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THE DEPARTMENT OF TRANSPORTATION'S DISADVANTAGED BUSINESS ENTERPRISE PROGRAM

(111–18)

HEARING

BEFORE THE

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

MARCH 26, 2009

Printed for the use of the
Committee on Transportation and Infrastructure

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CONTENTS

Page

Summary of Subject Matter v

TESTIMONY

Aranza, Gilbert, Chief Executive Officer, Star Concessions, Ltd. 7
Cloonen, Katherine M., President and Owner, JK Steel Erectors, Inc. 7
Clyburn, Hon. James E., a Representative in Congress from the State of South Carolina 4
Covington, Chuck, Chief Executive Officer, People's Transit 7
Cunningham, Julie A., President and Chief Executive Officer, Conference of Minority Transportation Officials 38
Hall, Amy, Member of DBE Task Force, Associated General Contractors of America, President, Ebony Construction Company 38
Kim, K. Dennis, President, EVS, Inc. 7
O'Bannon, Don T., Esq., Chairman, Airport Minority Advisory Council (AMAC), Vice President of Business Diversity Development, Dallas-Fort Worth International Airport 38
Payne, Joann, President, Women First National Legislative Committee 38
Szabat, Hon. Joel, Acting Assistant Secretary for Transportation Policy, U.S. Department of Transportation, accompanied by Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, U.S. Department of Transportation 7
Thompson, Anthony, President and CEO, Kwame Building Group, Inc. 7
Wainright, Dr. Jon S., Vice President, NERA Economic Consulting 7
White, Richard, Vice President of Properties and Business Development, Memphis-Shelby County Airport Authority, Chairman of the Business Diversity Committee, Airports Council International-North America, accompanied by Sara L. Hall, Vice President and General Counsel, Memphis-Shelby County Airport Authority 38

PREPARED STATEMENTS SUBMITTED BY MEMBERS OF CONGRESS

Brown, Hon. Corrine, of Florida 63
Clyburn, Hon. James, of South Carolina 66
Duncan, Hon. John J., of Tennessee 71
Johnson, Hon. Eddie Bernice, of Texas 76
Mitchell, Hon. Harry E., of Arizona 197
Norton, Hon. Eleanor Holmes, of the District of Columbia 200
Oberstar, Hon. James L., of Minnesota 202

PREPARED STATEMENTS SUBMITTED BY WITNESSES

Aranza, Gilbert 206
Cloonen, Katherine M. 212
Covington, Chuck 216
Cunningham, Julie A. 222
Hall, Amy 228
Kim, K. Dennis 280
O'Bannon, Don T. 284
Payne, Joann 297
Szabat, Hon. Joel 306
Thompson, Anthony 319
Wainright, Dr. Jon S. 323
White, Richard 381

Page

SUBMISSIONS FOR THE RECORD

Johnson, Hon. Eddie Bernice, a Representative in Congress from the State of Texas:
Sanchez, Thomas W., Stolz, Rich, and Ma, Jacinta S, "Moving to Equity: Addressing Inequitable Effects of Transportation Policies on Minorities," The Civil Rights Project at Harvard University: Cambridge, MA (2003) 80
Swanstrom, Todd, "The Road to Good Jobs: Patterns of Employment in the Construction Industry," Public Policy Research Center, University of Missouri, St. Louis (September 30, 2008) 148
Napolitano, Hon. Grace F., a Representative in Congress from the State of California, letter from Will Kempton, Director, California State Department of Transportation, to the transportation construction community 198
Payne, Joann, President, Women First National Legislative Committee, written statement of Beth Doria, Federation of Women Contractors 304
Szabat, Hon. Joel, Acting Assistant Secretary for Transportation Policy, U.S. Department of Transportation, responses to questions from Rep. Napolitano 315
Wainright, Dr. Jon S., Vice President, NERA Economic Consulting:
Responses to questions from the Committee 373
Index of additional materials submitted for the record 380

ADDITIONS TO THE RECORD

Asian American Justice Center, Aimee Baldillo and Aarathi Deshmukh, written statement 392
Committee on Transportation and Infrastructure, index of all disparity studies submitted for the record by witnesses and others 398
U.S. Department of Transportation, index of materials submitted for the record 400
Women Construction Owners & Executives, USA, Theresa Kern, President, Deborah Wilder, Past President, written statement 401

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March 25, 2009

SUMMARY OF SUBJECT MATTER

TO: Members of the Committee on Transportation and Infrastructure

FROM: Committee on Transportation and Infrastructure Staff

SUBJECT: Hearing on "The Department of Transportation's Disadvantaged Business Enterprises Program"

PURPOSE OF HEARING

On Thursday, March 26, 2009, at 11:00 a.m., in room 2167 Rayburn House Office Building, the Transportation and Infrastructure Committee will meet to receive testimony regarding the Department of Transportation's Disadvantaged Business Enterprises Program.

BACKGROUND

The U.S. Department of Transportation's (DOT) Disadvantaged Business Enterprises (DBE) program was established through a series of legislative initiatives to remedy past and current discrimination against minority and women-owned businesses to ensure that they are provided equal opportunity to compete for DOT-assisted highways, transit and airport contracts.

First established by regulation in 1980 as a minority and women's business enterprise program, pursuant to Title VI of the "Civil Rights Act of 1964" and other nondiscrimination statutes applicable to DOT financial assistance programs, the DBE program was later statutorily authorized in 1983 by the "Surface Transportation Assistance Act of 1982" (P.L. 97-424), primarily to aid small businesses owned and controlled by socially and economically disadvantaged individuals in the highway and transit programs.[1]

In 1987, Congress passed the "Surface Transportation and Uniform Relocation Assistance Act of 1987" (P.L. 100-17), and the "Airport and Airway Safety and Capacity Expansion Act of

[1] DBE programs for women-owned businesses and the DOT's airport program continued under the original 1980 regulations. *See* 64 Fed. Reg. 5096 (Feb. 2, 1999).

1987" (P.L. 100-223), which expanded the statutory DBE program to include airports, airport concessions and women-owned businesses.[2] In 1991, Congress reauthorized the highway/transit DBE programs and, in 1992, amended the airport DBE program to include management contracts and suppliers of goods and services.[3] The DBE program for highways and transit has since been reauthorized in successive surface transportation statutes.[4]

I. What is a DBE?

A firm (and its minority and women owners) seeking certification as a DBE must meet: (1) an ownership and control test, (2) a personal net worth test, and (3) a size standard.[5] For eligibility purposes, a DBE is defined as a small for-profit business where socially and economically disadvantaged individuals own at least 51 percent of the economic interests of the entity and also control and manage the business operations of the firm.[6] Minorities and women are presumed to be socially disadvantaged (although that presumption is rebuttable).[7] Others may qualify as socially disadvantaged on a case-by-case basis.[8]

To be regarded as economically disadvantaged, an individual must, among other things, have a personal net worth (PNW) that does not exceed $750,000, excluding the equity in the individual's primary residence and the value of their ownership interest in the firm seeking certification.[9] Individuals seeking an Airport Concessions Disadvantaged Business Enterprises (ACDBE) certification may exclude other assets that the individual can document are necessary to obtain financing or a franchise agreement for the initiation or expansion of his or her ACDBE firm (or have in fact been encumbered to support existing financing for the individual's ACDBE business), up to a maximum of $3 million.[10]

As to size, to be eligible as a DBE, a business must be an existing small business (as defined by the SBA) and must not have average annual gross receipts over the firm's previous three fiscal years, in excess of $22.41 million.[11]

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[2] Note that the airport DBE program is codified in statute and does not have to be specifically reauthorized in the same manner as the surface transportation DBE program.

[3] *See* "The Intermodal Surface Transportation Efficiency Act of 1991" (P.L.102-240), and the "Airport and Airway Safety, Capacity, Noise Improvement, and Intermodal Transportation Act of 1992" (P.L. 102-581). For the airport concessions program, this statutory change permitted the value of contracts with, or of goods procured from, certified DBE firms to be counted toward DBE participation goals.

[4] *See* the "Transportation Equity Act for the 21st Century" (TEA-21) (P.L. 105-178), and the "Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users" (SAFETEA-LU) (P.L. 109-59).

[5] 49 C.F.R. §§ 26.61-26.73 (2008).

[6] 49 C.F.R. § 26.69 (2008).

[7] For purposes of the DBE program, ethnic minorities include: Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans or other minorities found to be disadvantaged by the Small Business Administration (SBA). 49 C.F.R. § 26.67 (2008).

[8] 49 C.F.R. § 26.67(d) (2008).

[9] 49 C.F.R. § 26.67(a)(2)(ii) (2008). The $750,000 number was originally set by the SBA in 1989 and then borrowed by DOT and applied to the surface transportation and airport contracting programs in 1999, and airport concessions in 2005.

[10] 49 C.F.R. § 23.3 (2008).

[11] *See* DOT Final Rule: Disadvantaged Business Enterprise Program; Inflationary Adjustment (signed March 24, 2009)(to be published in the Federal Register).

II. How does the DBE program work?

Congress has established a national 10 percent aspirational participation goal for firms certified as DBEs with respect to surface transportation programs, airport federally-assisted contracting (i.e., procurement, construction, or professional services contracts), and airport concessions.[12]

DOT regulations require recipients of federal financial assistance (i.e., state and local transportation agencies and airport operators) that anticipate awarding prime contracts of more than $250,000 to establish an annual aspirational DBE participation goal that reflects what DBE participation would be in the absence of discrimination.[13] Recipients must base their goals on how to achieve a level playing field in their individual programs, regardless of the 10 percent national goal.[14] These goals must be based on demonstrable evidence of the availability of ready, willing, and able DBEs relative to the DOT-assisted contracts that will be let that fiscal year ("FY").[15] It is important to note that a recipient's goal is aspirational only; quotas and set-asides are generally not permitted.[16] In addition, DOT does not assess penalties for not meeting DBE goals as long as good faith efforts are made.[17]

Importantly, recipients are required to use race-neutral means (i.e., without application of any criteria that favor DBEs over non-DBEs) to meet as much of their overall goal as possible. Examples of race-neutral means include: providing assistance in overcoming issues such as the inability to obtain bonding or financing; unbundling large contracts to make them more accessible to small businesses; informational and communication programs on contracting procedures and specific contract opportunities; and other business support services.[18]

If a recipient is unable to meet its overall DBE participation goal through race-neutral means, then the recipient must establish contract goals (which are deemed race conscious) for DBE participation.[19] This means that the recipient has determined that without the use of race-conscious measures, the level playing field could not be achieved. An example of how DBE goals might be set:

> [S]uppose Recipient X establishes an 11 percent overall goal for Fiscal Year 2000. This is the amount of DBE participation X has determined it would have if the playing field were level. Recipient X projects that, using a combination of race-neutral means, it can achieve 5 percent DBE participation. Recipient X then sets contract goals on some of its contracts throughout the year to bring in an additional 6 percent DBE participation.[20]

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[12] *See* §1101(b) of SAFETEA-LU; 49 U.S.C. §§ 47107(e), 47113 (2009).

[13] Federal Transit Administration (FTA) or Federal Aviation Administration (FAA) recipients who reasonably anticipate awarding $250,000 or less in prime contracts in any fiscal year are not required to develop overall DBE goals.

[14] *See* 64 Fed. Reg. 5107 (Feb. 2, 1999).

[15] DOT, in its regulations, details the type of evidence that can be used as a basis for setting goals, including: DBE Directories and Census Bureau Data, bidder's lists, disparity studies, goals used by another recipient in similar circumstances and other alternative methods. *See* 49 C.F.R. § 26.45 (2008).

[16] Note that DOT's regulations do allow "set-asides" only in "limited and extreme circumstances . . . when no other method could be reasonably expected to redress egregious instances of discrimination." 49 C.F.R. § 26.43 (2008). Neither set-asides nor quotas are permitted in the airport concessions program. 49 C.F.R. § 23.61 (2008).

[17] 49 C.F.R. §§ 26.41, 26.47 (2008).

[18] 49 C.F.R. § 26.51 (2008).

[19] *Id.* However, contract goals may only be used for those DOT-assisted contracts that have subcontracting possibilities.

[20] *See* 64 Fed. Reg. 5112.

In addition, recipients of DOT financial assistance are required to establish a Unified Certification Program (UCP).[21] The purpose of a UCP is to ensure that DBEs and applicants (including airport concessionaires) will have "one stop shopping" on certification matters with respect to every recipient in the state. If a business wants to be certified as a DBE, it must submit an application to the UCP for approval. A determination as to whether a firm meets the DBE criteria will be made through various means, including on-site visits, personal interviews, reviews of licenses, stock ownership, equipment, bonding capacity, work completed, resume of principal owners, financial capacity, and type of work preferred.[22] Once a DBE is certified through the UCP, that certification must be honored by all recipients of DOT funds within the state; as opposed to having the DBE apply separately to each recipient with which it wants to work.[23]

The DOT also has counting rules to ensure that recipients have a mechanism to verify that the work committed to a DBE at contract award is actually performed by the DBE, as well as to have appropriate mechanisms to ensure compliance with the program.[24] Each recipient must report to DOT semi-annually on DBE commitments and achievements for the previous 6 months and then the full year. If the actual achievements of a particular contractor's, or a recipient's, program, falls short of commitments, DOT views this as an indication that corrective action should be taken to improve program performance.[25] As noted above, DOT does not sanction recipients if they fall short of their overall DBE participation goal, unless the recipient has not administered its DBE program in good faith.[26]

III. The Impact of Federal Case Law on DOT's DBE Program

In 1995, the U.S. Supreme Court's decision in *Adarand v. Pena (Adarand)*,[27] a contracting case dealing with the expenditure of DOT funds in the state of Colorado, set forth constitutional requirements for race and/or gender conscious contracting programs established by Congress and implemented by the DOT. The Court held that race-conscious programs were subject to a "strict scrutiny" standard of legal review. The Court stated that strict scrutiny involves a two-part analysis. First, to enact a race-conscious program, the government must have a "compelling governmental interest." Second, the Court stated that combating discrimination was a compelling interest, but race-conscious programs could only be used if they are "narrowly tailored."[28]

It should be noted that the 1995 *Adarand* decision did not specifically determine the constitutionality of any affirmative action or government DBE program (including the DOT's DBE

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[21] 49 C.F.R. § 26.81 (2008). Recipients (i.e., state DOTs and airports and transit properties that receive funds directly from FAA or FTA) must commit in writing to participate.

[22] 49 C.F.R. § 26.83 (2008).

[23] States are required to annually survey and compile a list of small and socially and economically disadvantaged business concerns within the State, and submit this list to DOT.

[24] *See, generally*, 49 C.F.R. §§ 26.37, 26.55 (2008).

[25] *See* DOT Official Questions and Answers DBE Program Regulation (49 CFR 26) (Updated Feb. 19, 2009), http://osdbu.dot.gov/dbeprogram/dbeqna.cfm.

[26] 49 C.F.R. § 26.47 (2008).

[27] 515 U.S. 200 (1995).

[28] On remand following the Court's decision in *Adarand v. Pena*, the U.S. Court of Appeals for the Tenth Circuit noted that factors to be considered regarding whether the DOT DBE program is "narrowly tailored" include: (1) the availability of race-neutral alternative remedies; 2) limits on the duration of the [DBE] certification programs; (3) flexibility; (4) numerical proportionality; (5) the burden on third parties; and (6) over-or under-inclusiveness. *See Adarand Constructors v. Slater*, 228 F.3d at 1147, 1178 (10th Cir. 2000).

program at issue in the case).[29] In response to the Court's decision in *Adarand*, however, the Clinton Administration undertook a review of all federal programs using race or gender as a basis for decision making. In 1998, Congress reauthorized the DBE program for surface transportation programs in TEA-21. In 1999, the DOT finalized new rules for the DBE program designed to meet the requirements of strict scrutiny and, in 2005, new rules for the ACDBE program were issued.[30] Circuit courts that have considered the constitutionality of the DOT DBE program since the rules were re-written have upheld the program against facial challenges.[31]

Although not a case reviewing the DOT's DBE program, there has been a recent ruling by the United States Court of Appeals for the Federal Circuit in *Rothe Development Corp. v. Dept. of Defense* (*Rothe*) declaring the Department of Defense's (DOD) 1207 Program, which is one of the programs that the DOD uses to meet its SBA goals, unconstitutional because "Congress did not have before it, at the time of the 2006 reenactment of Section 1207, a 'strong basis in evidence' for the proposition that DOD was a passive participant in racial discrimination in relevant markets across the country and that therefore race-conscious measures were necessary."[32] The *Rothe* court's application of strict scrutiny in evaluating the DOD minority business program may have implications for other Federal agencies in the event of future litigation.

However, one court decision that impacted how the DOT DBE program is applied is *Western States Paving v. Washington State Department of Transportation*.[33] In this case, the United States Court of Appeals for the Ninth Circuit (9th Circuit) held that the federal DBE program was facially constitutional, but that the Washington State DOT DBE program was unconstitutional "as applied," because the Washington State DOT had not narrowly tailored the program by ensuring that it had sufficient statistical evidence to target its remedial measures. As a result of this decision, the DOT advised recipients located in the 9th Circuit to use all race-neutral goals, pending the completion of studies to assist in narrowly tailoring the use of race-conscious goals. This has negatively impacted DBE participation in those states.[34]

For example, the FAA has compiled statistics regarding the airport DBE program following the ruling in *Western States*, which demonstrate that DBE participation was generally lower when only race-neutral means were used.[35] FAA collected data from airports located in 9th Circuit States for which numbers were available in both 2004 (the last year before race-conscious measures were discontinued) and 2007 (the most recent year for which data have been compiled and only race-neutral means were used). Twenty eight of those airports had race-conscious components in their 2004 goals, but had no race-conscious components in their 2007 goals. Of these 28 airports, FAA found that 18 (64 percent) had DBE participation that was significantly lower in percentage terms, in 2007 than in 2004.

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[29] The case was remanded back to the lower courts and the program was ultimately upheld as constitutional in 2000 by the 10th Circuit in *Adarand Constructors v. Slater*. *Id.* at fn. 28.

[30] *See* 64 Fed. Reg. 5096 (Feb. 2, 1999); 70 Fed. Reg. 14508 (Mar. 22, 2005).

[31] *See, e.g., Sherbrooke Turf Inc. v. Minn. DOT.*, 345 F.3d 964 (8th Cir. 2003); and *Northern Contracting, Inc. v. State of Illinois*, 473 F.3d 715 (7th Cir. 2007). A facial challenge is a challenge that the law is unconstitutional on its face, as opposed to unconstitutional in its application.

[32] 545 F.3d 1023 (Fed. Cir. 2008).

[33] *W. States Paving Co., Inc. v. Wash. State DOT*, 407 F.3d 983 (9th Cir. 2005).

[34] Note that some of the recipients have completed the requisite studies and are once again using both race-neutral and race-conscious means to meet DBE aspirational program goals.

[35] *FAA response to Chairman Costello question for the record on the DBE program (March 17, 2009): Hearing on the FAA Reauthorization Act of 2009 before the H. Subcomm. on Aviation*, 111th Cong. (Feb. 11, 2009).

Airport	DBE Achievements 2004 (%)	DBE Achievements 2007 (%)
Anchorage, AK	6.9	0
Kodiak, AK	11.5	22.3
Palmer, AK	2.8	47.3
Page, AZ	20.2	0.8
Ryan Airfield, AZ	12.9	13.2
Tucson, AZ	7.0	0.8
San Francisco, CA	33.0	34.5
Fresno, CA	8.7	7.8
Palm Springs, CA	6.1	0.9
Santa Barbara, CA	2.1	0.5
Contra Costa, CA	3.6	5.4
County of San Diego, CA	6.9	4.6
Ventura, CA	10.5	40.6
San Diego County Regional, CA	11.3	4.6
Honolulu, HI	66	0
State of Hawaii	22	0
Friedman Memorial, ID	1.7	0
Gooding, ID	7.7	6.4
Pocatello, ID	9.9	15.8
Lemhi County, ID	44.2	1.9
Bert Mooney, MT	4.6	16.8
Missoula, MT	8.9	4.6
Sanders County, MT	4.1	4.8
Sidney Richland, MT	0.2	1.0
Reno Stead, NV	5.2	0
State of Nevada	10.1	8.9
Klamath Falls, OR	0.9	0.4
Portland, OR	27.9	2.0

Source: FAA, 2009.[36]

[36] According to the FAA, DBE achievements are expressed in percentages of FAA financial assistance used in contracting.

In addition, the Federal Highway Administration has compiled similar data, as shown below.

State DOT	DBE Achievements 2004 (%)	DBE Achievements 2007 (%)
Alaska	6.70	8.20
Arizona	9.6	3.77
California[37]	10.4	6.6
Hawaii	9.0	2.0
Idaho[38]	4.35	14.79
Montana	5.38	5.09
Nevada[39]	4	0.11
Oregon	12.80	10.60
Washington	9.7	Contract goals were suspended for only one year (2005 – 2006). During that time, DBE participation was 3.6%. Upon completion of its study, goals were reinstated in 2007.

Source: DOT, Federal Highway Administration, 2009.

This recent evidence illustrates the importance of, and the continuing need for, the DBE program to ensure that minority and women-owned businesses have an opportunity to bid on DOT-assisted contracts.

[37] The DOT states that according to the California DOT Disparity Study (which covered 2002 – 2006), the use of DBEs on federally-assisted contracts was 9 percent from 2002 – April 1, 2006 and dropped to 4.9 percent from May – December 2006.

[38] According to the DOT, the FY 2007 participation number is not based on DBE participation achieved through entirely race-neutral means. It includes multiyear contracts with pre-existing DBE contract goals. The DOT notes that according to the Idaho DOT Disparity Study, DBE participation reported at 7.3 percent for the period 2002 – January 2006; DBE participation reported at 4.9 percent for the period February 2006 – December 2006.

[39] The DOT states that according to the Nevada DOT Disparity Study, DBE participation reported at 4 percent for the period October 1999 – September 2005; DBE participation reported at 1.3 percent for the period October 2005 – 2006.

WITNESSES

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Member of DBE Task Force
Associated General Contractors of America
President - Ebony Construction Company

HEARING ON THE DEPARTMENT OF TRANSPORTATION'S DISADVANTAGED BUSINESS ENTERPRISE PROGRAM

Thursday, March 26, 2009

HOUSE OF REPRESENTATIVES
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE,
Washington, DC.

The Committee met, pursuant to call, at 11:00 a.m., in Room 2167, Rayburn House Office Building, the Honorable James Oberstar [Chairman of the Committee] presiding.

Mr. OBERSTAR. The Committee on Transportation and Infrastructure will come to order.

The purpose of today's hearing is a very serious and deeply felt need to establish a record on the need for continuation of the Disadvantaged Business Enterprise program. The DBE program was established by regulation in 1980, following the Civil Rights Act of 1964. It has been expanded and adjusted and adapted through a series of four highway and aviation reauthorization legislative initiatives, the purpose of which have been to correct past discrimination, current discrimination against minority, against women-owned businesses to ensure they have equal opportunity to compete for Federal funds in our highway, transit, and airport programs.

Major infrastructure investments as the ones we make in aviation and surface transportation program are important sources of revenue to local construction and engineering firms. But for very long, a very, very long time, disadvantaged and minority-owned businesses were not to win portions of those big contracts because of barriers to entry in the sector. They were unable to compete with larger firms who were bidding on these projects. And that is why there was need for the Minority Business Enterprise program.

In 1980, I said it was a regulatory initiative to establish such a program under the Civil Rights Act of 1964. In 1983, there was legislation enacted to establish a national 10 percent aspirational participation goal for firms certified as DBEs for surface transportation programs, for Federal aid to airports for procurement, for construction, for professional services contracts, and for airport concessionaires.

The regulations of DOT require beneficiaries of Federal aid—State and local transportation agencies and airport operators—to establish annual aspirational DBE participation goals that reflect their participation and reflect what participation would be in the absence of discrimination. And that is for prime contracts of more than $250,000.

Now, it is important to understand that technical term. The recipient's goal is aspirational only. Quotas and set-asides are not permitted.

Recipients are required to use race-neutral means to meet as much of their overall goal as possible: providing help for bonding, financing, unbundling large contracts to make them more accessible to small businesses, establishing informational programs on contracting procedures, programs to inform small business enterprises on specific contract opportunities.

But, if a recipient is unable to meet, if a large contractor or the agency contracting is unable to meet its overall DBE participation goal through race-neutral means, then that beneficiary, that agency must establish contract goals, which are deemed race conscious, for DBE participation. So that, in technical real-world terms, means that the recipient has determined that without the use of race-conscious measures, minority-and women-owned businesses would not have an adequate opportunity to participate in these contracts.

The DBE program has faced a number of legal and legislative challenges, but I am very satisfied and very pleased that, with the work that we have done in this Committee over a number of years, the program has withstood those challenges. In 1995, the U.S. Supreme Court ruled, in the Adarand v. Pena case, which everyone knows is the Adarand case, that a race-conscious programs were subject to a strict scrutiny standard of legal review. That gave us a lot of headaches in the TEA-21 legislation. And we have as our lead witness one of those who had the biggest headache, among others, Eleanor Holmes Norton of this Committee, Maxine Waters, who was of great counsel, Eddie Bernice Johnson, now Chair of our Water Resources Subcommittee. All of us counseled together and Mr. Clyburn, then a Member of the Committee, with his resonant voice, was able to bring everybody together. He doesn't need a gavel; he just needs to speak.

So that ruling required that all affirmative action programs be "narrowly tailored to serve a compelling governmental interest." That sent everybody scurrying. How do we narrowly tailor? What do we establish as a compelling government interest? The DOT tried to address that with new regulations to ensure non-discrimination, and every court since then that has reviewed DOT regulations has found them to be constitutional.

Now, our Committee has compiled volumes of evidence, actual and word-of-mouth, case-by-case, that discrimination continues to adversely affect minority-and women-owned businesses across the Country. And these data demonstrate that there is a significant difficulty remaining for small and disadvantaged businesses to compete. If we can expand access to Federal contracts, and have much greater, much more expansive Federal program that will go in the range of $450 billion to $500 billion over the next six years, then we are going to be doing something really significant for the minority community in this Country. Make them full partners in reducing congestion, improving mobility, and keeping America competitive. To keep America competitive, all have to be able to compete, and that is where this legislation comes in.

We on this Committee have supported the continuation of DBE in both Democratic majorities and Republican majorities, although it was a pretty tough negotiation and an intense conference between the House and Senate in 1998 that I want to say Mr. Clyburn played a very, very pivotal role. I am grateful for your contribution, Mr. Clyburn.

Mr. OBERSTAR. Mr. Petri?

Mr. PETRI. Thank you very much, Mr. Chairman, and thank you for calling today's hearing to review the Department of Transportation's Disadvantaged Business Enterprise, or DBE, program. It is important that we review the status of and the need for these programs on a regular basis.

It has been over 25 years since Congress created these programs, which were intended to increase participation in federally-assisted State and local contracts by small businesses owned and controlled by disadvantaged individuals. It is an admirable goal and I look forward to hearing from today's witnesses as to the progress that we have made toward its realization.

Three Department of Transportation administrations, including the FAA, oversee DBE programs. Allowing fair competition for airport construction projects and airport concession contracts is clearly important. It is a goal I support as long as it is determined that there is a compelling need for the program and as long as the program is conducted in a fair, transparent, and legal way.

I look forward to hearing from the Department of Transportation and the aviation and airport representatives on the status of the DBE programs in the aviation sector.

Given the current state of the economy and its particular impact on the airline and airport industry, I am interested in learning how the program is assisting small businesses to compete for newly funded airport improvement projects. Likewise, I look forward to learning more about how the airport concession program is working post-9/11 and during these very, very trying times.

Again, I would like to thank you, Mr. Chairman, for calling this hearing and our witnesses for taking the time to join us today, and particularly someone I admire a great deal, my friend, the Majority Whip from the State of South Carolina, Jim Clyburn, who is kicking things off for this hearing. Thank you.

Mr. OBERSTAR. Thank you very much, Mr. Petri.

I might add Mr. Mica is at a meeting, a roundtable discussion with handicapped persons in our Subcommittee hearing room. I just left that meeting a few moments ago, and he will join the hearing later on.

I would like to ask unanimous consent that Representative Sheila Jackson Lee, in due course, be allowed to sit on the dais, but not to ask questions or to make comments as the hearing proceeds. Without objection, so ordered.

Mr. Clyburn, please proceed.

I will ask other Members to withhold comments because we are going to have votes fairly soon, unless the Whip changes that schedule.

[Laughter.]

STATEMENT OF HON. JAMES E. CLYBURN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF SOUTH CAROLINA

Mr. CLYBURN. Thank you very much, Mr. Chairman, Mr. Petri, other Members of the Committee. Thank you all so much for allowing me to be a part of this process here today.

I am very honored and pleased to appear before you today. As a former Member of this Committee, I know firsthand the significance of the many programs and various matters that fall within your jurisdiction. I am also aware and stand in awe of the tremendously positive impact this Committee's work has on our Country.

I want to discuss with you today one of those various matters that is of great importance and concern not only to me personally, but I believe to our Nation as a whole, and that is the issue of effectively confronting historical inequities occurring in our Nation's transportation industries.

The hearing today focuses on the Disadvantaged Business Enterprise, DBE, programs authorized by Congress and administered by the Department of Transportation. As the Committee is aware, the Department of Transportation DBE programs apply to airports and surface transportation. They have been enacted by Congress to address historic discrimination against minority-owned firms in transportation and to ensure that minority-and women-owned businesses have a fair opportunity to participate in contracting opportunities made possible by Federal financial assistance.

Mr. Chairman, the word discrimination is a tough term. It conjures up images of past times and past acts that many people would like to forget. Any discussion of it makes many people uncomfortable. In this regard, I am reminded of the debate that ensued when Attorney General Holder observed essentially the same point last month.

Mr. Chairman and Members of this Committee, although an uncomfortable discussion at times, it is absolutely essential that we, as Members of Congress and as citizens, be willing to talk about the continuing challenges that racial and gender discrimination and, for that matter, other forms of discrimination raises for public policy.

This Committee has demonstrated on a bipartisan basis its commitment to fairness and to tackling this issue, and for this reason I commend you for holding this hearing today.

Mr. Chairman, sometimes I hear pundits argue that there is no current need for the DOT DBE programs. They reason that times have changed and that America is much more enlightened than when the first statutory DBE program was enacted back in 1983 during the Reagan Administration. Critics and opponents often argue that the DBE programs are legally or constitutionally suspect.

However, despite such assertions, it is my strong belief that discrimination is still a problem, that DOT DBE programs remain necessary, and that the programs are constitutionally sound.

Mr. Chairman, it is true times for minority and women entrepreneurs have improved from what they were when the first DBE programs were enacted. Although I readily acknowledge and celebrate these improvements, I also know that it does not mean that discriminatory conduct has ended. Indeed, there are numerous aca-

demic and statistical studies demonstrating the lingering effects of past discrimination and that there are ongoing incidences of racial discrimination.

Equally compelling are the anecdotal stories that I hear from minority and women businesses in my congressional district and from around the Country. For the most part, these entrepreneurs have to find ways in which to persevere and to overcome. Some are successful and some are not.

I also urge the Committee to keep in mind that discrimination can be both direct and indirect. Either method is just as harmful and just as wrong. For example, beyond the denial of a contract, discriminatory practices can be evident in how a contract is structured. It is in the eligibility criteria for the work, in quotes for materials from suppliers, in the practices of prime contractors towards subcontractors, or in credit or bonding determinations.

Mr. Chairman and Members of the Committee, I speak to this issue from personal experiences. For more than 17 years, immediately before coming to this body, I supervised the investigations of thousands of these cases in my native State of South Carolina. I did so under four governors, to Democrats and two Republicans. Many of those cases had no merit. But, unfortunately, many of them did. The academic and statistical studies and stories of individual entrepreneurs are poignant and painful reminders to us as legislators that progress is not a reasonable justification, or legal or moral, to stop combating inequities and discrimination.

Although we should acknowledge and celebrate the fact that the policies that were first developed in this Committee have helped minority-and women-owned firms participate in the transportation industry, we should also understand that there is ongoing work required if the playing field is going to become truly level.

Earlier, I mentioned that the term discrimination makes a lot of people feel uneasy. Perhaps this is particularly understandable for airport owners, State DOT officials, transit agencies and the like whose leaders are committed to inclusion, who truly engage in good faith efforts for DBE participants, and who fully comply with Federal DBE participation goal requirements. To these leaders I tell you that your commitment is understood and appreciated, and your accomplishments are noted.

Further, I urge you to understand that congressional efforts redress continuing barriers to participation in no way diminishes your good work. To my way of thinking, it is quite the opposite. Your efforts represent a model of best practices that should be emulated.

Mr. Chairman, while addressing discrimination and working to ensure fairness is the right policy, this Committee should not overlook the clear economic case for inclusion and diversity. Our Nation suffers when those who are talented, who have new ideas, and who want to work hard are denied the opportunity to compete because of their ethnic background, race, or gender.

Mr. Chairman, before closing, I want to say a word about the constitutional soundness of the DOT DBE programs. I mentioned previously the DBE programs are intended to remedy discrimination in order to make it possible for all firms to have a fair chance to participate in the business opportunities arising from Federal

transportation spending. The DOT DBE statutes and regulations have been carefully crafted and narrowly tailored to meet the rigorous, strict scrutiny constitutional standards established by the United States Supreme Court in the Adarand decision in 1995. In fact, all of the full United States Circuit Courts of Appeal that have considered the constitutionality of the DOT DBE programs since Adarand and new regulations put in place after that decision have found that the program is constitutional. This conclusion has been affirmed by the 7th, 8th, 9th, and 10th Circuits.

Mr. Chairman, in closing, I want to share with you a very personal experience. A few days after being appointed to run the work training programs for Charleston County, South Carolina, I received a phone call from a Mrs. Rowena Tobias, someone I knew only by reputation and the society pages in the local newspapers. She invited me to her home on Charleston's South Battery, where the two of us spent the better part of an hour reflecting on Charleston's history. She shared with me the fact that Charleston was once the leading economic engine on the Country's East Coast. Whenever there were problems, she said, people would sit down to talk and work their way through them, except for one. She said to me on that day that Charleston lost its standing because whenever the issue of race came up, people would stop talking. She told me that we are not going to be able to work our way through the issues of race if we continue to stop talking whenever the subject came up. She asked me to promise her that I would never stop talking until we solve this very important problem.

Mr. Chairman, I commend you and this Committee for reviewing and discussing the DOT's DBE programs and the issues of discrimination and fairness, and I thank you for allowing me another opportunity to continue keeping the promise I made to Mrs. Rowena Tobias over 40 years ago. Thank you so much for allowing me to be here, and I will answer any questions you may have.

Mr. OBERSTAR. Mr. Whip, thank you very much for that very compelling, powerful, and moving statement.

Mr. CLYBURN. I want.

Mr. OBERSTAR. Is Ms. Tobias still——

Mr. CLYBURN. No, she is no longer with us, Mr. Chairman.

Mr. OBERSTAR. We will keep your promise to her. We will never stop talking——

Mr. CLYBURN. I appreciate it.

Mr. OBERSTAR.—about race——

Mr. CLYBURN. Thank you.

Mr. OBERSTAR.—about its effect. It may be a different color, but I remember as a kid going out looking for jobs when I was in high school, and you would go to the mining companies and they would say bohunks need not apply. It has the same effect. They can tell by your name, if not by your skin color.

Mr. CLYBURN. Absolutely.

Mr. OBERSTAR. Mr. Petri, do you have any comments?

Mr. PETRI. No.

Mr. OBERSTAR. I think we will thank you for your testimony and for your participation, and I will always remember in the markup the conference in 1998 on the TEA-21 legislation, when just having Jim Clyburn at the table, having him say his name and shake his

head was enough to confirm the House position on minority business enterprise issues in that legislation.

Mr. CLYBURN. Well, thank you, Mr. Chairman, for your kindness, and I thank Mr. Petri for his long friendship. He is one of the people that I really admire a whole lot, and I want him to know that the counsel he gave to me during those trying times will never be forgotten. Thank you.

Mr. OBERSTAR. There are a series of votes on the floor, the nine minutes remaining; 420 have not yet voted, so there is plenty of time. We will continue with the next panel and at least let them get started, and that will be beginning with Joel Szabat, Deputy Assistant Secretary for Transportation Policy, accompanied by Mr. Robert Ashby, Deputy Assistant General Counsel for Regulation and Enforcement; Dr. Jon Wainwright, Vice President for NERA Economic Consulting; Chuck Covington, Chief Executive Officer, People's Transit; Ms. Katherine Cloonen, President and Owner of JK Steel Erectors; K. Dennis Kim, President of EVS; Mr. Gilbert Aranza, Chief Executive Officer, Star Concessions; Mr. Anthony Thompson, President and CEO, Kwame Building Group, Incorporated.

We will begin Deputy Assistant Secretary Szabat.

It is probably Hungarian, Szabat.

Mr. SZABAT. Almost, sir. It is Polish.

Mr. OBERSTAR. Polish. Close, but not related. Hungarians are a different ethnic origin than Poles.

Mr. SZABAT. And nothing but respect for them, sir.

[Laughter.]

Mr. OBERSTAR. Well, they are neighbors to my ancestral land of Slovenia.

I read your testimony and read it twice last night, and I thank you for the thoroughness of the presentation, the excellent examples that you provided, and for the very substantive contribution it makes to the purpose of this hearing. Please proceed, summarize your statement.

After Mr. Szabat's presentation, we will recess for votes and reconvene immediately thereafter.

TESTIMONY OF THE HONORABLE JOEL SZABAT, ACTING ASSISTANT SECRETARY FOR TRANSPORTATION POLICY, U.S. DEPARTMENT OF TRANSPORTATION, ACCOMPANIED BY ROBERT C. ASHBY, DEPUTY ASSISTANT GENERAL COUNSEL FOR REGULATION AND ENFORCEMENT, U.S. DEPARTMENT OF TRANSPORTATION; DR. JON S. WAINRIGHT, VICE PRESIDENT, NERA ECONOMIC CONSULTING; CHUCK COVINGTON, CHIEF EXECUTIVE OFFICER, PEOPLE'S TRANSIT; KATHERINE M. CLOONEN, PRESIDENT AND OWNER, JK STEEL ERECTORS, INC.; K. DENNIS KIM, PRESIDENT, EVS, INC.; GILBERT ARANZA, CHIEF EXECUTIVE OFFICER, STAR CONCESSIONS, LTD.; AND ANTHONY THOMPSON, PRESIDENT AND CEO, KWAME BUILDING GROUP, INC.

Mr. SZABAT. Thank you, Mr. Chairman, Members, and thank you for inviting the U.S. Department of Transportation here today to review the status of our——

Mr. OBERSTAR. Turn that microphone closer to you.

Mr. SZABAT.—to review the status of our Disadvantaged Business Enterprise program.

I am Joel Szabat, the Deputy Assistant Secretary for Transportation Policy. Joining me today is Bob Ashby, our Deputy Assistant General Counsel for Regulation and the man, as much as anyone, sir, who is responsible for the detailed information that was provided in our written testimony.

The Department of Transportation has a proud record of reaching out to work with small and minority businesses. We send twice as much of our business to small businesses as a typical Federal agency. Over 40 percent of the Federal Aviation Administration's direct contracting dollars go to small businesses, and the rest of the Department finds small businesses suitable for over half of our contract work.

The DBE program is even more important to minority-owned firms in the transportation field, providing them with an equal opportunity to participate in over $30 billion worth of DOT-assisted highway, transit, and airport contracts each year. In fiscal year 2008, DBEs were awarded $3.3 billion, or 11 percent of DOT's total assisted contracting. Additionally, this year the Recovery Act entrusted $48.1 billion to the Department of Transportation. Over $35 billion of these monies will be provided through assisted contracts covered by the DBE program, creating another $3 billion to $4 billion in job-creating business opportunities for DBEs.

Transportation's DBE program works. As Chairman Oberstar and Congressman Clyburn have already noted, every Federal court that has examined our rule has agreed it is constitutional. The program is narrowly tailored to redress the continuing effects of discrimination. There are no quotas or set-asides. Goals are set based on evidence and no one is sanctioned or loses a business opportunity just for failing to hit a number.

There is powerful evidence of the continuing compelling need for the DBE program. Recipients can set race conscious goals for DBEs only when they conclude, based on the evidence, that racial neutral measures alone cannot create a nondiscriminatory market for DBEs. From 2004 to 2008, recipients found it necessary to use race conscious goals 81 percent of the time. Without this tool, they could not have properly addressed the effects of discrimination.

A 2005 Federal court decision drove this point home by demonstrating the debilitating effect of denying the use of race conscious goals. This decision barred jurisdictions on the West Coast from using race conscious measures until they had conducted disparity studies. Despite the use of race neutral measures by assisted contract recipients, DBE participation declined in 7 of the 9 affected States, 18 of 28 airport districts, and 7 of 9 transit authorities over the three year period.

Disparity studies are providing important statistical evidence of the presence and effects of discrimination in the marketplace. These studies paint an indelible picture of a nationwide problem not limited to any particular minority group or any region of the Country. Disparity studies also collect firsthand stories of how discrimination affects individuals trying to compete on an uneven playing field.

With your permission, the Department will submit summaries of statistical and anecdotal evidence in our additional material for the record.

Mr. OBERSTAR. Without objection, that information will be received and included in the record at this point, following your testimony.

Mr. SZABAT. Thank you, Mr. Chairman.

The anecdotal and survey information provided by disparity studies illustrates a continuing barrier to participation encountered by DBEs; that a lack of access to the informal network of communication and relationships that are crucial to success in the contracting business. Most of us depend on a network of trusted friends and colleagues for advice and recommendations. Unfortunately, in the world of contracting, as in elsewhere, those networks frequently are limited to people of the same race or gender. Possibly the most important function our program performs is to help correct this lack of access.

When there is a race conscious goal in a contract, primes must make good faith efforts to contact qualified DBE firms whose owners may not be part of their normal networks. This process creates business relationships that lead to opportunities for DBEs, and our data shows that this process has been successful where other good faith efforts have failed.

The information we have submitted to the Committee for the record demonstrates a clear, compelling, continuing, nationwide need for the DBE program. Within DOT, we are continually working to improve the program to meet this need.

Thank you, Mr. Chairman, Members. Mr. Ashby and I will be happy to respond to any questions you may have.

Mr. OBERSTAR. And we will come back to the rest of the panel. There are two minutes remaining on this vote. We will all have to leave for the House floor and reconvene as quickly as possible after the last vote.

The Committee will resume its sitting and the Chair can confidently announce there will be no more interruptions from the House floor. The last votes have occurred. Now we will proceed with the hearing and thank Secretary Szabat for his presentation.

Mr. Ashby, you are next. You are not speaking separately, Mr. Ashby?

Mr. ASHBY. No, sir. I am in the capacity of assisting with answering questions that you may have.

Mr. OBERSTAR. You are support services for——

Mr. ASHBY. Exactly, sir.

Mr. OBERSTAR. All right. Okay. Very good.

Dr. Wainwright.

Mr. WAINWRIGHT. Thank you, Mr. Chairman, Mr. Guthrie, other members of the Committee. Thank you for your invitation to appear here today. My name is Jon Wainwright. I am a Vice President with NERA Economic Consulting. I hold a doctorate in economics from the University of Texas at Austin.

With the Committee's permission, I would like to include my written testimony in the record as if read in full.

Since 1989, I have devoted my professional life to studying race and sex discrimination and its impact on business enterprise. I

have served as the project director or principal investigator for over 40 studies of business discrimination. I have authored a book on the subject and have provided expert testimony in Federal and State courts on these and related matters.

The primary bulwark against business discrimination has been the use of public sector purchasing power to promote fair and full access to government contracting opportunities for minority-and women-owned businesses, and to mitigate the impact of such discrimination in the private sector. The USDOT DBE program is a key example of such policies at the Federal level.

Because the DBE program is subject to the strictest standard of constitutional scrutiny, it is important that any DBE studies used to assess discrimination and to assess the presence of DBEs in the transportation sector are of high quality, independent and objective, academically rigorous, and incorporate as much relevant evidence as possible. It is also important that DBE studies be carried out by economic and statistical experts who can be qualified in Federal court to testify regarding their data, methods, and findings if called upon to do so.

In 1999, Congress reviewed and revised the DBE program's authorizing statute and implementing regulations. As already mentioned, every court that has considered the issue has found the DBE regulations to be constitutional on their face. Whether USDOT grant recipients can withstand an as-applied challenge, however, turns at least in part on whether they went to court prepared with a high quality DBE study and an expert to testify about it.

For example, when the DBE programs in Minnesota and Illinois were challenged, such studies played important roles in successfully defending the constitutionality of the programs applied by each agency. In contrast, when the program at Washington State was challenged, no study or expert was proffered at all. As a result, the 9th Circuit lacked the benefit of any guidance on the correct economic analysis of discrimination and made several serious errors as a result.

Although unrelated to the USDOT DBE program, a similar situation recently occurred in the Federal Circuit Court of Appeals in the Rothe case, concerning the DoD program for small disadvantaged businesses. Here again, the defendants proffered no study of their own, nor an expert to testify about such a study, and once again the court made several serious errors in its economic reasoning, concluding, for example, that factors such as firm size should be factored into study estimates of DBE availability.

Since 2000, I have directed 16 studies at NERA where one or more of the participating entities was a State Department of Transportation, transit authority, or airport. With the Committee's permission, I would like to provide copies of these studies for the record. The studies span the Country. Of the 75 Members in this Committee, 50 hail from States represented in the studies submitted. Despite their geographic diversity, the study findings show much more similarity than difference. DBEs throughout the Nation continue to face large disparities in almost every aspect of business activity that can be quantified.

It is fair to ask whether these disparities result primarily from discrimination or from other factors. Our DBE studies have put such questions to the test using the most recent available data. Our studies find that even when other nondiscriminatory attributes are held constant, the disparities between DBEs and non-DBEs tend to remain large, adverse, and statistically significant.

In addition to statistical evidence, we have conducted thousands of surveys and hundreds of in-person interviews with DBEs and non-DBEs alike, and the results are strikingly similar across the Country and across different industries. There is general agreement that without the use of affirmative remedies such as the DBE program, these firms would receive few opportunities on government contracts, as is the case on public contracts without goals, and especially in the private sector.

Our studies' findings strongly suggest a continuing need for the USDOT DBE program to help remedy the ill effects of business discrimination in the transportation sector. The economic consequences of that program are significant. It has improved economic opportunities for minorities and women in business, and thereby improved the overall competitiveness and efficiency of the American economy.

Thank you. I would be glad to answer any questions.

Mr. OBERSTAR. Thank you very much, Dr. Wainwright. Those are very compelling statistics and reports that you cited in your testimony. We will come back to that later. And the information you requested will be received for the hearing and perhaps, depending on the volume of the documentation, included in the hearing record at this point. If it is too voluminous, it will be included in the Committee files.

Mr. Covington.

Mr. COVINGTON. Good morning, Mr. Chairman.

Mr. OBERSTAR. Please put your microphone on, please.

Mr. COVINGTON. Good morning, Mr. Chairman and Members of the Committee. My name is Chuck Covington, and I am the President and CEO of People's Transit in Detroit, Michigan. My company provides vehicles and crews for ground transportation, including Detroit Metropolitan Airport.

Thank you for the chance to talk about the airport DBE program. Small and minority businesses are the backbone of this Country. Without the DBE program, big business would steam roll right over us. I believe that tendency is partially responsible for the economic trouble we face today. One thing is clear: small minority businesses are not the ones that have brought our Nation's financial system to the brink.

I have dealt with discrimination my entire life, and I still deal with it. Last year, one of my employees receive a quote on new tires. The supplier quoted us more than $613 for each tire. I called a white business associate and learned that he had only paid $400 per tire for the same tires, from the same supplier. My employee who obtained the original quote has what might be described as an ethnic sounding voice. So I used a white voice, called the tire supplier, and got the $400 price.

When asked why we had initially been given the higher price, nothing the supplier said justified the actions. A 50 percent mark-

up on one of the most basic supplies in my business puts me at a huge disadvantage. Today's business climate is tough, and it has been tough in Michigan for years. No business person can succeed if they are paying a race-based markup on supplies.

Some other examples are important. Even those of us who have accumulated wealth, for instance, equity in our homes, face more difficulty getting loans than similarly situated white entrepreneurs. Housing discrimination is real. Early in my career I responded to an ad for an apartment, but when I showed up, I was told that the apartment had been rented. I knew what was going on, but I had my white secretary call and inquire. She was told the unit was still available.

Housing discrimination matters, because, for many minority businesses, our homes represent our best source of collateral. Given Congress's investigations, you know that minorities pay higher mortgage rates. We also pay higher business loan rates, if we can get them. As long as housing and lending discrimination persists, minority business owners will be at a disadvantage.

Sadly, I have to deal with bigoted business people. Not long ago, I was sued by a white subcontractor. We resolved the case to my advantage, and later I heard that outside the courtroom the CEO that sued me had said that he never believed that N word and his Jew lawyer would take the case so far.

That slur says nothing against me, but it says a lot about the person that used it. One thing that it tells me is that I still have to work harder than the majority of business owners to succeed. Unfortunately, the good ol' boy network still exists. Breaking into that network is critical. I have seen situations in which unqualified majority firms were hired over me.

In a recent job involving shuttle services at a local mall, my bid was rejected and a non-minority firm was hired. I was brought in as a subcontractor and my drivers frequently had to manage the job and fill in when the prime's drivers did not show up. I was paid the same price that I had originally quoted the mall. I was more qualified; my price was fair; so why didn't I get the prime contract? I believe it has to do with the networks.

I serve in many public service and civic roles in my hometown, Van Buren Township, Belleville, Michigan. In these roles, I sometimes attend events at a local private club called the Eagles Club, one of the main places that business people in my area network. But the Eagles Club has an unwritten rule: African-Americans cannot be members. It sickens me that this club in my community would exclude me and my daughters because of our race. And this also impacts my business. If business people do business with those with whom they are comfortable, how am I supposed to succeed if I can't even join the club where they socialize?

The current DBE program helps enormously. Still, the program can be improved.

Thank you, Mr. Chairman, for the provisions already included in H.R. 915 to improve certification training and adjust the personal net worth cap for inflation. I believe that the DBE program should also be extended beyond AIP funds to include TSA and PFC funding. The discrimination that DBEs face is not limited by funding

source, and other efforts to end discrimination should not be limited either.

Thank you again for the opportunity to speak here today. I would be happy to take any questions you might have.

Thank you very much for that very powerful testimony. I appreciate your being here. We will return to that theme later.

Ms. Cloonen.

Ms. CLOONEN. Good morning. Thank you for inviting me to testify. My name is Katherine Cloonen. I am President and Owner of JK Steel Erectors, a small construction company. I started the company in 1991. We specialize in rebar and wire mesh installation in concrete and structural steel erection for transportation and other projects. The geographical area we cover is the rural area south and west of Chicago, Illinois.

JK Steel Erectors is certified as a Disadvantaged Business Enterprise with the Illinois Department of Transportation. I was certified by IDOT in November of 2000.

This testimony will be on three issues: one, the difference the DBE program has made; two, the discrimination I have faced; three, why the Disadvantaged Business Enterprise program needs to remain.

The difference the DBE program has made is dramatic. Since being certified, my sales have more than quadrupled. Before being certified, there was a lack of opportunity. Very few prime contractors used me. I was limited to a very small geographic radius and could not expand. I could not get my foot in the door. In many cases, smaller companies are not given a chance by the larger companies unless they are certified as a DBE.

Certification helps JK Steel and companies like mine increase in size. Once we are in the program, we are able to bid on larger jobs, get better bonding, get better loans, and purchase more equipment.

The certification has given JK Steel Erectors exposure. Being certified doesn't guarantee a job, but it does open doors. I still have to be the low bidder.

Discrimination has been, and still is, a factor for women and minorities in the construction business. I will illustrate a few examples. One company called and, instead of giving me an invitation to bid, the man asked if I wanted to make more money and he gave me an invitation to a meeting to sell health and beauty products for a pyramid company. I told him that if I had to sell his company's products in order to be a subcontractor for him, I would not do it. I have not done any business with that company since then.

Another instance of discrimination is that there are companies that will not do construction business with a female. I sent one of my male employees to negotiate a job and to be a project manager with such a company. When the owner understood that I had the day-to-day control, he never asked me again for another quote.

Often, I will get a call asking for the person in charge of estimating, and I say that I am that person, and then the caller hangs up. Once in a while the person says, well, I want the boss or the man in charge, and I say I am the boss, I am the man in charge; and I still hear a click on the other end of the phone. I was not taken seriously by contractors or union business agents.

Women are not afforded the networking opportunities that men are allowed, and without the DBE program many prime contractors just would not hire me.

The Disadvantaged Business Enterprise program needs to remain in the Department of Transportation. Even though I am now certified, I still have to prove myself on a day-to-day basis, and we are rated in several categories. It is not enough for the State of Illinois to say that I am qualified to do the work; I have to be low bidder for the steel and rebar on the project. We have to perform in a timely manner according to the IDOT specifications and turn in all the required documentation. I am responsible for several people's wages, benefits, and tax burdens.

Small businesses, including women-and minority-owned businesses, are the driving force in the United States economy. It is vital that, as the big companies merge, the smaller companies such as the DBE companies remain to help fuel the local communities. This is particularly true of areas away from the urban regions, where there is still a lack of true diversity.

If women and minorities were not a part of the DBE program, our companies would not get jobs just because some contractors feel that we are incapable of running a construction company on a day-to-day basis. Our businesses would take a backwards step to the struggles of where we were before we were certified. We are simply asking for the opportunity to bid and receive projects without bias.

I am grateful for the DBE program. Being certified with IDOT has given my company credibility. I am a director on the board of Associated General Contractors of Illinois. I serve on the Ironworkers Mid-America Pension Plan, and I am a trustee on the Ironworkers Local 444 Joint Apprenticeship Training Committee. These appointments would not have happened without the DBE program.

For these reasons, the DBE program should remain a part of the Department of Transportation. Thank you very much for your time and consideration.

Mr. OBERSTAR. Well, thank you for the courage to speak forthrightly about your experiences. We will come back to that testimony.

Mr. Kim.

Mr. KIM. Thank you, Mr. Chairman and Members of the Committee. My name is Dennis Kim. I am the President of EVS, Incorporated. EVS is an engineering company in the Twin Cities, Minnesota. As you know, Minnesota is Mr. Chairman's home State. I came to Minnesota in 1969 from South Korea. I attended the University of Minnesota when I arrived. Oftentimes, people ask me why do you still live in Minnesota when it is so cold. As you know, it can go down to 20 or 30 below zero. Usually, I answer that it is cold, we got frozen in Minnesota.

So I joined EVS when there were four people at the company, hoping some day I can become a successful business man. In 1982 I took over EVS. One of the ways to grow the business was to get involved in government contracting, so in 1984 I obtained a DBE certification. It was time-consuming, also a difficult process.

Currently, we have 22 employees, with an annual revenue of $2.5 million to $3 million. We are civil engineers land surveyors working on infrastructure projects.

I am proud of what I do as a small business person. In 1990, we designed four lake dams in Minnesota, which was a finalist for American Society Civil Engineers award for excellent engineering work. We also designed the decision driving course at Dakoma Technical College in the Twin Cities. The driving course is still being used to train police officers, firefighters, and commercial truck drivers. This project also received an outstanding award from another engineering group.

On a personal level, because I am from Korea, I eat Korean food. Some of you may know kimchi as supposed to be very good, healthy food, but it is also stinky. So people think it is really stinky because there is a lot of garlic in it. As you know, a lot of medical studies show garlic is good for our health. But, anyway, you know, people complain about the smell, so I have to mask the smell, so I have to brush and use mouthwash and drink milk, because I read somewhere drinking milk will mask stinky smell. Nobody has proved it yet, but I still try.

I want to talk about one instance which made me humiliated as a small business owner. In 1998, I first learned of a subcontracting opportunity with a white owned company. It was a highway design project with Rochester District of Minnesota Department of Transportation. The company was successful in winning the contract. The contract was to design several miles of highway. EVS was chosen as a subcontractor because we had contacted that company about this project. Also, there was a requirement of DBE requirement.

However, the project was delayed over a year because the scope of the project had been expanded after the contract was awarded, then there had been a number of issues with the project, including expanding the scope of work, delay of the work, and other engineering problems.

In 2003, I was summoned to a meeting in Rochester. When I walked in, there were three people in the room from the company and DOT. They were all while male Caucasians. I was told that I was at fault for the many problems with the project. Then they kicked me off the project, even with my protest. Later on, they hired another subcontractor owned by a Caucasian male. I felt that their reason for unfairly targeting me in this way is that I am Asian-American. They would not have done this to me if I were Caucasian. That is what I thought.

I did not complain to anyone about this because I was afraid of retaliation, and I did not want to be labeled as another minority contractor whining because I have enough comments about some people saying many DBEs complain without any good reason. Later on I learned we were blacklisted anyway because, when I tried to get the project, we were not successful.

I welcome the opportunity to do more work with the Minnesota DOT. In particular, I am excited about the stimulus package for infrastructure and reasonable energy projects. Since stimulus dollars have been available, I contacted the Minnesota DOT about the new opportunities. I noticed that they became a lot more friendlier, and

I hope this will continue. I really help that my story will motivate you to not only reauthorize the DBE program, but to improve it. Thank you.

Mr. OBERSTAR. Thank you very much for your testimony. Your comments about your English and the accent, had I been with you, I would have said to any of those folks, come and walk the streets of Iron Range communities in Minnesota when I was growing up. There you could hear accents of Slovenian, Croatian, Serbian, Italian, Finn, Norwegian, Swede. They all sounded different from British English.

Mr. KIM. Thank you, sir.

Mr. OBERSTAR. Mr. Aranza.

Please use your microphone.

Mr. ARANZA. Good afternoon, Mr. Chairman——

Mr. OBERSTAR. We want to hear every word you have to say.

Mr. ARANZA. Okay.—and Members of the Committee. My name is Gilbert Aranza, and I am the CEO of Star Concessions. Thank you for holding this hearings and inviting me to testify.

Star Concessions is a 100 percent minority-owned DBE operating food and beverage and retail concessions in airports, including DFW and Love Field. My company has excellent credentials, delivers top national brands and is highly qualified. Even so, we face race discrimination that makes it much harder to succeed. I have no doubt that, without programs like the FAA's ACDBE program, I would not have had any opportunities to succeed in the airport environment.

I don't believe the leaders of major companies are inherently bad people, but experience has taught me that many of these leaders do not see diversity as being good for the bottom line. Although these leaders advocate diversity, without the ACDBE program, I do not believe they would provide opportunities for minority-owned companies.

Our Nation has made progress against racial and ethnic discrimination. However, much remains to be done. Discrimination still negatively impacts minority businesses in many areas. Four of them are capital and financing, business networks, treatment by suppliers, and enduring stereotypes.

Discrimination in capital markets makes it incredibly difficult for minority entrepreneurs to obtain regular bank loans. For instance, I might be able to obtain 15 or 16 percent money, while a majority player has a greater chance of obtaining 7 or 8 percent money. I have been lucky with some banks, but 90 percent of my financing comes from lenders chartered by the Federal Government like the SBIC program to work with small and minority-owned businesses.

In terms of business networks, the good ol' boy network still prevails. Conventional wisdom says if we go to the right schools and join the right clubs, we will build good business networks. These business networks are essential to success, but minorities are often shut out.

I graduated from the University of Texas at Austin, one of the State's flagships schools, and from Harvard Law School. However, these degrees have not benefitted me in the same way that they have benefitted non-minority graduates. Nor have they insulated me from discrimination. As a minority, joining a professional club

in Dallas came at a price. Being a Member meant I had to tolerate discrimination in the form of racist jokes and having fellow Members mistake me for a waiter at various functions.

While airports and other public entities have laws enforcing equal opportunity, private businesses do not. Consequently, another problem faced by minority entrepreneurs is discrimination by vendors. I have worked with distributors who have been responsive to my needs. I have also had to deal with the opposite: distributors who ignored me completely. Price is also a problem. I had one supplier who said he was giving me mom and pop prices, prices that were ridiculously high. I believe that my race is one of the reasons for this treatment. I suspect that most of my suppliers still think, oh, he is just a minority. But now they have to think twice about acting on that attitude. Because of the DBE program, I had a chance to succeed and I have. Now, most suppliers who want access to the large customer market available in the airports where I work understand that I represent their best access to that market.

Still, I am certain that if the DBE program disappeared, many of these large majority-owned firms would stop doing business with minorities altogether. Enduring stereotypes may be one of the reasons for that. Recently, a distributor came into one of my stores and demanded to speak to the owner. Based on his rude and dismissive tone, I knew it hadn't even entered his mind that the Hispanic guy in front of him might be the owner.

I try to practice what I preach. I extend the benefits of the DBE program to others. For me, hiring and partnering with African-Americans is a priority. I don't have to do it; I am already 100 percent minority-owned. I do I because I believe it is the right thing to do. Fostering diversity and making money are not conflicting goals; it is good for business and good for society.

I am very supportive of the DBE program, the SBIC program, and other programs that assist minority business owners. If it weren't for those programs, I would not be where I am today. That said, there are ways that these programs could be improved. In the current economic climate, minority businesses need more and better access to credit and venture capital, and newer, smaller DBEs need proactive information and assistance from airport staff.

Thank you for the opportunity to speak to you today. I am happy to take any questions you might have.

Mr. OBERSTAR. Thank you very much for your testimony as well. We greatly appreciate your contribution.

Mr. Thompson.

Mr. THOMPSON. Thank you. My name is Anthony Thompson. I am the President and CEO of the Kwame Building Group. We are a local construction management company in St. Louis, Missouri, but we do have offices in Pittsburgh, Dallas, and now recently Seattle. My undergrad is an architectural engineering from the University of Kansas. I also have a degree in architecture for environmental design from the University of Kansas. I have an MBA in Finance and a Masters in Engineering from Washington University.

After working with the Corps of Engineers, Monsanto Chemical Company, and Anheuser-Busch, one of the largest brewers at one

time in the world, I decided to start my own business, and I was surprised at the challenges that I was faced with coming from the private sector with so much experience in construction management and the education to be successful in the business. I decided to start my own business and go through the exhaustive process of becoming certified and so forth. It was surprising to me that unless I was certified or unless I had gone through the rigorous process of being certified, none of the white or prime contractors really wanted to do business with us unless they had to, unless it was a requirement. So there was no opportunity for me to show my experience or what I was capable of without having that certification.

So after getting the certification, we began to win work. We were subcontractors to various firms throughout the Country, and the opportunity became very exciting for me because now I was able to employ other African-Americans, and women. I am proud to say that we currently have about 75 employees, of which 70 percent are minorities and women in senior and leadership positions. The average salary within our organization is $70,000 a year, and we give back to the community because also, like Mr. Aranza, we employ other minority vendors, we employ other minority and African-American suppliers and subcontractors.

We could easily say we don't need to do that because I am a 100 percent minority owned business, but I have an obligation to give back to the community. My mother has told me that none of us have made it until all of us have made it. I live by that, I run my business that way, and the opportunities are great. And the return on the investment that the DBE process has given us allows us to give back philanthropically in our community as well. We donate to various causes, mentoring programs, as well as scholarships. We have $600,000 worth of endowed scholarships for minority youth that we have established. We are trying to make that $1 million within the next four years.

