U.S. Dist. LEXIS 175374 (E.D. Cal. Dec. 19, 2016).

[1225] *Id.* at *9 (citations omitted). *See also*, Dyer v. Family Court, No. 16-cv-6876 (BMC)(RLM), 2016 U.S. Dist. LEXIS 180427 (E.D. N.Y. Dec. 28, 2016), in which the court stated that under § 1983 a plaintiff must show the defendant's personal involvement in an alleged constitutional deprivation. Moreover, liability under § 1983 generally is not imposed on a supervisor solely because of his position for the reason that that there is no *respondeat superior* or vicarious liability under § 1983.

[1226] Morris v. Eversley, 282 F. Supp.2d 196, 203 (S.D.N.Y. 2003) (citations omitted) (internal quotation marks omitted).

> subordinates who committed the wrongful acts[;] or (5) the defendant exhibited deliberate indifference … by failing to act on information indicating that unconstitutional acts were occurring.[1227]

5. Necessity of an Official Policy or Custom for Municipal Liability

Before a municipal defendant may be held liable for deprivations of civil rights, the Supreme Court's *Monell* decision requires that there must be a showing that a deprivation of a constitutional rights was based on or caused by a government policy or custom.[1228]

> "[T]he action that is alleged to be unconstitutional [must] implement or execute a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers … [or] pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decision making channels." … [U]nder *Monell*, a municipality can be held liable when execution of a government 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 for under Section 1983. [1229]

In *Forshey v. Huntingdon County*,[1230] a federal district court in Pennsylvania stated that in a § 1983 action a two-step inquiry is required to hold a municipality liable for harm a plaintiff has sustained. That is, there are two separate issues in a § 1983 claim against a municipality: "(1) whether plaintiff's harm was caused by a constitutional violation, and, (2) if so, whether the city is responsible for that violation."[1231]

> Liability extends to the municipality where the plaintiff's harm is suffered as a result of enforcement of a municipal policy established via either: (1) express municipal policy; (2) widespread practice that, while not written down formally, constitutes custom or usage with the force of law; or (3) the decision of a person with final policy-making authority. … In order for Defendants to be liable, Forshey must provide evidence that there was a relevant policy or custom, and that the policy caused the constitutional violation they allege.[1232]

An official policy does not necessarily need to be in writing or be formally adopted as a persistent and well settled custom may serve as the basis for a § 1983 claim.[1233] In *Kavanaugh v. Vill. of Green Island,*[1234] supra*,* a federal court in New York observed that

> [a] municipal policy or custom may be established by any of the following: 1) a formal policy, officially promulgated by the municipality … ; 2) action taken by the official responsible for establishing policy with respect to a particular issue …; 3) unlawful practices by subordinate officials so permanent and widespread as to practically have the force of law … ; or 4) a failure to train or supervise that amounts to 'deliberate indifference' to the rights of those with whom the municipality's employees interact.[1235]

In *Dellutri v. Village of Elmsford*,[1236] also decided by a federal district court in New York, the plaintiff, Dellutri, a long-time owner of real property in Elmsford, New York, alleged that in February 2005, an Elmsford building inspector and two assistants served him with a notice of violation charging that Dellutri was unlawfully operating his property as a two-family residence. Dellutri's claims against Elmsford included violations of procedural and substantive due process, denial of equal protection of the law, malicious prosecution, and abuse of process. The claims were based upon the alleged actions of the Elmsford judge who presided over Dellutri's trial, the building inspectors who served the notice of violation on Dellutri, and the Village attorney who served Dellutri with an appearance ticket and subsequently prosecuted Dellutri.

The federal court stated that that "'Congress did not intend municipalities to be held liable [under § 1983] unless action pursuant to official municipal policy of some nature caused a constitutional tort.'"[1237] The plaintiff failed to show that an officially adopted policy or custom of Elmsford existed that caused the plaintiff's injury and that there was "'a direct and deliberate causal connection between that policy or custom and the violation of Plaintiff's federally protected rights.'"[1238]

As for the plaintiff's claims against the Elmsford judge, because municipal judges typically are not policymakers, the municipality could not be held liable under *Monell* for a § 1983 "'claim based solely on the actions of its judges.'"[1239] As for the plaintiff's claims against the building inspectors, the plaintiff did not allege that they "exercised final policymaking authority."[1240]

It has been held that "an isolated incident or a meager history of isolated incidents is insufficient to prove the existence of an official policy or custom."[1241] 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.[1242] In *City of Oklahoma*

[1227] *Id.* (citations omitted) (internal quotation marks omitted).

[1228] Monell v. Dept. of Social Services, 436 U.S. 658, 694-5, 98 S. Ct. 2018 3037-38, 56 L. Ed.2d 611, 638 (1978).

[1229] Summers v. Ramsey, No. 13-6644, 2016 U.S. Dist. LEXIS 171177, at *36-37 (E.D. Pa. Dec. 12, 2016) (citations omitted), *aff'd*, Summers v. Ramsey, 705 Fed. Appx. 92 (3rd Cir. 2017).

[1230] No. 1:13-CV-00285, 2016 U.S. Dist. LEXIS 172090, (M.D. Pa. Dec. 9, 2016), *adopted by, objection overruled by, partial summary judgment granted by, in part, partial summary judgment denied by, in part,* Forshey v. Huntingdon Cnty., No. 1:13-cv-0285, 2017 U.S. Dist. LEXIS 4527 (M.D. Pa., Jan. 12, 2017).

[1231] *Id.* at *22.

[1232] *Id.* at *22-23 (citations omitted).

[1233] *See generally*, Owen v. City of Independence, 445 U.S. 622, 100 S. Ct. 1398, 63 L. Ed.2d 673 (1980).

[1234] No. 8:14-CV-01244, 2016 U.S. Dist. LEXIS 180210 (N.D. N.Y. Dec. 30, 2016).

[1235] *Id.* at *18 (citations omitted).

[1236] 895 F. Supp.2d 555 (S.D. N.Y. 2012).

[1237] *Id.* at 564 (citation omitted).

[1238] *Id.* at 566 (citations omitted).

[1239] *Id.* at 567 (citations omitted).

[1240] *Id.* at 568 (citations omitted).

[1241] Gedrich v. Fairfax County Dep't of Family Services, 282 F. Supp.2d 439, 472 (2003) (citation omitted) and Fultz v. Whittaker, 261 F. Supp.2d 767, 782 (W.D. Ky. 2003) (stating that "evidence of a single incident cannot establish the existence of a policy or custom") (citation omitted), *appeal dismissed* by Fultz v. Whittaker, No. 03-5514, 2004 U.S. App. LEXIS 3634 (6th Cir. Feb. 24, 2004).

[1242] Davis v. City of New York, 228 F. Supp.2d 327, 346 (S.D.N.Y. 2002).

City v. Tuttle,[1243] the Supreme 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."[1244]

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.[1245] Whether a particular official has final policymaking authority for the purposes of § 1983 is a question of state law.[1246] 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.[1247]

In sum, a policy is made when a decisionmaker having final authority to establish a municipal policy issues a final policy, proclamation, or edict, but even a custom may become so widespread that it has the force of law.

6. Remedies

Nominal, compensatory, and punitive damages potentially are recoverable under § 1983. For compensatory damages, a plaintiff must prove that the unconstitutional activities were the cause in fact of the plaintiff's injuries.[1248] Compensatory damages under § 1983 are governed by general tort-law compensation rules.[1249] There must be sufficient evidence on general damages, including emotional distress and pain and suffering, and on special damages, such as loss of income and medical expenses.[1250] In a § 1983 action, the court may award declaratory and injunctive relief, damages, and attorney's fees. Injunctive relief may be sought against an individual who is an officer or employee of a state or municipality.

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, future conduct.[1251] There is authority holding that, even if a plaintiff cannot prove actual damages, a court may award punitive damages.[1252] Municipalities generally are immune from punitive damages in § 1983 actions,[1253] as are municipal officers when sued in their official capacities.[1254]

Individuals subject to § 1983, who are not protected by other forms of immunity, may be held liable in some circumstances for punitive damages. The standard applicable to common law tort claims is the same for § 1983 actions. For example, punitive damages are recoverable "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."[1255] In *City of Newport v. Fact Concerts, Inc.*,[1256] the Supreme Court held that punitive damages could be awarded "against the offending official, based on his personal financial resources...."[1257]

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."[1258] The Eleventh Amendment bars claims for damages against state agencies and officials acting in their official capacity; however, 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, a rule that applies also to declaratory judgments.[1259]

[1243] 471 U.S. 808, 105 S. Ct. 2427, 85 L. Ed.2d 791 (1985).

[1244] *Id.* at 841, 105 S. Ct. at 2446, 85 L. Ed.2d at 815.

[1245] Caruso v. City of Cocoa, Fla., 260 F. Supp.2d 1191, 1203 (M.D. Fla. 2003). *See also*, Stewart v. Board of Commr's for Shawnee County, Kan., 320 F. Supp.2d 1143 (D. Kan. 2004) (stating that county department heads did not exercise final policymaking authority); Pino v. City of Miami, 315 F. Supp.2d 1230 (S.D. Fla. 2004) (§ 1983 action failed when the city manager had not ratified the decision to transfer a police officer).

[1246] McMillan v. Monroe County, Ala., 520 U.S. 781, 786, 117 S. Ct. 1734, 1737, 138 L. Ed.2d 1, 8 (1997).

[1247] McClure v. Houston County, 306 F. Supp.2d 1160 (M.D. Ala. 2003) (holding that the sheriff was not a policymaker for the county; thus, the county had immunity to claims based on the sheriff's alleged failure to train or supervise).

[1248] Memphis Community School Dist. v. Stachura, 477 U.S. 299, 309, 106 S. Ct. 2537, 2544, 91 L. Ed.2d 249, 260 (1986).

[1249] Petlock v. Nadrowski, No. 16-310 (FLW), 2016 U.S. Dist. LEXIS 169816 (D.N.J. Dec. 8, 2016), *reconsideration denied by, injunction denied by, without prejudice, motion dismissed by, as moot,* Petlock v. Nadrowski, 2018 U.S. Dist. LEXIS 8519 (D.N.J., Jan. 19, 2018).

[1250] 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).

[1251] Smith v. Wade, 461 U.S. 30, 54-55, 103 S. Ct. 1625, 1639-40, 75 L. Ed.2d 632, 650-51 (1983).

[1252] Glover v. Alabama Dep't of Corrections, 734 F.2d 692 (11th Cir. 1984).

[1253] 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 School 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 [sic] are imposed.*" *Id.* at 1197 (emphasis in original).

[1254] *Rodriquez Sostra*, 203 F. Supp.2d at 120 (citing *Gomez-Vazquez*, 91 F. Supp.2d 481, 482-83 (D. PR. 2000)). In Petlock v. Nadrowski, No. 16-310 (FLW), 2016 U.S. Dist. LEXIS 169816 (D.N.J. Dec. 8, 2016), the court stated that a plaintiff's claims may proceed on the basis of nominal and punitive damages only.

[1255] *Smith*, 461 U.S. at 56, 103 S. Ct. at 1640, 75 L. Ed.2d at 651.

[1256] 453 U.S. 247, 101 S. Ct. 2748, 69 L. Ed.2d 616 (1981).

[1257] *Id.* at 269, 101 S. Ct. at 2761, 69 L. Ed.2d at 633.

[1258] Schroll v. Plunkett, 760 F. Supp. 1385, 1389 (D. Or. 1991).

[1259] 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) and Murphy v. Arkansas, 127 F.3d 750, 754 (8th Cir. 1997) (holding that "[s]tate officials acting in their official capacities are § 1983 'persons' when sued for prospective relief," such as for reinstatement as a state employee).

The requirements for an injunction generally are that a movant must show that he or she will suffer irreparable harm if the injunction is not granted; that there is a substantial likelihood that the movant will succeed on the merits; that the state will not be harmed by the injunction more than the movant will be helped by it; and that the granting of an injunction is in the public interest. Alternatively, the movant must show either a combination of substantial likelihood of success on the merits and the possibility of irreparable injury or that serious questions have been raised and the balance of hardships tips sharply in the movant's favor.[1260]

7. Attorney's Fees

A prevailing party, whether as a plaintiff or a defendant, may be able to recover attorney's fees in a § 1983 case pursuant to 42 U.S.C. § 1988.[1261] 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.[1262] Ordinarily, a prevailing plaintiff may recover attorney's fees as a matter of course.[1263] A prevailing defendant 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."[1264]

In *Maher v. Gagne,*[1265] the Supreme Court held that attorney's fees under § 1988 are available in all types of § 1983 actions. A plaintiff prevails when actual relief on the merits of the plaintiff's claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.[1266] Attorney's fees may be recoverable under § 1988 in certain civil rights cases and employment discrimination cases.[1267]

In *Cervantes v. County of Los Angeles,*[1268] a federal district court in California held that the court, in its discretion, could award a reasonable attorney's fee to a prevailing party in § 1983 litigation.[1269] "A plaintiff 'prevails' when there is a material alteration of the legal relationship between the parties that modifies the defendant's behavior in a way that directly benefits the plaintiff."[1270] The court, over the defendants' objections, allowed a recovery of the plaintiff's attorney's fees for a motion for summary judgment, even though the plaintiff's motion was not granted. The court's reasoning was that a plaintiff who is unsuccessful in a stage of the litigation that was necessary to an ultimate victory may recover attorney's fees even for the unsuccessful stage when the unsuccessful claims share a common core of facts with the successful claim.[1271]

In *Raab v. City of Ocean City*,[1272] the Third Circuit disagreed with the district court's opinion that in a § 1983 action "'a party may only prevail by obtaining either a judgment or a court-ordered consent decree.'"[1273] The Third Circuit discussed the Supreme Court's decision in *Buckhannon Bd. and Care Home, Inc. v. W. Va. Dep't of Health & Human Res*.[1274] in which the Court identified the "threshold inquiries" for a recovery of attorney's fees under § 1988: "(1) whether there is a 'material alteration of the legal relationship of the parties,' and (2) whether that material alteration is 'judicially sanctioned.'"[1275] Although a plaintiff has to obtain at least some relief on the merits of a claim, a settlement rather than a verdict does not preclude a claim for attorney's fees.[1276] Although some out-of-court settlements lack a "judicial imprimatur,"[1277] a plaintiff who settles a case "may be entitled to attorney's fees if the district court has ancillary jurisdiction to enforce the terms of a settlement agreement."[1278] In *Raab*, the district court's dismissal order incorporated the terms of the settlement agreement, and the court retained jurisdiction to enforce the agreement.

A prevailing defendant 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."[1279] In *Braunstein*

[1260] Remlinger v. State of Nevada, 896 F. Supp. 1012, 1014-5 (D. Nev. 1995). It may be noted that the court stated the test as one of "probable success on the merits." *Id.* at 1015.

[1261] *See* Carrion v. City of New York, No. 01-CIV-2255 (NT), 2003 U.S. Dist. LEXIS 19909 (S.D.N.Y. Nov. 4, 2003).

[1262] Smith v. Robinson, 468 U.S. 992, 104 S. Ct. 3457, 82 L. Ed.2d 746 (1984).

[1263] Newman v. Piggie Park Enterprises, Inc. 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).

[1264] Hughes v. Rowe, 449 U.S. 5, 14, 101 S. Ct. 173, 178, 66 L. Ed.2d 163, 172 (1980); Christiansburg Garment Co. v. E.E.O.C., 434 U.S. 412, 421, 98 S. Ct. 694, 700, 54 L. Ed.2d 648, 657 (1978).

[1265] 448 U.S. 122, 128-9, 100 S. Ct. 2570, 2574-5, 65 L. Ed.2d 653, 660-1 (1980).

[1266] Norris v. Murphy, 287 F. Supp.2d 111, 114 (D. Mass. 2003).

[1267] Langford v. Hale County, 14-00070-KD-M, 2016 U.S. Dist. LEXIS 126295 (S.D. Ala. Sept. 16, 2016) (stating that because the plaintiff was successful in her § 1983 civil rights case, she was entitled to seek attorney's fees under § 1988).

[1268] No. CV 12-09889 DDP (MRWX), 2016 U.S. Dist. LEXIS 23378 (C.D. Cal. Feb. 24, 016).

[1269] *Id.* at *2 (citing 42 U.S.C. § 1988(b)).

[1270] *Id.* (citing Farrar v. Hobby, 506 U.S. 103, 111-2, 113 S. Ct. 566, 572, 121 L. Ed.2d 494, 503 (1992)). *See also*, Norris, 287 F. Supp.2d at 114.

[1271] *Id.* at *3, 4-5.

[1272] 833 F.3d 286 (3rd Cir. 2016).

[1273] *Id.* at 292 (citation omitted) (some internal quotation marks omitted).

[1274] 532 U.S. 598, 121 S. Ct. 1835, 149 L. Ed.2d 855 (2001).

[1275] *Raab*, 833 F.3d at 292 (citation omitted).

[1276] *Id.* at 293.

[1277] *Id.*

[1278] *Id.* at 294.

[1279] Hughes v. Rowe, 449 U.S.5, 14, 101 S. Ct. 173, 178, 66 L. Ed.2d 163,172 (1980); Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421, 98 S. Ct.694, 700, 54 L. Ed.2d 648, 657 (1978).

v. Arizona Department of Transportation,[1280] supra, decided by the Ninth Circuit, the issue of the defendants' recovery of attorney's fees arose in a § 1983 case in which the defendants prevailed against a challenge to the state's DBE program. The plaintiff Braunstein sought damages because of Arizona's use of an affirmative action program when awarding a transportation engineering contract. Braunstein alleged that the department's race- and gender-conscious affirmative action program violated his right to equal protection. After the dismissal of Braunstein's case, the question was whether the defendants who prevailed could recover attorney's fees.

The Ninth Circuit stated that "a prevailing defendant may only recover fees in 'exceptional circumstances' where the court finds that the plaintiff's claims are 'frivolous, unreasonable, or groundless.'"[1281] Although Braunstein's "specific claims may well have been frivolous, they were intertwined with other claims that were not."[1282] Because Congress validly abrogated state sovereign immunity for claims for damages under 42 U.S.C. § 2000d, the Eleventh Amendment did not bar Braunstein's claims under §§ 1981 and 1983 for damages against the defendants.[1283] The court held that the defendants were not entitled to attorney's fees, because the plaintiff sought "'relief for [a] violation of his civil rights under various legal theories based on essentially the same facts, and a number of his claims [were] not frivolous….'"[1284] The defendants failed to establish that their legal fees were "'attributable solely to the frivolous claims….'"[1285] The court also reversed the award of sanctions against the plaintiff's attorney.[1286]

In *Raab*, supra, the city was not liable on the claims against it; however, the district court denied the city's motion for attorney's fees. The appeals court held that a defendant is a prevailing party in a § 1983 action for the purpose of recovering its attorney's fees "'only if the District Court finds that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.'"[1287] The foregoing standard did not apply to Rabb's claims. Ocean City's alleged inadequate training and supervision "may form the basis for section 1983 liability against a municipality when 'both (1) contemporaneous knowledge of the offending incident or knowledge of a prior pattern of similar incidents; and (2) circumstances under which the supervisor's inaction could be found to have communicated a message of approval to the offending subordinate are present.'"[1288] The Third Circuit held that the district court "acted within its discretion in finding that Raab's claims were not frivolous, unreasonable, or without foundation"[1289] and affirmed the district court's denial of Ocean City's motion for attorney's fees.

In *Amedee Geothermal Venture I v. Lassen Municipal Utility District*,[1290] the court denied the defendant's motion for attorney's fees under § 1988, because the plaintiff's claims, although unsuccessful, were not frivolous.[1291] The defendant was the Lassen County Municipal Utility District in which the plaintiff, a private entity, operated a geothermal power plant. Until 2009, the defendant had supplied the plaintiff's power plant with the electricity needed to start various turbines and operate the equipment to enable the plant to generate electricity from geothermal energy. According to the plaintiff, the dispute arose in 2009 when the defendant unilaterally converted the electricity supply line to the defendant's power plant from 34.5 kv to 12.47 kv.

Although the plaintiff did not invoke § 1983 as its private right of action, the court construed the plaintiff's claims as if they had been brought under § 1983, because the plaintiff argued § 1983 in its opposition brief. In granting the defendant's motion for summary judgment, the court held that there was no genuine issue of material fact on whether a single decision by the defendant's legislative body caused the alleged constitutional violation. There also was no genuine issue of material fact on the plaintiff's Fourth Amendment claim under § 1983, because there was "'no authority for the proposition that [the plaintiff's] asserted contractual right to continued 34.5 kv electricity rises to a property interest protected by the Fourth Amendment.'"[1292]

When the defendant sought attorney's fees and costs under 42 U.S.C. § 1988, the court stated that a more "rigorous standard applies to prevailing defendants—as contrasted with prevailing plaintiffs—because the 'policy considerations which support the award of fees to a prevailing plaintiff are not present in the case of a prevailing defendant.'"[1293]

The court held that the plaintiff's case was not frivolous. As long as a plaintiff makes a plausible argument,

> [a] civil rights claim under § 1983 is not "frivolous" merely because the "plaintiff did not ultimately prevail." … If the plaintiff "made [a] plausible argument as to why they should prevail[,] the fact that the arguments were not successful doesn't make them frivolous." … For example, even if the court grants summary judgment because no "reasonable jury could return a verdict in [the plaintiff's] favor," the court may still deny a prevailing defendant's attorney's fees. … Further, if a plaintiff's claims "raised a question that was not answered clearly by [Ninth Circuit] precedent," then those claims were not frivolous….[1294]

In the court's opinion, the plaintiff's Fourth Amendment argument that the defendant violated a property interest protected by the Fourth Amendment was "'a good faith effort to advance a novel theory' even though the 'position was unsupported by existing precedent.'"[1295]

[1280] 683 F.3d 1177 (9th Cir. 2012).

[1281] *Id.* at 1187 (citation omitted).

[1282] *Id.* at 1189.

[1283] *Id.*

[1284] *Id.* (citation omitted).

[1285] *Id.* (citation omitted).

[1286] *Id.*

[1287] Raab v. Ocean City, 833 F.3d 286, 297 (2016) (citations omitted).

[1288] *Id.* at 298 (citation omitted).

[1289] *Id.*

[1290] 8 F. Supp.3d 1211 (E.D. Cal. 2014).

[1291] *Id.* at 1217.

[1292] *Id.* at 1213 (citation omitted).

[1293] *Id.* at 1214 (citations omitted).

[1294] *Id.* at 1215 (citations omitted).

[1295] *Id.* (citation omitted).

Another 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,*[1296] 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.[1297]

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 which arises from a common nucleus of facts with federal constitutional claims, even if the court chooses to avoid ruling on the constitutional issues.[1298] 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 provided that (2) the successful pendant 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*[1299] for pendent jurisdiction.[1300]

In *Osterweil v. Bartlett*,[1301] a § 1983 case, a federal district court in New York, granted a judgment in favor of the plaintiff when the plaintiff challenged the denial of an application for a permit to possess a pistol. When the plaintiff, as the prevailing party, sought attorney's fees, the defendant argued that the plaintiff "prevailed not on a pendent state law claim but on a question of state statutory interpretation certified to the state's highest court."[1302] The court disagreed, holding that "an award of fees is permitted where 'the plaintiff prevails on a wholly statutory, non-civil-rights claim pendent to a substantial constitutional claim.'"[1303] An award of attorney's fees in the case "'furthers the Congressional goal of encouraging suits to vindicate constitutional rights without undermining the longstanding judicial policy of avoiding unnecessary decision of important constitutional issues.'"[1304] A denial of attorney's fees under these circumstances "would undermine 'the policy concern of avoiding unnecessary constitutional decisions' that is the 'underlying rationale' of permitting plaintiffs to collect attorney's fees on state law claims pendent to substantial constitutional claims."[1305] There were no "special circumstances" that justified denying the plaintiff an award of attorney's fees.[1306]

Another issue is whether there is a right to attorney's fees when the plaintiff is awarded only nominal damages. In *Farrar v. Hobby,*[1307] the Supreme Court 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."[1308] The Court held that the awarding of nominal damages in a civil rights suit highlights the plaintiff's failure to prove actual, compensable injury. In a § 1983 action, because damages must always be for the purpose of compensating for injuries caused by the deprivation of a constitutional right, when a plaintiff recovers only nominal damages, "the only reasonable fee is usually no fee at all."[1309]

Nevertheless, the courts have awarded attorney's fees in some cases when the plaintiff recovered only nominal damages. In *Ortiz de Arroyo v. Barcelo,*[1310] the First Circuit held that the plaintiffs were the prevailing party and were 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,*[1311] a jury awarded the plaintiff nominal damages in the amount of one dollar, but the court awarded virtually the entire amount of attorney's fees and costs the plaintiff requested.

Likewise, in *Project Vote/Voting or American, Inc. v. Dickerson*,[1312] the Fourth Circuit held that the plaintiffs, who were awarded nominal damages of one dollar for their claim under § 1983, were entitled to attorney's fees. The "[p]laintiffs successfully brought a meritorious civil rights claim to prevent the enforcement of an unconstitutional government regulation in the public interest…."[1313]

In brief, the plaintiffs challenged a Maryland Transit Administration (MTA) regulation that prevented the plaintiffs from registering voters at MTA bus and train stations. As a part of later settlement negotiations, the MTA agreed to suspend the enforcement of the regulation. After the plaintiffs moved to reopen the case, because of their dissatisfaction with MTA's new

[1296] 346 F.3d 541 (5th Cir. 2003).

[1297] *Id.* at 550.

[1298] *Id.* at 550 (citing Scham v. District Courts Trying Criminal Cases, 148 F.3d 554, 556 (5th Cir. 1998)).

[1299] 383 U.S. 715, 86 S. Ct. 1130, 16 L. Ed.2d 218 (1966). *See* Henry v. Dreibelbis, No. 3: CV-17-1391, 2018 U.S. Dist. LEXIS 135110, at *14 (M.D. Pa. Aug. 10, 2018) (stating that "[f]ederal courts have jurisdiction over state claims which are related to the federal claims and result from a common nucleus of operative facts") (citing United Mine Workers v. Gibbs, 383 U.S. 715, 725, 86 S. Ct. 1130, 1138, 16 L. Ed.2d 218, 228 (1966) and Aldinger v. Howard, 427 U.S. 1, 9, 96 S. Ct. 2413, 2418, 49 L. Ed.2d 276, 283 (1976)).

[1300] *Southwestern Bell Telephone Company*, 346 F.3d at 551.

[1301] 92 F. Supp.3d 14 (N.D.N.Y. 2015).

[1302] *Id.* at 23.

[1303] *Id.* (citation omitted).

[1304] *Id.* (citation omitted).

[1305] *Id.* at 24 (citation omitted).

[1306] *Id.* at 25.

[1307] 506 U.S. 103, 113 S. Ct. 566, 121 L. Ed.2d 494 (1992).

[1308] *Id.* at 114, 113 S. Ct. at 574, 121 L. Ed.2d at 505.

[1309] *Id.* at 118, 113 S. Ct. at 577, 121 L. Ed.2d at 508 (citation omitted).

[1310] 765 F.2d 275 (1st Cir. 1985).

[1311] 287 F. Supp.2d 111 (D. Mass. 2003).

[1312] 444 Fed. Appx. 660 (4th Cir. 2011) (Per Curiam).

[1313] *Id.* at 664.

regulations, the district court granted the plaintiffs' motion for summary judgment and awarded one dollar in damages, the amount the plaintiffs had requested. The plaintiffs, thereafter, moved for an award of attorney's fees under 42 U.S.C. § 1988. The district court relied on *Farrar v. Hobby*[1314] and *Mercer v. Duke University*[1315] in holding that because the plaintiffs "received only nominal damages, 'the only reasonable fee is … no fee at all.'"[1316]

On appeal, the plaintiffs' argued that, because their lawsuit successfully vindicated important First Amendment rights, and because they received substantially all of their requested relief, they were entitled to attorney's fees. The Fourth Circuit agreed, reversed the district court, and remanded the case.

The Fourth Circuit relied on Justice O'Connor's concurring opinion in *Farrar,* supra, that "set out a three-factor test to 'help separate the usual nominal-damage case, which warrants no fee award, from the unusual case that does warrant an award of attorney's fees,'"[1317] a test the Fourth Circuit adopted in *Mercer v. Duke University*.[1318] The Fourth Circuit stated that the *Farrar-Mercer* test instructed the court to consider: "(1) the degree of the plaintiff's overall success, (2) the significance of the legal issue on which the plaintiff prevailed, and (3) the public purpose served by the litigation."[1319]

The Fourth Circuit held that the district court's reliance on the Supreme Court's "rejection of the 'catalyst theory' for determining whether a plaintiff is a prevailing party for § 1988 purposes" was "misplaced."[1320] The appeals court held that "[a] plaintiff can be considered a prevailing party 'by virtue of having obtained an enforceable … settlement giving some of the legal relief sought in a § 1988 action.'"[1321] The court held that the issue in a § 1983 case need not be "'groundbreaking' or '"novel,'" because "our First Amendment right to speak freely in public forums is a significant legal issue."[1322] The plaintiffs "successfully brought a meritorious civil rights claim to prevent the enforcement of an unconstitutional government regulation in the public interest; this is the very form of litigation Congress wished to encourage by enacting § 1988."[1323]

The Supreme Court has handed down several decisions which significantly cut into the award of attorney fees in § 1983 actions. The Court's decision in *Marek v. Chesney,*[1324] interpreting Rule 68 of the Federal Rules of Civil Procedure, encourages settlement of civil rights cases by denying an 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.[1325]

Finally, on the one hand, the Eleventh Amendment does not bar recovery of attorney's fees against the state.[1326] 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.[1327]

8. Conclusion

This part of the report discusses civil actions brought under § 1983 of the Civil Rights Act of 1871 and the immunity of a state or state agency, or of a state official acting in his or her official capacity, from § 1983 claims. Section 1983 does not create a cause of action in and of itself. 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.

A state or state agency is not a person under § 1983 and cannot be sued by a private party for monetary damages or injunctive relief under § 1983 in a federal or state court. Government officials who are sued may have absolute or qualified immunity for § 1983 claims. Government officials are immune from civil damages if their conduct did not violate a clearly established constitutional or statutory right of which a reasonable person would have known. A municipality may be held liable in a § 1983 action when it is established that an official policy or custom of the municipality violates the Constitution or laws of the United States.

E. AGE DISCRIMINATION IN EMPLOYMENT ACT

1. Introduction

Based on data available from the Equal Employment Opportunity Commission (EEOC), each year the EEOC receives thousands of complaints alleging age discrimination. In Fiscal Years 2016 and 2017, respectively, there were 20,857 and 18,376 "receipts" or charges of violations of the Age Discrimination in Employment Act of 1967 (ADEA).[1328] According to the EEOC, receipts include all charges filed under the ADEA, as well as

[1314] 506 U.S. 103, 113 S. Ct. 566, 121 L. Ed.2d 494 (1992).

[1315] 401 F.3d 199 (4th Cir. 2005).

[1316] *Project Vote*, 444 Fed. Appx. at 661 (citation omitted).

[1317] *Id.* at 662 (citation omitted).

[1318] *Mercer*, 401 F.3d at 204.

[1319] *Project Vote*, 444 Fed. Appx. at 662 (citations omitted).

[1320] *Id.* at 662-63 (citation omitted).

[1321] *Id.* at 663 (citations omitted).

[1322] *Id.* at 664 (citations omitted).

[1323] *Id.* (citation omitted).

[1324] 473 U.S. 1, 105 S. Ct. 3012, 87 L. Ed.2d 1 (1985).

[1325] *Id.* at 11-12, 105 S. Ct. at 3018, 87 L. Ed.2d at 11. In Wilson v. Nomura Securities International, Inc., 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.

[1326] Hutto v. Finney, 437 U.S. 678, 689-92, 98 S. Ct. 2565, 2572-4, 57 L. Ed.2d 522, 533-5 (1978) (validity questioned by some citing references).

[1327] Kentucky v. Graham, 473 U.S. 159, 167, 105 S. Ct. 3099, 3106, 87 L. Ed.2d 114, 122 (1985) (validity questioned by some citing references).

[1328] Pub. L. No. 90-202, 81 Stat. 602 (codified at 29 USC §§621-634). *See* EEOC, Age Discrimination in Employment Act (Charges filed with EEOC), FY 1997–FY 2017, https://www.eeoc.gov/eeoc/statistics/enforcement/adea.cfm (last accessed on Jan. 7, 2019).

those filed concurrently under Title VII, the ADA, and other federal statutes.[1329]

E.2 of this report analyzes the statutory and regulatory framework for ADEA claims. E.3 discusses whether the states as employers have sovereign immunity to ADEA claims by employees for monetary damages. E.4 explains that federal agencies may be sued under the ADEA for disparate treatment and/or disparate impact claims because of Congress's amendment of 29 U.S.C. § 633a. As discussed in E.5, the ADEA applies only to employers, because a plaintiff has no right of action under the Act against a supervisor or other individual. E.6 analyzes the Supreme Court's decision in *Gross v. FBL Fin. Servs. Inc.*[1330] that holds that a person's age must be the "but-for" cause in an age discrimination case for a discriminatory adverse employment action, including a hostile workplace, constructive discharge, or retaliation.

E.7, 8, and 9 discuss ADEA claims for disparate treatment, disparate impact, and retaliation.

2. Statutory and Regulatory Framework for an Employee's ADEA Action

Congress enacted the ADEA, because Congress determined that "the setting of arbitrary age limits regardless of potential for job performance has become a common practice" and that "certain otherwise desirable practices may work to the disadvantage of older persons."[1331] The ADEA sought to "to promote [the] employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment."[1332]

The ADEA now prohibits age discrimination in employment against individuals age 40 or over.[1333] The ADEA may be enforced in accordance with the powers, remedies, and procedures provided in the Fair Labor Standards Act.[1334]

The ADEA states in 29 U.S.C. §§ 623(a)(1)-(3):

> 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 Act.[1335]

Section 626(c) of the ADEA authorizes any aggrieved person to

> bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary [Commission] to enforce the right of such employee under this Act.[1336]

Furthermore, in an action under 29 U.S.C. § 626(c)(1) "a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this Act, regardless of whether equitable relief is sought by any party in such action."[1337]

A prospective plaintiff has to comply with some prerequisites before instituting a legal action against an employer for age discrimination. First, § 626(d)(1) states that "[n]o civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary"[1338] of the Commission. The charge must "be filed … within 180 days after the alleged unlawful practice occurred…."[1339]

Second, in a case to which 29 U.S.C. § 633(b) applies,[1340] the charge must be filed "within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier."[1341]

There are some exceptions to the ADEA's broad prohibition against age discrimination. For example, "an employer may rely on age where it 'is a *bona fide occupational qualification* reasonably necessary to the normal operation of the particular business,'"[1342] referred to as the "BFOQ exception." The Act also permits an employer to engage in conduct otherwise prohibited by § 623(a)(1) when "the employer's action 'is based on

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[1329] *Id.*

[1330] 557 U.S. 167, 129 S. Ct. 2343, 174 L. Ed.2d 119 (2009).

[1331] 29 U.S.C. § 621(a)(2) (2018).

[1332] 29 U.S.C. § 621(b) (2018).

[1333] 29 U.S.C. § 631(a) (2018).

[1334] 75 Pub. L. No. 718, 52 Stat. 1060 (1938) (codified at 29 U.S.C. §§ 201-219).

[1335] 29 U.S.C. §§ 623(a)(1)-(3) (2018).

[1336] 29 U.S.C. § 626(c)(1) (2018).

[1337] 29 U.S.C. § 626(c)(2) (2018).

[1338] 29 U.S.C. § 626(d)(1) (2018).

[1339] 29 U.S.C. § 626(d)(1)(A) (2018).

[1340] 29 U.S.C. § 633(b) (2018) states:

> In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 7 of this Act [29 USCS § 626] before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: *Provided,* That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

[1341] 29 U.S.C. §§ 626(d)(1)(B) (2018).

[1342] Kimel v. Florida Board of Regents, 528 U.S. 62, 67, 120 S. Ct. 631, 637, 145 L. Ed.2d 522, 531 (2000) (quoting 29 U.S.C. § 623(f)(1)) (emphasis supplied).

reasonable factors other than age,'"[1343] a provision referred to as the "RFOA" exception, or when an employer "'discharges or otherwise disciplines an individual for good cause.'"[1344] The ADEA "exceptions are difficult to define and arc often determined on a case-by-case basis."[1345]

Congress amended the ADEA in 1974 to prohibit age discrimination generally in employment by the federal government.[1346]

3. State Sovereign Immunity for Claims for *Monetary* Damages under the ADEA

In 1974, Congress amended the ADEA so that employees could maintain a legal action for age discrimination against a public entity in any federal or state court. Congress extended the ADEA's prohibitions to the states by "a simple amendment to the definition of 'employer'" in 29 U.S.C. § 630(b).[1347] As amended, the ADEA permits "an individual to bring a civil action 'against any employer (including a public agency) in any Federal or State court of competent jurisdiction.'"[1348] The ADEA made "it unlawful for an employer, including a State, 'to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual ... because of such individual's age.'"[1349]

In 2000, in *Kimel v. Florida Board of Regents*,[1350] in an opinion by Justice Sandra Day O'Connor, the Supreme Court struck down the ADEA's abrogation of the states' sovereign immunity under the Eleventh Amendment for ADEA claims. Justice O'Connor's opinion in *Kimel* identified two issues to be decided: whether the ADEA contained "a clear statement of Congress' intent to abrogate the States' Eleventh Amendment immunity and, if so, whether the ADEA is a proper exercise of Congress' constitutional authority."[1351]

In *Kimel*, the Supreme Court's decision arose out of the review of three cases that the Eleventh Circuit consolidated. In one case, Roderick MacPherson and Marvin Narz, ages 57 and 58 at the time, brought an action under the ADEA against their employer, the University of Montevallo (University), in a federal district court in Alabama. The plaintiffs alleged that the University discriminated against them on the basis of their age; that the University retaliated against them because they filed discrimination charges with the EEOC; and that the University's College of Business, where the plaintiffs were associate professors, "employed an evaluation system that had a disparate impact on older faculty members."[1352] It was not disputed that the University, an "instrumentality" of the state of Alabama, was subject to the ADEA.[1353]

In a second case, in April 1995, a group of current and former faculty members and librarians of Florida State University, (including the named petitioner J. Daniel Kimel, Jr. in *Kimel*), sued the Florida Board of Regents (Regents) in a federal district court in Florida. An amended complaint added as plaintiffs current and former faculty members and librarians of Florida International University. The plaintiffs alleged that the Regents "refused to require the two state universities to allocate funds to provide previously agreed upon market adjustments to the salaries of eligible university employees."[1354] The plaintiffs alleged that the Regents violated the ADEA, as well as the Florida Civil Rights Act of 1992,[1355] because the Regents' action "had a disparate impact on the base pay of employees with a longer record of service, most of whom were older employees."[1356]

In the third case, in May 1996, Wellington Dickson filed an action against his employer, the Florida Department of Corrections, in a federal district court in Florida. The state employer allegedly failed to promote Dickson because of his age and because of grievances he had filed for the department's alleged age discrimination.[1357]

When the plaintiffs in the *MacPherson*, *Kimel*, and *Dickson* cases appealed the district courts' decisions to the Eleventh Circuit, the United States intervened to defend the ADEA's abrogation of the states' sovereign immunity under the Eleventh Amendment.[1358] The Supreme Court granted *certiorari* to resolve a conflict among the federal circuits on whether the ADEA validly abrogated the states' immunity.

As stated, the first question was whether Congress had made its intention clear in the ADEA to abrogate the states' immunity: "'Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.'"[1359] The Supreme Court found in *Kimel* that the ADEA in 29 U.S.C. § 216(b) "clearly" allowed individuals to bring suit against states by authorizing "employees to maintain actions for backpay 'against any employer (including a public agency) in any Fed-

[1343] *Id.* at 67, 120 S. Ct. at 637, 145 L. Ed.2d at 532 (quoting 29 U.S.C. § 623(f)(1)) (emphasis supplied).

[1344] *Id.* (quoting 29 U.S.C. § 623(f)(3)).

[1345] Adam N. Bitter, *Smith v. City of Jackson: Solving an Age-old Problem?*, 56 Cath. U.L. Rev. 647, 655 n.61 (2007) (citing 29 C.F.R. § 1625.7 (2006) and stating that "with respect to the RFOA provision, EEOC regulations caution that '[n]o precise and unequivocal determination can be made as to [its] scope,'" (*id.* § 1625.7(b), and that "[t]he regulations make a similar finding as to the BFOQ defense"). *Id.* § 1625.6(a)).

[1346] *Kimel*, 528 U.S. at 68, 120 S. Ct. at 638, 145 L. Ed.2d at 532 (citing 29 U.S.C. § 633a).

[1347] *Id.* at 68, 120 S. Ct. at 637, 145 L. Ed.2d at 532.

[1348] *Id.* at 68, 120 S. Ct. at 637-38, 145 L. Ed.2d at 532 (quoting 29 U.S.C. § 216(b)).

[1349] *Id.* at 66, 120 S. Ct. at 636, 145 L. Ed.2d at 531 (quoting 29 U.S.C. § 623(a)(1)).

[1350] 528 U.S. 62, 120 S. Ct. 631, 145 L. Ed.2d 522 (2000).

[1351] *Id.* at 66-67, 120 S. Ct. at 637, 145 L. Ed.2d at 531.

[1352] *Id.* at 69, 120 S. Ct. at 638, 145 L. Ed.2d at 533.

[1353] *Id.*

[1354] *Id.* at 70, 120 S. Ct. at 638, 145 L. Ed.2d at 533.

[1355] Fla. Stat. § 760.01-760.11

[1356] *Kimel*, 528 U.S. at 70, 120 S. Ct. at 638, 145 L. Ed.2d at 533.

[1357] *Id.*

[1358] *Id.* at 71, 120 S. Ct. at 639, 145 L. Ed.2d at 534.