The growth of our organization has been great, but doing business with minority firms and the DBE program should be a business imperative, not just a feel good sort of program. It does not cost more money to do business with minorities. It is more economical to do business with minorities and DBEs. For example, the east terminal for Southwest Airlines that was constructed in St. Louis was $15 million over budget when it was initially presented to start construction. They could not start the project because they did not have the funds. We were brought on to augment the existing staff to do value engineering and support estimates to get the cost down within the budget. We were able to find those $15 million worth of savings and, as a result of that, they hired us on to be the construction manager to oversee the entire construction of that project.

Our fee for the four years that we managed that project was $4 million, so that was a pretty good return on investment for a $15 million savings on a project of that magnitude. That led to us being a joint venture partner with two of the largest construction companies in the world on the $1.5 billion expansion at Lambert International Airport, of which we gained experience and were able to lead the team at that point. That led to us now recently being

prime contractor selected for some taxiway expansions and renovations at Lambert, as well as Seattle Airport.

So, as you can see, the growth and development I tried to create opportunities, I think you may have this book in front of you that lists several of our transportation-related projects throughout the Country that have been led by our organization, and there are a lot of minorities within our organization that would not have a chance to lead major projects had they not come to work for a Disadvantaged Business Enterprise.

So thank you very much, and I would be glad to answer any questions as we move forward.

Mr. OBERSTAR. Well, yours is certainly a wonderful success story. Great to have that contribution.

Let me ask Ms. Brown if she has some comments.

Ms. BROWN. I am ready, Mr. Chairman. First of all, let me just thank Mr. Chairman for holding this hearing and thank the participants for coming and giving their stories.

We just passed the largest stimulus bill, the recovery bill, billions of dollars, and it seems as though there is some push-back from some of the different agencies as far as minority participation, and particularly in the area of transportation, whether I am talking about the airport or transit. I want to know is there anything in the bill from the Department that would cause the push-back? Because, as you just heard, I feel that minority participation is crucial. When we passed that stimulus bill, I look at it like my grandmamma's sweet potato pie: I want my slice hot out of the oven. And I am sure that is what you want too. And we all contribute to that pie, and I want to hear from the Department on this issue.

Mr. SZABAT. Madam Congresswoman, I don't know that we will get our Recovery Act money hot out of the oven, but we do intend to move it very quickly. But of the $48 billion that was entrusted to the Department in Recovery Act monies, over $35 billion will be distributed as formula grants through Federal Highways, through the Federal Transit Administration, and through our Airport Grant and Aid program. All of those monies are—I say again, are—covered by the DBE program. We estimate that that will lead to, conservatively, at least $3 billion, probably closer to $4 billion in business opportunities for DBEs.

Ms. BROWN. To follow up, there was a bonding program because some minorities have problems. Can you tell me what is the status of the bonding program?

Mr. SZABAT. Yes, Madam Congresswoman. There is a $20 million program for bonding assistance for DBEs that was included in the Federal Highway portion of Transportation's Recovery Act. We are working with the Small Business Administration in order to craft an assistance program. If we use the money straight for bonding, we would be able to help fewer than 200 small businesses. So what we are looking at is to a program where we would actually cover the costs of small businesses that participate in the Small Business Administration's bonding program, in which case we could actually assist far more businesses with that $20 million.

As you might expect, working between two agencies with two different programs, there are some technical matters for us to work

through, but we are confident that we will have something set up within the next few months.

Ms. BROWN. And I guess I just want to follow up again because it seems like there have been some push-backs from some of the airports that received dollars prior to the stimulus. What would cause them to think that the program is not——

Mr. ASHBY. Madam Congresswoman, we had received some expressions of concern from recipients in various modes along the lines that because the stimulus funding was going to increase the amount of funding available for projects as much as it is, that somehow they might not be able to find sufficient DBE capacity in order to do the job. We weren't convinced by that. We put out guidance very early on after the passage of the legislation that said, I think very plainly, that not only do the DBE programs apply to this stimulus funding, but that we expected our recipients to do further outreach to use some of their underutilized DBE capacity, of which there is some, and to make sure that the promise of these stimulus funds extended to all businesses wanting to work with us, including DBEs.

Ms. BROWN. Thank you.

Mr. OBERSTAR. Ms. Johnson, our Chair of the Water Resources; Ms. Brown, Chair of our Rail Subcommittee, thank you.

Ms. Johnson?

Ms. JOHNSON. Thank you very much, Mr. Chairman. Let me commend you for having this hearing, and I would like to ask unanimous consent to place my opening remarks in the record.

Mr. OBERSTAR. Without objection, so ordered.

Ms. JOHNSON. From the Department of Transportation, I have read your testimony, and you cite some commonly known barriers to success for DBEs, such as the lack of bonding, in addition to a host of other issues. As you may know, largely due to the leadership of this Committee, the recently enacted American Recovery and Reinvestment Act provides $20 million for that bonding, and I have written to the Secretary inquiring as to how these funds would be allocated. You just finished giving some on that, but I would like to hear a little bit more in depth. And we will be having some local meetings in order to get this word out so that, in case it might be able to assist some of the DBEs.

You know, it has not been easy over the years. Back when I was in the State Senate, I had to write the Department and ask them to withhold money from Texas until they worked out something, and it took so long I forgot I had written that when Texas called and asked if I would release it. But very often these contracts are made very, very large purposefully, but they don't have to be. So do you do anything actively to get the information out to prime contractors?

Mr. SZABAT. Yes, Madam Congresswoman. To handle your questions in order, first, regarding the $20 million in assistance, the Department will commit to working with you and your staff as we develop criteria in conjunction with the Small Business Administration, to share that with you, with any other Member of the Committee who is interested, before we actually go out and make a public announcement of what we intend to do so that you are

aware of what we are trying to accomplish and how we intend to accomplish that.

In terms of getting the information out to prime contractors, remember, our program is essentially three distinct programs. The Federal Aviation Administration, the Federal Highway Administration, and Federal Transit Administration each run their own. They have a series of seminars, nowadays webinars that they use to get the words out. And I think many of the contractors here would indicate that Federal Register notices and the other ways that you normally use announcements to get information out to contractors is one of our more effective ways.

But, again, we would be happy to share with you information from each of our three modes and how they communicate their programs to the community.

Mr. ASHBY. And if I might add, with respect to the issue about unbundling larger contracts, that is something that we have always endorsed and supported in our regulations. It is specifically mentioned there. We also recognize, though, that unbundling is often something that has been easier to praise than implement, and for that reason, in some regulatory proposals that we anticipate publishing in hopefully the very near future, we are going to be seeking comment and suggestions on additional ways that we, as the Department of Transportation, can do more to encourage or push grant agencies to unbundle their contracts and divide them into smaller chunks that are more readily able to be performed by small businesses.

Ms. JOHNSON. Thank you. Now, I hear what you are saying and I can appreciate it very much. You know that these projects have to be started within a certain period of time, but you are going to move expeditiously to make sure that you are on target with them having opportunity to participate?

Mr. ASHBY. That is certainly our objective.

Mr. OBERSTAR. If the gentlewoman would yield just a moment.

Ms. JOHNSON. Yes.

Mr. OBERSTAR. That is a very important point that you have raised, about the size of contracts. The reverse side of that coin is that when State DOTs want to achieve some other objective, they segment contracts into smaller pieces and award this piece and that piece at a time in order to avoid, as they have done in certain circumstances, avoid Davis-Bacon requirements. And we certainly don't want to see that kind of avoidance either. But breaking contracts down into more manageable pieces as part of an overall project so that there are elements that can be bid by minority enterprises is an important factor.

Are there regulations that deal with this or is there guidance, is there policy guidance for State DOTs as they undertake these projects?

Mr. ASHBY. Our existing regulations specifically talk about unbundling as one of the key race neutral efforts to help small businesses, including DBEs, realizing that I think everyone perceives there is more needing to be done in that area. As I said, we are in the process of proposing regulations and asking for comment on additional ways of encouraging unbundling by our grant recipients.

Mr. SZABAT. I will add to that, Mr. Chairman. There is, as the Congresswoman alluded to, there is an inherent tension with what we are trying to accomplish with the Recovery Act, to get the money out quickly to create jobs. We are aware of that. Depending on whether it is an airport, a transit or a highway project, we have between 120 and 180 days, the recipients do, to get half of their money obligated. In those cases, to be obvious and honest, our hope is to work with them to find projects that are ready to go, and if they have contracts that are ready to go, we will be less enthusiastic about pressing them to unbundle them if it means a delay in getting people to work. That is an honest answer.

Having said that, those contract opportunities are still covered by the goaling of DBE. So if there is in fact a tradeoff, the tradeoff is between the opportunity of having more prime contracts and increasing the subcontracting opportunities. We hope it doesn't come to that, but we do recognize that there is a tension there, and we are watching that very closely.

Ms. JOHNSON. I know my time has expired, but give me——

Mr. OBERSTAR. No, time has not expired. I took some of the time.

Ms. JOHNSON. Oh, thank you, Mr. Chairman.

Give me a frame of time that you have in mind to achieve this.

Mr. SZABAT. If I could ask you to expand the question, to achieve which goal, Madam Congresswoman?

Ms. JOHNSON. Going to Small Business Administration. You know, sometimes government works slowly, and I was just trying to determine how long you anticipated working that out so you can——

Mr. SZABAT. For the DBE granting, I would be surprised if it took us more than three months to have that out the door.

Ms. JOHNSON. By that time, those contracts will be out there, because if they don't get them started by then, they have to send the money back. So you are going to have to move faster than that to give us some opportunities.

Mr. SZABAT. Then we will do it faster than that.

Ms. JOHNSON. Okay. Could you keep in touch with me?

Mr. SZABAT. We will make it a point to.

Ms. JOHNSON. Thank you.

Mr. OBERSTAR. Following up on Ms. Johnson's questions, I first want to observe that, thus far in the recovery program, OMB has allocated to DOT $40 billion for highway and transit funding, and an additional amount to wastewater treatment. Thirty-three States have been approved for 800 projects, totaling $2.9 billion, which is 10 percent of the recovery funds. And I also note for the record that the Congressional Budget Office was wrong, Office of Management and Budget was wrong, Larry Summers was wrong. They said that they would send out only 2 percent. They were wrong, and I said so. And now you have proven them wrong and the States have proven them wrong. Eleven contracts in my own State of Minnesota have already been awarded for a net of 1,000 new jobs created, just as one example. Federal Transit Administration has awarded grants for 500 transit vehicles—trolleys, buses, vans, ferries, and bus shelters. Amtrak has sent $938 million in capital improvement grants out, contracts out, and for rehabilitation of 68

passenger cars for Amtrak at a value of $82 million on that contract; replacing a bill on the Niantic River for Amtrak.

This is evidence that the Department is really moving out, the States are moving out smartly and they are doing the things they need to do. The question is on the size of these contracts, those that I have seen are in the range from $500,000 to $10 million or $12 million. There are a couple that are in the range of $100 million. Do you have information on sort of the average size of contract that Mr. Thompson, as a prime contractor, would bid on or that Mr. Aranza, Mr. Kim would bid as a subcontractor or Ms. Cloonen?

Mr. SZABAT. Mr. Chairman, we don't have that information in yet, and that is because it has only been in the last two weeks that we have started collecting information that we have actually had outlays going out the doors for these contracts. That information is coming in. It is coming in very rapidly and we are in the process of setting up our systems to capture that. So we can easily pull together, within the next week or so, snapshots and crosscuts of that information, but it will probably be a month or more, probably two months, closer to two months before we actually have the systems up and running so that we are actually able, on a real time basis, to reflect that level of granularity in tracking contract data.

Ms. BROWN. Mr. Chairman?

Mr. OBERSTAR. Yes. The gentlewoman from Florida.

Ms. BROWN. On that point, could I raise another point? I think what we have had is eight years of not monitoring the departments, so I am very interested in the follow-up, making sure we are monitoring it and let the agencies that we are watching them. They have programs in place, they have minorities in place that they work with, and we want to make sure that they get part of those contracts. So I think it is the feedback. What you said, generally, for them to report back to us, to report back to us on the progress of the money going out, but also what kind of minority and female participation. See, those agencies then will keep that in mind as they award these programs. This is not anything new. We just want them to do their jobs. But we need to monitor what they are doing.

Mrs. NAPOLITANO. Would the gentleman yield?

Mr. OBERSTAR. The gentlewoman from Texas has the time.

Ms. JOHNSON. Yes, I will yield.

Mrs. NAPOLITANO. I will be very short. Thank you, madam, for yielding to me.

On the same point, Ms. Brown is correct, we have been dealing with this for many years, since I was in the State House. How do we know that this is being enforced? Is there anything that tells us that you audit some of these for unbundling? Is there something that can tell this Committee how effective that has been or not been, following up on Ms. Brown's question? Is there a follow-up to be able to indicate whether or not, even if you unbundle, many of those who are testing to be minorities are fraudulent minorities; and are you going after the fraud perpetrators and blacklisting them for a few years, at least, to allow the legitimate minorities to be able to be successful?

Mr. SZABAT. Yes, Congresswoman. Whenever you have a program like this, there are at least two enticements for fraudulent

behavior. One is, as you say, the people who will falsely represent themselves to be minorities, and the second one is that you will have prime contractors who will either establish fronts or will bring in a DBE firm and then discard it after they have won the contract. We look for both of those.

Now, given how many DBEs at any one time—there are 27,000 or so out there and other firms that are interested in applying—and how many contractors active at any one time, our single best source of information is other people, especially other contractors, filing complaints to indicate that they believe that there is fraudulent behavior. Every one of those complaints is investigated by our staff and civil rights offices within each of the modes or within the Office of the Secretary, and, separately, the Inspector General's Office has also conducted investigations.

Mr. ASHBY. If I may add, Congresswoman, our Inspector General's Office has made DBE fraud a primary emphasis area. They have had a great deal of success over the last five years or so. They have taken action. This resulted in something like 49 indictments, 43 convictions, millions of dollars in fines or forfeitures, and a lot of jail time. I personally had the privilege, a year and a half ago or so, of testifying in a DBE fraud case brought by our IG and U.S. Attorney folks in Miami which resulted in someone who had done a classic pay a DBE not to do the work scheme, five years in jail.

Mrs. NAPOLITANO. You say you do by complaint. Do you actually do any audits to be able to ferret out any of those?

Mr. ASHBY. There are audits by our operating administrations of DBE program performance in general. Our certification office in the civil rights office looks at phony certifications.

Ms. JOHNSON. Reclaiming my time.

Mrs. NAPOLITANO. I am sorry. Go ahead.

Mr. ASHBY. So there is a good deal of work that our people do both by themselves and to insist that our recipients look at what is happening in their own programs.

Ms. JOHNSON. But you indicated here in the testimony that there were some contractors that would make commitments long enough to get the contract, and then that commitment would disappear. Is that fraud?

Mr. ASHBY. It may not necessarily be fraud in the legal sense. It is certainly a sharp practice which is contrary to the provisions and intent of our program. In the forthcoming rulemaking actions, one of the things that we are seeking to do is to put into place provisions that would require written consent of the airport or the transit authority or the highway department before a prime contractor was able to drop a subcontractor, a DBE subcontractor that they had relied upon to get the contract. That was an issue that was brought up in our stakeholder meetings that we have been having over the last several months and one of considerable concern in the community that we are responding to.

Ms. JOHNSON. When you find something of this sort, do you refer to the Inspector General or how do you handle it?

Mr. SZABAT. It depends on the nature of the complaint. All fraud complaints goes to the Office of the Inspector General. If there are complaints about a rule being misinterpreted, about sloppy bookkeeping, about a State not following our standards, those things

are handled with our auditors and through our normal chain of command, working directly with the States, with the transit districts, or with the airport authorities.

Ms. JOHNSON. Could I make a request? Could you send me, about every couple months, a report of different findings that you have in this area? I am not asking you to tell me all of what you have done—I will find that out when I get the report—but just tell me about the various incidences that you have noticed.

Mr. SZABAT. We will make it a point to do so.

Ms. JOHNSON. Thank you very much.

Thank you, Mr. Chairman.

Mr. OBERSTAR. Now the Chair recognizes the gentleman from Louisiana, Mr. Cao.

Mr. CAO. Thank you very much, Mr. Cao.

I just wanted to follow up on the questions that have been presented. I want to know whether or not the DOT programs and operations could be strengthened by administrative sanctions.

Mr. ASHBY. As of now, the main sanction available with respect to our grantees, to the airports and highway departments and so forth, themselves, is simply that compliance is a condition of receiving financial assistance, and that is a pretty powerful incentive. In some of our other civil rights programs, for example, in our aviation disability program, there is the option of civil penalties, which must be granted legislatively. In addition, we have an existing tool of suspension and debarment that can be used not only for criminal activity on the part of contractors and other participants, but also for essentially unethical business practices, and that is a tool which I think can be used profitably to deal with folks whose conduct might not rise to the level of criminal conduct, but who are engaging in activities that undermine the program. Of course, with respect to firms that are certified improperly, we have the existing sanction of removing their certification so they can no longer participate.

Mr. CAO. Now, how does the DBE program assist minorities in attaining needed financing, and is there appropriate oversight of this process?

Mr. ASHBY. Again, the DBE program itself, in terms of our regulations, does not directly assist people in getting financing. We do talk about things like bonding, capital assistance programs as among the race neutral measures that our recipients are directed to take in order to get as much DBE participation as they can through race neutral means. Through the bonding initiative that we have discussed in the recovery package, through our Office of Small and Disadvantaged Business Utilization, which has a short-term lending program, and, of course, through cooperation with the programs of the Small Business Administration, there is that kind of assistance that is available to at least some DBEs. Our Federal Highway Administration also has a program which has been repeatedly authorized by this Committee and Congress to provide supportive services to DBEs.

Mr. CAO. Based on my experience with minority contractors from the 2nd Congressional District for New Orleans, a lot of the minority groups who want to be involved in the rebuilding process have the problem of meeting all the criteria required in order to qualify

for certain projects, so I see there might be a need to assist them in that area. Do you see that same problem in other areas of the United States besides the New Orleans area?

Mr. ASHBY. I think that the information we have suggests that there are a number of barriers that typically exist that help prevent DBEs from getting a fair opportunity of the jobs. The studies that Dr. Wainwright mentions identify in substantial detail the capital and bonding and prequalification and other barriers that may be more difficult for some minority companies to surmount than larger, well established non-minority companies. So I think one does see evidence of that kind of barrier across the board, and the studies that Dr. Wainwright and others have submitted for the record I think give ample evidence of that.

Mr. CAO. I don't have any further questions, Mr. Chairman. Thank you.

Mr. OBERSTAR. Thank you, Mr. Cao.

Mrs. Napolitano, gentlewoman from California.

Mrs. NAPOLITANO. Thank you, Mr. Chair, and I thank my two ladies for allowing me some time.

Mr. Szabat, I want to continue the dialog and the questioning in regard to the bundling issue and to the enforcement issue, the audit issue. Would you be able to provide this Committee the number of those fraudulent cases where you found convictions necessary as a percentage of the total number of complaints? In other words, are we going after them? Are you finding enough of those that discourage others from trying to attempt fraud in seeking contractors, or is it just too lucrative for them to worry about any penalties?

Mr. SZABAT. We will find that information and we will provide it to the Committee.

Mrs. NAPOLITANO. I guess, maybe, Mr. Chair, I am very concerned because I just spoke to Ms. Velazquez, Chair of the Small Business Committee, and she was indicating that, in Small Business, the hub zones have been found to be very fraudulent, to the fact that she is suspending the hub zones designation because, after the second round of audits and investigations, there were 17 left. Of those 17, 10 had ben found to be questionable. So that goes down to 7, and that is nationwide; and that is a sad story for our administration not be having a handle on. So that brings concern about what other agencies are not actually enforcing or going after those fraudulent cases and doing enough to where it means something to the public who is being left out.

Mr. SZABAT. Your point is well received.

Mrs. NAPOLITANO. Thank you. One of the other areas is how do the DBE regulations ensure that the race neutral methods are used as much as possible?

Mr. ASHBY. If I may answer, Congresswoman, we have a process by which when a recipient proposes its overall goal for everything it is doing during the given year, that level playing field for nondiscriminatory participation, they are required to show us—we always tell them show your work—they are required to show us what is the evidence they have for being able to make a particular amount of their goal through race neutral means and what are the race neutral means they are using, as well as what evidence they

have for needing to use race conscious means for the other portion of their goal; and our FTA, FHWA, FAA staff initially in the field and, where necessary, later in headquarters, review those submissions and can and have gone back to the States and said, wait a minute, your evidence may not support your conclusions, why are you making this assumption. So there is a fair amount of direct Federal oversight of those decisions.

Mrs. NAPOLITANO. Does this also include the other general race—what is the other term that they use?

Mr. ASHBY. Race conscious.

Mrs. NAPOLITANO. Race conscious, right.

Mr. ASHBY. Yes, that is true for both those aspects of the goal program.

Mrs. NAPOLITANO. I guess maybe I have a concern that because many minorities cannot apply for prime contracts because of their size and their ability to find the funding, so they become subcontractors. And if there is a way of being able to ace them out, if you will, of being able to be participants based on those reasonings, what can we do to be able to assure that the minorities are served well? And I am talking about all minorities.

Mr. ASHBY. Again, I think that our program has fairly clear criteria for the size of the businesses. We don't age people out in the same sense that the SBA program does, but we do have size criteria; and the success stories that we provided for the record talk about a number of cases in which DBE companies who started out as subcontractors have become more successful, the term that is used is graduated from the program, and become successful prime contractors in their jurisdiction. So that kind of thing can and does happen, and obviously one of the objectives of our program is to provide all the possible assistance so that——

Mr. SZABAT. And if I may follow up with Mr. Ashby's answer, Congresswoman, for us in the Department, sometimes it is important for us to remember that this program is one tool in the toolkit, it doesn't cover all of the needs. Both you, Congresswoman Johnson and Congressman Cao have talked about the importance of bonding and financing. This program makes no pretensions to do that. We have never had a significant bonding program of our own; we had a small one in the Department a few years ago. Until we have the $20 million with the Recovery Act, and that, in and of itself, is very small. Those sorts of assistance—the financing, the bonding guarantees—will primarily come through SBA or other agencies, Federal or otherwise.

Having said that, we think that this program is very meritorious for all of its other reasons. But we don't pretend that it meets all of the needs for all of the witnesses and all of the other companies that participate in the DBE program.

Mrs. NAPOLITANO. Okay, is there an issue because of the number of subprimes that you have a problem in being able to go through all of them and assert that they are legitimate or that they are worthy or that they will be able to be prospective contractors?

Mr. ASHBY. We have in the program a very significant certification element which goes through the bona fides of each firm applying to participate in significant detail, and that program is the first line of defense to make sure that the firms that participate are

genuinely eligible for this program. We also have oversight of those certification efforts by our operating administrations, and when there is a disagreement about whether someone should be certified, that often comes to our Office of Civil Rights for decision, and they do a very thorough job of looking at the record and seeing if the right decision——

Mrs. NAPOLITANO. Which goes back to my question of being able to audit and figure out whether they are legitimate or not.

Mr. SZABAT. And there is more that we can do in that area, Congresswoman, and more that we are doing. One of the challenges we have had is for many years, and up to this day in some areas, our program has been paper based. So we had 50 States, numerous airport authorities, transit districts, all of them certifying on their own, all of them turning this in to us in to three different modes—aviation, highways and transit. So when I tell you that there are 27,000 DBEs out there, I can't give you an exact number because we are not accounting for duplications, whether one of these companies is certified in more than one State or if they are certified both on the airport side as well as on the transit side, for example.

The Federal Aviation Administration has already moved to automated system, a system that is called DOORS, and we are in the planning phases to do that also with transit and with highways. When this information is automated, it will be much easier for us to automate because we will be able to make more real-time comparisons of the data as it comes up from the States, from the transit districts, and from the airport authorities.

Mrs. NAPOLITANO. Thank you.

Mr. Chair, I would like to ask you to receive into the record a letter from Caltrans in regard to some of the issues that have just been covered, and thank you very much for the time.

Mr. OBERSTAR. Without objection, the Caltrans letter from Director Will Kempton will be included in the record at this point. And we will work with the gentlewoman and USDOT on the specific issues raised in that letter.

Mr. Cohen, gentleman from Tennessee.

Mr. COHEN. Thank you, sir. I am pleased that I have guests that will be here testifying before the second panel. We are still on the first panel, are we not?

Mr. OBERSTAR. Yes, we are.

Mr. COHEN. So I am premature or you are premature, but I am ready and fired up and ready to go.

[Laughter.]

Mr. OBERSTAR. Well, thank you very much.

I appreciate most of the questions have been directed at our DOT witnesses, but I do want to come to a very important matter raised by Mr. Szabat's testimony and Ms. Cloonen, Mr. Aranza and other witnesses, and that is these informal networks. You described it very well as old boy networks. That really does exist, doesn't it? There is an exclusion. If you don't happen to be in the same golfing group or the hunting group. In Minnesota it would be ice fishing. You have all seen Grumpy Old Men. That really exists, people really do get pretty testy about their fish houses on the ice; and if you are not part of that group, it is sort of maybe we can't call it an invisible exclusion or discrimination, but it certainly is a discrimi-

nation. How can we address those matters outside of the—or perhaps within regulation or within the legal structure?

Do you have some ideas, Ms. Cloonen?

Ms. CLOONEN. Thank you. One of the ways that I am able to meet with more male-owned contractors is that I join associations that allow the women in. But I still don't go on the Canadian fishing outings. So I don't know, legally, other than offering or encouraging the associations to be open to female and minorities being a part of that, I am not really sure another way to do that legally.

Mr. OBERSTAR. But the DBE provisions give you access, is that right, Mr. Kim, Mr. Aranza, Mr. Thompson? Why don't you pick it up from there?

Mr. KIM. Thank you, Mr. Chairman. As Ms. Cloonen mentioned, sometimes it is tough to get access to these major consultants or contractors, but with the DBE program they are kind of forced to talk with you, so that is the first step. So when we have opportunity, we have to perform, we have to deliver what we promise; otherwise, we are going to be in trouble. But it takes more than that.

As you indicated, there are some groups out there, something you don't see always, but how do you get over with it? That is not easy, but one way I found out is partially successful, I try to participate in civic organizations and I serve as a board member for a number art music organizations, I serve in Rotary Committee. So by these community organizations I get to meet other people, expand my contacts. As you all know, it is all relationship driven. We need to build relationships with decision-makers. That is one way to get in, but it is always not that easy, so we have to work really hard.

Mr. OBERSTAR. Thank you. I was intrigued by your comment about food. It reminded me of the days when I worked in the summers in the iron ore mines and in the concrete block factory in my hometown of Chisholm, and we had Swedes, Norwegians, Finns, Serbs, Croatians, and the aromas were wonderful when they opened their lunch pails at lunchtime. Nobody complained. They all wanted to share their respected foods.

Mr. Aranza.

Mr. ARANZA. Yes, sir. Unfortunately, those networks exist, and I have found the only way to change it is to use political power, to go to my city council friends that are minority or to go to my Congress friends like Congresswoman Johnson and basically tell them what I believe is happening and try to change the makeup of the boards that govern airports, to put people like Don O'Bannon, who is here, to oversee that the good ol' boy network doesn't continue to permeate and control every piece of business that goes on, in my case, in the city of Dallas. So, without political power, I don't know how minorities or you could effectively change what happen despite our collective abilities to perform.

Mr. OBERSTAR. Mr. Thompson.

Mr. THOMPSON. Yes. That is really a key issue. I said a lot of great things about my organization, but I failed to mention all of the discriminatory experiences, because there are so many. We would be here all day if I talked about all the discrimination that I had to deal with on a day-to-day basis. It is real. One of the things we have to be concerned about also is, once you graduate

from the program, you are no longer protected, so to speak, by the DBE program. Then the real troubles begin, because now, if there is no incentive for the prime contractors to do business with you, they won't, and you go back to being destitute and looking for work, unless you can quickly move to the private sector, establish yourself as a competent professional firm that people will want to do business with, because it is the right thing to do but, more importantly, because it is economically feasible to do so.

But if it weren't for organizations, from a networking standpoint, like COMTO, the Conference of Minority Transportation Officials, that is where the relationships and the networking helps organizations like mine. Those conferences and a lot of the programs that they provide puts us with prime contractors and also puts us in line to be considered for priming. The gentleman, Mr. Aranza, mentioned Don O'Bannon of Dallas. There is an excellent program that he headed up down there, the GMax program, that we were able to be a part of. We partnered with a minority disadvantaged business and, through our professional management expertise and their local construction knowledge, we had a GMax prime contractor for about three years through that particular program. But it was all as a result of the DBE program.

Mr. OBERSTAR. Thank you.

Mr. Covington, do you have any observations on that subject? Please use your microphone.

Mr. COVINGTON. It is direct and it is indirect, as you have seen, and it also puts a subconscious cloud on a lot of minority and women. When you do participate in your community, when you give back to your community, like Mr. Kim and Mr. Aranza have, and yet you can go to places where they will hold a civic event or a fundraiser and you know that, by your race or your sex, you are not allowed to join, it dampens your enthusiasm a bit. And to know that we are adults, we have been through some of this, but when it falls down as far as your children, you know that your children aren't allowed to join these same organizations that house the same people that you see, that you have to work with daily to try to advance your business, it is a psychological disadvantage.

The DBE program does help, because all we are asking for is to get our time at bat, just our time to play. The DBE program does help there. It does help with airports as far as AIP funds. But we also think that, to help level the field, it needs to be expanded to TSA and PFC funds as well. That is another way that we can help attempt to level this playing field.

Mr. OBERSTAR. I would think that, under the construct of the PFC, when the language—which I wrote in 1990, that we said it is applicable to and eligible for anything that AIP is applied for, that the rules for AIP should apply to PFC. So if that is not the case, then before we bring this aviation reauthorization bill to the House floor in a manager's amendment, we will have to address that issue.

Mr. COVINGTON. We appreciate it, Mr. Chairman.

Mr. OBERSTAR. Thank you.

Mr. Cohen, before I go to you, I want to recognize the gentlewoman from the District of Columbia, our legal scholar who was partner in our wordsmith and legal craftswoman when we re-

sponded to the Adarand decision. I am grateful for your counsel, your guidance as we went through that difficult time. We had Mr. Clyburn here earlier and I recognized his contributions at that time. Thank you for being here, Ms. Norton.

Ms. NORTON. Well, thank you very much, Mr. Chairman. And despite the hearings going on, I certainly had to make it my business to be here. But I particularly want to thank you for making this a Full Committee hearing, indicating that this is a matter of great importance to the entire Committee. Before I came to Congress, you had already established yourself and the reputation of those who had worked under you for the priority you have always given to these issues, including, as my question shall indicate, something that you put in some prior bills.

Those before us understand that this hearing is being held not simply because the Members of this Committee feel strongly about the matter at hand. It is being held as part of our constitutional and legal obligation. Title VI of the 1964 Civil Rights Act bars the expenditure of funds that discriminate based on race, sex, and in a number of other ways, and that is taken from the 14th Amendment of the United States Constitution. So we are only carrying out our required duty, and these statutes simply implement the 14th Amendment and Title VI.

I have been very interested to here especially the questions on minority and women business enterprises. Because they have been so thoroughly explored, I would like to go to a section of the stimulus bill that is of equal importance to many of us, and I think this question is best addressed to the two Department of Transportation representatives, because they go both to policy and to enforcement.

This is a jobs bill. For the first time, the stimulus bill, at least, could allow minorities and women to get a foothold in the construction industry. In about 1980, the program that the Federal Government had set up in conjunction with management and labor that would have integrated the construction trades was abruptly dropped by the administration at hand. What that meant was that people had to find their way into these top paying construction jobs. That wasn't easy, although it should be said for the record that the construction trades have long left the discriminatory policies for which they had become so infamous.

But there has not been a training tract for people who weren't already a part of the industry or didn't already know how to get in the industry. In fact, before this economy collapsed, there were jobs shortages in the trades. Now, we are not going to put out this kind of money all at one time, say spend it all at one time for a long time, so my question goes to pre-apprentice and apprenticeship programs. I don't think we need to have a war between the journeymen and the minorities who look to see that all the jobs are going to people that look like everybody except me, especially since minorities and women have not had the same opportunity to become journeymen.

That is why, in the wisdom of the Chairman, we are carrying out something that he has had in the full transportation bill, at least in the transportation section, for at least the last two authorizations or reauthorizations for the transportation bill. These were sections that allowed a very large sum of money, when you imagine

how much money gets put out, this is the biggest blob of money to come out of the Congress. One half of one percent could have gone to training.

When the stimulus bill came, we did our homework and we found that only 17 States in either of—we don't even know if that is in any one authorization—and don't worry, you are going to provide us with that information. Only 17 States had taken advantage of it. We don't have any information on how the Department administered this or looked at this. Seventeen States out of 50 States, all of which hunger covered this money. But it was optional. So you would have had to care enough about who the jobs went to in order to take one half of one percent of this great big highway appropriation to use in this way.

So we did it differently this time. We said it is not optional. You will take—and we gave specific amounts of money. Too little, in my estimation, but they are specific amounts of money. In the highway section we say you will use up to $20 million, not you can take it. It is out of the money you get, but you will use that. And the other out of the section that comes under my own Subcommittee that has control of GSA, FEMA, etcetera, but especially GSA, it says $3 million. This is not optional money.

Now, I dare believe that the reason 17 States have failed to do it or not do it, based on their druthers, is because the Department took no leadership one way or the other. So forgive me if I ask what leadership have you taken since this money is now required to be used and spent in a bill which the President said is first and foremost for making jobs for the American people?

Mr. SZABAT. Thank you, Congresswoman. I will take that in two segments. The first is, of course, the $20 million that we have specifically for the bonding assistance and other training assistance.

Ms. NORTON. Just a moment. I am not sure the money is for bonding assistance. The $20 million, I think, is for—I know my $3 million is for jobs, sir.

Mr. OBERSTAR. There are two separate accounts. There is an account for training and then there is an account for surety bonds and assurance to cover the unique and special needs of minority business enterprises.

Ms. NORTON. Thank you, Mr. Chairman. Indeed, I am now informed it is $20 million each.

Mr. OBERSTAR. Twenty each, yes.

Ms. NORTON. Twenty million each for bonding. Nobody is saying out of that little bit of money take bonding and training. So would you inform this Committee what the Department has done this time to see that the States implement this money?

Mr. SZABAT. Well, and keeping in mind, as you have alluded to, $20 million is a very, very small sum of money in order to provide meaningful training assistance for these programs nationwide, the Federal Highway Administration has incorporated guidance to the States as to how they can use this money, and I would be delighted to share that information with you and with Members of the Committee as to what the guidance is and to how the guidance has been disseminated.

Ms. NORTON. Since the Chairman has put everybody on deadlines, could I ask that in 10 days you get to the Chairman of this Committee what that guidance is?

Mr. SZABAT. We will have it to you by close of business tomorrow, ma'am.

Ms. NORTON. Appreciate that, sir. And we would like this as well: we would like to know the nature of your outreach beyond guidance. Guidance says this is what to do, this is how you access it, these are what the rules are. Very important. But I would like to know, in addition, what the Department is doing, given how few States have taken advantage of this appropriation in the past. Therefore, these States, along with the Federal Government, are responsible for the fact that there are so few minority and female journeymen. And, by the way, whatever there are, we better make sure they get some work and we are in touch with the White House on beefing up the Office of Federal Contract Compliance and the EEOC. But what we know is that this was a section of the law which nobody paid any attention to, they just used their own money, their last dime on the last bit of highway with the same workforce, a workforce that is aging out, sir. Don't worry any more about the sons and the cousins being handed construction jobs; they don't want to do it. You know, they want to do low tech, if I may say so, because too few of them go on to the kinds of jobs we would like them to do because it would take a great deal of education. So they are sitting behind some machine while people are looking for people who can become journeymen.

So I want to know what kind of outreach to the States you are prepared to do to encourage the States to use this money, because I can assure you this Chairman is going to be keeping track of just what has happened to this money and how many people and what kinds of people have been trained under this money, especially since he was the author of it for two reauthorizations and the States just let the money lie there or, worse, used it for other purposes.

Mr. SZABAT. We will provide that information as well.

Ms. NORTON. Thank you, sir, also within 10 days.

Thank you very much, Mr. Chairman.

Mr. OBERSTAR. I thank the gentlewoman.

Mr. Cohen.

Ms. NORTON. Mr. Chairman, I have a statement which I would like——

Mr. OBERSTAR. Without objection, the statement will be included in the record.

Mr. COHEN. Thank you, Mr. Chairman. My questions are going to go toward the surety bond issue. I have had a lot of people in my community, minorities who have had trouble getting work because they can't make the bond, and bonds and other safeguards are there to protect the public on many occasions, but at the same time they make it impossible for new businesses, often minority businesses, to get business.

If Mr. Thompson shakes his head or anybody else has any thoughts, have there been creative ways to get around the bonding problem in communities or projects that you are familiar with?

Mr. THOMPSON. Sure, I would like to speak to that. First, I would like to say that the bonding is a really interesting phenomenon because it costs the project, in most cases, more money by even having the bonding in the first place. A lot of the prime contractors on the private sector work are not required to bond the private sector work. Therefore, they are storing up their bonding capacity so that when the large public projects come along, they have the capacity. I can assure you that if every major prime contractor had to bond every job that they performed, they would not have enough bonding capacity to do the public work.

But on the private work, they would require those that at least are seeking out minority assistance, they require the minority subs to bond the work that they are not bonding as a prime. So, therefore, the capacity that those minority contractors did have are no longer available when public sector projects come around.

So what I have suggested and has worked on some public projects is that, first of all, if you are a general contractor, if you are a minority and you are going after a prime contract, why should you bond the entire $10 million job if you are only self-performing five percent or if 80 to 90 percent of the work is subcontracted? If each of the subcontractors only bonded their portion of the work, and even the prime contractor, bond the work that you are self-performing. There is no value in layering all these bonds on these various projects.

So that is more from a general contractor standpoint. But from a subcontractor standpoint, depending on the role that he is performing, there are ways that they can bond their portion of the work or even phase the bonding so that, when they complete 40, 50 percent of the bond, release that bond so they can have that capacity for other projects. The problem is most of the sub or minority contractors are not able to go and secure additional work because it is tied up on one particular job until the project is entirely completed, and we all know through litigation and other issues that come up on a project, that one project could tie up his bonding capacity for two or three years and will prevent his ability to bid on additional work. That has been my experience.

Mr. COHEN. Is there a way around it? Is there some type of——

Mr. THOMPSON. Well, I think the way around it is, depending on the complexity of the job or the timing of the job, sometimes these projects, particular stimulus work, they are such fast turnaround projects, if there is a general contractor that has deep pockets and has the capacity to bond, why even require that the sub or minority contractor bond it at all? You are already protected by the general contractor. If the work has to be done in a short period of time, there is not a lot of time for anybody to get in trouble.

Mr. COHEN. Anybody else want to comment?

[No response.]

Mr. COHEN. I noticed in the testimonies Dr. Wainwright and I believe Mr. Aranza both hit on the point that minority firms are more likely to be denied credit than non-minority firms. Are there other factors like bonding requirements that might act as a defacto means of discrimination that work against minorities other than the credit and bonding? Mr. Aranza?

Mr. ARANZA. Well, in my business, I am in the airport concessions business, and we basically don't have anything that we can mortgage. We get concession rights and as much as the airports should be thanked for providing us that opportunity, it further makes it difficult for us to get financing. I have many friends in Dallas who are minority contractors that I try to use on every one of my projects, and bonding is the largest issue; and in some cases I am able to assist them, but primarily because my projects are all half a million or less and we get them done rather quickly, so we sort that out. But in a lot of cases for major construction projects on airports themselves, the bonding is the big deterrent to their ability to get a job.

Mr. COHEN. I think there would be problems. Mr. Covington, I was interested in hearing your statement about clubs that you go to where you can't be a member. Those clubs exist in my community as well, and you can't be a member based on your race, and often, also, your religion. And I have commented just recently I am a minority in my district. I represent a majority African-American district, and I have never felt more like a minority in my life than at the country club that wouldn't accept you or me. There I not only felt totally estranged and unwelcome, but I knew if I was in a situation, I was looking for votes and/or contributions. You would be looking for possibly contacts later on for jobs and/or for maybe loans from the banks, because that is where the bankers and the members of the board all reside, and they provide those loans and those jobs to the people they sit around with in the plaid shirts and the plaid pants at the country club that wouldn't have us as members. So I relate and that is going to take a long time, but much of it is systemic and it goes back to slavery and it goes through Jim Crow, and we need to end it.

Mr. COVINGTON. Absolutely, sir. It has been said that people do business with people they like. People get information from people that they feel comfortable with. And under the circumstances that you were talking about, it is impossible for us to gain the same access.

Mr. OBERSTAR. Thank you very much.

The Member of our Committee who was most responsible for the provisions in the stimulus package on bonding, Mr. Cummings, the issue was raised at a meeting of the Congressional Black and Hispanic Caucus, which I was participating, and Mr. Cummings made the contribution that the State of Maryland had a program to deal with this, and he provided me with that information. The Committee staff took that language, we crafted it into Federal legislative language for the stimulus program, and that $20 million is there because Mr. Cummings is the godfather of it.

I would like to recognize the gentleman at this time.

Mr. CUMMINGS. Mr. Chairman, thank you very much. I will be very brief. I know, folks, we have another panel. I just wanted to make one quick statement.

First of all, I want to thank you, Mr. Chairman, for making sure those provisions were included in that legislation.

Mr. Chairman, as you can see—and I have not heard all the testimony because I had three other hearings today, but, as you can see, bonding is a phenomenal impediment that prevents folks from

participating in these programs. Even in the Maryland program, when we created, through the Maryland Small Business Financing Authority, a way to guarantee the bonds, the bonding community still found ways to not bond, which is phenomenal, which is incredible. So I think that this is something that we are going to—I think that what we have done is a great start, Mr. Chairman, but I think we have to keep digging a little deeper so that we can make sure that we strike down all of these barriers.

You know, for the life of me, I can't figure out why it is that, in 2008, that we still have folks that bend over backwards not to allow people into these opportunities. But the fact is that they still exist. And I am very curious, with regard to my folks from Transportation, panelists, to see what you all present to Ms. Johnson, because I realize that $20 million is very limited, and I am just wondering if you all, in this new era of Obama, who, by the way, I supported a million percent, I think that if we are going to have a color-blind society, then we should have a color-blind society that goes to the point of eliminating this wall that blocks so many people from opportunity.

Let me just end on this, Mr. Chairman. I have now lived long enough and see enough to know that there are so many people that have given their blood, their sweat, their tears in the area of minority contracting; they have given their very, very best. They banged on doors, they have done it right, they have been honest, they have applied for this, they have responded to proposals. They have done it over. And over and over and over again they see and feel the wind from a door being shut in their faces over and over and over again, and they do get tired of going home to their children and their children asks them, mommy, how did you make out on that contract, and they get tired of saying I didn't get it.

But, you know, the most painful thing about it, Mr. Chairman, is that they go through all of that, denied opportunity over and over again, and then they die. They die. They die while banging on the door of opportunity that has been shut in their faces. And this bonding issue is one I think if we are able to accomplish nothing else but striking down this issue—and there are many more we need to deal with—then I think we will have accomplished a lot.

And, Mr. Chairman, I don't want you for one moment to take this in any way but to say that I think we have you as a partner in this fight because I know that you are very, very sensitive to these issues. And I also know something else about you: you don't like the idea of trying to break down a wall only to find out that somebody else is putting a wall up simultaneously. So some kind of way hopefully we can work with this Administration and our Congress to continue in the community, the contracting community—and I am not trying to say all contractors are like have been described, but the fact is that it is still a barrier, and I have seen it over and over again. I saw it as a lawyer going before what is called our Board of Investments in Baltimore, where people just could not get that bond; and these were qualified folks who did great work; were dependable.

But with that, Mr. Chairman, I see my time is running out and I thank you.

Mr. OBERSTAR. Thank you very much for your comments, for your observations, for your kind words. But with the experience we have had in the stimulus and on this bonding issue, I assure you, when we do the long-term transportation bill, this element will be a part of it. We will make it permanent law. With this experience in hand and with the testimony at today's hearing on the specifics of this issue, we establish an extraordinarily solid record, and to extend it also to the aviation law and to the wastewater treatment program, where we extended DBE provisions for the first time in the history of that program because it hadn't been authorized in the last 14 years. We moved it through the House in the last Congress; it didn't get through the Senate. We moved it through the House in this Congress, and we hope we get to conference with the Senate on it. We are making progress in all of these arenas and we are not going to stop.

Just one closing observation. Ms. Cloonen, you talked about your experience with the ironworkers and the building trades, and, if I recall rightly, you are now on their board of advisors for the ironworkers union, is that right?

Ms. CLOONEN. Yes, I sit on the Ironworkers Mid-America Pension Plan.

Mr. OBERSTAR. Oh, the pension plan, yes.

Ms. CLOONEN. But I also sit on the Ironworkers Local 444 Apprentice Program Committee.

Mr. OBERSTAR. Are the other building trades accepting not just you, but women, other minority enterprises?

Ms. CLOONEN. Not too many. I was the first female on the pension board and I was the first female on the apprentice board.

Mr. OBERSTAR. Well, the ironworkers and the other building trades are frequent participants at our hearings, and they are frequent supporters of our initiatives, vigorous supporters of our initiatives. I think we will have a little conversation with them about this matter.

[Laughter.]

Ms. CLOONEN. That is great. Thank you.

Mr. OBERSTAR. And if it isn't a successful one, I have a woodshed to which I will invite them.

I thank this panel for your candor, for your information. I want to thank the DOT for vigorously pursuing this issue and all of its ramifications, and for the specific examples, Mr. Szabat, in your testimony, which, of course, is included in full in the record. Thank you all very, very much for your presentation.

We will now receive the second panel: Don O'Bannon, Chairman of the Airport Minority Advisory Council; Mr. Richard White, the Memphis-Shelby County Airport Authority. And I will turn to Mr. Cohen for an introduction. Ms. Sara Hall, also the Memphis-Shelby County Airport Authority; Ms. Joann Payne, Women First National Legislative Committee; Ms. Julie Cunningham, President and CEO, Conference of Minority Transportation Officials; Ms. Amy Hall, member of the DBE Task Force of AGC and President of Ebony Construction Company.

Welcome.

TESTIMONY OF DON T. O'BANNON, ESQUIRE, CHAIRMAN, AIRPORT MINORITY ADVISORY COUNCIL (AMAC), VICE PRESIDENT OF BUSINESS DIVERSITY DEVELOPMENT, DALLAS-FORT WORTH INTERNATIONAL AIRPORT; RICHARD WHITE, VICE PRESIDENT OF PROPERTIES AND BUSINESS DEVELOPMENT, MEMPHIS-SHELBY COUNTY AIRPORT AUTHORITY, CHAIRMAN OF THE BUSINESS DIVERSITY COMMITTEE, AIRPORTS COUNCIL INTERNATIONAL-NORTH AMERICA, ACCOMPANIED BY SARA L. HALL, VICE PRESIDENT AND GENERAL COUNSEL, MEMPHIS-SHELBY COUNTY AIRPORT AUTHORITY; JOANN PAYNE, PRESIDENT, WOMEN FIRST NATIONAL LEGISLATIVE COMMITTEE; JULIE A. CUNNINGHAM, PRESIDENT AND CHIEF EXECUTIVE OFFICER, CONFERENCE OF MINORITY TRANSPORTATION OFFICIALS; AND AMY HALL, MEMBER OF DBE TASK FORCE, ASSOCIATED GENERAL CONTRACTORS OF AMERICA, PRESIDENT, EBONY CONSTRUCTION COMPANY

Mr. OBERSTAR. Mr. O'Bannon, you are first on our list and you get yourself situated there, turn the microphone on. Welcome.

Mr. O'BANNON. Thank you, sir.

Mr. OBERSTAR. Glad to have you with us.

Mr. O'BANNON. It is a pleasure to be here. Good morning, Chairman Oberstar, Congresswoman Johnson, who is a proud Member of the Texas delegation, and other Members of the Committee. My name is Don O'Bannon. I am Chair of the Airport Minority Advisory Council and I am pleased to have the opportunity to appear before the Committee in support of the Federal Aviation Administration's Disadvantaged Business Enterprise program and the Airport Concessions Disadvantaged Business Enterprise program.

AMAC is the only national, nonprofit organization dedicated to fostering the full and fair participation of DBE businesses in airport contracting and concessions, and the inclusion of minorities and women in employment within the airport industry. As this Committee is aware, racial and gender discrimination, as heard from the panel before us, continues to present a serious problem in our Nation. As AMAC Chair, and with eight years of experience in the airport industry, I routinely see firsthand the impact of discrimination against DBE firms in all aspects of the airport industry, from contracting, construction, to concessions.

My testimony will detail the impact of discrimination on DBE contracting and concessions businesses, and will address policies that AMAC believes should be adopted as part of the FAA reauthorization.

Airport DBE contracting and concessions programs have started to address inequities faced by DBE firms, but there is compelling evidence demonstrating that there is ongoing need for these programs to address current discrimination faced by DBE firms. In testimony before and in statements submitted to Congress over the past six months, AMAC has submitted numerous disparity studies that through detailed, statistical, and anecdotal evidence demonstrate continuing discrimination against women and minorities in the aviation industry and the industry sectors with which airports and other transportation agencies conduct business. These studies represent every region of the Country, both urban and rural. These studies also demonstrate that discrimination faced by

women and minority groups—African-Americans, Hispanics, Asian, and Native Americans—comes in a variety of forms. Each of these studies provides significant quantitative evidence of discrimination against DBE firms in the industries that are related to airport contracting.

While statistical analysis presents quantitative evidence of discrimination, they do not tell the entire story. We can much better understand the seriousness of these statistics from stories that are told by the businesses themselves. Here are just three examples. A Hispanic contractor reported that a general contractor called him to express that he did not want any Mexicans on the job and that he had been called wetback, dumb Mexican, and my little Mexican friend. A white woman business owner reported that she encounters people who assumes that she is a front for male-owned businesses or that she is not qualified. Men she encounters on particular jobs have asked her what are you doing here. An African-American business man reported that people assume he does not understand relatively simple matters related to his work. On one occasion, as part of the bidding process for a concrete contract, an individual spoke to him very slowly to make sure that the African-American business man understood.

These studies provide strong statistical and anecdotal evidence of discrimination against minorities and women, and demonstrate that there is a continuing need for the airport contracting and concessions DBE program. As part of my testimony, with the permission of the Chair, I have submitted six additional studies and ask that they be included in the record.

Mr. CUMMINGS. [Presiding] Without objection, so ordered.

Mr. O'BANNON. Mr. Chairman, we would also like to thank you for addressing two issues related to the DBE program in H.R. 915. Although the airport DBE program is governed by a single set of Federal regulations, certifying officials often interpret and apply these rules differently. Section 135 of the bill would greatly ameliorate this problem by directing DOT to establish a mandatory certification training program and requiring those persons responsible for DBE eligibility and certification to complete the training.

Second, Section 137 of H.R. 915 addresses another aspect of DBE program eligibility, the personal net worth cap contained in DOT regulations. The personal net worth cap in the DBE program has not been adjusted for inflation since its inclusion in 1989. Section 137 directs the DOT to issue final regulations to initially adjust PNW for inflation that has occurred since 1989 and provides for yearly adjustment thereafter. AMAC believes this provision is an excellent addition to H.R. 915, as well as a matter of economic common sense and fairness.

Mr. Chairman, AMAC greatly appreciates the Committee's leadership on the important issue of diversity and inclusion in the airport industry. We thank you for the opportunity to provide testimony and for your consideration of our comments and views, and we look forward to working with this Committee in the future.

Mr. CUMMINGS. Thank you very much.

It is my understanding that Mr. Cohen will introduce our next witness. Is that correct, Mr. Cohen?

Mr. COHEN. Yes, sir.

Mr. CUMMINGS. I yield.

Mr. COHEN. Thank you, Mr. Chairman.

I am pleased today that we have two witnesses from my home city, Memphis, Tennessee, and the great airport that we have there, as witnesses here on the U.S. Department of Transportation's Disadvantaged Business Enterprise: Mr. Richard White, Vice President of Properties and Business Development at the Memphis-Shelby County Airport Authority; and Ms. Sara Hall, who is the Vice President and Legal Counsel and former legal counsel for the city of Memphis, but now for the city and County Airport Authority. I had the pleasure of being toured around the airport for specific aspects at one point, and I appreciate their courtesies.

The Memphis-Shelby County Airport Authority is one of the Nation's largest and leading airports, number one cargo airport in the Country, and it has demonstrated its dedication and inclusion of minority-owned and women-owned Disadvantaged Business Enterprises in contracting and procurement. And I don't know if it is for that reason or for the quality of the food that is served, but if you come to the Memphis Airport, you will smell the best ribs in all of America, in fact, all of the world permeating the concourses there, particularly Neely's has the smell that permeates and is just as good as the smell.

Five years ago, the Memphis-Shelby County Airport Authority led the way in compiling a study on whether discrimination existed for minorities and women. The 2008 Memphis study validated the importance of our affirmative action program and the continued prevalence of discrimination, which unfortunately exists in our business community. Minorities and women are still lacking equal opportunity to compete for Department of Transportation-assisted highways, HOT transit, and airport contracts, which the DBE program provides.

I am delighted to introduce these witnesses, to see them here in my other home city, Washington, and appreciate their sharing their information with the Members of the Committee, and I thank the Chairman for the opportunity to introduce these two fine Memphians.

Mr. CUMMINGS. Thank you very much, Mr. Cohen.

You are recognized, Mr. White.

Mr. WHITE. Chairman Cummings, Congressman Steve Cohen, Members of the House Transportation and Infrastructure Committee, thank you for allowing me to participate in this important hearing. My name is Richard White. I am the Vice President of Properties and Business Development at the Memphis-Shelby County Airport Authority. Today, I am testifying in my capacity as Chairman of the Airport Council International-North America's Committee on Business Diversity.

Airports are an integral part of their community. They not only provide economic development, but are a part of the community in which airport staff like me live, work, and raise our families. As such, insuring inclusion and eliminating discrimination is always our focus. We strive not only to meet the letter of the law, but to embrace the spirit of the law, as well as by ensuring that diversity of our community is evident in business and employment opportunities at our airport.

ACI-NA's Business Diversity committee plays a vital role in providing a forum to develop proactive outreach educational programs, best practices that allow fair participation for MWB businesses. Our committee produced a comprehensive white paper of airport DBE programs, and in 2007 we conducted a Disadvantaged Business Enterprise program survey to evaluate what was working and what was not. The survey found that finding certified DBEs continues to be a major barrier, and here is where the DBE program is important. In a recent meeting with a prime concessionaire at Memphis International Airport, I was told by that prime that they could not find a ACDBE in Memphis, Tennessee that could cook or provide barbeque for one of our restaurants in our airport.

The problem is if he couldn't find a certified minority to cook barbeque in Memphis, Tennessee, he just wasn't looking.

[Laughter.]

Mr. WHITE. But with the help of this program, we can help make those types of contacts.

Still, the certification process can be a barrier. We at ACI support the provisions of H.R. 915 that would require mandatory certification training. It is imperative that the certification process become more uniform so that DBEs with limited resources are able to get access to more opportunities. We have taken steps towards working more closely with DOT and FAA and other stakeholders to improve the certification process and make the program work better for everyone. In February of this year, ACI-NA joined the Airport Minority Council and the American Association of Airport Executives in sending a letter to DOT and FAA asking them to partner with us in order to take the next step forward in the UCP program.

The Memphis-Shelby County Airport Authority and sister airports have taken steps to ensure DBE participation in contracting. The Wayne County Airport Authority took extra steps to ensure good turnouts in their outreach sessions by providing free membership to their vendor list for all those that attended. Dallas-Fort Worth, in one four-month period, had 12 outreach events or meetings explaining the potential opportunities for retail food and beverage concessionaires in their new Terminal D.

Many airports have DBE programs for projects that are not funded with Federal money. The Metropolitan Washington Airport Authority runs an extensive local Disadvantaged Business Enterprise program focused on small business. In my airport, we have a business diversity development program for projects funded with general operating funds. The program is being revised based on results of the diversity study we just completed at the end of 2008.

My colleague, Sara Hall, is here with me today and will be happy to provide a brief overview of the disparity study conducted by Memphis-Shelby County Airport Authority and answer questions you might have.

Having an effective DBE program that opens the doors for participation for all people is always our focus. ACI-NA is committed to continuing this work to improve the program. Thank you for your time.

Mr. CUMMINGS. Thank you very much, Mr. White.

Ms. Hall?

Mr. COHEN. Mr. Chairman?

Mr. CUMMINGS. Yes.

Mr. COHEN. Before she makes her remarks, I just remembered Interstate Barbeque does a great job too, as well as Neely's, and I want to get myself out of trouble.

Mr. CUMMINGS. Very well.

Ms. Hall?

Ms. SARA HALL. Chair Cummings, and particularly my Congressman, Steve Cohen, who has long had a record of advocating for civil rights, my name is Sara Hall, and I am the Vice President and General Counsel for the Memphis-Shelby County Airport Authority. I did have the privilege of being the former city attorney and former HR director for the city of Memphis as well.

The Memphis-Shelby County Airport Authority has had a long history of inclusion of minority-owned, women-owned, and Disadvantaged Business Enterprises, M/W/DBEs, in contracting and procurement. Recently, we commissioned NERA to engage in a study to study the status of M/W/DBEs and the airport community and the Memphis metropolitan statistical area.

Despite progress, our study shows that discrimination still exists in the marketplace for minorities and women, particularly in the private sector, where these goals rarely exist. As a result, minorities and women continue to be under-represented and under-utilized both in MSCAA and non-MSCAA contracting, and in business ownership and in business earnings. For example, although 19.4 percent of all firms in the Memphis metropolitan areas are owned by blacks, less than 1 percent of sales and receipts go to these firms. The numbers for women are no better.

These results are not atypical. In talking with airports across the Country and looking at their disparity studies, I can tell you that the results are the same. Despite meaningful efforts by all the people you see here and our airport community, statistical and anecdotal evidence of discrimination still exists in airport contracting and in our communities. The conclusions of our study conducted by NERA are supported by over six years of contracting data, over 1,200 contracts and subcontracts, and over $900 million of work.

We applaud this Committee for examining this difficult issue. We encourage you to continue to look at disparities that exist in our communities, and we hope you will join us in our efforts to eliminate discrimination in our own backyards and across our Country. Thank you.

Mr. CUMMINGS. Thank you very much.

Ms. Payne.

Ms. PAYNE. Yes, sir. Before I start my testimony, if I may, sir——

Mr. CUMMINGS. You may want to turn your mic on. Is it on?

Ms. PAYNE. Thank you. Before I start my testimony, if I may, for the record submit two other testimonies. One is from the Federation of Women Contractors out of Illinois and the other is Women Construction Owners and Executives. They are part of Women First and they are nonprofit associations across the Country. If I may do so.

Mr. CUMMINGS. Without objection, we will make them a part of the record.

Ms. PAYNE. Thank you, sir. Also, that my full testimony also be part of the record, since I really cut this one down.

Mr. CUMMINGS. Without objection, so ordered.

Ms. PAYNE. Thank you, sir.

Mr. Chairman, thank you so much for the opportunity to be here today. I am President of Women First Legislative National Committee. Women First represents the interest of women-owned businesses certified in the Disadvantaged Business Enterprise program. Mr. Chairman, I wish with all my heart I could look you straight in the eye and say to you that this Committee does not need to authorize the DBE program. But, sadly, I cannot testify to that statement.

In 2001, Women First submitted an amicus brief to the Supreme Court in Adarand Construction v. Mineta. In the brief it said, "They have experienced firsthand the detrimental effect of discriminatory practices, which, to this day, continue to plague the construction industry. As a result of this discrimination, the ability of women owned businesses to compete for government contracts in the transportation related area has been severely hampered."

And in 2009 those words are still true.

In 2004, during the transportation authorization process, Senator Max Baucus, on behalf of Women First, submitted for the record 15 letters from women-owned businesses from different States who had continued to face discrimination in the highway construction industry. And in 2009 those words and those letters are still true today.

I am here to give voice to women DBEs who continue to face discrimination on a daily basis.

In surveying the DBEs across the Country regarding discrimination they have faced, I was not surprised by the anecdotal evidence of discrimination that was sent to me as these women-owned businesses continue to face a number of the same challenges they have been facing for years.

Said one DBE, when I applied for my first business line of credit, the bank loan officer actually said couldn't you get a man to cosign? Your husband perhaps?

Another DBE from Indiana told me that I own my own companies 100 percent, but I still face discrimination. Example: when a project's resident engineer won't speak to me on the job, but directs all his comments to the male standing to the left of me.

A women-owned DBE from Illinois wrote, my company is 23 years old and I have been in highway construction since 1971. Yet, I still deal with discrimination on a regular basis.

A DBE from Michigan wrote that she is still asked, after 25 years in business as a contractor, who runs the company? Who shall I call?

A DBE in Delaware wrote she had a disagreement with one of her prime contractors. The prime kept on calling her office, but always asked to talk to the male foreman rather than her. This went on for many, many, many months. The foreman kept telling the contractor he needed to talk to the boss. The contractor decided to take another approach: he called the DBE's home phone number and asked for her husband. Her husband had nothing to do with the contract or the company. The contractor said in the message

that they needed to sit down and talk about this to get it straightened out, and we don't have to involve your wife. When this failed to get a meeting, the contractor had no other choice but to meet with the boss, the woman who owns the company. The first thing he said to her, and I quote, "I am sorry this has taken so long, but I don't like dealing with women." Unbelievable.

In representing women-owned DBEs for about 23 years now, I have heard women discuss the problems they face in the construction industry many times with Members of Congress and with different administrations. These women, every day, have to face the assumption by others that their companies cannot do the work and they do not run their own businesses. Women-owned businesses still have problems obtaining loans and bonding, and after years in business they still have to explain that they are the boss to men on job sites who refuse to believe that women actually have the ability to be a boss.

If the DBE program were not to continue, I believe not just women and minority companies will be severely affected, but small majority-owned subcontracting businesses will be affected as well. The only small business program in the highway, airport, and transit industries will disappear. There will be no reason for subcontract work, even to majority firms. Thus, competition will be eliminated and prices will climb.

In conclusion, I had a member of the Women First Trustee Board tell me, when I asked why she still felt the burn of discrimination after years in business, she said to me that when she attends meetings, there are very few women, if any, around the table. She thinks, and I quote, "Well, it will be okay because I am at the table. I know these people; I work with these people. I make a pretty good living. So why do I still feel discrimination?" And then she realized why. She told me, and I quote, "It's because I'm not like them. I will never be like them. I'm different and they don't understand the importance of that."

I have thought about her statement so many times, and I believe this awareness should empower her and other women, because they contribute and make better an industry that is vital to our Country's daily life; and it is also why diversity is so important in the highway construction industry and in our Nation. Our diversity is what strengthens and bonds us together. We are a government for all the people, and all of our people deserve a chance to compete and contribute.

Recently,—and I am about finished, Mr. Chairman—a Minnesota-based DBE told a local radio station about the work that she and other women and minority-owned firms performed on par, equal to, any other contractor on the 35W bridge project, and this is what she said: I think we have been given a chance to show that a contractor can value the DBE experience. We can add value to the final product and to the taxpayers of Minnesota. And, Mr. Chairman, I think that pretty well says it all. Thank you.

Mr. OBERSTAR. [Presiding.] Thank you for raising that last example, Ms. Payne, because I am very much aware of that. At the outset of that bridge construction project, I made it very clear to the State DOT that they are going to adhere to the DBE program and they are going to culture and nourish and support, and Flatiron

Construction Company, to their great credit, made very vigorous outreach effort.

Ms. PAYNE. Outstanding. They did a great job, yes, sir.

Mr. OBERSTAR. But the need persists.

Ms. PAYNE. Yes, sir.

Mr. OBERSTAR. Ms. Cunningham.

Ms. CUNNINGHAM. Thank you, sir.

Mr. OBERSTAR. Please touch your microphone.

Ms. CUNNINGHAM. Mr. Chairman, I would like to thank you and Members of this Committee for this hearing, and I would also like to start out by thanking you for your long-term support of our organization, appearing at our policy forums over the years and really making sure that you understand what are the issues of our membership. Then I have to acknowledge Congressman Cummings, who is the official host and the godfather of our annual Transportation Braintrust, and has been so for, I believe, what is going to be 15 years. So I want to do that.

My name is Julie Cunningham, and I represent the Conference of Minority Transportation Officials. Our organization is celebrating 38 years of service as a voice for the transportation community, and today we are the only multi-modal association for minorities in all of the transportation industry. Because of the legacy of inequity in employment and business for minorities within the industry, our mission is as relevant today as ever: to level the playing field in transportation for individuals, businesses, and communities of color.

Our membership spans 29 cities and includes individuals, public transit agencies, airports, State DOTs, private businesses, academic institutions, and last, but certainly not least, small and Disadvantaged Business Enterprises. Several of our member firms are here today. You have heard from one from St. Louis who was on the first panel; Dallas, Mr. Al Brunson, Mr. Kevin Potter from St. Louis, and Mr. Prescott Sherrod from Virginia Beach.

As you know, COMTO has been at the forefront of this issue for quite some time. Our advocacy on behalf of DBEs has received national recognition. In 2006, the Department of Transportation awarded us the DBE Advocate of the Year. We have also partnered with the DOT and published the FTA's, the Federal Transit Administration's first CD on DBE methodology for Federal grantees. For the last two years we have conducted Title VI training workshops across the Country on behalf of the DOT, and the training components in these workshops includes information on DBE goal-setting, the certification process, and fraud detection.

In 2007, when the Wahlberg Amendment threatened to neutralize the DBE program, it was COMTO that made our voices heard here on the Hill and also in Chairman Olver's office, because it was an appropriations issue. Our chapters across the Country petitioned their congressional representatives and we met with Congressman Olver to ensure the voices of the DBE community were heard. We were effective and we thank Chairman Olver for his great support.

Mr. Chairman, as you have reminded our membership on more than one occasion, both you and the Majority Whip, the battle that was fought to include the DBE provision in TEA-21 in 1998 was

no less fierce than the battle is today. Majority Whip Clyburn outlined in his testimony here this morning that the program has stood up in court over and over again, and that testimony was supported by members on the first panel. So I don't want to spend a lot of time defending the fact that the program is in fact constitutional.

But what I want to do is talk to you a little bit about the concerns that my members have expressed. This week, I canvassed our membership and talked to a number of our DBE firms, a few transportation professionals who have responsibility for running State DBE programs, and I want to recognize Ms. Grimley-Johnson from Virginia DOT, one of our members, is here and is one of those people. I also visited with a senior partner from Booz Allen Hamilton, which is one of the Country's largest consulting firms and has one of the strongest mentor-protege programs in the Country. And each of these discussions resulted in the overlying theme from the members, so I just want to focus a little bit on what they said, really briefly.

The first thing that they said was that there needs to be more specific language in the RFPs issued by Federal grantees to ensure the integrity of good-faith efforts. Currently, there are no teeth in good faith and there is too much inconsistency from agency to agency. In the COMTO membership, our DBEs refer to good faith as drive-bys. In other words, primes will drive by and the drive-by could be faxing an organization like COMTO or making a phone call, and then they call it good faith and they say we couldn't find any.

Number two, we need a national uniform certification program. It is long overdue. As of 2008, all 50 States had established uniform certification programs. However, there is no national database or central repository for the vital data. The certification process is cumbersome and time-consuming and expensive for DBEs. And even though the DBE program is governed by a single set of Federal rules, the information requested by one certifying entity is far too often not the same information required by another.

Number three, there needs to be more aggressive and consistent compliance monitoring of the DBE program. And we heard the questions from Congresswoman Brown and Congresswoman Eleanor Holmes Norton, as well as Congresswoman Eddie Bernice Johnson, and they kept saying are we monitoring it. Well, there needs to be more monitoring, and COMTO recommends funding for the establishing, maintenance, and monitoring of a national DBE and ACDBE program to ensure and guarantee the success.

And, lastly, we believe that there should be the development of a national mentor-protegé program. We recommend the creation of outreach opportunities in collaboration with federally-funded transportation entities to connect the prime contractors with DBE firms around the Country.

During the transition process for President Barack Obama, I had the opportunity to serve on the transition team at the DOT Agency Review Group, and I saw firsthand that what this Nation is faced with is more about bricks and mortar and concrete and steel. It is about people and it is about jobs, and too often we forget that the golden nuggets of our industry are the people who participate in

the DBE program and the thousands upon thousands of people that they employ.

COMTO DBE firms touch the full spectrum of projects, offering everything from engineering services to advanced technologies to traffic engineering to professional services for legal, real estate, capital investments. They are suppliers that provide goods and services to the industry. They run the gamut from the very established businesses to the startups which are poised to partner in a mentor-protegé relationship. We have as members of our organization the only minority-owned manufacturer of heavy duty brakes and clutches for trucks, buses, trains, and power equipment. We have the only minority-owned railway engineering services firm. And we have one of the largest minority-owned firms whose primary business is to lay track.

So we must take into consideration that our reason for being here is not just a DBE issue; it is also a workforce issue. Small businesses hire, employ 70 percent of the workforce.

Congressman Cummings, as the Chairman of Government Oversight and Reform, you know that when we talk about cleaning up government, we must also talk about cleaning the program. We have to strengthen the program, not dismantle it, not eliminate it. Last week I was in St. Louis facilitating stakeholder meetings on behalf of the Missouri DOT for the new Mississippi River Bridge, a brand new bridge whose ground will be broken in the fall of this year. There were probably 150 people in attendance, most of them principals or employees of DBEs from both sides of the Mississippi River, the metropolitan St. Louis area and East St. Louis, which has an unemployment rate of 14.9 percent. They are the stakeholders wanting to contribute to the building of something new and exciting in their community, and a chance to play their part to help our economy recovery, wanting some of the business and some of the jobs of building that new bridge that will impact their community and make it more livable.

I will leave you with this. Recently, Secretary LaHood said, and I quote, "In a very short time, your cities will be humming with construction workers, engineers, maintenance crews, and many others. You will see roads repaved, interchanges improved, and bus and rail systems repaired, upgraded, and expanded." Well, I am very excited about the fact that the COMTO Board of Directors and I have a meeting with Secretary LaHood next week, and what we want to offer to him is that with that wonderful humming in the construction industry, we want to also hear the sweet chorus of our Nation's DBE firms, and also added to that the harmonies of all of their workforce—their engineers, their planners, their administrative workforce, their carpenters.

With that kind of chorus, with that kind of humming and melody all together, we can enhance our Nation's infrastructure, decrease discrimination, and harness the power of all our Nation's people and businesses to get our economy back on track. The members of COMTO stand ready to do our part. To dismantle or neutralize the existing DBE program will result in a very chilling effect not only minorities and women who have been demonstratively under-represented in federally-funded transportation contracts across the Country, but also a chilling effect against our very Nation.

Mr. Chairman, COMTO applauds the efforts of the T&I Committee to protect the DBE program and we support your efforts to advance inclusiveness in the industry. Thank you for the opportunity to testify.

Mr. OBERSTAR. Thank you for your splendid testimony. Really appreciate your comments and your remarks about my work in particular on this matter.

Ms. Hall, on behalf of AGC of America.

Ms. AMY HALL. Mr. Chairman and Members of the Committee, thank you for the opportunity to present testimony today on the U.S. Department of Transportation Disadvantaged Business Enterprise program. I am Amy Hall, President of Ebony Construction, located outside Toledo, Ohio, representing the Associated General Contractors of America.

Ebony is a second generation family-owned business that performs asphalt paving and milling, primarily as a subcontractor, in Ohio, Michigan, and Indiana. We are a certified DBE company. My comments today will focus on how the USDOT DBE program is administered by the Federal Highway Administration.

No industry as large, diverse, and fragmented as the construction industry is is entirely free of discrimination. While the vast majority of these men and women who work in our industry are good people, there are no doubt some bad seeds. AGC is working to foster a business climate that enhances opportunities for all businesses. The contracting community has concerns about the administration of the DBE program. Many program requirements are contradictory and/or ambiguous. In addition, there can be lack of uniformity in the ways each State handles these various requirements. These problems are real concerns for contractors because stepping over the line can lead to suspension, disbarment, and Federal prosecution. Any of these penalties can, at the very least, put a company out of business and have far graver consequences.

These concerns led the AGC to meet with then Federal Highway Administrator Mary Peters and then DOT Inspector General Ken Meade and other DOT representatives. The outcome of the meeting was the creation of an industry-government workgroup to: identify the contradictory and inconsistent program requirements; clarify the intent and the administration of these various requirements; and create guidance. This group met for over three years, and the end result was a document that we called the Tool Kit, which is initiated to help contractors comply with the program requirements. A copy of the Tool Kit is attached to my testimony.

AGC believes that the document is very helpful in clarifying for all parties involved how this program, the requirements and how they are intended to be implemented. However, despite all of our efforts, the DOT informed us that they could not endorse this document. Unfortunately, that renders this document useless, because contractors and DBEs must have the confidence in their decisions that they make related to program compliance are based on some official guidance from DOT.

AGC still believes there is a need for a document clarifying what contractors and DBEs can and cannot do in meeting the DBE program requirements. We believe there are real differences of opinion on how to administer the rules. Many of these issues also impede

DBEs from being successful in the program and cause uncertainty and potential traps for contractors and DBEs attempting to meet these requirements. An example of how the implementation of this program seems to undermine its intended purpose are the rules related to the expertise of the DBE owner. Once again, DBE owners are being held to a different standard than non-DBEs. As part of the commercially-useful function reviews, DBE subcontractors are being asked to go to the field and actually perform field tasks. Let's remember, running a successful contracting operation does not require the owner to be able to operate the machinery or perform any of the actual construction tasks. However, running a business requires an entirely different set of skills.

Another issue that was discussed as part of the Tool Kit is the type of assistance the general contractor is able to provide DBE subcontractors. It is industry standard practice to provide assistance to subcontractors with equipment, personnel, and material as the need exists. This assistance can be provided to the non-DBE subcontractor; however, if a prime contractor was to offer the same assistance to the DBE contractor, red flags are raised and both the contractor and the DBE could be subject to intense scrutiny or targeted for legal proceedings.

An example of the regulation that works against the DBE's success in the program is an issue that directly impacts my company. The regulations allow for the cost of material that is purchased by the DBE work for on the contract to count towards goal achievement. However, if the DBE purchases material from an entity associated with the prime, rather than a third party source, that portion of the contract is not counted. Often, the third party is not an option because the plans call for specific material production. Frequently, the prime contractor then becomes the only source for that material. Not allowing my purchase of asphalt from the prime undermines the ability of the prime to not only meet their goals, but negatively impacts my business.

Further meetings with the DOT resulted in the creation of the DBE Roundtable. Through this forum, issues can be raised and discussed in a public setting, resulting in guidance from DOT. AGC is hopeful that the Roundtable will continue. The Roundtable has addressed the use of joint checks, certification consistency, change orders, DBE capacity, and many more items. The issue I mentioned about material purchased from the prime has also been addressed, and we are awaiting OMB's response.

We believe the program rules need to be written in a way that allows for more collaboration, mentoring, and assistance. AGC has always encouraged the creation of mentor-protege programs that allow contractors to work with DBE firms in a collaborative fashion to ensure a mutually beneficial result.

Mr. Chairman and Members of the Committee, AGC has taken the approach that while the program is in place, we will work together to make it something that makes sense, does not impede the successful completion of the vitally needed transportation improvement projects, and does not create legal concerns for all participants. AGC is hopeful that the dialog that was started over the past years with DOT, the National Association of Minority Contractors, and the construction industry will continue.

Thank you to the Committee for having this hearing on the administration of the program, and I would be happy to answer any questions you may have.

Mr. OBERSTAR. Thank you, Ms. Hall. I want to thank AGC for their very active, assertive involvement in the DBE program and for the very significant contributions AGC has made. It is very much to their credit to have done it and have you as their very articulate witness.

Ms. AMY HALL. Thank you.

Mr. OBERSTAR. The sum of the testimony of these two panels is perhaps that three centuries of discrimination cannot be overcome in two decades, and that while there are successes, as noted in the DOT testimony and testimony of the various witnesses, there are still serious problems inherent in this program, and that those problems are reflective of the society in which we function. We can't change all of society, but we can sure change a good deal of it in this Committee and in the work that we do and the legislation that we move forward.

We have heard continuing theme about informal networks, about the ol' boy networks, about bonding requirements, about insurance needs. We have had this initial experience on funding to cover bonding needs of DBEs in the stimulus, and it is too early for any of the panelists to say they had an experience with it, but comment on that for me and then offer your thoughts about whether this would be a good precedent for us to include such language in the long-term six-year surface transportation authorization bill coming up.

Ms. Hall, it looks like you are ready to respond.

Ms. SARA HALL. Well, certainly, I think anything that we can do that helps highlight some of the hidden barriers to participation. One of the things that we have certainly found is that even if your contract compliance department or your airport is serious about making bonding and insurance requirements that are possible and encourage participation, you sometimes have a disconnect in the process; and unless there is education on all fronts through programs such as the one sponsored, you are not going to have real results.

What we have found is that you have to educate at every step of the way and make sure that there is not a step that is missed, because often, if that step is missed, then the barrier exists and you are simply not aware of it.

Mr. O'BANNON. Mr. Chair, there must be a commitment to be robust in our application and implementation of the program. That really is where the rubber meets the road. If you impose these requirements without thinking about their impact, then you are in fact creating artificial barriers to participation.

For example, you have a janitorial service contract, and as part of that solicitation you say we are requiring that you have five years worth of airport experience in doing janitorial work. Those are the types of artificial requirements and barriers in terms of criteria that really do prevent inclusion, and those are some of the things that you are going to have to focus on in terms of really implementing the program in such a way that that participation is both real and substantive.

Mr. OBERSTAR. Are you referring to an actual requirement in a proposal?

Mr. O'BANNON. Yes. I have seen those requirements.

Mr. OBERSTAR. How in heaven's name, tell me how experienced janitorial service at an airport differs from janitorial service.

Mr. O'BANNON. That is the issue on that particular contract that I had. But these are built in because sometimes the person drafting it is really drafting it from the perspective of what are we looking for. I mean, we are looking for people that frankly we don't have to supervise; we are looking for people who have been here for a while; we are looking for people who have the experience. And when you take that attitude in drafting these RFPs, you begin to exclude other potential providers from participating.

Mr. OBERSTAR. Earlier, Mrs. Napolitano, our Member from California, raised the issue with DOT whether they have an actual active review process where they are looking for those circumstances where there is this—she didn't use this term, but unseen, under-the-surface discrimination. What you are saying is maybe we need some structural—by that I mean institutional—review of contracts to see whether they are discriminatory in their requirements.

Mr. O'BANNON. Well, let me say this, Mr. Chair. The FAA Office of Civil Rights has done a great job with the resources that they have, but I can tell you from my personal experience they are understaffed. I mean, for the southwest region, we basically have one civil rights officer who is responsible for administering all of these programs across the board. She is the one who really is the day-to-day person who is responsible. But it is the DBE liaison officers at the individual agencies that are really responsible for implementing these programs, and if we are not aggressive, if we do not have experience, if we are not pushing this particular agenda, and if it is a stepchild of that agency, then we are not going to be successful.

Mr. OBERSTAR. We don't want stepchildren in the historic sense of that word. They are sort of unwanted, unappreciated, unloved. I have stepchildren and I love them, and that love is returned, I must say.

Section 136 of H.R. 915, the FAA Reauthorization Act, which has been reported from Committee—hasn't come to the House floor yet—provides: "This Section requires the Secretary to establish not later than one year after date of enactment a mandatory program to train airport owners and operators on how to properly certify whether small businesses and airport concessions qualify as small business concerns owned and operated by socio and economically disadvantaged individuals." It doesn't say anything about the Office of Civil Rights. It doesn't say anything about the staffing of that office. It doesn't say anything about the numbers of personnel. And now that you have raised that issue, this is something we can address before we bring this bill to the House floor. We can include such adjustment in a manager's amendment.

Mr. O'BANNON. Thank you.

Mr. OBERSTAR. Why is it difficult for disadvantaged, small, minority, women-owned enterprises to discuss, in whatever forum, the discrimination they are confronting? What are those barriers to raising the issue?

Yes, Ms. Cunningham.

Ms. CUNNINGHAM. Mr. Chairman, if I may, what our members tell us—and I heard this last week in St. Louis from hollers. When they raise the issue, then they lose the work or they don't get the next job. So there are penalties. So they go along to get along so that they can get the next contract.

Mr. OBERSTAR. So people are worried about sticking their neck out of the foxhole and getting it shot off?

Ms. CUNNINGHAM. Yes.

Mr. O'BANNON. That has been our experience as well. I mean, AMAC represents airport concessionaires and DBEs who do work in airport contracting, and even though they are willing to talk to us confidentially, their concern is they are going to be branded as firebrands or radical and simply people are not going to want to do business with them if they complain.

Mr. OBERSTAR. We have protection for whistleblowers, and a number of programs under the jurisdiction of this Committee. We just recently did something very significant for Coast Guard. We have it for aviation, for reporting of near misses, for reporting of failure maintenance oversight. Maybe we need something of that nature here, a whistleblower protection for minority enterprises.

Mr. Cummings. Godfather Cummings.

Mr. CUMMINGS. Oh, boy. Mr. Chairman, I want to pick up where you left off and tell you, Mr. Chairman, that one of the things that folks have a tendency to say when minority and women contractors raise issues, they have a tendency to say here they go again, meaning that a lot of times the legitimate complaints and concerns are dismissed, or they will say things like you are whining. That is a favorite word. But yet and still, people are not getting those opportunities. You can call it what you want, but the fact is that it doesn't take a rocket scientist to see the discrimination.

With regard to the whistleblowers, I think one of the things that happens is that while folk may have the protection, may get the protection of a whistleblower statute, folks don't necessarily want to go through the process, because although you have the protection, they feel that you are going to suffer no matter what in the meantime. And I think our witnesses probably would agree with that, I think. So we have got to be careful with even how we do that, and not assume that it is going to be the solution to all the problems.

But I want to come back to some of the things that you all have said, particularly you, Ms. Hall, and you, Mr. O'Bannon. In answer to one of the Chairman's questions, you all were talking about things that may be—and all of you, to a degree—impediments of reaching true participation with equity and parity with regard to minorities and women. Can you think of other things that you have not maybe mentioned yet today that we could, say, incorporate in a SAFETEA-LU bill or, as the Chairman has said, the aviation bill? I just think that this is a prime opportunity to get some of these things done right now. Like I said, we have a Chairman that is sensitive to these issues, and hopefully we have a Congress that is sensitive to them.

So I am just trying to make sure that we cover things that—I mean, if each one of you all maybe had something that you would

like to see in legislation, that is practical, that is,—and when I say practical, going back to what you said, Mr. O'Bannon, taking into consideration everything involved and truly thinking it out to the nth degree and saying, okay, this is going to, in the end, when all the dust settles, this has the most likelihood of helping this situation. And in your answer I am trying to get to what are those things that we can do hopefully to memorialize something that lasts beyond us. Because one of the most important things I think for us to do is, during our watch, to try to put things in place that will last beyond us. And, of course, you have to take into consideration the law as it is now and making sure that it fits within the law, because certainly the other thing is that, from a practical standpoint, if it doesn't fit within the law, then we have got the constitutional challenges.

So why don't we go right down the line? If you don't have a response, that is fine. But I think the Chairman is asking what can we do to try to—I don't want to make your trip in vein or your testimony in vein, so I want to make sure we are getting from you the very best that you have to offer as to what we might be able to do to help.

Mr. O'BANNON. Well, let me say this. First of all, AMAC, as an organization, would be more than happy to sit down and work with this Committee or with any Subcommittee in terms of coming up with specific recommendations. I am the guy in the weeds. I administer the DFW Airport DBE, ACDBE program, our MWBE program, so I am a weeds kind of guy, because, to me, it is these little decisions that have greatest impact in terms of are you able to be successful at the end of the day.

There are two or three areas that I would really ask this Committee to take a look at. One is we tried, at DFW, using an approach called subguard versus bonding. Subguard is an insurance program that replaces the bonding requirement. That approach can be successful if administered properly. And, again, the devil is in the detail. If you apply the same bonding standards for admission into the subguard insurance program, you have just traded one obstacle for another. But you can have a much looser set of criteria which still provides the protection for both the owner, the contractor, and the insurance company without some of the financial restrictions that go into the bonding requirement. So that is one approach that I think this Committee should take a look at.

A second approach that I think this Committee should take a look at is financing. The critical battle for many smaller minority- and women-owned businesses is that mobilization fee and the time that it takes in a public sector job to get paid. At DFW—and I will use my airport as an example—we have a situation where you work 30 days, you then have 30 days by statute to pay. That is 60 days. Assuming that you are a subcontractor, that prime contractor can pay you within 10 to 15 days from the date that they get paid. That is 75 days before you get your first check. You paid labor, material, and supplies. We must address the issue of providing adequate financing for mobilization.

Mr. CUMMINGS. And I want number three, but what you just said, in an economic time like we have right now, it is a death sentence to a small business, because most small businesses survive

based upon lines of credit. If you don't have a line of credit, under those circumstances, you are dead; you can't buy supplies, you can't pay employees, you can't pay rent. So you're dead.

Number three?

Mr. O'BANNON. Number three is we should look at the delivery methods, everything from—and by that—I don't want to disparage the people who work in my capacity, but some of us—you know, I am a lawyer by training, and what I had to do—and thank goodness our board supported this—was I went and I requested our board I need a construction expert. I need someone who has done construction so they can tell me how to speak constructiony to a construction person, because I found myself being—I would go in with the expectation of achieving a certain goal and simply get talked out of it because I simply didn't have the expertise to deal with it. So the staffing and the training of the DBE LEOs is critical. I mean, we must be able to critically, analytically assess the work, the scope of work. We must have experience in this area and enough training and background in order to impact the process. So it is the delivery of these services. If we do not have that training, we cannot be effective, and we either have to have the staffing that will bring that expertise to the forefront or the type of training that will make us more effective. You cannot take an HR person and say you are now the DBE LEO officer and expect that person to be successful.

Mr. CUMMINGS. Mr. White?

Mr. Chairman, I know I am running over. I just wanted to get these answers.

Mr. OBERSTAR. Please, just proceed. There are no other people clambering for the microphone right now.

Mr. WHITE. ACI's feeling is more of mandatory certification training where DOT and FAA really has a uniform process and where DBEs get certified as a DBE. That form they can use in Memphis, Tennessee, can go to Arkansas and do work, go to Mississippi and do work. I mean, in Memphis, Tennessee, we live right there in the region. You actually can do work in a four-State area. But without that certification and being seen as a real certification uniformly throughout the United States, that is a very difficult process.

Mr. CUMMINGS. Yes, ma'am.

Ms. SARA HALL. I would echo the two comments and just say that, certainly, anything that we can do on both sides of the equation, on the airport, the transportation, the DOT, FAA recipient side, and then also with the DMWBE to make the process easier is what we want to do. Uniform certification will do that; training will do that; as will the educational programs of AMAC and ACI, where they bring together the individuals and the airports who implement and carry out these regulations and really educate them about the hidden barriers and the well-meaning policies that, in effect, further discrimination and exclude people from the marketplace.

Mr. CUMMINGS. Ms. Payne?

Ms. PAYNE. Well, I ditto all of the above as far as the highway construction industry is concerned.

About 20 years ago, the prime contractor usually held the bonding. Today, the DBEs have got to get their own bonding, which is directly tied to the personal net worth issue. So the fact that we have addressed the personal net worth issue is extremely important.

Secondly, part of that personal net worth issue, today, to accumulate or to count personal net worth, retirement plans are part of it. That should be eliminated. It is very, very difficult if you have been in business or you are my age, say, for example, and you have been putting into a retirement plan, and you have now—well, maybe now not now, but in the past two or $300,000. Well, that was $300,000 that went immediately to your personal net worth, even though your business—it would be stupid to touch it, you can't touch it, so on and so forth. So eliminating the retirement plans as part of the personal net worth accumulation or accounting would be helpful tremendously to DBEs.

Also, I think in the highway construction industry people live and die by bank loans. You get a project, prime contractor, subcontractor, and you go to the bank to make sure you can do the work. Well, in this very bad economy, banks aren't loaning, and we have had a lot of women-owned businesses and minority-owned businesses actually go out of business because they couldn't get the loans necessary so they could do the work.

Mr. WHITE. Mr. Chairman, please excuse me. I need to go catch a flight, if I may.

Mr. OBERSTAR. You are excused, Mr. White. We don't want an airport person missing an aviation flight.

[Laughter.]

Ms. CUNNINGHAM. I would like to echo members of the panel, but I think high on our list of the COMTO membership is the need for a national uniform certification program. I sat with Al Brunson, who is sitting behind me, so if he will raise his hand so you all see him. He also sits as the advisor to the COMTO Board of Directors on small and disadvantaged business issues, so he is a member of our national board. But last night we had dinner and I was asking him all the places that he does business, and every place he does business he has to get—every State; he is in several States—he has to get certified, and these are all federally-funded projects either in transit or in highways. So from State to State to State he has to go get another certification. Well, he has been established for about nine years, but what about the firms that are starting up or have been in business less than three to five years? That is a very expensive and cumbersome process for them.

Mr. OBERSTAR. On that point, if the gentleman would yield. Are there significant differences State to State? Why does each—if you are doing this work under federally-funded out of the Highway Trust Fund, why does each State have to be so different?

Ms. CUNNINGHAM. Now, I can't——

Mr. OBERSTAR. Or are there real differences?

Ms. CUNNINGHAM. I can't give you the specifics, but I would gladly give him my seat. I can get you the information. I can get it to you by close of business tomorrow. But I will tell you that our small businesses complain about the fact that they have a mound

of paperwork like this for every certification, and maybe Ms. Hall can speak to that, I don't know.

Ms. AMY HALL. We have found that when we have applied for certifications in other States outside our home State, that this is true, and that happens, and I think it is probably because, at the end of the day, the onus of that particular DBE and their efficacy and their actual ability to perform work, that particular State feels the need to do the investigation and to do all the things that are supposed to be standard under the UCF. Not the UCF, but the UCP. I am sorry. So I would imagine that creates the silos in which each State works.

Mr. OBERSTAR. We could, I think, if the gentleman would continue to yield, we could provide guidance, direction to DOT to harmonize those requirements among the States. It is Federal funds, the same Federal Trust Fund dollars in the East Coast as on the West Coast and the northern border and the southern border. I don't understand why that is a problem.

Yes, Ms. Payne.

Ms. PAYNE. I was just going to say that I know it sounds like it is a really big problem, and it is. Please don't get me wrong. But in years past—actually, DOT does have a unification program, and the paperwork actually has been cut down by two-thirds, believe it or not, from the past. However, the States, their domain, because our program is so unique, where, like an SBA, certification is all paperwork. Our certification is onsite. So one State, even though their peer, the State beside them, has certified a company, they don't know anything about that company, necessarily, and they want to know, so they will come in and they will do an onsite presentation. They don't have to, but generally they do, and that is one of the problems. And that is the good thing about our program. I mean, it is really scrutinized and it is very difficult to get certified. But, on the other hand, it does hinder the uniform certification process.

Mr. OBERSTAR. Ms. Hall?

Ms. SARA HALL. Chairman Oberstar, I can tell you that in the last 12 months, I have attended both AMAC and ACI conferences where this very issue and this problem has been discussed, and in transportation our dollars come from the FAA, they are Federal dollars and they flow through to the airports in the various States. The States do have uniform certification agencies, but they are at the State level. So what happens, for example, in Memphis, Tennessee, is in 30 minutes we have a firm from Arkansas who wants to come over, they have to be certified in Tennessee, their Arkansas certification does not count. A firm 15 minutes away in Mississippi must be certified in Tennessee, and ACI and AMAC have gone on record writing both the FAA and TDOT to request a meeting, which they agreed to grant us, and we are looking forward to that, to sit down and discuss this issue and this problem.

And what we have heard is that while the rules are the same, as you know, the devil is in the details and they are all fact-specific. So each State may interpret a particular detail differently; may see an asset in a different way, especially when you are talking about joint assets; may view something differently; and literally the forms that are required are extensive. And when you are small,

it takes all your resources to get certified; you really can't get ready for your jobs.

Mr. O'BANNON. And under the existing regulations, it is optional for me to accept—I have the option, under the existing regulations, to accept certification from Virginia. Much of their hesitancy in doing that is concern about the integrity of their certification process.

Mr. CUMMINGS. Ms. Hall?

Ms. AMY HALL. Our position and our point of view is that we feel that two-way communication is vital to promoting the DBE program. We have created the Tool Kit, which we hope at some point will be endorsed by the DOT. The Roundtable was also created last year. It is a forum in which contractors, both majority and minority contractors, get together with the various DOT agencies, and we are able to sit down and discuss the rules and the regulations that are currently in place that have the potential to negatively impact both the contractor, as well as the DBE subcontractor. And one of the challenges that the DBE program has is to shift the consciousness from protecting the efficacy of the program from fraud to moving the program to what it is supposed to be, to build the capacity of the DBEs. And so many things have been created to prevent the fraud from happening; however, simultaneously, it negatively impacts the DBEs' ability to carry on industry standard practices and business practices that other subcontractors can do, but the DBEs cannot.

Mr. CUMMINGS. Thank you very much. I want to thank all of you for your testimony. I appreciate it. All of these suggestions are very, very helpful, and, as the Chairman has said, there is nothing like hearing people who are having to deal with something every day, every day, because you are the experts. So thank you very much.

And thank you, Mr. Chairman.

Mr. OBERSTAR. Yes, I concur in those comments. You are the experts. You are the practitioners on the front line.

Ms. Hall, you suggested that the DBE Tool Kit AGC developed be somehow incorporated in the Federal Highway Administration programming, is that the thrust of your——

Ms. AMY HALL. Yes. We have, for over the past three years, worked in conjunction with FHWA in creating this Tool Kit, and what it does is it breaks down the DBE program and puts in layman's terms the guidance and the how to interpret these rules both for the contractor, as well as the DBE contractor, because what happens or what we have found is, from State to State, each State interprets these rules differently. So in order to provide like one common language, so to speak, so everybody is understanding and working with the same rules, the Tool Kit was created.

Mr. OBERSTAR. It is a very intriguing idea, something we will have to evaluate further. Something of this nature takes on the character of law. We want to be very careful about how it is worded, how it is phrased, how it is practiced, and consequences that we haven't foreseen that might result from it. Have you talked to AASHTO about this Tool Kit——

Ms. AMY HALL. Yes.

Mr. OBERSTAR.—and considered having AASHTO included in their manual? Which is different from being a regulatory procedure.

Ms. AMY HALL. Right. We have. At the conception and the development of this Tool Kit, all the organizations have been abreast of what has been going on, yes.

Mr. OBERSTAR. Well, we have to evaluate that very intriguing suggestion, and we will work on that further.

Was it Mr. O'Bannon I think you said you are concerned about the integrity of the certification process. What do you mean by that, that it might differ from State to State? Is that what you are saying?

Mr. O'BANNON. The question always is how rigorous is that certification process, and you have heard some discussion about you have only a paper certification process in some jurisdictions; you submit your paperwork and then that basically is it. Other jurisdictions are much more concerned to make sure that there are onsite inspections. I mean, we have actually had experiences where you actually have gone onsite and the example I am using is the white female who was ostensibly the owner of this particular job was actually in a small clerical office in the back. Her husband was up front in a big office, and when you went on and did your onsite inspection, it really was apparent that the person running this company was the husband and not the wife. So those onsite inspections are valuable in determining and to make sure, to confirm that what is represented on paper is in fact what is going on.

So as the person who is responsible for working with these businesses, I want to make sure that the benefit of the program goes to those businesses that are supposed to be the beneficiaries. So I trust, because I know, the local certification process. I have more concern about other jurisdictions because I am not as familiar with what they are doing.

Mr. OBERSTAR. What you are really arguing for is a standardization of the certification process.

Mr. O'BANNON. Absolutely.

Mr. OBERSTAR. Which is interesting in another context at airports. The TSA accepts every State's driver's license as a verification of who that person is; it has their photo, it has their vitals, usually social security number and address, and so on. And TSA doesn't go behind that license to see whether every State has a good certification process for driver's licenses. But you are talking about something different here and we can craft language that will do this.

Mr. O'BANNON. I don't want my airport or my office written up because of fraud. I do not want that. So we have to be concerned about the integrity.

Mr. OBERSTAR. And it is clear that the civil rights offices, from previous testimony and from this panel's testimony, need more personnel.

Mr. O'BANNON. Absolutely.

Mr. OBERSTAR. They just don't have enough people. I think you said that earlier on your own.

Mr. O'BANNON. Yes.

Mr. OBERSTAR. Ms. Hall, you referenced a statistically significant wage disparities for all minority groups and white women. Is there a documentation for this?

Ms. SARA HALL. Excuse me, Chairman. Our disparity study is 318 pages. We have included it and submitted it to the Committee. We have also submitted a 20-page summary and then a shorter 2-page summary. We did use NERA. The study was quite extensive; it was six years of contracting data, over 1,200 contracts, subcontracts; and over $900 million of contracts. And NERA looked at every aspect and it was reviewed by the airport in great detail, and the disparities were statistically significant and adverse in all minority groups.

Mr. OBERSTAR. Let me just ask our counsel, Ms. Soumbeniotis, do we have that in our file?

Ms. SOUMBENIOTIS. We do have that in our file.

Mr. OBERSTAR. Okay, we will make sure that that remains a part of the Committee file. We will make a reference to it in the Committee hearing. And if there is an abstract summary of some discreet length, we can include that at this point in the record.

I want to be very clear in this hearing to establish the successes of the Minority Business Enterprise program, the obstacles to its full success, and the challenges that remain so that in some future court case, which is most surely to arise,—I have learned my years of legislating—that a court looks at it and says oh, there was a very substantial record in support of this legislation, and that is what we want. That was one of the main purposes of this legislation, is to build that record in the course of this hearing.

I just want to sharpen your focus now in this question. What has been the impact of the MBE program in DOT, for all of its modes, in ensuring that women-owned, black-owned, Hispanic-owned enterprises have been able to enjoy success?

Mr. O'BANNON. DFW conducted an economic impact study that was done by the University of Texas, and for the period September 29, 2006 through August 30th, 2008, we looked at the MWBE concessionaires. Those DMWBE concessionaires produced more than $350 million in gross revenue, and DMWBE firms on contracting provided over $280 million in contracting services and procurement. That spending and concessions operated generated an astounding $1.2 billion in economic activity, creating 14,000 job years of employment and increasing labor income by more than $450 million.

There is a positive economic contribution to removing discrimination and allowing these firms to participate in these opportunities both from a job creation standpoint, as well as State and local taxes, because my recollection—I don't have the statistics in front of me, but my recollection was $60 million was paid in State and local taxes by DMWBE firms from the activities.

Mr. OBERSTAR. That is an important part. Not only doing this work, they are paying taxes as well.

Mr. O'BANNON. Absolutely.

Mr. OBERSTAR. Employing people. People are paying taxes; the businesses are paying taxes. But can you say that without the presence of the MBE language, that much of this would not have occurred?

Mr. O'BANNON. That is correct. You would have a bifurcation in society where a portion of my community and the business owners who live in my neighborhood would not be participating in these dollars, because when I go to the grocery store, I am seeing local contractors and subcontractors who live in my neighborhood, who have contracts at DFW, and they are benefitting that local community and our region because of this economic activity.

Mr. OBERSTAR. Thank you.

Ms. Hall?

Ms. SARA HALL. Chairman Oberstar, there are a number of statistics and findings in our study. I think a few that might sum it up relatively quickly are that although black firm owners account for 19.4 percent of all firm owners in the Memphis metropolitan statistical area, they account for less than 1 percent of sales and receipts. For women, the number is women-owned firms account for 26.6 percent of all firms in the Memphis metropolitan statistical area, but account for less than 2.5 percent of sales and receipts. So we know that there is disparity.

What we also know from our study is that our utilization of M/W/DBEs in our study period was approximately 17 percent, much higher than the 1 percent and the 2.5 percent numbers, while not apples-to-apples comparisons, but they give you a good idea of the progress.

What is perhaps, as you said, it has taken us a long time to get here, and it will take us a long time to remedy these effects. What we found in our study was that the current availability of MWBEs in the Memphis metropolitan statistical area was 28 percent. And, again, these are broad numbers. So what we want to do is make sure that, in the public sector, that there are goals, that we encourage participation and inclusion, and that we allow those goals to reach out into the greater community, because what the anecdotal evidence of our disparity study said—and you can read it in a pretty large section—we both surveyed both by telephone, by written survey, and by individual interviews and group interviews, M/W/DBEs and non-M/W/DBEs alike, and what we found from the M/W/DBEs is that, in many instances, they told us that but for goals on public contracts, that they would not be included, and that by the very firms that used them as subcontractors when there were goals, those firms did not call them to submit quotes on projects without goals.

So I think you see both the progress that we have made and the progress yet to be made, and those studies certainly illustrate that.

Mr. OBERSTAR. That is very precise on point. Thank you, exactly what I am looking for.

Ms. Payne.

Ms. PAYNE. Well, Mr. Chairman, first of all, Women First has calculated that DBEs, women and minorities, certified, create about 100,000 jobs annually. So that would be number one. Secondly, for women, in 1988, women were at 1.6 percent nationwide. We are now over 6 percent. So that is the positive. There has been a tremendous increase as far as women participation and the dollars that they have generated.

The negative part is that, in my testimony that I didn't verbally give, but submitted, I called 15 States and talked to their DBE co-

ordinator in every State. Out of those 15 States, 10 got me the information that I needed, and I asked two questions. Question number one was what was your DBE actual achievement goal for 2007 and 2008; and the second thing I asked was what was your 100 percent State funding achievement for DBEs. In every case other than one the DBE Federal program had a goal of between 7 and 12 percent. State was less than 2 percent in most cases, with one exception to the rule.

So that tells you, with the program in place, qualified women-owned businesses and minority-owned businesses can do the work. Here it is being used because it is required. In those areas that are not required, they don't use them, privately or actually public monies if it is a State 100 percent funding, and they don't have a program; and most States do not have a program.

Mr. OBERSTAR. Thank you.

Ms. Cunningham.

Ms. CUNNINGHAM. I don't have the supporting statistics because I was told other people were going to do that, and they have done that very well, but I would like to draw a contrasting analogy, and that is—and I will just use public transit, because COMTO started out as public transit professionals.

In that part of the industry, minorities fund 60 percent of the fares for public transit; African-Americans about 38 percent, Hispanics 18 percent, and then the next group is American Indian and Asian-American. So almost 60 percent of fares are provided by people of color. Add to that the tax base that they support. Then you go around the Country and look at who is sitting behind the steering wheels of the buses and who is operating the railcars. So the impact of minorities in public transportation is significant in just their everyday living. I mean, they have to use public transportation.

But when you look at the firms that are doing business or the folks that are CEOs of those agencies, it is horrendously low. In the employment part, of 1500 major public transit agencies around the Country, less than 40 are people of color. So even the people that are making the decisions about contracts do not look like—they are not women and they are not people of color.

So, that said, I certainly can get you statistics from some of our collaborative organizations—AASHTO, AAPTA. I do not have those statistics today, but I can get them. But the impact of women-and minority-owned businesses I would believe is just as substantial as our use of the systems and the roads.

Mr. OBERSTAR. Thank you.

Ms. Hall.

If you provide information, it need not be duplicative.

Ms. CUNNINGHAM. It need not be? Okay.

Ms. AMY HALL. The DBE program, independent of the inherent challenges and the nature that comes with that, has provided opportunities for myself, as well as other contractors, to participate in an arena in which had historically not seen such participation, and it has allowed people to create jobs and give their employees a quality of life, which they wouldn't have been able to do that prior to the DBE program. So independent of all the challenges we have, the good part of the program is that it gives access. It gives

access for people and for groups of people who primarily and traditionally and historically have not had access.

Mr. OBERSTAR. Those are the answers that we were looking for, the framing of the issue for which I scheduled this hearing, and very instructive. It reminds me of a Haitian expression: [indiscernible]. Behind the mountains are more mountains.

Behind the problem are more problems. And while the language that is in place that we have been discussing during this hearing, making a move toward resolving these problems, there are still some issues yet unresolved.

I am reminded of the first days of the Reagan Administration in 1981, when they were trying to dramatically change the scope and the nature of government, and, in effect, to repeal the great society issue of legislation of the Johnson era, the immediate post-civil rights legislative era. And one after another program David Stockman, Reagan's budget director, said REA has been a success, there is no longer a need for it; we recommend termination of this program. EDA, the Federal Economic Development Administration, has been a great success, there is no longer a need for it. And when one after another proclaimed victory and said we can now erase these programs from the book, without for a moment considering that there was no final victory; there was a job yet to be done and that we had really only made a start on attacking the problem.

We have made a start with the DBE program. We now have to continue it. We have to open wider that door and address these fundamental underlying problems that you have addressed today in this panel and the previous panel. I thank you for your testimony.

The Committee is adjourned.

[Whereupon, at 3:53 p.m., the Committee was adjourned.]

Statement of Honorable Corrine Brown
Full Committee Hearing on Disability Business Enterprises
March 25, 2009

I want to thank Chairman Oberstar for holding this important hearing on the Disadvantaged Business Enterprise Program. I could bring up hundreds of businesses in my district that are benefiting or could benefit from DBE programs.

There should be no question that these programs are critical to ensuring some small measure of fairness in distributing the billions of dollars provided by the federal government each year. In fact, I think we should be doing even more to ensure that minority and women owned businesses are getting their fair share, and I think the upcoming transportation reauthorization is a great place to start.

I often use my grandma's sweet potato pie as an example. We all work to provide the ingredients for the pie, and all that minority and women owned businesses are asking for is a small slice. Majority owned businesses get the rest of the pie, and yet they are still not satisfied.

Minority, women owned, and DBE businesses have to work even harder to get the financing, insurance, and bonding that is needed to run a company and get contracts. And even then they usually end up subcontracting for large prime contractors who send these businesses their scraps so they can fulfill state mandated minority participation goals.

Eight years of Bush Administration policies have destroyed many of the meager provision designed to protect Disadvantaged Business Enterprises, but I am hopeful that with the new Obama Administration we can begin to turn that trend around, and return some fairness and equality to a system that is currently unfair and unequal.

With that, I want to welcome today's panelists. I look forward to hearing how the DBE program has made a positive impact on their business and community, and how we can strengthen and build the program.

Testimony of the Honorable James Clyburn (D-SC)

House Majority Whip

At the hearing on

U.S. Department of Transportation

Disadvantaged Business Enterprise Programs

March 26, 2009

Before the

Committee on Transportation and Infrastructure

U.S. House of Representatives

Chairman Oberstar, Mr. Petri, and members of the Committee, I am honored and pleased to appear before you today. As a former member of this Committee, I know first-hand the significance of the many programs and various matters within your jurisdiction. I am also aware, and stand in awe, of the tremendously positive impact this Committee's work has on our country.

I want to discuss with you today one of those matters that is of great importance and concern not only to me personally, but I believe to our nation as a whole, and that is the issue of effectively confronting historical inequities in our nation's transportation industries. The hearing today is on the disadvantaged business enterprise (DBE) programs authorized by Congress and administered by the Department of Transportation (DOT). As the Committee is aware, the DOT DBE programs apply to airports and surface transportation. They have been enacted by Congress to address historic discrimination against minority-owned firms in transportation and to ensure that minority and women-owned firms have a fair opportunity to participate in contracting opportunities made possible by federal financial assistance.

Mr. Chairman the word "discrimination" is a tough term. It conjures up images of past times and past acts that many people would like to forget. Any discussion of the terms makes many people uncomfortable. In this regard, I am reminded of the debate that ensued when Attorney General Holder observed essentially the same point.

Mr. Chairman and Members of this Committee, although an uncomfortable discussion at times, it is absolutely essential that we—as Members of Congress—and as citizens are willing to talk about the continuing challenges that racial and gender discrimination (and, for that matter, other forms of discrimination) raise for public policy. This Committee has demonstrated on a bipartisan basis its commitment to fairness and to tackling this issue. For this reason I commend you for holding this hearing today.

Mr. Chairman, sometimes I hear pundits (well intentioned and some not so well intentioned) argue that there is no current need for the DOT DBE programs. They reason "that times have changed" and that America is much more enlightened than when the first statutory DBE program was enacted in 1983 during the Reagan Administration. Critics and opponents often argue that the DBE programs are legally or constitutionally suspect. However, despite

such assertions, it is my strong belief that discrimination is still a problem, that DOT DBE programs remain necessary, and that the programs are constitutionally sound.

Mr. Chairman, it is true—times for minority and women entrepreneurs have improved from what they were when the first DBE programs were enacted. Although I readily acknowledge and celebrate these improvements, I also know that it does not mean that discriminatory conduct has ended. Indeed, there are numerous academic and statistical studies demonstrating the ongoing incidence of racial discrimination.

Equally compelling are the anecdotal stories that I hear from minority and women business owners in my Congressional District and from around the country. For the most part, these entrepreneurs have to find ways in which to persevere and to overcome. Some are successful and some are not. I also urge the Committee to keep in mind that discrimination can be both direct and indirect. It can be both "in your face" and subtle. Either method is just as harmful and just as wrong. For example, beyond the denial of a contract, discriminatory practices can be evident in how a contract is structured; in the eligibility criteria for the work; in quotes from materials suppliers, in the practices of prime contractors towards subcontractors; or in credit or bonding determinations.

Mr. Chairman and Members of the Committee, I speak to this issue from personal experiences. For more than 17 years, immediately before coming to this body, I supervised the investigations of thousands of these cases. I did so under four Governors, two Democrats and two Republicans. Many of those cases had no merit, but unfortunately many of them did.

The academic and statistical studies and stories of individual entrepreneurs are poignant and painful reminders to us as legislators that progress is not a reasonable justification (legally or morally) to stop combating inequities and discrimination. Although we should acknowledge and celebrate the fact that the policies that were first developed in this Committee have helped minority and women-owned firms participate in the transportation industry, we should also understand that there is ongoing work required if the "playing field" is going to become truly level.

Earlier I mentioned that the term "discrimination" makes a lot of people feel uneasy. Perhaps, this is particularly understandable for airport owners, State DOT officials, transit agencies and the like whose leaders are committed to inclusion, who truly engage in good faith efforts for DBE participation and who fully comply with federal DBE participation goal requirements. To these leaders, I tell you that your commitment is understood and your accomplishments are noted. Further, I urge you to understand that Congressional efforts redress continuing barriers to participation in no way diminishes your good works. To my way of thinking, it is quite the opposite. Your efforts represent a model of best practices that should be emulated.

Mr. Chairman, while redressing discrimination and working to ensure fairness is "the right" policy, this Committee should not overlook the clear economic case for inclusion and diversity. Our nation suffers when those who are talented, who have new ideas, and who want to work hard are denied the opportunity to compete because of their ethnic background, race or gender.

Mr. Chairman, I want to say a word about the constitutional soundness of the DOT DBE programs. As I mentioned previously, the DBE programs are intended to remedy discrimination in order to make it possible for all firms (including minority and women-owned companies) to have a fair chance to participate in the business opportunities arising from federal transportation spending. The DOT DBE statutes and regulations have been carefully crafted and narrowly tailored to meet the rigorous "strict scrutiny" constitutional standards established by the U.S. Supreme Court in the *Adarand* decision in 1995. In fact, all of the four U.S. Circuit Courts of Appeal that have considered the constitutionality of the DOT DBE programs since *Adarand* and new regulations put in place after that decision have found that the program is constitutional. This conclusion has been affirmed by the Seventh, Eighth, Ninth and Tenth Circuits.

Mr. Chairman, in closing I want to share with you a very personal experience. A few days after being appointed to run the work training programs for Charleston County, South Carolina, I received a phone call from a Mrs. Rowena Tobias—someone I knew only by reputation and the society pages in the local newspapers. She invited me to her home on Charleston's South Battery. The two of us spent the better part of an hour reflecting on

Charleston's history. She shared with me the fact that Charleston was once the leading economic engine on the Country's east coast. Whenever there were problems, she said, people would sit down to talk and work their way through them—except for one.

She said to me on that day that Charleston lost its standing because whenever the issue of race came up, people would just stop talking. She told me that we are not going to be able to work our way through the issues of race if we continue to stop talking whenever the subject came up. She asked me to promise her that I would never stop talking until we solve this very important problem.

Mr. Chairman, I commend you and this Committee for reviewing and discussing the DOT's DBE programs and the issues of discrimination and fairness, and I thank you for allowing me another opportunity to continue keeping the promise I made to Rowena Tobias over 40 years ago.

STATEMENT OF THE HONORABLE JOHN J.

DUNCAN, JR.

COMMITTEE ON TRANSPORTION AND

INFRASTRUCTURE

HEARING ON

"The Department of Transportation's Disadvantaged

Business Enterprise Programs"

March 26, 2009

Thank you, Chairman Oberstar, for holding this hearing on the U.S. Department of Transportation's Disadvantaged Business Enterprise

programs. I would also like to thank all of our witnesses for participating in the hearing.

In 1983, Congress passed the Surface Transportation Assistance Act. This Act contained provisions that attempted to increase participation of small businesses that were owned and controlled by socially and economically disadvantaged individuals in federal-aid highway contracts.

Over the years, the DBE program has successfully aided minority and women-owned small businesses in obtaining highway, aviation and transit contracts. Congress recognized this success by continuing the DBE program in every highway and transit authorization act since 1983.

In 2008, the U.S. DOT awarded $3.3 billion in contracts to DBEs. These contracts have helped some DBEs graduate to prime contractors and become better competitors in the highway, aviation and transit industry.

Since the creation of the program, some individuals have taken advantage of the program by falsely identifying themselves as a DBE.

The DOT's Office of Inspector General has diligently pursued such fraud cases and continues to protect the integrity of the DOT's DBE programs.

Our witnesses will provide us with success stories and ways to better the program. I look forward to hearing their perspectives.

Statement of the Honorable Eddie Bernice Johnson
T&I Full Committee Hearing on:
The Department of Transportation's Disadvantaged Business Enterprises Program
March 26, 2009

Thank you Mr. Chairman and I would like to commend you for holding this very important hearing on the issue of the Department of Transportation's Disadvantaged Business Enterprise Programs.

For nearly three decades, the Department of Transportation's DBE Programs have served as a catalyst in ensuring minority and women-owned business enterprises can compete competitively and fairly for federally funded transportation projects. As a former businesswoman I have witnessed first-hand the benefits of these programs and can assert, unequivocally, that these programs are vital in helping disadvantaged businesses overcome discriminatory hurdles and achieve success. While the economic impact of these firms is forecasted in the billions, better data is needed to accurately determine the true impacts of DBE investment.

While it is true that DOT's DBE programs have made significant strides in aiding a number of disadvantaged firms compete on a level playing field, I am convinced that there is still a very strong and compelling case for sustainability of these programs as the numbers speak for themselves.

I realize there are critics that feel this program is unconstitutional; however, the DBE programs have withstood various court challenges. In the most recent challenge, Adarand vs. Slater, the 10th Circuit found that the program met constitutional scrutiny. Moreover, the Court also found that these programs are narrowly tailored to meet compelling state interests and do not violate the equal protection clause under the U.S. Constitution.

It is important to note that Federal transportation spending creates billions of dollars worth of contracts. Approximately 85% of DOT's funding distributed through Operating Administrations is for construction. However, it is important to note that while minorities represent about 28% of the population, according to DOT they own roughly 9% of construction firms and receive about 5% of construction receipts. Moreover, women-owned construction firms receive only 48 cents of every dollar that they would be expected to receive based on their market availability.

A regularly used statistic by Members of this Committee is that for every $1 billion dollars invested in our nation's infrastructure, approximately forty thousand good-paying jobs are created. According to the Bureau of Labor Statistics, the mean annual wage of managers in the transportation construction industry is more than seventy thousand dollars; in construction and extraction the mean annual wage is thirty-five thousand dollars. Despite these facts, the percentages of minorities and women in the construction trades stand at: 2.5% women, 7% African Americans, and 17% Latino. Anglo workers make up the majority of the construction industry, accounting for 67% of all industry jobs.

Despite the good jobs, I feel it is reasonable to argue that, many minority groups view investment in transportation industry with a bit of skepticism because they do not see jobs or owners of enterprises held by women or minorities. Again, DOT's DBE Programs have made significant strides in reversing circumstances such as these; however, given the workforce that will be required to bolster our nation's crumbling infrastructure, I feel we have a tremendous opportunity to inject a significant number of underrepresented groups into the transportation industry.

Mr. Chairman, we talk a great deal about shovel-ready dirt in this Committee, specifically as it relates to jobs and sustainable infrastructure. This morning I am interested in learning about the D-E-R-T needed to improve the DBE programs. **Data.** How good is it, and how do we know if the needs of the DBE community are being met? **Enforcement.** Is DOT moving aggressively to punish companies that do not act in good faith with the program? **Resources.** Is the Agency requesting an adequate budget amount to enforce and implement policy? **Training.** Is the Agency placing enough emphasis on workforce development in order to increase the number of underrepresented groups in the transportation sector?

As I close, I would like to reiterate my thanks to the Chair for holding this important hearing. I feel strongly that there is not only a compelling, but an overwhelming government interest in ensuring that all American businesses have a fair chance to participate in federally funded programs and projects made possible in part by the good works of this Committee. A rising tide made possible by federal funds should lift all boats and not a select few.

I am pleased to support the continuation of the DBE programs and look forward to working with my colleagues to improve and strengthen these vital programs as we move forward on the FAA Reauthorization and a new authorization of the Federal Highway Bill.

I want to thank our witnesses that have come before us to testify this morning, particularly two who happen to be from the Dallas-Forth Worth region: Mr. Gilbert Aranza, CEO of Star Concessions and a constituent from my congressional district—Mr. Don O'Bannon, Chairman of the Airport Minority Advisory Council and Vice President of Business Diversity Development for D/FW Airport.

Before yielding back Mr. Chairman, I ask unanimous consent to submit for the record an excerpt from a joint report by the Center for Community Change and The Civil Rights Project at Harvard University entitled, "Moving to Equity: Addressing Inequitable Effects of Transportation Policies on Minorities" regarding minority and women employment in transportation construction in addition to transportation construction opportunities for minority and women contractors.

Lastly, I ask unanimous consent to submit for the record an excerpt from a recent report by the University of Missouri's Public Policy Research Center entitled, "The Road to Good Jobs: Patterns of Employment in the Construction Industry".

Thank you Mr. Chairman and I yield back the balance of my time.

MOVING TO EQUITY: Addressing Inequitable Effects of Transportation Policies on Minorities

By Thomas W. Sanchez, Rich Stolz,
and Jacinta S. Ma

A Joint Report of

CENTER FOR COMMUNITY CHANGE

The Civil Rights Project
HARVARD UNIVERSITY

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MOVING TO EQUITY: ADDRESSING INEQUITABLE EFFECTS OF TRANSPORTATION POLICIES ON MINORITIES

TABLE OF CONTENTS

Acknowledgments v
Executive Summary vi
Introduction 1
U.S. Transportation Policy in Historical Context 3
A Legacy of Highway and Urban Renewal Projects in Minority Communities 3
Case Studies in Michigan and North Carolina 4
The Evolution of Federal Transportation Policy 4
Demographic Realities 7
Residence 7
Income and Wealth 8
Transportation Modes 9
Defining Transportation Equity 10
Transportation Costs and Inequities 11
Economic Impact of Transportation Policy on Low-Income and Minority Households 11
The Equity Costs of Fare Increases 13
Transportation Policy Favors Higher-Income Public Transit Riders 14
Disparities in Federal Funding by Geographic Area 15
Transportation Policies' Indirect Economic and Social Effects 17
Spatial Mismatch 17
Transportation Policies and Access to Housing 19
Displacement 19
Gentrification 21
Access to Education 22
Transportation Policies and Health Effects 24
Air Pollution 24
Personal Safety 25
Unequal Access to Opportunities in the Transportation Construction Industry 26
Local Minority and Low-Income Hiring Preferences 27
Minorities' and Women's Employment in Transportation Construction 28
Transportation Construction Opportunities for Minority and Women Contractors 28
Language Barriers 30
Minority and Low-Income Community Participation in Transportation Planning 32
Enforcement of Civil Rights and Environmental Laws 34
Title VI of the Civil Rights Act of 1964 35
DOT's Enforcement of Civil Rights 36
National Environmental Policy Act of 1969 37
Policy Recommendations 38
Conclusion 40
Authors 41
Appendix 48
References 50

LIST OF TABLES AND FIGURES

Table 1: Central-City Racial Composition of Selected Large Cities 7
Table A.1: States' Disadvantaged Business Enterprise Program Contract Goals and Awards, Fiscal Years 1995 and 2000 48
Figure 1: Residential Segregation Indices for all U.S. Metropolitan Areas 8
Figure 2: Users of Public Transportation to Travel to Work, by Race 10
Figure 3: Household Transportation Spending, by Income Group 12
Figure 4: Users of Public Transportation, by Race 13
Figure 5: Modes of Transportation, by Household Income 15
Figure 6: Federal Highway Spending in Maryland, by County 16

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MOVING TO EQUITY: ADDRESSING INEQUITABLE EFFECTS OF TRANSPORTATION POLICIES ON MINORITIES

EXECUTIVE SUMMARY

Americans are increasingly mobile and ever more reliant on automobiles for meeting their travel needs, largely due to transportation policies adopted after World War II that emphasized highway development over public transportation. These and other transportation policies have had inequitable effects on minority and low-income populations, often restricting their ability to access social and economic opportunities, including job opportunities, education, health care services, places of worship, and other places such as grocery stores. Transportation policies limit access to opportunities through direct effects, such as inequitable costs, and indirect effects, such as residential segregation. The indirect effects are caused in part by the combined effects of transportation policies and land use practices.

This report identifies surface transportation policies' inequitable effects. It examines existing research in the area and highlights the critical need for more research and data collection related to the impact of transportation policies on minority and low-income communities. It also makes recommendations to address the racial injustices created by transportation policies.

U.S. Transportation Policy in Historical Context

Historically, although issues related to transportation were integral to the civil rights movement of the 1960s—embodied in the Montgomery Bus Boycott and Freedom Rides—the civil rights implications of transportation policies were largely ignored until the 1990s. Beginning in the 1950s and 1960s, it was common practice to construct major highways through low-income and minority communities. Similar policies and practices continue today and have led to destruction of thriving neighborhoods, eviction of minorities, and negative health effects.

In the 1990s, the primary federal transportation funding law, the Intermodal Surface Transportation Efficiency Act (ISTEA), changed the way funding was allocated and began to erode the long-standing preference for highway funding. In addition, ISTEA dramatically changed the way transportation projects were planned in metropolitan areas, providing significant responsibility and some funding to Metropolitan Planning Organizations (MPOs). Building on these changes when ISTEA expired, the Transportation Equity Act for the 21st Century (TEA-21) mandated increased public involvement in state and regional transportation planning. It also established grant programs to help serve the transportation needs of minority and low-income communities. TEA-21 is scheduled to expire on September 30, 2003, providing lawmakers an opportunity to make even more improvements and address the continuing inequities that minority and low-income communities experience.

Demographic Realities

Some general demographic facts provide a basis for understanding how transportation, race, poverty, and geography intersect. Although America's population is 69 percent white, 12 percent African American, 12.5 percent Latino, and 3.6 percent Asian American, the composition of major

cities and urban areas is quite different. Almost half of the 100 largest cities have predominantly minority populations, while whites live mostly in the suburbs. Disparities in poverty levels remain between whites and minorities. Whites have a poverty rate of only 5 percent, compared with 22 percent for African Americans, 20 percent for Latinos, and 10 percent for Asian Americans.

Nationally, public transportation users are disproportionately minorities with low to moderate incomes. Overall, public transit users are 45 percent white, 31 percent African American, and 18 percent Latino/Hispanic. In urban areas, African Americans and Latinos together comprise 54 percent of public transportation users (62% of bus riders, 35% of subway riders, and 29% of commuter rail riders.) Twenty-eight percent of public transportation users have incomes of $15,000 or less, and 55 percent have incomes between $15,000 and $50,000. Only 17 percent have incomes above $50,000. Just 7 percent of white households do not own a car, compared with 24 percent of African-American households, 17 percent of Latino households, and 13 percent of Asian-American households.

High Transportation Expenditures and Inequities in Transportation Funding

Transportation costs are particularly burdensome for low-income households, which devote greater proportions of their incomes to transportation-related expenses than do higher-income households. In 1998, those in the lowest income quintile, making $11,943 or less, spent 36 percent of their household budget on transportation, compared with those in the highest income quintile, making $60,535 or more, who spent only 14 percent.

Transportation expenditures continue to rise, reducing the amount low-income households have to spend on housing, food, health care, insurance, education, and other needs. The costs of car ownership can make it difficult to afford to purchase a home, and cars quickly depreciate compared with real property. Between 1992 and 2000, households with incomes of less than $20,000 saw the amount of their income spent on transportation increase by 36.5 percent or more (households with incomes between $5,000 and $9,999 spent 57 percent more on transportation than they did in 1992). In comparison, households with incomes of $70,000 and above only spent 16.8 percent more on transportation expenses than they did in 1992.

There are significant inequities between bus service, which tends to serve more low-income riders, and rail service, which tends to serve higher-income riders. These inequities pale in comparison to the differences between governmental financial and political support for highway systems and for public transit systems. Many transportation planners and policymakers, concerned primarily with the needs of suburban commuters, have focused on constructing highways and commuter rail lines that do little to serve the needs of minority and low-income communities that depend on public transportation.

Examination of state transportation spending priorities reveal another inequity. A body of research suggests that states are spending more resources on transportation needs in non-metropolitan areas than in metropolitan areas. More research examining geographically coded data on spending between cities and other areas would provide a better understanding of how transportation spending patterns impact minority and low-income communities.