[1359] *Id.* at 73, 120 S. Ct. at 640, 145 L. Ed.2d at 535 (citation omitted) (some internal quotation marks omitted).

eral or State court of competent jurisdiction....'"[1360] Furthermore, "Congress amended § 216(b) to provide for suits against States in precisely the same Act in which it extended the ADEA's substantive requirements to the States," confirmation for the Court that Congress subjection of the states to ADEA claims "was not mere happenstance."[1361]

The second question was whether Congress abrogated the states' immunity to the ADEA "pursuant to a valid exercise of constitutional authority."[1362] Previously, the Court had held in *EEOC v. Wyoming*[1363] that the ADEA was a valid exercise of congressional power to regulate commerce among the states.[1364] The *Wyoming* Court, however, did not address whether § 5 of the Fourteenth Amendment supported the exercise of congressional power to abrogate the states' immunity.[1365]

The *Kimel* Court stated that, although § 5 grants Congress the authority to abrogate the states' sovereign immunity, the Court recognized in *Fitzpatrick v. Bitzer*[1366] that "'the Eleventh Amendment, and the principle of state sovereignty which it embodies, are necessarily *limited by* the enforcement provisions of § 5 of the Fourteenth Amendment.'"[1367] The role of Congress "in the first instance [is] to 'determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment….'"[1368] Congress had "the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text."[1369]

Nevertheless, the Court held that § 5 of the Fourteenth Amendment does not grant Congress the power to "'decree the substance of the Fourteenth Amendment's restrictions on the States.... It has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation.'"[1370] Justice O'Connor stated that "whether purportedly prophylactic legislation constitutes appropriate remedial legislation, or instead effects a substantive redefinition of the Fourteenth Amendment right at issue" depends on whether there is "'a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'"[1371]

The Court held that the amendment to the ADEA extending the Act's prohibitions to the states was not appropriate under § 5 of the Fourteenth Amendment: "the substantive requirements the ADEA imposes on state and local governments are disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act."[1372] Older persons "'have not been subjected to a history of purposeful unequal treatment;'" the term "[o]ld age … does not define a discrete and insular minority;" and "age is not a suspect classification under the Equal Protection Clause."[1373] The Court held that "[m]easured against the rational basis standard of our equal protection jurisprudence, the ADEA plainly imposes substantially higher burdens on state employers."[1374]

The ADEA's legislative record confirmed for the Court that the 1974 extension of the ADEA to the states "was an unwarranted response to a perhaps inconsequential problem. 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."[1375] In fact, viewed as a whole, the legislative record "reveals that Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age."[1376] Accordingly, the Court held that the ADEA was "not a valid exercise of Congress' power under § 5 of the Fourteenth Amendment."[1377] The result, of course, of the *Kimel* decision is that the states and their agencies and instrumentalities have immunity under the Eleventh Amendment to claims for damages for age discrimination claims under the ADEA. State officials may be enjoined to prohibit violations of the ADEA.[1378]

4. The Federal Sector Provision of the ADEA

As noted, Congress amended 29 U.S.C. § 633a of the ADEA in 1974 to prohibit age discrimination in employment by the federal government.[1379] The courts have held that federal agen-

[1360] *Id.* at 73-74, 120 S. Ct. at 640, 145 L. Ed.2d at 535-6 (quoting 29 U.S.C. § 216(b)).

[1361] *Id.* at 76, 120 S. Ct. at 642, 145 L. Ed.2d at 537 (citation omitted).

[1362] *Id.* at 78, 120 S. Ct. at 642, 145 L. Ed.2d at 538.

[1363] 460 U.S. 226, 103 S. Ct. 1054, 75 L. Ed.2d 18 (1983).

[1364] *Id.* at 243, 103 S. Ct. at 1064, 75 L. Ed.2d at 33.

[1365] *Kimel*, 528 U.S. at 78, 120 S. Ct. at 643, 145 L. Ed.2d at 538.

[1366] 427 U.S. 445, 96 S. Ct. 2666, 49 L. Ed.2d 614 (1976).

[1367] *Kimel*, 528 U.S. at 80, 120 S. Ct. at 644, 145 L. Ed.2d at 540 (citations omitted) (emphasis supplied).

[1368] *Id.* at 80-1, 120 S. Ct. at 644, 145 L. Ed.2d at 540 (citation omitted) (some internal quotation marks omitted).

[1369] *Id.* at 81, 120 S. Ct. at 644, 145 L. Ed.2d at 540 (citation omitted).

[1370] *Id.* at 81, 120 S. Ct. at 644, 145 L. Ed.2d at 540-41 (citation omitted) (some internal quotation marks omitted).

[1371] *Id.* at 81, 120 S. Ct. at 644, 145 L. Ed.2d at 541 (citations omitted).

[1372] *Id.* at 83, 120 S. Ct. at 645, 145 L. Ed.2d at 542.

[1373] *Id.* at 83, 120 S. Ct. at 645-6, 145 L. Ed.2d at 542 (citations omitted) (some internal quotation marks omitted).

[1374] *Id.* at 87, 120 S. Ct. at 648, 145 L. Ed.2d at 545.

[1375] *Id.*, 528 U.S. at 89, 120 S. Ct. at 648-9, 145 L. Ed.2d at 546.

[1376] *Id.*, 528 U.S. at 91, 120 S. Ct. at 649, 145 L. Ed.2d at 547.

[1377] *Id.* at 91, 120 S. Ct. at 650, 145 L. Ed.2d at 547.

[1378] *See* Fikse v. State, 633 F. Supp.2d 682, 691 (N.D. Iowa 2009) (summary judgment denied by *Fikse v. Hall*, No. C 08-4071-MWB, 2010 U.S. Dist. LEXIS 5361 (N.D. Iowa, Jan. 25, 2010)) (stating that "[i]t does not appear that the Eighth Circuit Court of Appeals has squarely addressed the question of whether a state agency employee can assert a claim for injunctive relief from violation of the ADEA against the state agency's director, in his or her official capacity, notwithstanding the state agency's Eleventh Amendment immunity" but that "[t]he Eighth Circuit Court of Appeals has, however, recognized the general principle that state officials may be sued, in their official capacities, for injunctive relief, even when their agency has Eleventh Amendment immunity") (citations omitted).

[1379] 29 U.S.C. § 633a (2018) states:

> All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the

cies may be sued under the ADEA for disparate treatment and/or disparate impact.

In *Lagerstrom v. Mineta*,[1380] decided by a federal district court in Kansas, the plaintiff brought suit against Norman Y. Mineta, the Secretary of the Department of Transportation, under the ADEA. The plaintiff was 63 years of age when he applied for a position as an air traffic controller with the FAA. In August 2003, the plaintiff learned that the FAA earlier that year had hired air traffic controllers for the Kansas City Air Route Traffic Control Center in Olathe, Kansas. In September 2003, the plaintiff initiated an administrative complaint with the FAA, in which he alleged that the FAA had discriminated against him because of his age when it selected other applicants. After the EEOC issued a right to sue letter, the plaintiff filed his action.

The district court described the federal sector provision, 29 U.S.C. § 633a, as a limited waiver of sovereign immunity.[1381] The U.S. DOT argued that disparate impact claims are not within the scope of that waiver,[1382] because "the legislative history, statutory text and treatment of Section 633a demonstrate that Congress only intended to waive sovereign immunity as to claims of intentional age discrimination."[1383]

The district court agreed with the plaintiff and held that § 633a did not proscribe disparate impact claims against federal agencies, because § 633a was "'patterned'" on §§ 717(a) and (b) of the Civil Rights Act of 964, 42 U.S.C. § 2000e-16, as amended in March 1972, that also extended Title VII's protections to federal employees.[1384] The federal sector provision of Title VII "provides that 'all personnel actions affecting employees or applicants for employment … shall be made free from any discrimination based on race, color, religion, sex, or national origin.'"[1385] The court found that "[t]he legislative history of the federal sector provision suggests that by enacting Section 633a [of the ADEA], Congress intended to address both intentional and unintentional discrimination."[1386] The court held that § 633a(a) "generically protects federal employees from 'any discrimination based on age,'"[1387] while observing that "other courts have entertained disparate impact theories in the federal sector."[1388]

5. No ADEA Claims Permissible Against Individuals

The ADEA applies only to employers. A plaintiff has no right of action under the ADEA, as well as the Rehabilitation Act, the ADA, or Title VII, against individuals as defendants.[1389] Thus, under the ADEA, employees may not hold another individual or a supervisor liable as they are not amenable to suit under the ADEA.[1390]

In *Wilson v. U.S. Department of Transportation*,[1391] a district court in the District of Columbia held that the ADEA does not "impose individual liability; the only proper defendant in suits brought under [this statute] is the head of the department or agency being sued."[1392] A federal district court in Ohio stated more recently that "[t]here is no remedy under Title VII and the ADEA against a co-worker or a supervisor in his or her individual capacity."[1393] Moreover, union officials may not be held liable in their individual capacities for discrimination under the ADEA or Title VII.[1394]

6. Age Discrimination as the "But-For" Cause of Discrimination Under the ADEA

As the Supreme Court has construed the ADEA, age is not to be considered as one factor among other factors when a claimant alleges age discrimination. Rather, a person's age must be the "but-for" cause in an age discrimination case for a discriminatory adverse employment action, a hostile workplace, retaliation, or constructive discharge.

United States) in military departments as defined in section 102 of title 5, United States Code, in executive agencies as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission [Postal Regulatory Commission], in those units in the government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office [Government Publishing Office], the General Accounting Office [Government Accountability Office], and the Library of Congress shall be made free from any discrimination based on age.

[1380] 408 F. Supp.2d 1207 (D. Kan. 2006).

[1381] Id. at 1209 (citing Zhu v. Fed. Hous. Fin. Bd., 389 F. Supp.2d 1253, 1291 (D. Kan. 2005) (stating that "Title VII and the ADEA … contain limited waivers of the sovereign immunity of the United States"). *See*, respectively, 42 U.S.C. § 2000e-16 (2018) and 29 U.S.C. § 633a (2018).

[1382] *Lagerstrom*, 408 F. Supp.2d at 1209 (citation omitted).

[1383] *Id.*

[1384] *Id.* at 1210 (citing Lehman v. Nakshian, 453 U.S. 156, 166 n.15, 101 S. Ct. 2698, 2705 n.15, 69 L. Ed.2d 548, 557 n.15 (1981)).

[1385] *Id.* (citing 42 U.S.C. § 2000e-16(a)).

[1386] *Id.*

[1387] *Id.* at 1211.

[1388] *Id.* at 1213 (citing Armstrong v. Powell, 230 F.R.D. 661 (W.D. Okla. 2005) (disparate impact theory assumed for class certification motion); Koger v. Reno, 98 F.3d 631 (D.C. Cir. 1996) (disparate impact analysis assumed valid); Klein v. Sec'y of Transp., 807 F. Supp. 1517 (E.D. Wash. 1992) (*prima facie* case of disparate impact discrimination established); Arnold v. U.S. Postal Serv., 649 F. Supp. 676 (D.D.C. 1986) (Title VII disparate impact applicable to ADEA)).

[1389] Bryant v. Greater New Haven Transit Dist., 8 F. Supp.3d 115, 128 (D. Conn. 2014).

[1390] Cheng v. Benson, 358 F. Supp.2d 696, 700 (N.D. Ill. 2005) (stating that "'[t]he appellate courts consistently hold that liability [in employment discrimination law] should fall solely to the employer, thus prohibiting personal liability.…'" *Id.*) (citation omitted).

[1391] 759 F. Supp.2d 55 (D.D.C. 2011), *motion granted by, partial summary judgment denied by, as moot, count dismissed at, claim dismissed by, dismissed by, in part,* Wilson v. United States DOT, No. 10-490 (RMC), 2011 U.S. Dist. LEXIS 60475 (D.D.C., June 4, 2011).

[1392] *Id.* at 67.

[1393] McDaniel v. Plain Local Sch. Bd., No. 5: 16-CV-2096, 2016 U.S. Dist. LEXIS 175815, at *3 (N.D. Ohio Dec. 20, 2016) (citations omitted).

[1394] *Id.* (citations omitted).

In *Gross v. FBL Fin. Servs. Inc.*,[1395] decided by a bare majority of the Supreme Court, the petitioner Jack Gross (Gross) began working for the respondent FBL Financial Group, Inc. (FBL) in 1971. As of 2001, Gross was FBL's director of claims administration. In 2003, when Gross was 54 years old, FBL reassigned Gross to the position of claims project coordinator and transferred many of his job responsibilities to a newly created position—claims administration manager. FBL gave the new position to Lisa Kneeskern, whom Gross had previously supervised, and who was then in her early forties. At trial, Gross's evidence suggested that his reassignment was based at least in part on his age. FBL argued that Gross's reassignment was part of a corporate restructuring and that his skills were better suited to his new position.[1396]

Justice Thomas's opinion in *Gross* noted that the question presented by the petitioner was "whether a plaintiff must present direct evidence of age discrimination … to obtain a mixed-motives jury instruction in a suit brought under the [ADEA]…."[1397] The term mixed-motives refers to permissible and impermissible considerations.

Justice Thomas focused initially on the Court's decision in *Price Waterhouse v. Hopkins*,[1398] a mixed-motives case. In *Price Waterhouse*, the question was "the proper allocation of the burden of persuasion in cases brought under Title VII of the Civil Rights Act of 1964 … when an employee alleges that he suffered an adverse employment action because of both permissible and impermissible considerations—i.e., a 'mixed-motives' case."[1399] In *Price Waterhouse*, six members of the Court "ultimately agreed that if a Title VII plaintiff shows that discrimination was a 'motivating' or a 'substantial' factor in the employer's action, the burden of persuasion should shift to the employer to show that it would have taken the same action regardless of that impermissible consideration."[1400] Moreover, "to shift the burden of persuasion to the employer, the employee must present 'direct evidence that an illegitimate criterion was a substantial factor in the [employment] decision.'"[1401]

In *Gross*, the question the Court was asked to decide was "whether a plaintiff must 'present direct evidence of discrimination in order to obtain a mixed-motive instruction in a non-Title VII discrimination case.'"[1402] Justice Thomas, however, wrote that the question to be decided was a different question – the question was "whether the burden of persuasion *ever* shifts to the party defending an alleged mixed-motives discrimination claim brought under the ADEA."[1403]

The difference between a Title VII case and an ADEA case is that Congress amended Title VII "explicitly" to authorize "discrimination claims in which an improper consideration was 'a motivating factor' for an adverse employment decision."[1404] In contrast, "the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor."[1405] Thus, in a case under 29 U.S.C. § 632(a)(1) of the ADEA, "the plaintiff retains the burden of persuasion to establish that age was the 'but-for' cause of the employer's adverse action."[1406] That is, "[a] plaintiff must prove by a preponderance of the evidence (which may be direct or circumstantial) that age was the 'but-for' cause of the challenged employer decision."[1407] In *Gross*, the Court's 5-4 decision held that the plain language of the ADEA shows that "[t]he burden of persuasion does not shift to the employer to show that it would have taken the action regardless of age, even when a plaintiff has produced some evidence that age was one motivating factor in that decision."[1408]

In a more recent case, a New York state appellate court addressed the "but-for" cause of alleged age discrimination in a case against the Department of Transportation (DOT). In *DeKenipp v. State of New York,*[1409] the claimant, an engineer, appealed a judgment by the New York Court of Claims that ruled in favor of the state of New York on the claimant's claim for age discrimination. In 2006, the claimant, a 52-year-old civil engineer employed by the DOT, applied for a promotion to the position of Environmental Specialist 2, Maintenance. The DOT, however, offered the position to an employee who was 10 years younger than the claimant. When the ES2-M position was available again, as well as the position of Environmental Specialist 2, Construction, the claimant applied for both positions. The DOT awarded the ES2-M position to the claimant, while offering the ES2-C opening to an individual who was 13 years younger than the claimant. Thereafter, the claimant commenced an action against the DOT for age discrimination in violation of the federal ADEA, as well as the New York Human Rights Law.

The appellate court, when discussing the legal standard for an ADEA claim, noted that in *Gross*, supra, the Supreme Court imposed "a higher standard in ADEA cases. An ADEA claimant must now prove, 'by a preponderance of the evidence, that age was the but-for cause of the challenged adverse employment action…."[1410] However, because the Supreme Court in

[1395] 557 U.S. 167, 129 S. Ct. 2343, 174 L. Ed.2d 119 (2009).

[1396] *Id.* at 170, 129 S. Ct. at 2347, 174 L. Ed.2d at 125 (citation omitted).

[1397] *Id.* at 169-70, 129 S. Ct. at 2346, 174 L. Ed.2d at 124.

[1398] 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed.2d 268 (1989).

[1399] *Gross*, 557 U.S. at 171, 129 S. Ct. at 2347, 174 L. Ed.2d at 125 (citation omitted).

[1400] *Id.* at 171, 129 S. Ct. at 2347, 174 L. Ed.2d at 126 (citation omitted).

[1401] *Id.* at 172, 129 S. Ct. at 2347, 174 L. Ed.2d at 126 (citation omitted).

[1402] *Id.* at 173, 129 S. Ct. at 2348, 174 L. Ed.2d at 126 (footnote omitted).

[1403] *Id.* at 173, 129 S. Ct. at 2348, 174 L. Ed.2d at 126-27 (footnote omitted) (emphasis supplied).

[1404] *Id.* at 174, 129 S. Ct. at 2349, 174 L. Ed.2d at 127 (citation omitted).

[1405] *Id.*

[1406] *Id.* at 177, 129 S. Ct. at 2351, 174 L. Ed.2d at 129.

[1407] *Id.* at 177-78, 129 S. Ct. at 2351, 174 L. Ed.2d at 129 (citation omitted).

[1408] *Id.* at 180, 129 S. Ct. at 2352, 174 L. Ed.2d at 131.

[1409] 97 A.D.3d 1068, 949 N.Y.S.2d 279 (2012).

[1410] *Id.* at 1069-70, 949 N.Y.S.2d at 281-2 (citation omitted) (some internal quotation marks omitted).

Gross "did not expressly reject the conventional burden-shifting framework," the appellate court concluded, as had the Second Circuit, that the three-step, burden-shifting analysis in *McDonald Douglass* still applies in ADEA cases.[1411] The appellate court held that when a claimant responds to "an employer's legitimate and nondiscriminatory explanations, [the] claimant must now show that those explanations are pretextual and that his or her age was the 'but-for' reason 'and not just a contributing or motivating factor' for an adverse employment action."[1412]

Although the claimant in *DeKenipp* established a *prima facie* case of age discrimination, the DOT "met its burden of proving that there were legitimate, nondiscriminatory reasons for selecting applicants other than claimant."[1413] For example, the DOT showed that in regard to the 2006 ES2-M position, the interviewer's testimony "established that the applicant who was offered the position was more highly rated and considered to be better qualified."[1414] The appellate court affirmed the decision of the Court of Claims, because the "claimant failed to meet his burden of proving that defendant's proffered reasons 'were false and that discrimination was the real reason' for his failure to obtain the desired promotion…."[1415]

Also following the but-for rule in *Gross* is a decision by the Ohio Court of Claims. In *Pla v. Cleveland State Univ.*,[1416] the Ohio Court of Claims stated that, even though the plaintiff "established that the reasons offered for her termination are likely false," the plaintiff still had to prove that "the real reason was discriminatory intent."[1417] The court observed that the federal courts in ADEA cases require that for a plaintiff to prevail on a disparate treatment claim the plaintiff "must prove that age was the 'but-for' cause for the challenged adverse employment action."[1418] In Ohio, state "courts have held that the 'ultimate inquiry' in considering an employment based age discrimination case is 'whether the plaintiff was a victim of intentional discrimination and was subject to an adverse employment decision *because of* his or her age, i.e., whether age was the 'but for' cause of the employer's adverse decision.'"[1419]

7. Disparate Treatment Claims Under the ADEA

The cases in this part of the subsection involve disparate treatment giving rise to an age discrimination claim. In *Apsley v. Boeing Co.*,[1420] decided by the Tenth Circuit in 2012, the plaintiffs alleged age discrimination based on disparate treatment. The plaintiffs were employees of The Boeing Company (Boeing) who sued the defendants Boeing and Spirit AeroSystems, Inc. (Spirit). In 2005 Boeing sold its facilities in Wichita, Kansas, and Tulsa and McAlester, Oklahoma (the Division) to Spirit. On June 16, 2005, Boeing terminated the Division's entire workforce (more than 10,000 employees). The next day, Spirit rehired 8,354 employees, who had been selected by Boeing's managers. The plaintiffs alleged that their termination of employment violated the ADEA, as well as the Employee Retirement Income Security Act,[1421] Title VII of the Civil Rights Act of 1964, and the Americans with Disabilities Act.[1422]

The plaintiffs' ADEA claim proceeded under a "pattern or practice theory" of liability. The plaintiffs, first, had to "make a prima facie showing that 'unlawful discrimination has been a regular procedure or policy followed by an employer or group of employers.' … If they succeed, '[t]he burden then shifts to the employer to defeat the prima facie showing of a pattern or practice by demonstrating that the plaintiffs' proof is either inaccurate or insignificant.'"[1423]

The district court "concluded that the Employees' statistics did not establish a prima facie case of a pattern or practice of discrimination."[1424] After considering the plaintiffs' "statistical, circumstantial, and anecdotal evidence as a whole," the district court held that the evidence "was 'insufficient to establish a pattern or practice of age discrimination.'"[1425] For the reasons discussed below, the Tenth Circuit affirmed.

As for the plaintiffs' use of statistics, the appeals court agreed that "[g]ross statistical disparities … alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination,'"[1426] but "[s]tatistics must always be evaluated in the context of 'all of the surrounding facts and circumstances.'"[1427] The Tenth Circuit held, as did the district court, that "the Employees' statistics suggest, at most, isolated or sporadic instances of age discrimination."[1428] In fact, "[t]he Employees' own figures show that the Companies recommended and hired over 99% of the older employees they would have been expected to recommend and hire in the absence of any discrimination."[1429] The data showed that "older employees made up a similar percentage of the Companies' workforce immediately before and after the divestiture."[1430] The court held that the plaintiff's other evi-

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[1411] *Id.* at 1070, 949 N.Y.S.2d at 282 (citation omitted).

[1412] *Id.* (citation omitted) (some internal quotation marks omitted).

[1413] *Id.*

[1414] *Id.*

[1415] *Id.* at 1071, 949 N.Y.S.2d at 283 (citations omitted).

[1416] 2016-Ohio-3150 (Ct. Cl. 2016).

[1417] *Id.* at P36 (citing Crase v. Shasta Bevs., Inc., 2012-Ohio-326 at P21 (Ohio Ct. App. 2012)).

[1418] *Id.* (citing Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 177, 129 S. Ct. 2343, 2352, 174 L. Ed.2d 119, 129 (2009).

[1419] *Id.* (citations omitted) (emphasis in original).

[1420] 691 F.3d 1184 (10th Cir. 2012).

[1421] 93 Pub. L. No. 406, 88 Stat. 829 (1974) (codified at 18 U.S.C. §§ 1001-1461).

[1422] 101 Pub. L. No. 336, 104 Stat. 327 (1990) (codified at 42 U.S.C. §§ 12101-12213).

[1423] *Aspley*, 691 F. 3d at 1194 (citations omitted) (some internal quotation marks omitted). The court stated that "[i]f the plaintiffs also seek 'individual relief for the victims of the discriminatory practice,' the case moves into the second or subsequent stages. … In these additional proceedings, it must be determined whether each individual plaintiff was a victim of the discriminatory practice.'" *Id.* (citations omitted).

[1424] *Id.* (citation omitted).

[1425] *Id.* at 1195 (citations omitted).

[1426] *Id.* (citation omitted).

[1427] *Id.* (citation omitted).

[1428] *Id.* at 1200 (citation omitted).

[1429] *Id.* (citation omitted).

[1430] *Id.* at 1201 (citation omitted).

dence did not show a widespread pattern or practice of disparate treatment and age discrimination.[1431]

Likewise, the plaintiffs failed to prove disparate impact. The appeals court noted that, although "older employees predominated in the workforce both before and after … [Boeing's sale of the Division], a lower percentage of older workers than younger ones were rehired."[1432] The court found that the plaintiffs' "statistics reveal a highly unlikely disparity in the treatment of older and younger workers. But the disparity is, in absolute numbers, very small."[1433]

In *Coleman v. Quaker Oats Co*.,[1434] decided by the Ninth Circuit in 2000, the defendant Quaker Oats Co. (Quaker), during a series of reductions in force from 1994 to 1995, laid off employees in Arizona, including the plaintiffs Jerry Jeney (Jeney), Joseph Gentile (Gentile), and Perry Coleman (Coleman), along with hundreds of other employees nationwide. The issue was whether the former employees had raised a genuine issue of material fact under the ADEA by showing that they were fired because of their age.[1435] After the plaintiffs Jeney, Gentile, and Coleman filed complaints with the EEOC, the Commission in May 1998 issued its determination that there was "reasonable cause to believe Quaker had discriminated against older employees as a class and had violated the law when it terminated Jeney, Gentile, and Coleman."[1436] In October 1995, Jeney, Gentile, Coleman, and seven other plaintiffs, filed an action in a federal district court in Arizona, alleging that Quaker fired them because of their age in violation of the ADEA.

The plaintiffs' claim, at least initially, was based on disparate treatment—that the plaintiffs were treated differently than other employees in the lay-offs. The court stated that "[t]o establish a violation of ADEA under the disparate treatment theory of liability, [the plaintiffs] 'must first establish a prima facie case of discrimination. If [the plaintiffs do so], the burden then shifts to [Quaker] to articulate a legitimate nondiscriminatory reason for its employment decision. Then, in order to prevail, [the plaintiffs] must demonstrate that [Quaker's] alleged reason for the adverse employment decision is a pretext for another motive which is discriminatory."[1437] The plaintiffs "must produce 'specific, substantial evidence of pretext.'"[1438] The court added: "Despite the burden shifting, the ultimate burden of proof remains always on the former employees to show that Quaker intentionally discriminated because of their age."[1439] Furthermore, when plaintiffs rely on circumstantial evidence to make a *prima facie* case, they "must demonstrate that they were (1) members of the protected class (at least age 40); (2) performing their jobs satisfactorily; (3) discharged; and (4) replaced by substantially younger employees with equal or inferior qualifications."[1440]

The Ninth Circuit found, however, that Quaker articulated legitimate, non-discriminatory reasons for the plaintiffs' termination,[1441] thus shifting the burden to the plaintiffs to show that Quaker's reasons were a "pretext for age discrimination."[1442] Although the plaintiffs sought to use statistics to show that Quaker's reasons for their termination were pretextual, the Ninth Circuit ruled that their "statistics failed to account for obvious variables—including education, previous position at the company, and distribution of age groups by position—that would have affected the results of the analysis."[1443]

For the court, the question was not whether the other candidates were more qualified; instead, the question was "'whether the other candidates [were] more qualified with respect to the criteria that [Quaker] actually employ[ed].'"[1444] For example, with respect to Jeney's position at the company, Quaker was no longer employing sales representatives: "'In a reduction-in-force case, there is no adverse inference to be drawn from an employee's discharge if his position and duties are completely eliminated…. If [Jeney] cannot show that [Quaker] had some continuing need for his skills and services in that his various duties were still being performed, then the basis of his claim collapses.'"[1445] With respect to other plaintiffs that Quaker laid off, Quaker was no longer employing persons in their fields of experience.[1446] The court held that regardless of the EEOC's determination of reasonable cause for age-discrimination, the plaintiffs failed "'to produce enough evidence to allow a reasonable factfinder to conclude either: (a) that the alleged reason for [their] discharge was false, or (b) that the true reason for [their] discharge was a discriminatory one.'"[1447]

In *Quaker*, late in the pre-trial proceedings, the plaintiffs attempted to plead disparate impact claims, but the court held that allowing the plaintiffs to proceed with a new claim after the close of discovery would have been prejudicial to Quaker. The reason was that "[a] disparate impact theory, lacking the requirement that the plaintiff prove intent and focusing on statistical analyses, requires that the defendant develop entirely different defenses, including the job relatedness of the challenged business practice or its business necessity. Neither of these are necessary to defend against a disparate treatment theory."[1448]

The plaintiff alleged disparate treatment in violation of the ADEA in *Bryant v. Greater New Haven Transit Dist*.,[1449] decided by a federal district court in Connecticut. In November 2004, the

[1431] *Id.* at 1205-6.

[1432] *Id.* at 1190.

[1433] *Id.* at 1207.

[1434] 232 F.3d 1271 (9th Cir. 2000).

[1435] *Id.* at 1277.

[1436] *Id.* at 1279-80.

[1437] *Id.* at 1280-81 (citation omitted).

[1438] *Id.* at 1282 (citation omitted) (some internal quotation marks omitted).

[1439] *Id.* at 1281 (citation omitted).

[1440] *Id.* (citation omitted).

[1441] *Id.* at 1282.

[1442] *Id.*

[1443] *Id.* at 1283 (citations omitted).

[1444] *Id.* at 1285 (citation omitted).

[1445] *Id.* at 1287 (citation omitted) (some internal quotation marks omitted).

[1446] *Id.*

[1447] *Id.* at 1291 (citation omitted).

[1448] *Id.* at 1292.

[1449] 8 F. Supp.3d 115 (D. Conn. 2014).

Greater New Haven Transit District (GNHTD) hired the plaintiff as a transit driver. The plaintiff was an African American male over the age of forty who also had a heart condition during some of the time relevant to the case. The GNHTD, a political subdivision of Connecticut, provides special transportation services to disabled and elderly clients.[1450]

After GNHTD terminated the plaintiff's employment in January 2010, Bryant brought ADEA claims for disparate treatment because of his January 2010 termination and his February 2011 suspension; a claim for retaliation that allegedly occurred after the plaintiff returned to work in July 2010, retaliation that continued until his resignation in April 2011; a hostile work environment claim; and a constructive discharge claim relating to the plaintiff's April 2011 resignation.[1451]

The district court stated that the analysis of the plaintiff's disparate treatment claim had to be based on the burden-shifting framework for Title VII claims as set forth in *McDonnell Douglas Corp.,* supra,[1452] as modified by the Supreme Court's decision in *Gross v. FBL Financial Services, Inc.*[1453] Under the burden-shifting analysis, although a plaintiff has to make a *prima facie* case of discrimination, the plaintiff's burden to do so is *de minimis*.[1454] If the plaintiff makes a *prima facie* case, the "'burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for its action.'"[1455] If a defendant "articulates a legitimate, nondiscriminatory reason for its action, the plaintiff 'can no longer rely on the prima facie case, but may still prevail if she can show that the employer's determination was in fact the result of discrimination.'"[1456] According to the Supreme Court's decision in *Gross*, supra, a plaintiff making a disparate-treatment claim under the ADEA still "'must prove, by a preponderance of the evidence, that age was the but-for cause of the challenged adverse employment action and not just a contributing or motivating factor.'"[1457]

The district court reiterated the elements that Bryant had to establish for a *prima facie* case of age discrimination. Bryant had to show "'(1) that [he] was within the protected age group, (2) that [he] was qualified for the position, (3) that [he] experienced adverse employment action, and (4) that such action occurred under circumstances giving rise to an inference of discrimination.'"[1458] The Connecticut federal court noted "that 'the Second Circuit has long held that a suspension without pay, for which a plaintiff receives no backpay, is an adverse employment action sufficient for a retaliation claim.'"[1459] However, the plaintiff did not have a disparate treatment claim, in part, because he did not have a DOT Medical Card and was not eligible to work at the time of his suspension in February 2011.[1460] Furthermore, Bryant did not have a similarly situated co-employee, a comparator, who was "(1) 'subject to the same performance evaluation and discipline standards' and (2) 'engaged in comparable conduct.'"[1461] The comparator the plaintiff identified did not receive different discipline for a similar infraction near the time of (i.e., temporal proximity to) the plaintiff's suspension.[1462]

A recent Louisiana case, *Robinson v. Bd. of Supervisors for the Univ. of La. Sys.,*[1463] involved age discrimination and a finding of constructive discharge in violation of the ADEA. The Supreme Court of Louisiana affirmed a jury finding of age discrimination in favor of Robinson. In 1971, the University of Southwestern Louisiana, presently the University of Louisiana at Lafayette (ULL), hired the plaintiff James Robinson, then 27, to work in what became the campus police department. In 1980, Police Chief Joey Sturm promoted Robinson, who, thereafter, rose to the rank of captain. In 2002, Sturm left the department to pursue other employment opportunities. During Sturm's absence, Robinson served as interim chief on three separate occasions. In 2010, when Sturm returned to ULL as campus police chief, Sturm promoted Robinson to police major A when Robinson was 66 years of age. Robinson was the oldest employee in the department with most of the employees being in their early forties.

However, in March 2011, Robinson lost his assignment as the custodian of the evidence room when the position was assigned to a lower ranking officer. In March 2011, Sturm recommended to the ULL Vice President of Student Affairs that disciplinary action be taken against Robinson for insubordination for failing to follow orders concerning an audit of the evidence room. In May 2011, Robinson became the subject of an internal affairs investigation over alleged missing evidence; however, because Robinson had executed the requisite paperwork certifying his intent to retire effective July 15, 2011, disciplinary action was withheld.

In August 2012, Robinson filed an action under both federal and state law for damages for age-based employment discrimination by the department. The jury rejected ULL's proffered legitimate, non-discriminatory reason for its actions and rendered a verdict in favor of Robinson for $367,918.00, a judgment that the First Circuit Court of Appeal of Louisiana affirmed.

The Supreme Court of Louisiana stated that "[a]n age discrimination claim can be grounded on a theory of constructive discharge"[1464] and that "[a] constructive discharge occurs when an employee quits [his] job under circumstances that are treated as an involuntary termination. … If an employee's working conditions are deliberately made so intolerable that the employee

[1450] *Id.* at 122.

[1451] *Id.* at 128-29.

[1452] 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed.2d 668 (1973).

[1453] 557 U.S. 167, 129 S. Ct. 2343, 174 L. Ed.2d 119 (2009).

[1454] *Bryant*, 8 F. Supp.3d at 129 (citation omitted).

[1455] *Id.* (citation omitted) (some internal quotation marks omitted).

[1456] *Id.* (citation omitted).

[1457] *Id.* (quoting *Gross*, 557 U.S. at 180, 129 S. Ct. at 2352, 174 L. Ed.2d at 131) (some internal quotation marks omitted).

[1458] *Id.* (citation omitted).

[1459] *Id.* at 129-30 (citation omitted).

[1460] *Id.* at 130.

[1461] *Id.* (citation omitted).

[1462] *Id.* at 132.

[1463] 225 So.3d 424 (La. 2017), *decision reached on appeal by, writ granted by, in part, writ denied by, in part,* Robinson v. Bd. of Supervisors for the Univ. of La. Sys., 2017 La. App. LEXIS 2251 (La. App., 1 Cir., Dec. 1, 2017).

[1464] *Id.* at 432.

is forced to involuntarily resign, such constitutes a constructive discharge."[1465] The "reasonable employee" test is used to determine whether there has been a constructive discharge, *i.e.*, "whether a reasonable person in the employee's shoes would have felt compelled to … resign."[1466]

After reviewing some of the evidence of the embarrassment, humiliation, and other treatment to which Robinson was subjected,[1467] the court found that the record reasonably supported "the conclusion that Major Robinson's duties were taken from him prior to May 2011[] and that these duties were reassigned to subordinates."[1468]

The ULL, relying on the Supreme Court's decision in *Gross v. FBL Fin. Servs. Inc.*,[1469] argued that "even if Major Robinson proved a constructive discharge, he failed to prove that his age was the 'but-for' cause of his discharge."[1470] The court, however, found that "that negative age-based comments that are direct, unambiguous, and of temporal proximity to the adverse employment action, when considered in combination with other circumstantial evidence of pretext, are probative of discriminatory intent."[1471] Furthermore, although there was conflicting evidence, the jury "apparently did not find credible [the] defendant's explanation that Robinson voluntarily retired or that any adverse employment action taken against him was due to his insubordination."[1472] The court did amend the amount of damages awarded by the jury.[1473]

8. Disparate Impact Claims Under the ADEA

The issue in *Smith v. City of Jackson*,[1474] decided by the Supreme Court in 2005, was whether the petitioners could recover for age discrimination in violation of the ADEA based on disparate impact theory. The Court held that disparate impact claims are cognizable under the ADEA.

The petitioners were police and public safety officers employed by the city of Jackson, Mississippi (City). The petitioners argued that salary increases that they received in 1999 violated the ADEA "because they were less generous to officers over the age of 40 than to younger officers."[1475] Officers with "less than five years of tenure received proportionately greater raises when compared to their former pay than those with more seniority. Although some officers over the age of 40 had less than five years of service, most of the older officers had more."[1476]

The petitioners claimed that the city "deliberately discriminated against them because of their age (the 'disparate-treatment' claim) and that they were 'adversely affected' by the plan because of their age (the 'disparate-impact' claim)."[1477] In *Smith*, as said, the issue was whether the disparate-impact theory of recovery that the Court approved in *Griggs v. Duke Power Co.*[1478] for Title VII cases also applies to ADEA cases.[1479] Although the Court held, as discussed below, that the ADEA permits "recovery in 'disparate-impact' cases comparable to *Griggs*," based on the evidence, the petitioners in *Smith* failed to prove "a valid disparate-impact claim…."[1480]

The Court held that there were several reasons that disparate impact claims are cognizable under the ADEA. First, the ADEA provides "that it shall be unlawful for an employer '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….'"[1481] Second, the foregoing language in the ADEA is identical to the language used in Title VII, § 703(a)(2), of the Civil Rights Act of 1964.[1482] Third, unlike Title VII, the ADEA's § 4(f)(1), 29 U.S.C. § 623(f)(1), "contains language that significantly narrows its coverage by permitting any 'otherwise prohibited' action 'where the differentiation is *based on reasonable factors other than age*,'" the RFOA provision identified earlier.[1483] Fourth, the Court found it to be persuasive that in the more than two decades after its decision in *Griggs*, the federal courts of appeals had "uniformly interpreted the ADEA as authorizing recovery on a 'disparate-impact' theory in appropriate cases."[1484]

The Court explained the difference between disparate treatment and disparate impact in ADEA cases. "The RFOA provision provides that it shall not be unlawful for an employer 'to take any action otherwise prohibited under subsectio[n] (a) … where the differentiation is based on reasonable factors other than age discrimination….' In most disparate-treatment cases,

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[1465] *Id.* (citations omitted). As stated by the court, "[t]he inquiry is case-and-fact specific, and the relevant factors which may be present singularly or in combination include: (1) demotion; (2) reduction in salary; (3) reduction in job responsibilities; (4) reassignment to menial or degrading work; (5) reassignment to work under a younger (or less experienced/qualified) supervisor; (6) badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation; or (7) offers of early retirement (or continued employment on terms less favorable than the employee's former status)." *Id.* (citation omitted).

[1466] *Id.* (citation omitted).

[1467] *Id.* at 433.

[1468] *Id.* at 433-4.

[1469] 557 U.S. 167, 129 S. Ct. 2343, 174 L. Ed.2d 119 (2009).

[1470] *Robinson*, 225 So.3d at 434 (citation omitted).

[1471] *Id.* at 436.

[1472] *Id.* at 439.

[1473] *Id.* at 440.

[1474] 544 U.S. 228, 125 S. Ct. 1536, 161 L. Ed.2d 410 (2005). *See* Adam Bitter, *Smith v. City of Jackson: Solving an Age-old Problem*?, 56 Cath. U. L. Rev. 647, 650 (2007) (noting that the *Smith* case was decided by a majority of the Court in a "splintered opinion").

[1475] *Smith*, 544 U.S. at 230, 125 S. Ct. at 1539, 161 L. Ed.2d at 415.

[1476] *Id.* at 231, 125 S. Ct. at 1539, 161 L. Ed.2d at 416.

[1477] *Id.*

[1478] 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed.2d 158 (1971).

[1479] *Smith*, 544 U.S. at 230, 125 S. Ct. at 1539, 161 L. Ed.2d at 415.

[1480] *Id.* at 232, 125 S. Ct. at 1540, 161 L. Ed.2d at 416.

[1481] *Id.* at 233, 125 S. Ct. at 1540, 161 L. Ed.2d at 417 (citation omitted).

[1482] *Id.*

[1483] *Id.* at 233, 125 S. Ct. at 1540-41, 161 L. Ed.2d at 417 (emphasis supplied).

[1484] *Id.* at 236-37, 125 S. Ct. at 1543, 161 L. Ed.2d at 419 (footnote omitted).

if an employer in fact acted on a factor other than age, the action would not be prohibited under subsection (a) in the first place."[1485]

However, "[i]n disparate-impact cases … the allegedly 'otherwise prohibited' activity is not based on age."[1486] For example, "'[c]laims that stress disparate impact … involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another….'"[1487] Therefore, for disparate-impact claims, "the RFOA provision plays its principal role by precluding liability if the adverse impact was attributable to a nonage factor that was 'reasonable.' Rather than support an argument that disparate impact is unavailable under the ADEA, the RFOA provision actually supports the contrary conclusion."[1488]

Furthermore, as noted, "the scope of disparate-impact liability under [the] ADEA is narrower than under Title VII."[1489] The RFOA provision "is consistent with the fact that age, unlike race or other classifications protected by Title VII, not uncommonly has relevance to an individual's capacity to engage in certain types of employment."[1490] What sets the ADEA apart from other anti-discrimination laws is that "certain employment criteria that are routinely used may be reasonable despite their adverse impact on older workers as a group."[1491]

The Court, nonetheless, affirmed the Fifth Circuit's decision that upheld the district court's grant of a summary judgment to the city. First, the petitioners did "little more than point out that the pay plan at issue [was] relatively less generous to older workers than to younger workers;" they did not identify "any specific test, requirement, or practice within the pay plan that [had] an adverse impact on older workers."[1492] Second, the city's plan was based on other reasonable factors.[1493] For example, "[r]eliance on seniority and rank is unquestionably reasonable given the City's goal of raising employees' salaries to match those in surrounding communities. … [T]he City's decision to grant a larger raise to lower echelon employees for the purpose of bringing salaries in line with that of surrounding police forces was a decision based on a 'reasonable facto[r] other than age' that responded to the City's legitimate goal of retaining police officers."[1494]

In the same year the Supreme Court decided *Smith v. City of Jackson*, supra, Justice Kennedy's opinion for the Court in *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc*.,[1495] involving low-income housing and disparate impact theory, stated that

> [t]ogether, *Griggs* holds and the plurality in *Smith* instructs that antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose.[1496]

Justice Kennedy said also that "[t]hese cases … teach that disparate-impact liability must be limited so employers and other regulated entities are able to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system.[1497]

Finally, Justice Kennedy wrote that "[g]overnmental or private policies are not contrary to the disparate-impact requirement unless they are 'artificial, arbitrary, and unnecessary barriers.'"[1498]

9. Retaliation Claims Under the ADEA

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. *Bryant v. Greater New Haven Transit District*,[1499] supra, is an example of an ADEA retaliation claim. In that case retaliation claims are analyzed under the burden-shifting approach in the *McDonnell-Douglas* case.[1500] For a *prima facie* case of retaliation, Bryant had "to show by a preponderance of the evidence '[1] participation in a protected activity known to the defendant; [2] an employment action disadvantaging the plaintiff; and [3] a causal connection between the protected activity and the adverse employment action.'"[1501] A plaintiff may prove causation by showing "(1) indirectly … that the protected activity was followed closely by discriminatory treatment, or through other circumstantial evidence such as disparate treatment of fellow employees who engaged in similar conduct;" or "(2) directly[] through evidence of retaliatory animus directed against the plaintiff by the defendant."[1502]

Bryant had no evidence showing disparate treatment of fellow employees following Bryant's submission of his first complaint to the Connecticut Commission on Human Rights and Opportunities (CHRO), nor did the plaintiff offer "any evidence

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[1485] *Id.* at 238, 125 S. Ct. at 1543-4, 161 L. Ed.2d at 420 (citations omitted).

[1486] *Id.* at 239, 125 S. Ct. at 1544, 161 L. Ed.2d at 421 (citation omitted).

[1487] *Id.* (citation omitted) (some internal quotation marks omitted).

[1488] *Id.* (footnote omitted).

[1489] *Id.* at 240, 125 S. Ct. at 1544, 161 L. Ed.2d at 421.

[1490] *Id.* at 240, 125 S. Ct. at 1545, 161 L. Ed.2d at 422.

[1491] *Id.* at 241, 125 S. Ct. at 1545, 161 L. Ed.2d at 422.

[1492] *Id.*

[1493] *Id.*

[1494] *Id.* at 242, 125 S. Ct. at 1546, 161 L. Ed.2d at 423 (citation omitted).