Indirect Economic and Social Effects Hinder Access to Opportunities

Transportation policies that favor highway development over public transit have several indirect negative effects. For one, such policies encourage housing development increasingly farther away from central cities, which has played an important role in fostering residential segregation and income inequalities. Also, the practice of locating major highways in minority and low-income communities has reduced housing in those areas. Other transportation investments, such as extending a rail line into a community, have made it more difficult for minorities and low-income individuals living there to afford housing because of ensuing property value increases. Individuals displaced by rising property values commonly have few alternative housing options and may end up living farther away from their jobs and social networks—a problem that is compounded by limited transportation options.

Transportation policies favoring highways over transit have also helped to create "spatial mismatch"—the disconnect that occurs when new entry-level and low-skill jobs are located on the fringes of urban areas that are inaccessible to central-city residents who need those jobs. Public transportation systems operate most efficiently in densely developed urban areas and do a poor job of serving people who need to reach destinations far from the core downtown area.

Transportation policies can also have indirect negative effects in the areas of health and education: Highway construction in minority and low-income communities can impair health through increased pollution, and access to education may be limited by cutbacks in school bus service with no affordable public transit as an alternative.

Many transportation planners and policymakers have failed to recognize the link between transportation and land use policies and the impact of transportation policy on access to social and economic opportunities. Also, they have not recognized the need to take a regional approach in trying to address the inequitable effects of transportation policy.

Unequal Access to Opportunities in the Transportation Construction Industry

Federal transportation spending creates hundreds of thousands of jobs and billions of dollars worth of contracts. Although construction projects are often located in or near minority communities, minorities are generally underrepresented in the construction industry or likely concentrated in low-paying jobs. Of the more than 6.25 million people employed in construction, just 7 percent are African Americans and 17 percent are Latinos/Hispanics.

Minorities represent about 28 percent of the population, but according to the U.S. Department of Transportation (DOT) they own only 9 percent of construction firms and receive about 5 percent of construction receipts. DOT's Disadvantaged Business Enterprise program works to remedy this inequality by requiring states to allocate a portion of their federal transportation dollars to construction opportunities for small disadvantaged businesses, including those owned and operated by minorities.

Language and Information Barriers

Inequitable transportation policy decisions are often made because minority and low-income individuals and communities are unable to learn about transit options or have little voice in transportation planning because of language barriers or lack of information. Like other obstacles to transportation accessibility, language barriers diminish social and economic opportunities by limiting a person's ability to travel (such as by preventing a person from obtaining a drivers' license), which is exacerbated by their inability to communicate to policymakers and planners about transportation needs.

Minimal Outreach to Minority Communities in the Transportation Planning Process

How transportation policies are decided and who is able to influence those decisions have played an important role in creating and sustaining the inequities of current transportation policies. State departments of transportation and Metropolitan Planning Organizations are responsible for planning transportation in a way that achieves the greatest system efficiency, mobility, and access while addressing environmental and social concerns. Although these agencies are required to seek out and consider the needs of low-income and minority households, there are no effective mechanisms to ensure their compliance with this requirement.

Ineffective Legal Protections and Lack of Accountability

Civil rights laws such as Title VI of the Civil Rights Act of 1964 and environmental laws provide some legal protections for minority communities faced with discriminatory transportation policies. Enforcement of these protections, however, has been limited and should be increased. Currently there are no generally accepted measures or standards by which to gauge whether transportation planning and outcomes of transportation policies are equitable, and it is extremely difficult to enforce any requirements for equitable transportation policies.

Primary Policy Recommendations

In the past decade, federal transportation policies have taken some important steps toward becoming more equitable for minority and low-income individuals and communities. Much more needs to be done, however, and the expiration of TEA-21 provides an opportunity for action. Implementation of the following recommendations would significantly support moving to equity:

- Increase funding for public transit and develop new programs and support existing ones that improve minority and low-income individuals' mobility.
- Establish enforceable standards to measure whether the benefits and burdens of transportation policies are distributed equitably to minority and low-income communities.
- Increase funding for research that examines transportation equity, and improve data collection—including by collecting geographically coded data—to provide a better basis for evaluating the effects of transportation policies.
- Increase funding for enforcement of Title VI of the Civil Rights Act of 1964 and the National Environmental Policy Act, and improve efforts to enforce them.
- Recognize the interaction between transportation, land use, and social equity, and support programs that address these effects.

MOVING TO EQUITY: ADDRESSING INEQUITABLE EFFECTS OF TRANSPORTATION POLICIES ON MINORITIES

By Thomas W. Sanchez, Rich Stolz, and Jacinta S. Ma

INTRODUCTION

Transportation plays a vital role in our society. In fact, the Supreme Court recognized that the right to travel is one of the fundamental rights guaranteed by the Fourteenth Amendment to the U.S. Constitution.[1] Given the important role of transportation, it would be expected that policymakers would battle over transportation policy. Too often, however, those battles are fought over what specific projects will be funded and in which states or congressional districts, and scant attention is paid to the larger social and economic effects of transportation policies.

The civil rights movement provides some evidence of the social importance of transportation to people of color. In 1955, the arrest of Rosa Parks for refusing to give her seat on a bus to a white rider sparked the Montgomery Bus Boycott. Freedom Riders faced violent attacks to assert the rights of African Americans to ride on integrated buses traveling interstate.

Many past and current transportation policies have limited the life chances of minorities by preventing access to places and opportunities. The expiration in 2003 of the Transportation Equity Act for the 21st Century (TEA-21) provides an opportunity to address some of the inequitable effects that transportation policies have on minority and low-income communities.

Americans have become increasingly mobile and more reliant on automobiles to meet their travel needs due largely to transportation policies adopted after World War II that emphasized highway development over public transportation. According to Census 2000 data, less than five percent of trips to work in urban areas were made by public transit, but this varies significantly by race and location.[2] Minorities, however, are less likely to own cars than whites and are more often dependent on public transportation. The "transit-dependent" must often rely on public transportation not only to travel to work, but also to get to school, obtain medical care, attend religious services, and shop for basic necessities such as groceries. The transit-dependent commonly have low incomes and thus, in addition to facing more difficulties getting around, they face economic inequities as a result of transportation policies oriented toward travel by car.

Surface transportation policies at the local, regional, state, and national levels have a direct impact on urban land use and development patterns. The types of transportation facilities and services in which public funds are invested provide varying levels of access to meet basic social and economic needs. The way communities develop land dictates the need for certain types of transportation, and on the other hand, the transportation options in which communities invest influence patterns of urban development.

While many lament the trend toward "suburban sprawl" as unaesthetic or damaging to the environment, those who support social equity should also be concerned about this trend. Substantial investment in highway development and other transportation programs that

encourage private automobile use has encouraged and supported low-density developments that extend increasingly farther and farther from the central city and to residential and commercial areas that are increasingly spread out—edgeless cities.[3] In addition to being costly to state and local governments,[4] transportation policies that encourage these growth patterns play a substantial role in producing some indirect, negative social and economic effects, including perpetuating residential segregation and exacerbating the inability of minorities to access entry-level employment, which is increasingly found in suburban areas.[5]

This report reviews existing data and research regarding the economic and social effects of transportation policies. While the data suggest that these policies have inequitable effects on minority and low-income communities, more research is necessary to further understand the effects of transportation policies on minorities, particularly those living in the suburbs.

We first provide historical background and demographic context for the remainder of the report. Next, we examine existing data about the costs of transportation and how these costs combined with current transportation policy priorities have inequitable effects on low-income minorities. We then identify indirect inequitable economic and social effects of surface transportation policies on minorities and examine existing research in this area. These indirect effects include inequitable access to employment and housing, and education and health disparities. The report then delves into the issue of unequal access to opportunities for construction jobs and contracts created by federal transportation programs. We next focus on the role of language barriers in access to transportation and participation in the transportation planning process, and examine the issue of minority participation in transportation planning processes. Following discussion of enforcement of civil rights and environmental laws, we close with policy recommendations and conclusions.

Efforts to improve the fairness of transportation policies must first recognize the complexities and wide impact of those policies on civil rights, mobility, land use, and the environment. These efforts must also include setting easily enforceable standards to measure whether the benefits and burdens of transportation policies are distributed equitably to minority and low-income communities.[6] Transportation researchers and scholars are increasingly recognizing the importance of social equity, largely due to the successful efforts of grassroots organizations to draw attention to the unfairness of transportation policies. An executive committee member of The National Academies' Transportation Research Board predicted in 1999 that "[e]quity will be one of the major themes in transportation policy for the coming decade," and called for more analysis and discussion of the distribution of costs and benefits of transportation projects to minority communities.[7]

The environmental justice movement has addressed some of the inequitable effects of transportation polices on racial minorities and brought attention to the issue of transportation equity. Environmental justice efforts, however, have primarily drawn attention to governmental policies that negatively and inequitably affect the natural environment in areas with concentrated minority populations (and consequently negative health effects).[8] Historically, transportation equity has been largely ignored by the vast majority of transportation planners and researchers. Transportation policy inequities should be addressed both through environmental justice efforts and through traditional transportation analyses about access and mobility. We hope that this

report, by further defining the issues, will compel policymakers, researchers, and administrators who work on transportation policies to recognize the critical need to support transportation equity as part of their work.

U.S. Transportation Policy in Historical Context

Transportation issues have been central to the civil rights movement from its inception, in ways both symbolic and systemic. In 1892, Homer A. Plessy, an African American, attempted to sit in the whites-only section of a segregated railway car. The Supreme Court, in its infamous *Plessy v. Ferguson*[9] decision, created the separate-but-equal doctrine and held constitutional the state statute that required different races to use different railway cars.[10]

During the civil rights movement of the 1960s, much of the discussion about transportation issues for minority and low-income persons revolved around land use patterns and the social and economic conditions of urban areas. Shortly following the civil unrest in Los Angeles in 1965, the California governor appointed a commission chaired by John McCone (McCone Commission) to examine the causes of the unrest. The McCone Commission identified "inadequate and costly" transportation as contributing to high rates of unemployment among the black urban population.[11] In 1968, the National Advisory Commission on Civil Disorders (commonly known as the Kerner Commission) released its report on the causes and effects of riots in U.S. cities. Among its recommendations for enhanced employment opportunities for central-city residents was the creation of improved transportation links between ghetto neighborhoods and new job locations in the suburbs.[12]

In 1968, Dr. Martin Luther King, Jr., described how city planning decisions result in transportation systems that underserve minority communities: "Urban transit systems in most American cities . . . have become a genuine civil rights issue—and a valid one—because the layout of rapid-transit systems determines the accessibility of jobs to the African-American community. If transportation systems in American cities could be laid out so as to provide an opportunity for poor people to get meaningful employment, then they could begin to move into the mainstream of American life."[13]

A Legacy of Highway and Urban Renewal Projects in Minority Communities

Post–World War II surface transportation policies were not favorable to minority and low-income communities. Many older residents of such communities across the country clearly remember the impact that new major highway construction had on their neighborhoods. Generally, federal and state agencies sited highway projects in low-income communities, typically using the rationale that property values were lower. Because of this practice, a great deal of resentment developed in minority and low-income communities toward highway construction that began in the 1950s and 1960s as part of "slum clearance" and "urban renewal" strategies and displaced or physically divided entire communities. These types of highway construction projects occurred during a time when federal transportation "policy" did little more than allocate large amounts of money to build interstate highways.

Case Studies in Michigan and North Carolina

Two case studies highlight the experiences of predominantly minority communities that fought efforts to build highways through their neighborhoods. Both communities were forced to resort to legal action because residents' concerns were not heeded by transportation planners and agencies.

Hamtramck, Michigan, a city within a city—it is almost entirely surrounded by the city of Detroit—now promotes itself as a diverse community, but from 1959 to 1965 approximately 1,800 African-American families were displaced from their homes as part of various urban renewal and revitalization strategies.[14]

In 1959, 600 African-American Hamtramck families were removed to make room for a parking lot; several years later, another 1,200 families, mostly African Americans, were moved to make room for Interstate 75. The freeway isolated the Grand Haven–Dyar neighborhood, which was primarily African American, cutting it off from the rest of Hamtramck, including schools, churches, shops, restaurants, and other amenities. In 1971, a U.S. District Court judge ruled against Hamtramck in a class-action case challenging the city's transportation decisions as discriminatory displacement. The judge's ruling described the city's action as "Negro Removal." In late 2002, the Hamtramck City Council finally settled the 30-year old civil rights lawsuit, and plans are under way to build replacement homes for many of the families displaced by the interstate highway.[15]

In James City, North Carolina, several major transportation projects had already been built in or near the almost 100 percent African-American community that disrupted its economic and community life when the Neuse River Bridge project was proposed. [16] U.S. highway 70, built in the 1970s, literally paved over a historic cemetery that was important to the James City community. In the early 1990s, an airport runway expansion project forced the condemnation of homes and damaged other historic cemeteries of local importance. Advocacy and legal efforts halted plans to run the Neuse River Bridge project, a massive highway bridge and interchange system, right through the center of James City. Eventually, however, the project was sited in another part of the city.[17]

The experiences of Hamtramck and James City are not unique. Dozens of communities across the nation were treated similarly as highways were built through and near them. Residents point to highway construction in cities as diverse as Los Angeles; Memphis, Tennessee; New Orleans; Canton, Ohio; and New York City as a significant contributor to economic and neighborhood blight in previously stable low-income and minority communities.

The Evolution of Federal Transportation Policy

During the 1970s and 1980s, no significant federal efforts were directed toward ensuring transportation equity,[18] and displacement of minorities and destruction of minority communities because of highway construction continued. During this period, however, federal support for public transportation increased, which indirectly benefited low-income, racial minorities through the development and expansion of urban transit systems. These benefits were limited because the

amounts invested in public transportation were dwarfed by amounts invested in building highways. Federal transportation funding went directly to state departments of transportation, which had sole discretion to decide which projects to fund. Federal policy heavily encouraged states to spend on highways by making highway projects eligible for the highest level of federal matching funds—four dollars in federal funding for every dollar the state contributed.[19]

The Intermodal Surface Transportation Efficiency Act (ISTEA) was the first major federal transportation policy to give any consideration to the health, economic, and social effects of transportation policy on racial minority and low-income communities. Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,"[20] issued in 1994, went even further by clarifying that federal agencies must identify and address any "disproportionately high and adverse human health or environmental effects" on minority and low-income populations in all of their programs, policies, and activities.

ISTEA,[21] enacted by Congress in 1991, addressed a number of the most significant flaws in previous transportation funding policies. ISTEA included clear (if easy-to-evade) requirements for public participation in transportation planning and provided for some local control of the allocation of federal transportation money. The new law represented a dramatic departure from the previous system of transportation planning; one congressperson noted several years after its passage that ISTEA "...was not simply a highway bill, or even a highway and transit bill. Instead, it restructured the entire process by which we planned and carried out surface transportation improvements in the United States."[22]

One of the more noteworthy changes was that ISTEA made Metropolitan Planning Organizations (MPOs) primarily responsible for planning and allocating transportation funding in metropolitan areas by giving funds directly to them.[23] Although MPOs had been in existence since the 1950s, generally operating either as a subdivision of the state department of transportation or as a function of a regional council of governments, ISTEA and the U.S. Department of Transportation's (DOT's) implementing regulations made them more influential and gave them uniform functions and responsibilities.[24] ISTEA also broadened the membership of the policy-setting boards of MPOs governing large areas, requiring that they include representatives from local governments in the region, agencies operating major transportation systems, and state officials.[25]

ISTEA and its implementing regulations required MPOs and state planning agencies to develop 20-year regional plans outlining in detail the priorities, policies, and strategies for the region's transportation system.[26] MPOs were also required to prepare, with community involvement, a Transportation Improvement Program listing the transportation projects that would be undertaken in the next three years.[27]

In addition, ISTEA made a number of changes that addressed the allocation of federal funding. Most important, mass transit was given the same federal funding match as highways, thus taking a step toward eliminating the clear policy preference for highway spending.

In 1994, President Clinton issued Executive Order 12898, which directed federal agencies to incorporate achieving environmental justice as part of their missions. As a result of

this order, transportation agencies issued guidance for incorporating environmental justice principles into existing programs, policies, and activities. DOT's order on environmental justice indicates that President Clinton's executive order was intended to encompass social and economic effects interrelated to adverse human health and environmental effects.[28]

When ISTEA expired in 1998, Congress passed TEA-21,[29] which currently governs federal funding of surface transportation systems. This act is one of the major tools through which transportation planning and implementation can be made more responsive to equity and environmental justice concerns.[30] With a $217 billion spending allocation for transportation projects over a six-year period (1998–2003 inclusive),[31] TEA-21 has been called "the largest public works bill enacted in the nation's history."[32]

TEA-21 retains the general decision-making structure and planning process that ISTEA created for distributing federal transportation spending to states and metropolitan areas.[33] TEA-21, however, significantly strengthened the opportunities for public involvement and required greater responsiveness to the concerns of minority and low-income communities in the transportation planning process. Other objectives of TEA-21 focus on improving low-income persons' transportation mobility levels by ensuring that public transportation provided through different modes and by different agencies are coordinated to ensure "connections between people and jobs, goods and markets, and neighborhoods."[34]

TEA-21 also established grant programs to help serve the transportation needs of minority and low-income communities. For example, it authorized the Job Access and Reverse Commute grant programs, which provide federal funds to states, local governments, local transit agencies, and nonprofit organizations. Job Access grants were intended to provide new or expanded transportation services to help welfare recipients and eligible low-income individuals get to jobs and employment-related services (education, training, child care, etc.). Reverse Commute grants were designed to transport individuals to suburban employment centers from urban, rural, and other suburban locations. TEA-21 also established the Transportation and Community and System Preservation Pilot Program, which supports local activities to help better integrate land use and transportation planning.

Some other federal laws that are not primarily concerned with transportation have provisions addressing some aspect of transportation equity. For example, the welfare reform act—formally known as the Personal Responsibility and Work Opportunity Reconciliation Act of 1996—was intended to move people off public assistance to some form of employment.[35] Federal policymakers, recognizing in 1997 that most households in the Temporary Assistance for Needy Families program created by the new welfare law had limited transportation mobility, funded a welfare-to-work grant program that could be used for transportation assistance. For fiscal years 1998 and 1999, $3 billion was allocated to states to address mobility needs.[36]

DEMOGRAPHIC REALITIES

The current effect of surface transportation policies on minority and low-income communities can best be understoood in the context of general demographic facts that show how transportation, race, poverty, and geography intersect. The 2000 census provided tremendous amounts of new demographic information that map changes in the American population and the characteristics of its minority population over the past decade. Analysis of the census data shows persistent disparities between whites and people of color.

Residence

Where people live can greatly affect what types of transportation options are available to them to travel to work and to carry out their daily activities. Although America's population is approximately 69 percent White, 12 percent African American, 12.5 percent Latino, and 3.6 percent Asian American,[37] the composition of major U.S. cities and urban areas is quite different. Since 1960, people of color have increasingly populated metropolitan areas.[38] Only 52 of the 100 largest cities have a majority white population, according to 2000 census data.[39] The 100 largest cities generally saw an increase in Latinos, Asian Americans, and African Americans and a decrease in whites, with the Latino population growing the most rapidly.[40] (See Table 1.)

Table 1. **Central-City Racial Composition of Selected Large Cities**

City	% White, Non-Hispanic	% African American	% Latino	% Asian American
Los Angeles	31	12	44	11
New York	35	26	27	11
Chicago	35	34	26	5
Philadelphia	41	44	10	5
Washington, DC	39	45	10	5
Detroit	20	71	5	1
Houston	32	25	37	5
Atlanta	31	62	4	2
Dallas	38	23	34	4
Boston	56	20	13	8

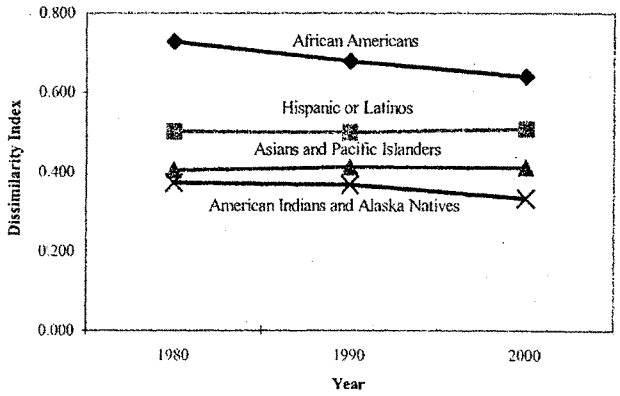
Note: These cities are in the 10 largest primary metropolitan statistical areas.
Source: Lewis Mumford Center
(http://mumford1.dyndns.org/cen2000/WholePop/WPdownload.html).

Metropolitan areas, as defined by the U.S. Census Bureau, have increased in population since 1910, but suburban growth has accounted for most of these increases.[41] By 2000, half of all Americans lived in the suburbs.[42] Although more minorities are living in the suburbs than in 1990, whites still have the highest percentage of any racial group living in the suburbs (71%).[43] In the top 102 most populous metropolitan areas, minorities comprised only 27 percent of suburban populations.[44]

As these facts about the populations of cities and suburbs suggest, residential segregation continues to persist. On average, African Americans, Latinos, and whites live in neighborhoods with people primarily of the same race.[45] Over the past 20 years, however, overall racial segregation levels have declined across U.S. metropolitan areas.[46] One report examining five different indicators of metropolitan residential segregation found that overall residential segregation declined between 4 and 11 percent between 1980 and 2000.[47] From 1980 to 1990 the overall rate of change was approximately 3.8 percent, while from 1990 to 2000 it was 3.4 percent—suggesting that racial integration slowed during the 1990s compared with the 1980s. These modest changes are shown in Figure 1. Generally, since 1980, Latino–white and Asian–white segregation levels have remained approximately the same.[48] Black–white segregation remains significantly higher than the levels of segregation for other minority groups.[49]

Trends in residential segregation also vary by region, metropolitan size, and racial composition. It is unclear whether integration is occurring generally for racial minorities or whether it is isolated to more mobile, middle-class households.

Figure 1. **Residential Segregation Indices for all U.S. Metropolitan Areas**



Note: Higher values indicate more segregation; the reference group is non-Hispanic whites.
Sources: U.S. Bureau of the Census, Summary File 1, 1980–2000; Iceland, Weinberg, and Steinmetz (2002).

Income and Wealth

While these general trends suggest that residential segregation is decreasing somewhat in metropolitan areas, the unequal distribution of metropolitan household incomes has not made a corresponding improvement. For example, the neighborhood income gap for African Americans and whites increased in absolute and percentage terms in 40 of the 50 largest metros.[50] In fact, research shows that the level of income inequality in the United States is increasing and that the United States ranks at the bottom in income equality compared with other industrialized

countries.[51] Trends at the national level are symptomatic of income distribution disparities at the state, regional, and local levels and have far-reaching social and economic implications.[52]

Disparities in poverty levels between whites and minorities remain, even though these levels are low for all groups compared with levels found by previous surveys. In 2001, whites had a poverty rate of approximately 8 percent compared with 23 percent for African Americans, 21 percent for Latinos,[53] and 10 percent for Asian Americans.[54] Consistent with these figures are the facts that generally: 1) The poverty rate in cities is almost double the suburban rate, 2) cities have significantly higher unemployment rates than the suburbs, and 3) there is an income gap between those living in the cities and in the suburbs.[55]

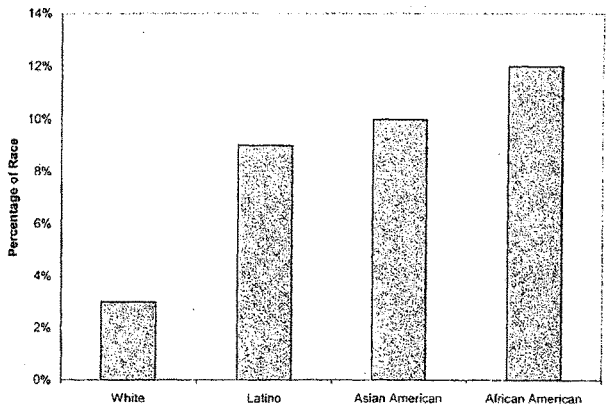
Household wealth—or assets minus debts—differs significantly by race as well. In 1995, the median household wealth was $40,200.[56] For non-Hispanic white households, the median wealth was $49,030. For African-American households it was only $7,073, and for Latino households it was $7,255. For those in the bottom 20 percent, the median wealth by race was $9,700 for non-Hispanic white households, $1,500 for African-American households, and $1,300 for Latino households. Forty-four percent of the wealth in the United States was invested in homes and 8 percent was in motor vehicles. The median value of homes owned was $50,000 and the median value of motor vehicles was $6,675. The section "Transportation Costs and Inequities" discusses the implications of transportation costs and car ownership for wealth accumulation.

Transportation Modes

People's income levels generally correspond with their ability to own a car and the type of transportation they use. The vast majority of Americans rely on cars to meet their transportation needs, but minorities have significantly higher rates of lacking cars. Only 7 percent of white households own no cars.[57] However, 24 percent of African-American households, 17 percent of Latino households, and 13 percent of Asian-American households own no cars.[58]

In part, because people of color have higher poverty rates, they also have higher rates of using public transportation[59] to travel to work. Only 3 percent of whites rely on public transportation to get to work compared with 12 percent of African Americans, 9 percent of Latinos, and 10 percent of Asian Americans (see Figure 2).[60] In urban areas, African Americans and Latinos together comprise 54 percent of public transportation users (62 percent of all bus riders, 35 percent of all subway riders, and 29 percent of all commuter rail riders.)[61]

Figure 2. **Users of Public Transportation to Travel to Work, by Race**



Source: U.S. Bureau of the Census (n.d.)

DEFINING TRANSPORTATION EQUITY

Before examining the specific economic and social effects of transportation policies on minority and low-income communities, it is necessary to define transportation equity. While most transportation planners are concerned primarily with the efficiency and cost of transportation, including people's mobility levels and the accessibility of transportation to the most people, those concerned about transportation equity seek fairness in mobility and accessibility levels across race, class, gender, and disability. The ultimate objective of transportation equity is to provide equal access to social and economic opportunity by providing equitable levels of access to all places.

In the United States, concern about providing equal access to social and economic opportunity has mostly centered around an issue first identified by John Kain (1968) that is now commonly referred to as the "spatial mismatch hypothesis." Spatial mismatch refers to the disconnect between the locations of housing and jobs suitable for lower-income people. In other words, those who most need entry-level jobs (primarily people of color) generally live in central cities while entry-level jobs are mostly in suburban locations that are not easily accessible from central cities.

In England, however, policymakers and advocates often take a broader view of social inequity. The British effort to combat "social exclusion" is a more wide-ranging approach than the American battle against spatial mismatch.[62] Efforts to eradicate social exclusion address communities that are isolated from or marginalized by general society. The English government defines social exclusion as "a shorthand term for what can happen when people or areas suffer from a combination of linked problems such as unemployment, poor skills, low incomes, poor housing, high crime, bad health and family breakdown."[63]

Instead of directly addressing spatial equity questions through housing and land use policies that would improve housing affordability, discourage sprawling development, and improve enforcement of housing discrimination laws, U.S. policymakers have directed significant attention to overcoming the combined problem of residential segregation and limited employment accessibility for low-income persons by improving their transportation mobility. Federal policies fail to directly address the more fundamental issue of "access and participation" on a broad scale. In the United States, attempts to counter spatial inequity are usually limited to improving housing and employment access—represented in some respects by residential segregation—whereas *social exclusion* is a much broader concept. It encompasses concerns about 1) physical (personal) exclusion, 2) geographic exclusion, 3) exclusion from facilities, 4) economic exclusion, 5) temporal exclusion, 6) fear-based exclusion, and 7) space exclusion. Addressing social exclusion includes addressing problems such as lack of access to jobs, education, and training; low levels of access to public transportation at particular times of the day, which has an impact on persons without cars working late and early-morning shifts; and limited access to public and private spaces because of unsafe conditions and design.[64]

Transportation equity is a similarly broad concept. The importance of transportation policies and their inequitable effect on minority and low-income communities by limiting access to social and economic opportunities must be understood in this broader context.

TRANSPORTATION COSTS AND INEQUITIES

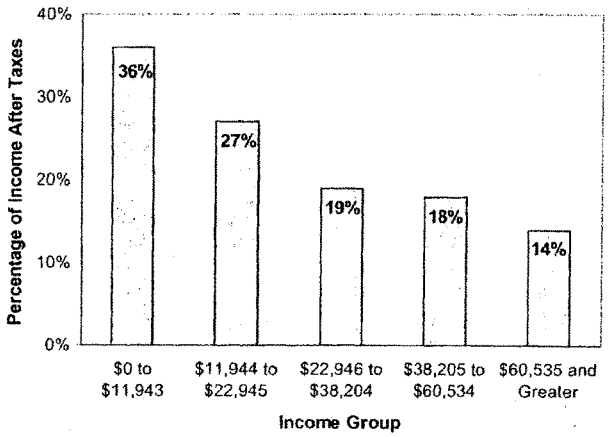
Economic Impact of Transportation Policy on Low-Income and Minority Households

Transportation policies have a direct effect on low-income, minority communities by making it difficult to access transportation to various places. Federal, state, and local transportation policies emphasizing highway construction have led to dependency on automobiles and rising transportation costs. Generally, 80 cents of every dollar spent on federal surface transportation programs is earmarked for highways, and 20 cents is earmarked for public transportation (which includes both bus and rail transit). Although 20 percent of federal transportation funding is generally allocated to public transit, for various reasons, states are unlikely to be devoting 20 percent of their overall transportation expenditures to public transportation.[65]

Thirty states restrict use of their gasoline tax revenues to funding highway programs only.[66] Revenues from gas taxes are the single largest funding source for transportation programs. Several other states allow only a small portion of gas tax revenues to be spent on transit. For example, Michigan allocates for public transportation 10 percent or less of its state gas tax and related transportation revenue.[67] In Alabama, the Birmingham metropolitan region has struggled to raise state and local revenue to match more than $80 million in federal grants for public transportation largely because the state constitution prohibits the use of gas tax revenue for this purpose.[68] At the local level, funds spent on bus transit capital and operating expenses sometimes add up to a small percentage of funds spent on all different types of transit and may be much less than the 20 percent allocated by federal policy.[69]

Policies that restrict allocation of public funds to public transit contribute to increasing household transportation expenses, particularly for low-income families. Data from the Consumer Expenditure Survey suggest that low-income households devote a greater proportion of their income to transportation-related expenses regardless of whether they use public transportation or own a car. A Surface Transportation Policy Project report found that in 1998, those in the lowest income quintile spent 36 percent of their household budget on transportation, compared with those in the highest income quintile, who spent only 14 percent on transportation (see Figure 3). Low-income workers who use a vehicle to commute spend 7 percent more of their income on transportation costs compared with those using public transportation.[70]

Figure 3. **Household Transportation Spending, by Income Group**



Source: Surface Transportation Policy Project and Center for Neighborhood Technology (2000), Consumer Expenditure Survey 1998.

In some metropolitan areas, households spend as much for transportation as they do for housing.[71]

Another measure of the impact of transportation costs on low-income and minority households is the rate of increase in transportation expenditures. Between 1992 and 2000, households with incomes of less than $20,000 saw the amount of their income spent on transportation increase by 36.5 percent or more (households with incomes between $5,000 and $9,999 spent 57 percent more on transportation than they did in 1992). In comparison, households with incomes of $70,000 and above only spent 16.8 percent more on transportation expenses than they did in 1992. This research suggests not only that low-income families are spending more of their incomes on transportation, but also that transportation costs are increasing at a faster rate for these households.

These trends indicate that household transportation costs are increasing over time, meaning that households have less to spend on housing, food, health care, insurance, education, and other needs. Other evidence suggests that the debt incurred by families related to car ownership makes buying a home more difficult. Cars represent a major household expenditure but quickly depreciate as an asset compared with real property.[72]

A major factor contributing to these rising costs is the increase in sprawling development patterns manifest in U.S. metropolitan areas. Sprawling development translates into longer travel distances and more auto dependency. Low-density, noncontiguous development also makes public transit an infeasible option for many commuters. As public transit service diminishes, a household's auto dependency increases. In addition, much research links inefficient land use patterns to negative impacts on air quality, public health, and energy consumption.[73]

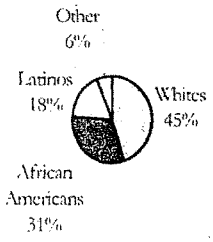
The Equity Costs of Fare Increases

The emphasis on highway and road construction in federal and state policy shifts resources away from public transportation options for low-income families.

According to survey results released by the American Public Transportation Association (APTA) in November 2002, more than 50 percent of the transit agencies that responded to the survey had implemented, or were planning to implement, fare increases (almost 90 percent of the large systems), and 34 percent said they were cutting back on transit service.[74] These fare increases and service cuts are being driven primarily by municipal, county, state, and transit agency budget crises brought on by the nation's economic slump.[75] Those who are dependent on public transportation often have difficulty meeting fare increases.

Although more research is needed in this area, it is likely that because people of color are disproportionately poor and have higher rates of using public transportation, fare increases create a greater economic burden on minorities. An APTA report in 1992 found that nationwide, on average, users of public transportation are 45 percent white, 31 percent African American, and 18 percent Latino/Hispanic (see Figure 4) even though their general populations are approximately 69 percent, 12 percent, and 12.5 percent, respectively.[76]

Figure 4. **Public Transportation Users, by Race**



Source: American Public Transportation Association (1992).

Public transportation users also tend to have lower incomes. Nationally, approximately 38 percent of transit users have incomes of $20,000 or less, while 41 percent have incomes between $20,000 and $75,000. Only 21.5 percent have incomes above $75,000.[77]

APTA research and other sources suggest that fare increases can have very negative consequences for transit agencies.[78] As fares go up, ridership tends to fall. These trends also tend to be more pronounced in smaller population centers. By increasing fares, public transit agencies run the risk of losing ridership, particularly riders with other transportation options. Those that remain—riders who lack other options—bear the burden of higher fares and service cutbacks that may result from ridership decline, which may severely impact their economic livelihoods and ability to access basic services.[79] Little research examines the impact of fare reductions on transit agencies and ridership. One expert found that reducing fares can dramatically increase ridership.[80] More research in this area would provide a clearer understanding of the effect of fare increases on minority and low-income populations.

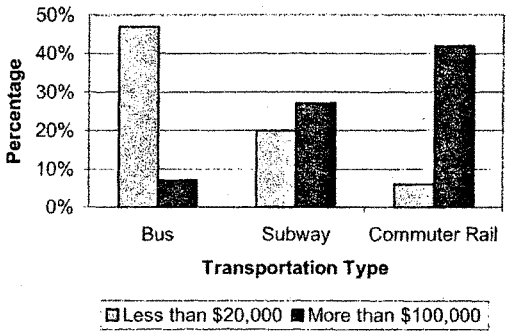
Transportation Policy Favors Higher-Income Public Transit Riders

Research also suggests that low-income riders of transportation tend to subsidize their higher-income counterparts for a couple of reasons. First, fare structures are often designed in such a way that short trips subsidize longer trips, and low-income and central-city riders generally make short trips compared with higher-income suburban users who make long trips.[81] One researcher noted that a user who travels one mile pays more than twice the true cost of the trip, whereas a user who travels 20 miles pays only 20 percent of the cost.[82] Second, the amount of revenue gained from passenger fares, including passes, tends to be higher on central-city transit routes than suburban routes, and more low-income transit riders tend to make trips on central-city routes.[83]

The most egregious example of this subsidization can be seen by comparing bus and rail service.[84] Data from the 2001 National Household Travel Survey show that in urban areas, households earning less than $20,000 comprised 47 percent of bus riders, 20 percent of subway riders, and 6 percent of commuter rail riders.[85] Households earning $100,000 or more comprised 42 percent of commuter rail riders, 27 percent of subway riders, and only 7 percent of bus riders.[86] Clearly, more individuals with low incomes rely on bus service and more high-income individuals rely on rail service (see Figure 5).

Bus transit receives only 31 percent of the capital funds spent nationwide for transit, although it carries more than 60 percent of the trips.[87] This disparity is exacerbated by requirements that federal funding for transit generally must be used only for capital expenditures, not operating expenses. Because rail transit is capital-intensive and bus transit is labor-intensive, a greater emphasis on capital subsidies favors rail service over bus service, and consequently generally favors higher-income over lower-income riders.

Figure 5. **Modes of Transportation, by Household Income**



Sources: Pucher and Renne (2003); U.S. Department of Transportation (n.d.).

Although we are not aware of any studies documenting the disparities in funding spent on bus compared with rail transit in specific cities, Los Angeles is one example of a city that engaged in this type of disparate funding. Community activists and attorneys alleged in a lawsuit[88] in the early 1990s that the Los Angeles Metropolitan Transportation Authority (LAMTA) spent only 30 percent of its resources on bus transit, even though almost 94 percent of its riders used the buses and 80 percent of them were people of color. Seventy percent of LAMTA's resources went to rail, even though only 6 percent of its riders used rail. Rail riders were primarily white.[89]

The gulf between governmental financial and political support for rail compared with bus service, however, is not nearly as great as that for highway systems compared with public transit systems.

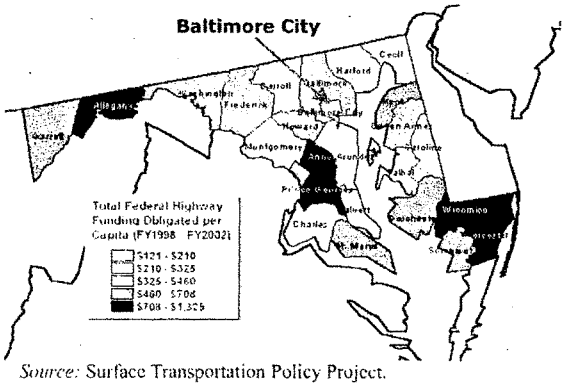
Disparities in Federal Funding by Geographic Area

The negative consequences of funding policies that favor spending on highways over transit are exacerbated because MPOs, which have a better understanding of the transportation needs of metropolitan areas where many minorities and low-income individuals reside, and would be more likely to invest in public transit, only receive a small percentage of federal funds. Currently, MPOs have direct control over only 6 percent of federal transportation funds. This distribution formula discourages establishment of integrated transportation and land use policies. Although states have the ability to provide more funding to local transportation agencies, few states actually do. One notable exception is California, which gives 75 percent of its federal and state transportation program funds to regional and metropolitan transportation agencies. These local agencies have pioneered innovative programs such as providing incentives to develop denser housing within walking distance of mass transit. Increased funding for MPOs would potentially allow them to make major multimodal investments that address air quality, traffic congestion, and other priority concerns of their specific communities.[90]

Although most of the nation's population is located in metropolitan areas, generates substantial revenues for highway spending, and has significant transportation infrastructure needs, there is research evidence that states spend more on serving transportation needs in nonmetropolitan areas than in metropolitan areas.[91] A recent study of transportation spending in Ohio found that while urban counties generated more local revenues for highway spending than other areas, there was not a corresponding high level of spending in urban areas.[92] Studies examining metropolitan areas and counties are informative. An analysis of per capita spending between cities and other areas, however, would provide us with a better understanding of how transportation funds are being spent.[93] This type of analysis is difficult to perform because DOT data[94] on how federal transportation funds are spent are provided only on a county-level basis, and county boundaries do not always coincide with city limits.

In Maryland, however, county boundaries coincide with the city of Baltimore boundaries. Thus, it is possible to determine the per capita distribution of funding by county and determine how funding for Baltimore ranks relative to other counties. An unpublished analysis by the Surface Transportation Policy Project shows that Baltimore receives the lowest federal highway funding per capita in the state—$121 per person—showing a clear preference in funding for suburban and rural counties (see Figure 6).[95] Interestingly, the distribution of this $121 per person is fairly even, with the largest amount spent on bridge repair, and a significant portion directed to bicycle and pedestrian facilities, transit, and road repair. More of this type of analysis and analysis of spending on other types of transportation is necessary to provide a better understanding of whether inequitable patterns of transportation spending exist. This type of analysis can only be performed if more data is collected that is geographically coded and consists of geographic units smaller than counties.

Figure 6. **Federal Highway Spending in Maryland, by County**



Source: Surface Transportation Policy Project.

It is also difficult to analyze whether there are any funding disparities between minority communities and nonminority communities for the same reason—the DOT data are only available for counties.

TRANSPORTATION POLICIES' INDIRECT ECONOMIC AND SOCIAL EFFECTS

The previous section examined the *direct* effects of transportation policies on low-income minorities' finances and their ability simply to get around. This section examines the *indirect* effects of transportation policies.

One of the central indirect effects is the reinforcement of residential segregation. The form that we currently think of as "the city" is a product of both land use and transportation investment decisions. Highway investments in combination with federal housing and lending policies leading to post–World War II suburbanization played a significant role in "white flight" from central cities to suburbs, which had a profound impact in defining urban form and racial segregation patterns.[96] Highway investment encourages the development of suburbs located increasingly farther away from central cities and has played an important role in fostering residential segregation patterns and income inequalities.[97] Inequitable or inefficient land use patterns such as those resulting in residential segregation often are reinforced by policies, such as transportation investment decisions, that were established several decades ago.

As many researchers have documented, residential segregation greatly influences minorities' access to housing, education, and economic opportunities.[98] More research, however, needs to be performed examining the relationship between transportation policies and residential segregation and how it should be addressed.

Spatial Mismatch

Of all the issues in transportation equity, the perceived spatial mismatch between the residential location of low-income, urban (and often minority) households and the location of low-skill jobs has received the most attention in the academic literature.[99] It has been documented that a major factor underlying the spatial mismatch hypothesis was the deconcentration of jobs from central cities. Despite the trend of businesses relocating in suburban zones, a large proportion of metropolitan employment remains in downtowns.

Managerial and information processing services have tended to remain in downtown areas while entry-level, low-skill jobs are flowing to the urban fringe and beyond. Research suggests that the average distance between a central-city resident's home and potential employment locations has been increasing over time.[100] As this distance increases, low-skill workers with few transportation options are unable to travel to these new, dispersed locations. In theory, when job locations are concentrated, commute times and distances are shorter than when jobs are located in dispersed locations—that is, commuting to jobs in dispersed locations is inefficient. Some argue, however, that dispersing residences and jobs leads to *more* efficient transportation because the negative effects of transportation will also be dispersed, resulting in less congestion.[101] Such theories ignore the fact that transit-dependent populations have limited travel mode options.

Related to the spatial mismatch between jobs and central-city residents are reverse commuting travel patterns. While a majority of commute trips flow to the central city from outlying areas, a portion of trips must flow in the opposite direction to connect workers with job

opportunities located in the urban fringe and suburbs. In 2000, 1.6 million people per day made reverse commutes in the 10 largest metropolitan areas. Recently released data from the U.S. Bureau of the Census on county-to-county commute flows in the 10 largest metropolitan areas show that the volume of reverse commuting increased from 3.4 percent to 4.0 percent of all commute trips.[102] This translates into 320,000 new reverse commute trips for those 10 areas. While this may not appear to be a significant increase in reverse commuting, compared with other commute trip types, reverse commutes represented nearly 13 percent of new commute trips in the past 10 years. Also, these figures provide no insight into the number of additional reverse commute trips that might be taken if there were better transportation options serving these travel patterns.

Because it is difficult for public transportation to serve dispersed suburban locations from the central city, workers who have or would like to take a job requiring a reverse commute and are transit-dependent are put at a distinct disadvantage. It is likely that the vast majority of reverse commute trips require a car, especially if travel is required during off-peak periods (evenings and weekends). Without reliable transportation options, transit-dependent workers are often excluded from suburban employment opportunities.

Urban public transportation systems operate most efficiently in concentrated, densely developed urban areas. These systems, which also tend to be oriented toward downtowns, do a poor job of serving dispersed trip origins and destinations.[103] Often transit systems do not adequately serve the needs of minorities and low-income individuals with nontraditional work hours.

There are several important analytical issues to consider when examining the relationship between residential and employment locations. The simple ratio of total jobs to total working-age persons in a specific geographic area is an inadequate indicator of mismatch. Workers' job skills, educational background, gender, race, and mobility are significant factors in determining the numbers and types of jobs that a worker is qualified to hold. Controlling for "skills" and "mobility" matching, the disparity in employment levels by race and gender is generally attributed to historic or contemporary discrimination.[104] Recent research suggests that higher levels of access to public transit service is associated with lower levels of metropolitan wage inequality.[105] However, further research is needed that focuses on the relationships among residential location, transportation mobility, and employment outcomes to inform appropriate public policy decisions.

There are mixed findings on whether improved access to public transportation results in higher levels of employment. A 1997 study in Dade County, Florida did not find a strong relationship between public transportation access to employment locations and rates of employment of minorities.[106] On the other hand, a study examining Atlanta and Portland, Oregon, found that access to bus transit had beneficial effects related to increased employment for all races.[107] Other studies have also indirectly accounted for the role of public transportation in central-city employment levels by incorporating public transportation travel times into job accessibility calculations.[108]

The spatial mismatch analyses leave open the question of whether public transportation significantly affects employment levels and commuting activities in urban areas. With more

detailed data and analysis, these effects can be better understood, providing tangible evidence of the relationship between increasing and improving public transportation and solving metropolitan unemployment and commuting problems. This type of research would be useful to clarify or redirect current policies attempting to overcome the spatial mismatch between low-income persons and employment opportunities.

Some argue that transportation policies and people's preferences are so strongly in favor of traveling by automobiles that mobility benefits from public transportation are considered negligible.[109] Some also argue that public transit is not a viable alternative to the personal automobile due to the geographic imbalance between housing and job locations.[110] The fact that small investments are made in transit (relative to roads and highways) while metropolitan areas continue to sprawl leads to further auto-dependency that imposes a disproportionate burden on low-income persons.[111] Many low-income and minority households lack access to an automobile and thus depend on public transit, which limits the location and types of employment that are available to them.[112]

Recent research suggests that increased automobile ownership rates may have beneficial impacts on low-income workers and their families.[113] Autos not only improve job search activities, but also job retention, especially in cases where (or when) public transit service is unavailable.[114] In addition, autos provide flexibility beyond work-related trips, so that individuals can meet other daily needs related to child care, education, shopping, health care, etc. The role of cars should be a consideration in transportation mobility strategies for low-income and minority people. The challenge, however, is to devise public policy that effectively increases auto access in cases in which other modes are infeasible.

Transportation Policies and Access to Housing

Displacement and gentrification because of transportation projects are two examples of the negative impacts that have been inflicted on low-income neighborhoods of color. Residential location and housing are directly related to the need for equitable and efficient transportation systems, especially for persons with limited mobility. When housing is taken away for freeway projects in minority and low-income communities or becomes unaffordable, the displaced individuals have fewer options for seeking alternative housing and may end up living farther away from their jobs and social networks. This will be especially burdensome if their transportation options are limited. An individual's residential location is crucial and encompasses not only issues of affordability, but also access to public schools, police and fire protection, and public transportation.[115]

Displacement

Transportation policies and practices of locating freeway projects in minority neighborhoods have, in a number of cases, impeded the ability of minorities to access housing. Although there are no empirical data on the number of communities or people affected or the extent of the impact, historical and current examples of disproportionate impacts of transportation projects on minority neighborhoods exist and are discussed in this section.

Freeway placements and expansions in urban areas typically occur where land prices are depressed—which frequently corresponds with the residential neighborhoods of low-income and minority households. Such neighborhoods generally have low levels of political power resulting from institutional discrimination over time. In some respects, freeway locations in cities are the philosophical progeny of "Negro removal" or "urban renewal" programs that were thought to cure "urban blight" by tearing down minorities' homes.[116]

Some freeway construction projects have destroyed thousands of residential units occupied by minority and low-income households. In some cases, community objections to proposed projects have prevented widespread displacement and other inequitable effects. For example, in 1972, individuals and organizations concerned about people who would be displaced by the proposed I-105 "Century Freeway" construction in Los Angeles brought a lawsuit against state and federal government officials seeking injunctive relief. In 1982, the U.S. District Court approved a final consent decree requiring the state and federal defendants to provide 3,700 units of decent, safe, and sanitary replacement housing to residents who were displaced by the freeway.[117]

Another example is the proposed extension to the Long Beach Freeway (710) in California. In 1994, the original proposal to extend the freeway provided more measures to lessen the impact of the proposed freeway in the predominantly white communities of South Pasadena and Pasadena and fewer measures in El Sereno, an almost completely Latino neighborhood in east Los Angeles.[118] The original plan was to place mostly below-grade freeways in Pasadena and South Pasadena, but not in El Sereno. Also, it would have built five tunnel sections in Pasadena and South Pasadena to "mitigate the perception of a divided neighborhood" and only one tunnel in El Sereno (including a tunnel near the South Pasadena High School, but not one near the Sierra Vista Elementary School in El Sereno). Community members objected to the extension as proposed and, through a lawsuit, were able to make the project more equitable.

In addition to destroying thriving neighborhoods, some freeway construction has posed physical hazards to the minorities and low-income individuals living near them. In Miami–Dade County, Florida, community residents remember well the detrimental impact that the construction of Interstate 95 had on vibrant African-American communities and business districts in the 1950s and 1960s. The decision to widen I-95 in the 1990s exacerbated the negative impact of the highway on local residents. Not only had the community never recovered from the original highway construction—the neighborhood's property values had declined significantly over the past couple of decades as blight crept into the community—but the highway is within feet of residents' houses. The only barrier protecting homes from the noise, vibration, and danger of potential accidents was a wire fence. On several occasions, local residents reported cars, tires, and other debris flying into their yards from the freeway, and many residents were afraid to be in the rear of their houses for fear of their lives.[119]

Local residents, who were predominantly minority and low to middle income, argued that the placement of the freeway and the proposed expansion was a clear case of discrimination and environmental injustice. Their accusations were further supported by the observation that other stretches of I-95 in Miami–Dade County in areas that were typically affluent and less likely to be

predominantly minority had well-built and sturdy sound mitigation walls protecting property from the highway. In response to the residents' concerns and allegations of discrimination, Florida officials quickly pulled together the financial resources to build a mitigation wall.[120]

Another current example of how transportation decisions can have a negative impact on a minority community is the controversy over a proposed major road that threatens to destroy a sacred American Indian site just outside of Albuquerque, New Mexico. Community leaders there are struggling to protect the Petroglyphs, a place for prayer and culture for the many Native American tribes (primarily Pueblo Indian tribes) in that region of the country. Despite its designation as a national park in 1998, developers and local politicians have repeatedly attempted to build roads through the park to facilitate access to new suburban growth farther out into the areas around Albuquerque. Through political and community organizing and legal advocacy, the Sacred Alliances for Grassroots Equality Council has succeeded in slowing efforts to develop portions of the Petroglyph National Park. Whether they will be able to prevent completely road construction through the Petroglyphs remains in question because powerful interests continue to advocate for road construction.[121] Although proposed road projects would not destroy the community in which the Native Americans reside, they would be just as harmful because they would destroy a sacred site that is an integral part of their sense of community.

In other large construction projects—such as I-670 in Columbus, Ohio; I-94 in Detroit; I-5 in Portland, Oregon; and I-43 in Milwaukee—anecdotal evidence suggests that minority and low-income communities have been unable to prevent large numbers of individuals from being displaced, and the resulting disintegration of their communities.

Gentrification

Another housing-related impact of transportation policies is gentrification. Gentrification is commonly characterized as a transformation of neighborhood conditions that encompass physical, economic, and demographic dimensions and can be defined as "the process by which higher income households displace lower income residents of a neighborhood, changing the essential character and flavor of that neighborhood."[122] It occurs for a number of reasons, including increased desirability of an area due to a transportation investment such as extension of a commuter rail line, new or improved train service or station, or addition of a highway ramp or exit. Most commonly, gentrification has been portrayed in terms of residential location patterns, such as "back to the city" flows of middle-income households from the urban fringe or suburbs or elsewhere within a metropolitan area.

Gentrification, however, manifests itself through reinvestment and rehabilitation of previously degraded neighborhoods, improving the physical condition and appearance of both residential and commercial properties. Due to the perception that increased property values, increased safety, and improved neighborhood amenities signal neighborhood revival, middle-income households upgrade housing conditions for their personal consumption. While owner-occupied single-family residences replace renter occupancy, businesses that target the demographic group of middle-income homeowners transform older, traditional commercial locations through reinvestment and rehabilitation of structures. Thus, the gentrification process entails physical property improvements, a demographic change to higher income levels, more

"yuppie" (young, urban professionals) households, and property value increases. Some neighborhood gentrifications absorb vacant properties, while others involve replacement (or displacement) of households no longer able to afford housing due to housing cost (price/rent) appreciation.

While some consider property value increases resulting from gentrification to be positive, such changes have also been criticized for worsening the well-being of low-income persons, especially in neighborhoods of color. Some have argued that increases in property values are capitalized in rent increases, which then push households that are less able to pay to other neighborhoods or to undesirable housing arrangements.[123] In particular, some argue that certain antisprawl land use policies that direct housing development away from the urban fringe reduce housing affordability and limit housing choice, especially for low-income households. Others have argued, in addition to causing displacement, that gentrification is undesirable because it leads to homogenous neighborhoods that are not socioeconomically or culturally diverse.[124] However, there is insufficient data to draw specific conclusions about the net social and economic impacts of transportation investments on gentrification and displacement.

Access to Education

Creating barriers to access to education is another indirect effect of transportation policies. Following the Supreme Court decision in *Brown v. Board of Education*,[125] "busing" and yellow school buses became well-known symbols of the fight for equal educational opportunities for African Americans. The significance of these symbols is diminishing because more and more school systems are returning to the idea of neighborhood schools and courts are declaring school districts "unitary," meaning they have eliminated the effects of past segregation as far as they are able. Today's transportation policies, however, still have an effect on access to educational opportunities for a number of minorities and individuals from low-income communities.

No longer do most students rely on yellow school buses to get to school. Many students depend on public transportation to attend school and college as well as participate in extracurricular activities. A recent study of this issue estimated that nationally, during normal school hours, the majority—60 percent—of all student trips were made by car and that these were primarily trips to and from school.[126] One study found that students traveling to or from school in cities of more than 500,000 accounted for 15 percent of all public transportation trips.[127] It was estimated in 1996 that 20 percent of school children in California were using public transportation or other special transportation service to go to school and that growing numbers of students were relying on public transportation in other states such as Ohio.[128]

As The National Academies' Transportation Research Board stated, "transit services in large urban areas have long been used to transport students, particularly those in high school and junior high school."[129] While there is no research documenting how many of these students taking public transportation are minorities, it stands to reason that many of the K–12 (kindergarten through 12th grade) students who depend on public transportation are minorities located in urban areas with a developed public transportation system. Supporting this idea is the fact that Los Angeles,[130] Houston,[131] and Washington, DC[132]—cities with significant minority populations—provide discounted public bus fares for students.

Although the large majority of K–12 students do not need to rely on public transit to get to school, for those who do, access to that transportation may mean the difference between attending and missing school. For instance, during efforts to obtain free student transit passes from the Metropolitan Transportation Commission serving the San Francisco Bay area, evidence was presented that students without access to public transportation would not attend school.[133] A number of high school students in Oakland and El Cerrito, which have significant minority populations, testified that they needed free transit passes because their families sometimes had to decide between food and bus fare.[134] In Portland, Oregon, the school district does not provide bus service for students living within 1.5 miles of a school. Sisters in Action for Power, an organization focusing on the interests of low-income girls and girls of color, pressed for free rides to high school on public buses after its survey of more than 2,000 students found that 11 percent reported missing school due to their inability to meet transportation costs.[135] Students in Providence, Rhode Island, in an informal survey of more than 500 high school students, found that a number of students whose families were unable to afford bus passes stayed home and missed school, especially during harsh winter days, and others got detention for being late because of the amount of time it took them to walk to school.[136] Currently, students attending Providence public high schools who live within three miles of their school must walk or provide their own means of transportation.

Limited funding for schools makes it difficult for school districts to transport all children in school buses. Recent severe cuts in school budgets makes it likely that more school districts will need to reduce the transportation services they provide and that more children will need to rely on public transportation to attend school. Transportation policies should recognize and address this growing need.

In addition, education reform laws do not always consider the impact of access to transportation. For example, states authorizing charter schools do not always require that the schools provide transportation to students.[137] Some states that require charter schools to provide transportation to students only require that they follow the same standards of other schools in the district, such as providing transportation only to those residing in the school district in which the charter school physically exists even though charter schools generally can enroll students from surrounding school districts. Failure to provide transportation may reinforce the segregative effect of charter schools by eliminating the option of low-income minority students to enroll in these schools due to a lack of transportation.[138] Another education reform law, the No Child Left Behind Act,[139] allows students to transfer from "failing" schools, which are often schools with predominantly minority populations. It does not require that transportation be provided to students who wish to transfer. Although this provision has the potential to reduce segregated schools, not providing transportation to nonfailing schools means that many minority students will not be able to take advantage of this option.

Lack of access to transportation also affects access to higher education. Many people of color, for financial and other reasons, attend local community colleges or do not live on campus, often requiring that they find transportation other than walking. For example, minority students make up 30 percent of community college enrollment nationally and their enrollment is often higher in urban areas.[140] It is likely that at least some of these students rely on public

transportation. These students are likely to experience long or inconvenient commutes as many colleges were designed to serve a region and not necessarily to be accessible by public transportation. It is not known how many students who cannot afford a car decide not to go to college or drop out in the face of an overly arduous commute on inadequate public transportation. Federal and local transportation policies must find ways to better serve the transportation needs of those most dependent on public transportation or the dream of equal access to educational opportunities will remain deferred for many students of color.

TRANSPORTATION POLICIES AND HEALTH EFFECTS

Beyond access to social and economic opportunities, transportation policies can create or help to perpetuate health disparities. That racial minorities face health disparities compared with whites is widely recognized. Health professionals also recognize that addressing the inequities requires both health treatment and prevention programs for individuals and social policy changes to address the root causes of inequity.[141] As a National Association of County and City Health Officials paper states, "Socioeconomic conditions such as polluted environments, inadequate housing, absence of mass transportation, lack of educational and employment opportunities, and unsafe working conditions are implicated in producing inequitable health outcomes."[142]

Several articles published in the field of public health have suggested that residential racial segregation is a primary cause of racial disparities in health.[143] One article examined the link between segregation and health disparities in Detroit,[144] which has a population that is approximately 83 percent African American.[145] The article suggests that the transportation policies of the 1950s and 1960s—which supported highway system expansions and location of heavily traveled roads in impoverished neighborhoods in Detroit—led to residents' higher risks for a variety of diseases.[146]

Air Pollution

Like Detroit, many urban areas have significant pollution, much of which can be traced to transportation policies that favor highway development and automobile travel over public transportation. In addition, these transportation policies combined with land use or zoning policies lead to more toxic usage of land in poor and minority neighborhoods than in affluent areas and areas with fewer minorities.[147] Higher percentages of African Americans (65%) and Latinos (80%) compared with whites (57%) live in areas with substandard air quality.[148] Research suggests that these polluted environments in turn result in higher rates of respiratory diseases, such as asthma.[149]

It is known that the occurrence of asthma and asthma-related deaths is higher in African Americans and Latinos than in whites.[150] Asthma is almost twice as common among African Americans as it is among whites. Even more disturbing are the disparities in asthma deaths among African Americans and whites: Though African Americans make up approximately 12 percent of the U.S. population, they account for about 24 percent of all asthma deaths.[151] A report by the Environmental Protection Agency found that non-Hispanic African-American children who live in families with incomes below the poverty level have the highest rate (8.3%) of asthma of all racial groups.[152]

While it is not known to what extent these disparities are due to outdoor pollution, research studies have found a strong and significant correlation between residing near heavy automobile or truck traffic and increased difficulties with respiratory function and higher incidence of disease, such as asthma, in children.[153] Specifically, studies have found that high concentrations of air pollutants from vehicles are linked to asthma.[154] A study of Atlanta during the 1996 Summer Olympics when alternative transportation strategies were implemented[155] found that hospitals and doctors saw significantly fewer children for serious asthma problems.[156] A study examining the effect of daily air pollution levels on asthmatic children living in the Bronx and East Harlem, New York; Baltimore; Washington, DC; Detroit; Cleveland; Chicago; and St. Louis found that increased exposure to certain air pollution was associated with asthma.[157]

The neighborhoods of Harlem and South Bronx in New York City have received attention due to the high rates of asthma among their residents. Central Harlem's population is approximately 88 percent African Americans and 10 percent white.[158] South Bronx has a population of approximately 79 percent Latino and 19 percent African American.[159] Neither of these communities has been meeting air quality standards.[160] Most of the area's bus depots were sited in Harlem[161] and like the South Bronx, it contains or is surrounded by heavily traveled commuter highways.[162] One study of these communities found the rates of developmental and respiratory diseases (such as asthma) are disproportionately high.[163]

Personal Safety

Transportation policies that favor reliance on automobiles and building busy roads in minority communities also raise another public health concern: personal safety—particularly that of minorities and low-income individuals who live in urban areas. Overall, African Americans and Latinos have a pedestrian fatality rate that is almost twice as high as that of whites,[164] and they have a higher percentage of pedestrian fatalities than their percentage of the population in the United States.[165] One study found that the most dangerous metropolitan areas for walking were Orlando, Tampa, West Palm Beach, Miami, and Jacksonville, Florida; Memphis and Nashville, Tennessee; Houston and Dallas–Fort Worth, Texas; and Phoenix.[166] Each of these areas has a significant minority population. A study of Atlanta pedestrian fatality rates during 1994–1998 found that whites had a significantly lower pedestrian fatality rate of 1.64 per 100,000 than Latinos (3.85) and African Americans (9.74).[167] Newspaper accounts have reported that in Orange County, California and in the Virginia suburbs of Washington, DC, Latinos suffer a greater percentage of pedestrian fatalities than their population in those areas.[168]

Disparities in the number of pedestrian deaths are exacerbated because higher percentages of people of color than of whites do not own a car and must rely on walking as a primary mode of transportation. An analysis of 2000 census data show that these minorities are much more likely than whites to walk to work. While 2.6 percent of non-Hispanic white workers walked to work in 2000, 3.2 percent of African-American workers, and nearly 4 percent of Latino and Asian American workers, walked to work.[169]

One study of pedestrian injuries found that children who are pedestrians are at increased risk for serious traumatic brain injury and lifelong disability if they live in poverty, face a large traffic volume and traffic moving at high speeds, and lack space to play other than sidewalks and streets.[170] National Highway Traffic Safety Administration data show that the most dangerous roads for pedestrians are those that have multiple lanes, high speeds, no sidewalks, long distances between intersections or crosswalks, and roadways lined with large commercial establishments and apartment blocks.[171]

Relying on walking for transportation may have other negative effects. One study found that low-income mothers relying on walking as a primary mode of transportation suffered physical fatigue and stress from having to manage walking long distances with young children in all types of weather and on busy roads.[172]

Walking and bicycling have been widely promoted as efficient, low-cost ways to increase physical activity and thus improve overall health.[173] However, minorities and those who live in areas of poverty do not live in areas conducive to walking and bicycling. The Centers for Disease Control identified the most common barriers preventing children from walking and bicycling to school as dangerous motor-vehicle traffic and long distances.[174]

States are spending very little federal transportation funding to improve conditions for walking.[175] As documented by the Surface Transportation Policy Project, a national organization concerned with improving the nation's transportation system, "less than one percent (0.7 percent) of federal transportation construction, operations, and maintenance funds are spent to ensure a safe walking environment."[176] Transportation policy should support both public transit and safe environments for pedestrians.

Unequal Access to Opportunities in the Transportation Construction Industry

While minorities often suffer the burdens of having large transportation construction projects placed in their neighborhoods, they do not usually reap the benefits of lucrative contracts or high-paying jobs in the construction industry. Policymakers generally contend that every $1 billion in federal infrastructure investment creates approximately 30,000 to 40,000 jobs in construction and related industries.[177] For communities affected by these investments, the associated noise, dust, and inconvenience of the construction further intensify frustrations with transportation policies. Adding insult to injury, many communities have noted that too many of these jobs are filled by workers living in other neighborhoods. Too little attention has been paid to who gets these jobs and whether any of those who live in the communities burdened by the transportation projects benefit by obtaining employment to construct the highways.

Local Minority and Low-Income Hiring Preferences

Federal law has acknowledged the value of allowing hiring preferences for individuals in certain low-income communities—local hiring preferences for workers on tribal reservations and in the Appalachian region[178] of the country are or have been allowed—but these preferences overlook most of America's low-income communities, particularly in urban areas. TEA-21 allows states to use a percentage of federal transportation funding to pay for supportive services to help women and minorities enter the transportation construction trades, but few states exercise this option.[179]

In Los Angeles, a coalition of community groups, churches, and local elected leaders persuaded the Alameda Corridor Transportation Authority to incorporate a local hiring preference into the contract for a multibillion-dollar multimodal project. The project involved excavation of a 21-mile trench under numerous major and minor roads to lay a rail bed that now links the Ports of Long Beach and Los Angeles to distribution centers in downtown Los Angeles. The project runs through a number of very poor and minority communities in south central and east Los Angeles.

The contract required that 30 percent of all hours worked on the mid-corridor portion of the project go to local residents. It also funded a pre-apprenticeship program, which provided stipends for 650 local residents. More than 700 pre-apprenticeship program graduates were placed in jobs in the construction industry; 188 received jobs on the project. Thirty-one percent of all hours worked on the mid-corridor section of the project were performed by local residents, and 75 percent of them were minorities. Of that group, 190 were former welfare recipients and 102 were women with children.[180] The project finished on-time and under budget.

The Alameda Corridor program succeeded only because a portion of the project was funded by a loan from DOT rather than a federally aided highway grant. The only portion of the project on which the Alameda Corridor Transportation Authority could require a local hiring preference was on the mid-corridor portion; other portions of the project were excluded. Initially, the Alameda Corridor Transportation Authority would not agree to a local hiring preference unless DOT clarified that such a preference was legal. Grassroots groups successfully sought an opinion from DOT, which authorized the local hiring preference on the mid-corridor portion of the project, but concluded that Congress would need to create a new exemption to allow future local hiring preferences on federally aided highway projects.

The significance of hiring local residents to work in the transportation construction industry extends beyond a particular construction project. As the overrepresentation of Latinos in the construction industry suggests, these job opportunities provide the real possibility of sustained employment in a well-paying industry with the prospect for career growth. Given projected growth in the industry and the transferability of construction skills, strategies that ensure greater participation by minorities in local construction projects ultimately may create significant employment opportunities for minorities, particularly for low-income families with few other options.

Minorities' and Women's Employment in Transportation Construction

Minorities and women are either underrepresented in the construction industry or are likely concentrated in the lowest-paying jobs. According to the U.S. Bureau of Labor Statistics, of the more than 6.25 million people employed in the construction industry, the percentages of minorities and women in the construction trades were: 2.5 percent women, 7 percent African Americans, and 17 percent Latinos/Hispanics.[181]

In comparison, 2000 census data showed that women comprised almost 51 percent of the U.S. population, that African Americans comprised approximately 12 percent, and Latinos/Hispanics comprised 12.5 percent.[182] These numbers indicate that women and African Americans are clearly underrepresented in the construction industry. While Latinos/Hispanics are overrepresented compared with their population in the United States,[183] Latino construction workers are likely to be among the lowest-paid workers. Census data show that Latinos have lower incomes than non-Hispanic whites,[184] and recent data from the Bureau of Labor Statistics reveal that the median weekly earning of Latinos is lower than that of all other racial groups.[185]

Specific data on minority and female representation in the transportation construction trades, however, is currently unavailable. The agency responsible for tracking this information is the Federal Highway Administration (FHWA, which is part of DOT), and within FHWA this duty has been delegated to the Office of Civil Rights (OCR). Currently, states are required to submit annual reports to FHWA OCR based on data submitted to them by primary contractors about their workforces. Due to resource and staffing constraints, however, the FHWA OCR has not collected, compiled, or analyzed this data since 1995.

Given these data limitations, it is possible only to hypothesize about the amount of economic benefit women and minorities receive from major federal investments in highway and transit construction. The majority of highway and street construction jobs are unionized positions and pay relatively well. According to the Bureau of Labor Statistics, the mean annual wage of managers in the transportation construction industry is more than $70,000; in construction and extraction the mean annual wage is $35,000.[186] Despite the good jobs created by transportation construction, many low-income and minority community members look on investment in transportation construction with some skepticism because they often do not see jobs to construct projects in their communities held by women or minorities, let alone local residents.

Although the data are not specific to construction of transportation infrastructure, it is possible to anticipate significant job growth in this industry as the result of the reauthorization of TEA-21, which provides the primary federal funding for transportation. The next funding program may send as much as $375 billion to the states for transportation construction projects of all types.

Transportation Construction Opportunities for Minority and Women Contractors

In addition to having the potential to increase employment opportunities for minorities, transportation policies can assist businesses owned by women and minorities. In 1998, when Congress was debating TEA-21, one of the most controversial elements of the proposal was

DOT's Disadvantaged Business Enterprise (DBE) program that was established by President Reagan in 1983.

The purpose of the program is to help small businesses owned and controlled by disadvantaged individuals, including minorities and women, by ensuring that they get a portion of the construction business generated by federal transportation funding. Although minorities represent more than 28 percent of the population, according to DOT, they own only 9 percent of all construction firms and received only about 5 percent of construction receipts. Women-owned construction firms receive only 48 cents of every dollar that they would be expected to receive based on their market availability. The DBE program works to remedy these inequalities.[187]

Since enactment of TEA-21, the DBE program has withstood various court challenges. In the most recent challenge, the current DBE program, which the federal government had refined from the original program, was found to meet constitutional scrutiny. In *Adarand Constructors, Inc. v. Slater*, the 10th Circuit Court found in 2000 that the program is narrowly tailored to meet a compelling state interest and therefore does not violate the equal protection clause of the Constitution.[188] The decision discussed in great detail the government's evidence of discrimination impeding the ability of qualified minority businesses in construction subcontracting to form and discrimination against existing minority businesses impeding the ability of those firms to compete for contracts. For example, the government found that: "the average loan to a black-owned construction firm is $49,000 less than the average loan to an equally matched nonminority construction firm;"[189] prime contractors like to contract with subcontractors with whom they have long-standing relations and as a result new minority businesses are "seldom or never invited to bid for subcontracts on projects that do not contain affirmative action requirements;"[190] and minority construction subcontracting firms received 87 cents for every dollar that they would be expected to receive given their availability.[191]

In 2001, a report by the U.S. General Accounting Office (GAO) examined DOT's DBE program. The report, in examining past court decisions, concluded that there was evidence of past discrimination that could justify the establishment of DBE participation goals for disadvantaged businesses. Similarly, the GAO found that there was insufficient information available to understand fully the economic impact of DBE programs. However, the GAO concluded that in the specific instances where DBE programs were eliminated in Minnesota and Louisiana, minority-owned businesses in the transportation construction industry suffered significant negative impacts—DBE participation, in both contracts and dollars awarded, fell precipitously.[192] (For more information on state participation goals and contract awards, see the Appendix.)

According to DOT data, in fiscal year 2000 the DBE program helped to encourage more than $2 billion in investment to disadvantaged businesses, including minority and women-owned businesses.[193] The exact impact of this investment is impossible to determine due to current gaps in data. However, this is clearly a substantial sum of money that otherwise may not have been available to these small businesses. The DBE program is critical for ensuring that disadvantaged businesses have access to transportation contracts.

LANGUAGE BARRIERS

Like other obstacles to transportation accessibility, language barriers that are not addressed diminish social and economic opportunities, particularly for minorities. Language barriers affect a person's ability to travel (such as by preventing a person from obtaining a drivers license) and prevent individuals from communicating their transportation needs to policymakers. How transportation policies are decided and who is able to influence those decisions have played important roles in creating and sustaining the inequities of transportation policies.

Many Latinos and Asian Americans face language barriers. The 2000 census data show that only 1 percent of whites and 1 percent of African Americans speak English "not well or not at all," compared with 24 percent of Latinos and 17 percent of Asian Americans.[194] Latinos and Asian Americans are the fastest-growing minority populations in the United States, suggesting that language barriers will continue to be an issue in the future.[195]

Latinos account for 50 percent of all of those who speak English not well or not at all.[196] Of those who speak English not well or not at all, 23 percent use public transportation to travel to work.[197] These facts suggests that transportation agencies and those collecting transportation data would be able to serve and reach a significant portion of the population with language barriers by translating documents, announcements, and meeting proceedings into Spanish. Of course, every community has populations that differ in composition and may have significant non-Spanish-speaking populations with language barriers whose needs should also be addressed.

Collection of transportation data often fails to include individuals with limited ability to communicate in English. For example, the National Household Travel Survey, which is the only comprehensive survey of how Americans get around on a daily basis, was conducted only in English until the year 2001.[198] In the 2001 survey, it was conducted in Spanish as well as English, but non-English speakers only made up 1.9 percent of the sample.[199] In addition, the survey is conducted only on the telephone, so those who are simply less comfortable speaking English are more likely to decline to participate.

Executive Order 13166 "Improving Access to Services for Persons with Limited English Proficiency," issued in August, 2000, specifically addresses the need to improve access to federally funded programs and services for persons whose English abilities prevent them from effectively interacting with social service providers. The order reiterates the principles of nondiscrimination embodied in Title VI of the Civil Rights Act of 1964, which states that federally funded programs/services cannot discriminate based on national origin.[200] Specifically, the order clarified to recipients of federal funds that "failing to provide meaningful access to individuals who are limited English proficient" may constitute national origin discrimination under Title VI. In addition, it required federal agencies to provide guidance to recipients of federal funds and create internal guidance for their own agencies to ensure compliance with the order and the 1964 Civil Rights Act.

In 2001, DOT issued "Guidance to Recipients of Special Language Services to Limited English Proficient (LEP) Beneficiaries."[201] This guidance described some situations with which

LEP individuals may have particular difficulties, including 1) obtaining information about public transportation services, 2) understanding regulatory requirements and legal implications of public services, 3) understanding signage, 4) navigating public transportation systems, 5) understanding processes by which planning/transit agencies acquire properties, and 6) seeking employment opportunities.

DOT's guidance emphasizes that recipients of federal funds "should take reasonable steps to ensure LEP persons are given adequate information, are able to understand that information, and are able to participate effectively in recipient programs or activities." It outlined the elements of an effective language assistance program. Specifically, it suggested that a recipient should "conduct a thorough assessment of the language needs of the population and communities affected by the recipient . . . develop and implement written language assistance plans . . . ensure staff understand the recipients language assistance policy and are capable of carrying it out . . . provide necessary services to LEP persons . . conduct regular oversight of their language assistance programs."

This guidance suggests that data gathering for the transportation planning process must be done in a way that represents the service area and the people living there. Transportation planning agencies should assess the languages used, needs, and ability levels of the population, and adjust their data-gathering instruments and methods accordingly. These agencies must also allow meaningful access for those with limited English abilities to participate in the planning and data-collection processes.

In response to the DOT guidelines, the Center for Community Change, a national organization concerned with assisting low-income communities, issued comments stressing the importance of assessing "meaningful access" in terms of breadth, interpretation, and implementation. They recommended that assessments be used to monitor recipient activities and that these assessments include measurable benchmarks to track improvements in services to LEP individuals and public involvement throughout the development of the benchmarks, and that agencies be held accountable to these measures.[202]

Although no comprehensive survey has been conducted to determine how many transportation agencies have implemented strategies for overcoming language barriers, some agencies have taken steps to address the needs of those who are not proficient in English. For example, the New York City subway system has various multilingual maps and brochures as well as a language line that provides multilingual assistance for all transit-related matters every day from 6:00 a.m. to 9:00 p.m.[203] The Washington, DC Metro system publishes its Metro guide in 10 languages in addition to English.[204] Another example is the Minnesota Department of Transportation, which requires publishing notices in non-English newspapers, printing notices in languages other than English, and providing translators at public meetings as part of its "Public Involvement Procedures for Planning and Project Development."[205] The Metropolitan Transportation Commission for the San Francisco Bay area has translated some documents, provided some services, and provided some translation services in languages other than English.[206] Addressing language barriers in transportation planning is particularly important for public policy because leaving out large proportions of urban limited-English-speaking populations gives an incorrect picture of service needs and concerns.

MINORITY AND LOW-INCOME COMMUNITY PARTICIPATION IN TRANSPORTATION PLANNING

In addition to language barriers, other barriers prevent minority and low-income communities from participating in transportation planning processes. The two main bodies responsible for transportation planning are state departments of transportation and Metropolitan Planning Organizations. These agencies bear the difficult and vital responsibility of planning transportation for a region in a way that achieves the greatest system efficiency, mobility, and access while addressing environmental and social concerns. The mandates for environmental justice and social equity in state departments of transportation[207] and MPOs' activities are Title VI of the Civil Rights Act of 1964 and President Clinton's 1994 Executive Order 12898. President Clinton's order states that "each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations."

Effects on human health and the environment have implicit connections to social and economic well-being as well as questions of equity. DOT recognized these connections and promotes three core principles of environmental justice that states and MPOs should use in their land use and transportation analyses: 1) To avoid, minimize, or mitigate disproportionately high and adverse human health and environmental effects, including social and economic effects, on minority populations and low-income populations; 2) To ensure the full and fair participation by all potentially affected communities in the transportation decision-making process; and 3) To prevent the denial of, reduction in, or significant delay in the receipt of benefits by minority and low-income populations.[208]

Several MPOs, in complying with these mandates, have conducted technical analyses to assess how well regional transportation systems serve different social and economic groups. Many of these analyses have been used to demonstrate the need for federal funding for programs such as the Jobs Access and Reverse Commute programs.[209] One report found that nearly half of the MPOs they surveyed had conducted different types of reverse commuting and employment access projects, which are targeted to low-income individuals and minorities.[210]

These principles of environmental justice were integrated into the TEA-21 administrative regulations and became requirements of the state department of transportation and MPO planning processes.[211]

ISTEA and TEA-21 required state departments of transportation and MPOs to increase the role of citizen participation in the transportation planning process. The laws required "early and continuous" public involvement, which has become an increasingly important element of environmental and social justice challenges.[212] During extensive outreach by FHWA and the Federal Transit Administration (FTA) in preparation for the rulemaking process to implement TEA-21's planning and environmental provisions, the public raised concerns regarding equity, environmental justice, and Title VI requirements. Suggestions regarding public involvement included 1) increasing stakeholder and public participation, 2) developing strategies to identify and better engage culturally diverse groups in transportation planning and decision making, and

3) withholding planning certification unless the public involvement process includes underserved communities.[213]

The regulations that implemented TEA-21's public involvement provision require that state departments of transportation and MPOs "seek out and consider the needs of those traditionally underserved by existing transportation systems including but not limited to low-income and minority households."[214] Yet, greater efforts need to be made to increase participation levels of historically underrepresented populations. There are no procedures for reviewing whether state departments of transportation and MPOs are adequately implementing this requirement and, although the Federal Highway Administrator may withhold payment of funds to enforce this regulation, we are unaware of any situations in which this has happened.[215]

Increasing participation of minority and low-income communities in the state department of transportation planning process is particularly important because of the large scale of their projects and the amount of transportation funding they control. It is also more difficult for the same reasons. An FHWA report evaluating statewide long-range transportation plans examined the public involvement efforts described in 48 statewide plans. The report indicated that states varied widely in the points at which public participation was sought. Some states only sought input prior to the planning process and others sought input at multiple stages. Also, the methods employed by states to gain public input varied dramatically, with public meetings the most relied-upon means (44%) for obtaining public input. According to the report, New Mexico officials felt that public meetings only attract those already familiar with the transportation planning process, and thus that state relied on focus groups of randomly selected citizens to help inform its planning process. The report did not indicate any specific efforts states made to ensure that they were obtaining input from minority or low-income households.[216]

One challenge facing MPOs is that many of their boards are overrepresented by suburban interests by virtue of a "one-area, one-vote" system. When district boundaries for MPO board representatives and planning units are drawn that result in approximately equal-sized geographic areas, urban core areas that have denser populations end up being underrepresented compared with suburban zones that have lower population densities.[217] This system influences the level of public involvement and participation of persons based on residential location—and negatively so in the case of low-income, neighborhoods of color in urban core areas. Recent research suggests that MPO board and voting structures have a significant effect on the outcomes of transportation investment decisions—especially those related to public transit.[218]

Although specific information about the racial and ethnic composition of MPO boards has not been collected formally and comprehensively, it is likely that minorities are not appropriately represented on MPO boards. For example, the MPO for Montgomery, Alabama has no minorities on its board even though African Americans make up 40 percent of the local population. During the FHWA and FTA investigation of a challenge to the MPO certification, it was discovered that the MPO had a Citizen's Advisory Committee in name only that had never been convened.[219] In the Philadelphia area, there are 18 voting members and 22 alternates on the MPO board; only five are minorities, and of the 15 nonvoting members and their alternates, only three are minorities. Atlanta's MPO has five minority members among 39 total board members. Detroit, with a population that is approximately 71 percent African American, has an MPO board

whose main policies are set by a 46-member executive committee that is approximately 11 percent African American. Comprehensive collection of data on the composition of MPO boards would be useful in assessing levels of representation by race and ethnicity.

Specific challenges remain in regard to greater public participation and involvement in transportation decision making by state departments of transportation and MPOs. Community-based groups that assist transportation agencies should be encouraged to improve outreach processes and strategies to identify culturally diverse groups and facilitate their involvement. In addition, these efforts are greatly needed to support the information dissemination about transportation and related land use impacts. Organizations such as the Transportation Equity Network of the Center for Community Change[220] and the Funders' Network for Smart Growth and Livable Communities—a national organization supporting philanthropic organizations working to advance social equity, create better economies, build livable communities, and protect and preserve natural resources—advocate for broadening the base of community organizing around issues of smart growth and social and environmental justice.[221] Mechanisms are needed that allow formal recognition of these coalitions as community representatives on MPO advisory committees and decision-making boards. In addition, MPOs, local governments, researchers, and community-based organizations need funds for more data collection and analysis about transportation access to basic needs such as health care, jobs, affordable housing, and public education.[222]

Although state departments of transportation currently control the vast majority of transportation decisions, MPOs play an important role in shaping transportation policies that affect significant populations of minorities and low-income individuals. Both of these agencies can play an increasingly important role in achieving social equity by addressing transportation equity issues through the broad view of social exclusion. Transportation service provision, the consequences of interaction between land use and transportation decisions, and issues of spatial equity are best addressed on a regional basis and at appropriate stages in the planning process. Although regional challenges can be addressed incrementally with localized solutions, the overall set of factors affecting travel supply and demand occurs at the regional level—where land use patterns and transportation efficiency intersect. Regional perspectives can facilitate a more comprehensive approach to questions of social equity.

ENFORCEMENT OF CIVIL RIGHTS AND ENVIRONMENTAL LAWS [223]

Civil rights laws such as Title VI of the Civil Rights Act of 1964 and The Fair Housing Act (Title VIII of the Civil Rights Act of 1968) provide some legal protections for minority communities faced with discriminatory transportation policies such as discriminatory location of particular transportation projects, unequal distribution of transportation resources across metropolitan regions, discriminatory fare structures, and other inequities spotlighted in this report. Enforcement of these protections, however, has been limited because it has not been made a priority and in part because of a lack of resources.

For example, DOT's 2003 budget request included only $9.2 million for the Office for Civil Rights out of a total request of $59.3 billion. This $9.2 million would be used for a myriad of purposes: "to support internal and external civil rights and equal opportunity matters; support

the Minority Serving Institutions student internship program; enforce Federal civil rights statutes; carry out special emphasis commemoration, hiring, reporting and diversity programs; implement executive orders; investigate EEO [Equal Employment Opportunity] complaints, support the Disability Resource Center; support the Shared Neutrals Alternative Dispute Resolution Program; and oversee and coordinate equity programs throughout the Department."[224]

Title VI of the Civil Rights Act of 1964

Title VI of the Civil Rights Act of 1964[225] prohibits discrimination on the basis of race, color, or national origin in any program or activity receiving federal financial assistance. It applies to all recipients of federal aid, such as state departments of transportation and Metropolitan Planning Organizations. Title VI also applies to all programs run by federal aid recipients, regardless of whether the specific program is federally funded. Prohibited discrimination includes complete denial of benefits or services, provision of inferior benefits or services, or otherwise treating someone differently in the provision of benefits or services because of race, color, or national origin. For example, a Title VI violation would occur if a state transportation agency decided to furnish replacement housing to whites but not to people of color being displaced because of a highway project.

In 2001, the Supreme Court in *Alexander v. Sandoval*[226] ended the ability of private individuals to bring a suit to enforce certain Title VI regulations. Federal regulations under Title VI prohibit recipients of federal funds from conducting activities that have a less favorable effect or "disparate impact" on members of one racial or ethnic group than on another. Now, individuals may only bring lawsuits charging a violation of the Title VI statute in which they must prove that an action was taken intentionally to discriminate. They can no longer rely solely on statistical evidence to show that an action had a disparate impact on persons of a specific race, color, or national origin. Federal agencies, however, can still enforce the regulations. They may suspend or terminate funding to obtain compliance with Title VI or may seek equitable relief, such as an injunction. This change argues for the federal government to more rigorously enforce Title VI because individual lawsuits are now severely limited.

DOT regulations require states to use a range of measures to ensure compliance with Title VI. States are required to: have an adequately staffed civil rights unit, have procedures to address civil rights complaints and to collect statistical data on protected populations, conduct annual reviews of programs, provide training for staff to explain Title VI obligations, and submit annual updates to the regional federal highway administration offices, among others.[227]

Through the issuance of the executive order on environmental justice and DOT guidance, the federal government clarified Title VI requirements as they relate to transportation issues. Specifically, the order requires all federal agencies to make achieving environmental justice part of its mission by identifying and avoiding "disproportionately high and adverse" effects on minority and low-income people. DOT's final guidance on implementing the order described the process for incorporating environmental justice principles into DOT programs, policies, and activities.

Furthermore, FHWA and FTA issued internal guidance on "Implementing Title VI Requirements in Metropolitan and Statewide Planning."[228] This document focused primarily on public involvement and planning activities to be evaluated during an MPO certification process and the process for approving statewide transportation improvement programs, and lists a series of questions to aid verifying compliance with Title VI. Examples include:

- What strategies and efforts has the planning process developed for ensuring, demonstrating, and substantiating compliance with Title VI? What measures have been used to verify that the multimodal system access and mobility performance improvements included in the plan and Transportation Improvement Program, and the underlying planning process, comply with Title VI?

- Does the public involvement process have an identified strategy for engaging minority and low-income populations in transportation decision making? What strategies, if any, have been implemented to reduce participation barriers for such populations? Has their effectiveness been evaluated? Has public involvement in the planning process been routinely evaluated as required by regulation? Have efforts been undertaken to improve performance, especially with regard to low-income and minority populations? Have organizations representing low-income and minority populations been consulted as part of this evaluation? Have their concerns been considered?

Although helpful for community organizations and federal aid recipients, the guidance failed to address the concerns most often raised by community groups regarding the accumulation of negative economic and environmental impacts caused by transportation projects and their location and the distribution of resources across metropolitan communities over time. The guidance called for processes to review potential Title VI or environmental justice issues, but it established no thresholds, expectations, or standards for these reviews.

DOT's Enforcement of Civil Rights

Although the federal government states that it is committed to the enforcement of Title VI, there appears to be very little actual enforcement. For example, states receiving federal funds, in most cases, simply submit a single-page document assuring their compliance with Title VI requirements, including DOT regulations, without any accompanying evidence to support their assurance.

In addition, FHWA received fewer than 20 Title VI complaints in 2002 and initiated no Title VI investigations. In comparison, the Equal Employment Opportunity Commission received 29,910 race-based employment discrimination complaints and filed 246 lawsuits against employers in 2002.[229] The U.S. Department of Education's Office for Civil Rights received 870 Title VI discrimination complaints based on race in 2000.[230] We do not know why the volume of Title VI complaints to FHWA is so low, but possible factors include people's lack of information about how to file a complaint, perception that filing a complaint would not be effective, and lack of information about the agency's authority to enforce Title VI.

In August 2002, DOT's Director of Civil Rights issued "White Paper on Civil Rights Operations at the U.S. Department of Transportation." In the paper, the director acknowledged that numerous studies had raised concerns regarding the authority of the agency's Civil Rights Office, the priority of the civil rights mission within the agency, the adequacy of resources and staffing, and the inability to establish clear measurements for performance and effectiveness. Among specific concerns raised in the document, the director commented that lack of resources prevented DOT from: conducting audits of federal-aid recipients, conducting pre-award reviews and full compliance reviews, monitoring federal-aid recipients, and developing and implementing improved policies. Furthermore, the director acknowledged that DOT is unable to provide sufficient technical assistance to regulated entities and the public, and its capacity to conduct internal training is limited.

In addition, the paper stated independent reviewers have noted that collaboration among civil rights offices within DOT historically has been weak. The civil rights function is scattered widely in the agency, hampering coordination by administrative offices. An example of this lack of coordination can be found in the technical assistance and enforcement structure within FHWA and FTA. FHWA's Office of Civil Rights is responsible for Title VI compliance reviews, but the bulk of them are conducted by FHWA's divisional offices. There is one divisional office for each state and each of them has, at most, one civil rights staff person and several planning staff. The FTA has its own civil rights staff and has offices at the regional level rather than the divisional level.

In the case of a recent civil rights complaint in Montgomery, Alabama, community members who filed the complaint with both FHWA and FTA traveled to Atlanta to meet with their regional FTA office. There they found not only that the regional staff were unaware of their complaint, but also that their communications with the divisional FHWA staff had not been forwarded to their FTA regional counterparts.[231]

Because of these problems, some advocates have turned to environmental laws to seek protections for minority communities.

National Environmental Policy Act of 1969

The requirements of The National Environmental Policy Act of 1969 (NEPA) unquestionably apply to transportation decisionmaking processes.[232] In some instances, The NEPA has given minority communities some protections because of the strong procedural requirements for public review and consideration of alternatives and mitigation (and, increasingly, cumulative and adverse impacts) involved at the transportation project stage. Specifically, NEPA requires 1) identification of the purpose and need for a proposed project or program; 2) an assessment of a project's or program's environmental effects, "including human health, economic, and social effects," on minority and low-income communities, and Indian tribes; 3) consideration of alternatives when significant impacts are expected; 4) identification of mitigation measures to eliminate or minimize significant impacts; and 5) a public process for review of need, impacts, alternatives, and mitigation options.

NEPA challenges to highway proposals are increasingly raising the lack of analyses examining cumulative environmental and social impacts in efforts to stop destructive transportation projects. MPOs and state transportation departments need to consider not only travel patterns encouraged and secondary land use impacts, but also the consequences for access and mobility, household expenditures for transportation, and urban congestion.

Laws and policies protecting people of color are often more difficult to advance than policies protecting the environment. For example, the Endangered Species Act[233] effectively protects endangered species whose habitats are threatened with harm by transportation projects, but similarly strong laws are not in place to protect minority and low-income communities from inequitable transportation projects.

Specific impacts on open spaces, plant and animal habitats, and other ecosystems tend to be easier to quantify than social and economic impacts such as decreased housing affordability, unemployment, weakened economic development, and weakened neighborhood cohesion.[234] NEPA requires an assessment of the impact of any planned transportation project on the environment and *community* before the project can begin.[235] Although some consideration has been given to quantifying or determining how to measure the impact on a community, little attention has been given to conducting these types of assessments.[236]

Current environmental justice efforts related to transportation are encouraging public involvement during the impact assessment phases of project development that can be crucial for residents of disproportionately impacted neighborhoods. While some policymakers are seeking to streamline the approval process for transportation projects, including the environmental impact assessment, assessing the impact on the community is a requirement that was never seriously implemented.

POLICY RECOMMENDATIONS

TEA-21, which directs more than $200 billion in transportation funding to states and communities and determines how these funds may be used, will expire on September 30, 2003. The reauthorization of the act provides Congress with an enormous opportunity to incorporate provisions that will meaningfully address travel issues and concerns of minority and low-income communities across the nation.

The following are some recommendations that follow from the issues raised in the report and from what we know from existing research. Implementation of these recommendations would help address the racial injustices created by transportation policies across the country and advance the national—and constitutional—goal of equality.

1. **Increase funding for public transportation, and develop new programs and support existing programs that improve minorities' mobility.** Public transportation is a public service that should be supported. Also, support programs focusing on the needs of low-income and minority transit users to provide reliable connections to job sites and other necessary destinations. For example, the Job Access and Reverse Commute programs support a number of promising efforts to connect low-wage workers to jobs and services, but

additional funding is needed to examine which of these efforts are most effective and most likely to be successfully replicated. Also, a handful of significant research identifies increased access to cars as having a positive impact on the ability of minorities to gain access to and retain employment, which suggests that pilot programs that help low-income minorities access cars when public transit is inadequate should be developed.

2. **Include performance measures in legislation that evaluate whether transportation decisions and outcomes are equitable and that can be easily enforced by individuals and governmental officials.** Standards are needed to measure whether transportation decisions and project outcomes—including environmental, economic, social, and mobility impacts—are fair for minority and low-income communities. These standards should include analyses of alternative approaches to project design and implementation that provide minority and low-income communities genuine options with respect to the impacts they would face. These measures should encompass equitable transportation planning processes and implementation.

3. **Improve data collection.** Support data collection and management processes that can be used to evaluate the impact of transportation projects and plans on minority and low-income communities. For example, more data about the types of transportation investments that are being made and the specific geographical areas to which these investments are being directed are necessary to better understand 1) whether the needs of minority communities are being met and 2) the relationship between transportation policies and social and economic effects on minority communities. Fund research to inform whether new transportation data collection strategies are necessary, recommend appropriate changes to current collection efforts (such as collecting data in foreign languages), provide guidance on standards to measure whether data collection on minority communities has been adequate, and suggest a medium for data to be systematically reported in a way that allows for comparison across communities.

4. **Increase funding for enforcement of civil rights and environmental laws and regulations, such as Title VI and NEPA, and improve efforts to enforce them.** Encourage efforts to enforce civil rights laws by codifying existing regulatory provisions authorizing DOT to withhold funds if an MPO or a state fails to comply with Title VI. Refine and clarify the obligations carried by states, MPOs, and other recipients of federal transportation funds by identifying the types of data, public input, and modeling efforts that would most likely ensure that minority communities do not disproportionately suffer negative effects from transportation policies.

5. **Increase funding for research that examines the social equity impact of transportation projects.** There is a critical gap in research on these issues. TEA-21 provides funding to ensure that the United States will be a world leader in surface transportation research and development in such areas as human factors and the use of advanced materials by providing $3.3 billion in funding over six years. In DOT's description of "Reports and Studies Required by TEA-21,"[237] only 2 of the 80 items listed appear to address issues related to social equity. This funding could be used in part to create and support efforts to develop research programs that focus the attention of academic institutions, in partnership with community organizations, on examining impacts, including social and economic impacts, of

transportation policies on low-income and minority communities.[238] These research programs should be collaborative and lead to ideas for practical ways to address negative impacts.

6. **Recognize the interaction between transportation, land use, and social equity, and support programs that understand and address this interaction.** Policymakers should use all opportunities to address the inequitable effects of transportation. For example, California and Maryland have prioritized allocation of Low-Income Housing Tax Credits to transit-accessible areas,[239] and other states have different financial incentives for transit-oriented housing development. Also, equity principles should be incorporated into smart growth initiatives because inequitable growth is not "smart."

7. **Restore the ability of individuals to bring lawsuits under Title VI challenging actions that cause a disparate impact on the basis of race, color, or national origin.** The federal government is not well equipped to be the sole enforcer of Title VI complaints because of limited resources and the involvement of multiple governmental agencies in making enforcement decisions.

8. **Allow local communities, in cooperation with other stakeholders, to establish local hiring preferences for transportation projects that will be constructed in or near areas of high unemployment and poverty.** Furthermore, create incentives to ensure that these preferences are complemented with strong recruitment, training, and monitoring mechanisms.

9. **Support efforts to identify and remove barriers to minority and low-income community participation in transportation planning and decision making.** These efforts could include providing resources and incentives to community groups, nonprofit organizations, and academic centers to actively participate in transportation planning. Also, give MPOs incentives to identify barriers to public participation and encourage them to partner with community groups to increase the participation of people from minority and low-income communities.

10. **Preserve DOT's Disadvantaged Business Enterprise program to ensure that a fair share of federal transportation contracting funds are directed to women-owned and minority-owned businesses and ensure that job opportunities are available to low-income and minority individuals in the transportation construction industry.**

11. **Preserve and increase funding for programs that may help to address racial health disparities.** Examples include programs that reduce air pollution from diesel and other vehicular exhaust, and data collection about minority pedestrian activity to better understand pedestrian mobility, exposure, and safety. These resources should be directed to communities experiencing the greatest negative health impacts.

CONCLUSION

Transportation policies not only have inequitable effects on the ability of low-income individuals and minorities to access places, but also have serious indirect effects such as

encouraging and reinforcing residential segregation; restricting access to employment and other economic opportunities, housing, and education; and causing health disparities. This report identifies these effects to illustrate the need for those who work on transportation issues to address seriously the inequitable effects of transportation policies.

As this report—particularly the section on enforcement of civil rights and environmental laws—has underscored, a vital step is the development of measures or standards of whether the burdens and benefits of transportation polices and decisions are equitable to minority and low-income communities. These communities have suffered many of the burdens of transportation policies, and it is unclear how many of the benefits they have gained. Once measures are established, individuals and government officials must be able to easily enforce such measures, including in the courts if necessary; otherwise, equity cannot be ensured.

Another critical need identified in this report is for additional research and data collection on transportation equity issues. Existing research provides some strong indications of the links between transportation policies and inequitable effects on minorities and low-income individuals, but some significant gaps remain. Although TEA-21 allocated $3.3 billion over six years for surface transportation research and development to ensure that the United States will be a world leader in these areas, only a very small fraction of those funds are spent on research examining transportation's effect on social equity.[240]

Policymakers, researchers, and advocates need to recognize the interaction between transportation, land use, and social equity and support programs that understand and address this interaction. There are many opportunities for policymakers to address some of the inequitable effects of transportation policies on minority and low-income communities. The upcoming reauthorization of TEA-21 is one such opportunity. Housing development policies are another. "Smart growth" initiatives are yet another, but smart growth initiatives have not always incorporated principles of equity. Policymakers should use these many opportunities to move us toward equity for all.

AUTHORS

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[1] *Shapiro v. Thompson*, 394 U.S. 618 (1969).
[2] Pucher and Renne (2003).
[3] The term "edgeless cities" was coined by Lang (2003).
[4] For a description of some studies examining the costs of sprawl, see Katz and Muro (2003).
[5] Kain (1968).
[6] One scholar, Todd Litman (1999), has set forth a framework for evaluating transportation equity and suggests examining horizontal equity (focusing on fairness of cost–benefit allocation between individual groups that are considered comparable in wealth and ability), vertical equity with regard to income and social class (focusing on

allocation of costs between income and social classes); and vertical equity with regard to mobility need, and ability (focusing on how well an individual's transportation needs are met compared with others in their community).
[7] Wachs (1999).
[8] Some environmental justice advocates are concerned about the built environment as well.
[9] 163 U.S. 537 (1896).
[10] 166 U.S. 552.
[11] Governor's Commission (1965); Kain and Meyer (1970).
[12] National Advisory Commission on Civil Disorders (1968).
[13] Hair (2001) quoting Martin Luther King, Jr., *A Testament of Hope*, reprinted in A Testament of Hope: The Essential Writings and Speeches of Martin Luther King, Jr., 326–27 (James Melvin Washington ed., 1991).
[14] Singer (2002).
[15] Singer (2002).
[16] Shepard and Sonn (1997).
[17] Shepard and Sonn (1997).
[18] See Black (1995) and Weiner (1999) for historical accounts of federal transportation policies.
[19] See Center for Community Change (1998).
[20] President William Jefferson Clinton, Executive Order No. 12898, 50 Federal Register 32 (February 16, 1994).
[21] Intermodal Surface Transportation Efficiency Act (ISTEA), 23 U.S.C. § 101 *et. seq.* (1991) (amended in 1998 by TEA-21).
[22] Hearing on ISTEA Rail Infrastructure Programs before the Railroad Subcommittee of the Committee on Transportation and Infrastructure, 105th Cong. (Mar. 18, 1997) (statement of Rep. Robert A. Borski).
[23] ISTEA, 23 U.S.C. § 101 *et. seq.* (1991). Metropolitan areas are defined as areas with a population greater than 50,000; state departments of transportation continue to oversee areas not covered by an MPO. See 23 C.F.R. §§ 450.104, 450.200, 450.202.
[24] See 23 C.F.R. § 450.312(a); see also Center for Community Change (1998), p. 14.
[25] ISTEA, 23 U.S.C. § 134 and 23 C.F.R. §450.306 (1991). For example, the Boston MPO consists of representatives from the cities of Boston, Everett, Newton, and Peabody; the towns of Bedford, Framingham, and Hopkinton; the Massachusetts Port Authority; the Massachusetts Bay Transportation Authority; the Massachusetts Highway Department; the Executive Office of Transportation and Construction; and other governmental agencies. Boston Metropolitan Planning Organization. Detailed information about the MPO. Retrieved May 2003 from http://www.ctps.org/bostonmpo/mpo/whatde.htm. Some MPOs have included representatives of the business community and the general public on their boards, but these may not be voting members.
[26] See 23 U.S.C. § 101 *et. seq.* (1991); 23 C.F.R. § 450.214(a), (b)(2); 23 C.F.R. § 450.322(a).
[27] See 23 U.S.C. § 101 *et. seq.* (1991); 23 C.F.R. § 450.216(a); 23 C.F.R. § 450.324(a)–(d), (f)(1).
[28] U.S. Department of Transportation (1997).
[29] Pub. L. No. 105–178 (as amended by Title IX of Pub. L. No. 105–206).
[30] See, for example, Center for Community Change (1998), pp. 11, 13–17, 19–22); Gardner (1998); Klesh (2001).
[31] See TEA-21 §§ 1101–1104.
[32] Gardner (1998), p. 1098.
[33] See generally 23 C.F.R. § 450.
[34] Bullard (1996), p. xi.
[35] Danziger, et al. (1999).
[36] Kaplan (1998).
[37] U.S. Bureau of the Census (2001).
[38] Hobbs and Stoops (2002).
[39] Brookings Institution Center on Urban and Metropolitan Policy (2001).
[40] Brookings Institution Center on Urban and Metropolitan Policy (2001).
[41] Hobbs and Stoops (2002).
[42] Hobbs and Stoops (2002).
[43] Logan (2001). Only 39% of African Americans, 49% of Latinos, and 59% of Asian Americans lived in suburbs.
[44] Frey (2001). Suburban diversity is complex, and these overall statistics conceal the significant variations across metropolitan areas and racial or ethnic group. Also see Frey (2002) and Logan (2002a) for more details about these variations.
[45] Lewis Mumford Center (2001). "The typical white lives in a neighborhood that is 80.2% white, 6.7% black, 7.9% Hispanic, and 3.9% Asian. . . . [T]he typical black lives in a neighborhood that is 51.4% black, 33.0% white, 11.4%

Hispanic, and 3.3% Asian. The typical Hispanic lives in a neighborhood that is 45.5% Hispanic, 36.5% white, 10.8% black and 5.9% Asian."

[46] As measured with decennial census data using several different segregation indices.

[47] Iceland, Weinberg, and Steinmetz (2002), using five indicators introduced by Massey and Denton (1988).

[48] Lewis Mumford Center (2001).

[49] Lewis Mumford Center (2001).

[50] Logan (2002b).

[51] McFate (1991).

[52] Galbraith (1998).

[53] Latinos may be of any race.

[54] Proctor and Dalaker (2002).

[55] Logan (2002).

[56] Luckett (2001)

[57] Source: U.S. Bureau of the Census (n.d.)

[58] Source: U.S. Bureau of the Census (n.d.).

[59] The census definition for public transportation includes bus or trolley bus, streetcar or trolley car, subway or elevated railroad, ferryboat, or taxicab.

[60] Source: U.S. Bureau of the Census (n.d.).

[61] Pucher and Renne (2003).

[62] See Sinclair and Sinclair (2001); Church, Frost, and Sullivan (2000).

[63] Office of the Deputy Prime Minister, Social Exclusion Unit (United Kingdom). (n.d.).

[64] See Church, Frost, and Sullivan (2000); Office of the Deputy Prime Minister Social Exclusion Unit (2003).

[65] Puentes and Prince (2003).

[66] Puentes and Prince (2003).

[67] Stolz (2001b).

[68] Niolet (2003).

[69] Interfaith Federation (1999).

[70] U.S. Department of Transportation (2003a).

[71] Surface Transportation Policy Project and the Center for Neighborhood Technology (2000).

[72] Surface Transportation Policy Project and the Center for Neighborhood Technology (2000).

[73] Environmental Justice Resource Center (1999).

[74] American Public Transportation Association (2002). Three hundred and fifty systems were surveyed and 33 percent responded. Twenty-three large, 31 medium, and 60 small systems (defined by number of unlinked trips per year) responded.

[75] American Public Transportation Association (2002).

[76] American Public Transportation Association (1992).

[77] Pucher and Renne (2003)

[78] American Public Transportation Association (1991).

[79] See American Public Transportation Association (1991) and Rubin (2000).

[80] Rubin (2000).

[81] Deka (In press).

[82] Deka (In press).

[83] Deka (In press).

[84] The demographics of a community and amount of subsidization likely vary by locality, and there may be some communities in which this type of subsidization may be appropriate, but not enough data exist to make that determination.

[85] Pucher and Renne (2003).

[86] Pucher and Renne (2003), Table 10.

[87] Deka (in press).

[88] The Los Angeles Bus Riders Union was the lead plaintiff in the case brought by the NAACP Legal Defense and Educational Fund. The case was settled and included provisions requiring LAMTA to reduce bus pass fares, purchase new buses, and expand bus service. (Mann 1997).

[89] See Rubin (2000); Labor/Community Strategies Center, Bus Riders Union, et al. v. L.A. County Metropolitan Transportation Authority, Plaintiffs' Revised Statement of Contentions of Fact and Law, No. CV-945936 (C.D. CA, October 24, 1996).

[90] See Kinsey (2003).
[91] Puentes and Prince (2003).
[92] Hill, et al. (2003).
[93] This type of analysis would provide a better understanding of transportation spending in states with large minority populations in rural areas as well as in states with large minority populations in cities.
[94] Federal Highway Administration data on roadway spending.
[95] Unpublished analysis of Michelle Ernst, Surface Transportation Policy Project, May 2003, based on the Federal Highway Administration's 2001 Fiscal Management Information Systems data.
[96] Jackson (1985); Downs (1971).
[97] Jackson (1985); Downs (1971).
[98] See, for example, Orfield and Eaton (1996); Massey and Denton (1993).
[99] See Ihlanfeldt and Sjoquist (1998).
[100] Holzer (1991).
[101] Gordon, Kumar, and Richardson (1989).
[102] Source: U.S. Census 2000 (retrieved from http://www.census.gov/population/www/socdemo/journey.html and http://www.census.gov/populatin/www/cen2000/commuting.html).
[103] Kain (1968).
[104] Wilson (1987).
[105] Sanchez (2002).
[106] Thompson (1997).
[107] Sanchez (1999).
[108] Ellwood (1986).
[109] Holzer, Ihlanfeldt, and Sjoquist (1994); Kain and Meyer (1970); Meyer and Gómez-Ibáñez (1981); Taylor and Ong (1995); Gómez-Ibáñez (1976).
[110] Wachs and Taylor (1998); Ong and Blumenberg (1998).
[111] Pucher and Renne (2003).
[112] Murakami and Young (1997); Coulton, Leete, and Bania (1997); Meyer (1999).
[113] Ong (1996); Blumenberg (2002); Raphael and Rice (2002).
[114] Wachs and Taylor (1998).
[115] Lee (1997).
[116] powell and Graham (2002).
[117] Bullard and Johnson (1997).
[118] Lee (1997).
[119] Stolz (2002).
[120] Stolz (2002).
[121] SAGE Council, Protecting the Petroglyphs at www.sagecouncil.org/petroglyphs.html.
[122] Kennedy and Leonard (2001) has more on the debate over the exact definition of "gentrification."
[123] Sanchez (1998).
[124] Hodge (1980); Laska and Spain (1980).
[125] *Brown v. Board of Education of Topeka*, 347 U.S 483 (1954).
[126] Transportation Research Board (2002). It estimated that 25 percent of trips were on school buses and only 2 percent were by public transit.
[127] American Public Transportation Association (n.d.). In cities with populations of 50,000 to 199,999, trips to or from school were 26 percent of all transit trips.
[128] Transportation Research Board (2002). p. 17.
[129] Transportation Research Board (2002). p. 16.
[130] See the Los Angeles County Metropolitan Transportation Authority's Web site at http://www.mta.net/metro_transit/fare_info/discount_passes_students.htm describing discounted fares for elementary, middle, and high school students.
[131] See the Metropolitan Transit Authority of Harris County, Texas Web site at http://www.hou-metro.harris.tx.us/services/fares01.asp describing reduced fares for middle and high school students.
[132] See the Washington Metropolitan Area Transit Authority Web site at http://www.wmata.com describing reduced fares for D.C. public school students.
[133] See Metropolitan Transportation Commission (2001), which describes the MTC's consideration of a proposal to provide free bus passes for low-income students as a means to improve student attendance.

[134] Cabanatuan (2001).
[135] Haley (2000); Girls Initiative Network. As a result of the efforts of Sisters in Action, Portland's transit agency serving the three-county area provides free bus rides to low-income high school students.
[136] DARE Seeds of Change (2003).
[137] Some states that do require charter school to provide transportation to students include Florida, Illinois, Kansas, Massachusetts, North Carolina, and New Jersey.
[138] For more information about the segregative effect of charter schools see the forthcoming charter school report to be published by The Civil Rights Project.
[139] Pub. Law 107-110, see § 1116.
[140] The American Association of Community Colleges states that, "in urban areas, community college enrollments reflect the proportion of minorities in local populations." (American Association of Community Colleges, n.d.).
[141] National Association of County and City Health Officials (2002).
[142] National Association of County and City Health Officials (2002).
[143] See Schulz (2002).
[144] Schulz (2002).
[145] Source: U.S. Bureau of the Census (n.d.).
[146] Schulz (2002).
[147] Maantay (2001).
[148] Frumkin (2002) citing Wernette, D. R., and Nieves L. A. (1992). Breathing polluted air: Minorities are disproportionately exposed. *EPA Journal* 18, 16–17.
[149] Wjst, et al. (1993); Weiland, et al. (1994); Oosterlee, et al. (1996); Mortimer, et al. (2002).
[150] Frumkin (2002); Centers for Disease Control (2002a).
[151] American Lung Association (2000).
[152] U.S. Environmental Protection Agency (2000).
[153] Wjst, et al. (1993); Weiland, et al. (1994); Oosterlee, et al. (1996); Mortimer, et al. (2002).
[154] Friedman, et al. (2001); Lin, et al. (2002).
[155] These included "an integrated 24-hour-a-day public transportation system, the addition of 1,000 buses for park-and-ride services, . . . closure of the downtown sector to private automobile travel, altered downtown delivery schedules." (Friedman, et al. 2001).
[156] Friedman, et al. (2001).
[157] Mortimer, et al. (2002).
[158] New York City Department of City Planning. Manhattan Community District 10 Profile. Retrieved May 2003 from http://www.ci.nyc.ny.us/html/dcp/html/lucds/mn10lu.html.
[159] New York City Department of City Planning. Bronx Community District 2 Profile. Retrieved May 2003 from http://www.ci.nyc.ny.us/html/dcp/html/lucds/bx2lu.html
[160] Perera, et al. (2002).
[161] National Association of County and City Health Officials (2002).
[162] Perera, et al. (2002).
[163] Perera, et al. (2002).
[164] Centers for Disease Control and Prevention (n.d.).
[165] Surface Transportation Policy Project (2002).
[166] Surface Transportation Policy Project (2002).
[167] Frumkin (2002), p. 117.
[168] Frumkin (2002), p. 117; Surface Transportation Policy Project (2002), p. 13.
[169] Data source: U.S. Bureau of the Census (2000).
[170] Rivara (1999).
[171] Frumkin (2002); see also Surface Transportation Policy Project (2002).
[172] Bostock (2001).
[173] For example, see Centers for Disease Control and Prevention (2002b) and Pucher and Renne (2003).
[174] Centers for Disease Control and Prevention (2002b).
[175] Surface Transportation Policy Project (2002).
[176] Surface Transportation Policy Project (2002).
[177] American Association of State Highway and Transportation Officials (2002).
[178] 23 U.S.C. 140(d) (tribal reservations preference) and Appalachian Regional Development Reform Act 40 App. U.S.C. 201 (expired October 2001).

[179] 23 US Code Section 140 (b) and (c).
[180] Center for Community Change (2002).
[181] U.S. Bureau of Labor Statistics (2001a).
[182] U.S. Bureau of the Census (2000, 2001).
[183] These employment data include construction projects in Puerto Rico, which may partially account for the overrepresentation of Latinos employed in the construction industry.
[184] U.S. Bureau of the Census (2002).
[185] U.S. Bureau of Labor Statistics (2003).
[186] U.S. Bureau of Labor Statistics (2001b).
[187] U.S. Department of Transportation, Office of Small and Disadvantaged Business Enterprise (n.d.).
[188] 228 F.3d 1147 (10th Cir. 2000).
[189] 228 F.3d at 1170.
[190] 228 F.3d at 1170.
[191] 228 F.3d at 1173.
[192] General Accounting Office (2001).
[193] Federal Highway Administration Office of Civil Rights (2002).
[194] Source: U.S. Bureau of the Census (2000).
[195] U. S. Bureau of the Census (2001).
[196] Source: U.S. Bureau of the Census (n.d.).
[197] Source: U.S. Census as calculated by the National Council of La Raza, based on sample data from the Census 2000 Long Form (May 2003).
[198] Surface Transportation Policy Project (2003b). Also see Bernstein (2002).
[199] U.S. Department of Transportation (n.d.-a).
[200] President William Jefferson Clinton, Executive Order 13166, Federal Register 65, no. 159 (page 50121) (11 August 2000).
[201] U.S. Department of Transportation (2001b).
[202] Stolz (2001a).
[203] Karleen Cooke. (30 May 2003). MTA New York City. Personal communication with Jacinta Ma.
[204] See the Washington Metropolitan Area Transit Authority's Web site at http://www.wmata.com/default.cfm.
[205] U.S. Department of Transportation (2001a), p. 6745.
[206] See the Metropolitan Transportation Commission's Web site at http://www.mtc.ca.gov/index.htm.
[207] We have not conducted a review of state laws, but it is likely that some states have additional laws mandating environmental justice and social equity.
[208] For example, these principles can be found in the FHWA's brochure "An Overview of Transportation and Envorinmental Justice" available at http://www.fhwa.dot.gov/environment/ej2000.htm as well as the FHWA's Environmental Justice Web page at http://www.fhwa.dot.gov/environmenta/ejustice/facts/index.htm#legislation.
[209] These are formally known as the Access to Jobs program.
[210] Wolf and Farquhar (2003).
[211] Wolf and Farquhar (2003). See, 23 C.F.R. §§ 450.212 and 450.316.
[212] Katz, Puentes, and Bernstein (2003).
[213] Federal Highway Administration and Federal Transit Administration (1999).
[214] 23 CFR §450.316. The exact language of the regulation governing state departments of transportation is slightly different, requiring "a process for seeking out and considering the needs of those traditionally underserved by existing transportation systems, such as low-income and minority households which may face challenges accessing employment and other amenities." 23 C.F.R. § 450.212.
[215] There have been several instances in which FHWA and FTA conditionally certified MPOs (in Indiana, Illinois, Alabama, Florida, California).
[216] Noerager and Lyons (2002).
[217] Mizuno (1995).
[218] Nelson (2003).
[219] Montgomery Transportation Coalition (2001).
[220] The Transportation Equity Network is a national coalition of grassroots organizations in minority and low-income communities concerned with the impact of transportation policies on their communities.
[221] Funders' Network for Smart Growth and Livable Communities (2002).
[222] Surface Transportation Policy Project (2003a).

[223] This section does not address internal U.S. Department of Transportation hiring practices.
[224] U.S. Department of Transportation (2003b).
[225] Title VI of the Civil Rights Act of 1964, 42 U.S.C. ' 2000d, et seq.
[226] 532 U.S. 275, 121 S.Ct. 1511 (2001).
[227] 23 CFR Part 200, §200.9.
[228] U.S. Department of Transportation (1999).
[229] U.S. Equal Employment Opportunity Commission (2003a and 2003b).
[230] It initiated 47 compliance reviews/investigations but did not publish how many of those were based on possible race or ethnic discrimination. U.S. Department of Education (2000).
[231] Broadway (2003).
[232] See the U.S. Department of Transportation's Federal Highway Administration Web site. Transportation decisionmaking factors. Available at http://www.fhwa.dot.gov/environment/nepa/decision.htm.
[233] Endangered Species Act of 1973, 16 U.S.C. §1531.
[234] Almanza and Alvarez (1995); Forkenbrock, Benshoff, and Weisbrod (2001).
[235] National Environmental Policy Act, 42 U.S.C. §§432-4347. Other laws and regulatory documents also require that the impact on a community be considered in transportation decisionmaking processes. See the FHWA's and FTA's environmental justice web site. The Facts. Available at http://www.fhwa.dot.gov/environment/ejustice/facts.index.htm.
[236] For example, see Brock, et al. (1996).
[237] Available at: http://www.fhwa.dot.gov/tea21/tearptsr.htm
[238] An example of this type of research can be found on the National Institutes of Health Web site at http://grants1.nih.gov/grants/guide/rfa-files/RFA-ES-03-007.html.
[239] California Code of Regulations, Title 4, Division 17, Chapter 1.
[240] U.S. Department of Transportation, TEA-21 Fact Sheet available at http://www.fhwa.dot.gov/tea21/factsheets/factsht$.htm

APPENDIX

Table A.1. compiles data from the Federal Highway Administration's Office of Civil Rights, which is responsible for gathering data and implementing the U.S. Department of Transportation's (DOT's) Disadvantaged Business Enterprise (DBE) program. This table is based on data self-reported by states to the federal government; none of this data has been independently verified.

The table reflects changes in the program over time between fiscal years 1995 and 2000. The first column reflects percentage goals for minority contracting in response to percentage goals originally established under TEA-21. The second column reflects the percentage of total funds awarded through contracts that went to DBEs, either as prime contracts or commitments to subcontractors under the original DBE program. The third column reflects changes in state DBE goals since DOT refined its DBE program to meet constitutional requirements and directed that program participation goals be set according to the level of DBE participation that would be expected absent discrimination and based on the number of "ready, willing and able" DBEs in local markets. Twenty-eight states lowered their DBE goals; eighteen, including the District of Columbia, increased their DBE goals. Seven, including Puerto Rico, did not change their goals.

The fourth column shows actual contract awards in fiscal year 2000 under the revised goals. Forty-five states awarded a smaller percentage of funds, through prime contracts and/or subcontracts, to DBEs in fiscal year 2000 than in fiscal year 1995. The percentage of actual contract awards and commitments increased in only seven states. Nationally, in fiscal year 1995, 15.7 percent of contract dollars went to DBEs, but by fiscal year 2000 only 10.5 percent went to DBEs.

Table A.1. **States' Disadvantaged Business Enterprise Program Contract Goals and Awards, Fiscal Years 1995 and 2000**

State	Fiscal Year 1995 DBE Goal (% of contract dollars)	Fiscal Year 1995 DBE Prime Contract Awards Plus Subcontract Commitments (% of contract dollars)	Fiscal Year 2000 DBE Goal (% of contract dollars)	Fiscal Year 2000 DBE Prime Contract Awards Plus Subcontract Commitments (% of contract dollars)
Alabama	10	12.7	9	9.71
Alaska	10	13.2	6.7	7.37
Arizona	10	13.7	9	12.85
Arkansas	10	9.0	8.2	7.62
California	20	25.8	18	10.56
Colorado	10	13.7	10	5.6
Connecticut	12	13.7	10	14.72
District of Columbia	10	40.5	33	29.95
Delaware	10	14.4	10	7.26
Florida	10	15.8	8	7.38
Georgia	10	10.4	10	16.84
Hawaii	10	14.3	19	23.18
Idaho	10	11	7.6	9.77
Illinois	10	14.1	12.5	11.92

Indiana	10	13.5	11	7.69
Iowa	10	11.1	7.5	9.96
Kansas	10	11.8	10	7.59
Kentucky	11.5	20.8	11.5	11.47
Louisiana	10	13.2	10.6	7.26
Maine	10	12.8	7	4.99
Maryland	13	14.7	15	12.27
Massachusetts	11	13	13.8	13.67
Michigan	14	15.5	12	9.62
Minnesota	10	11.8	11.6	2.25
Mississippi	10	16.5	9	10.52
Missouri	10	12.3	15	10.56
Montana	10	17.1	6.5	21.59
Nebraska	10	10	11	8.42
Nevada	10	11.7	5	6.11
New Hampshire	10	23.5	8	13.66
New Jersey	13	20.4	13.4	19.49
New Mexico	14	25.9	10.5	5.61
New York	16	13.7	13.4	12.99
North Carolina	10	11.1	13.51	11.98
North Dakota	10	10.8	7.5	3.28
Ohio	10	18.2	9	8.43
Oklahoma	10	14.7	9.25	11.32
Oregon	14	14	12.9	11.48
Pennsylvania	10	12.8	11.2	8.45
Puerto Rico	30	68.7	30	31.91
Rhode Island	10	10.8	10	8.16
South Carolina	10	11.6	10.5	10.81
South Dakota	10	10.4	7	8.32
Tennessee	10	13.3	11	12.08
Texas	15	17	11.9	14.72
Utah	10	10.3	7	15.6
Vermont	10	15.3	11.2	15
Virginia	12	14.9	10.1	13.05
Washington	16	16.4	14	10.97
West Virginia	10	11.8	10.51	6.43
Wisconsin	10	10.8	11.5	10.69
Wyoming	10	14.4	3.5	7.52

REFERENCES

Almanza, S., & Alvarez, R. (1995). Low-income communities & communities of color. Background paper presented at the Transportation: Environmental Justice and Social Equity Conference, Washington, DC.

American Association of Community Colleges. (n.d.). Student enrollment and characteristics. Retrieved May 2003 from http://www.aace.nche.edu/Content/NavigationMenu/AboutCommunityCollege.

American Association of State Highway and Transportation Officials. (2002). Transportation investment: Stimulate and sustain economic recovery through transportation investment. Washington, DC: Author.

American Civil Liberties Union of Northern California. (n.d.). Reaching for the dream, thinking higher: Cecelia Blanks. Retrieved April 2003 from http://aclunc.org/affirmative-action/dream/blanks.htm.

American Lung Association. (2000, October). *Minority lung disease data 2000.* Retrieved May 2003 from http://www2.lungusa.org/pub/minority/mldd_00.html.

American Public Transportation Association. (n.d.). Public transportation ridership statistics. Retrieved May 2003 from http://www.apta.com/research/stats/ridershp/race.cfm.

American Public Transportation Association. (1991). Effects of fare changes on bus ridership. Washington, DC: Author.

American Public Transportation Association. (1992). Americans in transit: A profile of public transit passengers. Washington, DC: Author.

American Public Transportation Association. (2002). Impact of the 2001–2002 economic slowdown on public transportation. Washington, DC: Author.

Bernstein, S. (2002). Planning as if people and places matter: Surface transportation research needs and performance for the next century. Testimony before the Senate Committee on Environment and Public Works, March 15. Retrieved June 2003 from http://www.fhwa.dot.gov/reauthorization/rmrt09.htm.

Black, A. (1995). *Urban mass transportation planning.* New York: McGraw-Hill.

Blume, H. (1991). Student's bus ride home inspires play on racial tension; Drama: La-Keisha Howlett has turned her experiences into "Black Talk" the skits plead for racial tolerance. *Los Angeles Times,* April 4, Long Beach edition, Part J, Page 1, Column 2.

Blumenberg, E. (2002). On the way to work: Welfare recipients and barriers to employment. *Economic Development Quarterly* 16(4), 314–325.

Bostock L. (2001). Pathways of disadvantage? Walking as a mode of transport among low- income mothers. *Health and Social Care in the Community* 9(1), 11–18.

Broadway, Jon. (2003). Montgomery Transportation Coalition. Interview, April 8.

Brock, W., et al. (1996). Community impact assessment: A quick reference for transportation. Washington, DC: U.S. Department of Transportation, Federal Highway Administration. Retrieved June 2003 from http://www.fhwa.dot.gov/environment/nepa/cia.htm.

Brookings Institution Center on Urban and Metropolitan Policy. (2001, April). Racial change in the nation's largest cities: Evidence from the 2000 census. Retrieved April 2003 from http://www.brook.edu/dybdocroot/es/urban/census/citygrowth.htm.

Bullard, R. D. (1996). Introduction: Environmental justice and transportation. In Environmental justice and transportation: Building model partnerships: Proceedings document. Clark Atlanta University.

Bullard, R. D., & Johnson, G. S. (Eds.). (1997). *Just transportation: Dismantling race & class barriers to mobility*. Gabriola Island, B.C.: New Society Publishers.

Cabanatuan, M. (2001, July). Poor kids' pleas for bus passes taken to heart. *San Francisco Chronicle*, p. A-19. Retrieved May 2003 from http://www.co.alameda.ca.us/board/carson/news/2001/kids.htm.

Center for Community Change. (1998). Getting to work: An organizer's guide to transportation equity, 13. Washington, DC: Author.

Center for Community Change. (2002). Replicating success: The Alameda Corridor Job Training & Employment Program. Washington, DC: Author.

Centers for Disease Control and Prevention. (n.d.). National Center for Injury Prevention and Control, Injury fact book 2001–2002, Retrieved May 2003 from http://www.cdc.gov/ncipc/fact_book/07_Different.htm

Centers for Disease Control and Prevention. (2002a, March). Surveillance for asthma, United States, 1980–1999. Retrieved May 2003 from http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5101a1.htm

Centers for Disease Control and Prevention. (2002b). Barriers to children walking and biking to school—United States, 1999. *Morbidity and Mortality Weekly Report* 51, 701–704.

Church, A., Frost, M., & Sullivan, K. (2000). Transport and social exclusion in London. *Transport Policy* 7(3), 195–205.

Cohn, S., & Fossett, M. (1996). What spatial mismatch? The proximity of blacks to employment in Boston and Houston. *Social Forces* 75, 557–572.