[1495] 135 S. Ct. 2507, 192 L. Ed.2d 514 (2005).

[1496] *Id.* at 2518, 192 L. Ed.2d at 532.

[1497] *Id.*

[1498] *Id.* at 2524, 192 L. Ed.2d at 538 (quoting *Griggs*, 401 U. S. 424, 431, 91 S. Ct. 849, 853, 28 L. Ed.2d 158, 164 (1971)).

[1499] 8 F. Supp.3d 115 (2014).

[1500] *Id.* at 132.

[1501] Id. (citation omitted) (some internal quotation marks omitted). *See also*, Concepcion v. Nice Pak Products, Inc., No. 03 Civ. 1894(LTS)(THK), 2004 U.S. Dist. LEXIS 15873, at *8-9 (S.D. N.Y. Aug. 16, 2004) (quoting Wanamaker v. Columbian Rope Co., 108 F.3d 462, 465 (2d Cir. 1997)).

[1502] *Bryant*, F. Supp.3d. at 133 (citation omitted) (some internal quotation marks omitted).

of retaliatory animus directed against him by the Defendant."[1503] The only method open to Bryant to prove retaliation was to argue that the "timing of the events," the "'temporal proximity between an employer's knowledge of protected activity and an adverse employment action [was] sufficient evidence of causality to establish a prima facie case;'"[1504] However, the cases "'uniformly hold that the temporal proximity must be very close….'"[1505]

The court in *Bryant* held that the disciplinary actions taken against Bryant were insufficient to establish a *prima facie* case. Prior to the filing of his CHRO complaint, the plaintiff had received many disciplinary citations, including nearly two dozen for tardiness.[1506] After the defendant "provided a legitimate nondiscriminatory reason for Plaintiff's February 2011 suspension," Bryant had no evidence to contradict the defendant's reason.[1507] In addition, the court held that the "the temporal relationship, standing alone, [was] too long to create an inference of discrimination to support a prima facie case of retaliation" by reason of Bryant's suspension.[1508] Similarly, "[t]he temporal proximity of the disciplinary actions alone [was] … insufficient to support a showing of retaliatory animus."[1509]

The ADEA also permits an employee's age discrimination claim against a federal agency for retaliation. Until the Supreme Court's decision in *Gomez-Perez v. Potter*,[1510] it had not been clear whether Congress had abrogated the sovereign immunity of *federal agencies* to retaliation claims under the ADEA. For example, a federal district court in Virginia, noting that 29 U.S.C. § 633a(a) waives sovereign immunity of federal agencies for age discrimination suits against them, stated that the ADEA does not expressly prohibit suits against federal agencies for retaliation.[1511] The same court recognized that the Second Circuit and D.C. Circuit had held that Congress waived sovereign immunity for retaliation claims under the ADEA against federal agencies.[1512]

The Supreme Court resolved the issue in *Gomez-Perez v. Potter* in 2008.[1513] In *Gomez-Potter*, the question was whether a federal employee, who was a victim of retaliation because of filing an age discrimination complaint, could assert a claim under the federal-sector provision of the ADEA.[1514] The petitioner Myrna Gómez-Pérez was a full-time window distribution clerk for the United States Postal Service in Dorado, Puerto Rico, when in October 2002, at the age of 45, she requested a transfer to the post office in Moca, Puerto Rico, so that she could be closer to her mother who was ill. Later that month, when the petitioner requested to return to her former job at the Dorado Post Office, her supervisor changed the position in Dorado to part-time, filled the position with another employee, and denied the petitioner's application. After first filing an unsuccessful grievance with the union, and, thereafter, a complaint with the Postal Service for equal employment opportunity age discrimination, the petitioner was subjected to various forms of retaliation.

The petitioner's action in the district court alleged that the defendant violated the federal-sector provision of the ADEA, 29 U.S.C. § 633a(a), by retaliating against her because she filed a complaint alleging age discrimination. The defendant moved for summary judgment, arguing that the United States had not waived sovereign immunity for ADEA retaliation claims and that the ADEA federal-sector provision did not permit retaliation claims. The district court granted the motion. The D.C. Circuit affirmed, holding that "the federal-sector provision's prohibition of 'discrimination based on age,' § 633a(a), does not cover retaliation," thus creating a split among the circuits.[1515]

The Supreme Court, in an opinion by Justice Alito, stated that "[t]he federal-sector provision of the ADEA provides that '[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age … shall be made free from any discrimination based on age.' … The key question in this case is whether … the statutory phrase 'discrimination based on age' includes retaliation based on the filing of an age discrimination complaint."[1516] The Court held that it does and reversed and remanded.

The Court relied on its interpretation of similar language in other antidiscrimination statutes. For example, in a decision interpreting Title IX of the Education Amendments Act of 1972, the Court held:

> Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination…. Retaliation is, by definition, an intentional act. It is a form of "discrimination" because the complainant is being subjected to differential treatment. Moreover, retaliation is discrimination "on the basis of sex" because it is an intentional response to the nature of the complaint: an allegation of sex discrimination. We conclude that when a funding recipient retaliates against a person *because* he complains of sex discrimination, this constitutes intentional "discrimination" "on the basis of sex," in violation of Title IX.[1517]

The Court held that the ADEA's federal-sector provision's prohibition of discrimination based on age proscribes retalia-

[1503] *Id.*

[1504] *Id.* (citation omitted).

[1505] *Id.* (citation omitted) (some internal quotation marks omitted).

[1506] *Id.* at 136 (citation omitted).

[1507] *Id.* at 134.

[1508] *Id.* (citation omitted).

[1509] *Id.* at 136.

[1510] 553 U.S. 474, 128 S. Ct. 1931, 170 L. Ed.2d 887 (2008).

[1511] *Cyr v. Perry*, 301 F. Supp.2d 527 (E.D. Va. 2004).

[1512] *Id.* at 532 (stating that "two other circuits - the Second and District of Columbia 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"). *Id* at 533. (citations omitted).

[1513] 553 U.S. 474, 128 S. Ct. 1931, 170 L. Ed.2d 887 (2008).

[1514] *Id.* at 477, 128 S. Ct. at 1935, 170 L. Ed.2d at 893.

[1515] *Id.* at 479, 128 S. Ct. at 1935-36, 170 L. Ed.2d at 894 (citation omitted).

[1516] *Id.* at 479, 128 S. Ct. at 1936, 170 L. Ed.2d at 894 (citation omitted).

[1517] *Id.* at 480-81, 128 S. Ct. at 1936-37, 170 L. Ed.2d at 895 (emphasis in original) (quoting Jackson v. Birmingham Bd. of Ed., 544 U.S. 167, 173-74, 125 S. Ct. 1497, 1504, 161 L. Ed.2d 361, 370-371 (2005)).

tion as well. The Court rejected the decision of the D.C. Circuit that had "perceived a 'clear difference between a cause of action for discrimination and a cause of action for retaliation' and [that] sought to distinguish *Jackson*…."[1518] Justice Alito stated that "it is 'appropriate' and 'realistic' to presume that Congress expected its prohibition of 'discrimination based on age' in § 633a(a) 'to be interpreted in conformity with' its similarly worded prohibition of 'discrimination' 'on the basis of sex' in 20 U.S.C. § 1681(a), which it had enacted just two years earlier."[1519] Furthermore, "[t]he ADEA federal-sector provision was patterned 'directly after' Title VII's federal-sector discrimination ban. … Like the ADEA's federal-sector provision, Title VII's federal-sector provision … contains a broad prohibition of 'discrimination,' rather than a list of specific prohibited practices."[1520]

Finally, the Court addressed the respondent's arguments that "principles of sovereign immunity 'require that Section 633a(a) be read narrowly as prohibiting substantive age discrimination, but not retaliation'" and that the ADEA's "waiver provision 'must be construed strictly in favor of the sovereign.'"[1521] The Court held that "[s]ubsection (c) of § 633a unequivocally waives sovereign immunity for a claim brought by '[a]ny person aggrieved' to remedy a violation of § 633a. Unlike § 633a(c), § 633a(a) is not a waiver of sovereign immunity; it is a substantive provision outlawing 'discrimination.' That the waiver in § 633a(c) applies to § 633a(a) claims does not mean that § 633a(a) must surmount the same high hurdle as § 633a(c)."[1522]

10. Conclusion

This subsection of the report discusses employment discrimination claims as authorized by the ADEA. Although the Supreme Court struck down Congress's attempt to abrogate the states' sovereign immunity for ADEA claims, Congress amended the ADEA to permit ADEA claims against federal agencies. The ADEA permits both disparate treatment and disparate impact claims for violations of the Act, as well as for retaliation. As a result of the Supreme Court's decision in *Gross v. FBL Fin. Servs. Inc.*,[1523] supra, age discrimination must be the "but-for" cause of the discrimination that allegedly occurred in an employer's hiring, discharging, or disciplining of an employee or in subjecting an employee to a hostile workplace, a constructive discharge, or retaliation.

[1518] *Id.* at 482, 128 S. Ct. at 1938, 170 L. Ed.2d at 896 (citation omitted).

[1519] *Id.* at 485, 128 S. Ct. at 1939, 170 L. Ed.2d at 898 (citation omitted) (some internal quotation marks omitted).

[1520] *Id.* at 487, 128 S. Ct. at 1940, 170 L. Ed.2d at 899-900 (citation omitted).

[1521] *Id.* at 491, 128 S. Ct. at 1942, 170 L. Ed.2d at 901-02 (citations omitted).

[1522] *Id.* at 491, 128 S. Ct. at 1943, 170 L. Ed.2d at 902 (citation omitted). Section 633a(c) states: "Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act."

[1523] 557 U.S. 167, 129 S. Ct. 2343, 174 L. Ed.2d 119 (2009).

F. DISCRIMINATION UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

1. Introduction

Congress enacted Title VII of the Civil Rights Act of 1964 to implement "'the federal policy of prohibiting wrongful discrimination in the Nation's workplaces.'"[1524] Title VII provides remedies for intentional discrimination and unlawful harassment in the workplace and creates statutory authority and guidelines for the adjudication of disparate impact suits under Title VII.

A recent amendment to Title VII was the Lilly Ledbetter Fair Pay Act of 2009,[1525] which Congress enacted in response to the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co*.[1526] The *Ledbetter* decision "significantly impair[ed] statutory protections against discrimination … by unduly restricting the time period in which victims of discrimination [could] challenge and recover for discriminatory compensation decisions or other practices…."[1527] Congress amended Title VII "to clarify that a discriminatory compensation decision or other practice that is unlawful … occurs each time compensation is paid pursuant to [a] discriminatory compensation decision or other practice…."[1528]

Part F. 2. of the report analyzes Title VII's statutory and regulatory framework. F. 3. discusses whether the states or state officials have immunity from Title VII claims.

F. 4. sets forth what is required for a *prima facie* case for disparate treatment claims for violations of Title VII. F. 5. analyzes the use of the direct and indirect methods of proof to establish causation. This part also discusses the importance of "temporal proximity" in Title VII cases, i.e. the time between an employee's engagement in protected activity, such as filing an EEOC complaint, and an employer's alleged adverse employment action against the employee.

F. 6. discusses whether an employer's adverse employment action may be shown to be a pre-text for discrimination.

F. 7. explains the "cat's paw" theory in proving that an adverse employment action was motivated by discrimination.

F. 8. analyzes Title VII and disparate treatment claims, for example, for discrimination in hiring, including "pattern or practice" discriminatory hiring; promotions, terminations, and suspensions; and the use of performance evaluations and personal performance plans, as well as whether an employer violates Title VII when suspending or terminating an employee's security clearance. F. 8. also discusses Title VII claims for a hostile work environment and constructive discharge. F. 9. analyzes claims for retaliation in violation of Title VII, including an employer's withholding of evidence as constituting retaliation.

[1524] Duncan v. Johnson, 213 F. Supp.3d 161 (D. D.C. 2016) (citation omitted).

[1525] Pub. L. No. 111-2, 123 Stat. 5.

[1526] 550 U.S. 618, 127 S. Ct. 2162, 167 L. Ed.2d 982 (2007).

[1527] Lilly Ledbetter Fair Pay Act of 2009, § 2 (1).

[1528] Lilly Ledbetter Fair Pay Act of 2009, Preamble; *See* 42 U.S.C. §§ 2000e-5(e)(3)(A) and (B) (2018).

F. 10, 11, and 12. discuss the purpose of providing for disparate impact claims under the rubric of Title VII, the elements needed for a *prima facie* case for disparate impact claims, and an employer's alleged refusal to adopt an alternative employment practice as a disparate impact.

F. 13. addresses Title VII and discrimination claims for sexual harassment, including whether an employer may be held liable vicariously for a supervisor's sexual harassment of an employee. F. 14. discusses claims for discrimination in violation of the Pregnancy Discrimination Act of 1978.[1529] F. 15. discusses claims for discrimination because of a person's religion. F. 16. analyzes the impact on Title VII claims of an employer's policy against violence or threats of violence in the workplace.

Finally, F. 17 and 18., respectively, discuss class actions and remedies to redress violations of Title VII.

2. Statutory and Regulatory Framework

Sections 2000e-2(a)(1) and (2) of Title 42 of the United States Code state that it is "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.[1530]

Title VII includes federal and state agency-prerequisites to filing a Title VII lawsuit. To bring a Title VII a claim, first, a plaintiff must file a charge of discrimination timely with the U.S. Equal Employment Opportunity Commission (EEOC) either in the first instance or with the appropriate state or local agency in the states that have parallel state or local antidiscrimination legislation and agencies.

Although the statute should be consulted for more details, 42 U.S.C. § 2000e-5(e)(1) provides:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.[1531]

If within 30 days after a charge is filed with the EEOC, or within 30 days after the expiration of any period of reference under §§ 20003-5(c) and (d), and the Commission has been unable to secure an acceptable conciliation agreement from a respondent, "the Commission may bring a civil action against any respondent [that is] not a government, governmental agency, or political subdivision named in the charge."[1532] When a respondent is a government, governmental agency, or political subdivision, and the Commission has been unable to secure an acceptable conciliation agreement from the respondent, "the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court."[1533] An aggrieved person in such a case has the right to intervene in an action involving a government, governmental agency, or political subdivision.[1534]

If the Commission dismisses a charge, or if within 180 days from the filing of the charge, or the expiration of any period of reference under §§ 20003-5(c) and (d), whichever is later, and neither the Commission nor the Attorney General has filed a civil action, the Commission or the Attorney General must notify the aggrieved person.[1535] Within 90 days after the giving of such notice,

> a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.[1536]

A plaintiff in a Title VII action must have adhered to the above and other requirements; otherwise, a court will lack jurisdiction over the plaintiff's employment discrimination action.

Title VII claims may be subject to dismissal for failure to exhaust administrative remedies.[1537] For example, a federal district court in the District of Columbia, in an age and gender discrimination case, granted the defendant's motion for summary judgment, in part, because the plaintiff failed to exhaust administrative remedies for some of his claims.[1538]

A plaintiff's civil action is limited to the claims and/or incidents that the plaintiff alleged in his or her administrative complaint. In *Duncan v. Johnson*,[1539] the plaintiff could not prevail on his retaliation claims, first, because he had not exhausted his administrative remedies. Second, the plaintiff alleged in his civil complaint instances of retaliation that were not included in his EEOC complaint.[1540]

[1529] Pub. L. No. 95-555, 92 Stat. 2076.

[1530] 42 U.S.C. §§ 2000e-2(a)(1) and (2) (2018).

[1531] 42 U.S.C. § 2000e-5(e)(1) (2018).

[1532] 42 U.S.C. § 2000e-5(f)(1) (2018).

[1533] *Id.*

[1534] *Id.*

[1535] *Id.*

[1536] *Id.*

[1537] Gomez v. Orleans Parish School Board, No. 04-1521 SECTION "N" (1), 2005 U.S. Dist. LEXIS 17810, at *23 (E.D. La. Aug. 11, 2005).

[1538] Duncan v. Johnson, 213 F. Supp.3d 161 (D. D.C. 2016).

[1539] 213 F. Supp.3d 161 (D. D.C. 2016).

[1540] *Id.* at 186.

> [G]enerally speaking, a lawsuit that flows from an EEOC charge is limited to the claims made in the charge. … "[A] Title VII lawsuit following [an] EEOC charge is limited in scope to claims that are 'like or reasonably related to the allegations of the charge and growing out of such allegations'" … and that would "arise from 'the administrative investigation that can reasonably be expected to follow the charge of discrimination.'"[1541]

Title VII claims may be time-barred depending on the claims and circumstances of the case.[1542] Moreover, "'discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges.'"[1543]

3. Whether the States or State Officials Have Immunity to Title VII Claims

In the 1972 amendments to Title VII by the Civil Rights Act of 1964, Congress acted pursuant to its authority in § 5 of the Fourteenth Amendment to authorize federal courts to award money damages to an individual against a state government that had subjected a person to employment discrimination on the basis of his or her race, color, religion, sex, or national origin. The courts have held that the states do not have immunity to claims for disparate treatment or disparate impact brought under Title VII.

In 1976, in *Fitzpatrick v. Bitzer*,[1544] current and retired male employees of the state of Connecticut brought a class action that alleged, *inter alia*, that certain provisions of the state's statutory retirement benefit plan discriminated against them because of their sex in violation of Title VII.[1545] A federal district court in Connecticut held that the Connecticut State Employees Retirement Act violated Title VII's prohibition against sex-based employment discrimination. The Second Circuit affirmed in part and reversed in part. Because the action for damages was in essence a suit against the state, the appeals court held that the Eleventh Amendment barred a private action against the states under Title VII for retroactive damages.[1546]

In reversing the Second Circuit, the Supreme Court stated that

> the Eleventh Amendment, and the principle of state sovereignty which it embodies …, are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment. In that section Congress is expressly granted authority to enforce "by appropriate legislation" the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority. When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority.[1547]

The Court held that Congress may determine "what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment [and] provide for private suits against States or state officials which are constitutionally impermissible in other contexts."[1548]

In 1999, in *Crum v. Alabama (In re Employment Litig.)*,[1549] the Eleventh Circuit held that Congress validly abrogated the states' sovereign immunity under the Eleventh Amendment from claims arising under the disparate impact provisions of Title VII of the Civil Rights Act of 1964.[1550] In ruling that there is no immunity, the Eleventh Circuit considered whether the prohibition in Title VII of disparate impact discrimination exceeded Congress's power in § 5 of the Fourteenth Amendment to enforce the "constitutional command" that no state shall deny to any person the equal protection of the law.[1551]

The *Crum* decision focused on whether "a plaintiff must prove that a government agent acted with 'discriminatory purpose….'"[1552] The Court stated that in the context of the equal protection of the law, the prohibition of disparate impact discrimination must be consistent with the premise that "what the Constitution prohibits is *intentional* discrimination on the part of state actors…."[1553] The court noted that in *City of Boerne v. Flores*[1554] the Supreme Court stated that "'legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional,' … but 'there must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'"[1555]

The Eleventh Circuit held that "disparate impact analysis does not require plaintiffs to demonstrate a subjective discriminatory motive on the part of the decisionmaker"[1556] but that the "ultimate issue" in a disparate impact case is not any different "'than in cases where disparate treatment analysis is used.'"[1557] The purpose of the prohibition of disparate impact discrimination is "to get at 'discrimination [that] could actually exist under the guise of compliance with [Title VII].'"[1558] "[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.'"[1559]

The "core injury" targeted by the prohibitions of purposeful discrimination and disparate impact discrimination "remains

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[1541] *Id.* at 185 (citations omitted).

[1542] *Gomez*, 2005 U.S. Dist. LEXIS 17810, at *10.

[1543] *Duncan*, 213 F. Supp.3d at 185 (citation omitted).

[1544] 427 U.S. 445, 96 S. Ct. 2666, 49 L. Ed.2d 614 (1976).

[1545] *Id.* at 448, 96 S. Ct. at 2667, 49 L. Ed.2d at 617.

[1546] *Id.* at 451-52, 96 S. Ct. at 2669, 49 L. Ed.2d at 619 (citations omitted) (footnote omitted).

[1547] *Id.* at 456, 96 S. Ct. at 2671, 49 L. Ed.2d at 621-22 (citation omitted).

[1548] *Id.* at 456, 96 S. Ct. at 2671, 49 L. Ed.2d at 622 (citations omitted) (footnote omitted).

[1549] 198 F.3d 1305 (11th Cir. 1999).

[1550] *Id.* at 1308.

[1551] *Id.* at 1319.

[1552] *Id.* (citation omitted).

[1553] *Id.* at 1320 (emphasis in original).

[1554] 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed.2d 624 (1997).

[1555] *Crum*, 198 F.3d at 1320 (citations omitted).

[1556] *Id.* at 1321.

[1557] *Id.* (citation omitted).

[1558] *Id.* (citations omitted).

[1559] *Id.* (citations omitted).

the same: intentional discrimination."[1560] As for any burden that the prohibition of disparate impact discrimination places on employers, "[t]hey must merely 'demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.'"[1561] The court held that, when Congress enacted the disparate impact provisions of Title VII, Congress "unequivocally expressed its intent to abrogate the states' Eleventh Amendment sovereign immunity" and that Congress "acted pursuant to a valid exercise of its Fourteenth Amendment enforcement power."[1562]

In 2001, in *Okruhlik v. University of Arkansas*,[1563] a case decided by the Eighth Circuit, the plaintiffs brought claims found on disparate treatment and impact discrimination on the basis of gender, a hostile workplace environment, sexual harassment, and discrimination in terminations and promotions. Although Arkansas argued that "claims of disparate treatment and disparate impact discrimination under Title VII … are barred by the Eleventh Amendment,"[1564] the court held, as had the Supreme Court and other courts, that Congress clearly abrogated the states' sovereign immunity in Title VII actions.[1565] 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."[1566] Among other things, the court found "much support" in the record, including at various times "numerous reports detailing racial and gender discrimination by the states…."[1567]

Another question that arises is whether state officials or officials of political subdivisions have immunity to claims against them in their official or individual capacities. In *Seibert v. Jackson County*,[1568] a case involving sexual harassment against a county employee, the defendant, the former sheriff, argued that, in his individual capacity, he was not Seibert's employer for Title VII purposes. The court held that "a supervisor may be 'considered an employer under Title VII if he wields the employer's traditional rights, such as hiring and firing.' … [I]f Defendant Byrd exercise[d] such power as a public official, it 'is necessarily exercised ... by a person who acts as an agent of the corporate or municipal body he represents.'"[1569]

In *Titus v. Ill. DOT*,[1570] the plaintiff alleged that he was discriminated against on the basis of his race when he brought § 1983 claims for disparate treatment and retaliation against certain employees of the Illinois DOT in their individual capacities.[1571] The court held that "'the same standards for proving intentional discrimination apply to Title VII and § 1983 equal protection'" claims.[1572] The court, therefore, adopted its Title VII discrimination analysis in the case in finding that Titus had "alleged sufficient facts to state a plausible Section 1983 claim of race discrimination based on his August 2009 suspension."[1573] The court declined to dismiss the § 1983 claim against two IDOT employees for discrimination and retaliation, because the plaintiff had "sufficiently alleged" their personal involvement in his August 2009 suspension.[1574]

4. *Prima Facie* Case for Disparate Treatment Claims

To establish a *prima facie* case for disparate treatment, a plaintiff alleging discrimination must prove that he or she was a member of a protected class, was performing his or her job satisfactorily, experienced an adverse employment action and that similarly situated individuals were treated more favorably.[1575]

If a plaintiff establishes the required elements, the burden shifts to the defendant to come forward with a legitimate, non-discriminatory reason for its adverse employment action. Although the burden of production shifts to the defendant after a plaintiff makes a *prima facie* case, the burden of persuasion rests at all times on the plaintiff. After the defendant provides a legitimate, non-discriminatory reason for taking an adverse employment action, the burden shifts back to the plaintiff to show why the defendant's reason is actually a pretext for discrimination.

5. Proof of Causation in Title VII Cases

a. Direct Method of Proof

As with other forms of discrimination discussed in other sections of this report, "a plaintiff may prove employment discrimination under Title VII by using either the 'direct method' or 'indirect method.'"[1576] Although a specific situation may involve two or more modes of proof, distinct modes of proof have developed.

Direct evidence is evidence "that, if believed by the trier of fact, would prove discriminatory conduct on the part of the employer without reliance on inference or presumption. … '[D]irect evidence essentially requires an admission by the decision-maker that his actions were based upon the prohibited animus.'"[1577] Direct evidence may consist of "statements by persons involved in the decision-making process which tend to show a discriminatory attitude" to enable a court to decide

[1560] *Id.* at 1322.

[1561] *Id.* at 1322-3 (quoting 42 U.S.C. § 2000e-2(k)(1)(A)(i)).

[1562] *Id.* at 1324.

[1563] 255 F.3d 615 (8th Cir. 2001).

[1564] *Id.* at 621 (footnote omitted).

[1565] *Id.* at 624.

[1566] *Id.* (emphasis supplied).

[1567] *Id.* at 625.

[1568] No. 1:14-cv-188-KS-MTP, 2015 U.S. Dist. LEXIS 102632 (S.D. Miss. Aug. 5, 2015).

[1569] *Id.* at *3 (citation omitted).

[1570] 828 F. Supp.2d 957 (N.D. Ill. 2011).

[1571] *Id.* at 971-72.

[1572] *Id.* at 972 (citation omitted).

[1573] *Id.*

[1574] *Id.*

[1575] Rhodes v. Illinois, 359 F.3d 498, 504 (7th Cir. 2004).

[1576] *Id.* (citation omitted).

[1577] *Id.* (citations omitted) (some internal quotation marks omitted).

whether "a discriminatory animus was the motivating factor in the employment decision."[1578]

When describing the direct approach, the Seventh Circuit has stated that the "method is a bit of a misnomer: it simply refers to anything *other than* the *McDonnell Douglas* indirect approach."[1579] The direct approach "really" involves the presentation of "sufficient direct evidence of the employer's discriminatory intent or 'a convincing mosaic of circumstantial evidence—that point[s] directly to a discriminatory reason for the employer's action.'"[1580]

b. Indirect Method of Proof

One court has described the indirect method as "a formal way of analyzing a discrimination case when a certain kind of circumstantial evidence—evidence that similarly situated employees not in the plaintiff's protected class were treated better—would permit a jury to infer discriminatory intent."[1581] Again, a plaintiff may construct a "'convincing mosaic' of circumstantial evidence that allows a jury to infer intentional discrimination."[1582] Circumstantial proof includes suspicious timing, ambiguous statements, or other behavior, as well as statistical or anecdotal evidence.

c. The Effect of Temporal Proximity on Causation

The passage of time may defeat a direct or indirect claim. In a case alleging retaliation, for example, there has to be "temporal proximity" between the time the employee engaged in protected activity, such as filing an EEOC complaint, and an adverse employment action.

In *Sims v. Fort Wayne Community Schools,*[1583] the defendant had disciplined and then discharged 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."[1584] The plaintiff failed to show the "causal link between her protected activity and her suspensions and termination."[1585] The court stated that the passage of time was far too great to infer a causal connection and that time had become the plaintiff's enemy.[1586] The plaintiff's evidence failed to show that there was a material issue of fact in dispute on the issue of whether the plaintiff's discipline was a pretext for discrimination. Sims failed to establish that the defendants' reasons were "factually baseless," were not the "actual motivation for [Sims's] discharge," or were "insufficient to motivate the discharge."[1587]

6. Whether an Employer's Justification for an Adverse Employment Action Is a Pretext for Discrimination

If a plaintiff makes a *prima facie* case, the defendant must provide a legitimate non-discriminatory reason for its adverse employment action against the plaintiff. If the employer meets its burden of going forward, the plaintiff must show that there is a genuine dispute on whether the employer's reason is merely a pretext for prohibited discrimination.[1588] "'Pretext means more than a mistake on the part of the employer; pretext means a lie, specifically a phony reason for some action.'"[1589] Although the courts require the burden-shifting approach in Title VII cases, the Seventh Circuit has criticized the accepted method as being "too complex, too rigid, and too far removed from the statutory question of discriminatory causation.'"[1590] Nevertheless, because of Supreme Court precedent, the Seventh Circuit's opinion is that it is "not authorized to abandon the established framework."[1591]

In *Duncan v. Johnson*,[1592] supra, the defendant Department of Homeland Security came forward "with evidence to show that there were legitimate, non-discriminatory concerns about plaintiff's performance and professionalism in the workplace that prompted each of the adverse actions that [had] to be considered on the merits."[1593] The court stated, however, that when "the defendant proffers legitimate, non-discriminatory or non-retaliatory reasons for the challenged actions, the court need not conduct the threshold inquiry into whether the plaintiff established a *prima facie* case of discrimination. Instead, the court is required to analyze whether the defendant's asserted reason is in fact a legitimate, nondiscriminatory explanation."[1594] Assuming the court accepts the employer's reason or reasons, the burden shifts to the plaintiff to provide direct or circumstantial evidence that the employer's explanation for its decision is a pretext for discrimination. The plaintiff must show either that the defendant's justification for its action is a pretext for discrimination

[1578] Merritt v. Iowa Dep't of Transp., 2004 Iowa App. LEXIS 436, at *6 (Iowa App. 2004) (citing Yates v. Rexton, Inc., 267 F.3d 793, 799 (8th Cir. 1998)).

[1579] Smith v. Chi. Transit Auth., 806 F.3d 900, 904 (7th Cir. 2015) (emphasis in original).

[1580] *Id.* at 905 (citation omitted).

[1581] *Id.* (footnote omitted).

[1582] Nobles v. NALCO Chemical Co., No. 01 C 8944, 2004 U.S. Dist. LEXIS 3284, at *24 (N.D. Ill. March 2, 2004) (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).

[1583] No. 1: 03-CV-430-TS, 2005 U.S. Dist. LEXIS 6174 (N.D. Ind. Feb. 2, 2005).

[1584] *Id.* at *19.

[1585] *Id.* at *36.

[1586] *Id.* at *37.

[1587] *Id.* at *48 (citing Tincher v. Wal-Mart Stores, Inc., 118 F.3d 1125, 1130 (7th Cir. 1997)).

[1588] Smith v. Chi Transit Auth., 806 F.3d 900, 905 (7th Cir. 2015).

[1589] *Id.* (citation omitted).

[1590] *Id.* (citation omitted).

[1591] *Id.* at 906 (citation omitted).

[1592] 213 F. Supp.3d 161 (D. D.C. 2016).

[1593] *Id.* at 182.

[1594] *Id.* (citation omitted).

"or that the employment action was motivated by discrimination in addition to the proffered legitimate reason."[1595]

The plaintiff may "establish pretext masking a discriminatory motive by presenting 'evidence suggesting that the employer treated other employees of a different [protected class] ... more favorably in the same factual circumstances.' … 'To prove that he is similarly situated to another employee, a plaintiff must demonstrate that [he] and the allegedly similarly situated ... employee were charged with offenses of comparable seriousness.'"[1596] In *Duncan*, supra, the plaintiff did not adduce any evidence showing that other employees committed offenses that were similar to those for which Duncan was sanctioned or that other employees at the time were treated any differently.[1597]

7. The "Cat's Paw" Theory in Proving that an Adverse Employment Action Was Motivated by Discrimination

Under the "cat's paw" theory of employment discrimination, an employer may be held "liable if the decision-maker was manipulated by another employee acting with discriminatory intent."[1598] The Supreme Court elaborated on the cat's paw theory in *Staub v. Proctor Hosp*.[1599] The theory seems to have originated "'from a fable conceived by Aesop, put into verse by La Fontaine in 1679, and injected into United States employment discrimination law by [Judge] Posner in 1990.'"[1600] The cat's paw fable concerns "'a monkey who wants chestnuts that are roasting in a fire [who] persuades an intellectually challenged cat to fetch the chestnuts from the fire for the monkey, and the cat does so but in the process burns its paw.'"[1601]

In employment discrimination law, "'[t]he cat's paw metaphor refers to a situation in which an employee is fired or subjected to some other adverse employment action by a supervisor who himself has no discriminatory motive, but who has been manipulated by a subordinate who does have such a motive and intended to bring about the adverse employment action.' … To create a question of fact under the 'cat's paw' theory of liability, a plaintiff must point to 'affirmative evidence that [somebody] improperly influenced the decision-makers.'"[1602]

Under the cat's paw theory, a plaintiff must show that a supervisor performed an act motivated by discriminatory animus that was intended by the supervisor to cause an adverse employment action, and that the act was a proximate cause of the ultimate action.[1603] An example of a court's consideration of the cat's paw theory is *Smith v. Chi. Transit Auth*.[1604] The issue was whether William Mooney (Mooney), the vice president of bus operations at the CTA, acted with discriminatory intent when he discharged Smith. There was no evidence that Mooney was racially biased. In fact, Mooney replaced Smith with another black male employee. The court stated that "Smith's case can succeed only under the 'cat's paw' theory, which holds an employer liable if the decision-maker was manipulated by another employee acting with discriminatory intent. … The evidence suggest[ed] that Mooney fired Smith largely because of the EEO Unit's findings on [a female bus operator's] sexual-harassment complaint against Smith."[1605]

Smith argued "that the CTA had an unwritten policy that the EEO Unit had exclusive authority to investigate sexual-harassment complaints but routinely violated this policy by permitting the operations departments to conduct their own investigations when white employees were accused of harassment."[1606] The court found that there was no evidence "that the CTA regularly channeled investigations of white employees to the operations departments while keeping investigations of nonwhite employees under the auspices of the EEO Unit."[1607] There was no other evidence of racial bias against Smith.

In *Duncan v. Johnson*,[1608] supra, the court stated that Duncan appeared to be invoking the "'cat's paw' theory of causation in employment discrimination cases that was discussed in *Staub*…."[1609] The ultimate decision-makers on Duncan's suspension did not know of his prior EEO activity;[1610] nevertheless, Duncan argued that "because it was Andrews [his superior] who 'provided the sole evidence used to commit these employment actions and thus was the sole influence for the decision-makers to … suspend [him] without pay,' [Andrews] should be considered the 'decision-maker.'"[1611]

The cat's paw theory failed, because there was no evidence that Andrews "had any knowledge that [Duncan] had actually engaged in protected activity at the time [Andrews] prepared her memorandum."[1612] Andrews's memorandum to the Employee and Labor Relations Department recounted "the facts surrounding plaintiff's failure to complete [a] project as assigned, the importance of the deadline, and the burdens plain-

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[1595] *Id.* at 183 (citations omitted).

[1596] *Id.* (citations omitted) (some internal quotation marks omitted).

[1597] *Id.* at 184.

[1598] Smith v. Chi Transit Auth., 806 F.3d 900, 906 (7th Cir. 2015). (citing Staub v. Proctor Hosp., 562 U.S. 411, 422, 131 S. Ct. 1186, 179 L. Ed.2d 144 (2011)).

[1599] 562 U.S. 411, 131 S. Ct. 1186, 179 L. Ed.2d 144 (2011).

[1600] Jackson v. City of Chi., No. 13 C 8304, 2016 U.S. Dist. LEXIS 34422, at *35 n.10 (N.D. Ill. March 17, 2016) (quoting Staub v. Proctor Hosp., 562 U.S. 411, 415 n.1 131 S. Ct. 1186, 1190 n.1, 179 L. Ed.2d 144, 151 n.1 (2011)).

[1601] *Id.* (quoting Cook v. IPC Int'l Corp., 673 F.3d 625, 628 (7th Cir.2012).

[1602] *Id.* at *35 (citation omitted) (some internal quotation marks omitted).

[1603] *Duncan*, 213 F. Supp.3d at 191.

[1604] 806 F.3d 900 (7th Cir. 2015).

[1605] *Id.* at 906 (citation omitted).

[1606] *Id.*

[1607] *Id.* at 906-7.

[1608] 213 F. Supp.3d 161 (D. D.C. 2016).

[1609] *Id.* at 190 (citations omitted) (footnote omitted).

[1610] *Id.* at 188.

[1611] *Id.* at 190 (citing Staub v. Proctor Hosp., 562 U.S. 411, 131 S. Ct. 1186, 179 L. Ed.2d 144 (2011)).

[1612] *Id.* at 192.

tiff's actions placed on his coworkers,"[1613] but Andrews made no recommendation regarding an employment action against Duncan.

The court held that "'cat's paw' causation can be cut off [when] an 'independent investigation ... determin[ed] that the adverse action was, apart from the supervisor's recommendation, entirely justified.'"[1614] Because in Duncan's case a three-member panel made its own recommendation, the "circumstances were sufficient to cut off any taint that colored the allegedly retaliatory initial referral"[1615] from Andrews.

8. Title VII and Types of Disparate Treatment Claims

a. Requirement of an Adverse Employment Action

For an employee to state a Title VII disparate treatment claim against his or her employer, there must be a sufficient showing "'that (i) the plaintiff suffered an adverse employment action (ii) because of the plaintiff's race, color, religion, sex, national origin, age, or disability.'"[1616] However, "[n]ot every action by an employer against an employee qualifies as an 'adverse employment action' that is protected by Title VII."[1617]

> An actionable adverse employment action is a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." … To ultimately establish an adverse employment action, a plaintiff must show that she "experience[d] materially adverse consequences affecting the terms, conditions, or privileges of employment or future employment opportunities such that a reasonable trier of fact could find objectively tangible harm." … Plaintiff must, "in most cases," show "direct economic harm," … affecting, for instance, his grade or salary.[1618]

In cases against DOTs and other employers, some plaintiffs were unable to prevail against the employer's motion for summary judgment, because their claim did not constitute an adverse employment action under Title VII, and/or because they could not show that the employer's justification for its adverse employment action was a pretext for discrimination.[1619]

b. Discrimination in Hiring

In *Hernandez v. DOT*,[1620] in February 2006, the plaintiff Manuel Hernandez (Hernandez), a person of Hispanic decent, applied for a position as the Arizona DOT (ADOT) supply warehouse manager. On October 13, 2005, a panel interviewed six candidates, including Hernandez, who applied for the position. Hernandez received an overall score of 59, the lowest score of any applicant. The panel selected a Caucasian male, Hendrickson, for the position.

In his action against the DOT, Hernandez asserted three Title VII claims: retaliation because of his involvement in an earlier class action that the DOT settled; disparate treatment based on the plaintiff's national origin, and a claim for ostracism. An Arizona federal district court granted the DOT a summary judgment on all claims.

First, Hernandez failed to show that the department's explanation for selecting Hendrickson was a pretext for retaliation.[1621] The court found that Hernandez's circumstantial evidence of retaliation was not "sufficiently 'specific' and 'substantial' for a reasonable jury to render a verdict in Hernandez's favor on his retaliation claim."[1622] Second, the plaintiff did not present "sufficient evidence for a reasonable [factfinder] to determine that ADOT discriminated against him on the basis of race or national origin."[1623] Hernandez failed to present "sufficient evidence for a reasonable factfinder to determine that ADOT's proffered reason for not hiring Hernandez [was] 'unworthy of credence' or to find that ADOT's decision was influenced by a discriminatory motive."[1624] The court explained that

> [t]o satisfy the unworthy of credence prong of the pretext analysis, a plaintiff must identify specific inconsistencies, contradictions, implausibilities, or weaknesses in the employer's explanation so that a reasonable factfinder could infer that the employer did not act for the asserted reason.[1625]

[1613] *Id.* at 189 (citation omitted).

[1614] *Id.* at 195 (citation omitted).

[1615] *Id.* at 193.

[1616] *Id.* at 178 (citations omitted).

[1617] *Id.* at 179 (citations omitted).

[1618] *Id.* (citations omitted).

[1619] *See*, *e.g.*, Felix v. Wis. Dep't of Transp., 828 F.3d 560 (7th Cir. 2016) (involving plaintiff's discharge because of threats she made against coworkers); Butler v. Ala. Dept. of Transp., 536 F.3d 1209 (11th Cir. 2008) (holding that no adverse employment action was taken against the plaintiff); Crownover v. State, 165 Wn. App. 131, 265 P.3d 971 (2011) (stating that the plaintiff did not offer proof that she was treated less favorably than similarly situated employees); Wooden v. Hammond, No. 11-cv-5472-RBL, 2013 U.S. Dist. LEXIS 39613 (W.D. Wash. March 21, 2013) (dismissal of disparate treatment claims because there was no evidence that reprimands were based on discrimination as the plaintiff presented no evidence of age- or race-based discrimination); Harris v. Mississippi Transportation Comm'n, 329 Fed. Appx. 550 (5th Cir. 2009) (granting defendant a summary judgment because the plaintiff failed to provide evidence that the MTC's reasons for disciplining him were a pretext for retaliation); Weaks v. North Carolina Dep't of Transp., 761 F. Supp.2d 289 (M.D. N.C. 2011) (failure of disparate treatment claim because the plaintiff could not prove that the defendant's decision to promote another individual was a pretext for discrimination); Hall v. N.Y. City Dep't of Transp., 701 F.Supp.2d 318 (E.D.N.Y. 2010) (holding that the plaintiff could not prove that she was discriminated against based on her race or gender because she did not provide evidence that similarly situated employees were treated more favorably; because she did not suffer an adverse employment action by not receiving overtime opportunities; and because excessive scrutiny of her was not an adverse employment action); Ortiz-Moss v. New York City Dept. of Transp., 623 F.Supp.2d 379 (S.D.N.Y. 2008) (plaintiff's disparate treatment claim failed because she did not offer evidence that she was discriminated against based on her gender); Evans v. Texas Dept. of Transp., 547 F.Supp.2d 626 (E.D. Tex. 2007) (granting the defendant a summary judgment on the plaintiff's discrimination claim because she did not provide evidence that a similarly situated coworker was treated more favorably than she was).

[1620] 702 F. Supp.2d 1119 (D. Ariz. 2010).

[1621] *Id.* at 1125.

[1622] *Id.* at 1128 (citation omitted).

[1623] *Id.* at 1129.

[1624] *Id.* at 1130 (citation omitted).

[1625] *Id.* (citations omitted).

Third, Hernandez's claim of ostracism failed, because he did not exhaust his administrative remedies as required by 42 U.S.C. § 2000e-5, and because his claim was not included in his EEOC Charge.[1626]

c. Pattern or Practice Disparate Treatment Claims Because of Discriminatory Hiring

A New York case is an example of a pattern or practice disparate treatment claim for discrimination under Title VII that involved sex discrimination by New York City's hiring practices against female bridge painters.[1627]

In *United States v. City of New York*,[1628] the United States brought a Title VII action against the City of New York (City) and the New York City DOT in which the government alleged that the defendants discriminated against women by hiring only men to work as bridge painters. The court found that the complete absence of female bridge painters was well-known to the DOT. For example, union officials raised the issue twice with the DOT. DOT officials also knew that some male bridge painters did not welcome women as painters. However, DOT supervisors claimed that the absence of female decontamination facilities, such as garment changing areas and showers, was a bar to interviewing or hiring women.[1629]

The district court set forth the legal authority and standards for an employment discrimination claim under Title VII: "Title VII prohibits both intentional discrimination—known as disparate treatment—and unintentional discrimination practices which have a disproportionately adverse effect on a protected class—known as disparate impact."[1630] The New York case "require[d] proof of an employer's discriminatory motive, which 'can in some situations be inferred from the mere fact of differences in treatment.'"[1631]

> In a "pattern or practice" disparate treatment case, proof of discrimination focuses on "widespread acts of intentional discrimination against individuals." … "To succeed … plaintiffs must prove more than sporadic acts of discrimination; rather, they must establish that intentional discrimination was the defendant's *standard operating procedure*." … Accordingly, "the initial focus in a pattern-or-practice case is not on individual employment decisions" but on the existence of multiple related acts of discrimination.[1632]

The plaintiff's burden in such a case is to

> "demonstrate that unlawful discrimination has been a regular procedure or policy followed by an employer or group of employers." … To establish liability, "the Government is not required to offer evidence that each person for whom it will ultimately seek relief was a victim of the employer's discriminatory policy. Its burden is to establish a *prima facie* case that such a policy existed. The burden then shifts to the employer to defeat the *prima facie* showing of a pattern or practice by demonstrating that the Government's proof is either inaccurate or insignificant."[1633]

There are "'two kinds of circumstantial evidence to establish the existence of a policy, pattern, or practice of intentional discrimination: (1) statistical evidence aimed at establishing the defendant's past treatment of the protected group, and (2) testimony from protected class members detailing specific instances of discrimination.'"[1634] The court noted that "'when there is a small number of employees, anecdotal evidence alone can suffice.'"[1635] In its case against New York City and its DOT, the United States relied on anecdotal rather than statistical evidence.