Coulton, C., Leete, L., & Bania, N. (1997). Housing, transportation and access to suburban jobs by welfare recipients in the Cleveland area. Center for Urban Poverty and Social Change: Mandel School of Applied Social Sciences, Case Western Reserve University.

Danziger, S., Corcoran, M., Danziger, S., Heflin, C., Kalil, A., Levine, J., Rosen, D., Seefeldt, K., Siefert., K., & Tolman, R. (1999). Barriers to the employment of welfare recipients. Poverty Research & Training Center, University of Michigan.

DARE Seeds of Change. (2003). No education without transportation. Providence, RI: Author.

Deka, D. (In press). Social and environmental justice issues in urban transportation. In Susan Hanson & Genevieve Giuliano (Eds.), *Geography of urban transportation* (3rd Ed.). New York: Guilford Press. Manuscript submitted for publication.

Downs, A. (1971). Suburban housing: A program for expanded opportunities. *Real Estate Review* 1(1), 4–10.

Ellwood, D. T. (1986). The spatial mismatch hypothesis: Are there teen-age jobs missing in the ghetto? In Richard B. Freeman & Harry J. Holzer (Eds.), *The black youth employment crisis*. Chicago: University of Chicago Press.

Environmental Justice Resource Center. (1999). Sprawl, Atlanta: Social equity dimensions of uneven growth and development. Atlanta: Clark-Atlanta University.

Federal Highway Administration Office of Civil Rights. (2002). *FY 2000 twelve month summary of federal aid DBE awards and commitments.* Washington, DC: Author.

Federal Highway Administration and Federal Transit Administration. (1999). *Federal Highway Administration and Federal Transit Administration TEA-21 planning and environmental provisions: Options for discussion, office of metropolitan planning and programs*. Washington, DC: Authors.

Forkenbrock, D. J., Benshoff, S., & Weisbrod, G. E. (2001). Assessing the social and economic effects of transportation projects. National Cooperative Highway Research Program. Washington, DC: Transportation Research Board.

Frey, W. (2001, June). Melting pot suburbs: A Census 2000 study of suburban diversity. Washington, DC: Brookings Institution. Retrieved April 2003 from http://www.brookings.org/es/urban/projects/census/freyexecsum.htm.

Frey, W. (2002, February). Metro magnets for minorities and whites: Melting pots, the new Sunbelt, and the heartland. Population Studies Center Research Report No. 02-496. Retrieved April 2003 from http://www.psc.isr.umich.edu/pubs/papers/rr02-496.pdf

Friedman, M. S., Powell, K. E., Hutwagner, L., Graham, L., & Teague, W. G. (2001). Impact of changes in transportation and commuting behaviors during the 1996 summer Olympic Games in Atlanta on air quality and childhood asthma. *Journal of the American Medical Association* 285(7), 897–905.

Frumkin, H. (2002). Urban sprawl and public health. *Public Health Reports* 117, 201–217.

Funders' Network for Smart Growth and Livable Communities. (2002). Community organizing: A Populist base for social equity and smart growth. Livable Communities@Work, Miami, FL: Author.

Galbraith, J. K. (1998). *Created unequal*. New York: Free Press.

Gardner, D. C. (1998). Transportation reauthorization: A summary of the Transportation Equity Act (TEA-21) for the Twenty-First Century, 30. *Urban Law Journal* 1097, 1099–1101.

General Accounting Office. (2001, June). Disadvantaged Business Enterprise: Critical information is needed to understand program impact. GAO-01-586. Washington, DC: Author.

Girls Initiative Network. (n.d.). Students get cheaper Tri-Met passes. Retrieved May 2003 from http://www.girlsinitiativenetwork.org/girlsinactionactivities_trimetpasses.htm.

Gómez-Ibáñez, J. A. (1976). Assessing the arguments for urban transit operating subsidies. *Transportation Research Record* 573, 126–132.

Gordon, P., Kumar, A., & Richardson, H. W. (1989). The spatial mismatch hypothesis: Some new evidence. *Urban Studies* 26, 315–326.

Governor's Commission on the Los Angeles Riots. (1965). *Violence in the city—An end or a beginning?* Los Angeles: Author.

Hair, P. D. (2001). *Louder than words: Lawyers, communities and the struggle for justice*. New York: Rockefeller Foundation.

Haley, K. (2000, September). Sisters acting up: Meet the sisters in action for power. *Wiretap*. Retrieved May 2003 from http://www.alternet.org/story.html?StoryID=9753

Hill, E. W., Geyer, B., O'Brien, K., Robey, C., Brennan J., Puentes, R. (2003). Slanted pavement: How Ohio's highway spending shortchanges cities and suburbs. Washington, DC: Brookings Insitution.

Hobbs, F., & Stoops, N. (2002, November). Demographic trends in the 20th Century: Census 2000 special reports at 100. Washington, DC: U.S. Department of Commerce, U.S. Bureau of the Census.

Hodge, D. (1980). Inner city revitalization as a challenge to diversity? Seattle. In S. B. Laska & D. Spain (Eds.), *Back to the City: Issues in neighborhood renovation* (pp. 187–203). New York: Pergammon Press.

Holzer, H. J. (1991). The spatial mismatch hypothesis: What has the evidence Shown? *Urban Studies* 28, 105–122.

Holzer, H. J., Ihlanfeldt, H. R., & Sjoquist, D. L. (1994). Work, search, and travel among white and black youth. *Journal of Urban Economics* 35, 320–345.

Iceland, J., Weinberg, D. H., & Steinmetz, E. (2002, May). Racial and ethnic residential segregation in the United States: 1980–2000. Paper presented at the annual meetings of the Population Association of America, Atlanta, GA.

Ihlanfeldt, K. R., & Sjoquist, D. L. (1998). The spatial mismatch hypothesis: A review of recent studies and their implications for welfare reform. *Housing Policy Debate* 9(4), 849–892.

Interfaith Federation. (1999). People's Re-certification Hearing on NIRPC, Gary, Indiana, June 1.

Jackson, K. T. (1985). *Crabgrass frontier*. New York: Oxford University Press.

Kain, J. F. (1968). Housing segregation, Negro employment, and metropolitan decentralization. *Quarterly Journal of Economics* 82, 175–197.

Kain, J. F., & Meyer, J. R. (1970). Transportation and poverty. *The Public Interest* 18, 75–87.

Kaplan, A. (1998). Transportation: The essential need to address the "To" in welfare-to-work. *Welfare Information Network: Issues Notes*, 2 (10). Retrieved May 2003 from http://www.welfareinfo.org/transitneed.htm.

Kasarda, J. D. (1983). Entry-level jobs, mobility, and urban minority unemployment. *Urban Affairs Quarterly* 19, 21–40.

Katz, B. & Muro, M. (2003). Smart growth saves money. *Detroit News*, April 13. Available at http://www.detnews.com/2003/editorial/0304/13/a15-134946.htm.

Katz, B., Puentes, R., & Bernstein, S. (2003). TEA-21 reauthorization: Getting transportation right for metropolitan America. Washington, DC: Brookings Institution Center on Urban and Metropolitan Policy.

Kennedy, M. and Leonard, P. (2001). Dealing with neighborhood change: A primer on gentrification and policy choices. Retrieved June 2003 from http://www.brookings.edu/dybodocroot/es/urban/gentrification/gentrification.pdf. Washington, DC: The Brookings Institution and Oakland, CA: Policy Link.

Kinsey, S. (2003). Local control breeds local innovation: California's successful experiment with sub-allocation. *Progress*, p. 3. Washington, DC: Surface Transportation Policy Project.

Klesh, K. J. (2001). Urban sprawl: Can the "transportation equity" movement and federal transportation policy help break down barriers to regional solutions? *Environmental Law Journal* 7, 649.

Lang, Robert E. 2003. *Edgeless cities: Exploring the elusive metropolis.* Washington, DC: Brookings Institution Press.

Laska, S. B., & Spain, D. (1980). *Back to the city: Issues in neighborhood renovation.* New York: Pergammon Press.

Lee, B. L. (1997). Civil Rights and legal remedies: A plan of action. In R. D. Bullard & G. S. Johnson (Eds.), *Just transportation: Dismantling race & class barriers to mobility*. Gabriola Island, BC: New Society Publishers.

Lewis Mumford Center. (2001, April). Ethnic diversity grows, neighborhood integration lags behind. Retrieved April 2003 from http://mumford1.dyndns.org/cen2000/WholePop/WPreport/page1.html.

Lin, S., Munsie, J. P., Hwan, S., Fitzgerald, E., & Cayo, M. R. (2002). Childhood asthma hospitalization and residential exposure to state route traffic. *Environmental Research* A(88), 73–81.

Logan, J. R. (2001, July). The new ethnic enclaves in America's suburbs. Lewis Mumford Center. Retrieved April 2003 from http://mumford1.dyndns.org/cen2000/suburban/SuburbanReport/page1.htm.

Logan, J. R. (2002a, June). The suburban advantage: New census data show unyielding city-suburb economic gap, and surprising shifts in some places. Lewis Mumford Center Census 2000 Metropolitan Racial and Ethnic Change Series. Retrieved April 2003 from http://mumford1.dyndns.org/cen2000/CityProfiles/SuburbanReport/page1.html

Logan, J. R. (2002b). Separate and unequal: The neighborhood gap for blacks and Hispanics in metropolitan America. Lewis Mumford Center for Comparative Urban and Regional Research, University of Albany.

Litman, T. (1999). Evaluating transportation equity. Victoria, BC: Victoria Transport Policy Institute. Retrieved June 2003 from http://www.vtpi.org/equity.pdf.

Luckett, S. (2001, May). Did you know? Homes account for 44 percent of all wealth: Findings from the SIPP 1995. *U.S. Census Bureau Current Population Reports.*

Maantay, J. (2001). Zoning, equity, and public health. *American Journal of Public Health* 91, 1033–1041.

Mann, E. (1997). Confronting transit racism in Los Angeles. In R. D. Bullard & G. S. Johnson (Eds.), *Just Transportation: Dismantling race & class barriers to mobility.* Gabriola Island, BC: New Society Publishers.

Massey, D. S., & Denton, N. A. (1988). The dimensions of residential segregation. *Social Forces* 67, 281–315.

Massey, D. S., & Denton, N. A. (1993). *American apartheid: Segregation and the making of the underclass.* Cambridge, MA: Harvard University Press.

McFate, K. (1991). *Poverty, inequality and the crisis of social policy.* Washington, DC: Joint Center for Political and Economic Studies.

Metropolitan Transportation Commission. (2001). Bus pass pilot program for low income students. Retrieved May 2003 from http://www.mtc.ca.gov/projects/rtp/bus_pass.htm.

Meyer, J. A. (1999). Assessing welfare reform: Work pays. *The Public Interest* 136, 113–120.

Meyer, J. R., & Gómez-Ibáñez, J. A. (1981). *Autos, transit, and cities.* Cambridge, MA: Harvard University Press.

Milton S. Eisenhower Foundation. (1998). *The millennium breach: The American dilemma, richer and poorer.* Washington, DC: Author.

Mizuno, M. (1995). Justice in decision making. Background paper presented at the Transportation: Environmental Justice and Social Equity Conference, Washington, DC.

Montgomery Transportation Coalition. (2001). Report on the Montgomery MPO: The case against re-certification (October 9, 2001).

Mortimer, K. M., Neasa, L. M., Dockery, D. W., Redline, S., & Tager, I. B. (2002). The effect of air pollution on inner-city children with asthma. *European Respiratory Journal* 19, 699–705.

Murakami, E., & Young, J. (1997). Daily travel by persons with low income. Paper presented at the Nationwide Personal Transportation Survey Symposium, Bethesda, Maryland.

National Advisory Commission on Civil Disorders. (1968). *Report of the National Advisory Commission on Civil Disorders.* Washington, DC: U.S. Government Printing Office.

National Association of County and City Health Officials. (2002, September). Creating health equity

through social justice. Draft Working Paper

National Highway Traffic Safety Administration. (n.d.). Safety tips for traveling to school on public transit. Retrieved May 2003 from http://www.nhtsa.dot.gov/people/injury/buses/GTSS/newspublictransit.html.

Nelson, A. C. (2003). Transit decision-making processes by MPOs and regional planning bodies. Discussion paper presented at the Metropolitan Institute at Virginia Tech, Alexandria, VA.

Niolet, B. (2003). Transportation plan rejected. *The Birmingham News*, March 4.

Noerager, K. & Lyons, W. (2002). Evaluation of statewide long-range transportation plans. Washington, DC: U.S. Department of Transportation. Retrieved June 2003 from http://www.fhwa.dot.gov/hep10/state/evalplans.htm

Office of the Deputy Prime Minister, Social Exclusion Unit (United Kingdom). (n.d.). Information on Web site. Retrieved May 2003 from http://www.socialexclusionunit.gov.uk/.

Office of the Deputy Prime Minister Social Exclusion Unit (United Kingdom). (2003, February). Making the connections: Final report on transport and social exclusion. Retrieved May 2003 from http://www.socialexclusionunit.gov.uk/published.htm.

Ong, P. (1996). Work and car ownership among welfare recipients. *Social Work Research* 2(4), 255–262.

Ong, P., & Blumenberg, E. (1998). Job access, commute and travel burden among welfare recipients. *Urban Studies* 35(1), 77–93.

Oosterlee, A., Drijver, M., Lebret, E., & Brunekreef, B. (1996). Chronic respiratory symptoms in children and adults living along streets with high traffic density. *Occupational & Environmental Medicine* 53(4), 241-247.

Orfield, G., & Eaton, S. E. (1996). *Dismantling desegregation: The quiet reversal of Board v. Board of Education*. New Press.

Perera, F. P., Illman, S. M., Kinney, P. L., Whyatt, R. M., Kelvin, E. Z., Shepard, P., Evans, D., Fullilove, M., Ford, J., Miller, R. L., Meyer, I. H., & Rauh, V. A. (2002). The challenge of preventing environmentally related disease in young children: Community based research in New York. *Environmental Health Perspectives* 100(2), 197–204.

powell, j. a., & Graham, K. M. (2002). Urban fragmentation as a barrier to equal opportunity. In D. M. Piche, W. L. Taylor, & R. A. Reed (Eds.), *Rights at risk: Equality in an age of terrorism*. Report of the Citizens Commission on Civil Rights, Washington, DC.

Proctor, B. D., & Dalaker, J. (2002). Poverty in the United States: 2001. Washington, DC: U.S. Bureau of the Census.

Pucher, J., & Renne, J. L. (2003). Socioeconomics of urban travel: Evidence from the 2001 NHTS. *Transportation Quarterly* 57(3), forthcoming. Retrieved May 2003 from http://nhts.ornl.gov/2001/html_files/Socioeconomics%20of%20Urban%20Travel.htm.

Puentes, R., & Prince, R. (2003, March). Fueling transportation finance: A primer on the gas tax. Washington, DC: Brookings Institution.

Raphael, S., & Rice, L. (2002). Car ownership, employment, and earnings. *Journal of Urban Economics* 52, 109–130.

Rivara, F. P. (1999). Pediatric injury control in 1999: Where do we go from here? *Pediatrics* 103(4), 883–888.

Rubin, T. A. (2000). Environmental justice and transportation decisions—The Los Angeles experience. Paper presented at the Transportation Research Board Annual Meeting, Washington, DC.

Sanchez, T. W. (1998). Equity analysis of personal transportation system benefits. *Journal of Urban Affairs* 20(1), 69–86.

Sanchez, T. W. (1999). The connection between public transit and employment. *Journal of the American Planning Association* 65(3), 284–296.

Sanchez, T. W. (2002). The impact of public transportation on U.S. metropolitan wage inequality. *Urban Studies*. 39(3), 423–436.

Schulz , A. J., et al. (2002). Racial and spatial relations as fundamental determinants of health in Detroit at 677. *The Milbank Quarterly* 80(4).

Shepard, F. L., & Sonn, P. K. (1997). A tale of two cities. In Robert Bullard & Glenn Johnson (Eds.), *Just transportation*, pp. 42–52. Gabrioloa Island, B.C.: New Society Publishers.

Sinclair, S. P., & Sinclair, F. (2001). Access all areas? An assessment of social inclusion measures in Scottish local transport strategies. Center for Research into Socially Inclusive Services, Edinburgh College of Art/Heriot Watt University.

Singer, C. M. (2002). New homes lure back blacks kicked out in '60s. *The Detroit News*. December 11, p. A1.

Stolz, R. (2001a). Letter to Marc Brenman, Office of Civil Rights, U.S. Department of Transportation, Washington, DC: Center for Community Change.

Stolz, R. (2001b). MOSES Gathering power for transportation equity. In *The Organizing Newsletter*. Washington, DC

Stolz, R. (2002). Transportation equity and environmental justice. In *Planners Network Magazine*. Fall

Surface Transportation Policy Project and Center for Neighborhood Technology. (2000). Driven to spend: The impact of sprawl on household transportation expenses. Washington. DC: Author.

Surface Transportation Policy Project. (2002). Mean Streets 2002. Washington, DC: Author.

Surface Transportation Policy Project. (2003a). Stay the course: How to make TEA-21 even better. Washington, DC: Author.

Surface Transportation Policy Project. (2003b, January). Transfer. Volume IX, Issue 2, available at http://www.transact.org/Transfer/trans03/01_17.asp#4.

Taylor, B. D., & Ong, P. M. (1995). Spatial mismatch or automobile mismatch? An examination of race, residence, and commuting in U.S. metropolitan areas. *Urban Studies* 32, 1453–1473.

Thompson, G. L. (1997). How ethnic/racial groups value transit accessibility: Modeling inferences from Dade county. Paper presented at the Annual Meeting of the Association of Collegiate Schools of Planning, Ft. Lauderdale, Florida.

Transportation Research Board. (2002). The relative risks of school travel: A national perspective and guidance for local community risk assessment. Washington, DC: National Academies.

U.S. Bureau of the Census. (n.d.). Census 2000 data. Available at http://www.census.gov.

U.S. Bureau of the Census. (2000). Table DP-1 Profile of General Demographic Characteristics: 2000. Washington, DC: Author.

U.S. Bureau of the Census (2001) Census 2000 PHC-T-1, Population by Race and Hispanic or Latino Origin for the United States: 1990 and 2000, Table 1 Population by Race and Hispanic or Latino Origin, for All Ages and for 18 Years and Over, for the United States: 2000. Retrieved April 2003 from http://www.census.gov/population/www/cen2000/phc-t1.html.

U.S. Bureau of the Census. (2002, September) Historical Income Tables: Table H-5. Race and Hispanic Origin of Householder—Households by Median and Mean Income: 1967-2001. Retrieved April 2003 from http://www.census.gov/hhes/income/histinc/h05.html.

U.S. Bureau of Labor Statistics. (2001a). Household data annual averages, Table 11. Employed persons by detailed occupation, sex, race, and Hispanic origin. Retrieved May 2003 from ftp://ftp.bls.gov/pub/special.requests/lf/aat11.txt.

U.S. Bureau of Labor Statistics. (2001b). 2000 national occupational employment and wage estimates—Construction and extraction occupations. Retrieved May 2003 from http://www.bls.dol.gov/oes/2000/oes_47Co.htm.

U.S. Bureau of Labor Statistics. (2003). Usual weekly earnings of wage and salary workers, table 2. Median usual weekly earnings of full-time wage and salary workers by age, race, Hispanic or Latino ethnicity, and sex, first quarter 2003 averages, not seasonally adjusted. Retrieved May 2003 from http://www.bls.gov/news.release/wkyeng.t02.htm.

U.S. Department of Education Office for Civil Rights (2000). Annual report to Congress: Guaranteeing equal access to high-standards education. Washington, DC: Author. Retrieved June 2003 from http://www.ed.gov/offices/OCR/AnnRpt2000/index.html.

U.S. Department of Transportation. (n.d.-a). National Household Travel Survey, 2001. 2002 NHTS Users Guide. Retrieved May 2003 from http://nhts.ornl.gov/2001/usersguide/chapter2.html.

U.S. Department of Transportation. (n.d.-b). National Household Travel Survey, 2001. Retrieved May 2003 from http://nhts.ornl.gov/2001/index.shtml

U.S. Department of Transportation (1997). Notice of final DOT Order on environmental justice. Federal Register 62, no. 72 (15 April 1997): 18377.

U.S. Department of Transportation. (1999). Memorandum re: Action: Implementing Title VI requirements in metropolitan and statewide planning. Washington, DC: Author.

U.S. Department of Transportation. (2001a). Transportation and environmental justice case studies (Publication No. FHWA-EP-01-010). Washington, DC: Author.

U.S. Department of Transportation. (2001b). Guidance to recipients of special language services to limited English proficient (LEP) beneficiaries, 66 Federal Register 6733, January 22.

U.S. Department of Transportation. (2003a). BTS Issue Brief (No.1), Bureau of Transportation Statistics. Washington, DC: Author.

U.S. Department of Transportation. (2003b). DOT Budget in Brief 2003. Retrieved June 2003 from http://www.dot.gov/bib/toc.html.

U.S. Department of Transportation, Office of Small and Disadvantaged Business Utilization. (n.d.). The New DOT Disadvantaged Business Enterprise (DBE) Regulation. Retrieved May 2003 from http://osdbuweb.dot.gov/business/dbe/Fact.html.

U.S. Environmental Protection Agency. (2000, December). America's children and the environment: A first view of available measures. Retrieved May 2003 from http://yosemite.epa.gov/ochp/ochpweb.nsf/content/ACE-Report.htm/$file/ACE-Report.pdf

U.S. Equal Employment Opportunity Commission. (2003a). Race-based charges FY 1992–FY 2002. Retrieved June 2003 from http://www.eeoc.gov/stats/race.html.

U.S. Equal Employment Opportunity Commission. (2003b). Litigation statistics, FY 1992 through FY 2002. Retrieved June 2003 from http://www.eeoc.gov/stats/litigation.html.

Wachs, M., & Taylor, B. D. (1998). Can transportation strategies help meet the welfare challenge? *Journal of the American Planning Association* 64(1), 15–19.

Wachs, M. (1999). New expectations for transportation data. Address at the Transportation Research Board Conference on Personal Travel, June 29.

Weiland, S. K., Mundt, K. A., Ruckmann, A., & Keil, U. (1994). Self-reported wheezing and allergic rhinitis in children and traffic density on street of residence. *Annals of Epidemiology* 4(3), 243–247.

Weiner, E. (1999). *Urban transportation planning in the United States: An historical overview*. Westport, CT: Praeger.

Wilson, W. J. (1987). *The truly disadvantaged: The inner city, the underclass, and public policy*. Chicago: University of Chicago Press.

Wjst, M., Reitmeir, P., Dold, S., Wulff, A., Nicolai, T., von Loeffelholz-Colberg, E. F., & von Mutius, E. (1993). Road traffic and adverse effects on respiratory health in children. *British Medical Journal* 307(6904), 596–600.

Wolf, J. F., & Farquhar, M. B. (2003). Using metropolitan planning organizations as a test case for the new regionalism and the new governance. Paper presented at the American Society for Public Administration 64th National Conference, Washington, DC.

The Road to Good Jobs: Patterns of Employment in the Construction Industry

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Second Annual Report

Transportation Equity Network

Public Policy Research Center, University of Missouri, St. Louis

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Acknowledgments

The Road to Good Jobs is sponsored by the Transportation Equity Network (TEN), a coalition of over 300 grassroots organizations, which was established in 1997 to make federal, state, and local transportation policy more responsive to the needs of low-income communities and minorities. TEN has affiliates in metropolitan areas across the nation working to create good jobs for African Americans, women, and other groups traditionally excluded from construction. *The Road to Good Jobs* examines the employment discrimination of African Americans and women in the construction industry. But unlike its predecessor, *The Road to Jobs*, released in 2007, *The Road to Good Jobs* will also discuss patterns of pay and union membership in construction across the nation's top twenty-five metropolitan areas.

The research for *The Road to Good Jobs* could not have been completed without the work of Laura Barrett, National Policy Director of the Gamaliel Foundation, whose idea it was to create both the *The Road to Jobs* and *The Road to Good Jobs* studies. Dr. Todd Swanstrom, Des Lee Professor of Community Collaboration and Public Policy Administration at the University of Missouri - St. Louis (UMSL), was primarily responsible for writing the report. Data retrieval and analysis was provided by the Public Policy Research Center at UMSL. Dr. David Laslo's team of dedicated researchers from the UMSL Public Policy Research Center (PPRC) included Christine Marx, Richard Rabe, Maria Freshman, and David Bromm. Becky Pastor helped with composition and layout of the report. Jill Kuhlberg from the George Warren Brown of Social Work at Washington University also provided support in data retrieval and coordination of the project.

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Table of Contents

Executive Summary iii

Introduction: The Need for Good Jobs 2

Good Jobs in the Construction Industry 2

Findings on Job Inclusion 4

Findings on Job Quality 8

Reports from Individual Metropolitan Areas 13

Policy Recommendations 37

Metro Area Profiles 42

Appendix: Data and Methodology 43

Endnotes 45

Executive Summary

Construction is one of the few industries where workers without a college education can obtain good jobs, with decent pay, good benefits, and job ladders. In 2006 the average wage for construction workers was $18.29 an hour. The looming shortage of skilled construction workers presents an opportunity for disadvantaged groups to obtain good jobs without displacing current workers. Our study of the largest twenty-five metropolitan areas in the country, however, found that both African Americans and women were employed in construction at rates well below their participation in the overall workforce. Indeed, if blacks were employed in construction at the same rate that they employed in the overall workforce in 2006, we estimate that 137,044 more blacks would be employed in construction in our twenty-five metropolitan areas. We also found that women held only between 1 and 9 percent of construction jobs. On the other hand, Hispanics were employed in construction at rates higher than their percentage in the overall workforce. Not all jobs in construction are "good" jobs, however. Pay varies tremendously across metropolitan areas. Our data shows that a construction worker in Chicago makes almost twice as much per hour ($27.70) as a construction worker in Dallas ($15.65). The average Dallas construction worker barely makes enough to support a living wage for one adult and one child. Our study found a strong correlation between the unionization rate in metropolitan areas and the average construction wage. We end with policy recommendations both to increase the participation of women, minorities, and disadvantaged groups in construction and to improve the quality of jobs in the construction industry. In particular, we point to the tremendous potential for "green" jobs in construction.

The Road to Good Jobs: Patterns of Employment in the Construction Industry

The Transportation Equity Network (TEN) is a coalition of about 300 grassroots organizations committed to making transportation more responsive to poor people, minorities, the handicapped, and other disadvantaged groups. TEN's JOBS NOW campaign is designed to target the jobs from federal and state transportation projects to disadvantaged communities. One year ago, TEN published *The Road to Jobs*, an analysis of patterns of employment of blacks, Hispanics, and women in the construction industry in eighteen metropolitan areas. This report updates and expands last year's report.

Last year *The Road to Jobs* pointed to the great need for decent paying jobs for people who do not attend college. Construction jobs can fill that need. They pay well and offer on-the-job training. Moreover, the looming shortage of skilled construction workers presents an opportunity to employ women, minorities, and other disadvantaged groups without displacing current workers. Last year's report showed, however, that blacks and women are employed in the construction industry at rates far below their employment in the general workforce.

Pointing to evidence of continuing discrimination in the construction industry, *The Road to Jobs* proposed policies that would give excluded groups greater access to construction jobs. *The Road to Jobs* garnered considerable media attention, with articles appearing in a number of newspapers, including USA Today, Detroit Free Press, Albany Times Union, and St. Louis Post-Dispatch. News conferences on the report were held by grassroots members of the TEN coalition in a number of cities, including Detroit, Minneapolis, St. Louis, Albany, and Chicago. TEN's JOBS NOW! campaign has continued to win victories around the nation. The Missouri Department of Transportation (MoDOT) signed agreements with grassroots coalitions in Kansas City and St. Louis committing ½ of 1 percent of federal highway dollars on specific projects to local workforce development. Today, in St. Louis, 59 minorities, women, and low-income persons are employed on the I-64 project because of this agreement. The Michigan Department of Transportation committed to a 4-year, $15 million state policy that will direct transportation funds into local job training. The first class of 80 students just graduated. A TEN affiliate in Minnesota passed a statewide legislation committing the state Department of Transportation to spending the "maximum amount feasible" on local workforce development.

The Road to Jobs also found that Hispanic men have established a strong foothold in the construction industry. Generally, this is good news. But, unfortunately, Hispanic men tend to have construction jobs which are less well paid, less unionized, less skilled, and often more dangerous.[1] TEN concluded that it is not enough to open up the construction industry to previously excluded groups; we also must work to improve the quality of jobs in the construction industry. As a result, we have expanded the scope of this year's report to look at job quality as well as job inclusion. Accordingly, we have titled our follow up to last year's report *The Road to Good Jobs*.

Introduction: The Need for Good Jobs

There is a pressing need in the United States for more "good" jobs. A good job is one that pays enough to support a family, includes health and retirement benefits, has safe and supportive working conditions, and includes job ladders so that workers can advance as their skills advance. Although the proportion of jobs that pay poverty or near-poverty wages has actually declined, the proportion of good jobs, as defined above, has risen. Workers must now cope with a much more unstable job market. Increasingly, workers face longer periods of unemployment and a growing number of dead-end jobs with poor pay and benefits.

A few decades ago, workers used to spend most of their career with one company, often unionized, and enjoying high job security, a chance to work their way up job ladders, and solid benefits. Good jobs like this are increasingly a thing of the past. Job quality has deteriorated. Between 1983 and 2006 the amount of time a middle-aged worker could expect to spend with the same employer fell by more than one-third.[2] As a recent study put it: "Workers entering the labor force can expect to hold fewer steady jobs, to not often find themselves on a within-company upward career trajectory, and to receive less on-the-job training."[3] The tremendous growth of what one author calls "unjobs" is striking: temporary jobs and outsourcing are two of the fastest growing trends in the American labor market. The proportion of workers who get employer-provided health insurance fell from 69.0 percent in 1979 to 55.9 percent in 2004. During that same period the proportion workers provided pensions fell from 50.6 percent to 45.5 percent.[4] Companies are less committed to their workers than they were even a decade ago.

The problem is especially severe for minorities, women, and those with less than a college education. Between 1973 and 2005 the wages of those with a high school education or less fell significantly in inflation-adjusted dollars while those with college degrees or more enjoyed significant increases. In 2005, one-third of black employees and 25.5 percent of women workers made poverty-level wages, compared to "only" 15.2 percent of white male workers. Women, blacks, and Hispanics are less likely than white men to be provided with health insurance or a pension by their employer. In 2004, for example, only 39.7 percent of Hispanics had employer-provided health insurance coverage.[5]

Good Jobs in the Construction Industry

The construction industry offers a supply of good jobs that are increasingly rare in today's job market. Moreover, individuals without a college degree can get construction jobs that pay well, provide clear job ladders, and include health and pension benefits. One of the great advantages of a construction job is that you can "earn while you learn." Apprenticeship programs pay workers as they acquire the skills to move up the job ladder. For single mothers or others who cannot afford to stop working in order to get an education, this is very attractive.

The number of construction job openings is growing, presenting more opportunities for disadvantaged groups to obtain good jobs without displacing current workers. Programs to bring women and minorities into good construction jobs can succeed. As we will see, however, there are two problems with this

optimistic scenario: 1) evidence of continuing discrimination against blacks and women in the industry; 2) a falling proportion of good jobs in construction.

In 2006 the average wage in construction in the United States was $18.29, well above most jobs in the service sector.[6] One reason wages have remained relatively high is that construction is insulated from global competition. Contractors cannot build a new office building or highway in China and then ship it to Chicago. Although skilled construction workers have been hurt by competition from prefabricated components, such as cabinets and windows, it still is basically a labor-intensive industry that relies upon skilled workers to produce one-of-a-kind products adapted to individual sites.

Construction is also a growing industry. It is the only goods producing industry that has enjoyed steady job growth in recent years.[7] The federal government projects annual openings for 245,900 skilled construction workers each year from 2004-2014.[8] These openings are the result of job growth in the industry as well as openings due to retirements and job transfers. The Aspen Institute projects zero growth in the native labor supply in the next twenty years.[9] Realistically, the industry will have to reach out to immigrants, as well as previously excluded groups, such as women and minorities, to meet the demand for construction workers.

Construction is one of the few industries where workers with relatively little formal education can acquire the skills necessary to earn incomes that can support a middle-class lifestyle. The reason for this is that most construction skills are craft skills, learned on the job through formal and informal apprenticeship systems. Many building trades, however, do require basic math skills. Because of this on-the-job training system, construction is one of the few industries today where good jobs are filled by workers advancing up job ladders rather than by educated workers recruited from outside. In banking, schools, and hospitals between 82 and 92 percent of "good" jobs are filled by workers with at least some college; in construction, only 42 percent of "good" jobs go to college-educated workers. [10]

In the construction industry, the most successful job training programs are run by joint union-management apprenticeship committees.[11] Union apprenticeship programs are covered by collective bargaining agreements in each metropolitan area in which a few cents for every hour worked is put into a fund to pay for job training. Each apprenticeship program is run by one of the approximately fourteen building trades (carpenters, electricians, etc.) in each state or metropolitan area. The U.S. Department of Labor registers apprenticeship programs that meet twenty-two basic standards. Each apprenticeship program creates a job ladder from apprentice to journeyman, with hourly wages increasing year by year until the top journeyman status is achieved. The value of the training to an individual worker in the form of higher wages, greater safety, etc. has been estimated at between $40,000 and $150,000.[12]

While many jobs in construction fit the picture described above and are "good" jobs, the proportion of good jobs in construction is declining. After controlling for inflation, construction industry wages fell 17 percent between 1973 and 2006.[13] The percentage of construction workers covered by health insurance is below the national average and the U.S. construction industry has death rates well above those reported for other developed countries.[14] Despite the documented need for almost a quarter of a million new skilled construction workers each year, only about 40,000 workers enter construction apprentice

programs each year and fewer than that graduate each year.[15]

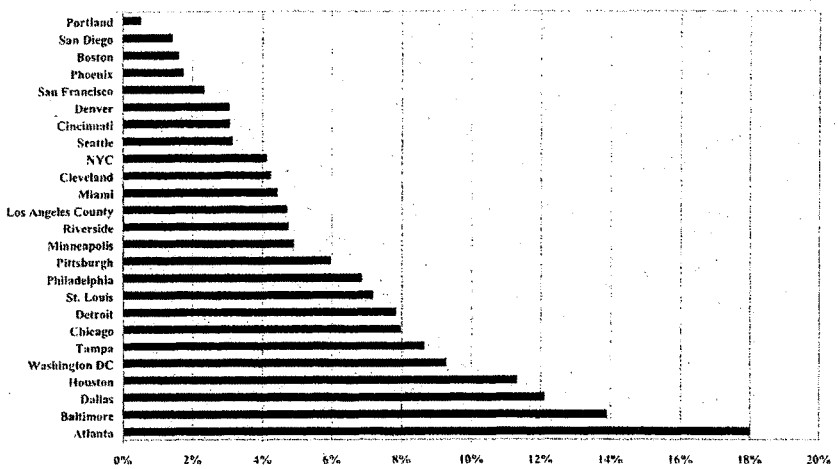
The causes of the deterioration of good jobs in construction are complex but probably the most important factor is the declining union presence. The unionization rate in construction in the U.S. fell from 50 percent in 1966 to only 14.2 percent in 2005.[16] The declining unionization rate has resulted in lower skill levels in construction and lower wages. Even the Business Roundtable, founded in 1972 to oppose construction unions, recognizes that underfunding of job training in construction by open-shop contractors is a serious problem.[17] An association of nonunion firms has been formed to provide training but the research shows that joint union-management apprenticeship programs enroll 70 percent of the apprentices, have higher completion rates, and produce more skilled journeymen.[18]

In short, the construction industry presents an opportunity for disadvantaged groups to gain access to good jobs, lifting up not just individuals but whole communities. This opening is threatened, however, by the declining presence of good jobs in the construction industry. We now turn to how these issues play out in the twenty-five largest metropolitan areas in the nation. Are women and minorities gaining access to construction jobs? Are good jobs in construction disappearing?

Findings on Job Inclusion

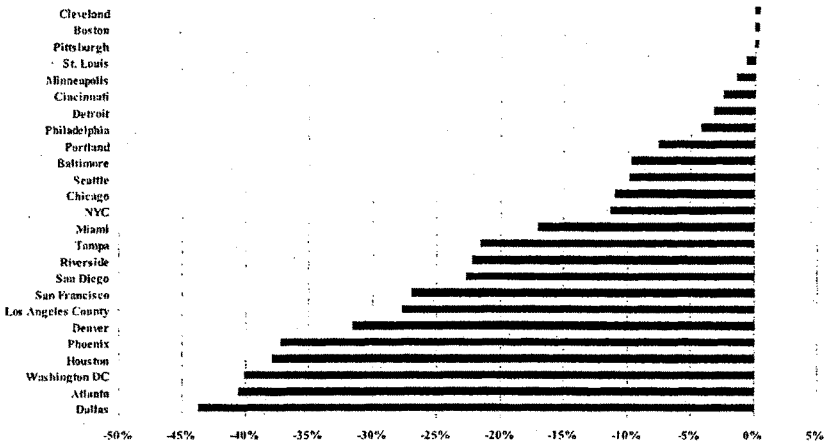
First, we examined the extent which minorities are employed in the construction industry. We assumed that minorities should be employed in construction jobs at about the same percentage as they are in the general workforce. The percentage difference between the proportion in the general workforce and the proportion in construction we call the "employment gap." A positive number indicates that employment in construction for group in question falls below their participation in the general workforce. A negative number indicates employment at a rate above their participation in the general workforce. (For details about our methodology, see the Appendix.)

Figure 1: Gap Between Share of Total Workforce and Construction Workforce for Black, Non-Hispanic Workers 2006



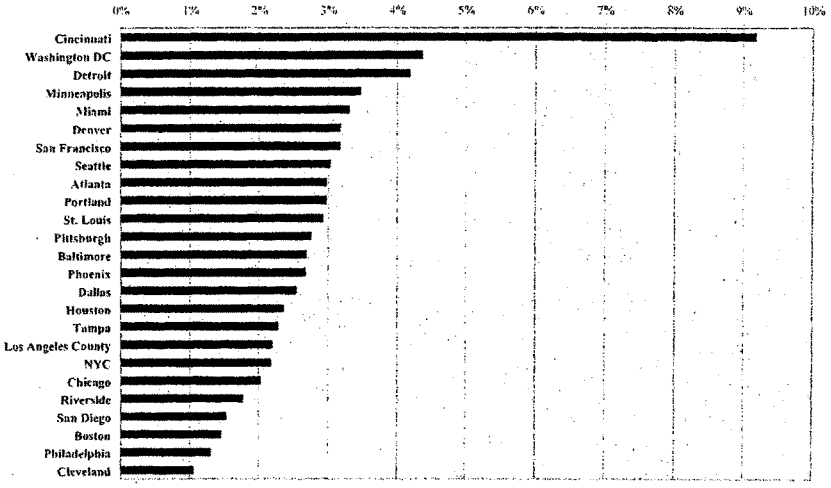
In every metropolitan area we studied, we found a positive employment gap for African Americans (Figure 1). Atlanta had the largest gap (18 percent), followed by Baltimore, Dallas, and Houston. The cities most open to employment by African Americans were Portland, San Diego, and Boston. Portland's employment gap, for example, was less than 1 percent. Overall, we estimate that 137,044 black workers are "missing" from the construction workforce in our twenty-five metropolitan areas. In other words, if blacks participated in construction at the same rate they participated in all industries, thousands of more blacks would be employed in construction.

Figure 2: Gap Between Share of Total Workforce and Share of Construction Workforce - Hispanic Workers 2006



The findings for Hispanics are dramatically different. In only three cities (Cleveland, Boston, and Pittsburgh) did Hispanics have a smaller percentage of the construction workforce than the general workforce and even in these cities the gap was tiny. In all the other cities Hispanics had a greater presence in construction than in the workforce generally. Dallas, Atlanta, and Washington, DC all had negative employment gaps of 40 percent or more, meaning that Hispanics were employed in construction at a much higher rate than the general workforce.

Figure 3: Percent of Construction Workforce that is Female
2006



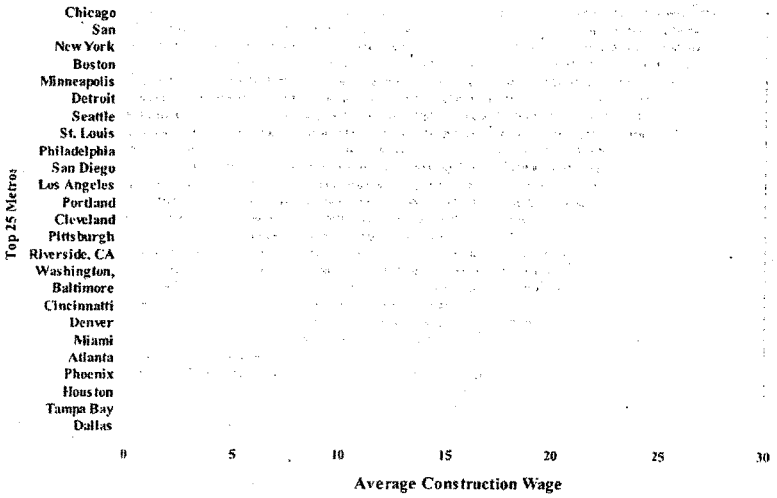
The employment goal for women is more difficult to determine. Unlike minorities, many have questioned whether women should be expected to hold the same percentage of jobs in construction that they hold in the overall workforce. The construction industry has many physically demanding jobs, and some question whether women have the physical strength for some jobs or whether women are interested in construction jobs. In fact, construction has changed. In many parts of construction backbreaking labor has been replaced by machines. Women are clearly capable of operating construction machinery and doing most other forms of construction work as well. Recognizing the changing realities of the skilled trades, under the leadership of Secretary of Labor Ray Marshall, the Department of Labor established goals and timetables for the employment of women in construction. In 1980, the Department of Labor raised set the goal that one out of every four apprenticeships, most of which are in construction, should be held by women. We think 25 percent is a reasonable goal for employment in construction.

The exclusion of women from skilled construction jobs has deep historical roots. Skilled construction work has been viewed traditionally as "man's work." As late as 1968, out of 77,151 apprenticeships in construction nationwide, only 2 were held by women.[19] Since then women have made inroads into skilled construction jobs. As Figure 3 shows, however, none of the cities we studied came even close to realizing the 25 percent goal in 2006. The female percentage of the construction workforce varied from a high of 9 percent in Cincinnati to a low of 1 percent in Cleveland. We still have a long way to go.

Findings on Job Quality

At the same time that it is important to track the access of women and minorities to construction jobs, it is also important to see if those jobs are good jobs. It does little good to gain access to an industry if the pay is poor, the benefits are inadequate, working conditions are dangerous, and there are few opportunities for advancement. We begin by examining pay in the construction industry in our twenty-five metropolitan areas.

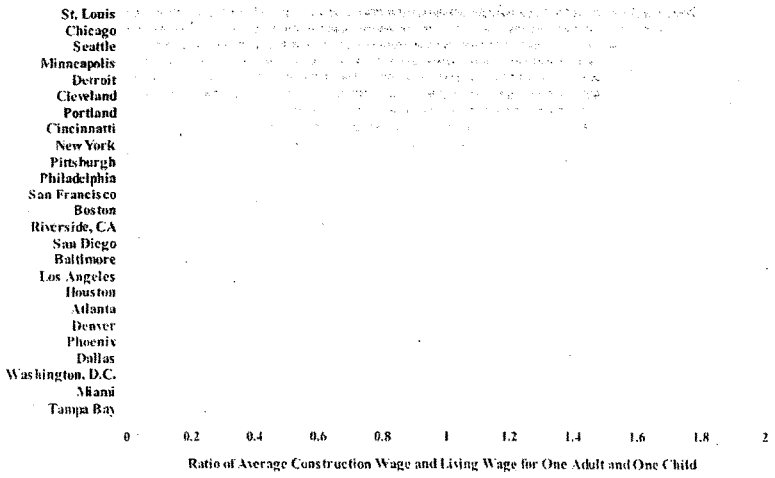
Figure 4. Average Construction Wage 2004-2007



As Figure 4 shows, wages in the construction industry vary tremendously from one metropolitan area to the next. The metropolitan areas with the highest wages are Chicago ($27.70), San Francisco ($26.91), and New York ($26.88). The lowest hourly wages are in Dallas ($15.65), Tampa Bay ($15.88), and Houston ($15.99). The average annual construction wage varies from a high of $57,610 in Chicago to a low of $32,540 in Dallas. In other words, whether calculated by the hour or by the year, a construction worker in Chicago makes on average 77 percent more than a construction worker in Dallas.

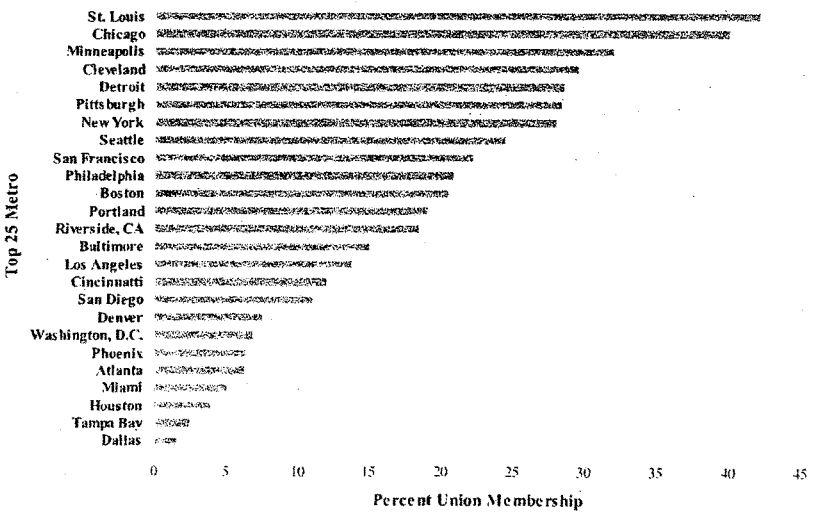
The difference in wages is huge but of course this comparison ignores the variation in the cost of living across different metropolitan areas. The Living Wage Calculator estimates the minimum pay rate at which an employee can meet basic needs and remain self-sufficient without government assistance.[20] The living wage is based on geographically-specific data on the cost of food, housing, child care, medical care, transportation, and other necessities. Estimates for state and federal income taxes and payroll taxes are also factored into the living wage calculation. These costs are adjusted to reflect the household structure (number and ages of adults and children, and gender of adults in the household). Because the wage is intended to reflect the lowest wage at which the employee can meet basic needs, the calculation of each component includes assumptions that reflect the most likely decisions of low-wage earners. For example, the food calculation assumes that all food will be prepared in the home, and the child care expenditures are based on the lowest costs possible for the selected geography.

Figure 5. Ratio of Average Construction Wage and Living Wage: 2004-07



As Figure 5 shows, when you control for the cost of living in different metropolitan areas all of the metro areas provide a living wage for one adult and one child, but some do much better than others. The rankings of metropolitan areas in terms of what the average construction wage can buy are very different. Now, the top metro area in the country is St. Louis, where the average construction wage is 1.78 times the living wage. St. Louis is followed by Chicago (1.69) and Seattle (1.56). The worst metropolitan areas for construction wages are Tampa Bay (1.02) Miami (1.03) and Washington, D.C. (1.05). The cost of living in these metropolitan areas means that a full-time construction wage is barely enough to support a single parent with one child. The main culprit in the case of Washington, DC, which has a fairly healthy construction wage, is the high cost of housing. Areas that were near the top on hourly wage, such as New York, Boston, and San Francisco, fall to the middle or bottom of the pack after the cost of living is taken into account.

Figure 6. Construction Union Membeership Rate: 2004-07



Why do some metropolitan areas have much higher construction wages, even after controlling for the cost of living? The main reason is the strength of the construction trade unions. Figure 6 shows that the presence of unions in construction varies tremendously across the country. St. Louis has the highest unionization rate at 41.9 percent, followed by Chicago (39.8 percent), and Minneapolis (31.9 percent). The lowest unionization rate is found in Dallas (1.6 percent), followed by Tampa Bay (2.5 percent), and Houston (4.0 percent).

Figure 7. Scatter Plot: Construction Industry Union Memebership Rate and Construction Wage /Living Wage Ratio : 2004-07

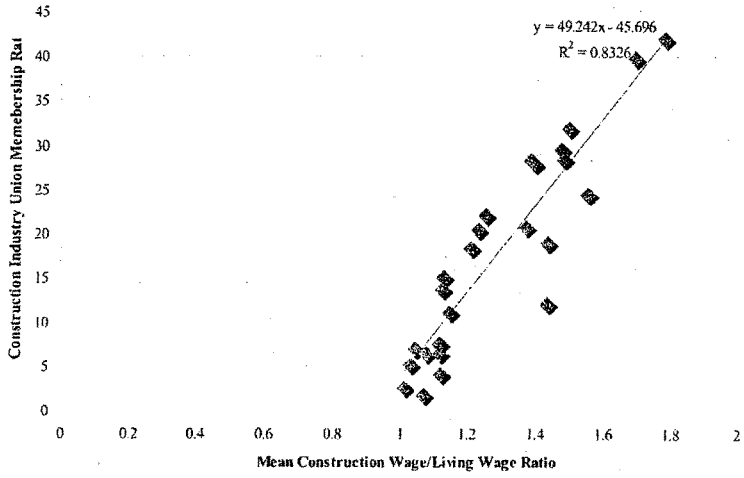


Figure 7 shows the relationship between union membership and the ratio of construction industry wages to the living wage. Each dot represents a metropolitan area and the line represents the best fit-correlation between the two variables. The upward slope of the line shows that as the union membership rates increase across metropolitan areas, the effective buying power of the average construction worker also increases. There is a strong relationship between union membership and construction wages. The R-Square statistic indicates that union membership "explains" over 83 percent of the wage variation. Not surprisingly, St. Louis construction workers, who have the highest unionization rate (41.9 percent), also have greatest buying power (78 percent higher than the living wage). On the other hand, Dallas construction workers, who have the lowest unionization rate (1.6 percent), have weak buying power from their wages (just 7 percent above the living wage).

We have not been able to obtain data on benefits and working conditions down to the metropolitan level. We do know, however, that, nationwide, 83 percent of unionized construction workers have employment-based health insurance compared to only 48 percent of nonunion construction workers. Similarly, 71 percent of union construction workers participate in retirement plans, compared to only 21 percent of nonunion workers.[21] Clearly, unionized construction workers enjoy both better wages and benefits compared than nonunion construction workers. Moreover, unions run, with contractors, the best apprenticeship training programs around the country.

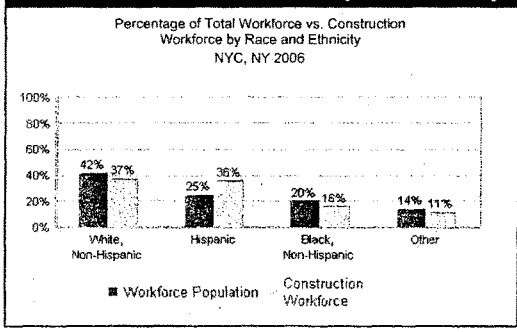
We now turn to the profiles of the twenty-five largest metropolitan areas in the nation.

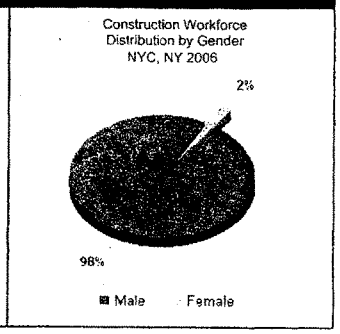
NYC, New York

Metro Area Population, Construction Wage, Minimum and Living Wage

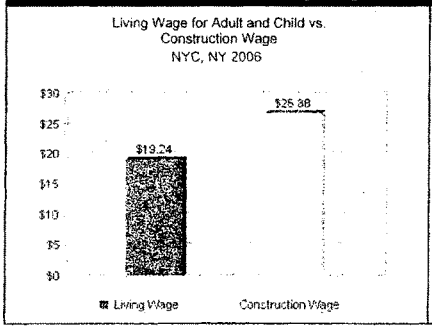
County/City	2006 Total Population ACS Estimates	2007 Average Construction Wage	Minimum Wage	Living Wage for Adult and a Child
Queens, NY	7,737,049	$26.88	$7.15	$19.24
New York, NY				
Bronx, NY				
Kings, NY				

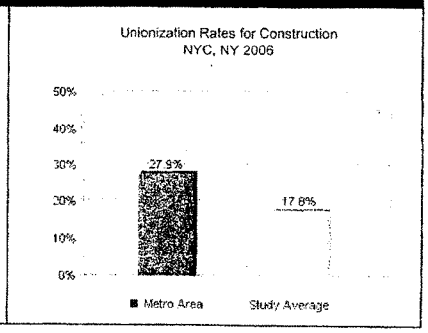
Workforce by Race, Ethnicity, and Gender





Living Wage and Unionization Rates





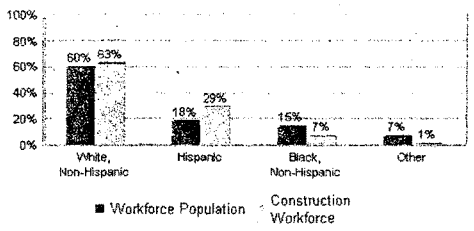
Chicago, Illinois

Metro Area Population, Construction Wage, Minimum and Living Wage

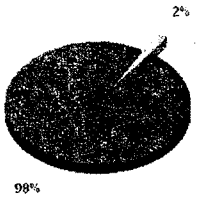
County/City	2006 Total Population ACS Estimates	2007 Average Construction Wage	Minimum Wage	Living Wage for Adult and a Child
Cook, IL	5,288,655	$27.70	$7.50	$16.37

Workforce by Race, Ethnicity, and Gender

Percentage of Total Workforce vs. Construction Workforce by Race and Ethnicity
Chicago, IL 2006

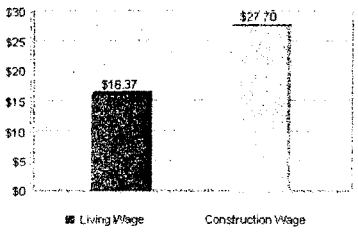


Construction Workforce Distribution by Gender
Chicago, IL 2006

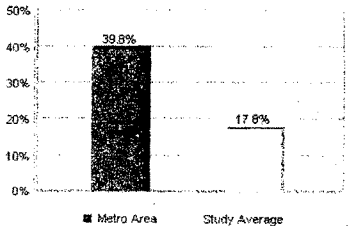


Living Wage and Unionization Rates

Living Wage for Adult and Child vs. Construction Wage
Chicago, IL 2006



Unionization Rates for Construction
Chicago, IL 2006

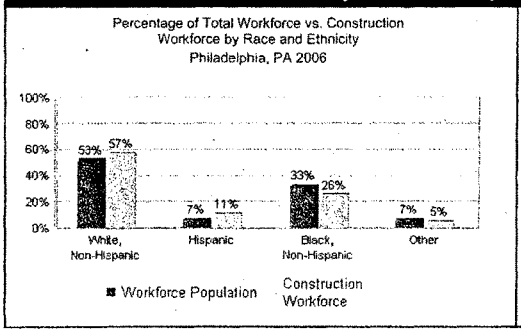


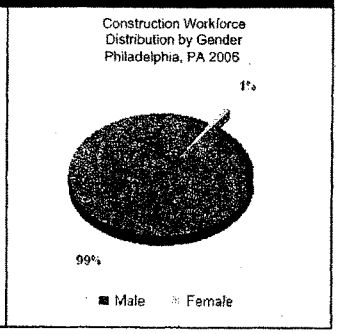
Philadelphia, Pennsylvania

Metro Area Population, Construction Wage, Minimum and Living Wage

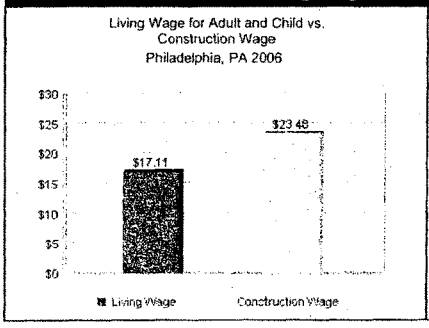
County/City	2006 Total Population ACS Estimates	2007 Average Construction Wage	Minimum Wage	Living Wage for Adult and a Child
Philadelphia ,PA	1,448,394	$23.48	$7.15	$17.11

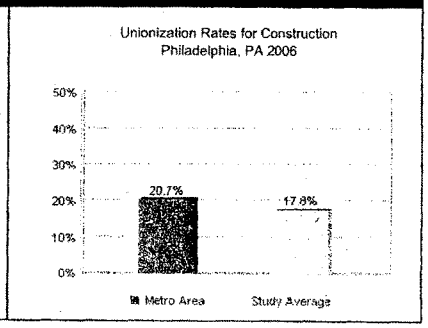
Workforce by Race, Ethnicity, and Gender





Living Wage and Unionization Rates



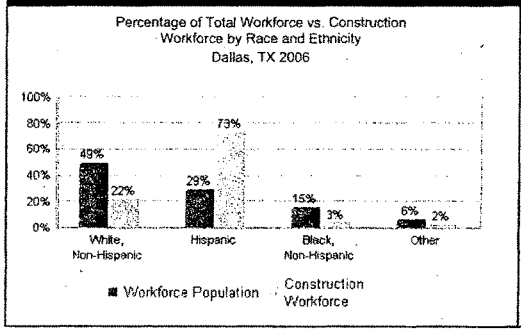


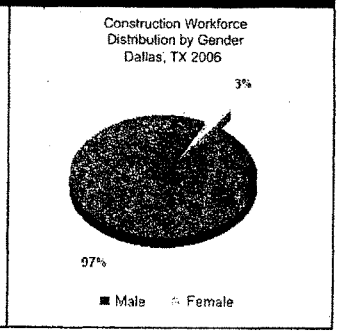
Dallas, Texas

Metro Area Population, Construction Wage, Minimum and Living Wage

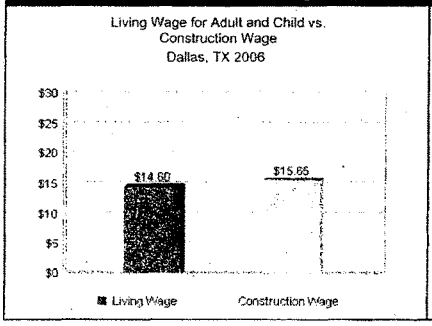
County/City	2006 Total Population ACS Estimates	2007 Average Construction Wage	Minimum Wage	Living Wage for Adult and a Child
Dallas, TX	2,345,815	$15.65	$5.85	$14.60

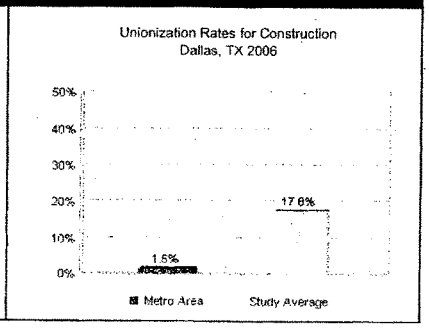
Workforce by Race, Ethnicity, and Gender





Living Wage and Unionization Rates





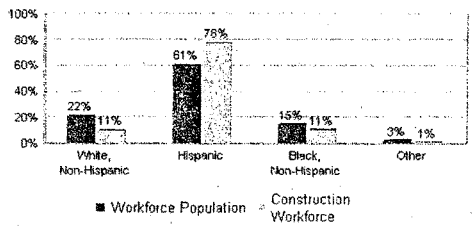
Miami, Florida

Metro Area Population, Construction Wage, Minimum and Living Wage

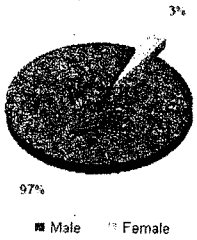
County/City	2006 Total Population ACS Estimates	2007 Average Construction Wage	Minimum Wage	Living Wage for Adult and a Child
Miami-Dade, FL	2,402,208	$17.39	$6.67	$16.84

Workforce by Race, Ethnicity, and Gender

Percentage of Total Workforce vs. Construction Workforce by Race and Ethnicity
Miami, FL 2006

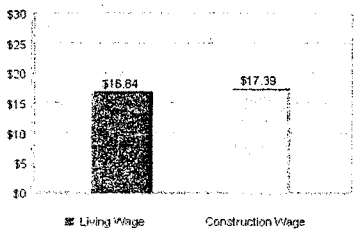


Construction Workforce Distribution by Gender
Miami, FL 2006

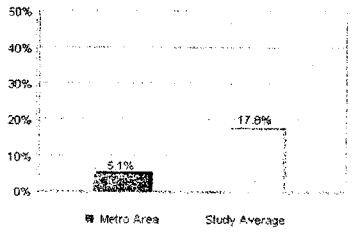


Living Wage and Unionization Rates

Living Wage for Adult and Child vs. Construction Wage
Miami, FL 2006



Unionization Rates for Construction
Miami, FL 2006

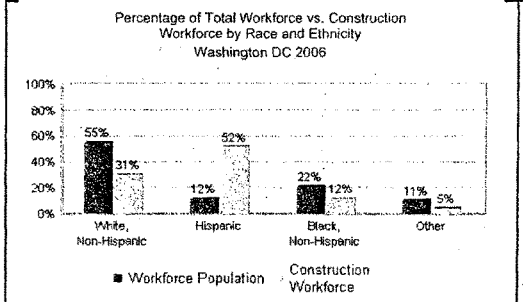


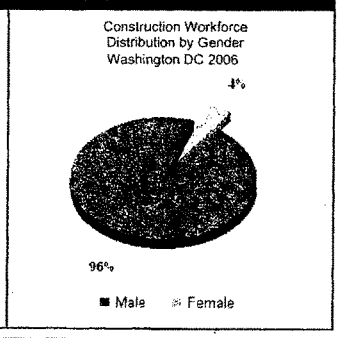
Washington DC

Metro Area Population, Construction Wage, Minimum and Living Wage

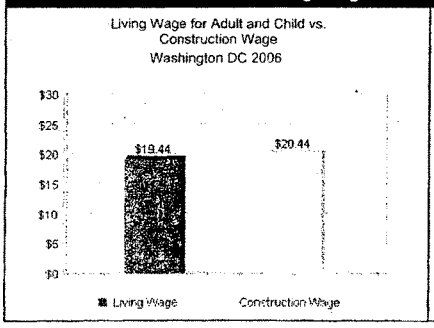
County/City	2006 Total Population ACS Estimates	2007 Average Construction Wage	Minimum Wage	Living Wage for Adult and a Child
District of Columbia, DC	3,643,507	$20.44	$7.00	$19.44
Fairfax, VA			$5.85	
Arlington, VA				
Alexandria city, VA				
Prince Georges, MD			$6.15	

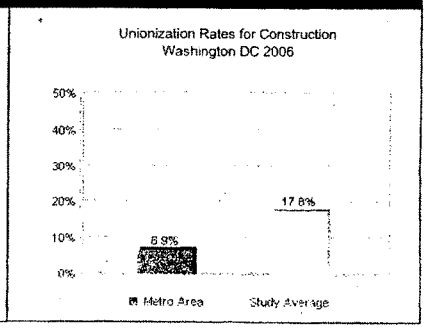
Workforce by Race, Ethnicity, and Gender