The court held that the "DOT lacked consistent hiring standards in the Bridge Painter Section, that less qualified men were given preferences over more qualified women, and that the disparate treatment was intentional appeasement of DOT's existing all-male workforce."[1636]

First, the court found that the defendants' hiring was based, in part, on "'subjective word-of-mouth hiring methods' [that] are suspect and used to mask ongoing bias."[1637] Second, the DOT and Bridge Painter Section's "provisional hiring system lacked written standards with specific instructions to guide DOT personnel in provisional hiring."[1638] Third, the defendants' in-person interviews, for which there were no notes memorializing them, were "deeply flawed."[1639] Fourth, the government was able to show that less qualified men received preferential treatment.[1640]

Finally, there were no legitimate reasons for the defendants' discriminatory hiring pattern or practice. For example, "[e]ven assuming that locker rooms were available, that fact ha[d] no bearing on whether DOT's hiring *practices* violated Title VII. That DOT had sufficient space for women only buttresse[d] the Government's case, as it remove[d] a potential business justification for hiring only men."[1641] The court reserved entry of final judgment until the parties provided "the appropriate amount of backpay and specific procedures governing provisional hiring of discrimination victims."[1642]

The court also held that the government proved its claim of pattern-or-practice employment discrimination by the defendants, even though "the discrimination appeared to impact only four women…."[1643] There is "'[n]o precise mathematic formulation' for a pattern or practice claim. … Even discrimination

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[1626] *Id.* at 1131.

[1627] United States v. City of New York, 713 F. Supp.2d 300, 316 (S.D. N.Y. 2010).

[1628] 713 F. Supp.2d 300 (S.D. N.Y. (2010).

[1629] *Id.* at 315.

[1630] *Id.* at 316 (citation omitted).

[1631] *Id.* (citation omitted).

[1632] *Id.* (citations omitted) (emphasis in original).

[1633] *Id.* at 316-7 (citations omitted).

[1634] *Id.* at 317 (citation omitted).

[1635] *Id.* (citations omitted).

[1636] *Id.* at 318.

[1637] *Id.* (citation omitted).

[1638] *Id.*

[1639] *Id.* at 319.

[1640] *Id.* at 320. *See* the court's summary of the female applicants' qualifications at 320-2.

[1641] *Id.* at 324.

[1642] *Id.* at 326.

[1643] *Id.* at 323 (citation omitted).

against just four women is sufficient to support a pattern or practice claim."[1644]

d. Discrimination in Promotions

Title VII forbids discrimination in promotions of employees. In *Payne v. State of Connecticut Department of Transportation*,[1645] the plaintiff, an African American male, was 49 years of age at the time he was denied a promotion for a position as Transportation Special Service Section Manager. Payne alleged that the DOT denied him a promotion because of his race, age, and gender. The DOT argued that Payne failed to establish a *prima facie* case, because Payne could not show that he was the most qualified candidate for the position, and because the record disclosed no irregularities in the DOT's process. However, the court ruled that Payne had the basic skills necessary for the position of section manager and established the necessary elements for a *prima facie* case. The court denied the DOT's motion for summary judgment, *inter alia*, because Payne "established a record sufficient to support an inference that the adverse employment action was pretextual."[1646]

In *Cortez v. DOT*,[1647] the plaintiff had worked for the Connecticut DOT since February 2005 as an Affirmative Action Officer within the contract-compliance division. In July 2005, Cortez applied for an open program-manager position within the same division. A panel interviewed Cortez, as well as an African American co-worker, Debra Goss, but the panel preferred Goss. In October 2005, Cortez filed a complaint with the Commission on Human Rights and Opportunities (CHRO) in which he claimed that he was discriminated against in connection with the Department's promotion of Goss. In July 2006, after the DOT posted a vacancy for an Affirmative Action Officer position within another division, Cortez applied for the position and was interviewed by a diverse panel. The panel recommended a white woman for the position. In February 2007, Cortez brought an action against the DOT that alleged that the Department discriminated against him on the basis of his gender and race, retaliated against him, and constructively discharged him, all in violation of Title VII.

The court chose not to address the DOT's argument that "Cortez ha[d] not made out a *prima facie* case of discrimination because 'he cannot establish that he was not promoted to Affirmative Action Program Manager under circumstances giving rise to an inference of discrimination.'"[1648] Instead, the court considered whether the DOT's proffered justification could be found to be pretextual. Cortez offered "no evidence … suggesting that [the] process reflected any discrimination on account of Cortez's race or gender," nor did Cortez offer any "evidence which show[ed] that the panel's recommendation was merely a pretext for discrimination."[1649]

[1644] *Id.* (citations omitted).

[1645] 267 F. Supp.2d 207 (D. Conn. 2003).

[1646] *Id.* at 212.

[1647] 606 F. Supp.2d 246 (D. Conn. 2009).

[1648] *Id.* at 250 (citation omitted).

[1649] *Id.* at 251.

e. Discrimination in Terminations of Employment

Title VII, of course, prohibits discrimination by an employer when discharging an employee. In *Rayyan v. Va. Dep't of Transp.*,[1650] following the termination of his employment, Rayyan sued his former employer, the Virginia Department of Transportation (VDOT), for alleged racial and religious discrimination and retaliation in violation of Title VII and for alleged racial discrimination in violation of 42 U.S.C. § 1981, *et seq*.

Rayyan sought to prove that a former supervisor had made derogatory statements about Rayyan. However, to prevail against VDOT's summary judgment motion, Rayyan had to "'produce direct evidence of a stated purpose to discriminate and/or indirect evidence of sufficient probative force to reflect a genuine issue of material fact.' … The evidence must directly reflect the alleged discriminatory attitude and 'bear directly on the contested employment decision.'"[1651] Because of the "isolated nature of [the] alleged statements and the lapse in time between the comments and Rayyan's dismissal,"[1652] the court found that the "derogatory statements" that Rayyan presented "were stray remarks [that lacked] a nexus connecting them to his dismissal."[1653] Another reason that Rayyan's racial discrimination claim failed was that Rayyan could not make a *prima facie* case of discrimination; he failed to show "by a preponderance of the evidence that he was performing his job satisfactorily…."[1654]

In *Chambers v. Fla. DOT*,[1655] the plaintiff appealed a district court's order that granted the Florida DOT a summary judgment in her employment-discrimination case under Title VII and the Florida Civil Rights Act. Once Chambers became a work program analyst for statewide programs in the work program office, she retained the position until the termination of her employment in September 2012. Because of an unsatisfactory evaluation, the DOT had placed Chambers on a 90-day performance improvement plan (PIP), but, when the plan concluded, Chambers was rated at the bottom of the satisfactory performance range.[1656]

Following a special evaluation of Chambers by the manager of statewide programs, Susan Wilson, Chambers noted on her evaluation that she thought Wilson's negative review was racially motivated because several years earlier Wilson allegedly had made a "'racial comment' about Chambers."[1657] The district court ruled that "Chambers failed to show that the DOT's legitimate non-discriminatory reason for her termination—poor work performance over an extended period of time—was a pretext for intentional discrimination."[1658]

[1650] 719 Fed. Appx. 198 (4th Cir. 2018).

[1651] *Id.* at 202 (citations omitted).

[1652] *Id.* at 203.

[1653] *Id.* at 202.

[1654] *Id.* at 205.

[1655] 620 Fed. Appx. 872 (11th Cir. 2015).

[1656] *Id.* at 874.

[1657] *Id.* at 875.

[1658] *Id.* at 876.

The Eleventh Circuit stated that the only disputed fact was the one of pretext and that to show a pretextual termination Chambers had to "'demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence.'"[1659] Chambers's only evidence for her termination was "Wilson's alleged racial slur about Chambers and two other black employees in 2008;"[1660] however, the comment, occurring nearly four years prior to Chambers' termination of employment, was "insufficient on its own to establish a material fact on pretext."[1661] The court ruled that, "[e]ven assuming that Wilson inaccurately or unfairly scrutinized and evaluated her work performance, Chambers ha[d] not presented evidence suggesting that Wilson was not honestly dissatisfied with Chambers's work."[1662]

The plaintiff also did not have evidence of "disparate treatment of employees outside of the plaintiff's protected class to constitute circumstantial evidence of discrimination…."[1663] Chambers's "proffered comparators were not similarly situated to her—none had a history of poor work performance."[1664] For example, neither employee had had a PIP requirement nor required the level of assistance that Chambers had been described as needing to perform her duties as program analyst.[1665]

f. Discrimination in Suspensions of Employees

A suspension of an employee also may be a violation of Title VII. In *Titus v. Ill. DOT*,[1666] *supra*, although the court dismissed some of the plaintiff's claims, the court ruled that the plaintiff alleged sufficient facts to state a claim regarding his suspension in August 2009. First, the plaintiff had alleged that he was a member of a protected class; that his suspension was an adverse employment action; and that the DOT treated similarly situated non-black highway maintainers more favorably than Titus, because they received suspensions that were of shorter duration.[1667] In addition, the issue of the plaintiff's performance evaluation was central to the case, because the plaintiff's "substantive claim of discrimination [would] turn on whether he can establish, through the indirect method of proof, that his job performance met his employer's expectations."[1668]

g. Discrimination in the Use of Performance Evaluations and Personal Performance Plans

Plaintiffs have argued that their performance evaluations or an employer's requirement that they complete a PIP to improve their job performance are adverse employment actions under Title VII. In general, "'performance evaluations ordinarily are not actionable under Title VII' when they 'do not obviously result in a significant change in employment status….'"[1669] The Fifth Circuit has held that "negative reprimands and poor performance evaluations do not constitute ultimate adverse employment decisions actionable under Title VII."[1670]

Moreover, a requirement that an employee participate in a PIP to improve performance has been held not to be a materially adverse employment action.[1671]

> While the agency acknowledges that the "failure of a PIP can result in demotion, suspension, or disciplinary action," … in this case, plaintiff admits that "no adverse action was taken against [him] for failing the PIP." … So because the failure of the PIP did not cause any "direct economic harm," … or any lead to any "materially adverse consequences," … it cannot form the basis of a discrimination claim either.[1672]

In another case, the D.C. Circuit held that a PIP did not constitute an adverse employment action when the plaintiff did not allege that the PIP affected her grade or salary or cause a significant change in her employment status.[1673]

h. Discrimination because of a Suspension of an Employee's Security Clearance

The federal courts "lack subject matter jurisdiction over claims relating to the revocation of security clearances…." [1674] In the employment context, "'an adverse employment action based on [the] denial or revocation of a security clearance is not actionable under Title VII.'"[1675] Agencies have broad discretion when it comes to the protection of classified information, including determining "who may have access to it."[1676] However, a suspension of a security clearance may constitute an adverse employment action when "'agency employees acted with a retaliatory or discriminatory motive in reporting or referring information that they knew to be false.'"[1677] A security clearance may be suspended when an employee's superior "honestly believed" that the employee "engaged in misconduct…."[1678]

i. Discrimination Claims for a Hostile Work Environment

Discrimination on the basis of race, color, religion, sex, or national origin may be so severe or pervasive as to give rise to an employee's claim for a hostile work environment and/or constructive discharge. The latter claim is discussed later in the report.

[1659] *Id.* at 877 (footnote omitted) (citation omitted).

[1660] *Id.*

[1661] *Id.* (citations omitted).

[1662] *Id.* at 878 (citation omitted).

[1663] *Id.* at 879.

[1664] *Id.*

[1665] *Id.*

[1666] 828 F. Supp.2d 957 (N.D. Ill. 2011).

[1667] *Id.* at 969.

[1668] *Id.* (footnote omitted).

[1669] Duncan v. Johnson, 213 F. Supp.3d 161, 179 (DC. D. C. 2016).

[1670] Gomez v. Orleans Parish School Bd., No. 04-1541 SECTION "N" (1), 2005 U.S. Dist. LEXIS 17810, at *37 (E.D. La. 2005) (citations omitted).

[1671] *Duncan*, 213 F. Supp.3d at 179.

[1672] *Id.* (citations omitted).

[1673] Taylor v. Small, 350 F.3d 1286, 1293 (D.C. Cir. 2003).

[1674] *Duncan*, 213 F. Supp.3d at 180.

[1675] *Id.* (citation omitted).

[1676] *Id.* (citation omitted).

[1677] *Id.* at 181 (citation omitted).

[1678] *Id.* at 198 (citation omitted).

For an employee to establish a *prima facie* case based on the existence of a hostile workplace because of sexual harassment, a plaintiff has to show that the

> (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.[1679]

The evidence must show that the conduct was "'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,'[1680] '"one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so."'[1681] However, not all verbal or physical harassment in the workplace is prohibited under Title VII.[1682]

To determine whether the conduct in the work environment created "an objectively hostile work environment," the courts may consider all of the circumstances, including "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."[1683]

In *Rhodes v. Illinois Department of Transportation,*[1684] the Department "concede[d] that Rhodes was subject to unwelcome, sexually-related conduct severe or pervasive enough to create a hostile work environment."[1685] However, to hold the employer liable when the harasser is a *co-worker*, the court stated that the plaintiff must show that the employer was "negligent" in discovering or remedying the harassment.[1686] 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."[1687] The supervisor must be the plaintiff's supervisor. In *Rhodes*, the court held that Rhodes failed "to establish that she made a concerted effort to inform IDOT"'[1688] that a problem existed.

In *Prowell v. State*,[1689] 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 regulations specifically identified favoritism based on sexual relationships as coming within the purview of what is prohibited by federal law.[1690] Furthermore, the court agreed that the plaintiff's complaint stated a claim because she had identified a specific lost opportunity.[1691]

j. Discrimination Claims for Constructive Discharge

A *prima facie* claim for a constructive discharge requires a plaintiff to demonstrate "that the discharge or harassment 'occurred in circumstances giving rise to an inference of discrimination on the basis of [his] membership' in a protected class."[1692]

In *Cortez v. DOT*,[1693] Cortez made a discrimination claim for a constructive discharge. As a federal court in Connecticut explained, "'[a]n employee is constructively discharged when his employer, rather than discharging him directly, intentionally creates a work atmosphere so intolerable that he is forced to quit involuntarily.'"[1694] In a constructive discharge case, the employer must have intentionally caused working conditions to deteriorate to an "'intolerable level.'"[1695] An employer must have "'acted with the specific intent to prompt'"[1696] an employee's resignation. Whether working conditions became intolerable is an issue that "'is assessed objectively by reference to a reasonable person in the employee's position.'"[1697] In *Cortez*, however, the plaintiff provided no evidence to support his "conclusory contentions" of constructive discharge.[1698]

[1679] Rhodes v. Ill. DOT. 359 F.3d 498, 505 (2004) (citation omitted). *See also*, Brown v. Ark. State Highway & Transp. Dep't, 358 F. Supp.2d 729, 734 (W.D. Ark. 2004) (stating that in a claim for a racially hostile work environment, a "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") (citing Jackson v. Flint Ink North Am. Corp., 370 F.3d 791, 793 (8th Cir. 2004)).

[1680] *Rhodes*, 359 F.3d at 505 (citations omitted).

[1681] Brown v. Ark. State Highway & Trans. Dep't, 358 F. Supp.2d 729, 734 (W.D. Ark. 2004) (citation omitted) (some internal quotation marks omitted).

[1682] Nobles v. Nalco Chem. Co., No. 01 C 8944, 2004 U.S. Dist. LEXIS 3284, at *35 (N.D. Ill. March 2, 2004). 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.* at *36.

[1683] *Id.* at *34-35.

[1684] 359 F.3d 498 (7th Cir. 2004).

[1685] *Id.* at 505.

[1686] *Id.* at 506 (internal quotation marks omitted) (citation omitted) (emphasis supplied).

[1687] *Id.* at 505 (citation omitted) (emphasis supplied).

[1688] *Id.* at 507.

[1689] No. 03-80-HA, 2003 U.S. Dist. LEXIS 25530 (D. Ore. Aug. 11, 2003).

[1690] *See* 29 C.F.R. § 1604.11(g) (2018) (stating that when "employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit").

[1691] *Prowell*, 2003 U.S. Dist. LEXIS 25530, at *20.

[1692] Cortez v. DOT, 606 F. Supp.2d 246, 253 (D. Conn. 2009) (citation omitted).

[1693] 606 F. Supp.2d 246 (D. Conn. 2009).

[1694] *Id.* at 252-53 (citation omitted).

[1695] *Id.* at 253 (citation omitted).

[1696] *Id.* (citation omitted).

[1697] *Id.* (citation omitted).

[1698] *Id.*

9. Claims for Retaliation in Violation of Title VII

a. Anti-retaliation Clauses in Title VII

Title VII contains two prohibitions on retaliation that are known as the opposition clause and the participation clause.[1699] Under § 2000-3(a) of Title VII, "it is an unlawful employment practice for an employer to discriminate against an employee '[(1)] because he has *opposed* any practice made an unlawful employment practice by this subchapter, or [(2)] because he has made a charge, testified, assisted, or *participated* in any manner in an investigation, proceeding, or hearing under this subchapter.'"[1700] "[A]ctionable retaliation … does not include trivial harms…."[1701] The term "material adversity in the retaliation context" means "an action that well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'"[1702]

b. Prima Facie *Case for Retaliation Claims*

An employee alleging retaliation must show that "(1) he engaged in protected activity; (2) he suffered a materially adverse action; and (3) that 'a causal link connects the two.'"[1703] Another court has stated that a retaliation claim requires an employee to "establish a *prima facie* case by showing that he was engaged in a protected activity, that his employer was aware of this activity, that he was subject to an adverse employment action, and that there was a causal connection between his protected activity and the adverse action."[1704] A plaintiff also "must show that 'he had a good faith, reasonable belief that the underlying employment practice was unlawful.'"[1705]

At the summary judgment stage, a plaintiff has to provide "sufficient evidence … that [the] retaliation was the 'but for' cause of the alleged adverse action."[1706] Only retaliatory actions allegedly occurring after the date of the employee's complaint to the EEOC or the employee's other protected activity should be considered.[1707]

In *Nichols v. Ill. DOT*,[1708] Nichols had engaged in protected activity when he filed a grievance requesting a religious accommodation.[1709] Regarding Nichols's retaliation claim, the court held that circumstantial evidence "'suffices if a convincing mosaic of circumstantial evidence would permit a reasonable trier of fact to infer retaliation by the employer.'"[1710] In Title VII cases, circumstantial evidence includes "'suspicious timing, ambiguous oral or written statements, or behavior toward or comments directed at other employees in the protected group;'"[1711] evidence that employees who were similarly situated were treated differently; and "'evidence that the employer's proffered reason for the adverse employment action was pretextual.'"[1712]

The timing in Nichols's case was suspicious, because the DOT suspended Nichols, pending a decision to discharge him, less than a month after Nichols filed a grievance regarding his request for a religious accommodation.[1713] Under the circumstances, it could be inferred "that IDOT knew that Nichols was complaining about discrimination based on his Islamic faith."[1714] The court denied IDOT's motion for summary judgment.

c. Proof of Causation in Retaliation Cases

A plaintiff may establish a *prima facie* case of retaliation and overcome the defendant's motion for summary judgment by using either the direct method and/or the indirect method of proof.[1715]

Causation may be established in one of three ways. First, causation may be proved directly "'through evidence of retaliatory animus directed against the plaintiff by the defendant.'"[1716] Second, causation may be proved indirectly "'by showing that the protected activity was followed closely by discriminatory treatment, or through other circumstantial evidence such as disparate treatment of fellow employees who engaged in similar conduct….'" [1717] Third, causation may be established "by showing a sufficiently close temporal connection between the protected activity and the adverse action;" however, "'the temporal proximity must be very close,' which ordinarily means closer in time than a few months."[1718] In *Cortez*, supra, the court found that there was no evidence of a causal connection between Cortez's protected activity, *i.e.*, his filing of a complaint with the CHRO and the DOT's alleged retaliatory actions against him.[1719]

There is some authority that causation is necessarily limited by the temporal proximity of the plaintiff's protected activity and the defendant's alleged retaliatory conduct. In *Titus v. Ill.*

[1699] McNorton v. Ga. DOT, 619 F. Supp.2d 1360, 1372 (N.D. Ga. 2007).

[1700] *Id.* at 1372-3 (quoting 42 U.S.C. § 2000e-3(a)) (emphasis supplied).

[1701] Duncan v. Johnson, 213 F. Supp.3d 161, 187 (DC. D. C. 2016). (citations omitted).

[1702] *Id.* (citation omitted) (some internal quotation marks omitted).

[1703] *Id.* at 188 (citation omitted).

[1704] Cortez v. DOT, 606 F. Supp.2d 246, 251 (D. Conn. 2009) (citation omitted).

[1705] *Id.* (citation omitted).

[1706] *Duncan*, 213 F. Supp.3d at 189 (citation omitted).

[1707] *Cortez*, 606 F. Supp.2d at 251-252.

[1708] 152 F. Supp.3d 1106 (N.D. Ill. 2016).

[1709] *Id.* at 1139.

[1710] *Id.* (citation omitted).

[1711] Smith v. Chi Transit Auth., 806 F.3d 900, 905 (7th Cir. 2015) (citation omitted).

[1712] *Nichols*, 152 F. Supp.3d at 1139 (citation omitted).

[1713] *Id.*

[1714] *Id.* at 1140 (citation omitted).

[1715] *See* Sitar v. Indiana Dept. of Trans., 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. Sitar was transferred and discharged before the end of six months. INDOT claimed that the reason for the brevity of Sitar's tenure was unsatisfactory performance. Sitar argued that her transfer and termination were the result of sex discrimination, sexual harassment, and retaliation. The appellate court reversed and remanded a summary judgment in favor of the department.

[1716] *Cortez*, 606 F. Supp.2d at 251 (citation omitted).

[1717] *Id.* (citation omitted).

[1718] *Id.* (citation omitted) (some internal quotation marks omitted).

[1719] *Id.* at 252.

DOT,[1720] supra, the court held that "'[i]f the plaintiff has evidence from which one may reasonably infer that [his] former employer waited in the weeds for five or ten years and then retaliated against [him] for filing an EEOC charge, we see no difficulty with allowing the case to go forward.'"[1721] Thus "a period of time greater than four months between the statutorily protected activity and the adverse employment action does not necessarily, as a matter of law, negate a causal connection."[1722]

d. Employer's Withholding of Evidence as Retaliation

A defendant's withholding of evidence from the plaintiff and/or the EEOC may constitute discriminatory retaliation. In *Titus*, supra, the plaintiff alleged, *inter alia*, in his retaliation claim that IDOT withheld evidence from the EEOC and from him.[1723] The court held that "[t]he purpose of Title VII's anti-retaliation provision is 'to prevent employer interference with unfettered access to Title VII's remedial mechanisms ... by prohibiting employer actions that are likely to deter victims of discrimination from complaining to the EEOC, the courts, and their employers.'"[1724] The provision is not limited to terms and conditions of employment; "'[r]ather, Title VII's antiretaliation provision prohibits any employer action that well might have dissuaded a reasonable worker from making or supporting a charge of discrimination,'"[1725] such as when the employer withheld evidence.

10. Purpose of Providing for Disparate Impact Claims under Title VII

Besides liability for disparate treatment, an employer may be held liable for disparate impact, *i.e.,* for a policy or practice that is facially neutral but that, in practice, is discriminatory. Section 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.[1726]

In a disparate impact case, a plaintiff's burden is to show that the policy or practice in question has a disproportionate impact on a protected class.[1727] With intentional discrimination, intent matters, whereas there is no intent-analysis in disparate impact cases.[1728]

The Eleventh Circuit held in *Crum*, supra, that the purpose of disparate impact analysis in Title VII cases is to "to get at 'discrimination [that] could actually exist under the guise of compliance with [Title VII].'"[1729] As an example, the court cited the Supreme Court's decision in *Griggs v. Duke Power Co*.[1730] In *Griggs*, after

> the company abandoned its policy of *de jure* discrimination, [the company] made the completion of high school a prerequisite for employees who wanted to transfer from the company's labor department (the only department previously employing African-Americans) to any other department in the company (all of which formerly hired only whites). The Court found that the high school requirement, as well as other standardized tests used by the defendant, had a disparate impact on African-Americans because "in North Carolina …, while 34% of white males had completed high school, only 12% of [African-American] males had done so."[1731]

The Court held "that 'under the Act, 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….'"[1732] The court in *Crum* observed that since *Griggs*, Congress had "codified the appropriate burdens of proof in a disparate impact case in 42 U.S.C. § 2000e-2(k) (1994)" and that there is "settled jurisprudence … to implement the methodology."[1733]

Thus, in a disparate impact case alleging racial discrimination, a plaintiff must "show that there is a legally significant disparity between (a) the racial composition, caused by the challenged employment practice, of the pool of those enjoying a job or job benefit; and (b) the racial composition of the qualified applicant pool."[1734]

11. *Prima Facie* Case for Disparate Impact Claims

In a disparate impact case in which racial discrimination is alleged, a court initially seeks to "gain some handle on the baseline racial composition that the impact is 'disparate' from; that is, what should the racial composition of the job force look like absent the offending employment practice."[1735] The baseline must be "adequately tailored to reflect only those potential applicants who are actually qualified for the job or job benefit at issue."[1736] To enable a court "'[t]o adequately assess statistical data, there must be evidence identifying the basic qualifications [for the job or job benefit at issue] and a determination,

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[1720] 828 F. Supp.2d 957 (N.D. Ill. 2011).

[1721] *Id.* at 971 (quoting Veprinsky v. Fluor Daniel, Inc., 87 F.3d 881, 891 N 6 (7th Cir. 1996)).

[1722] *Id.*

[1723] *Id.* at 970.

[1724] *Id.* (citation omitted).

[1725] *Id.* (citation omitted) (some internal quotation marks omitted).

[1726] 42 U.S.C. § 2000e-2(k)(1)(B)(i) (2018).

[1727] *See* E.E.O.C. v. Consolidated Services Systems, 777 F. Supp. 599, 603 (N. D. Ill. 1991).

[1728] Jones v. City of Boston, 845 F.3d 28 (1st Cir. 2016) (stating that proof of a disparate impact claim requires no proof of intentional discrimination).

[1729] Crum v. Alabama, 198 F.3d 1305, 1321(1999) (citations omitted).

[1730] 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed.2d 158 (1971).

[1731] *Crum*, 198 F.3d at 1311 (citation omitted).

[1732] *Id.* (citation omitted) (some internal quotation marks omitted)

[1733] *Id.*

[1734] *Id.* 1312 (footnote omitted) (citations omitted).

[1735] *Id.*

[1736] *Id.* (citations omitted).

based upon these qualifications, of the relevant statistical pool with which to make the appropriate comparisons.'"[1737] As the Eleventh Circuit explained in *Crum*, "[t]he key to this first stage is to understand that the concept of a 'disparate impact' on one racial group over another only makes sense if we tailor the qualified applicant pool to reflect only those applicants or potential applicants who are 'otherwise qualified'…."[1738]

In a disparate impact case, when "the plaintiffs have met their burden of demonstrating that a challenged employment practice causes a disparate impact, the burden shifts to the defendant employer 'to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.' … Alternatively, the complaining party can demonstrate 'that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in efficient and trustworthy workmanship.'"[1739]

> [T]he ultimate focus of the inquiry remains on the question of who should be included in the qualified applicant pool. If the employer can demonstrate that the practice at issue is a job[-] related business necessity, then the employer has shown that there is no ultimate disparate impact; this is because the qualified applicant pool would only include those persons who could meet the employer's challenged criteria.[1740]

Plaintiffs succeed when an employer is unable to demonstrate business necessity.[1741]

12. Refusal to Adopt an Alternative Practice as a Disparate Impact

As illustrated by the First Circuit's decision in *Jones v. City of Boston,*[1742] an employer's refusal to adopt an alternative practice proposed by an employee being discriminated against may amount to a disparate impact violation. In *Jones*, eight police officers and other plaintiffs claimed that they suffered adverse employment actions by the Boston Police Department because of a racially discriminatory hair drug test. The plaintiffs constituted less than 2 percent of black individuals who tested positive for cocaine, but, as a result of the test, nine lost a job or job offer, and one received an unpaid suspension subject to being placed in a drug rehabilitation and testing program. As discussed below, the First Circuit held that,

> [a]lthough the drug test was indisputably job related and its use was consistent with business necessity, a reasonable factfinder could nevertheless conclude that the Department refused to adopt an available alternative to the challenged hair testing program that would have met the Department's legitimate needs while having less of a disparate impact.[1743]

The First Circuit found that there was a "a material dispute of fact concerning whether, sometime in 2003, the department, by continuing to administer the challenged hair test, 'necessarily … refused to adopt' the alternative"[1744] suggested by Dr. Kidwell, the plaintiff's expert. The court found that there was sufficient evidence on

> which a reasonable factfinder could conclude that hair testing plus a follow-up series of random urinalysis tests for those few officers who tested positive on the hair test would have been as accurate as the hair test alone at detecting the nonpresence of cocaine metabolites while simultaneously yielding a smaller share of false positives in a manner that would have reduced the disparate impact of the hair test.[1745]

Even if the department's hair drug test were job-related and consistent with business necessity did "not mean that it was necessarily lawful to use the disparately impactful test."[1746] A jury could find that the department refused to adopt an alternative employment practice that was available and had less disparate impact that still serves the employer's "'legitimate needs.'"[1747]

The appeals court vacated the district court's grant of a summary judgment for the department and remanded.

13. Title VII Discrimination Claims for Sexual Harassment

a. Quid Pro Quo *Sexual Harassment Claims*

A *quid pro quo* sexual harassment claim requires a plaintiff to show that "'that the acceptance or rejection of a supervisor's alleged sexual harassment resulted in a tangible employment action.'"[1748] As discussed in other subsections of the report, "'[a] tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.' … 'A tangible employment action in most cases inflicts direct economic harm.'"[1749]

In *Seibert v. Jackson County*,[1750] supra, the plaintiff, a deputy in the county Sheriff's Department, alleged that the former sheriff sexually harassed her for months, transferred her to another location, and threatened to demote or fire her. Nevertheless, the court found that the threats of termination or demotion were not tangible employment actions and that the plaintiff "presented no evidence [that her transfer was] a 'tangible employment action' as contemplated by the Fifth Circuit's quid pro quo jurisprudence."[1751]

[1737] *Id.* (citation omitted).

[1738] *Id.* at 1313 (citation omitted).

[1739] *Id.* at 1314-15 (citations omitted) (some internal quotation marks omitted).

[1740] *Id.* at 1315.

[1741] *Id.*

[1742] 845 F.3d 28 (1st Cir. 2016).

[1743] *Id.* at 31.

[1744] *Id.* at 38.

[1745] *Id.*

[1746] *Id.* at 34.

[1747] *Id.* (citation omitted).

[1748] Siebert v. Jackson County, No. 1:14-CV-188-KS-MTP, 2015 U.S. Dist. LEXIS 102632, at *4 (S.D. Miss. Aug. 5, 2015) (citation omitted).

[1749] *Id.* at *4-5 (citations omitted).

[1750] No. 1:14-CV-188-KS-MTP, 2015 U.S. Dist. LEXIS 102632 (S.D. Miss. Aug. 5, 2015).

[1751] *Id.* at *6.

b. Violation of an Employer's Sexual Harassment Policy

In *Smith v. Chi. Transit Auth.*,[1752] supra, the plaintiff alleged that the CTA fired him because of his race, whereas the CTA proffered as its justification for discharging Smith his violation of CTA's policy against sexual harassment. In 2006, Smith was a transportation manager assigned to the Bus Services Management Unit. A bus operator reported to the CTA that in October 2006 Smith asked her to perform a striptease and to join him and his wife in a sexual relationship. A CTA investigation concluded that Smith had violated the authority's sexual harassment policy. In January 2007, William Mooney, who was responsible for any disciplinary action, along with the general manager of the Bus Service Management Unit, discharged Smith for his alleged violation of CTA's sexual harassment policy, as well as for other reasons.

The Seventh Circuit affirmed the district court's grant of a summary judgment for the CTA. The court agreed with the district court that there was no evidence that the investigation of the employee's sexual harassment against Smith was biased or not conducted properly. Smith's claim that the CTA terminated his employment because of his race failed under the direct and indirect methods of proof. There was no evidence that the authority's discharge of Smith due to the sexual harassment complaint was a pretext for racial discrimination against Smith.

c. Sexual Harassment and Hostile Work Environment Claims

When an employee's work environment becomes so severe and pervasively hostile that an employee must resign, the employee may have a claim for a constructive discharge in violation of Title VII.[1753] A workplace becomes hostile "'when the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'"[1754]

In a sexual harassment claim against a supervisor, an employee must show that she belongs to a protected class; she was subject to unwelcome sexual harassment; the harassment was based on sex; and the harassment affected a term condition, or privilege of her employment.[1755] In *Seibert*, supra, the court found credence in the plaintiff's version of the sexual harassment that she suffered that was sufficiently severe and pervasive to support her claim of a hostile work environment.[1756]

d. Whether an Employer is Liable Vicariously for a Supervisor's Sexual Harassment

The court held in *Smith*, supra, that under Title VII the county as the employer was not vicariously liable for a supervisor's harassment when the employer is able to show that it "'exercised reasonable care to prevent and correct promptly any sexually harassing behavior'" and that the "'employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer to avoid harm,'"[1757] such as by the sheriff, the alleged harasser. However, the county could be held liable when it had "'actual knowledge of harassment'" or when the harassment was "'known to higher management or to someone who ha[d] the power to take action to remedy the problem.'"[1758]

14. Discrimination in Violation of the Pregnancy Discrimination Act of 1978

In 1978, Congress amended Title VII by enacting the Pregnancy Discrimination Act (PDA).[1759] In *Legg v. Ulster County*,[1760] decided by the Second Circuit, a district court had dismissed Legg's claim against Ulster County and its former sheriff for pregnancy discrimination under Title VII as amended by the PDA. Legg had begun working as a corrections officer for the Ulster County Jail in 1996. After Legg became pregnant, her doctor provided a note recommending that she be assigned to light duty. Although Legg was assigned to light duty for a while, eventually she was required to work with inmates. While doing so, there was an incident that caused her to have to leave work and not return until after she gave birth.

The county's policy was that only employees who were injured on the job were eligible for an assignment to light duty, such as clerical and other duties. The only options for pregnant employees were to continue working full time; take accrued sick, vacation, or personal time; or take disability leave or leave under the Family and Medical Leave Act.[1761] The issue was whether the defendants, when they denied Legg's request for an accommodation under the county's light duty policy, discriminated against her because of her pregnancy. As discussed below, the Second Circuit reversed and remanded the case for a new trial.[1762]

The appeals court noted that "Title VII prohibits discrimination with respect to the terms, conditions, or privileges of employment because of a person's sex." [1763] Congress enacted the PDA to overrule the Supreme Court's holding in *General*

[1752] 806 F.3d 900 (7th Cir. 2015).

[1753] Downing v. Board of Trustees of University of Alabama, 321 F.3d 1017 (11th Cir. 2003).

[1754] Seibert v. Jackson County, No. 1:14-CV-188-KS-MTP, 2015 U.S. Dist. LEXIS 102632, at *6 (S.D. MS. 2015) (citation omitted).

[1755] *Id.* at *6-7 (citation omitted).

[1756] *Id.* at *10.

[1757] *Id.* at *11 (citation omitted).

[1758] *Id.* at *11-2 (citation omitted) (some internal quotation marks omitted).

[1759] Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k).

[1760] 820 F.3d 67 (2d Cir. 2016).

[1761] *Id.* at 70-71. The Family Leave and Medical Act, Public L. 103-3, 107 Stat. 6 (1993), (codified at 29 U.S.C. 2601-2654).

[1762] *Legg*, 820 F.3d. at 70.

[1763] *Id.* at 72 (citing 42 U.S.C. § 2000e-2(a)(1)).

Electric Co. v. Gilbert[1764] in which the Court held that pregnancy discrimination was not sex discrimination.[1765] In *Legg*, the Second Circuit stressed that the terms

> "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions [who] shall be treated the same for all employment-related purposes … as other persons not so affected but similar in their ability or inability to work.[1766]

The Second Circuit held that for Legg to prove her pregnancy discrimination claim, she had to "to show only (i) 'that she belong[ed] to the protected class,' (ii) that she sought accommodation,' (iii) 'that the employer did not accommodate her,' and (iv) 'that the employer did accommodate others similar in their ability or inability to work.'"[1767] As is customary in Title VII burden-shifting, if the plaintiff meets her burden of making a *prima facie* case, then "a presumption of discriminatory intent arises and the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for its policy or action."[1768]

A pregnancy discrimination claim may arise as a disparate treatment or disparate impact claim.[1769] If a claim is for disparate treatment, the "plaintiff must show that the defendant's actions were motivated by a discriminatory intent, either through direct evidence of intent or by utilizing the three-part burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*…."[1770] A disparate impact claim may be based on a policy or practice that is facially neutral or that is not motivated by discriminatory animus but that has a discriminatory effect.[1771]

During the pendency of Legg's appeal, the Supreme Court decided *Young v. United Parcel Service, Inc*.[1772] on which the Second Circuit relied in its opinion. The Supreme Court held in *Young* that "an employer's facially neutral accommodation policy gives rise to an inference of pregnancy discrimination if it imposes a significant burden on pregnant employees that is not justified by the employer's non-discriminatory explanation."[1773] The Court "held that an employer violates the PDA when it treats pregnant employees 'less favorably' than non-pregnant employees similar in their ability or inability to work to such an extent that it is more likely than not that the disparity is motivated by intentional discrimination."[1774]

The Court in *Young* focused on "'whether the nature of the employer's policy and the way in which it burdens pregnant women shows that the employer has engaged in intentional discrimination.'"[1775] Given the Court's decision in *Young*,

> the focus is on how many pregnant employees were denied accommodations in relation to the total number of pregnant employees, not how many were denied accommodations in relation to *all* employees, pregnant or not. The reason is simple enough; this comparison better reveals whether or not there is a burden on pregnant employees.[1776]

If the employer provides a legitimate, non-discriminatory justification for its policy, the plaintiff may rebut the justification with circumstantial proof of discriminatory intent. In *Young*, the defendants argued that their legitimate, non-discriminatory reason was that the "New York General Municipal Law § 207—c(1) requires municipalities to continue to pay corrections officers injured on the job but does not require the same for employees who become unable to work for other reasons."[1777] Although the Second Circuit agreed that "compliance with a state workers' compensation scheme is a neutral reason for providing benefits to employees injured on the job but not pregnant employees,"[1778] there were inconsistencies in the employer's justification for its policy. The appeals court held that "a reasonable jury drawing all reasonable inferences in Legg's favor could find that the defendants' current explanation — compliance with state law— is pretextual, and the real reason for the distinction was unlawful discrimination."[1779]

Because of the Supreme Court's decision in *Young,*

> a plaintiff can make [her] showing by presenting "sufficient evidence that the employer's policies impose a significant burden on pregnant workers, and that the employer's legitimate, nondiscriminatory reasons are not sufficiently strong to justify the burden, but rather—when considered alongside the burden imposed—give rise to an inference of intentional discrimination."[1780]

In addition, "a plaintiff may create a genuine issue of fact as to the existence of a significant burden by showing 'that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers.'"[1781]

In *Legg*, the court did not address disparate impact, because the court found that Legg produced sufficient evidence, even though it did not rise to the level of direct evidence, for a jury to decide that the county's policy was motivated by discriminatory intent.[1782] The facts, however, that Legg was pregnant and sought a light duty accommodation, which the county denied to Legg while providing light duty accommodations to other employees, were sufficient to permit a jury to find that it was "more likely than not that the policy was motivated by a discriminatory intent."[1783]

[1764] 429 U.S. 125, 97 S. Ct. 401, 50 L. Ed.2d 343 (1976).

[1765] *Legg*, 820 F.3d at 72.

[1766] *Id.* (quoting 42 U.S.C. § 2000e(k)) (other citations omitted).

[1767] *Id.* at 73 (citation omitted) (some internal quotation marks omitted).

[1768] *Id.* (citations omitted).

[1769] *Id.* 72 (citation omitted).

[1770] *Id.* (citation omitted)

[1771] *Id.* (citation omitted).

[1772] 135 S. Ct. 1338, 191 L. Ed.2d 279 (2015).

[1773] *Legg*, 820 F.3d at 70.

[1774] *Id.* at 73 (citation omitted).

[1775] *Id.* (citation omitted).

[1776] *Id.* at 76.

[1777] *Id.* at 75.

[1778] *Id.*

[1779] *Id.*

[1780] *Id.* at 74 (citation omitted).

[1781] *Id.* (citation omitted).

[1782] *Id.*

[1783] *Id.*

The Second Circuit held that, because the county denied an accommodation to 100 percent of its pregnant employees, such a disparity could result in a finding that the policy imposed a significant burden on its employees.[1784] Under the circumstances of Legg's case, the denial of an accommodation was "itself … evidence of a significant burden."[1785]

15. Discrimination Claims Because of a Person's Religion

There have been claims against DOTs and other employers for failure to accommodate a person's religion. Under Title VII, the term religion "includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate … an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."[1786]

In *Nichols v. Ill. DOT*,[1787] supra, Nichols, a Muslim, sued his former employer the Illinois DOT and the Illinois Department of Central Management System (CMS) under Title VII.[1788] In June 2008, IDOT terminated Nichols's after ten years of employment allegedly for violating IDOT's policy against workplace violence. Nichols's position throughout his ten-year employment with IDOT was as a "highway maintainer." His direct supervisor was George Martin, the yard technician.

Nichols alleged that IDOT was liable under Title VII for failing to accommodate his religious practices by refusing to grant his request for a quiet place to pray while at work, for discriminating against him because of his religion, and for retaliating against him because of his engagement in statutorily protected activities.[1789] To make a *prima facie* case on his failure to accommodate claim, Nichols had to show "'that the observance or practice conflicting with an employment requirement is religious in nature, that [he] called the religious observance or practice to [his] employer's attention, and that the religious observance or practice was the basis for [his] discharge or other discriminatory treatment.'"[1790]

The court found that Nichols's "testimony create[d] a disputed issue of fact as to whether Nichols's need to pray during the workday in 2008 while he was acting as temporary lead worker conflicted with his job requirements in that position."[1791] IDOT argued that Nichols did not notify IDOT properly of his religious requirements, because Nichols "never specifically told his supervisors that in order to properly pray during the workday he needed to be alone in a quiet place…."[1792] The court ruled that IDOT had "misperceive[d] the notice requirement:"[1793] "The employee's request satisfies the notice requirement if it is sufficient 'to alert the employer to the fact that the request is motivated by a religious belief.'"[1794]

One issue for the court in *Nichols* was whether an adverse employment action is necessary before an employee may make a claim for an employer's failure to accommodate the employee's religion. For the purpose of summary judgment, the court resolved the issue in the following manner:

> The Court … finds either that an adverse employment action separate from IDOT's failure to accommodate is not required[] or that the evidence is disputed as to whether IDOT's termination of Nichols's employment was motivated in part by his request for a religious accommodation. Should it later be determined that the evidence is insufficient to support a connection between Nichols's religious need to pray at work and IDOT's termination of Nichols's employment, then it may become necessary for the Court to make a definitive ruling on whether Nichols must establish some other employment action taken against him because of a conflict with his religious practice of prayer.[1795]

Assuming a plaintiff makes a *prima facie* case for a failure to accommodate, the issue becomes "whether IDOT either offered him a reasonable accommodation or else can establish undue hardship."[1796] IDOT failed to show that an accommodation would be an undue hardship, because IDOT relied "on the conclusory assertions of its management personnel … that it would be an undue hardship on IDOT to allow Nichols to return to the yard twice a day to pray."[1797] The court ruled that, "because a reasonable jury could question IDOT's good faith in asserting undue hardship,"[1798] the evidence sufficiently created a disputed issue of fact regarding IDOT's assertion of undue hardship. When an employee requests an appropriate accommodation because of his religion, his "employer may not simply reject it without offering other suggestions or at least expressing a willingness to continue discussing possible accommodations."[1799]

16. Effect on Title VII Claims of Alleged Violations of Policies Against Violence or Threats of Violence in the Workplace

In *Nichols v. Ill. DOT*,[1800] Nichols became aware of talk at the Harvey Yard about someone wanting to hurt him. Nichols was sufficiently distraught because of various threats that he called the Employee Assistance Program (EAP) in Springfield, Illinois.[1801] The event that gave rise to Nichols's termination of employment was a telefax that he sent to the EAP and the Labor Relations Department that IDOT construed to be a "'straight[-]

[1784] *Id.* at 76.

[1785] *Id.*

[1786] 42 U.S.C. § 2000e(j) (2018).

[1787] 152 F. Supp.3d 1106 (N.D. Ill. 2016).

[1788] CMS is a state agency with responsibility for overseeing and implementing the state civil service and personnel code.

[1789] *Nichols*, 152 F. Supp.3d at 1110-11.

[1790] *Id.* at 1120 (citation omitted).

[1791] *Id.*

[1792] *Id.*

[1793] *Id.*

[1794] *Id.* (citation omitted).

[1795] *Id.* at 1123 (footnote omitted).

[1796] *Id.*

[1797] *Id.*

[1798] *Id.* at 1124 (citation omitted).

[1799] *Id.* at 1125.

[1800] 152 F. Supp.3d 1106 (N.D. Ill. 2016).

[1801] *Id.* at 1114.

forward threat of violence' in violation of IDOT's 'zero tolerance policy.'"[1802]

The federal district court did not accept the department's interpretation of the telefax. If Nichols's telefax were construed to be an assertion of his right of self-defense, then Nichols's conduct was "itself protected activity…."[1803] The court elaborated:

> If Nichols had a protected right … to defend himself against violence directed at him because he is a Muslim, then his verbal assertion of that right in the April 2, 2008 fax also would constitute oppositional activity protected by the anti-retaliation provision of Title VII. … [A] n employer is "certainly free to maintain [a] 'zero-tolerance' policy," but "it cannot do so without also protecting its workers from unlawful harassment."[1804]

Title VII protects an employee to such an extent that an employer may not "'ignore clear warning signs and then terminate an employee who resists sexual harassment and assault at the workplace [or, as in this case, who resists threats of violence based on his religion]…."'[1805]

There was a material fact in dispute concerning whether Nichols in his telefax had threatened violence. However, IDOT failed to investigate any threats of violence against Nichols.[1806] The court recognized the possible applicability in Nichols's case of the "provocation defense:" That is, "[w]here the 'employer provokes a reaction from an employee, that reaction should not justify a decision to impose a disproportionately severe sanction.'"[1807] In addition, "'[w]hen an employee is fired because he acted to defend himself against harassment, which supervisors failed to take reasonable measures to prevent or correct, the termination process cannot be said to be free from discrimination. This is so even if the ultimate decision maker was moved purely by a legitimate concern about personnel matters.'"[1808]

With respect to the effect of IDOT's zero tolerance policy on Nichols's case, first, the court stated that "evidence regarding IDOT's stated reason for terminating Nichols—its 'zero tolerance' policy—may actually support an inference of discriminatory intent in this case."[1809] Second, "IDOT's written policy against workplace violence does not contain any zero-tolerance language, and IDOT has not pointed to any written rule or policy that does."[1810] Indeed, "a jury could conclude that IDOT's own formulation of the rule is so malleable that discrimination cannot be excluded as a motivating factor in Nichols's discharge."[1811]

As for Nichols's disparate treatment claim, IDOT argued that it was "'undisputed' that Nichols was discharged for cause because he violated IDOT's policy against violence in the workplace."[1812] The court disagreed, stating that "Nichols has assembled a number of pieces of evidence, none perhaps dispositive in itself, but that taken as a whole point in the same direction and thus provide adequate support to avoid summary judgment."[1813] For example, Nichols, the only Muslim at the Harvey Yard, was treated differently than the other workers who were not Muslim; he was punished more severely than other workers; and he "was excessively scrutinized and monitored…."[1814]

The court denied IDOT's motion for summary judgment.

17. Class Actions

Rule 23 of the Federal Rules of Civil Procedure sets forth the requirements that must be met for an action to proceed as a class action. An example of a Title VII putative class action in which the plaintiff failed to satisfy Rule 23 requirements is *Lomotey v. Connecticut, Dep't of Transp*.[1815] Although the plaintiff abandoned his effort to bring the case as a class action, the court addressed the requirements that a litigant must meet under Rule 23 for certification of a class action.

First, the court held that the plaintiff could not meet the commonality or typicality requirements of Rule 23. The court observed that the Supreme Court has held that in a pattern or practice or disparate impact case that,

> [c]onceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds, and his otherwise unsupported allegation that the company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact that the individual's claim will be typical of the class claims.[1816]

Lomotey had to "'produce some quantum of evidence to satisfy the commonality and typicality requirements, usually in the form of affidavits, statistical evidence, or both, tending to show the existence of a class of persons affected by a company-wide policy or practice of discrimination.'"[1817] However, the plaintiff provided no evidence that the DOT had a discriminatory policy, and there was no allegation that the same supervisor or group of supervisors had discriminatory bias.[1818] The plaintiff provided no affidavits or statistical evidence to show a "sufficient commonality and typicality to justify the certification of such a proposed class."[1819] The plaintiff failed to demonstrate that the plaintiff and prospective class members had suffered the same injury:

[1802] *Id.* at 1117 (citation omitted).

[1803] *Id.* at 1140.

[1804] *Id.* (citations omitted.

[1805] *Id.* at 1140-41 (citations omitted).

[1806] *Id.* at 1131-2.

[1807] *Id.* at 1132 (citation omitted) (some internal quotation marks omitted).

[1808] *Id.* (citation omitted) (footnote omitted).

[1809] *Id.* at 1136.

[1810] *Id.* at 1137.

[1811] *Id.* (citation omitted).

[1812] *Id.* at 1126 (citation omitted).

[1813] *Id.* (citation omitted).

[1814] *Id.*

[1815] No. 3:09 cv 2143 (VLB), 2012 U.S. Dist. LEXIS 25385 (D. Conn. Feb. 28, 2012).

[1816] *Id.* at *5-6 (quoting General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 102 S. Ct. 2364, 72 L. Ed.2d 740 (1982)).

[1817] *Id.* at *6 (citation omitted).

[1818] *Id.* at *8.

[1819] *Id.* at *7.

"'[E]ven a disparate impact injury gives no cause to believe that all their claims can productively be litigated at once.'"[1820]

The plaintiff also could not meet the requirement that he could represent the class adequately, in part, because of his prior lawsuit against the DOT. The defendants successfully argued that the doctrines of *res judicata* and collateral estoppel barred Lomotey's claims in the present action.[1821] Lomotey's five CHRO complaints suggested that the facts of the plaintiff's claim and the discrimination he allegedly experienced would be dissimilar to that of potential class members.[1822]

18. Remedies in Title VII Cases

The remedies that are available to an employee whenever an employer violates Title VII are set forth in 42 U.S.C. § 2000-5(g)(1).[1823] In *United States v. City of New York*,[1824] the court identified "'three categories of relief in Title VII cases: compliance relief, compensatory relief, and affirmative relief.'"[1825] For example, compliance relief includes "'ordering that new and valid selection procedures be adopted[] and authorizing interim hiring that does not have a disparate impact on any group protected by Title VII.'"[1826]

When an employer

> has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay … or any other equitable relief as the court deems appropriate.[1827]

Subsection (g)(1) also states that "[b]ack pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable."[1828]

In *Crum*, supra, the court discussed the meaning of 42 U.S.C. § 2000e-5(g)(1) ("If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint…."). The court stated that the foregoing statutory language ("intentionally engaged in … an unlawful employment practice") does not mean that the relief provided in the statute is only available in disparate treatment or pattern or practice cases.[1829] "The full range of equitable remedies are available in disparate impact cases as well."[1830]

An important caveat is that when "an individual plaintiff has shown that he or she was within the class of persons negatively impacted by the unlawful employment practice, then the employer must be given an opportunity to demonstrate a legitimate nondiscriminatory reason why, absent the offending practice, the individual plaintiff would not have been awarded the job or job benefit at issue anyway."[1831]

19. Conclusion

Title VII delineates employment practices that are a violation of the Act and establishes administrative prerequisites to an affected employee's filing of a legal action for a violation of Title VII. In 1972, Congress amended Title VII to permit federal courts to award money damages to an individual against a state government for employment discrimination proscribed by Title VII. The Supreme Court and other courts have held that Congress had the power to abrogate the states' sovereign immunity under Title VII for both disparate treatment and disparate impact claims.

This part of the report discusses the elements that a plaintiff must demonstrate for a *prima facie* case of disparate treatment in violation of Title VII, the methods of proof in such cases, and whether an employer's alleged justification for an adverse employment action was merely a pretext for discrimination. Title VII proscribes disparate treatment by employers in hiring, including pattern or practice discrimination, promotions, suspensions, and terminations. The report analyzes whether an employer's use of performance evaluations and personal performance plans may violate Title VII. Also, the report discusses whether an employer's suspension or termination of an employee's security clearance may violate VII. Under Title VII, an employer may be liable for a hostile work environment, constructive discharge, sexual harassment, a violation of the Pregnancy Discrimination Act of 1978, and discrimination on the basis of religion. An employer may be liable for retaliating against an employee when an employee engages in protected activity under Title VII, such as filing an EEOC complaint for employment discrimination.

The report discusses the purpose of providing for disparate impact claims under Title VII, the elements a plaintiff needs to establish for a *prima facie* case for disparate impact, and whether an employer's refusal to adopt an alternative practice constitutes a Title VII disparate impact violation.

Finally, the report discusses class actions and remedies that are available in in Title VII cases.

[1820] *Id.* (citation omitted).

[1821] *Id.* at *9.

[1822] *Id.* at *10.

[1823] Crum v. Alabama, 198 F.3d 1305, 1315 (1999).

[1824] 713 F. Supp.2d 300 (S.D. N.Y. (2010).

[1825] *Id.* at 325 (citation omitted).

[1826] *Id.* at 326 (citation omitted).

[1827] *Crum*, 198 F.3d at 1315 n.13 (quoting 42 U.S.C. § 2000e-5(g)(1)).

[1828] *Id.* (quoting 42 U.S.C. § 2000e-5(g)(1)).

[1829] *Id.* (citation omitted).

[1830] *Id.*

[1831] *Id.* at 1315 (citations omitted).

G. AMERICANS WITH DISABILITIES ACT

1. Introduction

As a result of the ADA Amendments Act of 2008 (ADAAA), there have been significant changes in the ADA since the publication in 2006 of the original report. Subsection G. 2. provides an overview of the ADA and discusses its history, purposes, and five titles. Subsection G. 3. analyzes several important amendments by the ADAAA of the ADA, in part, because of the ADAAA's rejection of Supreme Court cases that had narrowed the intended breadth of the ADA.

Subsection G. 4. analyzes Title I of the ADA and discrimination in employment against individuals with disabilities, including those who use wheelchairs, by an employer subject to the ADA. This part discusses the definition of the term disability and who is a qualified individual under Title I. It analyzes what is meant by the term disability that "substantially limits a major life activity" and the meaning of the term "being regarded as having a disability." G. 4 also discusses the requirement that a covered entity make reasonable accommodations for individuals with disabilities, including those who use wheelchairs. The subsection discusses whether and when an employer may use medical inquiries and require medical examinations; whether an employer may prohibit employees' use of illegal drugs and the use of alcohol in the workplace; and whether an employer discriminates against individuals with disabilities by using qualifying standards, tests, or selective criteria for employment. The subsection covers disparate treatment and disparate impact claims under the ADA, as well as an employer's failure to accommodate applicants or employees with disabilities, including those who use wheelchairs. Finally, besides explaining that states and state agencies have immunity to Title I claims, the subsection discusses the enforcement of Title I.

As discussed in subsection G. 5., Title II of the ADA prohibits its discrimination against individuals with disabilities, including those who use wheelchairs, by public entities providing public services, including transportation services. This part discusses who is a qualified individual with a disability under Title II; analyzes the respective regulatory jurisdiction of the Department of Justice and U.S. DOT of Title II; and discusses Title II's accessibility requirements for transportation vehicles and transportation facilities, including alterations of existing facilities. This part sets forth what is required for a *prima facie* claim under Title II; discusses whether the states and state agencies have immunity to Title II claims; explains administrative and judicial enforcement of Title II; and discusses whether an individual with a disability has a private right of action, as well as standing, to sue for a violation of Title II. Finally, this part discusses whether attorney's fees are recoverable.

G. 5. analyzes Title III and discrimination in public accommodations, including transportation services that are subject to Title III. The report discusses investigations and compliance reviews by the Attorney General and further, whether an individual with a disability has a private right of action, may obtain injunctive relief, and/or recover attorney's fees.

Subsection G. 6. discusses state laws prohibiting discrimination against individuals with disabilities.

2. Overview, Purposes, and the Five Titles of the ADA

In 1990, Congress enacted the ADA, which President George H.W. Bush signed on July 26, 1990, to eliminate discrimination against individuals with disabilities.[1832] The ADA was preceded by the Rehabilitation Act of 1973,[1833] § 504, which banned discrimination by recipients of federal funds against individuals on the basis of a disability.[1834]

When enacting the ADA, the Congress found that, although physical or mental disabilities do not diminish a person's right to participate fully in all aspects of society, many people with a disability are precluded from participating fully in society because of discrimination.[1835] The types of discrimination include

> outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities….[1836]

Prior to the ADA, individuals with disabilities who were discriminated against because of their disability often had no legal recourse to prevent discrimination or to redress its effects.[1837] The ADA seeks to eliminate discrimination against individuals with disabilities; provides enforceable standards to address discrimination against individuals with disabilities; ensures that the federal government plays a central role in enforcing the ADA standards; and invokes the authority of Congress, including its powers to enforce the Fourteenth Amendment and to regulate commerce, to prohibit discrimination on a day-to-day basis against people with disabilities.[1838]

The ADA has five titles. Title I prohibits entities from discriminating against individuals with disabilities in the context of employment.[1839]

Title II applies to *public* entities providing public services, including transportation services.[1840] Title II states that "no quali-

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[1832] 42 U.S.C. § 12101(b)(1) (2018).

[1833] Pub. L. No. 93-112, 87 Stat. 355.

[1834] 29 U.S.C § 794(a). Section 504 of the Rehabilitation Act states in part:

> No otherwise qualified individual with a disability in the United States, as defined in section 7(20) [29 USCS § 705(20)], shall, solely by reason of her or his disability, 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 or under any program or activity conducted by any Executive agency or by the United States Postal Service.

[1835] 42 U.S.C. §§ 12101(a)(1)-(3) (2018).

[1836] 42 U.S.C. § 12101(a)(5) (2018).

[1837] 42 U.S.C. § 12101(a)(4) (2018).

[1838] 42 U.S.C. §§ 12101(b)(1)-(4) (2018).

[1839] 42 U.S.C. § 12112(a) (2018).

[1840] Abrahams v. MTA Long Island Bus, 644 F.3d 110, 115 (2d Cir. 2011) (citing 42 U.S.C. § 12131-12134).

fied 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."[1841] As used in the ADA, the term public entities includes state and local governments, instrumentalities of state or local governments, the National Railroad Passenger Corporation (Amtrak), and any public commuter authority.[1842]

Title III of the ADA prohibits discrimination by *private* entities in places of public accommodation against individuals with a disability. Title III prohibits discrimination in a terminal, depot, or other station by any means of transportation, such as bus or rail, that provides general or special service on a regular and continuing basis to the general public.[1843] Section 12184(a) of the ADA states that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of specified public transportation services provided by a private entity that is primarily engaged in the business of transporting people and whose operations affect commerce."[1844]

Title IV requires common carriers to make telecommunication services available to individuals with hearing and speech disabilities "in a manner that is functionally equivalent to the abilities of a hearing individual who does not have a speech disability"[1845] and requires television public service announcements funded by the federal government to have closed-captioning.[1846]

Title V provides that

> [a] State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in [a] Federal or State court of competent jurisdiction for a violation of this Act. In any action against a State for a violation of the requirements of this Act, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.[1847]

This report discusses the extent to which states and state agencies have been held to retain their Eleventh Amendment immunity to ADA claims. Title V also prohibits retaliation.[1848]

3. The ADA Amendments Act of 2008 (ADAAA) and its Impact

a. Congressional Findings in and Purposes of the ADAAA

Congress enacted the ADA in 1990 to "'provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities' and provide broad coverage...."[1849] In 2008, in the ADAAA[1850], Congress rejected the United States Supreme Court's decisions in *Sutton v. United Air Lines, Inc.*[1851] and *Toyota Motor Mfg, Inc. v. Williams,*[1852] because the Court "narrowed the broad scope of protection" that Congress had intended for the ADA to provide.[1853] The Supreme Court "incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities…."[1854] Congress also rejected the Court's ruling that mitigative or corrective measures must be considered when determining whether an individual is substantially limited in a major life activity.[1855]

As the Congress stated in the ADAAA, in *Toyota Motor Mfg, Inc.,* the Court held

> that the terms "substantially" and "major" in the definition of disability under the ADA "need to be interpreted strictly to create a demanding standard for qualifying as disabled[]" and that to be substantially limited in performing a major life activity under the ADA "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives…."[1856]

Congress declared in the ADAAA, however, that the standard set by the Court in *Toyota* for the term substantially limits "created an inappropriately high level of limitation necessary to obtain coverage under the ADA…."[1857] Congress further declared that the primary objective in ADA cases should be to determine "whether entities covered under the ADA have complied with their obligations" and that "the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis…."[1858]

Finally, Congress stated that it expected the Equal Employment Opportunity Commission (EEOC), whose regulations, for example, had defined the term substantially limits to mean "significantly restricted," to revise its regulations so that they are consistent with the ADAAA.[1859]

b. Specific Amendments of the ADA

First, in the ADAAA, Congress amended the definition of disability. Although still having three parts or prongs, the term disability with respect to an individual now means:

[1841] 42 U.S.C. § 12132 (2018).

[1842] 42 U.S.C. § 12131(1) (2018).

[1843] 42 U.S.C. §§ 12181(7)(G), 12181(10), and 12182(a) (2018).

[1844] 42 U.S.C. § 12184(a) (2018).

[1845] 47 U.S.C. §§ 225(a)(3) and (b) (2018).

[1846] 47 U.S.C. § 611 (2018) (closed-captioning of public service announcements).

[1847] 42 U.S.C. § 12202 (2018).

[1848] 42 U.S.C. § 12203 (2018).

[1849] ADAAA § 2(a)(1).

[1850] Pub. L. No. 110-325, 122 Stat. 3553 (2008).

[1851] 527 U.S. 471, 119 S. Ct. 2139, 144 L. Ed.2d 450 (1999).

[1852] 534 U.S. 184, 122 S. Ct. 681, 151 L.Ed.2d 615 (2002).

[1853] ADAAA § 2(a)(4).

[1854] ADAAA § 2(a)(6).

[1855] James Concannon, *Mind Matters: Mental Disability and the History and Future of the Americans with Disabilities Act*, 36 Law & Psychol. Rev. 89, 104 (2012), [hereinafter Concannon].

[1856] ADAAA § 2(b)(4).

[1857] ADAAA § 2(b)(5).

[1858] *Id.*

[1859] ADAAA § 2(b)(6).

> (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment (as described in paragraph (3)).[1860]

Second, Congress amended the above third prong of the definition of disability in § 12102(1)(C) by stating that "[a]n individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity."[1861]

The ADA, as amended, relieves a plaintiff of having to prove that his or her employer regarded the plaintiff as being disabled. Because of the ADAAA, a plaintiff only has to prove that "he or she has been subjected to an action prohibited under this Chapter because of an actual or perceived physical or mental impairment…."[1862] The term impairment does "not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less."[1863]

Third, Congress directed that the ADA's definition of disability "shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act" and that the term substantially limits "shall be interpreted consistently with the findings and purposes of the [ADAAA]."[1864] Congress stated that "[a]n impairment that substantially limits one major life activity need not limit other major life activities … to be considered a disability" and that "[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."[1865]

Fourth, the ADAAA added a list of major life activities in response to judicial decisions that had held, for example, that the abilities to concentrate and think are not major life activities. Congress amended the definition of the term major life activities by providing that they

> include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.[1866]

As for the meaning of the term major bodily functions, they "include[] the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."[1867]

Fifth, the ADAAA specified that "[t]he determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures…."[1868] Thus, since the ADAAA, the courts are precluded from considering certain mitigating measures when determining whether an individual's impairment substantially limits a major life activity. Mitigating measures include:

> (I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;
>
> (II) use of assistive technology;
>
> (III) reasonable accommodations or auxiliary aids or services; or
>
> (IV) learned behavioral or adaptive neurological modifications.[1869]

However, regarding the use of ordinary eyeglasses or contact lens, the ADAAA took the approach that "[t]he ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity."[1870]

Sixth, Congress amended § 101(8) of the ADA so that the term qualified individual

> means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this title, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.[1871]

Finally, the ADAAA amended § 102 of the ADA so that 42 U.S.C. § 12112(a) now provides that "[n]o covered entity shall discriminate against a qualified individual *on the basis of disability* 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."[1872] As amended, subsection § 12112(b) sets forth various actions, such as "using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability," that come within the phrase "'discriminate against a qualified individual on the basis of disability.…'"[1873]

In sum, because of the enactment of the ADAAA, the courts in ADA cases have redirected their analysis "away from deter-

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[1860] ADAAA § 3(a), 42 U.S.C. §§ 12102(1)(A)-(C) (2018).

[1861] ADAAA § 4(a), 42 U.S.C. § 12102(3)(A) (2018).

[1862] Concannon, *supra* note 1855, at 105 (quoting 42 U.S.C. § 12102(3)(A) (2009)) (internal citation omitted).

[1863] ADAAA § 4(a), 42 U.S.C. § 12102(3)(B).

[1864] ADAAA § 4(a), 42 U.S.C. §§ 12102(4)(A) and (B).

[1865] ADAAA § 4(a), 42 U.S.C. §§ 12102(4)(C) and (D).

[1866] ADAAA § 4(a), 42 U.S.C. § 12102(2)(A) (2018).

[1867] ADAAA § 4(a), 42 U.S.C. § 12102(2)(B) (2018).

[1868] ADAAA § 4(a), 42 U.S.C. § 12102(4)(E)(i) (2018).

[1869] ADAAA § 4(a), 42 U.S.C. §§ 12102(4)(E)(i)(I)-(IV) (2018).

[1870] ADAAA § 4(a), 42 U.S.C. § 12102(4)(E)(ii) (2018).

[1871] ADAAA § 5(c), 42 U.S.C. § 12111(8) (2018).

[1872] ADAAA § 5(a), 42 U.S.C. § 12112(a) (2018) (emphasis supplied).

[1873] ADAAA § 5(a), 42 U.S.C. §§ 12112(b) and (b)(6) (2018).

mining whether an individual has a disability[] to determining whether disability discrimination occurred."[1874]

4. Title I of the ADA and Employment Discrimination

a. Entities Covered by Title I of the ADA

Title I of the ADA prohibits discrimination in employment based on a person's disability. An employer having more than 15 employees is a "covered entity" under the Act.[1875] The EEOC is responsible for enforcing Title I of the ADA. The EEOC's regulations implementing Title I are found in 29 C.F.R. part 1630. Interpretative guidance to Title I is included as an appendix to part 1630.

Claims arising under Title I have involved the issues of whether an individual, either as an applicant for employment or as an employee, is a qualified individual; whether an employer must make or should have made a reasonable accommodation for an applicant or an employee with a disability; and when an employer may make medical inquiries or require medical exams.[1876]

b. Definition of Disability under the ADA

The ADAAA amended the ADA's definition of what constitutes a disability within the meaning of the ADA. The term disability now means:

> (A) a physical or mental impairment that substantially limits one or more major life activities of such individual;
>
> (B) a record of such an impairment; or
>
> (C) being regarded as having such an impairment (as described in paragraph (3)).[1877]

The ADAAA also amended the meaning of subsection (C) quoted above so that an individual satisfies the requirement of "being regarded as having such an impairment" when "the individual establishes that he or she has been subjected to an action prohibited under [the ADA] because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity."[1878] Section 12102(1)(C) does not apply to transitory and minor impairments; for example, a transitory impairment is one with an actual or expected duration of six months or less.[1879]

As stated in *Smart v. DeKalb Cty*.,[1880] for "a *prima facie* case of disability-based discrimination under the ADA, a plaintiff must demonstrate that: (1) he has a disability as defined in the ADA; (2) he is a 'qualified individual,' meaning that, with or without reasonable accommodations, he can perform the essential functions of the job he holds; and (3) he was discriminated against because of his disability."[1881] "The ADA's definition of 'discriminate' includes a failure to make reasonable accommodations to the limitations of an individual with a disability."[1882]

In *Smart*, as for whether the defendant regarded Smart as being disabled, the court explained:

> "An individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." … "Prohibited actions include but are not limited to refusal to hire, demotion, placement on involuntary leave, termination, exclusion for failure to meet a qualification standard, harassment, or denial of any other term, condition, or privilege of employment...."[1883]

In *Hartigan v. Ill. DOT*,[1884] the parties disputed whether the plaintiff had a disability. The plaintiff alleged that after two visits to his physician in 2008 and 2009, he informed his yard technician that he was having trouble breathing because of exposure to cigarette smoke. After the yard technician informed Hartigan's co-workers of his problem, Hartigan experienced instances of harassment. In 2012, Hartigan's pulmonologist diagnosed him with "'mild COPD with multiple chemical sensitivity syndrome'…."[1885]

IDOT argued that "under the actual disability prong of the ADA's disability test," the plaintiff had to "support his claimed impairments with medical testing and diagnosis."[1886] The court found that Hartigan failed to present sufficient evidence that he had a disorder affecting his ability to breathe until his diag-

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[1874] National Council on Disability, A Promising Start: Preliminary Analysis of Court Decisions under the ADA Amendments Act, at 91 (2013), http://www.ncd.gov/rawmedia_repository/7518fc55_8393_4e76_97e4_0a72fe9e95fb.pdf (last accessed Jan. 7, 2019).

[1875] 42 U.S.C. § 12111(2) (2018) (stating that "[t]he term 'covered entity' means an employer, employment agency, labor organization, or joint labor-management committee"). Section 12111(5) states that "[t]he term 'employer' means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this title, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person." *See* Richardson v. Chicago Transit Auth., 292 F. Supp.3d 810, 815 (N.D. Ill. 2017) (holding that the Chicago Transit Authority, as an employer of more than 15 employees, is a covered entity under the ADA (citing 42 U.S.C. §§ 12111(2) and (5)).

[1876] Peggy Mastroianni, Jeanne Goldberg, and DeMaris Trapp, *Recent Americans with Disabilities Act Decisions*, U.S. Equal Opportunity Employment Commission, Office of Legal Counsel (2012), http://www.americanbar.org/content/dam/aba/events/labor_law/2012/03/national_conference_on_equal_employment_opportunity_law/mw2012eeo_mastroianni.authcheckdam.pdf (last accessed Jan. 7, 2019).

[1877] 42 U.S.C. §§ 12102(1)(A)-(C) (2018).

[1878] 42 U.S.C. § 12102(3)(A) (2018).

[1879] 42 U.S.C. § 12102(3)(B) (2018).

[1880] No. 1:16-cv-826-WSD, 2018 U.S. Dist. LEXIS 30117 (N.D. Ga. Feb.26, 2018).

[1881] *Id.* at *16 (citations omitted).

[1882] *Id.* (citation omitted).

[1883] *Id.* at *25 (citations omitted).

[1884] No. 12 CV 5966, 2015 U.S. Dist. LEXIS 54503 (N.D. Ill. April 22, 2015).

[1885] *Id.* at *14 (citation omitted).

[1886] *Id.* at *22 (citing 42 U.S.C. § 12102(1)(A)).

nosis of COPD on or about July 31, 2012.[1887] The court found that after Hartigan's July 31, 2012, diagnosis there was sufficient evidence that Hartigan had more difficulty breathing than most people in the general population when he was in the presence of tobacco smoke.[1888] Therefore, the plaintiff met his burden of showing that as of July 31, 2012, his COPD substantially interfered with his ability to breathe.[1889]

For Hartigan to survive IDOT's motion for summary judgment, the plaintiff had to provide sufficient evidence (1) that he engaged in a statutorily-protected activity, (2) that he suffered an adverse employment action, and (3) that his engagement in the protected activity caused the adverse employment action.[1890] Before an employee who is a qualified individual with a disability may expect a reasonable accommodation, the employer must be aware of the individual's disability.[1891] The employee has a "positive duty … to inform the employer of a disability before ADA liability may be triggered for failure to provide accommodations.'"[1892] Because of the defendant's actions after Hartigan's requested accommodations, IDOT did not fail to make reasonable accommodations for the plaintiff.[1893]

The plaintiff also made a claim for an adverse employment action. The plaintiff argued "that he was denied promotions and training[] and was subjected to a hostile work environment in retaliation for his engagement in statutorily protected activities."[1894] "A work environment becomes hostile when (1) the environment becomes 'both objectively and subjectively offensive;' (2) the harassing conduct is based on the employee's disability; (3) the conduct is 'either severe or pervasive; and (4) there is a basis for employer liability.'"[1895] The plaintiff neither produced evidence of being harassed because he was disabled[1896] nor produced evidence that his coworkers were aware of his disability.[1897] The court granted IDOT's motion for a summary judgment on Hartigan's claims of failure to accommodate and retaliation.

In *Downs v. Massachusetts Bay Transp. Auth.*,[1898] a case that involved impermissible medical inquiries, one issue was whether Downs had a disability. Downs argued that the history of his workers' compensation injuries established that he had "a record of a disabling impairment since his prior elbow and back injuries had previously substantially limited his ability to work," a claim that the defendant disputed.[1899] Nevertheless, the court held that "[t]he implementing regulations establish that an employee who has previously had a disabling impairment from which he has recovered in whole or in part has a record of a disability. … The nature and severity of an impairment, its duration or expected duration and its long-term or anticipated long-term impact (including any lingering effects) are all relevant to determining whether an impairment is substantially limiting."[1900] The court ruled that Downs had "presented sufficient evidence to allow a jury to conclude that the MBTA *did* view him as disabled when it decided to fire him."[1901]

c. A Qualified Individual Under the ADA

Under Title I of the ADA, an important issue is whether an individual with a disability satisfies the definition of a qualified individual under the Act and how the term qualified individual affects an employer's obligation to individuals with disabilities. The term qualified individual means "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[1902] Nevertheless, the ADA requires that "consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job."[1903] Thus, an employer's written job description is evidence of a particular position's essential functions.[1904]

As for whether an individual is a qualified individual under the ADA, "'an ADA plaintiff must show either that he can perform the essential functions of his job without accommodation, or, failing that, show that he can perform the essential functions of his job with a reasonable accommodation.'"[1905] "If a plaintiff cannot perform essential functions of his job, even with a reasonable accommodation, then he is not a 'qualified individual' and is unable to establish a *prima facie* case."[1906]

There are rules to consider when determining whether a qualified individual has been discriminated against because of his or her disability.[1907] For example, an employer discriminates against a qualified individual with a disability when an employer does not make a reasonable accommodation for "known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would

[1887] *Id.* at *23.

[1888] *Id.* at *26-27.

[1889] *Id.* at *27.

[1890] *Id.* at *32.

[1891] *Id.* at *27.

[1892] *Id.* at *27 (citations omitted).

[1893] *Id.* at *31.

[1894] *Id.* at *36 (citation omitted). The court noted "that the Seventh Circuit has not determined whether the creation of a hostile work environment is a sufficient adverse employment action to support a retaliation claim under the ADA." *Id.* (citation omitted).

[1895] *Id.* at *36-7 (citation omitted).

[1896] *Id.* at *38.

[1897] *Id.*

[1898] 13 F. Supp.2d 130 (D. Mass. 1998).

[1899] *Id.* at 139.

[1900] *Id.* (citations omitted).

[1901] *Id.* (emphasis supplied).

[1902] 42 U.S.C. § 12111(8) (2018).

[1903] *Id.*

[1904] *Id. See also*, Jarvela v. Crete Carrier Corp., 776 F.3d 822, 829 (11th Cir. 2015).

[1905] Smart v. Dekalb City., 2018 U.S. Dist. LEXIS 30117, at *28 (N.D. Ga. Feb. 26, 2018) (citation omitted).

[1906] *Id.* at *30 (citation omitted).

[1907] 42 U.S.C. §§ 12112(b)(1)-(7) (2018).

impose an undue hardship on the operation of the business of such covered entity.…"[1908]

A covered entity discriminates against a qualified individual with a disability whenever the covered entity denies "employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant…."[1909] It has been held that

> [a] disabled person is not qualified for an employment position … "if he or she poses a 'direct threat' to the health or safety of others which cannot be eliminated by a reasonable accommodation." … A "direct threat" is "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation."[1910]

The Fifth Circuit stated in *Cooper v. UPS*[1911] that an employee claiming that the employer failed to make a reasonable accommodation must show that he was "'an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position'"[1912] that he held or was seeking. "'The ADA does not require an employer to relieve an employee of any essential function of his or her job, modify those duties, reassign existing employees to perform those jobs, or hire new employees to do so.'"[1913] Because Cooper could not perform the essential functions of his job, he was "not a 'qualified individual with a disability.'"[1914] For an accommodation to be reasonable, a position must exist and be vacant; that is, an "'employer is not required to give what it does not have.'"[1915] Cooper did not present evidence that a position in plant engineering that he wanted was vacant or that he was qualified for such a position.[1916]

In a Title I case, a plaintiff bears the burden of showing that he is otherwise qualified to perform the essential functions of his job with or without a reasonable accommodation.[1917] A federal district court in Pennsylvania has explained that it is a two-step process to determine whether an individual with a disability is qualified under Title I of the ADA or the Rehabilitation Act.

> First, to be considered "otherwise qualified," the plaintiff must satisfy the prerequisites for the position, such as possessing the appropriate educational background, employment experience, skills, licenses and other job-related requirements. … Second, if the plaintiff is able to make that showing, he or she must then establish that, with or without reasonable accommodation, he or she can perform the essential functions of the position held or sought. … "The determination of whether an individual with a disability is qualified is made at the time of the employment decision."[1918]

Each of the *prima facie* elements is essential to an ADA or Rehabilitation Act claim. If a plaintiff is unable to satisfy the "qualified individual" prong, a court does not have to address the remaining elements.

d. A Disability that Substantially Limits a Major Life Activity

Under § 12102(1) of the ADA, the term disability means, *inter alia*, "a physical or mental impairment that substantially limits one or more major life activities"[1919] of an individual. First, the term substantially limits must "be interpreted consistently with the findings and purposes" of the ADAAA.[1920] Second, "major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working."[1921] Third, an impairment that substantially limits one major life activity need not limit other major life activities for the impairment to qualify as a disability.[1922]

In *Smart v. Dekalb Cty*.,[1923] supra, the plaintiff was a construction supervisor for DeKalb County Roads and Drainage in Georgia. Smart was required to maintain a Class A Commercial Driver's License (CDL) to perform at least some of his duties and submit to a physical examination approximately once every one to two years for purposes of assessing whether he could maintain his CDL.[1924] After a CDL physical in March 2015, the Medical Offices of Caduceus USA (Caduceus), the defendant's third party occupational health medical provider, issued a report stating with regard to the plaintiff's "work status" that the plaintiff was "disqualified/off work" due to glaucoma/hypertension, resulting in Smart being "refrained" from duty.[1925] Afterwards, Smart obtained a medical examiner's certificate from a private physician that stated that Smart "passed the CDL physical requirements,"[1926] a certificate that the defendant rejected because Caduceus USA did not issue it.

Smart's motion for summary judgment argued that he was he was actually disabled and was "regarded as" disabled by the defendant; that he was a qualified employee, with or without a reasonable accommodation, who could perform all of his

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[1908] 42 U.S.C. § 12112(b)(5)(A) (2018).

[1909] 42 U.S.C. § 12112(b)(5)(B) (2018).

[1910] Brockmeier v. Greater Dayton Reg'l Transit Authority, No. 3:12-cv-327, 2016 U.S. Dist. LEXIS 90439, at *25 (S.D. Ohio July 12, 2016) (citations omitted) (holding that Brockmeier did not meet the DOT's medical certification guidelines for operating a commercial vehicle required by the collective bargaining agreement between GDRTA and the Union and that GDRTA's accommodation for Brockmeier, a job-protected leave of absence, was reasonable).

[1911] 368 Fed. Appx. 469 (5th Cir. 2010).

[1912] *Id.* at 476 (citation omitted).

[1913] *Id.* (citation omitted).

[1914] *Id.* (citation omitted).

[1915] *Id.* at 477 (citation omitted).

[1916] *Id.*

[1917] Coleman v. Pa. State Police, No. 11-1457, 2013 U.S. Dist. LEXIS 99609, at *34 (W. D. Pa. July 17, 2013), *aff'd*, Coleman v. Pa. State Police, 561 Fed. Appx. 138 (3rd Cir. 2014).

[1918] *Id.* at *34-35 (citations omitted).

[1919] 42 U.S.C. § 12102(1)(A) (2018).

[1920] 42 U.S.C. § 12102(4)(B) (2018).

[1921] 42 U.S.C. § 12102(2)(A) (2018).

[1922] 42 U.S.C. § 12102(4)(C) (2018).

[1923] No. 1:16-cv-826-WSD, 2018 U.S. Dist. LEXIS 30117 (N.D. Ga. Feb. 26, 2018).

[1924] *Id.* at *2.

[1925] *Id.* at *3.

[1926] *Id.* at *6.

essential job functions; and that, because of his disability, he was subjected to unlawful discrimination.[1927]

To state a claim, Smart had to "first show that he suffers from a 'disability' as defined under the ADA. The ADA defines 'disability' as: '(A) a physical or mental impairment that substantially limits one or more major life activities ...; (B) a record of such an impairment; or (C) being regarded as having such an impairment…'"[1928] The court noted that the term "substantially limits" has to "'be construed broadly in favor of expansive coverage[] to the maximum extent permitted by the terms of the ADA.'" [1929] The court ruled that, although the plaintiff "suffered impairment due to his glaucoma, his impairment did not substantially limit a major life activity."[1930] His "testimony demonstrate[d] that his limitations were less than severe and of a relatively short duration," and he had "testified that he was able to participate in everyday activities, and any issues were eased when wearing glasses."[1931]

As for whether his hypertension constituted an actual disability, the court ruled that the plaintiff was "unable to show that his hypertension 'substantially limit[ed]' a major bodily function or major life activity"[1932] and that it was evident also that the plaintiff was "not 'substantially limited' because of it" as there was "no evidence that Plaintiff is unable to accomplish a major life activity due to his hypertension."[1933]

The issue, however, was whether the defendant placed the plaintiff "on leave 'because of' his glaucoma/hypertension."[1934] There was evidence that the defendant had some knowledge of Smart's glaucoma and hypertension.[1935] The court stated that the record established

> that Defendant took a prohibited action against Plaintiff when it placed him on refrain from duty status in March 2015 because he failed his CDL physical examination and was deemed by Caduceus as "Disqualified/Off Work" due to "glaucoma/hypertension." … This action was not unlike placing Plaintiff on involuntary leave for failure to meet a qualification standard. … The evidence also shows that Defendant did not allow Plaintiff to return to work when he presented documents prepared by an independent examining physician showing that Plaintiff met the requirements for a CDL….[1936]

The court found that there were genuine issues of material fact on whether the defendant could be held responsible for the actual findings of Caduceus, whether the defendant knew of the plaintiff's medical condition, and whether there was evidence that the defendant reviewed the plaintiff's medical records and regarded the plaintiff as disabled.[1937]

As for whether Smart was a qualified individual, the court decided that there was a genuine issue of material fact regarding "whether possessing a valid CDL was an essential function for construction supervisors and whether construction supervisors needed to be able to personally drive commercial vehicles on the job during an emergency situation."[1938] Although the application inquired about a valid CDL, the application did not specify whether it was essential to the plaintiff's job.[1939]

As for whether the plaintiff made a *prima facie* case under the ADA by showing that he was discriminated against because of his disability,[1940] the court stated that "'[u]nder the ADA, there are two distinct categories of disability discrimination: (1) disparate treatment and (2) failure to accommodate.'"[1941] However, because the plaintiff proffered sufficient facts only to show that the defendant may have regarded him as disabled, the court did not address whether the defendant failed to make a reasonable accommodation for Smart.[1942] There was a genuine issue of material fact regarding whether the defendant subjected the plaintiff to disparate treatment.[1943]

e. Being Regarded as Having a Disability

Section 12102(1)(C) of the ADA, as amended, defines a disability to include "being regarded as having such an impairment,"[1944] but an individual meets the "being regarded as" criterion when "the individual establishes that he or she has been subjected to an action prohibited under [the ADA] because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity."[1945]

In *Miller v. IDOT*,[1946] the court stated that, since the ADAAA, a person is able to satisfy the "regarded as" definition of disability when the person has "'has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.'"[1947] In *Miller*, the court applied the ADA prior to the ADAAA, because the claims arose before the amendment became effective, and determined that based on the evidence a reasonable jury could find that IDOT regarded the plaintiff as disabled because of his acrophobia.[1948]

[1927] *Id.* at *8.

[1928] *Id.* at *16-7 (citation omitted).

[1929] *Id.* at *18 (citation omitted).

[1930] *Id.* at *22.

[1931] *Id.*

[1932] *Id.* at *24 (citation omitted).

[1933] *Id.*

[1934] *Id.* at *26 (citation omitted).