Living Wage and Unionization Rates



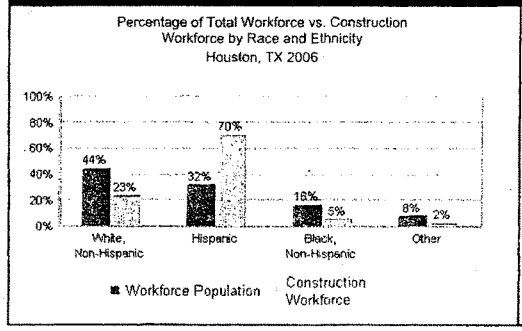


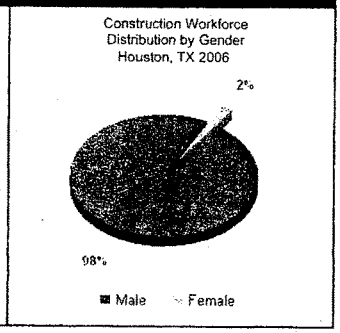
Houston, Texas

Metro Area Population, Construction Wage, Minimum and Living Wage

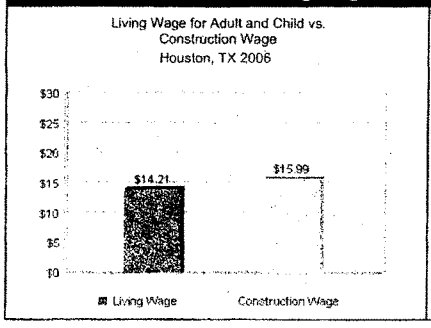
County/City	2006 Total Population ACS Estimates	2007 Average Construction Wage	Minimum Wage	Living Wage for Adult and a Child
Harris, TX	3,886,207	$15.99	$5.85	$14.21

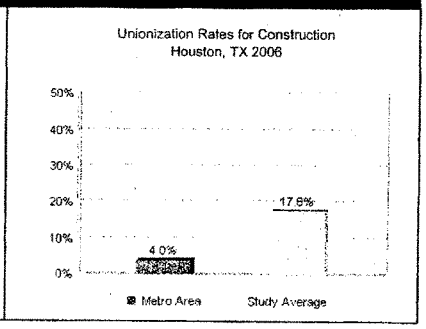
Workforce by Race, Ethnicity, and Gender





Living Wage and Unionization Rates



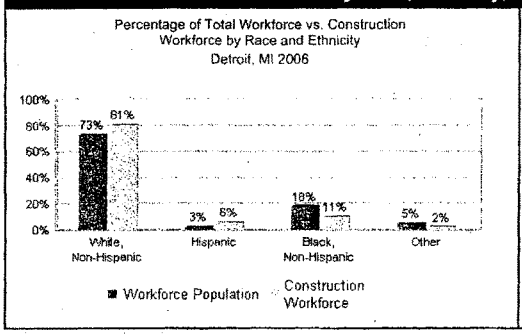


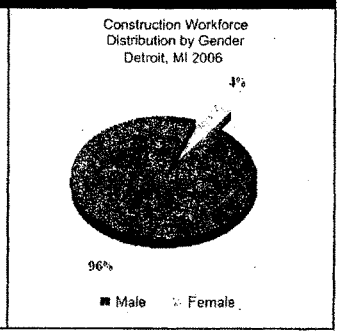
Detroit, Michigan

Metro Area Population, Construction Wage, Minimum and Living Wage

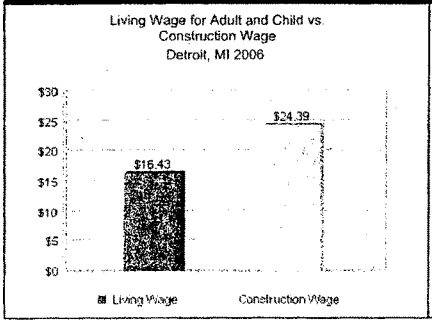
County/City	2006 Total Population ACS Estimates	2007 Average Construction Wage	Minimum Wage	Living Wage for Adult and a Child
Macomb, MI	4,018,969	$24.39	$7.15	$16.43
Wayne, MI				
Oakland, MI				

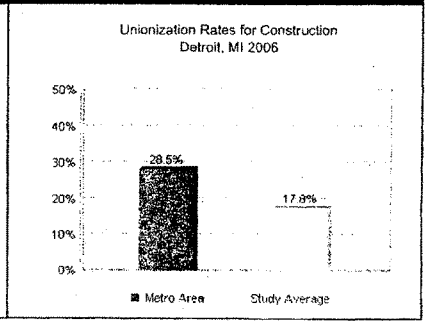
Workforce by Race, Ethnicity, and Gender





Living Wage and Unionization Rates



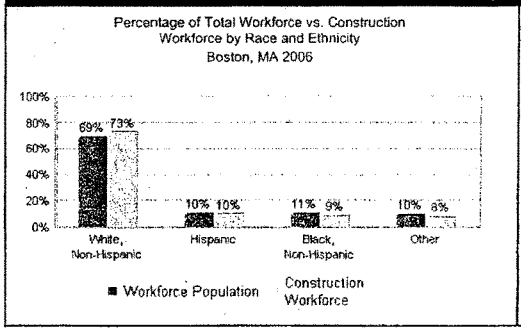


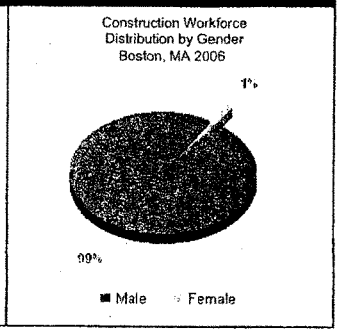
Boston, Massachusetts

Metro Area Population, Construction Wage, Minimum and Living Wage

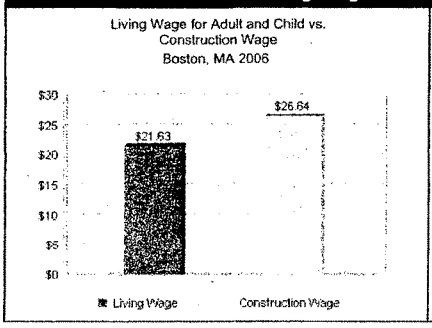
County/City	2006 Total Population ACS Estimates	2007 Average Construction Wage	Minimum Wage	Living Wage for Adult and a Child
Suffolk, MA	687,610	$26.64	$7.50	$21.63

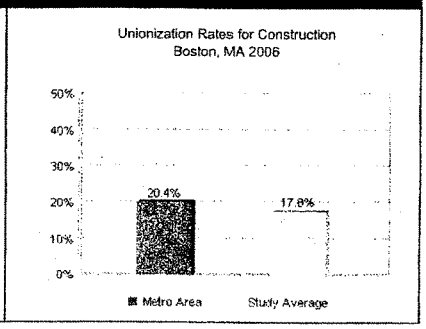
Workforce by Race, Ethnicity, and Gender





Living Wage and Unionization Rates



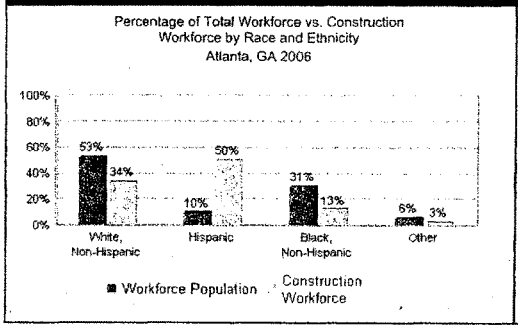


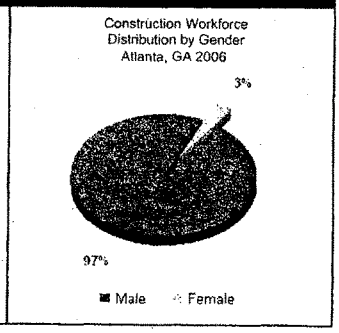
Atlanta, Georgia

Metro Area Population, Construction Wage, Minimum and Living Wage

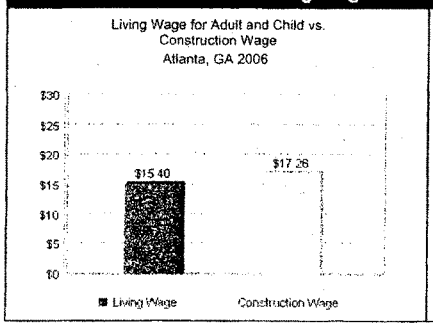
County/City	2006 Total Population ACS Estimates	2007 Average Construction Wage	Minimum Wage	Living Wage for Adult and a Child
Fulton, GA	3,120,040	$17.26	$5.85	$15.40
DeKalb, GA				
Cobb, GA				
Gwinnett,GA				

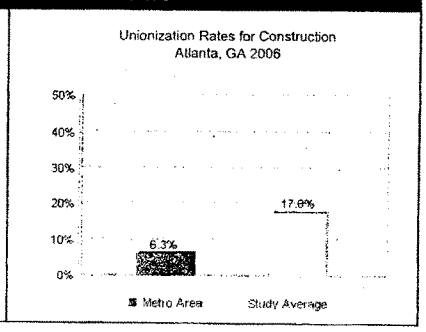
Workforce by Race, Ethnicity, and Gender





Living Wage and Unionization Rates



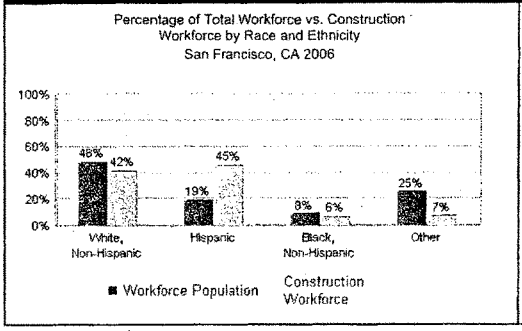


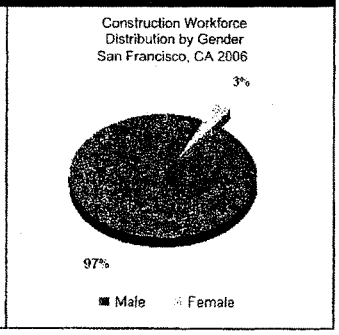
San Francisco, California

Metro Area Population, Construction Wage, Minimum and Living Wage

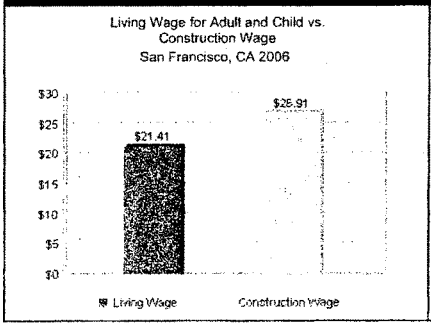
County/City	2006 Total Population ACS Estimates	2007 Average Construction Wage	Minimum Wage	Living Wage for Adult and a Child
Contra Costa, CA	3,225,786	$26.91	$7.50	$21.41
San Francisco, CA				
Alameda, CA				

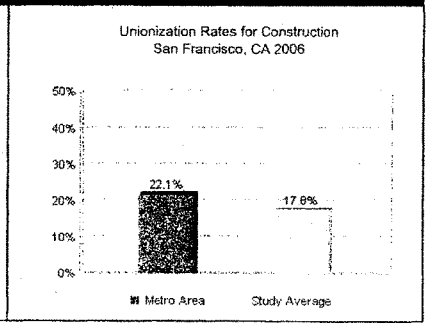
Workforce by Race, Ethnicity, and Gender





Living Wage and Unionization Rates





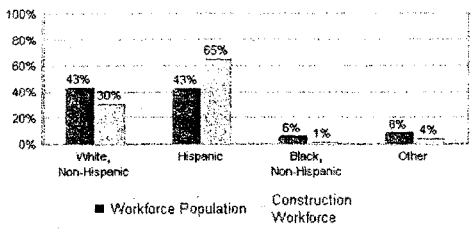
Riverside, California

Metro Area Population, Construction Wage, Minimum and Living Wage

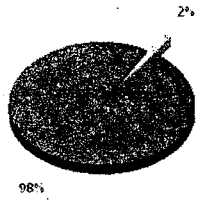
County/City	2006 Total Population ACS Estimates	2007 Average Construction Wage	Minimum Wage	Living Wage for Adult and a Child
San Bernardino, CA	4,026,135	$20.64	$7.50	$17.05
Riverside, CA				

Workforce by Race, Ethnicity, and Gender

Percentage of Total Workforce vs. Construction Workforce by Race and Ethnicity
Riverside, CA 2006

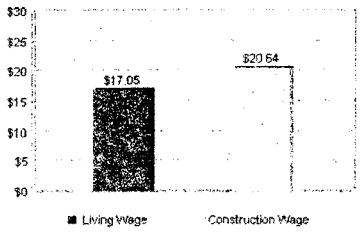


Construction Workforce Distribution by Gender
Riverside, CA 2006

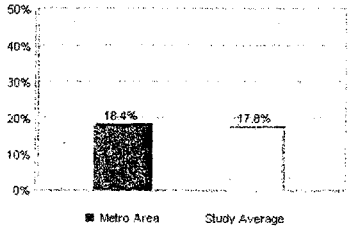


Living Wage and Unionization Rates

Living Wage for Adult and Child vs. Construction Wage
Riverside, CA 2006



Unionization Rates for Construction
Riverside, CA 2006



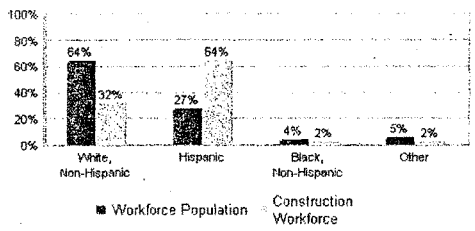
Phoenix, Arizona

Metro Area Population, Construction Wage, Minimum and Living Wage

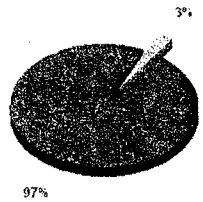
County/City	2006 Total Population ACS Estimates	2007 Average Construction Wage	Minimum Wage	Living Wage for Adult and a Child
Maricopa, AZ	3,768,123	$17.05	$6.75	$15.77

Workforce by Race, Ethnicity, and Gender

Percentage of Total Workforce vs. Construction Workforce by Race and Ethnicity
Phoenix, AZ 2006

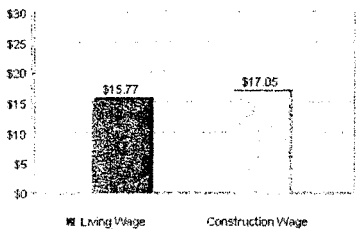


Construction Workforce Distribution by Gender
Phoenix, AZ 2006

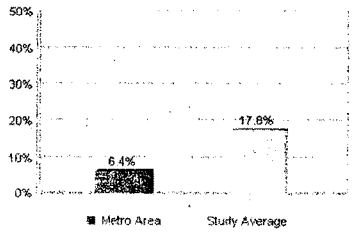


Living Wage and Unionization Rates

Living Wage for Adult and Child vs. Construction Wage
Phoenix, AZ 2006



Unionization Rates for Construction
Phoenix, AZ 2006



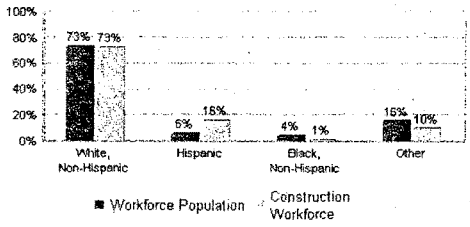
Seattle, Washington

Metro Area Population, Construction Wage, Minimum and Living Wage

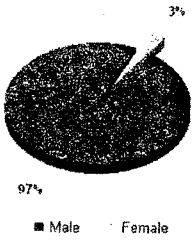
County/City	2006 Total Population ACS Estimates	2007 Average Construction Wage	Minimum Wage	Living Wage for Adult and a Child
King, WA	1,826,732	$24.26	$7.93	$15.60

Workforce by Race, Ethnicity, and Gender

Percentage of Total Workforce vs. Construction Workforce by Race and Ethnicity
Seattle, WA 2006

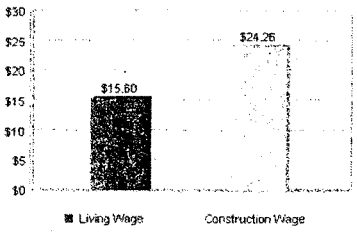


Construction Workforce Distribution by Gender
Seattle, WA 2006

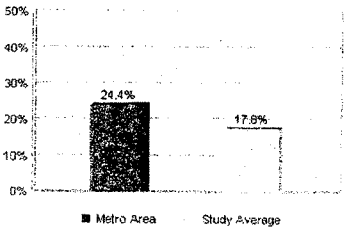


Living Wage and Unionization Rates

Living Wage for Adult and Child vs. Construction Wage
Seattle, WA 2006



Unionization Rates for Construction
Seattle, WA 2006



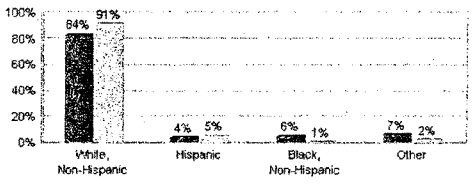
Minneapolis, Minnesota

Metro Area Population, Construction Wage, Minimum and Living Wage

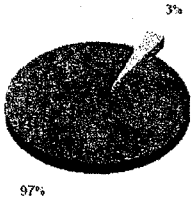
County/City	2006 Total Population ACS Estimates	2007 Average Construction Wage	Minimum Wage	Living Wage for Adult and a Child
Dakota, MN	2,330,314	$25.71	$6.15	$17.19
Hennepin, MN				
Ramsey, MN				
Anoka, MN				

Workforce by Race, Ethnicity, and Gender

Percentage of Total Workforce vs. Construction Workforce by Race and Ethnicity
Minneapolis, MN 2006

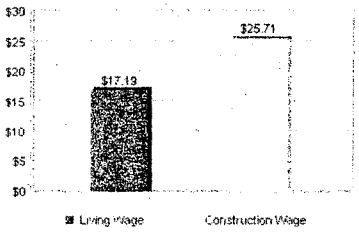


Construction Workforce Distribution by Gender
Minneapolis, MN 2006

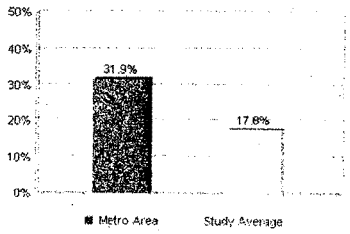


Living Wage and Unionization Rates

Living Wage for Adult and Child vs. Construction Wage
Minneapolis, MN 2006



Unionization Rates for Construction
Minneapolis, MN 2006

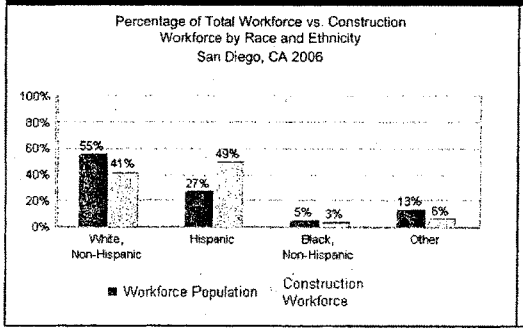


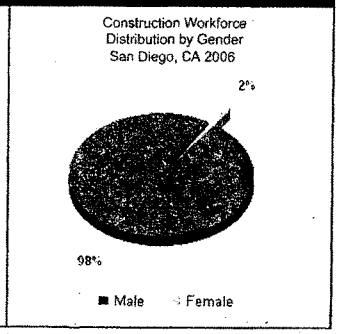
San Diego, California

Metro Area Population, Construction Wage, Minimum and Living Wage

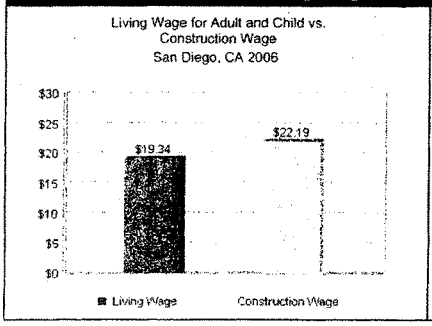
County/City	2006 Total Population ACS Estimates	2007 Average Construction Wage	Minimum Wage	Living Wage for Adult and a Child
San Diego, CA	2,941,454	$22.19	$7.50	$19.34

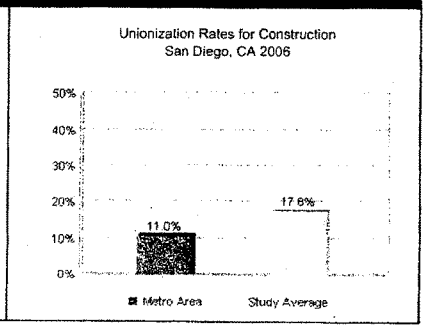
Workforce by Race, Ethnicity, and Gender





Living Wage and Unionization Rates



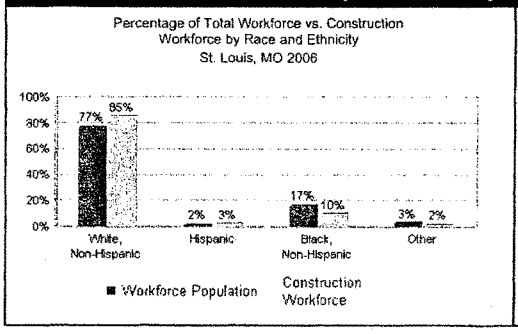


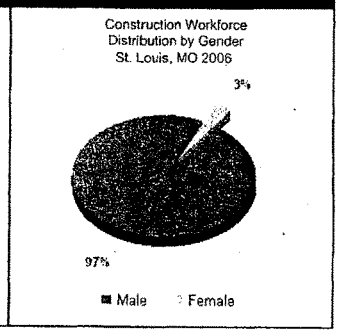
St. Louis, Missouri

Metro Area Population, Construction Wage, Minimum and Living Wage

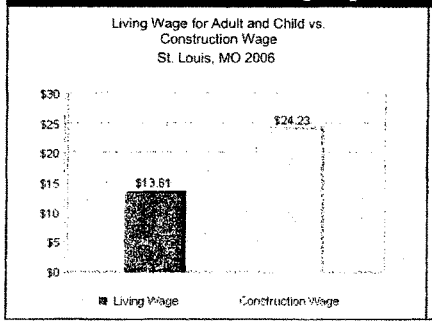
County/City	2006 Total Population ACS Estimates	2007 Average Construction Wage	Minimum Wage	Living Wage for Adult and a Child
Madison, IL	1,873,913	$24.23	$7.50	$13.61
St. Clair, IL				
St. Louis City, MO			$6.50	
St. Louis County, MO				

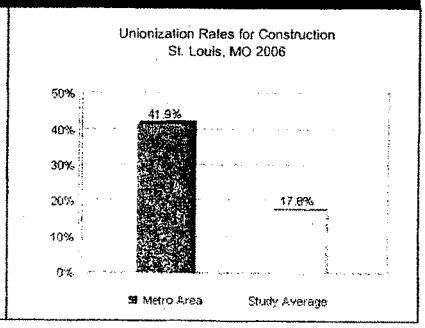
Workforce by Race, Ethnicity, and Gender





Living Wage and Unionization Rates





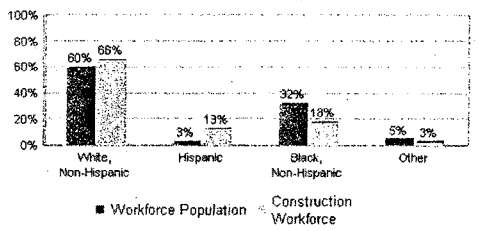
Baltimore, Maryland

Metro Area Population, Construction Wage, Minimum and Living Wage

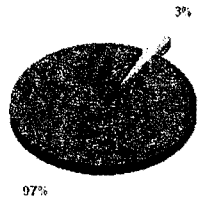
County/City	2006 Total Population ACS Estimates	2007 Average Construction Wage	Minimum Wage	Living Wage for Adult and a Child
Baltimore, MD	1,418,750	$19.70	$6.15	$17.40
Baltimore city, MD				

Workforce by Race, Ethnicity, and Gender

Percentage of Total Workforce vs. Construction Workforce by Race and Ethnicity
Baltimore, MD 2006

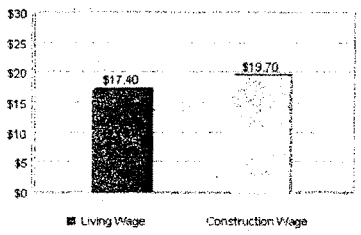


Construction Workforce Distribution by Gender
Baltimore, MD 2006

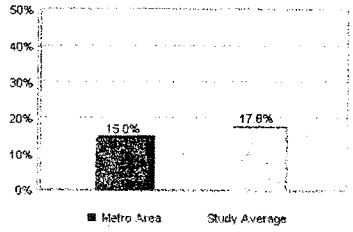


Living Wage and Unionization Rates

Living Wage for Adult and Child vs. Construction Wage
Baltimore, MD 2006



Unionization Rates for Construction
Baltimore, MD 2006

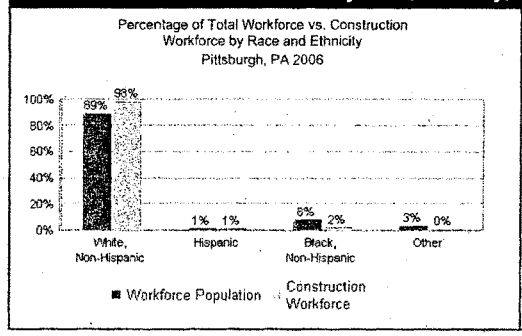


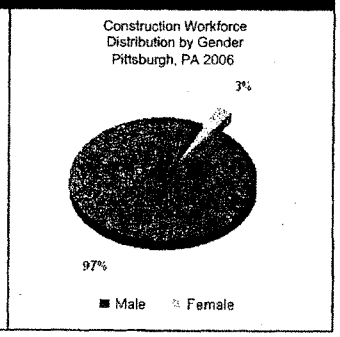
Pittsburgh, Pennsylvania

Metro Area Population, Construction Wage, Minimum and Living Wage

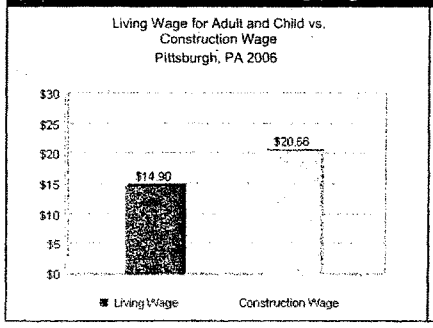
County/City	2006 Total Population ACS Estimates	2007 Average Construction Wage	Minimum Wage	Living Wage for Adult and a Child
Allegheny, PA	1,589,851	$20.66	$7.15	$14.90
Westmoreland, PA				

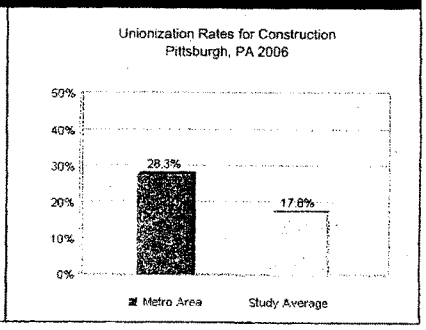
Workforce by Race, Ethnicity, and Gender





Living Wage and Unionization Rates



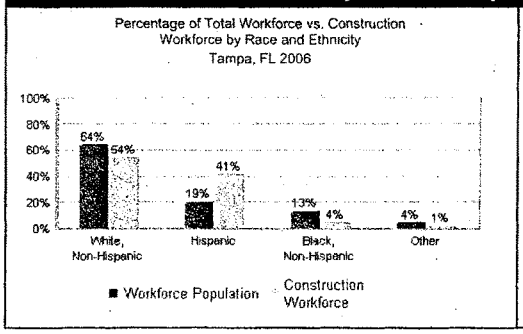


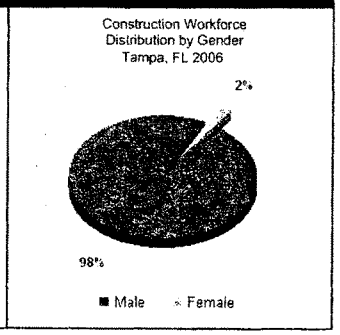
Tampa, Florida

Metro Area Population, Construction Wage, Minimum and Living Wage

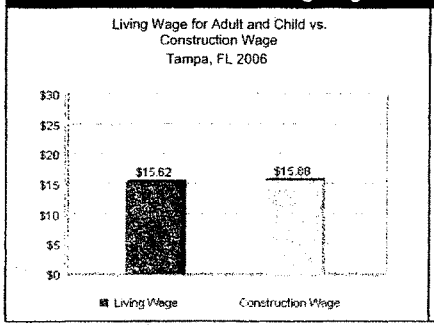
County/City	2006 Total Population ACS Estimates	2007 Average Construction Wage	Minimum Wage	Living Wage for Adult and a Child
Hillsborough, FL	1,157,738	$15.88	$6.67	$15.62

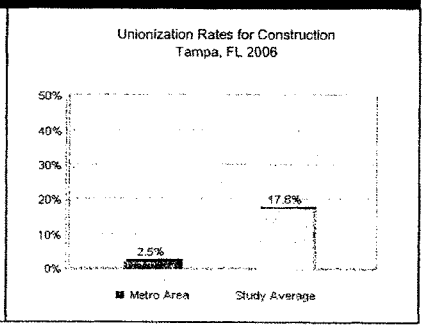
Workforce by Race, Ethnicity, and Gender





Living Wage and Unionization Rates





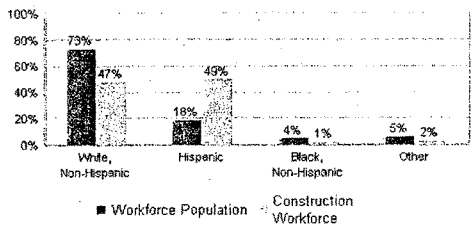
Denver, Colorado

Metro Area Population, Construction Wage, Minimum and Living Wage

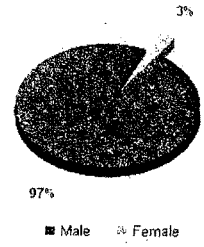
County/City	2006 Total Population ACS Estimates	2007 Average Construction Wage	Minimum Wage	Living Wage for Adult and a Child
Denver, CO	566,974	$19.03	$6.85	$16.99

Workforce by Race, Ethnicity, and Gender

Percentage of Total Workforce vs. Construction Workforce by Race and Ethnicity
Denver, CO 2006

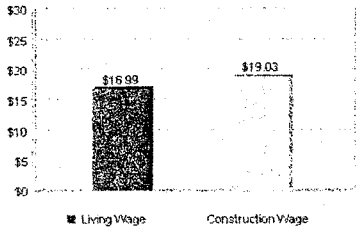


Construction Workforce Distribution by Gender
Denver, CO 2006

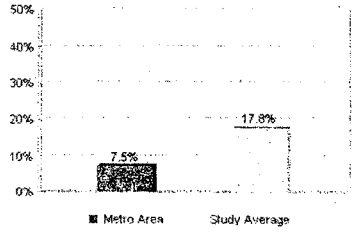


Living Wage and Unionization Rates

Living Wage for Adult and Child vs. Construction Wage
Denver, CO 2006



Unionization Rates for Construction
Denver, CO 2006



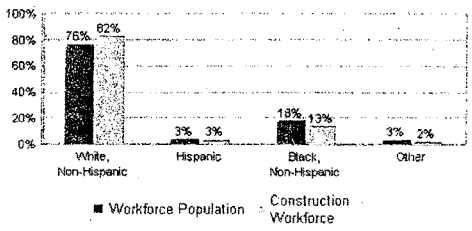
Cleveland, Ohio

Metro Area Population, Construction Wage, Minimum and Living Wage

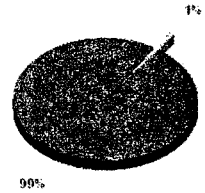
County/City	2006 Total Population ACS Estimates	2007 Average Construction Wage	Minimum Wage	Living Wage for Adult and a Child
Cuyahoga, OH	1,616,234	$21.20	$6.85	$14.36
Lorain, OH				

Workforce by Race, Ethnicity, and Gender

Percentage of Total Workforce vs. Construction Workforce by Race and Ethnicity
Cleveland, OH 2006

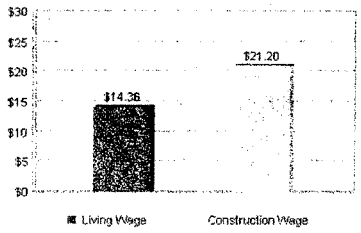


Construction Workforce Distribution by Gender
Cleveland, OH 2006

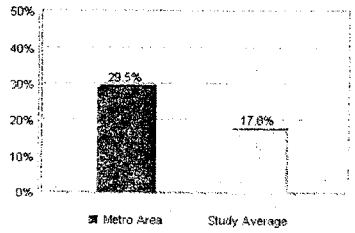


Living Wage and Unionization Rates

Living Wage for Adult and Child vs. Construction Wage
Cleveland, OH 2006



Unionization Rates for Construction
Cleveland, OH 2006

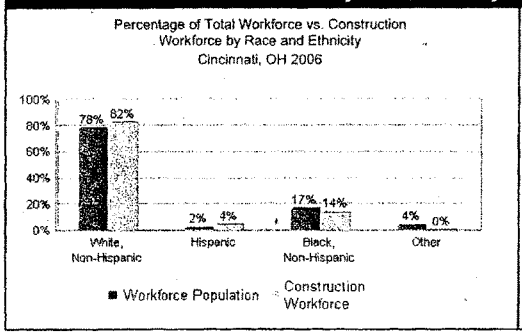


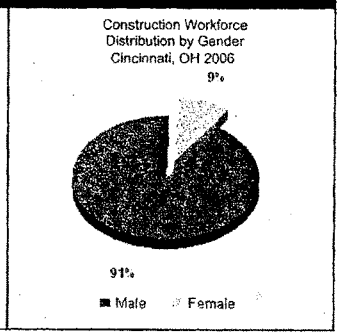
Cincinnati, Ohio

Metro Area Population, Construction Wage, Minimum and Living Wage

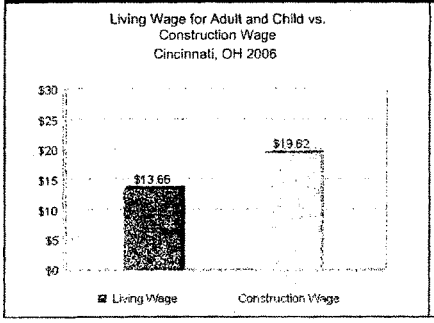
County/City	2006 Total Population ACS Estimates	2007 Average Construction Wage	Minimum Wage	Living Wage for Adult and a Child
Hamilton, OH	822,596	$19.62	$6.85	$13.66

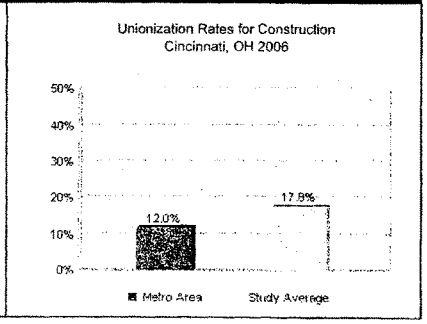
Workforce by Race, Ethnicity, and Gender





Living Wage and Unionization Rates



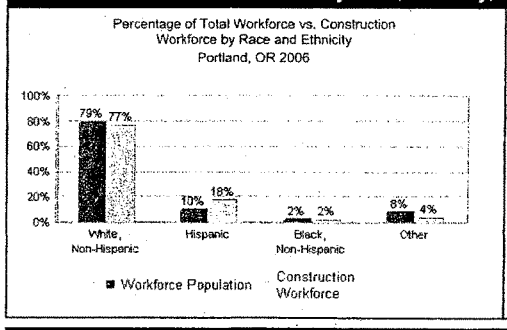


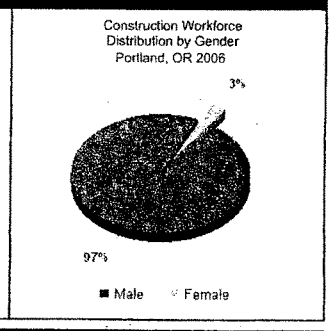
Portland, Oregon

Metro Area Population, Construction Wage, Minimum and Living Wage

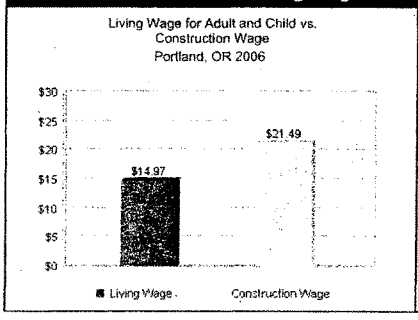
County/City	2006 Total Population ACS Estimates	2007 Average Construction Wage	Minimum Wage	Living Wage for Adult and a Child
Washington ,OR	1,195,723	$21.49	$7.80	$14.97
Multnomah, OR				

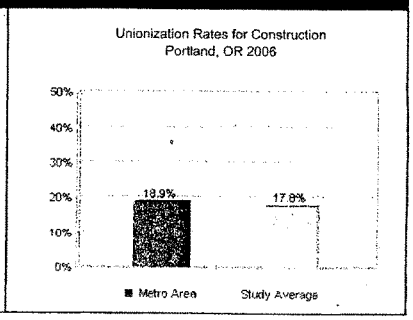
Workforce by Race, Ethnicity, and Gender





Living Wage and Unionization Rates





Policy Recommendations

Our nation's infrastructure is crumbling before our eyes. This provides us with a challenge and an opportunity -- the challenge to rebuild America to be strong and more economically competitive and the opportunity to put millions of people to work in the process. We must ensure that at all levels of government our national investment creates good jobs that benefit all members of the community, including women and minorities.

Two new trends give us cause for hope in the years ahead. Congress must consider a new transportation appropriations bill in 2009. If Congress is serious about addressing climate change as well as our decaying infrastructure, the transportation appropriations bill is the perfect place to begin this work. Creating a more diversified transportation system that encourages biking, walking, and greatly increased transit options will both help the climate and provide green jobs. In addition, the incorporation of "green" technologies, products, and practices will open up new and refashioned job opportunities in the construction field. Many of these opportunities will flow from innovative public policy which is focused on environmental sustainability, economic growth, and the equitable distribution of those economic benefits. For example, the wave of Green Buildings Codes in various cities across the country requires buildings to be constructed or retrofitted in line with nationally accepted energy efficiency standards. These regulations provide a stimulus to job creation in the fields of solar paneling, HVAC installation, carpentry, and other fields.

The demand for skilled construction labor is growing. In many regions of the country, the combination of an aging construction workforce and growing demand could lead to crippling labor shortages. Construction companies and unions need to recruit new workers and diversify their workforces if they are to meet future needs. The looming shortage of skilled labor in the construction industry is a crisis, but it is also an opportunity - an opportunity to give everyone a chance at achieving the American Dream. There will be plenty of jobs to go around, and a larger skilled construction workforce will grow all the more important as the United States attempts to address its infrastructure needs, including the repair of existing roads and bridges and responsible investment in new infrastructure.

Federal Level

1) **The federal government should increase investment in public transportation. Currently, only about 20 percent of federal transportation spending goes toward public transportation, which has been shown to generate more jobs and build the economy in a more substantial way than spending on highways.**

High gas prices are enough justification for increased investment in public transportation. Whether bus systems, rail systems, or inter-city freight and passenger trains, public transportation demand is rising as people escape congestion and the high cost of driving.

In addition to the benefits to people's pocketbooks, public transportation investments act as engines of economic revitalization and create good jobs. Analysis from the Transportation and Infrastructure Committee of the House of Representatives shows that for every dollar investment in transit, $6.21 is generated in economic activity. Also, a recent PIRG report showed that investment in transit produces nineteen percent more jobs than equivalent investments in road and bridge projects (see: http://www.uspirg.org/home/reports/report-archives/transportation/transportation2/a-better-way-to-go).

2) Federal transportation law (23 USC 140) allows states to utilize up to ½ of 1% of Surface Transportation Program (federal highway) funds for workforce development. This provision should be made mandatory and extended to all federal transportation projects, including public transit.

Until recently, only a few states have used the provision that allows ½ of 1 percent of federal highway funds to be utilized for targeted recruitment, training, pre-apprentice programs, and other workforce development initiatives. Recently, grassroots groups have won programs to reserve ½ of 1 percent of federal highway funds for job training programs in Michigan and Minnesota. Illinois is considering an even bigger investment, with work hours also reserved for low-income people, minorities and women through its capital bill, currently before the Illinois Legislature. Grassroots leaders have won community benefits agreements in Missouri as well, reserving ½ of 1 percent of the budget of highway projects for job training and contractor incentives.

The Safe, Accountable, Flexible and Efficient Transportation Equity Act (SAFETEA-LU), which became law in August of 2005, guarantees at least $244 billion in highway and transit spending over a five-year period, from 2005 through 2009. We recommend that the ½ of 1 percent provision be extended to all federal transportation projects, including public transit. If this provision were applied to all SAFETEA-LU spending, it would generate $1.22 billion for workforce development.

3) SAFETEA-LU included a "Sense of Congress" (Section 1920) that called for state DOTs to "facilitate and encourage" collaboration to "leverage scarce training and community resources and to help ensure local participation in the building of transportation projects." Section 1920 should be made mandatory and extended to all large federal construction projects, including projects by the Department of Housing and Urban Development (HUD), the National Aeronautics and Space Administration (NASA), and the U.S. Corps of Engineers. Implementation of this provision would mean that 30 percent of the work hours on large federally funded construction projects would be reserved for low-income people, ex-offenders, women and minorities.

4) Federal transportation law should make repairing existing infrastructure a priority over building new highways that promote more urban sprawl. "Fix it first!" We should also ensure we create complete streets so that everyone can safely and conveniently use the roads, even if they don't have a car.

The collapse of an interstate highway bridge in Minneapolis placed the issue of decaying infrastructure on the nation's agenda. The American Society of Civil Engineers Report Card for America's Infrastructure gave a grade of D to our roads and a grade of C to our bridges. The federal government should require that states first repair existing roads and bridges before building new roads and bridges. Research has shown that "fix it first" smart growth construction projects generate more jobs than new highways that fuel sprawl. (For evidence on this point, see: www.goodjobsfirst.org/pdf/backintown.pdf.) A complete streets policy would ensure that when the road is reconstructed or repaired, it provides safe access to all who use the road (pedestrians of all ages and abilities, bicyclists, transit riders, as well as auto and truck drivers). This would not only create good jobs, but also provide better access to those jobs for low-income workers who cannot afford a car.

5) Unions are a very important part of the construction industry, helping to insure that workers are well-trained, adequately paid, and enjoy reasonable benefits. The Employee Free Choice Act has bi-partisan support and will protect the right to organize. We support it.

Our research shows that metropolitan areas with higher rates of union membership in construction enjoy significantly higher real wages. Nationally, unionized construction workers are much more likely to have health insurance and retirement benefits. Just as important, unions have been shown to run, in conjunction with contractors, the best apprenticeship training programs. Unions benefit not just individual workers but the whole community. By increasing the productivity of construction workers, unions sustain a living wage and decent benefits for workers who can support their families and boost local businesses and the local tax base. According to a poll by Peter D. Hart Research Associates in December 2006, 60 million American workers would join a union if they could. Presently, labor law is tilted against unions. The Employee Free Choice Act would level the playing field so that American workers could make the choice themselves free of any coercion.

6) The Green Job Act, passed as part of the 2007 energy bill, authorizes $125 million per year to create an Energy Efficiency and Renewable Energy Worker Training Program. The Green Jobs Act is an initial pilot program designed to identify needed

skills, develop training programs, and train workers for jobs in a range of green industries. It targets a broad range of populations for eligibility, but has a special focus on creating "green pathways out of poverty." Congress has not yet appropriated any funds for the Green Jobs Act. We support full funding.

Jobs in the energy efficiency industry – which primarily focuses on weatherizing and retrofitting buildings – are for the most part familiar construction jobs. The Green Jobs Act creates training partnerships that require the participation of unions to support training that results in good jobs leading to economic self-sufficiency. A portion of the funds are directed to partnerships that train people under 200 percent of the poverty line. Although this is a small program, it is an important model to build on as the "green economy" grows dramatically.

7) **Invest in a green economic recovery that targets infrastructure, including building efficiency and mass transit. Pass a Clean Energy Corps to ensure that the work of rebuilding and retrofitting America is done by those who most need work.**

America is suffering through an economic recession, rising energy prices and energy insecurity, and job losses. All of these problems can and should be addressed simultaneously. A recent report from the Center for American Progress and the Political Economy Research Institute demonstrates that a targeted investment of $100 billion – roughly the amount the federal government returned to taxpayers as an economic stimulus earlier this year -- in greening America's infrastructure would create 2 million jobs, many of them in the construction industry. A number of organizations have proposed a Clean Energy Corps (CEC) as a vehicle for this kind infrastructure investment. The CEC would focus on retrofitting America's building stock and creating a skilled workforce which will be more racially diverse than today's. Concentrated in cities and struggling communities CEC would combat global warming, grow local and regional economies, and demonstrate the equity and employment promise of the clean energy economy.

State/Local Level

1) **State and local policies like Renewable Portfolio Standards, LEED building standards, Energy Efficiency Resource Standards, and Public Benefit Funds should be passed as a means to create large numbers of new construction jobs, while reducing greenhouse gas emissions and energy costs.**

There are a number of state and local policy tools to ensure the healthy development of energy efficiency and renewable energy markets. These are job creation policies, and far better economic development vehicles than tax giveaways to individual green businesses.

These kinds of job creation efforts can be paired with other policies to ensure that green jobs initiatives are smart and sustainable and pay off for workers and communities. Detailed policy recommendations can be found in the Greener Pathways report, available at: http://www.greenforall.org/resources/greener-pathways-jobs-and-workforce-development-in

2) State Departments of Transportation (DOTs) should reserve 30% of the work hours on highway and transit projects for low-income people, ex-offenders, minorities and women. State DOTs should encourage the development of local task forces to publicize opportunities in construction and should work with community-based organizations to develop pre-apprenticeship programs to prepare under-represented groups for employment in the construction industry.

The Missouri DOT (MoDOT) I-64 project in St. Louis is a model for increased construction work hours designated for the target populations. The project has pledged up to $2.5 million towards job training, including pre-apprenticeship programs, as well as contractor incentives for women, minority, and low-income persons, and has reserved 30% of the work hours on the project for these populations. (See http://www.thenewi64.org/new6_workforcedevelopment.jsp.)

3) Local governments should pass ordinances requiring local workforce development on all large publicly funded construction projects.

With the help of MORE2, a coalition of churches, Kansas City passed path-breaking legislation on April 26, 2007, which applies goals for hiring minorities and women to all construction firms doing business with the city. City governments around the country are exploring creative ways to insure that local residents benefit from construction in their communities.

4) Community-based organizations (CBOs) should work to negotiate "Community Benefits Agreements" (CBAs) on large construction projects in their communities that include guarantees for employing local residents, including women, minorities, and low-income people.

The Alameda Corridor project is a model of how community groups can negotiate a CBA that includes local workforce development. (See Lisa Ranghelli, Replicating Success: The Alameda Corridor Job Training & Employment Program, Center for Community Change, 2002; available at: http://www.communitychange.org/shared/publications/downloads/ACJC%20Replication%20Manual.pdf.)

Metropolitan Area Profiles

Metro area core counties included in the construction workforce analysis by race, ethnicity, and gender:

New York City: Queens, New York, Bronx, and Kings

Los Angeles: Los Angeles County

Chicago: Cook County

Philadelphia: Philadelphia

Dallas: Dallas

Miami: Miami-Dade

Washington, D.C.: District of Columbia, Fairfax, Arlington, Alexandria City, Prince Georges

Houston: Harris

Detroit: Macomb, Wayne, and Oakland

Boston: Suffolk

Atlanta: Fulton, DeKalb, Cobb, and Gwinnett

San Francisco: Contra Costa, San Francisco, and Alameda

Riverside: San Bernadino and Riverside

Phoenix: Maricopa

Seattle: King

Minneapolis: Dakota, Hennepin, Ramsey, and Anoka

San Diego: San Diego County

St. Louis: Madison, St. Clair, St. Louis City, and St. Louis County

Baltimore: Baltimore County and Baltimore City

Pittsburgh: Allegheny and Westmoreland

Tampa: Hillsborough

Denver: Denver County

Cleveland: Cuyahoga and Lorain

Cincinnati: Hamilton

Portland: Washington and Multnomah

Appendix: Data and Methodology

To examine patterns of employment in the construction industry we used data from the 2006 American Community Survey (ACS). Conducted by the U. S. Census Bureau, ACS conducts a rolling, random sample of housing unit addresses throughout the United States and Puerto Rico. Each year, about 1-in-40 addresses, or 2.5 percent of the nation's population, respond to the survey. The size of the sample permits reasonably accurate generalizations for communities of 65,000 or more. There are more than 60 questions on the American Community Survey. Responding to the survey is required by law. In 2010 the ACS will replace the long form in the decennial census.

For ACS data the residence of individual records can be allocated to a particular Public Use Microdata Area (PUMA). These areas contain about 100,000 people and, like other census geographies, are drawn to contain a more or less homogeneous population to the extent that that is possible for such a large population and area. ACS also includes information on the PUMA in which respondents work, allowing for place of work tabulations, which is what our analysis of discrimination in the construction industry is based upon.

To access the data we relied upon Steven Ruggles, Matthew Sobek, Trent Alexander, Catherine A. Fitch, Ronald Goeken, Integrated Public Use Microdata Series: Version 3.0 [Machine-readable database]. Minneapolis, MN: Minnesota Population Center [producer and distributor], 2004.

Aside from the PUMS and ACS data, additional geographic information was required for the project. In particular, GIS (Geographic Information System) shapefiles were necessary to identify which PUMAs should be used to represent each of the urban counties in our eighteen metropolitan areas. In generating data for the metro areas, core urban counties and urban cities (state of Virginia only) efforts were made to assure that the data represented only the geographic area covering the county – no more and no less. However, it is sometimes not the case that the PUMAs and counties have consistent boundaries, such that a county is made up of exactly one or more PUMAs. Thus, in cases where a PUMA intersected (or "straddled") the boundaries of a geographic unit for which data was desired, that PUMA had to be either included or excluded from the calculations. The decision of whether to include or exclude the PUMA depended on the number of "completely contained" PUMAs that fell within the geo-area in question: if the area already had at least two completely contained PUMAs – making accurate calculations for the area possible – then the straddling PUMA was left excluded while if the area had one or fewer completely contained PUMAs residing within it, then the straddling PUMA was included and any additional counties falling outside of the geo-area in question but inside the straddling PUMA were noted in the outputted data for the geo-area. Finally, for geo-areas composed of exactly one PUMA, only that one PUMA was used in making the necessary calculations.

Labor force calculations were based on the variable which reports, for individuals working in the county or counties under examination, whether or not they were in the labor force at the time of the survey, and if they were in the labor force, whether they were employed or unemployed. All calculations were restricted to those who were in the labor force and employed at the time of the survey. Individuals were identified

as being in the construction occupation based on the variable which gives for each individual reporting an occupation based on the six-digit SOC code starting with "47". We eliminated the less skilled and less well paid category of "helpers" (47-3000) and laborers (47-2961) from our analysis of construction jobs. Any individuals reporting an occupation of "unemployed" were also omitted from the occupational calculations, along with those reporting that they were "not in the labor force" or "unemployed" at the time of the survey.

To calculate the proportion of the total workforce or the construction industry that was of a particular race or ethnicity any respondent reporting Hispanic descent was coded into the Hispanic category, while all others were placed into either the non-Hispanic white, non-Hispanic black, or Other (also non-Hispanic) categories. The gender composition of the construction industry is the percentage of the workforce in the county who were females. Note that our analysis is based on the jobs located in the county, not on construction workers who happen to live in the county.

Endnotes

[1] Paul M. Goodrum, "Hispanic and Non-Hispanic Wage Differentials: Implications for United States Construction Industry," *Journal of Construction Engineering and Management*, July/August, pp. 552-559; Paul M. Goodrum and Jiukun Dai, "Differences in Occupational Injuries, Illnesses, and Fatalities Among Hispanic and Non-Hispanic Construction Workers." *Journal of Construction Engineering and Management*, September 2005: 1021-1028.

[1] Peter Gosselin, *High Wire: The Precarious Financial Lives of American Families* (New York: Basic Books, 2008), p. 116.

[1] Chris Benner, Laura Leete, and Manuel Pastor, *Staircases or Treadmills: Labor Market Intermediaries and Economic Opportunity in a Changing Economy* (New York: Russell Sage, 2007), p. 4.

[1] Lawrence Mishel, Jared Bernstein, and Sylvia Allegretto, *The State of Working America 2006/2007* (Cornnell University Press, 2007), pp. 135 and 138.

[1] *Ibid.*

[1] Center to Protect Workers' Rights, *The Construction Chart Book: The U.S. Construction Industry and its Workers*, 4th ed. (Silver Springs, MD: Center to Protect Workers' Rights, Center for Constructoin Resarch and Training, December 2007).

[1] Jeff Grabelsky, "Construction of De-construction? The Road to Revival in the Building Trades," *New Labor Forum* 16 (2), 2007, pp. 49-60.

[1] Daniel Hecker, "Occupational Employment Projections to 2014," *Monthly Labor Review*, November, 2005, pp. 70-101.

[1] Aspen Institute, *Grow Faster Together or Grow Slowly Apart: How Will American Work in the 21st Century* (Aspen Institute, 2002); as cited in Robert Giloth, "Full Employment and Local Workforce Politics and Policies," in *Economic Development in American Cities*, edited by Michael I. J. Bennett and Robert Giloth (State University of New York Press, 2007), p. 2.

[1] Pablo A. Mitnick Matthew Zeidenberg, *From Bad to Good Jobs? An Analysis of the Prospects for Career Ladders in the Service Industries* (Center on Wisconsin Strategy, 2007). Mitnick and Zeidenberg define "good" jobs as jobs paying more than $12.60 an hour in 2000.

[1] Robert W. Glover, Donald W. Long, Carl T. Haas, and Christine Alemany, *Return-on-Investment (ROI) Analysis of Education and Training in the Construction Industry* (Center for Construction Industry Studies, 1999).

[1] Bruce Nissen, *Training for the Workforce of the Future: Advantages and Disadvantages of Using Registered Apprentices in Two County GOB Projects* (Research Institute on Social and Economic Policy, Florida International University, 2006).

[1] Center to Protect Workers Rights, *op. cit.*

[1] Center to Protect Workers Rights, *op. cit.*

[1] Cihan Bilginsoy, "The Hazards of Training: Attrition and Retention in Construction Industry Apprenticeship Programs," *Industrial and Labor Relations Review* 57 (1), 2003, pp. 54-67.

[1] David Weil, "The Contemporary Industrial Relations System in Construction: Analysis, Observations and Speculations," *Labor history* 46 (4), 2005, pp. 447-471; and Center to Protect Workers Rights, *op. cit.*

[1] Business Roundtable, *Confronting the Skilled Construction Workforce Shortage: A Blueprint for the Future* (Business Roundtable, 1997).

[1] Glover, et al, *op. cit.*

[1] Robert W. Glover, "Apprenticeships: A Route to the High-Paying Skilled Trades for Women? In *Job Training for Women: The Promise and Limits of Public Policies*, edited by Sharon L. Harlan & Ronnie Steinberg (Temple University Press, 1984), p. 277.

[1] See http: [illegible] bls; accessed September 18, 2008.

[1] Center to Protect Workers Rights, *op. cit.* Both figures refer to production workers, not supervisory employees.

Statement of Rep. Harry Mitchell
House Transportation and Infrastructure Committee
3/26/09

--Thank you Mr. Chairman.

--Today we will examine the U.S. Department of Transportation's Disadvantaged Business Enterprises program (DBE).

--DBE was first established by regulation in 1980 as a minority and women's business enterprise program, and later statutorily authorized in 1983.

--As we prepare for reauthorization of SAFETEA-LU this year, it is important for us to examine DBE, and determine what changes, if any, may be necessary.

--I look forward to hearing for our witnesses.

STATE OF CALIFORNIA—BUSINESS, TRANSPORTATION AND HOUSING AGENCY ARNOLD SCHWARZENEGGER, Governor

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Flex your power!
Be energy efficient!

March 4, 2009

Dear Transportation Construction Community:

The California Department of Transportation (Caltrans) has just received conditional approval from the Federal Highway Administration (FHWA) to immediately implement its Federal Fiscal Year (FFY) 2009 Disadvantaged Business Enterprise (DBE) Goal and Methodology. The 2009 Goal and Methodology provides for a 6.75 percent race-conscious goal and a 6.75 percent race-neutral goal for an overall 13.5 percent program goal.

With the recent enactment of the American Recovery and Reinvestment Act (ARRA) of 2009 and the increase in transportation contracting opportunities it will bring, the urgency for Caltrans to implement contract goals has heightened. The conditional approval requires Caltrans to submit to FHWA the additional requested information to support its decision to make no upward adjustment to the FFY 2009 goal. The conditional approval also requires Caltrans to submit monthly status reports on its use of contract goals beginning March 31, 2009.

FHWA has indicated that failure to implement the overall goal and contract goals could result in the imposition of sanctions authorized by 23 Code of Federal Regulation (CFR) section 1.36. Those sanctions may include withholding federal funds, withholding approval of projects, or other action FHWA deems appropriate under the circumstances.

By March 30, 2009, the Division of Engineering Services and the Division of Procurement and Contracts will begin including an appropriate DBE race-conscious goal to include African American, Asian-Pacific American, Women, and Native American businesses, in the advertised contracts for federally funded projects. These four groups together will be referred to as Underutilized Disadvantaged Business Enterprises (UDBEs). The race-conscious goal established for each contract will be based on the subcontracting opportunities it provides and the availability of UDBEs. At this time, Hispanic American and Subcontinent Asian American businesses are not included in the race-conscious portion of the program. However, use of these businesses does count toward meeting the race-neutral portion of the goal and the overall goal. I encourage continued use of these groups at current levels in order to avoid the necessity of adjusting the goals as time goes on.

Implementation of the race-conscious component of the DBE program applies to Local Agencies as subrecipients. Caltrans will advise regional and local partners to begin implementing DBE race-conscious goals on federally funded projects within 90 days.

Caltrans will continue its commitment to the application of race-neutral measures as before. They include, but are not limited to, providing technical assistance, one-on-one counseling, training, and direct referral of DBEs to prime contractors through the California Construction Contracting Program and the memorandum of understanding with the California Community Colleges Chancellor's Office. More information can be found on the Web site at http://www.buildcalifornia.org.

Caltrans will also implement its Communication Plan to advise the DBE firms, community organizations, industry/trade associations, and California Legislators that Caltrans has conditional approval to implement the race-conscious component of the overall DBE goal. To broaden business communication and outreach, the Caltrans' Office of Business and Economic Opportunity will have information and the schedule of public forums on its Web site at http://www.dot.ca.gov/hq/bep. In addition, Caltrans staff will work with business groups such as the City-County-State-Federal Cooperative Committee, Caltrans Statewide Small Business Council, Associated General Contractors of California, Engineering and Utility Contractors Associations, Southern California Contractors Association, and American Council of Engineering Companies on the implementation of their program revision.

I thank you for your patience and understanding during the last year while Caltrans operated under race-neutral measures. If you have any questions regarding this announced change in the DBE program, please contact Robert Padilla, Disparity Study Project Manager, at (916) 324-0552, or by e-mail at robert_padilla@dot.ca.gov.

Sincerely,

WILL KEMPTON
Director

c: Walter Waidelich, Division Administrator, Federal Highway Administration
Rick Land, Chief Engineer, California Department of Transportation
Robert Padilla, Disparity Study Project Manager, California Department of Transportation

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DISTRICT OF COLUMBIA

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EMERGENCY COMMUNICATION, PREPAREDNESS, AND RESPONSE

March 26, 2009

Congresswoman Eleanor Holmes Norton Statement at the Transportation and Infrastructure Committee Hearing "The Department of Transportation's Disadvantaged Business Enterprises Program"

The Disadvantaged Business Program and Airport Concessions Disadvantaged Business Program are designed to remedy discrimination against minority and women owned businesses in airport related industries. The DBE and ACDBE programs are fair, effective and constitutional and above all, they are needed. We are all aware that despite enormous progress in the battle against discrimination, there is a great deal more that must be done to level the playing field for minority and women owned businesses.

The Congress receives enormous amounts of information about the ongoing problems of discrimination. Some of this information comes to us through formal channels like hearings and official reports, and some comes directly from our constituents. I looked through testimony submitted for the stimulus hearing on January 22, 2009 and the hearing on the FAA Reauthorization on February 11, 2009. I noticed that just during those two hearings we received twenty-one different studies from every region of this nation including: Alaska, Arizona, Colorado, Florida, Illinois, Kentucky, Maryland, Minnesota, Missouri, North Carolina, New Jersey, Tennessee, Texas, and Washington State. Each of these studies is a little bit different but each one contains detailed statistical and anecdotal evidence of discrimination against minority and women owned businesses in airport and transportation industries. These studies are also interesting in that they use different methodologies and approaches – and yet they each come to the same conclusion: discrimination is having a strong negative impact on minority and women owned businesses in every corner of this country. Together, these studies show that discrimination impacts women and every minority group including: African Americans, Hispanic Americans, Asian Americans and Native Americans. And finally these studies make clear that discrimination impacts minority and women owned businesses at many different points in the contracting process. It impacts credit, bonding and insurance. It impacts the contracting and bidding process itself. It impacts the working environment for minority and women owned businesses. In sum, discrimination is pervasive.

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All of this evidence illustrates how needed the DBE and ACDBE programs are. As a constitutional lawyer, I will tell you that this voluminous record makes clear that there is a very strong basis in evidence for Congress to pursue efforts to remedy discrimination. I believe this evidence also makes clear that we need to strengthen and expand the DBE and ACDBE programs. For instance, we need to make sure that the personal net worth cap on DBE and ACDBE eligibility has not been so eroded by inflation so as to be counterproductive. We also need to ensure that there is uniform training for the officials who certify DBEs and ACDBEs so that the program is efficient, effective and focused on helping the minority and women owned businesses that we need to. Finally, I hope that my colleagues will join me in examining whether there are ways we can expand the application of this program beyond the AIP program. The DBE program works and has been found to be facially constitutional by every federal circuit court that has examined it since the Supreme Court's decision in Adarand. Let's build on that success, respond to the volumes of evidence of discrimination, and do everything we can to level the playing field.