[1935] *Id.* at *27.

[1936] *Id.* at *26 (citations omitted).

[1937] *Id.*

[1938] *Id.* at *30-31.

[1939] *Id.* at *31.

[1940] *Id.* at *33 (citations omitted).

[1941] *Id.* (citation omitted).

[1942] *Id.* at *34 (footnote omitted).

[1943] *Id.* (footnote omitted).

[1944] 42 U.S.C. § 12102(1)(C) (2018).

[1945] 42 U.S.C. § 12102(3)(A) (2018).

[1946] 643 F.3d 190 (7th Cir. 2011).

[1947] *Id.* at 195, n.1 (citation omitted).

[1948] *Id.* at 197. *See also*, Adeleke v. Dallas Area Rapid Transit, 487 Fed. Appx. 901, 903 (5th Cir. 2012), *cert. denied*, Adeleke v. DART, 571 U.S. 856, 134 S. Ct. 137, 187 L. Ed. 2d 97 (2013). (holding that Adeleke failed to present "competent … evidence that DART knew that he was limited by mental illness or regarded him as impaired").

In *Richardson v. Chicago Transit Auth.*,[1949] a federal district court in Illinois stated that for a plaintiff to succeed on a regarded as claim, a

> Plaintiff must establish that he was discriminated against "because of an actual or perceived physical or mental impairment." … Because the sole basis of Plaintiff's claim is that the CTA refused to let him return to work because of his obesity, Plaintiff must show that his obesity constitutes an actual physical impairment under the ADA or that the CTA perceived Plaintiff to have a qualifying physical impairment.[1950]

In dismissing the claim, the court found that "no federal appellate court has held that extreme obesity constitutes a disability under the ADA absent some underlying physiological basis."[1951]

f. Reasonable Accommodations for Employees with Disabilities

Under the ADA, an employer may have to make a reasonable accommodation for an individual with a disability. The ADA states that the term reasonable accommodation includes "making existing facilities used by employees readily accessible to and usable by individuals with disabilities…."[1952]

Under the ADA,

> "[r]easonable accommodations are '[m]odifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable [a qualified] individual with a disability … to perform the essential functions of that position[.]" … An accommodation's reasonableness does not "depend solely on effectiveness or timeliness; in some circumstances, an accommodation can be reasonable even if it does not work as well as expected or if it takes a while to take effect." … Such an accommodation cannot be intangible[] and must consist of some specific duty that the employer will assume.[1953]

A reasonable accommodation may include

> job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.[1954]

In some instances, providing an accommodation may create an undue hardship. In general, there is an undue hardship when an action requires significant difficulty or expense when considered together with other factors identified in the statute.[1955] The EEOC has published enforcement guidance on reasonable accommodations and undue hardship under Title I of the ADA.[1956]

In *Motoyama v. DOT*,[1957] the pro se plaintiff, hired as an equal opportunity specialist for the Office of Civil Rights (OCR), was injured in a motor vehicle accident shortly after being hired. The plaintiff alleged employment discrimination by the Hawaii DOT (HDOT) and by Okimoto in his official capacity as the current Director of HDOT. The plaintiff's claims included unlawful retaliation under Title VII of the Civil Rights Act, disability discrimination under the ADA, and violation of the Equal Protection Clause of the United States Constitution. The plaintiff sought, *inter alia*, special, general, and consequential damages, back and front pay, lost employment benefits, and reinstatement to her position.[1958]

The plaintiff alleged, *inter alia*, that while she was on medical leave, she contacted the ADA Specialist in HDOT's OCR to inquire about reasonable accommodations under the ADA. Specifically, the plaintiff asked about having access to an accessible restroom and a parking space in close proximity to her office.[1959] After an investigation into the plaintiff's complaints against her co-workers found that the complaints were not credible, ultimately the DOT terminated Motoyama for misconduct because of making false complaints.[1960]

On her Title I claim under the ADA, the court held that, because "[t]he Eleventh Amendment prohibits suits against state agencies such as the HDOT 'regardless of the nature of the relief sought,'"[1961] the plaintiff could not sue an arm of the state in federal court for monetary or injunctive relief under Title I.[1962]

As for her Title II claims, the court held that Congress validly abrogated the states' Eleventh Amendment sovereign immunity to claims against states alleging violations of Title II, but that the

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[1949] 292 F. Supp.3d 810 (N.D. Ill. 2017).

[1950] *Id.* at 815 (citations omitted).

[1951] *Id.* at 816.

[1952] 42 U.S.C. § 12111(9)(A) (2018).

[1953] Hartigan v. Ill. Dep't of Transportation, No. 12 CV 5966, 2015 U.S. Dist. LEXIS 54503, at *28-29 (N.D. Ill. April 22, 2015) (citations omitted).

[1954] 42 U.S.C. § 12111(9)(B) (2018).

[1955] 42 U.S.C. § 12111(10)(A) (2018). The factors to consider when determining whether there is undue hardship are:

> (i) the nature and cost of the accommodation needed under this Act;
>
> (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
>
> (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
>
> (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

42 U.S.C. §§ 12111(10)(B)(i)-(iv) (2018).

[1956] EEOC, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act* (2002), [hereinafter Enforcement Guidance], https://www.eeoc.gov/policy/docs/accommodation.html (last accessed Jan. 7, 2019).

[1957] 864 F. Supp.2d 965 (D. Haw. 2012), *affirmed by, request denied by,* Motoyama v. DOT, 584 Fed. Appx. 399 (9th Cir. 2014), *cert. denied,* Motoyama v. Haw. DOT, 135 S. Ct. 2840, 192 L. Ed.2d 876 (2015).

[1958] *Id.* at 969.

[1959] *Id.* at 970.

[1960] *Id.* at 974.

[1961] *Id.* at 984 (footnote omitted) (citation omitted).

[1962] *Id.* at 985-6 (citations omitted).

plaintiff's Title II claims failed because Title II does not apply to employment.[1963]

The Eleventh Amendment also barred any claim against Okimoto, because the plaintiff did not allege "an ongoing present violation of federal law" for which there was any "appropriate prospective relief."[1964] If anything, the record did not "establish an inference" that the plaintiff's request for reasonable accommodations was "causally connected" to her termination.[1965] If anything, the record revealed that the defendants made a good faith effort to accommodate the plaintiff's request for parking and that they granted the plaintiff's request for flex-time.[1966]

In *Ilarraza-Rodriguez v. Puerto Rico*,[1967] the plaintiff alleged that the defendants violated his right to a reasonable accommodation under the ADA and the Rehabilitation Act and sought monetary and injunctive relief under 42 U.S.C. § 1983. The complaint alleged that on July 1, 2004, the plaintiff became a maritime transportation supervisor with the Puerto Rico Maritime Transport Authority (MTA). On March 25, 2014, the plaintiff's psychiatrist issued a reasonable accommodation request on behalf of the plaintiff, addressed to MTA's Human Resources Director, that sought his relocation to a service zone where he did not have to travel long distances.[1968] On July 18, 2014, a psychologist completed an MTA form in which the psychologist stated that the plaintiff suffered from an unspecified mood disorder and that his health condition commenced on February 17, 2014.[1969] On September 3, 2014, another psychologist who evaluated the plaintiff "diagnosed him with moderate major depression" and made recommendations for a reasonable accommodation.[1970] In November 2014, the plaintiff submitted a urine sample as part of a random drug test and tested positive to cocaine metabolites and benzoylecgonine that led to the plaintiff's termination in February 2015.

First, the court held that the Eleventh Amendment barred the plaintiff's claim for monetary relief under Title 1 as well as Title V of the ADA.[1971]

Second, the court held that the "plaintiff's claims for injunctive relief under the ADA and his claims for injunctive and monetary relief under the Rehabilitation Act … fail on the merits."[1972] "To state a claim under the ADA (and, ergo, under the Rehabilitation Act), plaintiff must plausibly plead that he: (1) was disabled; (2) was able perform the essential functions of his job, with or without an accommodation; and (3) was discharged because of his disability."[1973]

The court ruled that the evidence showed that the plaintiff's termination was caused by his positive drug test. There was no evidence that the defendant terminated the plaintiff's employment in retaliation for the plaintiff's filing of a discrimination charge on December 17, 2014.[1974]

g. Use of Medical Inquiries and Examinations

The ADA addresses when it is permissible for a covered entity to inquire of a job applicant about his or her disability or the nature or severity of it or to use a medical examination as a condition to employment.[1975] Pre-employment medical inquiries are allowed if they are relevant to an applicant's ability to perform job-related functions.[1976] An employer may require a medical examination of an applicant after an offer of employment and prior to the commencement of employment and may condition an employment offer on the results of an examination.[1977] However, all entering employees must be subject to the same examination regardless of disability, and the record must be kept confidential.[1978] It should be noted that the EEOC has published guidance on the ADA and disability-related inquiries and any requirement of medical examinations.[1979]

In *Downs v. Massachusetts Bay Transp. Auth.*,[1980] the plaintiff brought a Title I action against his former employer, the Massachusetts Bay Transportation Authority (MBTA), for wrongful termination because the MBTA terminated his employment after it learned Downs had given two false responses to questions during a pre-employment medical examination.[1981] Downs argued that the ADA and the Rehabilitation Act "prohibit employers from asking questions of the type he answered falsely[] and that the MBTA violated confidentiality requirements imposed by these statutes in making his responses to these questions available to its workers' compensation claims representative and to disciplinary authorities."[1982]

In brief, prior to a physical examination, Downs completed a medical history form that asked whether he had "'ever received workers' compensation' or 'ever had joint pains,'" both of which Downs answered negatively, "despite the fact that he had received workers' compensation on several prior occasions, twice for injuries to his elbow."[1983] Later, after Downs

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[1963] *Id.* at 986.

[1964] *Id.* (citation omitted).

[1965] *Id.* at 989.

[1966] *Id.* at 991. The plaintiff failed to show any causal link between the EEOC charges and her termination, and the record revealed that the defendants "proffered a legitimate nondiscriminatory reason for these adverse actions," *i.e.*, the plaintiff's misconduct involving the knowing filing of false complaints against her co-workers. *Id.* at 992.

[1967] No. 15-3167CCC, 2017 U.S. Dist. LEXIS 39046 (D. P.R. March 17, 2017)

[1968] *Id.* at *3.

[1969] *Id.* at *4.

[1970] *Id.* at *6.

[1971] *Id.* at *13.

[1972] *Id.* at *14.

[1973] *Id.* (citation omitted).

[1974] *Id.* at *16-7.

[1975] 42 U.S.C. §§ 12112(d)(1) and (d)(2)(A) (2018).

[1976] 42 U.S.C. § 12112(d)(2)(B) (2018).

[1977] 42 U.S.C. § 12112(d)(3) (2018).

[1978] 42 U.S.C. §§ 12112(d)(3)(A) and (B) (2018) (providing for some exceptions in subsection (B)(i)-(iii) when a disclosure is allowable of some of an applicant's medical condition or history).

[1979] Enforcement Guidance, *supra* note 1956.

[1980] 13 F. Supp.2d 130 (D. Mass. 1998).

[1981] *Id.* at 132.

[1982] *Id.*

[1983] *Id.*

underwent surgery on his right elbow, and, thereafter, made a workers' compensation claim, an MBTA representative discovered Downs's prior elbow injury and workers' compensation claims.[1984] After the MBTA dismissed Downs and after Downs sought unemployment benefits, there was a finding that Downs was discharged "'for a knowing violation of a reasonable and uniformly enforced rule;'" however, the Board of Review held that Downs's false answers did not preclude him from receiving workers' compensation benefits.[1985]

Downs argued "that the MBTA is covered both by Title II of the ADA, as it is a 'public entity,' which is defined to include 'any department, agency, special purpose district, or other instrumentality of a state or States or local government,' … and by the Rehabilitation Act, as it is a 'program or activity receiving Federal financial assistance….'"[1986] When Downs moved for summary judgment, the MBTA argued that the medical inquiries at issue occurred before the effective date of Title I and that Title II did not apply to employment discrimination. The MBTA's contention was that Title II "applies only to the services and programs offered by public entities[] and does not encompass the employment practices of such entities. Those practices, the MBTA maintains, can be addressed only under Title I, which is directly concerned with employment discrimination."[1987]

The court stated that

> [t]he vast majority of courts which have considered this question have concluded that the scope which the MBTA would accord Title II is too limited. In *Bledsoe v. Palm Beach County Soil & Water Conservation Dist*., 133 F.3d 816 (11th Cir. 1998), the court held that "Title II of the ADA does encompass employment discrimination." … Other courts have applied Title II to employment discrimination claims without question.[1988]

The court further stated:

> Title II provides that "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." … The MBTA focuses exclusively on the access to the "services, programs or activities" of public entities guaranteed by the first prong of this section[] and disregards the general prohibition on discrimination provided by the second prong.[1989]

The court held that, because "Title II does not impose the same procedural requirements as does Title I[,] … plaintiffs need not exhaust their administrative remedies before filing suit under Title II. Accordingly, Downs's failure to file a timely charge with the EEOC [was] no barrier to this suit."[1990]

Relying on the EEOC's ADA Enforcement Guidance,[1991] the court found that the MBTA asked Downs questions that were not permissible. The Enforcement Guidance provides that "[a]n employer may not ask disability-related questions prior to making a conditional job offer[] and defines a 'disability-related question' as one 'that is likely to elicit information about a disability.'"[1992] Quoting the Enforcement Guidance, the court stated that "'an employer may not use an application form that lists a number of potentially disabling impairments and ask the applicant to check any of the impairments he or she may have.'"[1993] The court ruled that the MBTA's questions were "impermissible … disability-related inquiries."[1994]

Although the MBTA could have asked its questions after it "had made Downs a true conditional offer of employment,"[1995] an employer may not ask impermissible questions and "base adverse employment decisions on the resulting answers…."[1996] The court stated that "[t]he distinction between what may be asked in the pre- and post-offer stages is designed to facilitate discovery of discrimination."[1997]

In *Downs,* the court also found that "[t]he ADA and the Rehabilitation Act require that 'information obtained regarding the medical condition or history of [an] applicant [be] collected and maintained on separate forms and in separate medical files and [be] treated as a confidential medical record'"[1998] and that "the MBTA's release of Downs's medical file violated his right to confidentiality under these statutes."[1999]

h. Illegal Use of Drugs and the Use of Alcohol at the Workplace

Under the ADA, a covered entity "may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees" and "may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace…."[2000] The use of a test to determine the illegal use of drugs does not constitute a medical examination.[2001]

A covered entity may take an employment action against an otherwise qualified individual when the person is "currently engaging in the illegal use of drugs…."[2002] However, the ADA

[1984] *Id.* at 133.

[1985] *Id.*

[1986] *Id.* (citations omitted).

[1987] *Id.* at 134-5.

[1988] *Id.* at 135 (citations omitted).

[1989] *Id.* (citation omitted).

[1990] *Id.* at 136.

[1991] EEOC, Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations (EEOC Notice 915.002 October 10, 1995).

[1992] *Downs*, 13 F. Supp.2d at 138 (citation omitted).

[1993] *Id.* (citation omitted).

[1994] *Id.*

[1995] *Id.* at 141.

[1996] *Id.* at 140.

[1997] *Id.* at 141 (citation omitted).

[1998] *Id.* at 141 (citations omitted).

[1999] *Id.* at 142.

[2000] 42 U.S.C. §§ 12114(c)(1) and (2) (2018). *See also*, 42 U.S.C. §§ 12114(c)(3)-(5) (setting forth other actions that are permitted under the ADA to combat illegal drug use or the use of alcohol in the workplace).

[2001] 42 U.S.C. § 12114(d)(1) (2018).

[2002] 42 U.S.C. § 12114(a) (2018).

precludes an employment action against an individual who "has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use" or when an individual "is participating in a supervised rehabilitation program and is no longer engaging in such use…."[2003]

i. Use of Qualifying Standards, Tests, or Selective Criteria

A covered entity may show that its use of "qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability [are] job-related and consistent with business necessity"[2004] and that job performance cannot be accomplished by a reasonable accommodation. One qualification standard that an agency may require is that an individual may not pose "a direct threat to the health or safety of other individuals in the workplace."[2005]

In *Leskovisek v. Ill. DOT*,[2006] the plaintiffs, two individuals with autism, one being unable to use speech to communicate, and the other with an impaired ability to communicate, were participants in the defendant's Students with Disabilities Program. The plaintiffs alleged that "Illinois created a structured application and interview process for applicants for most State positions"[2007] and that the defendant Central Management Services (CMS), a state agency, administered the process. Because of "the nature of their disabilities, [the plaintiffs] could not pass the test or participate in an interview without a reasonable accommodation, despite having already demonstrated their ability to perform the job."[2008] Although IDOT's chief counsel had indicated that IDOT did not object to a waiver of testing and interviewing requirements, IDOT's position was that CMS had to grant the requested accommodation.

First, the court ruled that the plaintiffs did not lack standing because they had not applied for vacant positions. Under the "futility doctrine" that applies to ADA cases, plaintiffs have standing when they allege "that they suffered an injury because they were unable to access the State's testing and interview process, lost their ability to compete for a full-time position, lost wages, and suffered emotional distress."[2009] A person has standing whenever the person is able to "demonstrate that applying for or requesting [a] benefit would have been futile."[2010] The court found that the plaintiffs "sufficiently alleged that it would have been futile to apply for a vacant position" when, because of their "lack of a reasonable accommodation, they could not complete the threshold testing and interview requirements"[2011] but "still want[ed] to be considered for employment…."[2012] Inasmuch as the plaintiffs "alleged a real and immediate threat of future violations to their rights,"[2013] they had standing to seek injunctive relief.

Second, the court ruled that the plaintiffs "requested a reasonable accommodation to the State's pre-employment testing and interviewing requirements."[2014] The defendants "failed to engage in the interactive process with Plaintiffs because Defendants never discussed alternatives to the State's testing and interviewing requirements and never responded with an answer to Plaintiffs' requests for an accommodation to those requirements."[2015] The defendant's actions "prevented the identification of an appropriate accommodation."[2016] Moreover, although CMS administered the state's hiring process, "[a]n entity cannot do through a contractual relationship that which it cannot do directly."[2017] Lastly, "an employer cannot 'reject an employee's requests for an accommodation without explaining why the requests have been rejected or offering alternatives.'"[2018] The court did not dismiss the plaintiffs' claim for a failure to hire, because the plaintiffs "plausibly alleged that it would have been futile to apply for a position due to Defendants' discriminatory practices."[2019]

Third, the court did not dismiss the plaintiffs' claim that the "[d]efendants violated the ADA by using qualification standards that screen out persons with disabilities,"[2020] which IDOT characterized as a disparate impact claim.[2021] The plaintiffs alleged sufficient facts to permit them to obtain evidence through discovery to show that the defendants' "testing process caused a relevant and statistically significant disparity between disabled and non-disabled applicants."[2022]

Fourth, the court did not dismiss the plaintiffs' claim that IDOT participated in a discriminatory administrative arrangement, because "IDOT controlled the Office Assistant/Associate position openings and functions but could not hire applicants without those applicants undergoing the CMS-controlled hiring process, which screened out Plaintiffs because of their disabilities…."[2023]

[2003] 42 U.S.C. §§ 12114(b)(1) and (2) (2018). *See* Jarvela v. Crete Carrier Corp., 776 F.3d 822, 830 (11th Cir. 2015) (stating that under 49 C.F.R. § 391.41(b) Jarvela "could not reasonably contend that a seven-day-old diagnosis of alcoholism was not 'current' at the time of his termination").

[2004] 42 U.S.C. § 12113(a) (2018).

[2005] 42 U.S.C. § 12113(b) (2018).

[2006] 305 F. Supp.3d 925 (C.D. Ill. 2018).

[2007] *Id.* at 930.

[2008] *Id.*

[2009] *Id.* at 932 (citation omitted).

[2010] *Id.* (citation omitted).

[2011] *Id.* at 933 (citation omitted).

[2012] *Id.*

[2013] *Id.*

[2014] *Id.* at 934.

[2015] *Id.*

[2016] *Id.* (citation omitted).

[2017] *Id.* at 935 (citation omitted).

[2018] *Id.* (citation omitted).

[2019] *Id.*

[2020] *Id.*

[2021] *Id.* at 936.

[2022] *Id.*

[2023] *Id.* at 937.

Fifth, the plaintiffs alleged that IDOT retaliated against them "by attempting to place them in an isolated workspace, terminating the Students with Disabilities program, and failing to hire or otherwise allow Plaintiffs to continue to work in another employment capacity."[2024] The court dismissed the plaintiff's retaliation claim against CMS with leave to replead but did not dismiss the plaintiff's retaliation claim against IDOT.

Finally, the court did not dismiss the plaintiffs' request for injunctive relief that is an available remedy under the ADA.[2025]

j. Disparate Treatment and Disparate Impact Claims Under the ADA

There are two basic types of 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."[2026] 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."[2027] Proof of a discriminatory motive is not required for a disparate impact claim.[2028]

The Seventh Circuit held in *Ernst v. City of Chicago*[2029] that the plaintiffs should have prevailed on their disparate impact claims, because the city "failed to establish that its physical-skills entrance test reflects 'important elements of job performance,'" and, thus, the test had a disparate impact on females applying to be paramedics.[2030]

k. Failure to Accommodate Applicants or Employees with Disabilities

In *Leskovisek v. Ill. DOT*,[2031] supra, the court stated that "a plaintiff can bring a claim of discrimination alleging disparate treatment, disparate impact, or a failure to accommodate."[2032] In *Hartigan v. Ill. Dep't of Transportation*,[2033] supra, the plaintiff alleged that the defendant failed to accommodate his disability and retaliated against the plaintiff by creating a hostile work environment in response to the plaintiff's inquiries regarding his disability. The *Hartigan* court stated that at the stage of a defendant's motion for a summary judgment on the plaintiff's failure to accommodate claim, a "Plaintiff must show sufficient facts to enable a reasonable jury to find that (1) Plaintiff was a qualified individual with a disability, (2) Defendant was aware of his disability, and (3) Defendant failed to accommodate Plaintiff's disability."[2034]

Under the ADA, an individual is disabled if, *inter alia*, the individual has "a physical or mental impairment that substantially limits one or more major life activities of such individual."[2035] However, the determination of a disability has to made on an individualized, case-by-case basis.[2036] The court in *Hartigan* ruled that the plaintiff did not present evidence of having experienced a disorder affecting his ability to breathe until the plaintiff was diagnosed later with COPD. Because IDOT took all reasonable steps to provide the plaintiff with clean, or recently cleaned, vehicles, and partnered him with non-smoking coworkers, the court granted the defendant a summary judgment on the plaintiff's failure to accommodate claim.

l. Whether States and State Agencies Have Immunity to Title I Claims

The ADA in Title V purports to preclude state immunity for violations of the ADA and prohibits retaliation.[2037] As discussed in this part, although Title 1 of the ADA authorizes claims for monetary damages, the courts have held that private individuals may not recover money damages from a state or state agency in a federal or state court under Title I of the ADA.[2038]

The analysis of the immunity issue begins with the Supreme Court's decision in *Board of Trustees of the University of Alabama v. Garrett.*[2039] 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."[2040] In *Garrett*, the Supreme 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 § 5 of the Fourteenth Amendment "is appropriately exercised only in response to state transgressions."[2041] The legislative record, however, "fail[ed] to show that Congress did in fact identify a pattern of irrational state discrimination in employment against

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[2024] *Id.* at 938 (citation omitted).

[2025] *Id.*

[2026] Casey's General Stores, Inc. 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)).

[2027] *Id.*

[2028] *Id.*

[2029] 837 F.3d 788 (7th Cir. 2016).

[2030] *Id.* at 805 (citation omitted) (some internal quotation marks omitted).

[2031] 305 F. Supp.3d 925 (C.D. Ill. 2018).

[2032] *Id.* at 933 (citations omitted).

[2033] No. 12 CV 5955, 2015 U.S. Dist. LEXIS 54503 (N.D. Ill. April 22, 2015).

[2034] *Id.* at *21 (citation omitted)

[2035] *Id.* (citation omitted) (some quotation marks omitted).

[2036] *Id.* at *22.

[2037] 42 U.S.C. §§ 12202 and12203 (2018).

[2038] White v. Wash. Metro. Area Transit Auth., 303 F. Supp.3d 5, 10 (D. D.C. 2018) (holding that WMATA was immune from suit under the Eleventh Amendment in claims for damages under Title I of the ADA). *See also*, Demshki v Monteith, 255 F.3d 986 (9th Cir. 2001) (holding that states enjoy Eleventh Amendment immunity from suits brought in federal court by private individuals seeking money damages when claims are predicated on alleged violations of Title I of the ADA).

[2039] 531 U.S. 356, 121 S. Ct. 955, 148 L. Ed.2d 866 (2001).

[2040] 42 U.S.C. § 12112(a) (2018).

[2041] *Garrett*, 531 U.S. at 368, 121 S. Ct. at 965, 148 L. Ed.2d at 880.

the disabled."[2042] Furthermore, the Court held that the remedy imposed by Congress was not "congruent and proportional to the targeted violation."[2043]

In 2012, in *Pham v. Cal. DOT*,[2044] which included a Title I ADA claim, the court held that sovereign immunity under the Eleventh Amendment extends to state agencies and departments, such as Caltrans. Pham's complaint failed to state a plausible claim for relief to the extent that it asserted a disability discrimination claim for money damages against Caltrans under 42 U.S.C. § 12112(a).[2045]

In *Howard v. Conn. DOT*,[2046] the plaintiff sued the Connecticut DOT for alleged racial discrimination in violation of the Civil Rights Act of 1964 and for disability discrimination in violation of the ADA.[2047] The plaintiff was responsible for the maintenance, construction, and repair of roads.[2048] The court held that the Eleventh Amendment barred the plaintiff's action that sought back pay and injunctive relief.[2049] Although the Supreme Court's decision in *Ex parte Young*[2050] "permits suits for prospective injunctive relief against state officers in their official capacities to remedy ongoing violations of federal law," the case did not apply because Howard's complaint did not name a state official as a defendant.[2051]

In *McCray v. Md. DOT*,[2052] the Fourth Circuit held that sovereign immunity barred McCray's age and disability discrimination claims because McCray could not seek injunctive or monetary relief from the MDOT or MTA.[2053]

In *Mattison v. Md. Transit Admin*.,[2054] the court held that the plaintiff could seek prospective injunctive relief. The plaintiff, Mattison who was employed by the Maryland Transit Administration (MTA), alleged "that his demotion and unequal compensation stem[med] from Defendants' discrimination and retaliation against him due to his disability,"[2055] diverticulitis, an inflammation of the digestive tract. The court observed that the Supreme Court has "concluded that while Congress certainly intended for the 'self-care' provision of the FMLA and Title I of the ADA to apply to the states, Congress did not validly abrogate state sovereign immunity in either case."[2056] The court ruled that "Eleventh Amendment immunity thus bars suits for money damages under the self-care provision of the FMLA and Title I of the ADA in federal court against the states, state agencies (and any sub-agencies therein), and state officials"[2057] but that "a plaintiff may seek injunctive relief under *Ex parte Young*…."[2058]

Finally, regarding Mattison's claim that the defendant Quraishi, the plaintiff's supervisor, engaged in a "consistent campaign of harassment and intimidation,"[2059] the court stated that only employers, not individuals, may be held liable for violations of the ADA, including for retaliation. Thus, "a supervisory employee is not liable for violations of the ADA, regardless of whether he is sued in his official or individual capacity."[2060]

In sum, individuals may not make Title I ADA claims for monetary damages against states, their agencies, or instrumentalities. There is authority that the Eleventh Amendment may not be asserted as a bar to an ADA claim made by the United States against a state for monetary damages or injunctive relief. In *United States v. Miss. Dep't of Pub. Safety,*[2061] the United States alleged that the defendant, a Mississippi state agency, violated the ADA by dismissing an individual because of his disability, Type II diabetes, from the training academy of the Mississippi Highway Safety Patrol.[2062] 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…."[2063]

The Fifth Circuit, reversing the district court's dismissal of the suit, held that the Eleventh Amendment did not bar the claim for monetary damages and other compensatory relief.[2064] Although the state of Mississippi argued that the United States was attempting to "circumvent the safeguards of the

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[2042] *Id.*

[2043] *Id.* at 374, 121 S. Ct. at 968, 148 L. Ed.2d at 884.

[2044] Nos. SACV 12-701 UA: SACV 12-709 UA, 2012 U.S. Dist. LEXIS 76039 (C.D. Calif. May 12, 2012).

[2045] *Id.* at *6 (citations omitted). Moreover, "[t]o the extent the complaint obliquely appears to allege Caltrans refused to hire Pham because of an unspecified disability, the complaint fails to state a cognizable claim under Title VII or § 1981 because neither of these statutes are directed at disabilities." *Id.* at *5.

[2046] No. 3:14-cv-947 (RNC), 2017 U.S. Dist. LEXIS 159716 (D. Conn. Sept. 28, 2017).

[2047] *Id.* at *1.

[2048] *Id.* at *2.

[2049] *Id.* at *5 (citing *Garrett*, 531 U.S. at 374, 121 S. Ct. 955, 148 L. Ed.2d 866 (2001)).

[2050] 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908).

[2051] *Howard*, 2017 U.S. Dist. LEXIS 159716, at *5.

[2052] 741 F.3d 480, (4th Cir. 2014) (citations omitted), *on remand at, dismissed by* McCray v. Md. DOT, No. ELH-11-3732, 2014 U.S. Dist. LEXIS 132362 (D. Md., Sept. 16, 2014), *affirmed*, McCray v. Md. DOT, 662 Fed. Appx. 221, 224 (4th Cir. 2016) (holding that McCray had exhausted her administrative remedies regarding her Title VII claim but that all of her claims were time-barred).

[2053] *Id.* at 480-83.

[2054] No. RDB-15-1627, 2016 U.S. Dist. LEXIS 65361, at *1 (D. Md. May 18, 2016).

[2055] *Id.* at *4.

[2056] *Id.* at *12 (citations omitted).

[2057] *Id.* at *12-13 (citations omitted).

[2058] *Id.* at 13 (citations omitted). *See also*, Nicholas v. La. Dep't of Transp. & Dev., No. 15-761-JJB-EWD, 2016 U.S. Dist. LEXIS 83700 (M.D. La. June 28, 2016) (holding that Louisiana had not waived its Eleventh Amendment immunity to ADEA or ADA claims by accepting federal funding) and Watson v. Ohio Department of Rehabilitation & Correction, 167 F. Supp.3d 912, 921 (S.D. Ohio. 2016) (dismissing plaintiff's claims under Title I of the ADA because sovereign immunity applies to "state agents and instrumentalities," as well as addition to the states).

[2059] *Mattison*, 2016 U.S. Dist. LEXIS 65361, at *5 (citation omitted).

[2060] *Id.* at *14 (citations omitted).

[2061] 321 F.3d 495 (5th Cir. 2003).

[2062] *Id.* at 497.

[2063] *Id.*

[2064] *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.

Eleventh Amendment [to] obtain personal relief for private individuals,"[2065] the Fifth Circuit noted that the Supreme Court stated in *Garrett,* supra, that the Court's ruling "had no impact on the ability of the United States to enforce the ADA in suits for money damages"[2066] and that the Eleventh Amendment did not bar the United States from suing to enforce federal law as authorized by the ADA.

m. Enforcement of Title I of the ADA

Title I of the ADA incorporates the powers, remedies, and procedures in 42 U.S.C. §§ 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of the Civil Rights Act of 1964 (CRA) for the enforcement of Title I ADA-employment claims by persons alleging discrimination on the basis of a disability.[2067] It has been held that the procedural requirements of Title I of the ADA and Title VII of the CRA must be construed identically.[2068]

Section 2000e-4 of the CRA created the EEOC. Section 2000e-5 empowers the Commission to prevent any person from engaging in any unlawful employment practice as set forth in 42 U.S.C. §§ 2000e-2 or 2000e-3. When a violation is alleged, § 2000e-5(e)(1) states, in part, that a "charge … shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred" with notice of the charge served as required by the section.[2069]

Section § 2000e-6(a) authorizes the Attorney General to bring a civil action whenever he or she "has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter [42 U.S.C. §§2000e-2000e-17]."

A provision that may be an issue in litigation is the 90-day rule in § 2000e-5(f)(1) within which a civil action must be brought,[2070] a rule that the courts have strictly enforced.[2071] The statute states that when

> the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General … shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.[2072]

In *Crawford v. Ga. DOT*,[2073] the plaintiff, a program technician, alleged that after she filed an In-House Grievance on January 14, 2013, for unfair treatment, unlawful discrimination, and for GDOT's managers' erroneous application of department policies and procedures, her "work environment shifted for the worse."[2074] Crawford alleged that her supervisors issued performance and disciplinary write-ups, conducted intimidating meetings and altered her work assignments.[2075]

On March 27, 2013, the plaintiff filed a charge of discrimination with the EEOC.[2076] After her termination, the plaintiff filed a second EEOC charge of discrimination. However, because the plaintiff failed to file suit within 90 days after her receipt of the EEOC's right to sue notice, a magistrate judge recommended dismissal of the ADA and Title VII claims.[2077]

5. Title II of the ADA and Discrimination by Public Entities

a. Scope of Title II

Although Title II governs public entities, Title II applies to almost all providers of transportation service, regardless of whether they are public or private, and regardless of whether

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[2065] *Id.*

[2066] Id. at 498. See EEOC v. Waffle House, 534 U.S. 279,122 S. Ct. 754, 151 L. Ed.2d 755 (2002)). *See also*, Bailey v. Wash. Metro. Area Transit Authority, 696 F. Supp.2d 68, 72 (D. D.C. 2010) (stating that "[n] either this Circuit nor the Supreme Court has expressly addressed whether state sovereign immunity prevents an individual plaintiff from obtaining injunctive relief under the ADEA or the ADA;" that the "Supreme Court has … specified that 'sovereign immunity applies regardless of whether a private plaintiff's suit is for monetary damages or some other type of relief;" and that "[c]onsistent with this precept, courts in other Circuits have held that individual plaintiffs may not obtain injunctive relief under the ADEA or the ADA from parties protected by sovereign immunity") (citations omitted).

[2067] 42 U.S.C. § 12117(a) (2018).

[2068] Shikles v. Sprint/United Mgmt. Co., 426 F.3d 1304 (10th Cir. 2005), *but see* Martin v. Mt. St. Mary's Univ. Online, 620 Fed. Appx. 661, 663 (10th Cir. 2015) and Gad v. Kan. State Univ., 787 F.3d 1032 (10th Cir. 2015) (questioning *Shikles* on other grounds).

[2069] A 300-day rule applies to claims by aggrieved persons that are instituted initially with a state or local agency.

[2070] For example, it has been held that a plaintiff who fails to pay the filing fee within 90 days of the receipt of a right-to-sue letter fails to file her complaint within the time allowed by 42 U.S.C. § 2000e-5(f)(1). Truitt v. County of Wayne, 148 F.3d 644 (6th Cir. 1998).

[2071] *See* Williams v Ga. Dep't of Def. Nat'l Guard Headquarters, 147 Fed. Appx. 134 (11th Cir. 2005), *cert. den.*, 546 U.S. 1176, 126 S. Ct. 1318, 164 L.Ed.2d 57 (2006) (holding that because an employee did not file a complaint within 90 days of receiving the EEOC's letter, as required by § 2000e-5(f)(1), and because the employee did not show any entitlement to equitable tolling of the period, the district court properly dismissed the employee's discrimination complaint).

[2072] 42 U.S.C. § 2000e-5(f)(1) (2018).

[2073] No. 1:16-CV-0310-WSD-JFK, 2017 U.S. Dist. LEXIS 60333, (N.D. Ga. Feb. 1, 2017), *adopted by, modified by, objection sustained by, motion granted by, dismissed by* Crawford v. Ga. DOT, No. 1:16-cv-3810-WSD, 2017 U.S. Dist. LEXIS 60010 (N.D. Ga., Apr. 19, 2017)).

[2074] *Id.* at *2 (citation omitted).

[2075] *Id.*

[2076] *Id.*

[2077] *Id.* at *14-6.

they receive federal financial assistance.[2078] Under Title II, the term public entities includes any state or local government; any department, agency, special purpose district, or other instrumentality of a state or states or local government; the National Railroad Passenger Corporation (Amtrak); and any commuter authority.[2079] Title II prohibits discrimination by public entities providing public services, including transportation services, against individuals with disabilities, including those who use wheelchairs.[2080]

b. Qualified Individual with a Disability Under Title II

Title II mandates that a qualified individual with a disability shall not, because of a 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."[2081] Under Title II, a qualified individual with a disability is one

> who, 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, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.[2082]

Section 12141 of the ADA defines other important terms used in Title II. Designated public transportation is "transportation … by bus, rail, or any other conveyance … that provides the general public with general or special service (including charter service) on a regular and continuing basis."[2083] A fixed route system is a designated public transportation system on which vehicles operate on a prescribed route according to a fixed schedule.[2084] A demand responsive system provides public transportation that is not a fixed route system.[2085] The term paratransit refers to "comparable transportation service required by the ADA for individuals with disabilities who are unable to use fixed route transportation systems."[2086]

c. Regulatory Jurisdiction of Title II

(1) Responsibility of the Department of Justice and Department of Transportation for Promulgation of Regulations

Under the ADA, the United States Attorney General and the Secretary of the Department of Transportation (U.S. DOT) are responsible for promulgating regulations to implement Title II. The Attorney General's regulations are in 28 C.F.R. parts 35 to 36, whereas the U.S. DOT's regulations are in 49 C.F.R. parts 27 and 37 to 39.[2087] In addition to other regulations pertinent to Title II, this part of the report discusses in particular the U.S. DOT's regulations in 49 C.F.R. parts 37 and 38 that establish minimum accessibility standards for transportation vehicles, such as rapid rail vehicles, light rail vehicles, buses, vans, commuter rail cars, intercity rail cars, and over-the-road buses, and transportation facilities. The U.S. DOT Standards apply to transportation facilities.

(2) Tile II, Part A, and Regulations Promulgated by the Attorney General

Part A of Title II of the ADA, which prohibits discrimination on the basis of disability in all services, programs, and activities provided to the public by state and local governments, except public transportation services,[2088] states that "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."[2089] Pursuant to the authority in 42 U.S.C. § 12134(a),[2090] the Attorney General issued regulations to implement part A of Title II of the ADA.[2091] The Attorney General's regulations are not to include any matter within the scope of the Secretary of Transportation's authority under 42 U.S.C. §§ 12143, 12149, or 12164.[2092] The Attorney General's regulations had to

> include standards applicable to facilities and vehicles covered by this subtitle, *other than facilities, stations, rail passenger cars, and vehicles covered by subtitle B*. Such standards shall be consistent with the minimum guidelines and requirements issued by the Architectural and Transportation Barriers Compliance Board in accordance with section 504(a) of this Act [42 U.S.C. § 12204(a)].[2093]

[2078] United States Department of Transportation, Federal Transit Administration, *Americans with Disabilities Act: Guidance*, FTA C 4710.1, Ch. 1.1, at 1-1 (Nov. 4, 2015), [hereinafter FTA Circular], https://www.transit.dot.gov/sites/fta.dot.gov/files/docs/Final_FTA_ADA_Circular_C_4710.1.pdf (last accessed Jan. 7, 2019).

[2079] 42 U.S.C. §§ 12131(1)(A)-(C) (2018).

[2080] Abrahams v. MTA Long Island Bus, 644 F.3d 110, 115 (2d Cir. 2011) (citing 42 U.S.C. § 12131, et seq.).

[2081] 42 U.S.C. § 12132 (2018).

[2082] 42 U.S.C. § 12131(2) (2018).

[2083] 42 U.S.C. § 12141(2) (2018). The section excludes public school transportation and transportation by aircraft or intercity or commuter rail transportation as defined in 42 U.S.C. § 12161 (2018).

[2084] 42 U.S.C. § 12143(3) (2018).

[2085] 42 U.S.C. § 12141(1) (2018). The term operates, when used regarding a fixed route system or demand responsive system, includes the operation of either system by a person having a contractual or "other arrangement or relationship with a public entity." 42 U.S.C. § 12142(4) (2018).

[2086] 49 C.F.R. § 37.3 (5) (2018).

[2087] Part 39 enforces the ADA's general nondiscrimination requirements that apply to vessels transporting individuals over water. 49 C.F.R. § 39.1 (2018).

[2088] *See* United States Department of Justice, Civil Rights Division, *Information and Technical Assistance on the Americans with Disabilities Act*, https://www.ada.gov/ada_title_II.htm (last accessed Jan. 7, 2019).

[2089] 42 U.S.C. § 12132 (2018).

[2090] 42 U.S.C. § 12134(a) (2018) (stating, in part, that "[n]ot later than 1 year after the date of enactment of this Act [enacted July 26, 1990], the Attorney General shall promulgate regulations in an accessible format that implement this subtitle).

[2091] 28 C.F.R. part 35, Nondiscrimination on the Basis of Disability in State and Local Government Services.

[2092] 42 U.S.C. § 12134(a) (2018).

[2093] 42 U.S.C. § 12134(c) (2018) (emphasis supplied).

The Ninth Circuit has held, for example, that pursuant to 42 U.S.C. § 12143 only the Secretary of Transportation may make rules determining the level of services required for paratransit.[2094] The court declined to interpret 28 C.F.R. § 35.102(b) so as to enlarge the Justice Department's jurisdiction beyond the limits established by 42 U.S.C. § 12134.

(3) Title II, Part B, and Regulations Promulgated by the Department of Transportation

Part B of Title II of the ADA governs public transportation services.[2095] The U.S. DOT's regulations in 49 C.F.R. part 27 implement § 504 of the Rehabilitation Act of 1973 so "that no otherwise qualified individual with a disability in the United States shall, solely by reason of his or her disability, 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."[2096]

However, 49 C.F.R. § 27.19(a) states that

> [r]ecipients subject to this part (whether public or private entities as defined in 49 CFR Part 37) shall comply with all applicable requirements of the [ADA] including the Department's ADA regulations (49 CFR parts 37 and 38), the regulations of the Department of Justice implementing titles II and III of the ADA (28 CFR parts 35 and 36), and the regulations of the Equal Employment Opportunity Commission (EEOC) implementing title I of the ADA (29 CFR part 1630).[2097]

The U.S. DOT regulations in part 37 implement Titles II and III.[2098] Section 37.5 provides that "[n]o entity shall discriminate against an individual with a disability in connection with the provision of transportation service."[2099] Entities shall not deny "any individual with a disability the opportunity to use the entity's transportation service for the general public"[2100] when the individual is capable of using the service; require an individual with a disability to use designated priority seats when the individual chooses not to use priority seats; or impose unauthorized special charges on individuals with disabilities, including individuals who use wheelchairs, for services that part 37 requires or services that are otherwise necessary to accommodate individuals with disabilities.[2101] Part 37 states when public and private entities providing public transportation must make reasonable modifications to their policies, practices, and procedures.[2102]

The ADA directed that the U.S. DOT regulations had to include standards that applied to facilities and vehicles covered by Title II and that the standards had to be consistent with the Architectural and Transportation Barriers Compliance Board's minimum guidelines and requirements.[2103] Part 37 of the U.S. DOT regulations require transportation vehicles, such as rapid rail vehicles, light rail vehicles, buses, vans, commuter rail cars, intercity rail cars, and over-the-road buses,[2104] to meet the minimum guidelines and accessibility standards set forth in part 38 of the regulations.[2105] The ADA Standards for Transportation Facilities that are set forth in Appendices B and D to 36 C.F.R. part 1191 and in Appendix A to part 37 are hereinafter referred to as the "DOT Standards."[2106]

d. Accessibility Requirements for Transportation Vehicles

On November 4, 2015, the FTA released a Circular that provides guidance for recipients and subrecipients of FTA financial assistance regarding their compliance with the ADA, § 504 of the Rehabilitation Act, and the U.S. DOT's regulations in 49 CFR parts 27, 37, and 38.[2107]

As 49 C.F.R. § 37.21(b) states, compliance with part 37 and § 504 of the Rehabilitation Act is a condition to receiving federal financial assistance. For example, transit providers ensure that their services, vehicles, and facilities are accessible to and usable by individuals with disabilities.[2108] Although the U.S. DOT's regulations apply to transportation services provided by FTA-grantees, the Justice Department's regulations apply to other types of services that grantees may provide. The regulations in Part 37 are to be interpreted consistently with the Justice Department's regulations, but part 37 prevails whenever there is any inconsistency.[2109] Part 37 applies

> to the following entities, whether or not they receive Federal financial assistance from the Department of Transportation:
>
> (1) Any public entity that provides designated public transportation or intercity or commuter rail transportation;
>
> (2) Any private entity that provides specified public transportation; and
>
> (3) Any private entity that is not primarily engaged in the business of transporting people but operates a demand responsive or fixed route system.[2110]

Contractors and subcontractors usually are subject to the same obligations as the public transit agencies with whom they

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[2094] Boose v. Tri-County Metro. Transp. Dist. of Or., 587 F.3d 997 (9th Cir. 2009).

[2095] 42 U.S.C. §§ 12141-12165 (2018).

[2096] 49 C.F.R. § 27.1 (2018).

[2097] 49 C.F.R. § 27.19(a) (2018).

[2098] 49 C.F.R. § 37.1 (2018) (stating that "[t]he purpose of this part is to implement the transportation and related provisions of titles II and III of the Americans with Disabilities Act of 1990").

[2099] 49 C.F.R. § 37.5(a) (2018).

[2100] 49 C.F.R. § 37.5(b) (2018).

[2101] 49 C.F.R. §§ 37.5(c)-(d) (2018).

[2102] 49 C.F.R. §§ 37.5(i)(2)-(3) (2018).

[2103] 42 U.S.C. §§ 12149(a)-(b) (2018).

[2104] 49 C.F.R. part 38, subparts (B) through (H) (2018).

[2105] 49 C.F.R. § 38.1 (2018).

[2106] The DOT Standards are accessibility standards for transportation facilities that are based upon the United States Access Board's ADA Accessibility Guidelines. *See* United States Access Board, *About the ADA Standards for Transportation Facilities*, https://www.access-board.gov/guidelines-and-standards/transportation/facilities/about-the-ada-standards-for-transportation-facilities (last accessed Jan. 7, 2019).

[2107] FTA Circular, *supra* note 2078, Ch. 1.1, at 1-1.

[2108] *Id.*, Ch. 1.1.2, at 1-1.

[2109] *See Id.*, Ch. 1.2.4, at 1-3 – 1-4.

[2110] 49 C.F.R. § 37.21(a).

contract.[2111] Moreover, transit agencies are obligated to ensure that their contractors comply with the requirements of part 37 in the same manner as the transit agencies when the agencies are providing the services directly.[2112]

With respect to transit providers, the FTA Circular provides guidance on compliance with federal laws and regulations applicable to fixed route bus service; complementary paratransit service; demand responsive service; and rapid, light, and commuter rail service, as well as water transportation/passenger ferries.[2113]

Specific provisions of the regulations apply to private entities whenever they receive FTA funds as a subrecipient or contractor to provide public transportation.[2114] Table 1-1 in the FTA Circular summarizes the parts and subparts of the regulations that apply to various types of transportation services that FTA grantees provide.[2115]

In *Reidy v. Cent. Puget Sound Transit Reg'l Auth.*,[2116] the plaintiff was a quadriplegic male who was injured in a swimming pool accident in 1998. Because of his disability, he used a remote-controlled wheelchair with a joystick. In late October, the plaintiff visited Pierce Transit's facilities to demonstrate the problem that he was having while boarding a MCI coach, which seats 57 passengers and is designed to be wheelchair-accessible, and to demonstrate his proposed solution.[2117] Afterwards, although some coach drivers moved the seats in the MCI coach in the manner necessary to allow the plaintiff to board, others did not.[2118] In early 2012, after Pierce's Safety and Training Board concluded that plaintiff's loading method would leave seats in an "unlocked and unsafe position" that violated the manufacturers' safety specifications, the plaintiff filed a complaint with the FTA.[2119] After the FTA concluded that the defendant had not violated the ADA, the plaintiff brought an action alleging intentional discrimination under the ADA.[2120]

The court stated that the "DOJ regulations implementing Title II of the ADA require public entities to make 'reasonable modifications' to practices when necessary to 'avoid discrimination' on the basis of disabilities, unless an entity can demonstrate that these modifications would fundamentally alter the nature of the 'service, program or activity' at issue."[2121] After "a plaintiff makes a preliminary showing that a reasonable accommodation was possible, … the burden shifts to the defendant to show that the requested accommodation would require a fundamental alteration or would be unduly burdensome for defendant.… The ultimate question of whether a given accommodation is reasonable is generally a question of fact."[2122]

The court discussed whether monetary damages are recoverable in a Title II case or under the Rehabilitation Act:

> To recover monetary damages under Title II of the ADA or the Rehabilitation Act, a plaintiff must prove intentional discrimination on the part of the defendant. … The Ninth Circuit applies the "deliberate indifference" standard to find intent; this standard requires that defendant both (a) know that harm to a federally protected right is substantially likely and (b) fail to act upon that likelihood. … In an accommodation case, this standard is satisfied when a public entity has notice that an accommodation is required and fails to act on its duty to investigate; however, to be deliberately indifferent, the entity's failure to act must be "a result of conduct that is more than negligent[] and involves an element of deliberateness."[2123]

The court concluded that "a public entity may be found liable for damages under Title II or Section 504 for 'intentional discrimination' if it intentionally or with deliberate indifference fails to provide a reasonable accommodation to disabled persons."[2124]

First, the court held that, as a matter of law, it could not "find that plaintiff has sufficient access to defendant's services where, on random occasion, he will inevitably be left without public transport."[2125]

Second, it was a question of fact whether the plaintiff's requested accommodation was unsafe.[2126] Whether an accommodation would place an undue administrative and financial burden on the defendant necessitates "a holistic assessment that requires looking at the cost of an accommodation relative to defendant's overall budget … among other factors."[2127]

The court held that the plaintiff failed to show that the defendant was deliberately indifferent to the plaintiff's concerns.[2128] However, because the record demonstrated that Reidy could not "easily and consistently ride MCI coaches" when he needed to travel and that he suffered from emotional distress as a result, Reidy was entitled to the injunctive relief he sought.[2129] The court granted in part and denied in part the defendant's motion for summary judgment.

In sum, as the FTA states, "[a]lmost all types of transportation providers are obligated to comply with Federal nondiscrimination regulations in one form or another."[2130]

[2111] FTA Circular, *supra* note 2078, Ch. 1.3.2, at 1-5 (discussing 49 C.F.R. § 37.23(a)).

[2112] *Id.*

[2113] *Id.*, Ch. 1.1, at 1-1.

[2114] *Id.*, Ch. 1.3.1, at 1-4–1-5.

[2115] *Id.*, Ch. 1.2.3, at 1-3.

[2116] No. C13-536RSL, 2014 U.S. Dist. LEXIS 177093 (W.D. Wash. Dec. 22, 2014).

[2117] *Id.* at *2-3.

[2118] *Id.* at *4.

[2119] *Id.* at *5

[2120] *Id.* at *5, 6.

[2121] *Id.* at *8-9 (citation omitted).

[2122] *Id.* at *9-10 (citations omitted).

[2123] *Id.* at *10 (citations omitted).

[2124] *Id.* at *10-11 (citation omitted).

[2125] *Id.* at *16.

[2126] *Id.* at *19.

[2127] *Id.* at *19-20 (citation omitted). *See also*, Andrews v. Mass. Bay Transit Authority, 872 F. Supp.2d 108, 114 (D. Mass. 2012) (stating that reasonable accommodations may include reassignment to a vacant position, unless such a reassignment is unduly burdensome).

[2128] *Reidy*, 2014 U.S. Dist. LEXIS 177093, at *21.

[2129] *Id.* at *22 (citations omitted).

[2130] FTA Circular, *supra* note 2078, Ch. 1.4, at 1-8.

e. ADA Standards for Transportation Facilities

Under the ADA, the U.S. Architectural and Transportation Barriers Compliance Board (Access Board) is responsible for design guidelines for the accessibility of facilities and vehicles that the ADA covers.[2131] As stated, the ADA Standards for Transportation Facilities that are set forth in Appendices B and D to 36 C.F.R. part 1191 and in Appendix A to part 37 are referred to in this report as the DOT Standards.[2132] Section 37.9(a) of the DOT's regulations states that "a transportation facility shall be considered to be readily accessible to and usable by individuals with disabilities if it meets the requirements of [part 37] and the requirements set forth in Appendices B and D to 36 CFR part 1191, which apply to buildings and facilities covered by the [ADA], as modified by Appendix A to [part 37]."[2133] Thus, the DOT Standards, which differ from the Justice Department's 2010 standards, apply to transportation facilities.[2134]

Transit agencies must comply with the DOT Standards when constructing new transportation facilities or altering existing ones. Transportation facilities must be accessible to and usable by individuals with disabilities when the facilities are viewed in their entirety.[2135] When a public transit agency owns more than 50 percent of a rail facility that is used by both commuter and intercity rail, the transit agency is responsible for making the rail facility accessible.[2136] When other entities control elements of facilities that individuals with disabilities use or would use, the FTA encourages transit agencies to "engage" with the other entities.[2137]

f. Construction of New Transportation Facilities

Section 12146 of the ADA states that for purposes of 42 U.S.C. § 12132, as well as § 504 of the Rehabilitation Act of 1973,

> it shall be considered discrimination for a public entity to construct a new facility to be used in the provision of designated public transportation services unless such facility is readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.[2138]

Section 37.41(a) of the regulations also requires that any new facility for providing designated public transportation services must be built so that it is readily accessible.[2139]

g. Alterations of Existing Facilities

The ADA applies to alterations of existing facilities. An alteration is a change that affects the usability of a facility.[2140] When there are alterations of an existing facility that is used for designated public transportation services, a public entity discriminates against individuals with disabilities when the public entity fails

> to make such alterations (or to ensure that the alterations are made) in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, upon the completion of such alterations.[2141]

When there are alterations of a "primary function area" of a public entity's transportation facility, such as platforms or waiting areas, the public entity, such as a transit agency, must "ensure that the path of travel to the altered area is readily accessible to the maximum extent feasible, subject to a disproportionate cost analysis."[2142] That is, "[w]hen the cost of alterations necessary to make a path of travel to the altered area fully accessible is disproportionate to the cost of the overall alteration, then such areas shall be made accessible to the maximum extent without resulting in disproportionate costs…."[2143]

Chapter 3 of the FTA Circular likewise discusses requirements for transportation facilities and emphasizes that the requirements apply to the construction of new facilities,[2144] as well as the alteration of existing ones.[2145]

h. Elements of a Title II Claim

According to the Tenth Circuit, there are "three ways to establish a discrimination claim [under Title II of the ADA]: (1) intentional discrimination (disparate treatment); (2) disparate impact; and (3) failure to make a reasonable accommodation."[2146]

For a plaintiff to prevail on a Title II ADA claim, the plaintiff must show that "(1) that he is a qualified individual with a disability; (2) that he was either excluded from participation in or denied the benefits of some public entity's services, programs, or activities or was otherwise discriminated against; and (3) that

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[2131] *Id.*, Ch. 3.1.1, at 3-2 (discussing 49 C.F.R. § 37.9(a)).

[2132] *Id.* The DOT Standards are accessibility standards for transportation facilities that are based upon the United States Access Board's ADA Accessibility Guidelines. *See* United States Access Board, *About the ADA Standards for Transportation Facilities*, https://www.access-board.gov/guidelines-and-standards/transportation/facilities/about-the-ada-standards-for-transportation-facilities (last accessed Jan. 7, 2019).

[2133] FTA Circular, *supra* note 2078, Ch. 3.1.1, at 3-1 (quoting 49 C.F.R. § 37.9(a)).

[2134] *Id.*, Ch. 3.1.1, at 3-2.

[2135] *Id.*, Ch. 3.1.2, at 3-3 (discussing 49 C.F.R. part 37, subpart C).

[2136] *Id.* (discussing 49 C.F.R. § 37.49(b)).

[2137] *Id.* Appendix D to 49 C.F.R. § 37.49 explains the requirements for coordinating shared Amtrak and commuter rail stations. *See* FTA Circular, *supra* note 2078, Ch. 3.1.2, at 3-3.

[2138] 42 U.S.C. § 12146 (2018).

[2139] *See* FTA Circular, *supra* note 2078, Ch. 3.3.1, at 3-10 (discussing 49 C.F.R. § 37.41(a)). "[A] facility or station is 'new' if its construction begins (*i.e.*, issuance of notice to proceed) after January 25, 1992, or, in the case of intercity or commuter rail stations, after October 7, 1991." *Id.* (quoting 49 C.F.R. § 37.41(a)).

[2140] *Id.*, Ch. 3.4.2, at 3-13 (discussing 49 C.F.R. §§ 37.3 and 37.43(a)).

[2141] 42 U.S.C. § 12147(a) (2018). *See also*, FTA Circular, *supra* note 2078, Ch. 3.4, at 3-11 (discussing 49 C.F.R. § 37.43(a)(1)).

[2142] FTA Circular, *supra* note 2078, Ch. 3.4, at 3-11; Ch. 3.4.4, at 3-14–3.15 (discussing 49 C.F.R. § 37.43(a)(2)).

[2143] *Id.*, Ch. 3.4.6, at 3-16 (quoting 49 C.F.R. § 37.43(f)(1)).

[2144] *Id.*, Ch. 3, at 3-1.

[2145] *Id.*, Ch. 3.4 at 3-11.

[2146] J.V. ex rel. C.V. v. Albuquerque Pub. Sch., 813 F.3d 1289, 1295 (10th Cir. 2016) (citations omitted).

such exclusion, denial of benefits, or discrimination was by reason of the plaintiff's disability."[2147]

In *Mich. Paralyzed Veterans of Am., Inc. v. Mich. DOT*,[2148] the plaintiffs challenged the accessibility of certain sidewalks, curbs, and intersections allegedly under the defendants' control and supervision "to persons with mobility and sight disabilities."[2149] The plaintiffs claimed that the defendants' failures to construct or alter facilities properly in a public right-of-way created numerous barriers that prevented the plaintiffs from being able to use sidewalks and crossing streets to have access to public transit to reach area businesses, as well as polling places.[2150] The court observed that "new constructions or alterations commenced after March 15, 2012, had to comply with the 2004 ADAAG standards."[2151] Because it received federal funds, MDOT did not claim immunity from claims under the Rehabilitation Act, but a court's analysis under the Act "'roughly parallels'" an analysis of claims under the ADA, inasmuch as the language of the two statutes are "'quite similar in purpose and scope.'"[2152]

MDOT argued that, although sidewalks and other pedestrian thoroughfares provide access to public facilities offering public services, activities, and programs, such sidewalks and pedestrian thoroughfares are not "'services, activities, or programs'" under Title II.[2153] MDOT argued that Title II "does not protect public access to 'facilities as opposed to public access to a 'service, activity, or program.'"[2154] The court found that the MDOT, regarding numerous projects begun after January 26, 1992, had failed to comply with 28 C.F.R. § 35.151 when it constructed or altered pedestrian walkways.[2155] A public entity is obligated to provide accessible public sidewalks in all pedestrian walkways, "not just those that serve as a gateway to another governmental service, program, or activity.…"[2156] The Justice Department has "stated in several amicus filings … that the provision and maintenance of sidewalks, curbs, and parking lots qualifies as 'services, programs, or activities[]' under Title II of the ADA."[2157] Moreover, an individual with a disability "'need not engage in futile gestures before seeking an injunction; the individual must show only that an inaccessible sidewalk actually affects his activities in some concrete way.'"[2158]

In *Bernstein v. City of New York*,[2159] involving the plaintiff's claim under Title II of the ADA, as well as under the Rehabilitation Act, the court stated that

> "a plaintiff must demonstrate that '(1) he is a qualified individual with a disability; (2) the defendant is subject to one of the Acts; and (3) he was denied the opportunity to participate in or benefit from the defendant's services, programs, or activities, or was otherwise discriminated against by the defendant because of his disability.'"[2160]

Bernstein's complaint alleged that he had been denied equal access to Central Park and provided examples "of the Park's alleged inaccessibility,"[2161] such as "missing detectable warnings at crosswalks."[2162] However, the court stated that "Title II and the Rehabilitation Act require only that entities make 'reasonable accommodations' to enable 'meaningful access' to services, programs, and activities."[2163] Nevertheless, the plaintiff's inadequate complaint was not "fatal" for that reason.

The court stated that the plaintiff not only alleged past injury under the ADA but also that it was "reasonable to infer from Bernstein's amended complaint that the alleged violations—including the allegedly violative conditions in Bernstein's amended complaint and the attached expert report—will continue."[2164] Because the complaint did not provide information on Bernstein's intent to return to the park in the future, the court remanded the case for further fact-finding.[2165] A plaintiff may recover compensatory damages only when the plaintiff establishes that the defendant engaged in intentional discrimination.

i. Reasonable Accommodations

Title II of the ADA mandates that individuals with disabilities "must be provided with 'meaningful access' to a public entity's programs and services."[2166] Public entities must make reasonable modifications of policies, practices, or procedures when the modifications are necessary to avoid discrimination because of a disability.[2167] Moreover,

> [a] public entity must provide a reasonable accommodation under the ADA when it knows that the individual is disabled and "requires an accommodation of some kind to participate in or receive the benefits of its services." ... "[A] public entity is on notice that an individual needs an accommodation when it knows that an individual requires one, either because that need is obvious or because the individual requests an accommodation."[2168]

[2147] Metro Treatment of Me., LP v. City of Bangor, No. 1:16-cv-00433-JAW, 2016 U.S. Dist. LEXIS 157619, at *22-23 (D. Me. Nov. 15, 2016) (citation omitted).

[2148] No. 15-cv-13046, 2017 U.S. Dist. LEXIS 183280 (E.D. Mich. Nov. 6, 2017).

[2149] *Id.* at *2.

[2150] *Id.* at *4.

[2151] *Id.* at *15 (citations omitted).

[2152] *Id.* at *12 (citations omitted).

[2153] *Id.* at *18.

[2154] *Id.* (court's opinion omitting citations).

[2155] *Id.* at *25.

[2156] *Id.* at *33.

[2157] *Id.* at *34 (citation omitted).

[2158] *Id.* at *37-8 (citation omitted).

[2159] 621 Fed. Appx. 56 (2d Cir. 2015).

[2160] *Id.* at 59 (citation omitted).

[2161] *Id.* at 58.

[2162] *Id.*

[2163] *Id.* at 59 (citation omitted).

[2164] *Id.* at 58.

[2165] *Id.* at 59.

[2166] Culvahouse v. City of LaPorte, 679 F. Supp.2d 931, 946 (N.D. Ind. 2009).

[2167] J.V. ex rel. C. V. v. Albuquerque Pub. Sch., 813 F.3d 1289, 1299 (10th Cir. 2016).

[2168] *Id.* (citation omitted).

A determination of what would be a reasonable modification "'is highly fact-specific, requiring [a] case-by-case inquiry.'" [2169]

In *Kaufman v. City of New York*,[2170] the plaintiffs alleged that the "defendants' placement of pedestrian barricades at, and the concomitant closing of, certain crosswalks, sidewalk curb ramps and sidewalks in midtown Manhattan," referred to as the Barricade Plan or simply the Plan, violated § 504 of the Rehabilitation Act and Title II of the ADA.[2171] The plaintiffs alleged that the Rehabilitation Act and the ADA "proscribe the City's denial of the benefits of this service, program or activity to any qualified individual with a disability."[2172]

The plaintiffs sought documents in discovery that they argued were "subject to disclosure because they [were] relevant to an element of their claim that must be established, to wit, that defendants can employ a reasonable modification to the Plan, which will rid the Plan of its discriminatory impact on plaintiffs."[2173]

The court ordered the disclosure of the documents that the plaintiffs sought because they were relevant to the plaintiffs'

> burden of establishing, as an element of the claim in their case, that a reasonable modification to the Barricade Plan is available that would permit Kaufman to receive the benefits of using the City's sidewalks, sidewalk curb ramps and crosswalks, which he claims the Plan now excludes him from doing because of his disability.[2174]

The defendants failed to establish the governmental deliberative privilege that they asserted as the basis for their nondisclosure of the documents.[2175]

j. Liability for Compensatory Damages for Intentional Violations of the ADA

Unless the defendant is a state or state agency and there is immunity for the reasons that will be discussed in further in this report, a plaintiff may recover compensatory damages when the plaintiff proves a defendant's intentional discrimination in violation of the ADA.

In *Savage v. South Florida Regional Transportation Authority,*[2176] the South Florida Regional Transportation-Authority (SFRTA) had an "envelope policy" that provided that individuals with disabilities who did not purchase a ticket in advance, and who were unable to purchase a ticket through a ticket vending machine (TVM), could request a self-addressed envelope from onboard security personnel and mail their payment after their trip.[2177] Because Savage, who was legally blind, was not told of the company's envelope policy, and because SFRTA had not made a reasonable accommodation to enable him to pay for his ticket at the end of his trip, Savage sued for "intentional disability discrimination."[2178] The plaintiff demonstrated that SFRTA's policy requiring a passenger with a disability to request an envelope was ineffective, but failed to provide evidence of SFRTA's intentional discrimination.[2179] The Eleventh Circuit held that, because the ticket-purchasing system complied with applicable regulations and guidelines, SFRTA had not excluded the plaintiff or denied the plaintiff the benefits of its transportation services.

In *Ferguson v. City of Phoenix*,[2180] the plaintiffs, who were deaf or hearing impaired, alleged that the city's 911 system ineffectively served the deaf in violation of Title II of the ADA, § 504 of the Rehabilitation Act, and 42 U.S.C. § 1983 and that the defendants treated the plaintiffs differently than they treated non-hearing impaired callers.[2181] The plaintiffs argued that under the ADA, the Rehabilitation Act, or § 1983, they were "presumptively entitled" to damages without regard to intent.[2182] After the district court's decision on the defendants' first motion for summary judgment, the case continued on the issue of damages. In the meantime, the parties entered into a consent decree that "required the City to eliminate the need for TDD [telecommunications device for the deaf] callers to use a TDD space bar to gain access to the 9-1-1 system."[2183] On the defendants' second motion for summary judgment, the district court ruled that the plaintiffs were not entitled to compensatory damages, because there was no evidence of the city's intentional discrimination or deliberate indifference.[2184]

The Ninth Circuit, which affirmed the district court's judgment, stated that the Justice Department's regulations that were applicable to the case "require that 'telephone emergency services, including 911 services, shall provide direct access to individuals who use [telecommunication devices] and computer modems.'"[2185] The court found, however, that there was no evidence of any intentional discrimination, deliberate indifference, or discriminatory animus by the city toward the plaintiffs.[2186] Although the plaintiffs were not entitled to damages, the appellate court stated that equitable relief, i.e., the injunction, was sufficient to remedy the plaintiff's "problem" and that, in the meantime, the city's corrective action had solved the problem.[2187]

[2169] Anderson v. City of Blue Ash, 798 F.3d 338, 356 (6th Cir. 2015) (citation omitted).

[2170] No. 98 Civ. 2648 (MJL)(KNF), 1999 U.S. Dist. LEXIS 5779 (S.D. N.Y. April 22, 1999).

[2171] *Id.* at *1.

[2172] *Id.* at *2.

[2173] *Id.* at *3.

[2174] *Id.* at *6.

[2175] *Id.* at *10-11, 13.

[2176] 523 Fed. Appx. 554 (11th Cir. 2013).

[2177] *Id.* at 554.

[2178] *Id.*

[2179] *Id.*

[2180] 157 F.3d 668 (9th Cir. 1998), c*ert. denied*, 526 U.S. 1159, 119 S. Ct. 2049, 144 L. Ed. 2d 216 (1999).

[2181] *Id.* at 671 and 672.

[2182] *Id.*

[2183] *Id.* at 673.

[2184] *Id.*

[2185] *Id.* at 672. (quoting 28 C.F.R. § 35.162)). The court relied also on a Justice Department manual entitled *The Americans with Disabilities Act: Title II Technical Assistance Manual* (stating that "[a]dditional dialing or space bar requirements are not permitted"), *id.* (https://www.ada.gov/taman2.html (last accessed Jan. 7, 2019)).

[2186] *Id.* at 675.

[2187] *Id.*

However, in *Munson v. Del Taco, Inc.*,[2188] the court held that "[i]ntentional discrimination need not be shown to establish a violation of the ADA's *access requirements*…."[2189] In the ADA, Congress "sought to eliminate all forms of invidious discrimination against individuals with disabilities, including not only 'outright intentional exclusion,' but also 'the discriminatory effects of architectural, transportation, and communication barriers' and the failure to make modifications to existing facilities.'"[2190]

k. Compensatory Damages for Violations of the ADA Because of Deliberate Indifference

Some courts have held that plaintiffs with disabilities may recover compensatory damages whenever a public entity's violation of the ADA was intentional discrimination or occurred because of deliberate indifference that "satisfies the requisite showing of intentional discrimination."[2191]

In *Stamm v. New York City Transit Authority*,[2192] the plaintiff alleged that the defendants' vehicles and facilities were not accessible to her and other persons with disabilities who utilize service animals.[2193] Because "a reasonable jury could find the evidence adduced by Plaintiff sufficient to establish deliberate indifference," a federal district court in New York denied the defendants' motion for summary judgment.[2194]

To recover compensatory damages, the plaintiff did not have to show "personal animosity or ill will" to prove intentional discrimination.[2195] The court held that

> a jury could reasonably conclude that at least one NYCTA official with authority to address the alleged discrimination and to institute corrective measures on Plaintiff's behalf had actual knowledge of ongoing discrimination against Plaintiff but failed to respond adequately.[2196]

The court held that the plaintiff could recover damages for emotional distress.[2197]

In *Midgett v. Tri-County Metro. Transp. District*,[2198] in which a wheelchair-user alleged numerous lift failures, a federal district court in Oregon held that "compensatory damages are not available under Title II of the ADA absent a showing of discriminatory intent or, at a minimum, deliberate indifference."[2199] However, the court found that occasional lift problems, when considered in the larger context of Tri-Met's entire fixed route system, did not violate the ADA.[2200] The plaintiff failed to provide "evidence from which a rational inference of discriminatory intent" could be drawn.[2201] Moreover, evidence of "'bureaucratic inertia as well as some lack of knowledge and understanding' do not satisfy the intent requirement."[2202]

l. Whether the States Have Immunity to Claims Under Title II of the ADA

Three years after the decision in *Garret*, supra, in 2004, the Supreme Court in *Tennessee v. Lane*[2203] considered whether Title II of the ADA was a proper exercise of congressional authority under § 5 of the Fourteenth Amendment to abrogate the states' Eleventh Amendment immunity. The Court held that, although Congress has broad power under § 5 to devise "appropriate remedial and preventative measures for unconstitutional actions," Congress "may not work a 'substantive change in the governing law.'"[2204] When 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."[2205]

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 disabilities."[2206] 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.[2207] The other respondent, a court stenographer, had lost work and "an opportunity to participate in the judicial process" because of her disability.[2208] The Court stated 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,"

[2188] 46 Cal.4th 661, 208 P.3d 623, 94 Cal. Rptr.3d 685 (Cal. 2009).

[2189] *Id.* at 669, 208 P.3d at 628, 94 Cal. Rptr.3d 691 (emphasis supplied).

[2190] *Id.* at 669-70, 208 P.3d at 628, 94 Cal. Rptr.3d 691 (citations omitted).

[2191] S.H. v. Lower Merion Sch. Dist., 729 F.3d 248, 262 (3rd Cir. 2013).

[2192] No. 04-CV-2163 (SLT)(JMA), 2013 U.S. Dist. LEXIS 8534 (E.D. N.Y. Jan. 22, 2013).

[2193] The defendants' motion for summary judgment argued that the plaintiff was not disabled, that she was not entitled to use a "service animal," that she was seeking to bring dogs onboard that did not qualify as service animals, and that she had failed to make a Title II claim or a claim for intentional infliction of emotional distress. *Id.* at *1.

[2194] *Stamm*, 2013 U.S. Dist. LEXIS 8534, at *11.

[2195] *Id.* at *3.

[2196] *Id.* at *11.

[2197] *Id.* at *21.

[2198] 74 F. Supp.2d 1008 (D. Or. 1999).

[2199] *Id.* at 1018. *See* Michael Lewyn, *Thou Shalt Not Put a Stumbling Block Before the Blind: The Americans with Disabilities Act and Public Transit for the Disabled*, 52 Hastings L. J. 1037, 1083-4 (2001).

[2200] *Midgett*, 74 F. Supp.2d at 1018. As for an injunction, the court noted "that the desired corrective action [had] already been taken" and that the plaintiff had "not met his burden of demonstrating a threat of *irreparable* future harm." *Id.* (emphasis in original).

[2201] *Id.* (citation omitted).

[2202] *Id.* (citation omitted).

[2203] 541 U.S. 509, 124 S. Ct. 1978, 158 L. Ed.2d 820 (2004).

[2204] *Id.* at 520, 124 S. Ct. at 1986, 158 L. Ed.2d at 835 (citation omitted).

[2205] *Id.* at 522, 124 S. Ct. at 1988, 158 L. Ed.2d at 836 (citation omitted).

[2206] *Id.* at 513, 124 S. Ct. at 1982, 158 L. Ed.2d at 831.

[2207] *Id.* at 514, 124 S. Ct. at 1983, 158 L. Ed.2d at 831.

[2208] *Id.*

including courthouses and other state-owned buildings.[2209] The Court held that Congress had the power under § 5 of the Fourteenth Amendment to abrogate the states' Eleventh Amendment immunity "to enforce the constitutional right of access to the courts."[2210] 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"[2211] or in some instances to use less costly or other measures as allowed by the regulations.[2212]

The Court decided the *Lane* case, however, on the narrow basis of whether Congress could abrogate the states' Eleventh Amendment immunity under Title II of the ADA when 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."[2213] 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 [*Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439, 105 S. Ct. 3249, 87 L. Ed.2d 313 (1985)] prohibition on irrational discrimination."[2214] The Eleventh Amendment does not preclude injunctive relief from being sought and awarded against a state agency for a violation of federal law.

States have sovereign immunity at least 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.

In 2003, in *Miranda B. v. Kitzhaber*,[2215] in which the plaintiff sought prospective injunctive relief, the Ninth Circuit held that Oregon was not entitled to sovereign immunity under the Eleventh Amendment, because Congress validly abrogated immunity from suit for claims under Title II of the ADA, and because the state waived immunity for claims under § 504 of Rehabilitation Act of 1973 when it accepted federal funds.

In 2006, in contrast, in *Everybody Counts, Inc. v. Northern Indiana Regional Planning Commission*,[2216] a federal district court in Indiana considered whether a fundamental right was at stake when it decided whether the Indiana Department of Transportation (INDOT), as a state agency, has immunity under the Eleventh Amendment, and, if so, whether Congress "properly" abrogated the states' immunity in the ADA.[2217]

The plaintiffs alleged that the defendants, including INDOT, deprived them of access to public transportation services in violation of Title II of the ADA and § 504 of the Rehabilitation Act. The plaintiffs argued that the municipal defendants provided a level of transportation services to individuals with disabilities that "was not comparable to the services provided to non-disabled riders in violation of the ADA."[2218] The plaintiffs further alleged that the municipalities that were violating the ADA and the Rehabilitation Act received federal grant funds and that, because the Act prohibits public entities from aiding other organizations that are discriminating, INDOT was violating the ADA.[2219] The plaintiffs' argued that INDOT had not adequately overseen the cities' compliance with the ADA.[2220] The court found that, because INDOT was "responsible for ensuring that the [Metropolitan Planning Organizations (MPOs)] comply with the ADA, the Rehabilitation Act, and other relevant federal statutes," INDOT's role was "limited to an oversight function and [to] being a pass-through funding entity."[2221]

The court explained that § 5 of the Fourteenth Amendment empowers Congress to abrogate the states' sovereign immunity "as necessary to enforce the substantive guarantees of the Fourteenth Amendment,"[2222] but "the power to determine what constitutes a constitutional violation" is for "the Supreme Court—not Congress—to decide…."[2223] Even though Congress "unequivocally expressed" its intent in the ADA to abrogate the states' sovereign immunity, whether Congress acted pursuant to a valid grant of Congressional authority was "not quite as straight-forward."[2224] For an act of Congress to abrogate Eleventh Amendment immunity, a court must identify the constitutional right at issue and "then determine whether a 'relevant history and 'pattern of constitutional violations' exists."[2225] The question, thus, was "whether the legislative 'fix' that Congress suggests is an appropriate response (or, in other words is 'congruent and proportional') to the history and pattern of unequal treatment."[2226] When fundamental rights, such as access to the courts are not at stake, it is much more difficult for Congress to abrogate Eleventh Amendment immunity.[2227] The issue, therefore, was whether under § 5 there was "'a congruence and

[2209] *Id.* at 524-25, 124 S. Ct. at 1989, 158 L. Ed.2d at 837-838 (footnotes omitted).

[2210] *Id.* at 531, 124 S. Ct. at 1993, 158 L. Ed.2d at 842.

[2211] *Id.* (citation omitted).

[2212] 28 C.F.R. §§ 35.151, 35.150(b)(1), and 35.150(a)(2) and (3).

[2213] *Lane*, 541 U.S. at 530 n.18, 124 S. Ct. at 1992 n.18, 158 L.Ed.2d at 841 n.18.

[2214] *Id.* at 532 n.20, 124 S. Ct. at 1994 n.20, 158 L.Ed.2d at 843 n.20 (citation omitted).

[2215] 328 F.3d 1181 (9th Cir. 2003).

[2216] No. 2:98 CV 97, 2006 U.S. Dist. LEXIS 39607 (N.D. Ind. March 30, 2006), *motion granted by,* Everybody Counts, Inc. v. N. Ind. Reg'l Planning Comm'n, No.: 2:98 CV 97-PPS-APR, 2010 U.S. Dist. LEXIS 94235 (N.D. Ind., Sept. 9, 2010).

[2217] *Id.* at *2-3.

[2218] *Id.* at *5.

[2219] *Id.* at *10.

[2220] *Id.* at *5.

[2221] *Id.* at *7.

[2222] *Id.* at *16 (citation omitted).

[2223] *Id.* at *17.

[2224] *Id.* at *15.

[2225] *Id.* at *16.

[2226] *Id.* (citation omitted).

[2227] *Id.* at *21.

proportionality between the injury to be prevented or remedied and the means adopted to that end.'"[2228]

The court held, first, that there was no clear fundamental constitutional right to public transportation.[2229] Second, Title II of the ADA was not a congruent and proportional remedy in cases that "implicat[e] only the right to be free from irrational disability discrimination in the provision of public transportation."[2230]

> Title II and its implementing regulations go beyond merely protecting disabled individuals from irrational disability discrimination. Instead, they expose states to money damages for violations of the ADA by creating a number of affirmative obligations that the state can only avoid by establishing undue financial hardship. This does not allow the state enough room to make classifications that are rationally related to some legitimate governmental purpose.[2231]

The court held that the Title II regulations impose various "affirmative actions in the form of 'reasonable modifications' which place a heavy burden on transportation providers."[2232]

> In this particular case, the burden on the state is exaggerated by a statutory scheme that essentially attempts to hold the state vicariously liable for disability discrimination even where the state is not the actual entity providing the transportation. … INDOT is merely a funding entity…. This regulation purports to place a significant oversight burden on INDOT by making INDOT responsible for any discrimination by any transportation provider to which INDOT has ever administered funds.[2233]

The court held that INDOT in this case had Eleventh Amendment immunity from actions for damages under Title II of the ADA.[2234] Moreover, for the plaintiffs to prove that INDOT "violated the ADA by aiding or perpetuating discrimination by providing assistance to an agency that discriminates on the basis of disability, there must first be proof that the agencies receiving grant money are actually discriminating against individuals with disabilities."[2235]

In 2006, in *United States v. Georgia,*[2236] the Supreme 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."[2237] After the Supreme Court's decision, the Eleventh Circuit remanded the case to the district court to specify the extent that the alleged conduct underlying Goodman's constitutional claims also violated Title II of the ADA.[2238] In 2007, the district court dismissed the plaintiff's ADA claims against the defendants in their individual capacities, because there is no ADA liability for individuals.[2239] In 2011, after a jury trial on the plaintiff's ADA claims, in which the plaintiff was found not to be an individual with a disability within the meaning of the ADA, the defendants moved for a summary judgment on the plaintiff's remaining § 1983 claims. The district court granted the motion in part, denied it in part, and dismissed it in part. The court found that "[t]he issues remaining for the trier of fact are whether the remaining Defendants were *deliberately indifferent* to Plaintiff's serious medical needs, whether Plaintiff was retaliated against for the exercise of his First Amendment rights, and whether those Defendants to whom Plaintiff allegedly complained about *constitutional violations* were made aware of these allegations and failed to take corrective actions."[2240]

Also, in 2006, in *Disability Rights Council of Greater Wash.,*[2241] supra, involving the adequacy of paratransit services, the court agreed with the United States, which intervened in the case, that it was not necessary to address the abrogation of immunity issue. Because DOT regulations that require WMATA to comply with the Rehabilitation Act also require WMATA to comply with all ADA requirements, WMATA had waived its immunity to the plaintiffs' claims under the Rehabilitation Act. The court held that any violations by WMATA of the ADA and the DOT's regulations were "necessarily violations of the Rehabilitation Act."[2242] The court, therefore, deemed the plaintiff's ADA claims as claims having been brought pursuant to the Rehabilitation Act.[2243]

In 2012, a federal district court in Alabama in *Mason v. City of Huntsville*,[2244] while deciding whether Title II of the ADA abrogated a state or state agency's sovereign immunity, stated that "other circuits and districts have narrowed the scope of valid Title II claims solely to those implicating a *fundamental right* …, [but] the Eleventh Circuit has not followed that path."[2245] Accordingly, the court held that "'Title II of the ADA is a valid

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[2228] *Id.* at *18 (citation omitted).

[2229] *Id.* at *30.

[2230] *Id.* at *32.

[2231] *Id.* at *32-3.

[2232] *Id.* at *33.

[2233] *Id.* at *35-36 (citations omitted).

[2234] *Id.* at *40. As for whether there was immunity under § 504 of the Rehabilitation Act, the court stated that § 504 differs from the ADA, because § 504 is "'a condition on the receipt of federal funds.'" *Id.* at *41 (citations omitted). *See also*, Monroe v. Indiana, No. 1:14-cv-00252-SEB-DML, 2016 U.S. Dist. LEXIS 43842, at *16 (S.D. Ind. March 31, 2016) (stating that the plaintiff's claims against the state defendants for damages under Title I of the ADA were barred by the Eleventh Amendment).

[2235] *Everybody Counts, Inc.*, 2006 U.S. Dist. LEXIS 39607, at *50.

[2236] 546 U.S. 151, 126 S. Ct. 877, 163 L. Ed.2d 650 (2006).

[2237] *Id.* at 159, 126 S. Ct. at 882, 163 L. Ed.2d at 659 (2006) (emphasis in original).

[2238] Goodman v. Ray, 449 F.3d 1152 (11th Cir. 2006).

[2239] Goodman v. Donald, No. CV 699-012, 2007 U.S. Dist. LEXIS 53386 (S.D. Ga. July 24, 2007).

[2240] Goodman v. Donald, No. CV 699-012, 2011 U.S. Dist. LEXIS 16189, at *30 (S.D. Ga. Feb. 17, 2011) (emphasis supplied).

[2241] 239 F.R.D. 9 (D. D.C. 2006).

[2242] *Id.* at 14.

[2243] *Id.* at 15.

[2244] No. CV-10-S-02794-NE, 2012 U.S. Dist. LEXIS 145698 (N.D. Ala. Oct. 10, 2012).

[2245] *Id.* at *21-22.

exercise of Congress's enforcement power under Section 5 of the Fourteenth Amendment."[2246]

In sum, states and state agencies have sovereign immunity for claims for monetary damages under Title I of the ADA. However, whether there is sovereign immunity for a claim under Title II appears to depend on whether the Title II claim arises out of the denial of a fundamental, constitutional right.

m. Administrative and Judicial Enforcement of Title II of the ADA

DOT regulations provide that recipients of federal financial assistance are subject to part 37's administrative enforcement requirements of [part 37] under the provisions of 49 CFR part 27, subpart C.[2247] Public entities, regardless of whether they received federal assistance, are also subject to enforcement action as provided by the Department of Justice.[2248]

n. Private Right of Action Under Title II of the ADA

Individuals affected by violations of Titles II, as well as Title III, discussed hereafter, have a private right of action.

Section 12133 of Title II incorporates the remedies, procedures, and rights in § 505 of the Rehabilitation Act, which, in turn, are the same remedies, procedures, and rights provided in Title VI of the Civil Rights Act of 1964.[2249] Because it has been held that there is an implied right of action in Title VI, Title II of the ADA likewise is enforceable by a private right of action by individuals with disabilities who allege discrimination that violates Title II.[2250]

The fact that there is a private right of action under Title II, however, does not mean that all alleged violations of the regulations may serve as a basis for a private action. For example, in *Donnelly v. Intercity Transit*,[2251] the court held that the plaintiff did not have a private right of action based on the regulation that was in dispute. The plaintiff, who had cerebral palsy and was wheelchair-bound, was a qualified individual with a disability under the ADA. The plaintiff, who had used the defendant's paratransit services for many years, claimed that he was injured while a passenger in a Dial-a-Lift van that the defendant Intercity Transit owned and operated.

Although Donnelly alleged that the defendant violated six federal regulations,[2252] the court stated that the issue was whether Donnelly could enforce 49 C.F.R. § 38.23(d)(7) by a private action.[2253] Even though the DOT regulation required the defendant to provide a shoulder harness for wheelchair users, the court stated that the requirement had "nothing to do with whether the Defendant provide[d] an appropriate level of service as defined by the 42 U.S.C. § 12143(a)…."[2254] The court held that, because the regulation imposed an obligation that was "nowhere to be found in the plain language of 42 U.S.C. § 12132(a)," the plaintiff could not enforce § 38.23(d)(7) by a private action under § 12132(a).[2255]

In *Ability Center of Greater Toledo v. City of Sandusky*,[2256] the issues were whether the city failed to make proper accommodations for individuals with disabilities when the city renovated its sidewalks and street curbs and whether it was liable for not having a transition plan to implement ADA requirements.[2257] Regarding the first issue, the Sixth Circuit held that 28 C.F.R. § 35.151, which applies to new construction and alterations, is enforceable by a private action because the regulation "effectuates a mandate of Title II."[2258] Title II "demands" that public entities do more than simply refrain from intentionally discriminating against individuals with disabilities.[2259] Title II "contemplates" that accommodations include the removal of "architectural barriers that impede disabled individuals from securing the benefits of public services."[2260] Therefore, to assure than an individual is not denied the benefits of a public service, the city had to remove an architectural barrier of its own creation.[2261]

As for the second issue, the court rejected the plaintiffs' claim that 28 C.F.R. § 35.150(d), applicable to transition plans, is enforceable by a private action under Title II. Although the regulation procedurally encourages public entities to consider and plan ways to accommodate individuals with disabilities, "there is no indication that a public entity's failure to develop a transition plan harms disabled individuals, let alone in a way that Title II aims to prevent or redress."[2262]

o. Standing to Bring a Title II Claim

In general, for Article III standing under the United States Constitution, a plaintiff must establish that he or she

> (1) … suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by the relief requested.[2263]

[2246] *Id.* at *42 (emphasis supplied).

[2247] 49 C.F.R. § 37.11(a).

[2248] 49 C.F.R. § 37.11(b).

[2249] 42 U.S.C. § 12133 (2018) and 29 U.S.C. § 794a(a)(2) (2018). *See* 42 U.S.C. § 2000d, *et seq.* (2018).

[2250] King v. Sec'y Ind. Family & Soc. Servs. Admin, No. 1:12-CV-312, 2013 U.S. Dist. LEXIS 20746, at *9-10 (N. D. Ind. Feb. 15, 2013). *See also*, Barnes v. Gorman, 536 U.S. 181, 184-5, 122 S. Ct. 2097, 2100, 153 L. Ed.2d 230 (2002).

[2251] No. C12-5650 KLS, 2012 U.S. Dist. LEXIS 163597 (W.D. Wash. Nov. 15, 2012).

[2252] *Id.* at *3-4.

[2253] *Id.* at *13-4.

[2254] *Id.* at *14.

[2255] *Id.* at *15.

[2256] 385 F.3d 901 (6th Cir. 2004).

[2257] *Id.* at 902.

[2258] *Id.* at 907.

[2259] *Id.* at 910 (citation omitted).

[2260] *Id.* at 907.

[2261] *Id.* at 911.

[2262] *Id.* at 914.

[2263] Tandy v. City of Wichita, 380 F.3d 1277, 1283 (10th Cir. 2004) (citations omitted).

Furthermore, "[t]he 'injury in fact' requirement is satisfied differently depending on whether the plaintiff seeks prospective or retrospective relief."[2264] When a plaintiff is seeking prospective relief,

> the plaintiff must be suffering a continuing injury or be under a real and immediate threat of being injured in the future. … Past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury. … The threatened injury must be "certainly impending" and not merely speculative. … A claimed injury that is contingent upon speculation or conjecture is beyond the bounds of a federal court's jurisdiction.[2265]

When a plaintiff is seeking retrospective relief, if the plaintiff has suffered a past injury that is "concrete and particularized," the "injury in fact" requirement is satisfied.[2266]

In *Bernstein v. City of New York*,[2267] supra, the court addressed whether the plaintiff had standing.

> To satisfy constitutional standing requirements, a plaintiff must prove: (1) injury in fact, which must be (a) concrete and particularized, and (b) actual or imminent; (2) a causal connection between the injury and the defendant's conduct; and (3) that the injury is likely to be redressed by a favorable decision. … Plaintiffs seeking injunctive relief must also prove that the identified injury in fact presents a "real and immediate threat of future injury," often termed "a likelihood of future harm."[2268]

In other ADA cases, the courts have determined that the plaintiff had standing when "'(1) the plaintiff alleged past injury under the ADA; (2) it was reasonable to infer that the discriminatory treatment would continue; and (3) it was reasonable to infer, based on the past frequency of plaintiff's visits and the proximity of defendants' [services] to plaintiff's home, that plaintiff intended to return to the subject location.'"[2269]

The court remanded the issue for further fact finding because the complaint did not provide information on Bernstein's intent to return to the park in the future.[2270]

p. Attorney's Fees

A court has jurisdiction under the ADA to award attorney's fees to a "'prevailing party' other than the United States."[2271] In litigation against the federal government, the Equal Access to Justice Act (EAJA),[2272] 28 U.S.C. § 2412, authorizes a private litigant to recover attorney's fees incurred when the litigant has prevailed in the lawsuit, and the government cannot prove that its position in the lawsuit was substantially justified.[2273] The Third Circuit has held that whether a plaintiff is a prevailing party depends, first, on whether the plaintiff achieved some of the benefit it sought by initiating the action, and, second, on whether the "'litigation constituted a material contributing factor in bringing about the events that resulted in the obtaining of the desired relief.'"[2274]

In *Collins v. SEPTA*,[2275] the plaintiffs recovered legal fees. The plaintiffs had alleged that SEPTA violated the ADA and the Due Process clause of the Fourteenth Amendment by denying the plaintiffs' access to paratransit services.[2276] Eventually, the parties negotiated a consent decree.[2277] SEPTA opposed the plaintiffs' application for attorney's fees, in part, because the plaintiffs did not prevail on all claims.[2278] A federal district court in Pennsylvania stated that the plaintiffs in the settlement received "relief of the 'same general type' they requested in the complaint, regardless of what legal theory led to that result."[2279] The court also found that the amount of the attorney's fees claimed was reasonable.

6. Title III and Discrimination in Public Accommodations

a. Prohibition of Discrimination by Places of Public Accommodation

Title III prohibits discrimination against individuals with disabilities by places of public accommodation. The term public accommodation includes "a terminal, depot, or other station used for specified public transportation…."[2280] Private entities operating a fixed route system,[2281] a demand responsive system,[2282] or over-the-road buses are subject to Title III.[2283]

b. What Constitutes Discriminatory Action Under Title III

Section 12182(a) of the ADA mandates that

> [n]o 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.[2284]

Section 12182(b) sets forth general prohibitions, stating that is discriminatory

> (1) to subject an individual or class of individuals on the basis of a disability or disabilities of such individual or class, … to a denial of the opportunity of the individual or class to participate in or benefit

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[2264] *Id.* (citation omitted).

[2265] *Id.* at 1283-4 (citations omitted).

[2266] *Id.* at 1284.

[2267] 621 Fed. Appx. 56 (2d Cir. 2015).

[2268] *Id.* at 57 (citations omitted).

[2269] *Id.* (citations omitted).

[2270] *Id.* at 59.

[2271] Am. Council of the Blind v. Wash. Metro. Area Transit Auth., 133 F. Supp.2d 66, 71 (D. D.C. 2001) (citation omitted).

[2272] Pub. L. No. 96-481, 94 Stat. 2325 (1980), (codified at 28 U.S.C. §2412).

[2273] Am. Council of the Blind, 133 F. Supp.2d at 71.

[2274] Collins v. Southeastern Pennsylvania Transportation Authority, 69 F. Supp.2d 701, (E.D. Pa. 1999). (quoting Metropolitan Pittsburgh Crusade for Voters v. Pittsburgh, 964 F.2d 244, 250 (3rd Cir. 1992)).

[2275] 69 F. Supp.2d 701 (E.D. Pa. 1999).

[2276] *Id.* at 702.

[2277] *Id.*

[2278] *Id.*

[2279] *Id.* at 704.

[2280] 42 U.S.C. § 12181(7)(G) (2018).

[2281] 42 U.S.C. §§ 12182(b)(2)(B)(i) and (ii) (2018).

[2282] 42 U.S.C. § 12182(b)(2)(C) (2018).

[2283] 42 U.S.C. § 12182(b)(2)(D) (2018).

[2284] 42 U.S.C. § 12182(a) (2018).

> from the goods, services, facilities, privileges, advantages, or accommodations of an entity.
>
> (ii) … to afford an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, … with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals.
>
> (iii) … to provide an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, … with a good, service, facility, privilege, advantage, or accommodation that is different or separate from that provided to other individuals, unless such action is necessary to provide the individual or class of individuals with a good, service, facility, privilege, advantage, or accommodation, or other opportunity that is as effective as that provided to others.[2285]

It is discriminatory regardless of whether any of the foregoing actions are accomplished directly or through contracts, licenses, or other arrangements.[2286] Likewise, it is unlawful to use administrative methods that discriminate against individuals with disabilities or "that perpetuate the discrimination of others who are subject to common administrative control."[2287]

c. Transportation Services Subject to Title III

Under § 12184(a) of the ADA, "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of specified public transportation services provided by a private entity that is primarily engaged in the business of transporting people and whose operations affect commerce."[2288]

Part 36 of the regulations issued by the Attorney General state that

> [a] public accommodation that provides transportation services, but that is not primarily engaged in the business of transporting people, is subject to the general and specific provisions in subparts B, C, and D of this part for its transportation operations, except as provided in this section.[2289]

The term transportation services includes, for example,

> shuttle services operated between transportation terminals and places of public accommodation, customer shuttle bus services operated by private companies and shopping centers, student transportation systems, and transportation provided within recreational facilities such as stadiums, zoos, amusement parks, and ski resorts.[2290]

Title III and the regulations also impose requirements in respect to architectural and other barriers.[2291]

> A public accommodation subject to this section shall remove transportation barriers in existing vehicles and rail passenger cars used for transporting individuals (not including barriers that can only be removed through the retrofitting of vehicles or rail passenger cars by the installation of a hydraulic or other lift) where such removal is readily achievable.[2292]

The regulations state that "[a] public accommodation subject to this section shall comply with the requirements pertaining to vehicles and transportation systems in the regulations issued by the Secretary of Transportation pursuant to section 306 of the Act."[2293]

d. Investigations and Compliance Reviews by the Attorney General

The ADA authorizes the Attorney General to investigate alleged violations of Title III.[2294] When an individual or a specific class of persons has been subjected to discrimination that is prohibited by Title III or part 36, the individual may request the Justice Department to institute an investigation.[2295] Whenever the Attorney General believes that there is a violation of part 36, the Attorney General may initiate a "compliance review."[2296]

After a compliance review or investigation under 28 C.F.R. § 36.502, or at any other time, the Attorney General may commence an action in a federal district court whenever the Attorney General has "reasonable cause" to believe that

> (a) [a]ny person or group of persons is engaged in a pattern or practice of discrimination in violation of the Act or this part; or
>
> (b) [a]ny person or group of persons has been discriminated against in violation of the Act or this part and the discrimination raises an issue of general public importance.[2297]

Private entities, thus, are subject to enforcement action as provided in the Justice Department's regulations that implement title III of the ADA.[2298]

e. Private Right of Action Under Title III

Title III permits individuals to bring suit in federal court and receive equitable remedies for discrimination, as well as allows the United States Attorney General to sue and seek civil penalties for violations.[2299]

As stated in the regulations implementing Title III,

> [a]ny person who is being subjected to discrimination on the basis of disability in violation of the Act or this part or who has reasonable grounds for believing that such person is about to be subjected to discrimination in violation of section 303 of the Act or subpart D of this part may institute a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order.[2300]

[2285] 42 U.S.C. §§ 12182(b)(1)(A)(i)-(iii) (2018).

[2286] *Id.* and 42 U.S.C. §§ 12182(b)(1)(A)(iv) (2018).

[2287] 42 U.S.C. §§ 12182(b)(1)(D)(i) and (ii) (2018).

[2288] 42 U.S.C. § 12184(a) (2018).

[2289] 28 C.F.R. § 36.310(a)(1) (2018).

[2290] 28 C.F.R. § 36.310(a)(2) (2018).

[2291] 42 U.S.C. § 12182(b)(2)(A)(iv) (2018). The section does not include barriers that can only be removed through the retrofitting of vehicles or rail passenger cars by the installation of a hydraulic or other lift. Id. *See also*, 28 C.F.R. § 36.310(b) (2018).

[2292] 28 C.F.R. § 36.310(b) (2018).

[2293] 28 C.F.R. § 36.310(c) (2018).

[2294] 28 C.F.R. § 36.502(a) (2018).

[2295] 28 C.F.R. § 36.502(b) (2018).

[2296] 28 C.F.R. § 36.502(c) (2018).

[2297] 28 C.F.R. §§ 36.503(a) and (b) (2018).

[2298] 49 C.F.R. § 37.11(b); 28 C.F.R. part 36; and FTA Circular, *supra* note 2078, Ch. 12.2, at 12-1.

[2299] Robert B. Fitzpatrick, *American with Disabilities Act of 1990,* 11 J. Nat'l Ass'n Admin. L. Judges 13, 22 (1991).

[2300] 28 C.F.R. § 36.501(a) (2018).

To make a *prima facie* case of discrimination under Title III, a plaintiff must demonstrate that he or she has a disability within the meaning of the ADA; that the defendant is a private entity that owns, leases, or operates a place of public accommodation; and that the defendant denied the plaintiff a public accommodation because of the plaintiff's disability.[2301] If a plaintiff is alleging discrimination because of an architectural barrier, the plaintiff must show that the ADA prohibits the architectural barrier at the defendant's place of business and that the barrier's removal is "readily achievable."[2302]

f. Injunctive Relief

Under the ADA, a party does not have to exhaust his or her administrative remedies before bringing an action.[2303] However, Title III does not provide for a private right of action to recover compensatory damages.[2304] Rather, the Act authorizes individuals who are subjected to discrimination, or who have reasonable grounds to believe they are about to be subjected to discrimination, to use the remedies and procedures in 42 U.S.C. § 2000a-3. Section 2000a-3(a) states:

> Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by [42 U.S.C. § 2000a-2], a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, may be instituted by the person aggrieved….

Under Title III, individuals are only entitled to seek injunctive relief.[2305] When granting injunctive relief, "[i]n the case of violations of § 36.304, § 36.308, § 36.310(b), § 36.401, § 36.402, § 36.403, and § 36.405 of this part, injunctive relief shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities to the extent required by the Act or this part."[2306] Furthermore, "[w]here appropriate, injunctive relief shall also include requiring the provision of an auxiliary aid or service, modification of a policy, or provision of alternative methods, to the extent required by the Act or this part."[2307]

g. Attorney's Fees

Attorney's fees are recoverable under § 12205 of the ADA.

> In any action or administrative proceeding commenced pursuant to this Act, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual.[2308]

7. 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."[2309] Iowa looks to the federal ADA "to help establish the framework to analyze claims and otherwise apply [the Iowa] statute."[2310]

A case applying state law on disability in the workplace is *Campbell v. N.C. Department of Transportation—Division of Motor Vehicles,*[2311] 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"[2312] under the statute. 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."[2313]

The case of *Nealy v. City of Santa Monica*[2314] concerned California's Fair Employment and Housing Act (FEHA), Gov.

[2301] Johnson v. Dhami, No. 2:14-cv-1150 KJM AC, 2014 U.S. Dist. LEXIS 122862, at *4 (E.D. Cal. Sept. 2, 2014).

[2302] *Id.* at *3 and *4.

[2303] Coalition of Montanans Concerned with Disabilities, Inc. v. Gallatin Airport Auth., 957 F. Supp. 1166 (D. Mont 1997) (requiring airport authority to install an elevator). *See* 42 U.S.C. § 12188 (2018) and 28 C.F.R. § 35.172(a) (2018) (the latter stating that "[t]he designated agency shall investigate complaints for which it is responsible under § 35.171").

[2304] Sigros v. Walt Disney World, Co., 190 F. Supp.2d 165, 169 (D. Mass. 2002) and Anonymous v. Goddard Riverside Community Ctr., No. 96 CIV. 9198 (SAS), 1997 U.S. Dist. LEXIS 9724, at *4 (S.D. N.Y. July 10, 1997).

[2305] Deck v. American Haw. Cruises, 121 F. Supp.2d 1292, 1297 n.5 (D. Haw. 2000). *See also*, Corless v. Cole, No. 13-00700 ACK-BMK, 2014 U.S. Dist. LEXIS 86677, at *13 (D. Haw. June 25, 2014) (stating that "[t]he only remedy available under Title III of the ADA is injunctive relief") (citing 42 U.S.C. § 12188, Wander v. Kaus, 304 F.3d 856, 858 (9th Cir. 2002)).

[2306] 28 C.F.R. § 36.501(b) (2018).

[2307] *Id.*

[2308] 42 U.S.C. §12205. *See also*, 28 C.F.R. § 36.505 (2018) (stating that "[i]n any action or administrative proceeding commenced pursuant to the Act or this part, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for the foregoing the same as a private individual").

[2309] Casey's General Stores v. Blackford, 661 N.W.2d 515, 519 (2003) (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.

[2310] *Id.* (citation omitted).

[2311] 155 N.C. App. 652, 575 S.E.2d 54 (2003).

[2312] *Id.* at 661, 575 S.E.2d at 60 (citation omitted).

[2313] *Id.* at 664, 575 S.E.2d at 62.

[2314] 234 Cal. App.4th 359, 184 Cal. Rptr.3d 9 (Cal. App. 2015).

Code, § 12900, *et seq*., that prohibits several employment practices relating to physical disabilities. A reasonable accommodation is a modification or adjustment to the work environment that enables the employee to perform the essential functions of the job he or she holds or desires. The "elements of a reasonable accommodation cause of action are (1) the employee suffered a disability[;], (2) the employee could perform the essential functions of the job with reasonable accommodation[;] and (3) the employer failed to reasonably accommodate the employee's disability."[2315] Under FEHA, Calif. Gov. Code, § 12940(m), employers must make a reasonable accommodation for the known disability of an employee unless doing so would produce undue hardship to the employer's operation.

The city successfully argued that Nealy could not perform the essential functions of a solid waste equipment operator, with or without reasonable accommodation. Because there were no vacant positions for which Nealy was qualified, and because Nealy failed to produce evidence showing a triable issue of material fact, the appellate court affirmed the grant of a summary judgment to the city.

As the court stated in *Hilbert v. Ohio Dep't of Transp.*,[2316] under Ohio law on disability and discrimination, the term disability is defined as

> physical or mental impairment that substantially limits one or more major life activities, including the functions of caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working; a record of a physical or mental impairment; or being regarded as having a physical or mental impairment.[2317]

Under Ohio law, R.C. 4112.01(A)(16)(a)(iii), the term alcoholism is defined as a physical or mental impairment.[2318]

> To prevail on a claim of disability discrimination …, a person must establish: (1) that he or she was disabled; (2) that an adverse action was taken by the employer, at least in part, because the person was disabled; and (3) that the person, though disabled, can safely and substantially perform the essential functions of the job in question. … If the plaintiff establishes a prima facie case, the burden then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the adverse employment action. … Once the employer does that, the burden shifts to the plaintiff to show "that the proffered reason was not the true reason" for the adverse employment action.[2319]

The court held that there was a genuine issue of material fact on whether Hilbert suffered from alcoholism.

The court in *Ferro v. R.I. DOT*[2320] granted the defendant's motion for summary judgment on the plaintiff's state- and federal-based claims for disability discrimination, because the plaintiff did not provide evidence that the harassment he suffered was physically threatening or humiliating, and because the plaintiff did not suffer an adverse employment action.[2321]

[2315] *Id.* at 373, 184 Cal. Rptr.3d at 19 (citations omitted).

[2316] 2017-Ohio-488, 84 N.E.3d 301 (Ohio App. 2017).

[2317] *Id.*, 2017-Ohio-488 at P49, 84 N.E.3d at 312 (citation omitted).

[2318] *Id.* (citing R.C. 4112.01(A)(16)(a)(iii)).

[2319] *Id.* at P48, 84 N.E.3d at 312 (citations omitted).

[2320] 2 F. Supp.3d 150 (D.R.I. 2014).

[2321] *Id.* at 159.

8. Conclusion

Subsection G of the report discusses the ADA, enacted in 1990, that Congress amended in 2008 by the ADAAA, in part, to reject Supreme Court cases that had narrowed the intended breadth of the ADA.

Title I of the ADA prohibits discrimination in employment by covered employers, as defined by the ADA, against individuals with disabilities, including those who use wheelchairs. This report discusses the definition of the term disability, who is a qualified individual under Title I, the meaning of the term "substantially limits a major life activity," and the meaning of the term "being regarded as having a disability." Under Title I, a covered entity must make reasonable accommodations for individuals with disabilities, including those who use wheelchairs. The report discusses whether and when an employer may use medical inquiries and require medical examinations of applicants or employees; whether an employer may prohibit employees' illegal use of drugs and the use of alcohol at the workplace; and whether it is a violation of the ADA for an employer to use qualifying standards, tests, or selective criteria for employment. The report discusses disparate treatment and disparate impact claims under Title I of the ADA. However, it has been held that states and state agencies have immunity to Title I claims. The report also discusses the enforcement of Title I.

Title II of the ADA prohibits discrimination against individuals with disabilities, including those who use wheelchairs, by public entities providing public services, including transportation services. The report discusses who is a qualified individual with a disability under Title II; analyzes the respective regulatory jurisdiction of the Department of Justice and U.S. DOT of Title II; and discusses Title II's accessibility requirements for transportation vehicles and transportation facilities, including alterations of existing facilities. The report discusses what is required for a *prima facie* claim under Title II; whether the states and state agencies have immunity to Title II claims; administrative and judicial enforcement of Title II; whether an individual with a disability has a private right of action, as well as standing, to sue for a violation of Title II; and whether attorney's fees are recoverable.

Title III prohibits discrimination in public accommodations, including transportation services that are subject to Title III. The report discusses investigations and compliance reviews by the Attorney General, whether an individual with a disability has a private right of action, and whether a plaintiff may obtain injunctive relief and/or recover attorney's fees.

Finally, the report discusses state laws prohibiting discrimination against individuals with disabilities.

H. FIRST AMENDMENT ISSUES

1. Introduction

Subsection H. 2 of this report discusses requests by organizations to place their logo on state license plates and inconsistency among the courts regarding whether a state may deny a group's application for its logo to appear on state license plates. H. 3 dis-

cusses whether under the First Amendment a public employee has a right to free speech in the workplace.

2. Logos on License Plates

The decisions are not consistent regarding whether under the First Amendment a state may deny a group's application to place a logo on a state license plate. In 2002, in *Sons of Confederate Veterans v. Vehicles,*[2322] the Fourth Circuit held that Virginia could not refuse an application from the Sons of Confederate Veterans (SCV) to place their organizational symbol on a specialty license plate issued by Virginia. In contrast to other Virginia statutes authorizing special plates, the statute at issue provided that no logo or emblem of any description should be displayed or incorporated into the design of license plates issued under Va. Code § 46.2-746.22.[2323] The court held that the special plates authorized in Virginia were not instances of "government speech" and that the logo restriction in this case constituted viewpoint-discrimination that could not survive strict scrutiny.[2324] The restriction, which prohibited the SCV from receiving special plates bearing the symbol of their organization that included the Confederate flag, violated the group's First Amendment rights.

In contrast, in 2015, the Supreme Court decided that Texas could refuse an application by the SCV for the issuance of a specialty plate bearing the SCV's logo. In *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*,[2325] decided by the Supreme Court in 2015, a Texas program offered general-issue and specialty license plates. If the Texas Department of Motor Vehicles Board approved a design, the state would make it available for display on license plates. The Texas Division of the Sons of Confederate Veterans and its officers (collectively the SCV) brought an action against the Chairman and members of the Board (collectively the Board). The SCV argued that the Board's rejection of SCV's proposal for a specialty plate design featuring a Confederate battle flag violated the Free Speech Clause.[2326]

The Supreme Court held that the state's

> specialty license plates are not a "nonpublic for[um]," which exists "[w]here the government is acting as a proprietor, managing its internal operations." … With respect to specialty license plate designs, Texas is not simply managing government property, but instead is engaging in expressive conduct. As we have described, we reach this conclusion based on the historical context, observers' reasonable interpretation of the messages conveyed by Texas specialty plates, and the effective control that the State exerts over the design selection process. Texas's specialty license plate designs "are meant to convey and have the effect of conveying a government message." …. They "constitute government speech."[2327]

The court held that the state had the authority to reject the plaintiff's design containing a confederate battle flag.[2328]

In *Choose Life Illinois, Inc. v. White*,[2329] the Seventh Circuit held that Illinois could refuse to issue a specialty plate because a specialty plate is not public forum, the state may control access to the forum, and the state's action in refusing applications for all specialty plates concerning abortion was viewpoint-neutral. The court stated that specialty license plates implicate the speech rights of private speakers, not the government-speech doctrine. Although the question of whether to grant specialty plates triggers a First Amendment "forum" analysis, the court held that "specialty plates are a nonpublic forum."[2330] Although the state of Illinois may not discriminate on the basis of viewpoint, "it may control access to the forum based on the content of a proposed message—provided that any content-based restrictions are reasonable."[2331]

The court stated that Illinois has authorized neither a pro-life plate nor a pro-choice plate to avoid the appearance of a government endorsement.[2332] The state's rejection of a "Choose Life" license plate was content-based but viewpoint-neutral; thus, there was no First Amendment violation in rejecting license plates that said: "Choose Life."[2333]

> Illinois has not favored one viewpoint over another on the subject of abortion … or prohibited the display of a viewpoint-specific symbol (Sons of Confederate Veterans). Instead, the State has restricted access to the specialty-plate forum on the basis of the content of the proposed plate—saying, in effect, "no abortion-related specialty plates, period." This is a permissible content-based restriction on access to the specialty-plate forum, not an impermissible act of discrimination based on viewpoint.[2334]

Finally, in *ACLU of N.C. v. Tennyson*,[2335] the dispute involved a North Carolina specialty license plate program that offers, *inter alia*, a "Choose Life" plate.[2336] The state repeatedly had rejected efforts to include a pro-choice license plate.[2337] Given the Supreme Court's decision in *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*,[2338] supra, the Fourth Circuit held that specialty license plates issued under North Carolina's program amounted to government speech.[2339] Accordingly, North

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[2322] 288 F.3d 610 (4th Cir. 2002).

[2323] Va. Code § 46.2-746.22 provides:

> On receipt of an application therefor and written evidence that the applicant is a member of the Sons of Confederate Veterans, the Commissioner shall issue special license plates to members of the Sons of Confederate Veterans. No logo or emblem of any description shall be displayed or incorporated into the design of license plates issued under this section.

[2324] *Sons of Confederate Veterans*, 288 F.3d. at 627.

[2325] 135 S. Ct. 2239, 192 L. Ed.2d 274 (2015).

[2326] *Id.* at 2245, 192 L. Ed.2d at 280.

[2327] *Id.* at 2251, 192 L. Ed.2d at 287 (citations omitted).

[2328] *Id.* at 2253, 192 L. Ed.2d 289.

[2329] 547 F.3d 853 (7th Cir. 2008), *rehearing denied by, rehearing, en banc, denied,* No. 07-1349, 2008 U.S. App. LEXIS 27560 (7th Cir.2008), *cert. denied*, 558 U.S. 816, 130 S. Ct. 59, 175 L. Ed. 2d 23 (2009).

[2330] *Id.* at 855.

[2331] *Id.*

[2332] *Id.*

[2333] *Id.*

[2334] *Id.* at 865.

[2335] 815 F.3d 183 (4th Cir. 2016).

[2336] *Id.* at 184.

[2337] *Id.*

[2338] 135 S. Ct. 2239, 192 L. ED. 2d 274 (2015).

[2339] *ACLU of N.C.*, 815 F.3d at 185.

Carolina was free to reject license plate designs that convey messages with which it disagreed.[2340]

3. Whether Public Employees Have a Right of Free Speech in the Workplace

An issue that has arisen is whether public employees have a First Amendment right of free speech in or associated with the workplace. In *Davies v. Trigg County,*[2341] the plaintiffs alleged that they were terminated or constructively discharged from their positions at Trigg County Hospital (TCH) after voicing concerns over hospital hiring practices, staffing policies, and the behavior of supervisors. The plaintiffs brought a § 1983 action, as well as a claim under the Kentucky Constitution, against the defendants Trigg County, Kentucky, TCH, and certain individuals in their official or individual capacities.

A federal court in Kentucky, based on Supreme Court and other precedents, held that "not all speech in the public workplace is protected by the First Amendment. Rather, *when public employees speak pursuant to their official duties, their speech is constitutionally unprotected*."[2342] At the motion to dismiss stage, the plaintiffs had "plausibly alleged that they spoke out as citizens on a matter of public concern" and that certain defendants, including TCH, "retaliated against them because of their speech."[2343]

For a *prima facie* case under § 1983, a plaintiff has to allege that a defendant acted under color of state law … [and] that the defendant's conduct deprived the plaintiff of rights secured under federal law.'"[2344] However, for a First Amendment retaliation claim, a § 1983 plaintiff "'must plead factual allegations sufficient to establish that (1) the plaintiff engaged in constitutionally protected conduct; (2) an adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) the adverse action was motivated at least in part by the plaintiff's protected conduct.'"[2345] Of course, because all defendants were government entities or actors, the plaintiffs had to overcome the barriers of sovereign and qualified immunity.[2346]

The court held that "'[i]n the public employment context, not all speech and conduct is protected. 'When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom;'"[2347] "a government employee must speak out on a matter of public concern to receive First Amendment protection from retaliation in the workplace;" and "the Supreme Court added a further wrinkle to the workplace speech jurisprudence when it decided *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed.2d 689 (2006)."[2348] In *Garcetti*, the Court held that "'when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.'"[2349] The *Garcetti* Court held "that the First Amendment does not prohibit managerial discipline based on an employee's expressions made *pursuant to his official responsibilities*."[2350]

However, in *Lane v. Franks*,[2351] the Supreme Court held "'that the First Amendment protects a public employee, … who provides truthful sworn testimony, compelled by subpoena, outside the scope of his ordinary job responsibilities.'"[2352] To determine whether a public employee's speech is protected, a court must "engage in a functional analysis of the employee's job responsibilities."[2353]

An example of such a functional analysis is the case of *Hays v. LaForge*,[2354] decided by a federal district court in Mississippi. The plaintiff Dr. William Bill Hays (Hays), former Chair of the Division of Languages and Literature at Delta State University (DSU), brought a § 1983 action against the defendant William N. LaForge (LaForge) in his official capacity as President of DSU and against the defendant in his individual capacity for various state law claims. The plaintiff's action alleged that, because of the plaintiff's exercise of his right to free speech as guaranteed by the First Amendment, the defendant in his official capacity retaliated against the plaintiff.

DSU is a state university in Mississippi that is managed and controlled by the Board of Trustees of State Institutions of Higher Learning. The plaintiff alleged "that his removal from the division chair position and reassignment to professor of English were in retaliation for his repeated exercises of his First Amendment right to free speech…."[2355] The court stated that for a plaintiff to state a claim under § 1983, the "'plaintiff must [1] allege the violation of a right secured by the Constitution and laws of the United States, and [2] must show that the alleged deprivation was committed by a person acting under color of state law.'"[2356] Furthermore, a plaintiff "'must have alleged facts that show that: (1) [he] suffered an adverse employment decision; (2) [his] speech involved a matter of public concern; (3) [his] interest in commenting on matters of public concern ... outweigh[s] the [defendant's] interest in promoting

[2340] *Id.*

[2341] No. 5:16-CV-00068-TBR, 2016 U.S. Dist. LEXIS 167181 (W.D. Ky. Dec. 5, 2016).

[2342] *Id.* at *8 (citing Garcetti v. Ceballos, 547 U.S. 410, 424, 126 S. Ct. 1951, 1961, 164 L. Ed.2d 689, 702-03 (2006)) (emphasis supplied).

[2343] *Id.* (citations omitted).

[2344] *Id.* at *9-10 (citation omitted).

[2345] *Id.* at *10 (citation omitted) (some internal quotation marks omitted).

[2346] *Id.*

[2347] *Id.* at *11 (quoting Garcetti v. Ceballos, 547 U.S. 410, 418, 126 S. Ct. 1951, 1958 164 L. Ed.2d 689, 699 (2006)).

[2348] *Id.* at *12 (citations omitted).

[2349] *Id.* at *13 (citation omitted).

[2350] *Id.* at *14 (citation omitted) (emphasis supplied).

[2351] 573 U.S. 228, 134 S. Ct. 2369, 189 L. Ed.2d 312 (2014).

[2352] *Davies*, 2016 U.S. Dist. LEXIS 167181, at *17-8 (citation omitted).

[2353] *Id.* at *16.

[2354] 113 F. Supp.3d 883 (N.D. Miss. 2015).

[2355] *Id.* at 894.

[2356] *Id.* (citation omitted).

efficiency; and (4) [his] speech motivated the adverse employment decision.'"[2357]

The court recognized that "[i]t is well established that 'the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern….'"[2358] Moreover, "'[s]o long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively.'"[2359] The district court noted that in *Garcetti v. Ceballos*,[2360] supra, the Supreme Court held that "'when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.'"[2361] To determine the role of the speaker,

> "the inquiry is a 'practical one,' and the controlling factor is whether the plaintiff's expressions were made pursuant to one of the numerous duties for which the plaintiff was employed." … Thus, "[e]ven if the speech is of great social importance, it is not protected by the First Amendment so long as it was made pursuant to the worker's official duties."[2362]

In a case such as this one, it is necessary to "shift our focus from the content of the speech to the role the speaker occupied when he said it.'"[2363]

The question of whether the employee's speech is employment-related may be a close one. However, based on the plaintiff's duties as division chair, the court found that certain of the plaintiff's allegations "clearly fail to constitute citizen speech on matters of public importance."[2364] For example, when the plaintiff in March 2010 "helped to circulate letters/petitions to DSU's then president to request that each college or school be allowed to determine its own budget to make budget reductions, the plaintiff's speech was pursuant to his official duties."[2365]

Even if the plaintiff's speech were construed to have been made in his capacity as a citizen, the plaintiff did not sufficiently allege that his speech "was a motivating factor in his removal and reassignment…."[2366] Furthermore, the plaintiff's "speech could not have motivated the adverse employment action unless the defendant was aware of it."[2367] The speech and the termination had to have "temporal proximity" to show "a causal connection between the speech and the adverse employment action."[2368] The plaintiff's speech, even if subject to First Amendment protection, was "too remote in time from the adverse employment action and not otherwise causally tied to the adverse employment action."[2369] The court granted the defendant's motion to dismiss and declined to exercise supplemental jurisdiction of the plaintiff's state law claims.

4. Conclusion

This segment of the report discusses First Amendment issues involving logos on state license plates, and whether a public employee has a First Amendment right of free speech in or connected to the workplace. The report discusses cases, with one exception, in which the courts have held that a state may deny a group's application for a logo on a license plate without violating the First Amendment. Regarding whether public employees have a right of free speech in the workplace, it has been held that to establish a constitutional violation, plaintiffs "must first prove that when they spoke out in the workplace, they spoke as citizens, and not pursuant to their official job duties."[2370]

I. SUMMARY AND CONCLUSIONS

Subection B of the report analyzes the constitutionality of the federal U.S. DOT DBE law and regulations, as well as other issues relating to affirmative action. The law has become more settled and consistent since the publication of the original report.

In *Adarand III*,[2371] 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. 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. Gender-based classifications continue to be reviewed on the basis of intermediate scrutiny.

Post-*Adarand III*, numerous courts have held that the federal DBE program and various states' implementation of the federal program are constitutional. When a government resorts to a race- or gender-based affirmative action program to remediate discrimination in public contracting, 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. When a DBE program is challenged as a violation of the Constitution, a court must determine whether the government has demonstrated a compelling interest to institute such a program.

When enacting a DBE program, because the reach of Congress is nationwide, Congress may consider evidence of discrimination in society at large in public contracting. The courts have held that Congress had a strong basis in evidence to conclude that the U.S. DOT program was necessary to redress private discrimination in federally assisted highway contracting.

[2357] *Id.* (citation omitted) (some internal quotation marks omitted).

[2358] *Id.* at 895 (citation omitted).

[2359] *Id.* (citation omitted).

[2360] 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed.2d 689 (2006).

[2361] *Hays*, 113 F. Supp.3d at 896 (citation omitted).

[2362] *Id.* (citations omitted).

[2363] *Id.* (citation omitted) (some internal quotation marks omitted).

[2364] *Id.* at 899.

[2365] *Id.* (citation omitted).

[2366] *Id.* at 901.

[2367] *Id.* at 904 (citations omitted).

[2368] *Id.*

[2369] *Id.* at 906.

[2370] Davies v. Trigg Cnty., No. 5:16-CV-00068-TBR, 2016 U.S. Dist. LEXIS 167181, *21 (W.D. Ky. 2016).

[2371] *Adarand III*, 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed.2d 158 (1995).

When there is a compelling interest for a DBE program, the government may institute the program both to eradicate discrimination by the government entity itself and to prevent the public entity from acting as a passive participant in perpetuating discrimination in public contracting through the expenditure of public revenue to finance private prejudice.

When a state implements, for example, the U.S. DOT's DBE program, the state does not have to satisfy independently the compelling interest required for having a DBE program. However, the application of a *national* program has to be limited to those parts of the country where race- or gender-based measures are demonstrably needed. A state DOT's implementation of a DBE program must be supported by a strong basis in evidence of discrimination in its state's public contracting transportation industry, and the state's program must be narrowly tailored.

Subsection C of the report discusses disparate impact cases arising out of the location of highways and related projects. The Supreme Court has interpreted § 601 of Title VI of the Civil Rights Act of 1964 as proscribing only intentional discrimination. Moreover, the Supreme Court has held that there is no private right of action to enforce the disparate impact regulations promulgated under § 602 of Title VI. Nonetheless, transportation officials need to be aware of civil rights laws and regulations implicated by planning- and project-decisions. 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. Second, an affected person may file a complaint with the funding agency alleging a violation of Title VI.

Subsection D of the report discusses civil actions brought under § 1983 of the Civil Rights Act of 1871 and the immunity of a state or state official acting in his or her official capacity from § 1983 claims. Section 1983 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. 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.

Importantly, neither a state transportation department nor its officers acting in their official capacities may be sued under § 1983. Although municipalities are persons under § 1983, a state or state agency is not a person under § 1983 and cannot be sued by a private party for monetary damages or injunctive relief under § 1983 in a federal or state court; a state official may not be sued in his or her official capacity for damages 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.

Government officials who are sued also may have absolute or qualified immunity for § 1983 claims. The qualified immunity doctrine serves to protect government officials who perform discretionary functions from suit and from liability for monetary damages under § 1983. As a general rule, in claims arising under federal constitutional and statutory law, government officials acting within their discretionary authority are immune from civil damages if their conduct does not violate a clearly established constitutional or statutory right of which a reasonable person would have known.

Although § 1983 does not restrict a state's Eleventh Amendment immunity, there are two exceptions. First, a state may be sued when Congress validly enacts legislation pursuant to § 5 of the Fourteenth Amendment that unequivocally expresses its intent to abrogate the states' Eleventh Amendment immunity under the United States Constitution. Second, a state may consent to suit. However, § 1983, by itself, did not abrogate the states' sovereign immunity under the Eleventh Amendment.

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. By virtue of the Supreme Court's decision in *Monell v. New York,*[2372] municipal corporations are persons amenable to suit under § 1983; however, the doctrine of *respondeat superior* is not a basis for holding local governments liable under § 1983 for the constitutional torts of their employees. Rather, for there to be a § 1983 action against a municipality, the claim must result from a municipal government policy, or in some cases a well-established custom, that violates federal law.

In a § 1983 action, the court may award declaratory and injunctive relief, compensatory and punitive damages, and attorney's fees. Municipalities, however, are generally immune from punitive damages in § 1983 actions, as are municipal officers when sued in their official capacities. Although the Eleventh Amendment bars claims for damages against state agencies and officials acting in their official capacity, the federal courts may enjoin action by state officials 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.

Subsection E of the report discusses the ADEA. Notably, in *Kimel v. Florida Board of Regents,*[2373] the Supreme Court struck down Congress's attempt to abrogate the states' sovereign immunity for ADEA claims. For those government agencies subject to the ADEA that lack immunity, as well as other employers subject to the ADEA, it should be noted that in an ADEA case the alleged age discrimination must be the "but-for" cause of the discrimination that allegedly occurred in the defendant's hiring, discharging, or disciplining of an employee or in subjecting an employee to a hostile workplace, a constructive discharge, or retaliation. The ADEA authorizes both disparate treatment and disparate impact claims for violations of the Act.

Subsection F discusses Title VII of the Civil Rights Act of 1964. Under Title VII, it is an unlawful employment practice for an employer "to fail or refuse to hire or to discharge any indi-

[2372] 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed.2d 611 (1978).

[2373] 528 U.S. 62, 120 S. Ct. 631, 145 L. Ed.2d 522 (2000).

vidual, 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…."[2374] 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 employment discrimination under Title VII by using either the direct or indirect method of proof. Subsection F discusses a wide range of claims that are cognizable under Title VII, such as for discrimination in hiring, including pattern or practice discrimination in hiring; discrimination in promotions, suspensions, and terminations; sexual harassment or religious discrimination in the workplace; and discrimination claims resulting from a hostile work environment, constructive discharge, and/or retaliation.

Subsection G of the report discusses the ADA. Title I of the ADA prohibits employment discrimination by covered employers, as defined by the ADA, against individuals with disabilities, including those who use wheelchairs. The report discusses the definition of the term disability, who is a qualified individual under Title I, the meaning of the term "substantially limits a major life activity," and the meaning of the term "being regarded as having a disability." Under Title I, a covered entity must make reasonable accommodations for individuals with disabilities, including those who use wheelchairs.

Although Title 1 of the ADA authorizes claims for monetary damages in cases of discrimination against individuals with disabilities, the Supreme Court held in *Board of Trustees of the University of Alabama v. Garrett*[2375] that the states and their agencies are not subject to claims under Title I. The reason is that Congress did not have a sufficient record of discrimination against individuals with disabilities by the states or state agencies to abrogate the states' and state agencies' immunity under the Eleventh Amendment to claims under Title I.

Title II of the ADA prohibits discrimination against individuals with disabilities, including those who use wheelchairs, by public entities providing public services, including transportation services. The report discusses who is a qualified individual with a disability under Title II; analyzes the respective regulatory jurisdiction of the Department of Justice and U.S. DOT of Title II; and discusses Title II's accessibility requirements for transportation vehicles and transportation facilities, including alterations of existing facilities, as well as other Title II requirements.

As for Title II claims against the states or state agencies, it appears that sovereign immunity does not immunize a state if its action violates or infringes a right that the courts have held is a fundamental right under the Constitution. The report discusses cases in which the courts have held more broadly, with the exception of one case located for the report, that the defendant state or state agency did not have immunity to Title II claims.

Title III prohibits discrimination in public accommodations, including transportation services that are subject to Title III. The report discusses investigations and compliance reviews by the Attorney General, whether an individual with a disability has a private right of action, the availability of injunctive relief, and the recovery of attorney's fees.

Subsection H of the report addresses First Amendment issues involving programs and logos on state license plates. The subsection discusses whether a public employee has a First Amendment right of free speech in, or having a connection to, the workplace.

Regarding logos on state license plates, the report discusses several cases in which the courts have held that the states may deny a group's application for a logo on a license plate without violating the First Amendment.

Public employees do not necessarily have a right of free speech in the workplace. A functional analysis is required to determine whether a public employee spoke as a private citizen or spoke in connection with his or her public duties. When a public employee's speech is related to his or her public employment duties, the public employee's speech is not protected by the First Amendment.

[2374] 42 U.S.C. § 2000e-2(a)(1) (2018).

[2375] 531 U.S. 356, 121 S. Ct. 955, 148 L. Ed.2d 866 (2001).

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