OPENING STATEMENT
THE HONORABLE JAMES L. OBERSTAR
FULL COMMITTEE HEARING ON
THE DEPARTMENT OF TRANSPORTATION'S DISADVANTAGED BUSINESS ENTERPRISES PROGRAM

MARCH 26, 2009

Today, the Committee will evaluate the Department of Transportation's ("DOT") Disadvantaged Enterprises ("DBE") Program. The DBE program was established through a series of legislative initiatives to remedy past and current discrimination against minority and women-owned businesses to ensure that they are provided equal opportunity to compete for DOT-assisted highways, transit and airport contracts.

Major infrastructure investments such as those in aviation and surface provide substantial sources of revenue to local construction and engineering contractors. For too long, disadvantaged and minority-owned businesses were unable to secure portions of these large contracts due to high barriers to entry in the sector, and were unable to compete with larger firms bidding to participate in these projects. That is where the need for the DBE program came in.

In 1983, Congress established a national 10 percent aspirational participation goal for firms certified as DBEs with respect to surface transportation programs,

airport federally-assisted contracting (i.e., procurement, construction, or professional services contracts), and airport concessions.

DOT regulations require recipients of federal financial assistance --state and local transportation agencies and airport operators -- that anticipate awarding prime contracts of more than $250,000 to establish an annual aspirational DBE participation goal that reflects what DBE participation would be in the absence of discrimination. A recipient's goal is aspirational only; quotas and set-asides are generally not permitted.

Importantly, recipients are required to use race-neutral means to meet as much of their overall goal as possible, such as providing assistance in obtaining bonding or financing, unbundling large contracts to make them more accessible to small businesses, or conducting informational programs on contracting procedures and specific contract opportunities.

However, if a recipient is unable to meet its overall DBE participation goal through race-neutral means, then the recipient must establish contract goals (which are deemed race conscious) for DBE participation. This means that the recipient has determined that without the use of race-conscious measures, minority and women

business owners would not have an adequate opportunity to participate in DOT-assisted contracts.

The DBE program has faced a number of legal and legislative challenges, and I am proud to say that the program has been able to withstand those challenges. In 1995, the U.S. Supreme Court ruled, in *Adarand v. Peña* that race-conscious programs were subject to a "strict scrutiny" standard of legal review. The ruling required that all affirmative action programs be "narrowly tailored to serve a compelling governmental interest," that of addressing discrimination. In response to the Supreme Court's decision in *Adarand*, the DOT issued new regulations to ensure non-discrimination in the award and administration of DOT-assisted contracts, and to assist firms owned and controlled by minorities, women, and other socially and economically disadvantaged persons have the opportunity to grow and become self-sufficient. Since *Adarand*, every federal court that has reviewed the DOT's DBE program has found it to be constitutional.

The Committee has also received volumes of evidence, both empirical and anecdotal, about the discrimination that continues to impact minority and women business owners across this nation.

This data demonstrates that it is difficult for small and disadvantaged businesses to compete—discrimination impacts minority and women owned businesses at many points in the contracting process, including obtaining credit, bonding, and insurance. By expanding access to federal contracts, minority owned small businesses are provided the opportunity and the aid needed to overcome the large barriers to entry they face in entering the marketplace.

Over the past two decades, the Committee on Transportation and Infrastructure has supported the continuation of the DBE program in the reauthorization of its transportation programs and we must work to continue and strengthen these programs as we reauthorize both the aviation and surface transportation programs this session.

I thank each of the witnesses for taking the time to be with us today and I look forward to your testimony.

The Statement of Gilbert Aranza
CEO, Star Concessions, Ltd.

At the hearing on:

The Department of Transportation's
Disadvantaged Business Enterprise
Programs

Thursday, March 26, 2009
11 o'clock am

Before the Committee on
Transportation and Infrastructure
of the United States House of Representatives

James L. Oberstar, Chairman

Good Morning. My name is Gilbert Aranza, and I am the CEO of Star Concessions, a 100 percent, minority-owned, certified DBE based in Dallas, Texas. I would like to thank Chairman Oberstar, Ranking Member Mica, and the distinguished members of the Committee for providing this opportuntity to present testimony.

Star Concessions, Ltd. ("Star") is the umbrella for a group of companies that operate food, beverage, retail and convenience store/service station concessions in airports. Star operates facilities out of Dallas/Fort Worth International Airport (DFW) and Dallas Love Field Airport (Love Field).

I am very pleased to be here today and to have the opportunity to testify about the Federal Aviation Administration's (FAA) Airport Concessions Disadvantaged Business Enterprise (ACDBE) Program. I strongly believe that I would not have received many of the opportunities I have had without the help of this program and other federal and local minority business programs. The fact is, while we have made progress in this country against racial and ethnic discrimination, a great deal remains to be done. Discrimination against minority-owned companies is still very common and very damaging. Even though many large, majority-owned companies advocate diversity, I truly believe that they would not make room for minority-owned companies without programs like the ACDBE program.

After the City of Dallas moved to single member council districts in 1991, the new city council, which included more minorities, moved aggressively to increase the number of minority contractors doing business with the city at every level. In 1995, I won the food and beverage concession contract at Dallas Love Field Airport. My competitors were four rather large companies, one being the former food and beverage concessionaire the preceding 37 years. Certainly, it made a huge difference that my company had excellent credentials and the ability to deliver the national brands the city wanted; but even though we were highly qualified, I do not believe that I would have won the contract without the push to be inclusive from the City Council and the DBE program. Since then, there have been numerous incidents I could cite that have contributed to my belief; that if it weren't for the ACDBE and other federal programs, airports and majority-owned companies would not provide opportunities for minorities and minority-owned companies to participate in the program. I don't say this because I believe the leaders of major companies are bad people, but I know from first hand experience that many of these companies do not view diversity as something that is good for business and good for the bottom line.

It is important to realize that discrimination impacts minority businesses in many different ways. Four areas in which I think discrimination continues to have a particularly negative impact are: 1) minorities are often denied traditional sources of financing; 2) minorities are excluded from business associations and networks; 3) discrimination by suppliers and other private companies; and 4) enduring stereotypes and bias.

Discrimination in Capital Markets and Financing

I can tell you that a minority-owned business has incredible difficulty obtaining regular bank financing. I am in the food and beverage industry, which already makes getting financing

difficult. The problem is compounded by operating in an airport where you don't own the physical space and are subject to a system that does not easily negotiate with its tenants. The reality is that banks are not open to doing business with minorities. Some banks won't talk to minorities at all. Others have learned to be polite over the years, but, at the end of the day, they have no interest in financing minority-owned businesses.

If a minority-owned firm manages to get a loan, it is almost always at a higher rate. For instance, I might be able to get 15 or 16 percent money, where a majority player might be able to get 7 or 8 percent money. I've been lucky with some banks, but 90 percent of my financing comes from lenders that are chartered by the federal government to work with small businesses and, specifically, minority small businesses – like lenders chartered by the SBIC program.

When obtaining capital is harder, it takes longer to get started – even when you are as driven as I am. I had trouble with financing right from the start. When I came back to Dallas as a young lawyer and tried to borrow money, race was absolutely a factor in my not being able to obtain loans. I can tell you that my Anglo counterparts – who didn't go to the same caliber of schools I went to – had no trouble borrowing money. I played the game the way it was supposed to be played and went to the University of Texas at Austin and Harvard Law School. Everyone always says, "If you get a good education, it makes all the difference." And I agree, a good education is important – but it didn't prevent my race from making it difficult to obtain financing.

Discrimination in Business Networks

I wish I could report that the Good Ol' Boy Network no longer exists, but I am afraid that I run up against it all the time. Conventional wisdom in Texas is that students who go to one of the state's flagship schools, like the University of Texas or Texas A&M, and stay in Texas usually find a built-in network of people with whom they can do business. It is the equivalent of graduating with a diploma and an advantage. However, I went to the University of Texas at Austin (UT Austin), and it hasn't benefited me professionally in the same ways it has benefited many non-minority graduates.

Let me give you an example. I joined the Young President's Organization, which is a fairly exclusive club in Dallas. The membership is comprised of people who run companies with revenues of 10 to 20 million before the age of 40. I qualified for that group in 1993, and I had to go to a number of meetings and events in order to be admitted. The first two times I was there, I had to listen to a white male telling racist jokes. I almost refused to continue. As it turns out, the white male telling the jokes was the Chair of the DFW Airport Board. Fortunately, this was before I had submitted any proposals to DFW International Airport.

During the time I was seeking admission, I was the only brown person in the Young President's Organization. There were no Blacks. I can tell you that less than a third of the members would shake my hand. They just walked by and ignored me. They constantly tried to bait me by saying derogatory things about immigrants and bilingual education. I was surprised when I was finally admitted. There were times I wanted to quit, but I made myself stay because groups like the Young President's Organization are very important for developing business connections and

relationships. In the early days, at holiday parties, I was the only brown person there other than the wait staff. It's amazing to remember how many members asked me to get them drinks.

Discrimination by Suppliers and Other Businesses

One of the biggest problems that minority entrepreneurs have to deal with is discrimination by other businesses. While the airports and other public or semi-public entities have laws and regulations enforcing equal opportunity, private businesses do not. This leaves room for a lot of discrimination. In recent years, I have had an inside view of how things work in large majority-owned companies. For instance, I served on a diversity-oriented board for a major company. To his credit, the CEO told those of us on these boards, "I want you to make life difficult for our leadership because they don't understand the importance of diversity." I was on that board for eight years. I saw the inner workings of the company's leadership. In some ways it is hard to fault them because they were trying hard when so many others weren't, but, the fact is, they were mostly white and male. We made some progress. When we started, the minority component of senior leadership for the company was very small. It was better when I left, but that progress did not come easily. Whether it was hiring more minority suppliers or employees, there is still more that could have been done.

Supply pricing is another problem. When I opened a convenience store at DFW, the prices I was getting from one of my suppliers were outrageous. He tried to convince me that he was giving me his "mom and pop" pricing. I finally had a pretty honest conversation with him, the result of which was that he started giving me prices that made sense. Honestly, I wasn't sure if that was the way he dealt with minorities or if he was only that way with people he didn't think were experienced enough to challenge him on his pricing. Either way, the result was the same. As a result of discrimination, minority business owners are more likely to be less experienced and therefore they end up being charged higher prices.

Another example I can think of involved a beer distributor that served the Dallas area. All of the local distributorships are owned by Anglos. The owner of one distributor made it a point to come to me, welcome me and ask if there was anything he could do for me. That was terrific and that guy deserves lots of credit. Then there was the counter-example. Another distributor's salesman simply ignored me. Over the years, the difference in service between the two became more and more evident. Eventually, I phased out my use of beer from the non-responsive distributor. I took it off tap and removed all their signage. One day the man who owned the distributorship was flying through Love Field and noticed none of his beer or signage in my stores. He made his way to my office at Love Field and asked why I wasn't selling any of his beer. I told him it was because the representatives from his company weren't responsive and pretty much ignored me. The next thing I knew he was my best friend. I sell their beer now, but it is hard to forget how they initially treated me.

I have decided that I want to do business with the people who behave in a proper manner toward minorities. I am pretty confident that most of my suppliers deal with me and think, "Oh, he is just a minority," but, at this point, I think I am getting favorable pricing from most of them. It's not because they all of a sudden decided they like Hispanic or Black people. It's because they know I can hurt them by not selling their product. Do I think for a minute that these people

would otherwise go out of their way to do business with minorities? Absolutely not! But with me, they don't have a choice – in part because of the DBE program and in part because those of us who were given a fair shot under those programs have now succeeded in such a way that we have to be dealt with fairly. Yet, I have no doubt that if the DBE program disappeared, many of these large, majority-owned firms would stop doing business with minorities all together.

Enduring Stereotypes and Bias

Even though many people want to believe that we now live in a colorblind or "post-racial" society, we don't. Just recently, a distributor came into one of my stores and demanded to speak to the owner. He was rude and dismissive, and, based on his tone, I knew it hadn't even entered his mind that the Hispanic guy in front of him might be the owner. I told him, "You are talking to the owner," and I stopped doing business with that company.

It's important to understand that even past discrimination impacts today's minority business owners. If you are old enough to be a successful business owner today – assuming you didn't just inherit a successful business – then you were in college and professional school and getting your early work experience several decades ago. I suspect that even though I was fortunate enough to go to some very good schools, my early work experience was very different than the experiences of my white competitors.

The year I got my first job at a law firm, I had to interview with all 42 attorneys at the firm. I guarantee you that young, white lawyers did not have that same experience. One of the lawyers who started working for the same firm as me, who graduated the same year I did and was white, flat out told me that he believed I had taken his place at Harvard Law School. His implication was that I had somehow "stolen" his spot through affirmative action. He wasn't the only one. Another associate said his friend graduated at the top of his class at another law school and that I had taken his friend's space at Harvard. I'm the type of guy who usually just perseveres and pushes this stuff down, but I went back to those guys and gave them copies of my transcripts and my resume and said, "Here, see if you can beat me. Take this and look at it and tell me if you can compete with me."

There were other problems with that first law firm job. When I started there, the firm actually had clients who refused to work with me because I was Hispanic, but I have to give credit to the senior partner. He called me into his office and told me what the clients had said about me. Then he said that he told them they were either going to work with me or they could find another law firm. That is the type of leadership we need more of in business and professional environments. I was the first minority hired and the first minority to make partner at a major law firm in the city of Dallas.

My Success Benefits Others

To the extent that I have been successful, I have practiced what I have preached. Minority business owners do more to hire and mentor other minorities. I know I do. I have African American partners in most of my businesses at the airports. I don't have to do it. I am already 100 percent minority-owned. I do it because it makes good business sense and it's the right thing

to do. I am not sure that non-minorities in my position believe it is either the right thing or the smart thing to do.

My employees are 40% Hispanic, 30% Black, 30% Anglo, and many of them are female. I have a pretty diverse management team, and they come into contact with a lot of people who are Anglo, and I stress to everybody that we don't tolerate discrimination at any level in this organization. My success means that I can have a zero tolerance policy for discrimination. I teach my employees they do not have to put up with being mistreated. If I hear that an Anglo route man has disrespected one of my minority managers, I will terminate that relationship. I won't put up with it. They need to send me someone who will be respectful of all of my employees if they expect to continue doing business with me.

When I became a Pizza Hut franchisee in 1993, I got a call from the General Counsel of Pizza Hut. He wanted to see me because they were in a position where they would not have had any Hispanic franchisees in the U.S. So they engaged the U.S. Hispanic Chamber of Commerce, and my name was at the top of the list, primarily because of my Dallas area restaurants. The president of Pizza Hut toured all of my restaurants. He asked me how it was possible that I had so many Black, Hispanic, gay and female managers. I told him, "If I don't do it, no one else will." And I really believe that. So if you come to my organization today, I probably have more African American and Hispanic American general managers than any other businesses of comparable size or larger.

The fact is, fostering diversity and making money are not conflicting goals. It is good for business, but you have to believe it is important and you have to do the work. Anglo business owners just aren't getting the job done. I think that creating a level playing field that will allow more minority-owned businesses to succeed is a critical part of accomplishing that goal.

Conclusion

I am very supportive of the DBE program and other programs that assist minority business owners. If it were not for the DBE program and the SBIC program, there is no way that I would be where I am today.

That said, there are ways that these programs could be improved. In the current economic climate, minority businesses need more and better access to credit and venture capital. In addition, I believe that there are ways that airport staff could be more helpful in working with DBEs that are not big players or who don't have the expertise of large corporations. A little bit of help and advice could go a very long way. For instance, large companies know to pick the best locations in order to increase their chances of getting customers, but a minority business just starting out might not know how to do that and could not afford a consultant to help. I think the airport staff could help a lot with things like that.

I am grateful for the opportunity to share my experiences with you and for your support of these crucial programs. I would be happy to take any questions you might have.

Testimony

U. S. House of Representatives Committee on Transportation and Infrastructure

The Department of Transportation's Disadvantaged Business Enterprise Programs

March 26, 2009

Katherine M. Cloonen
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The Honorable James Oberstar
U. S. House of Representatives
Chairman
Committee on Transportation and Infrastructure
Washington, D.C. 20515

I am the president and owner of JK Steel Erectors, Inc. I started the company in 1991 with funds I had saved to purchase a house. We specialize in rebar and wire mesh installation in concrete and structural steel erection for transportation, commercial, industrial, and public works projects. My employees are union ironworkers around the Joliet, Illinois area. I have six full time employees and up to thirty employees in the construction months. The geographical area we cover is the area south and west of Chicago, Illinois. Our mission is to provide quality work to the prime contractors with safety, efficiency and expediency.

JK Steel Erectors is certified as a Disadvantaged Business Enterprise with the Illinois Department of Transportation (IDOT) and the Women's Business Development Center of Chicago (WBDC). I was certified by IDOT in November, 2000, after being in business nine years.

This testimony will be on three issues:

1. The positive difference the D. B. E. program has made
2. The discrimination I have faced
3. Why the Disadvantaged Business Enterprise program needs to remain

The difference the D. B. E. program has made since being certified is that my sales increased dramatically. Prior to being certified with IDOT, JK Steel averaged sales just over one half million dollars annually. My sales after being certified with IDOT have averaged approximately two million dollars annually. My clients numbered about sixteen prior to being certified, and now, JK Steel has been a subcontractor for about thirty-five IDOT prime contractors due to the certification. Before being certified, there was a lack of opportunity. Very few prime contractors used me. I was limited to a very small geographical radius and could not expand. I could not get my foot in the door. Even when I sent a bid, they did not use me because I did not have the credibility. It was very tough to get prime contractors to believe that I actually was running a company of iron workers. The only contractors that would hire me were the ones that already knew me and my foremen. In many cases, smaller companies are not given a chance by the larger companies unless they are certified as a D. B. E.

Certification helps JK Steel, and companies like mine, increase in size. Once we are in the program, we have more opportunity to perform larger jobs, and we have a better ability to obtain loans, get bonding, and make larger equipment purchases.

The certification has given JK Steel Erectors exposure. Many prime contractors see our trucks on worksites and the JK Steel name on lists. This alone has solicited bid opportunities. Being certified does not guarantee a job, but it does open doors. I still have to be low bidder, but once I have had a chance to work for a company, they usually ask me to bid again because of the quality of workmanship.

Discrimination has been, and still is, a factor for women and minorities in the construction business. I will illustrate a few examples. One company called, and instead of giving me an invitation to bid, the man asked If I wanted to make more money and gave me an invitation to a meeting to sell health and beauty products for a pyramid company. I told him that if I had to sell this company's products in order to be a subcontractor for him, I would not do it. I have not done business with the company since then.

Another instance of discrimination is that there are companies that will not do construction business with a female. After having tried unsuccessfully to do business with a local contractor, I sent one of my male employees to negotiate the job and be project manager. When the owner understood that I had the day to day control, he never asked me for another quote.

Often I will get a call asking for the person in charge of estimating. Sometimes, when I answer that I am that person, the caller hangs up the phone. Occasionally the person says that he wants the boss or the man in charge. When I say that I am the boss and the man in charge, I still hear a "click" on the other end of the line.

When I first started business, in addition be being called "Honey," by the union business agents, I was not taken seriously when I called for iron workers from the hall. If they sent men, they sometimes sent the worst possible workers. It took years, and the IDOT certification, for the local union to understand that I was running the company.

Men can stop for a beer after work, play golf, or go fishing, all in private, to do their networking. A woman has to be very careful where she is seen, particularly with another man. Furthermore, it needs to be in a public place. Women are not afforded the networking opportunities that men are allowed. Of the female social entities with which I am involved, not ***one*** member is a general or prime contractor. This is not to say that all contractors discriminate against female contractors, however, without the D. B. E. program, many prime contractors just would not hire me.

The Disadvantaged Business Enterprise program needs to remain in the department of transportation. In order to get certified by IDOT, I had to prove all my capabilities, including showing them that I could tie rebar. Even though I am now certified, I have to prove myself on a job to job basis. I am only as good as my last job. On all IDOT projects, we are rated in several categories. It is not enough that the State of Illinois says I am qualified to do the work. I have to be low bidder for the steel and rebar on the project. We have to perform the work in a timely manner, according the prime contractor's schedule. We must do the work safely, with quality, in accordance with the IDOT specifications. Additionally, I am required to submit all of the certifications, all weekly and monthly equal employment opportunity reports, all other required documentations, and all of the correct invoices before I can begin to get paid. I am responsible for the quality of work of JK Steel Erectors, and I am responsible for several people's wages, benefits and tax burdens.

Small companies, such as mine, add workforce and quality of life to our communities. Small businesses, including women and minority owned businesses, are the driving force in the United States economy. In today's world of construction, companies are forced to merge into larger companies. It is vital that as the big companies merge, the smaller companies, such as the D. B. E. companies, remain to help fuel the

local communities. This is particularly true of areas away from the urban regions where there is still a lack of true diversity.

For a prime contractor to suggest that I am not qualified to run a steel company because I am female is absurd. The fact is this ideology still exists. If women and minorities were not a part of the D. B. E. program, our companies would not get jobs just because some contractors feel that we are incapable of running a construction company on a day to day basis. Our businesses would take a backward step to the struggles of where we were before we were certified. We are not asking for an entitlement. We are simply asking for the opportunity to bid and receive projects without bias.

I am grateful for the D. B. E. program. Being certified with IDOT has given my company credibility. I am a director on the board of Associated General Contractors of Illinois, I serve on the Iron Workers' Mid-America Pension Plan, and I am a trustee on the Iron Workers' Local 444 Joint Apprentice Training Committee of Joliet. I am chairman of the Kankakee Area Contractors iron worker negotiation committee. These appointments would not have happened without the D. B. E. program.

In conclusion, I have given testimony as to the difference the D. B. E. program has made. I have furnished examples of discriminatory practices, and I have provided reasons as to why the D. B. E. program should remain a part of the department of transportation.

Thank you very much for your time and consideration.

Sincerely,

Katherine M. Cloonen

Katherine M. Cloonen
President
JK Steel Erectors, Inc.

The Statement of Chuck Covington
President and CEO of People's Transit

Before the Committee on
Transportation and Infrastructure
Of the United States House of
Representatives

James L. Oberstar, Chairman

At the hearing on:

The Department of Transportation's
Disadvantaged Business Enterprise
Program

Thursday, March 26, 2009
11 O'Clock am

Good morning Mr. Chairman and members of the Committee. My name is Chuck Covington and I am the President and CEO of People's Transit in Detroit, Michigan.

My company provides employee shuttles, campus shuttles and general ground transportation. My vehicles provide numerous high-tech amenities like public address systems, DVD players, and flat screen televisions that make them rolling conference rooms. We currently do work at the Detroit Metropolitan Wayne County Airport also known as DTW and for many private corporations in Michigan and other states. My company is certified as an MBE, DBE, SDB and an 8(a) firm.

I am here today to talk about why the continuation of the Airport Disadvantaged Business Enterprise (DBE) and Airport Concessions Disadvantaged Business Enterprise program is so important. The fact of the matter is, despite all the progress this nation has made on issues of race discrimination, there is still a lot of work left to do. Small and minority businesses are truly the backbone of this country. Without programs like the DBE program, big business would steamroll over us. And perhaps that is some of the behaviour that has landed out country in the economic trouble it is in today. It certainly hasn't been small and minority businesses that have brought our nation's financial system to the brink.

I have dealt with discrimination my whole life – and I still deal with it all the time. Sure, it is different these days. Most of the time I don't hear racial slurs anymore – but the discrimination is there all the same. In some ways, I think that I – and other business owners like me – start to simply ignore a lot of the discrimination we observe. If we responded to every slight and every biased person, we would never get any work done. So we ignore most of it.

Still, every so often something happens that you just can't ignore. One very recent example will help you understand what I mean. Early last year, in 2008, one of my employees came to me with a quote on new tires for part of my fleet – coincidentally this was for a part of the fleet that I use at the airport. Apparently, the tire supplier wanted to charge me more than $613 apiece for 16 new tires. Since I have been around the business a while, I suspected that price was too high. Just to check my instinct, I called a friend, a white business associate who works in the same field, and asked how much he paid for the same tires from the same vendor. My friend told me that he had only paid $400 per tire for the same tires for the same type of vehicles.

Now I had known the $613 price was high – but even I was surprised at how much more this supplier was charging me than he was charging my friend. My employee who obtained the original quote is African-American and had what might be described as an ethnic sounding voice. I put on a white voice and called the tire supplier. And sure enough, I got the $400 price. Once I got the new price, I inquired a bit more as to why my employee had been given such an inflated price. Let's just say that while the supplier said a lot of words – not one of them made sense or provided any justification for a 50% increase in the price of the tires.

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It is important to understand what this sort of mark-up in supplies means to a small business owner like myself. A 50% mark up on one of the most basic supplies in my business puts me at an incredible competitive disadvantage. I know you all know that the business climate is tough out there. And believe me, it has been tough in Michigan for a long time now. NO businessperson, no matter how talented can succeed if they are paying a race-based mark-up on supplies. I know my competitors do not have to make so many extra calls to verify price before they buy tires – nor should I.

This is not an isolated incident and yet, I am not bitter or cynical. I think that to be an entrepreneur, you have to be an optimist. You have to be willing to accept five No's before you get one Yes. And yet I still wonder how many of the "No's" I have received were based on the color of my skin as opposed to the quality of my product.

Some other examples are important. The fact is that I am still asked to do more than some of my non-minority competitors to obtain business loans. Despite my success, and my reputation in this community, I, like many other minority business owners, am always required to give a personal guarantee for business loans and to put my personal assets at risk to finance business expansion. I do not believe that is always the case for my majority counterparts. And of course, as an African-American, I do not have a long history of family wealth.

It is also important to understand that even those of us who have accumulated some wealth, for instance in our homes, have had a harder time doing that than similarly situated white entrepreneurs. We all know that there is housing discrimination. I remember earlier in my career, looking for a new apartment. I called and learned that there were vacancies but when I showed up, I was told that all of the apartments had been rented. I knew what was going on, but just to confirm my suspicions, I had my white secretary call and inquire about the same apartments. She was told they were still available.

Why does housing discrimination matter to minority businesses? Especially housing discrimination that happened some years back? Because for many minority businesses today, our homes represent our best source of collateral for credit to develop and expand our businesses. Given Congress' investigation in to mortgage discrimination, you know that we minorities tend to pay higher mortgage rates. And of course, discrimination in business lending also exists. Many of the studies that have been submitted to this committee about discrimination against minority business detail the significant disparities in access to business loans. As long as housing and lending discrimination persist, it will negatively impact opportunities for minority business owners.

And despite the progress we have made as a nation, bigoted people still exist and some of them are in positions of power. Not so very long ago, I was involved in a court case. I had been awarded a multi-million dollar contract as a prime and had subcontracted out a portion of the work to a white firm. When the contract came up for renewal, I decided not to use that same subcontractor any more. That company sued me, I guess because

they thought that I should keep them as a subcontractor permanently regardless of whether I was happy with their work or whether the arrangement made good business sense. We resolved the case to our advantage and I later hired one of the majority firm's vice presidents away. That gentleman told me that during the course of the trial he had been in the hallway outside the courtroom and had heard the CEO of the majority company say that he never believed that, and I quote, "that nigger and his Jew lawyer" would take the case so far.

I want to be clear here: I don't lose sleep when an ignorant person calls me an ugly name. But when I do hear a racial slur, either spoken to me or behind my back, it tells me a lot about how steep my climb is in business. The slur says nothing important about me, but it tells me a lot about the person that used it. When a competitor or a prime contractors refers to me as a nigger – even behind my back – it gives me a window on just how stacked the deck is and how much harder I have to work than a majority business owner.

Another thing that stacks the deck is racial discrimination in business networks. Some people call these "Good Ol' Boy" networks. I like to call them the "comfortable networks." I know that breaking into these networks is essential for the success of my company. But it is a lot easier said than done.

I know that some people think that programs like the DBE program result in hiring "unqualified" minority firms. My experience has been very different. In fact, I have seen situations in the private sector, where no DBE program was in place and unqualified, or at least unprepared, majority firms were hired over me. For example when a Mall in our community needed a shuttle service to move retail employees from the shopping mall to outlying parking lots during the Christmas season, they hired a non-minority firm that was unable to fulfil their contractual obligations. My drivers frequently had to manage the prime contract and fill in gaps when the prime company's shuttle drivers did not show up. The non-minority business wound up subcontracting part of the work out to me at the same price that I had originally quoted the mall. In the end, I essentially performed the contract anyway and so I can't help but wonder whether the majority company that initially got the work did so because they were part of the "comfortable network." Clearly I was more qualified, my price was fair. In the end I had to clean up the problems the majority contractor caused. So why didn't I get the contract right from the beginning? I believe it has to do with networks.

Sometimes we minority companies get relegated to projects that have goals, or projects that are minority-focused in some way. Still, even in those cases, majority contractors sometimes still get the work. Recently, I submitted a bid for a contract to provide transportation for a minority business event. It was ultimately won by a non-minority firm. Later, the non-minority firm wound up leasing the vehicles from me and once again, it was at the same price I had originally bid. Now I highly doubt that this firm was doing the project for free which must mean they bid more than I had bid and still they won the contract. If the bidding process is entirely based on choosing the individual who submits the lowest bid and is best equipped to do the job, shouldn't the contract

have gone to me from the outset? I was clearly better equipped than the non-minority owned company that received the contract so if my bid was lower, why didn't I get the contract outright? I think the answer can be found in the "comfortable network."

One way that I have found to both serve my community and establish new business relationships is to serve in public service roles in my hometown, Van Buren Township, Belleville, MI, and with different civic organizations including: the Water and Sewer Commission; the Cable Commission; the Public Safety Committee; and the Local District Financing Authority. Although I no longer serve on the Planning Commission, I was once its Vice Chairman.

I understand that people do business with the people they like. But how do you get to know these people? The Eagles Club is one of the primary places that successful business people in my area network, and where the aforementioned civic organizations hold fundraisers. But it has an unwritten rule: African-Americans cannot be members. I have served on a number of boards and panels that hold functions at the Eagles Club, and I have attended many of them. But I can't be a member. I have served my community in both public and private positions and it sickens me that there is a club--in my community--that would exclude me and my daughters -- as members because of our race. But the fact that it impacts my ability to conduct business is reprehensible. If people do business with the people they are comfortable with, and if I am denied opportunities to sit down and get to know people--based on nothing more than my race--it automatically puts me and my business at a disadvantage.

People say they want minorities to succeed and to be competitive, but how can I be competitive if it costs me more to do business than an equally qualified, non-minority competitor? All of these things--the discrimination in lending, being banned from social clubs, being charged higher prices by vendors--they all add up to increase our chances of failing. And all of this makes it all the more important that we maintain the DBE program.

Still, it is important to know that just preserving the DBE program doesn't finish the job of levelling the playing field – there is more we can do. Along those lines, I hope that the Committee will consider making some needed improvements to the DBE programs. First of all, thank you, Mr. Chairman for the provisions already included in H.R. 915 that will help improve certification training and finally make long overdue adjustments for inflation in the Personal Net Worth Cap. These are vital changes and we appreciate your work to make sure they happen. I would also like to strongly urge the Committee to extend the DBE program to airport expenditures with both TSA funds and PFC funds. The discrimination that DBEs face is not limited to projects funded by AIP – it exists throughout our industry. For that reason, we should ensure that DBE-type requirements attach to TSA and PFC funds as well.

In closing, I want to thank you again for the opportunity you have given me to speak here today. Given the discrimination minority businesses face, even today, we need

opportunities that the DBE program provides. Without them, we would never have a chance and we, as a nation, would lose.

I would be happy to take any questions you might have.

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March 26, 2009

Testimony on the US DOT DBE Program

by Julie A. Cunningham, President & CEO
Conference Of Minority Transportation Officials

Opening Remarks

Mr. Chairman and members of the Transportation & Infrastructure Committee, let me first say thank you for conducting hearings on this very critical issue.

It is an honor to be here today to represent the Conference Of Minority Transportation Officials (COMTO). Our organization is celebrating thirty-eight (38) years of service, as a voice for the transportation community and today we are the only multi-modal association for minorities in all of the transportation industry. Because of the legacy of inequity of employment and business for minorities within the industry, our mission - which is as relevant today as ever - remains constant – to level the playing field in transportation for individuals, businesses and communities of color.

Our ever-increasing membership spans thirty-nine (39) urban cities across the United States and includes individuals, public transit agencies, airports, state DOTs, private businesses, academic institutions, other not-for-profit organizations and last, but certainly not least, small and disadvantaged business enterprises on whose behalf I speak today. I am pleased that several of our member DBE firms and supporters have traveled from around the country to be with us today.

As you know, COMTO has been at the forefront of this issue for quite some time.

COMTO's advocacy on behalf of DBEs has received national recognition:

- We were awarded the Department of Transportation's DBE Advocate of the Year in 2006.
- We partnered with the DOT and published a CD on DBE methodology for federal grantees.
- For the last 2 years, we have conducted Title VI training workshops across the country on behalf of the DOT. The training components in these workshops includes information on DBE goal setting, the certification process and fraud detection, to name a few
- We also are a member of the DOT DBE Roundtable, which meets on a quarterly basis at the DOT HQ.

When the Wahlberg Amendment threatened the DBE program in 2007, it was COMTO that made our voices heard throughout the U.S. and here on Capital Hill to thwart what could

have resulted in a chilling effect on the DBE community. The amendment would have systematically denied access to competition for DBE firms. Our chapters across the country petitioned their congressional representatives, and we met with Congressman Olver to ensure the voices of the DBE community were heard. We were effective. We thank Chairman Olver for his great support.

As a voice for the industry, collaboration is a key part of our strategy. We partner with other national industry organizations and stakeholders including the Airport Minority Advisory Council, American Public Transit Association, American State Highway & Transportation Officials, Transportation Equity Network, and the Women's Transportation Seminar to ensure and advocate access and opportunities for the small and disadvantaged business enterprise.

Earlier this month in partnership with Patton Boggs law firm, COMTO hosted a very well received, Transportation Summit, to develop strategies and recommendations for the new administration to discuss strategies for a ready-to-go and sustainable workforce. It was an excellent session and our summit white paper will be available to you in the next few days.

Just as with employment in the transportation industry, we believe redressing past and ongoing discrimination, with regard to contracting and business opportunities for minority and women owned firms is still a critical issue, as well as for veteran and service-disabled veterans.

Why DBE Program is Relevant Today?

Congress enacted the DOT DBE program to address the problem of discrimination against businesses owned by minorities and women in federally-supported transportation contracting. Over the years, the program has helped provide opportunities to thousands of businesses. Unfortunately, despite advances, more than two decades later, discrimination is still a serious problem. Disparity and other studies have documented well the ongoing problems faced by DBEs, including the:

- use of antiquated "old boy networks,"
- exclusion of DBEs from business opportunities,
- discrimination in credit lending, bonding and insurance,
- attempts to induce DBEs to act fraudulently as "fronts;"
- and discriminatory application of procurement and contracting rules.

Mr. Chairman, as both you, Majority Whip Clyburn and other members of Congress have shared with the COMTO Membership during our annual Transportation Braintrust , the battle that was fought to include the DBE Provision in the TEA-21 legislation was no less fierce over 10 years ago, than it is today. In 1998, the program's inclusion was the topic of very strong debates in both the House & Senate - both had amendments on the floor to either dismantle or neutralize the DBE Program. In the House, the amendment failed by a vote of 194-225. The program goals remained intact and charged doing all of the following:

- remedy past and current discrimination against disadvantaged business enterprises

- ensure a "level playing field" in which DBEs can compete fairly for DOT-assisted contracts,
- improve the flexibility and efficiency of the DBE program, and
- reduce burdens on small businesses.

Most of the opponents of the DBE program in Congress claimed that the DBE Program was an unconstitutional, illegal and racist program compromised of set asides and quotas. Contrary to these comments, the DOT DBE Program has proven to be a constitutional and legal program compromised of flexible, aspirational goals.

The landmark case ***Adarand v. Mineta,*** finally ended when the US. Supreme Court concluded that the DBE program is constitutional as long as the strict scrutiny standard was achieved. There have been other federal cases as well, that have upheld the facial constitutionality of the DBE programs.

So, I don't believe I need to spend much time arguing that the program is still relevant and that the playing field is still not level; but I would rather take a few minutes to offer solutions and briefly outline necessary and crucial improvements to the existing program.

Problems With the Current DBE Program

Earlier this week, I held a teleconference with a number of our DBE members and talked with other stakeholders and transportation professionals who have (or had in the past) the responsibility for running state DBE programs. I also visited with a Senior Partner at Booz Allen Hamilton, a COMTO business member, strong DBE advocate and as you know, one of the country's largest consulting firms. The overlying theme of these discussions was consistent regarding necessary and crucial improvements to the existing program. There were six (6) reverberating issues:

1. Need more specific language in the RFPs (issued by federal grantees) to ensure the integrity of "good faith efforts." Currently there are no teeth in "good faith efforts" and there is far too much inconsistency from agency to agency. For COMTO and its members, challenges remain in the process of goal setting, the DBE certification process, DBE eligibility requirements, and the usefulness of the UCPs in terms of streamlining and opening up more potential opportunities for contracts in federally funded transportation projects across the country.

   COMTO recommends that the DBE program is supported with increased federally-funded vigilance, including education, training, outreach, compliance, and enforcement mechanisms, which would be steadfastly evident and achieved in more measurable ways.

2. Uniform Certification Program (UCP): The DOT DBE program was a catalyst for the establishment of Unified Certification Programs (UCP) in each state across the country. The UCP was designed to help facilitate and streamline certification of disadvantaged businesses through a 'one-stop shop' concept. As of 2008, all 50 states had established

UCPs. However, there is currently no national database or central repository for this vital data.

COMTO recommends that Congress exercise greater oversight regarding compliance with this program reform. Further, to enhance best practices and consistent results, **COMTO recommends** that Congress require greater reciprocity of DBE certifications nationally. Further we encourage DOT to collaborate even more closely with other federal agencies such as the Small Business Administration, Department Of Labor and the Department of Veterans Affairs.

3. Cumbersome and Time Consuming Certification Process: As noted above, while some progress has been made with regard to DBE program certification, additional efforts to streamline the process are needed to reduce unwarranted burdens on DBE firms or applicants, and on certification officials. The current DBE eligibility and certification process is often unnecessarily cumbersome and burdensome. Even though the DOT DBE program is governed by a single set of federal rules, the information requested by one certifying entity is, far too often, not the same information required by another (both as to content and form of the information).

   COMTO recommends that Congress, require by statute, that all certification officials undergo formal, structured training and be tested and accredited. In this way, Congress can promote the consistent and fair interpretation and application of program eligibility rules. **COMTO further recommends** the establishment of a technology-based, unified DBE certification process that is clearly standardized with compliance reviews, to ensure consistency throughout the participating entities and national outreach.

   Mr. Chairman, COMTO applauds the mandatory certification training provisions included in H.R. 915 the Federal Aviation Administration Reauthorization Act. We urge you to include similar provisions in the surface transportation programs as well.

4. Need for More Aggressive and Consistent Compliance Monitoring of the DBE Program: **COMTO recommends** that Congress mandate the General Accounting Office (GAO) to commission a report on the current status of the Department of Transportation DBE/ACDBE program and to provide the critical information necessary to understand its impact when implemented, according to its mission, as was completed in June of 2001. COMTO welcomes the opportunity to support this effort.

5. Ongoing Congressional Oversight: Regarding the ongoing problem of discrimination in the transportation industry, **COMTO recommends** that Congress reauthorize the DOT DBE programs (in those instances where reauthorization is required) and retain the minimum national aspirational 10% DBE/ACDBE participation goal. **COMTO further recommends** that the DBE participation goal be made applicable not only to federally-funded transportation projects, but also to all programs or projects authorized by SAFETEA-LU and the AIP program (including, for example, airport projects funded with federally-approved "passenger facility charges"). Additionally, **COMTO recommends** funding for the establishment, maintenance and monitoring of a national

DBE/ACDBE program to ensure its success. This inclusive initiative will require additional compliance requirements and there will be a need to allocate funding to perform the required tasks.

6. Development of a National Mentor-Protégé Program. **COMTO recommends** the creation of outreach opportunities in collaboration with federally-funded transportation entities to connect prime contractors with DBE firms across the country. **COMTO further recommends** the creation of a web-based DBE opportunity clearing house, where transportation agencies post potential opportunities for DBE firms. COMTO is taking the lead with this effort and will discuss further with Secretary LaHood when we meet for our initial strategy session on April 1st.

COMTO Disadvantaged Business Enterprises-The Golden Nuggets

During President Obama's transition,, I had the opportunity to serve in the transition process on the DOT Agency Review Team and saw first-hand that what this nation is faced with is about more than bricks and mortar, concrete and steel.

This issue is more than just contracts, constructions and costs; it is clearly about the future of our nation's workforce. This is about people.....this is about jobs. Too often we forget that the golden nuggets of our industry are the people who participate in the DBE program and the thousands upon thousands of others who work for the DBE firms. DBEs are the force that will spur the stimulus projects.

COMTO DBEs firms touch the full spectrum of projects, offering everything from engineering services to advanced technologies to traffic engineering; to professional services for legal, real estate and capital investments. They are suppliers that provide goods and services to the industry. They run the gamut from the very established business to the start-ups which are poised to partner in a mentor-protégé relationship. We have, as members, the only minority owned manufacturer of heavy-duty brakes and clutches for trucks, buses, trains and power equipment (based in Miami, FL); we have the only minority owned railway engineering services firm (based in Jacksonville, FL) and we have one of the largest minority owned firms whose primary business is to lay track.

So, we must take into consideration that our reason for being here is not just a DBE issue – this is also a workforce issue. As we all know, small businesses hire 70% of the workforce. DBEs are the engines of our economy in transportation, now more than ever before.

Last week, I was in St. Louis facilitating stakeholder meetings on behalf of the Missouri DOT for the new Mississippi River Bridge. Construction of the bridge is scheduled to begin in the fall. There were probably 150 people in attendance – most of them principals or employees of DBEs from both sides of the Mississippi River – St. Louis, MO and East St. Louis, IL, which has an unemployment rate of 14.9%.

Stakeholders.....the people who live and work on both sides of the river – wanting to contribute to the building of something new and exciting in their community; wanting a fair

chance to play their part to help our economy recover; wanting some of the business and some of the jobs of building that bridge that will impact their community, wanting to employ their families and the people in their community.

In the St. Louis region, there is a group known as Gamaliel Foundation – which is a consortium of 400 faith based organizations. Members of Gamaliel are quick to tell you that President Barack Obama learned and perfected his community activism through Gamaliel. They have been at the forefront in both Missouri and Illinois advocating for a level playing field for DBEs, as well as for women, minorities and the economically disadvantaged looking to be employed in the heavy highway construction industry. DBEs employ the people in their community. If you want the community to take pride in ownership, let them take part in the building process. Let them contribute to their own livable community.

An effective DBE program makes it easy to support the economic recovery program. Recently Secretary LaHood said:

> *In a very short time, your cities will be humming with construction workers, engineers, maintenance crews and many others. You'll see roads repaved, interchanges improved and bus and rail systems repaired, upgraded and expanded.*

Well, I submit to you and the members of this committee, Mr. Chairman, that along with that melodious hum, needs to be the sweet chorus of our nation's DBE firms and then we can add the harmonies of a DBE firm's project manager, and the civil engineer, and the carpenter, and the administrative staff....

That's what will enhance the humming that Secretary LaHood referred to – the continued investment of human capital. With the kind of chorus I am describing, we can enhance our nation's infrastructure, decrease discrimination and harness the power of ALL our nation's people and businesses to get our economy back on track. The members of COMTO stand ready to do our part.

Conclusion

Collectively, we all – COMTO, our members, the Congress, both the private and public sector and our DBEs – have a tremendous responsibility to facilitate change in an industry that does not always benefit those from whom it benefits.

To dismantle or neutralize the existing DBE program will result in a very chilling effect against minorities and women who have been demonstratively under-represented in federally funded transportation contracts across this country.

In closing, allow me to share a quote from President Barack Obama:

> *Our economic dependence depended on individual initiative. It depended on a belief in the free market; but it has also depended on our sense of mutual regard for each other, the idea that everybody has a stake in the country, that we're all in it together and everybody's got a shot at opportunity.*

Mr. Chairman, COMTO applauds the efforts of the T&I Committee to protect the DBE program and we support your efforts to advance inclusiveness in transportation.

Thank you for the opportunity to testify here today. I would be happy to take any questions you might have.

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AGC of America
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
Quality People. Quality Projects.

Testimony of

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Sylvania, Ohio

Presented to the

Committee on
Transportation and Infrastructure

on the topic of

US Department of Transportation's
Disadvantaged Business Enterprise Program

March 26, 2009

The Associated General Contractors of America (AGC) is the largest and oldest national construction trade association in the United States. AGC represents more than 33,000 firms, including 7,500 of America's leading general contractors, and over 12,500 specialty-contracting firms. More than 13,000 service providers and suppliers are associated with AGC through a nationwide network of chapters. Visit the AGC Web site at www.agc.org.

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
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Mr. Chairman and Members of the Committee thank you for the opportunity to present testimony on the US Department of Transportation's (DOT) Disadvantaged Business Enterprise (DBE) program. I am Amy Hall, the President of Ebony Construction Company, located in Sylvania, Ohio, representing the Associated General Contractors of America. AGC is the oldest construction association in the country representing contractors that build all forms of infrastructure, including: highways, bridges, transit systems, railways, airport terminals and runways, water and wastewater treatment facilities, underground utilities, public buildings, multi-family housing, office buildings, military facilities, water resource projects, energy production and conservation, and the many other structures that are the backbone of the US economy and provide and ensure US Citizens' quality of life.

Ebony Construction Company is a second generation family owned business that operates in Ohio, Michigan and Indiana. Ebony is an asphalt paving and milling business. We work primarily as a subcontractor and mostly on publicly funded contracts. Ebony is a certified Disadvantaged Business Enterprise. My comments will focus on how the US DOT DBE program is administered by the Federal Highway Administration (FHWA) in the Federal-aid Highway Program, and by state DOTs.

Stepping back for just a moment, I'd like to briefly address the basic premises of the program, because both this program and its many state and local counterparts have been the subject of much litigation. Today, it is well beyond dispute that the DBE program is subject to "strict scrutiny" and will survive judicial review only if Congress has a "compelling interest" in continuing it.

No industry as large, diverse and fragmented as the construction industry is entirely free of discrimination. In 2005, this highly fragmented industry had 778,000 firms and 6.8 million paid employees. In the same year, ninety-two percent of construction firms had fewer than 20 employees; only one percent of construction firms had 100 or more employees; and the average construction firm had fewer than 9 employees. In 2007, construction spending totaled $1.14 trillion, or 8.2 percent of GDP. Among these thousands of firms and millions of employees conducting such a huge proportion of the nation's business, there are certainly some bad actors.

The vast majority of the men and women who work in the construction industry are good people. They provide both honest and critical services to the nation, and for their hard work, they accept modest compensation.[1] The construction industry is part of the larger society that it serves, and no doubt, it has many of the same problems, but it manifests discrimination no more than any other segment of our society. AGC is working to foster a business climate that enhances opportunities for all businesses.

Construction is an intensely competitive industry, and that competition penalizes any firm that resorts to discrimination. To succeed, construction firms have to focus on price, quality and reliability. Most public and many private owners continue to use the traditional design-bid-build system to deliver their construction projects. And most public owners remain subject to legal requirements for open competitive bidding. Such requirements typically include a publicly announced deadline for the submission of sealed bids, the public opening of such bids, and contract award to the lowest responsive and responsible bidder. Such a process precludes public

[1] Each year, the Construction Financial Management Association (CFMA) conducts a financial survey of the construction industry. According to that survey, construction firms' net earnings margins before income taxes averaged 2.7% in 2007 and 3.9% in 2008.

owners from engaging in unlawful discrimination. And the resulting pressure on prime contractors makes it necessary to select subcontractors based on experience, price and quality. The contracting community, the states and the agencies have concerns about the interpretation of many DBE program requirements. The DBE program has been evolving over the years with many changes. Practices that were encouraged by the Federal government and state governments are no longer acceptable. Many program requirements are contradictory or ambiguous when applied to real life scenarios. There is not uniformity in the way the states handle the program's various requirements. We in the business feel that there is a sincere interest in making the program work, but in many cases contractors and many government employees are not sure how to ensure compliance with elements of the program today. Some of this uncertainty may be due to the lack of compliance guidance and other problems reside in the implementing regulations.

The uncertainty felt in how to interpret elements of the rules poses a real concern for contractors. Not only did it lead to disputes in operations on the job site, but also because stepping over the line can lead to suspension, debarment and Federal prosecution. Any of these penalties can, at the very least, put a company out of business. AGC wanted to address the real concerns about the DBE program. There was a desire to come up with common language that could be applied in everyday life. As a result, AGC requested a meeting with then- Federal Highway Administrator Mary Peters, then-DOT Inspector General Ken Meade and other DOT representatives to discuss how to make the program work better. The result of the meeting was the creation of an industry-government work group to:

- Identify contradictory, inconsistent or ambiguous DBE program requirements.
- Clarify the intent and administration of these various requirements.
- Create guidance to communicate these clarifications.
- Determine the most expeditious method for getting these clarifications implemented.

AGC's goal was to find a way to create a template that could help the industry navigate this complex regulation. After this industry-government work group met for over three years, the end result was a document that we called a "toolkit" which is intended to help contractors comply with program requirements. A copy of the "toolkit" is attached to my testimony. AGC believes the document is very helpful in clarifying for all parties involved in this program how the requirements are intended to be implemented. We believe it is important information for contractors, DBE subcontractors, state DOT officials, and frankly for FHWA personnel as well.

However, after three years of meeting on what we all agreed were contradictory, inconsistent or ambiguous DBE program requirements and completing the "toolkit", DOT informed us that they could not endorse the document. Unfortunately that renders the document useless for contractors as a compliance document. Contractors and DBEs must have confidence that decisions they make related to program compliance are based on some official guidance from DOT. Simply saying that the issues are covered in the regulations does not fully explain how they should be applied in real world situations and we don't believe they really address contractors concerns.

AGC still believes there is the need for a document clarifying what contractors and DBEs can and cannot do in meeting the DBE program requirements. We believe there are real differences of opinion about how to administer rules on how to count participation, the best way to define "commercially useful function," and how general contractors can assist their DBE subcontractor to name a few priority areas. Many of these issues serve as impediments to DBEs being

successful in the program and cause uncertainty and potential traps for contractors attempting to meet program requirements.

We spent a lot of time talking about how to calculate goal compliance. As an example, in order to count a DBE contractor's participation on a project towards the contract goal, the DBE has to be deemed to be performing a "commercially useful function." However, the contractor who has to make a decision to hire the DBE is not permitted to make a determination about whether a particular DBE will in fact be performing a "commercially useful function." In the "toolkit" AGC and FHWA agreed to a series of questions that a prudent contractor could ask a DBE firm prior to signing a subcontract agreement. The questions are related to the DBEs experience, management of the job, work force, equipment ownership, potential subcontracting and other similar questions. The questions are not unlike questions asked of non-DBE subcontractors when they are being used for the first time. We felt that if the questions result in the contractor not believing that the DBE will perform a "commercially useful function" then the contractor should reject the subcontractor. DOT, however, says that a "commercially useful function" determination cannot be made by the contractor but rather by the government and this determination cannot be made upfront. This puts the contractor in a very untenable position when trying to make good faith efforts to meet contract goals.

Another example of how the implementation of this program seems to undermine its intended purpose is the rules related to the expertise level of the DBE owner. DBE owners are being held to a different standard than non-DBEs. They are disadvantaged by the program. As part of the Commercially Useful Function reviews, DBE subcontractors are being asked to go to the field and actually perform field tasks. Running a successful contracting operation does not require you to be able to operate the machinery or perform any of the actual construction tasks. While some contractors may start out their careers operating equipment, running the business requires an entirely different set of skills. Unfortunately the DBE regulations diminish the value of management expertise which is the key to business success. Non-DBEs are not expected to perform these specific construction tasks. This differentiation seems to undermine the ability of DBEs in becoming successful businesses.

Another issue that was discussed as part of the "toolkit" is the type of assistance the general contractor is able to provide to DBE and non-DBE subcontractors. The prime contractor is ultimately responsible for the successful completion of all aspects of the contract. Typically the owner is not concerned about who performs what part of the contract, only in the successful delivery of the completed product. To ensure success, the prime contractor will do what it takes to be sure that the subcontractor performs its contract efficiently, in a timely fashion and provides a final product of the highest quality. This may include assistance with equipment, personnel and material if problems arise in performing contract requirements. However, if the prime contractor was to offer the same assistance to the DBE subcontractor, suspicions are raised that the subcontractors is not serving a "commercially useful function" and the contractor and DBE could be subject to intense scrutiny or subject to legal proceedings.

An example of a regulatory provision that works against DBE success in the program is an issue that is of direct impact to my company. The regulations allow for the cost of material that is purchased by the DBE for work on the contract to count towards goal achievement. However, if the DBE purchases the material from the prime, rather than a third party source, that portion of the contract is not counted. Being in the paving business requires my company to have access to aggregate and liquid asphalt. In many parts of the country, there are very limited sources for

these products. In some instances the prime contractor is the only source, there is no third party source that can provide the needed material. Not allowing my purchase of asphalt from the prime undermines the ability of the prime to meet the contract goal and can hurt my business from growing. This is an issue that we have discussed with DOT and we are awaiting their proposed remedy.

Although DOT determined that it was unable to endorse the "toolkit" this did not end our efforts for program clarification. Further meetings with DOT resulted in the creation of a DBE Roundtable. Through this forum issues can be raised and discussed in a public setting resulting in guidance issued by DOT on specific issues. AGC is hopeful that the Roundtable and this process for clarifying issues can be continued. While this process is extremely helpful, there remains the need for an official guidance document to assist contractors, DBEs and state DOTs in understanding how issues will be resolved. We are starting to see some positive results of our persistence. As a result of the Roundtable discussions guidance was issued clarifying some of the assistance that is permissible, and we are glad that has been issued. The assistance discussed is often provided to non-DBE subcontractors and not allowing it for a DBE can be detrimental to their business success.

The Roundtable has also addressed other confusing and counterproductive regulatory provisions. In addition to what assistance primes can provide DBEs, we've also addressed "commercially useful function" determinations, the use of joint checks, DBE owner technical expertise, certification consistency and eligibility to count DBE participation, change orders, materials purchased from non-DBE suppliers, DBE capacity and more.

We believe the program rules need to be written in a way that allows more collaboration, mentoring and assistance. Assistance with bonding, equipment, estimating, and project management can prove helpful to developing businesses no matter who is the owner. AGC has always encouraged the creation of Mentor-Protégé programs that allow contractors to work with DBE firms in a collaborative fashion to ensure a mutually beneficial result. AGC believes that this concept should become a significant part of the program as we move forward.

Mr. Chairman and members of the Committee, AGC has taken the approach that while this program is in place we will try to work to make it something that makes sense, that does not impede the successful completion of vitally needed transportation improvement projects and does not create legal concerns for participants. AGC is hopeful that the dialogue that was started over the past several years with DOT, the DBE community and the construction industry will continue. Thank you to the committee for having this hearing on the administration of the program. I would be happy to answer any questions you may have.

DISADVANTAGED BUSINESS ENTERPRISE (DBE)
CONTRACTORS' TOOL KIT

ENDORSED BY:
ASSOCIATED GENERAL CONTRACTORS OF AMERICA
NATIONAL ASSOCIATION OF MINORITY CONTRACTORS
WOMEN 1ST

DISADVANTAGED BUSINESS ENTERPRISE (DBE) TOOL KIT

CONTENTS

SECTION PAGE

I. INTRODUCTION .....

II. GETTING STARTED .....

III. ELEMENTS OF A CONTRACTOR COMPLIANCE PROGRAM

A. RESPONSIBILITIES

B. DETERMINING AVAILABLE DBE'S

C. GOOD FAITH EFFORTS (GFE)

D. SPECIFIC PROJECT PARTICIPATION

1. PRE-ESTIMATE ACTIONS
2. DEVELOP A DBE PARTICIPATION PLAN
3. GOOD FAITH EFFORTS
4. IMPLEMENT YOUR DBE PARTICIPATION PLAN
5. QUOTE DOCUMENTATION
6. EXCLUSIVITY ARRANGEMENTS
7. BID CLOSE OUT
8. ADMINISTRATIVE RECONSIDERATION OF INADEQUATE GOOD FAITH EFFORTS

E. BUILDING THE PROJECT

1. EXECUTING DBE SUBCONTRACTS
2. PAYMENT, MONITORING AND DOCUMENTATION PROCEDURES
3. GENERAL COUNTING RULES
4. COMMERCIALLY USEFUL FUNCTION ("CUF")
5. MONITORING DBE "CUF"
6. ASSISTANCE TO DBEs
7. CHANGE ORDERS AND DBE CONTRACT GOALS
8. EMERGENCY PERFORMANCE OF DBE WORK
9. TERMINATION OF DBE CONTRACTOR
10. REPLACEMENT OF DBE
11. FINAL DOCUMENTATION AND CERTIFICATION

IV. APPENDICES .....

I. INTRODUCTION

Since the late 1970's, federal, State and local governments have established programs designed to maximize opportunities for firms owned by minorities, women and disadvantaged individuals to compete for and perform contracts. The United States Department of Transportation ("USDOT") issued revised regulations in February 1999 regarding the participation by Disadvantaged Business Enterprises ("DBE") in USDOT financial assistance programs. After the USDOT issued new regulations in 1999, each State DOT revised its DBE program to implement the new regulations.

This Tool Kit is meant to be a practical guide in establishing a contractor's DBE compliance program as implemented by the states and local governments where they work. It has been prepared from the user's perspective and guidance shared in the tool kit is the result of direct experience in obtaining and utilizing DBEs in accordance with the DBE program requirements.

The Tool Kit is divided into three sections ranging from Getting Started to assessing one's performance in meeting its own program.

The GETTING STARTED Section provides information on the resources you will need to set up your DBE Compliance Program.

The ELEMENTS OF A CONTRACTOR COMPLIANCE PROGRAM Section offers suggestions on how to follow-up on your program to insure its running properly and remains updated.

The Tool Kit provides checklists that can serve as practical tools for contractors' day-to-day use in the management of their DBE compliance program. Your program should make use of Appendices or Attachments in the same manner as this Tool Kit. Include copies of all pertinent rules, regulation, and specifications.

Because this Tool Kit is intended as a general guide, it cannot address every situation a contractor may encounter. Each State DOT may interpret or implement the same federal DBE regulations differently. The information provided in this Tool Kit can and should be adapted to meet a contractor's particular circumstances. Several key points are emphasized in the Tool Kit:

- Know your State DOT officials responsible for administering the DBE programs in the DOT headquarters and in the project area district and understand their interpretation of the rules and regulations implementing those programs.

- This tool kit was created through Joint Cooperative efforts of the construction industry and government officials. This spirit of joint cooperation should be mirrored on the state and local level.

- The local contractor chapter organizations should be involved with the DOT in the local goal setting committee.

- Reach out to DBEs and to DBE assistance organizations to determine the availability and capabilities of DBEs in your area.

- Make your best efforts to meet individual contract DBE goals and document those efforts in case your DBE participation falls short of the contract DBE goal.

- Be vigilant during contract performance.

- If you assist DBEs in any way, make sure your State DOT is aware and approves of the assistance.

- Identify a Company DBE coordinator and encourage your field supervisors to contact the DBE coordinator whenever a question arises or help is needed.

II. GETTING STARTED

The following are some good first steps you can take to gain an understanding of your State and Federal DBE program requirements.

- Understand State and Federal Rules

  Obtain copies of, review and retain for reference:

  a. Federal Rules
  b. State Rules
  c. State DOT contract requirements
  d. State DBE Plan Program

  - Include copies of these documents with your plan.

  - Review how your State DOT counts DBE participation on various types of work including subcontracts involving installation of materials, material suppliers, truckers, joint ventures, etc.

  - Review your State DOT's rules on "commercially useful function" (CUF). Attach your State DOT DBE Special Provision as Appendix F to this Tool Kit for guidance on what constitutes a commercially useful function.

  - Review your State DOT's policy on meeting DBE goals when contract changes are made which affect the DBE's work.

- Program Officials: It is important and useful for you to know the FHWA and your State DOT DBE program officials. They can assist you in understanding what they require concerning the DBE program and how you can follow the requirements.

- Review your State DOT's rules on documenting good faith efforts towards meeting the goal. You should attach your State DOT DBE Special Provision as Appendix B to this Tool Kit for guidance concerning what constitutes adequate good faith efforts.

In the next Section ELEMENTS OF CONTRACTOR COMPLIANCE PROGRAM, you will learn about the specific items your program should address.

III. ELEMENTS OF A CONTRACTOR COMPLIANCE PROGRAM

A. RESPONSIBILITIES

- Identify and assign a responsible person or persons for:

  1. Overall management of the Compliance Program.
  2. Administrative responsibilities such as reporting.
  3. Identifying certified and capable DBEs.
  4. Preparation and submission of proposed project specific DBE participation.
  5. Oversight of DBE Subcontractor work performance.

The DBE Compliance program should clearly describe the contractor's management approach toward complying with the DBE program requirements. It should identify the individual(s) in the organization who have the overall responsibility to carry out the program and who is designated the key individual(s) that everyone in the organization can approach to deal with issues supporting the contractor's compliance. In addition, in describing this management approach, it is imperative that everyone, including field specialists and foremen, understand the roles and responsibility of working together to see that this is done.

- Develop DBE procedures to follow, including:

  a. Estimating and bidding procedures.

  b. Procedures for negotiating and writing contracts.

  c. Procedures for monitoring, inspecting and documenting a DBE's performance and progress.

THIS TOOL KIT WILL AID YOU IN DEVELOPING SUCH PROCEDURES.

B. DETERMINING AVAILABLE DBE'S

- Your program should describe the process that you routinely use to identify, interview and assess available DBEs. Your State DOT requires DBEs to be certified at the time DBE commitments are submitted so it is imperative that you have an on-going process for identifying, soliciting

and evaluating the capabilities of DBEs that have the potential to bid on work the contractor maybe subcontracting out in response to an STA advertisement. This normal business practice can be the essential support behind a good faith effort determination on a project specific basis. This Tool Kit suggests a two-step process.

STEP 1 – DBE IDENTIFICATION

- Your State DOT is required to participate in a Unified Certification Program ("UCP"). The UCP is required to make all certification decisions on behalf of all USDOT recipients in each State. Each UCP is required to maintain a unified DBE directory containing all firms certified by the UCP. The UCP is required to make the directory available on the internet, as well as in print. (See 49 CFR § 26.81.) A State's Unified Certification Program must certify DBE firms.

  Obtain a current DBE directory listing of certified firms. Your State DOT maintains and makes available to interested persons a directory identifying all firms eligible to participate as DBEs in your State DOT's program. Online directories are more up to date and a better source for obtaining information on certified DBE firms. The listing for each DBE firm will include its address, phone number and the types of work the firm has been certified to perform as a DBE. These directories are revised at least annually. Further, your State DOT will make updated information available on request.

  The UCP DBE Directory should be relied on as your primary source of firms to contact in preparation of your bid.

Step 2 – DBE Solicitation

Your State DOT requires that you not reject DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. You need to determine whether interested DBEs are certified in the work they want to bid on. Meet with DBE firms. Assess their availability, willingness and ability to perform work. Develop ongoing dialogue and relationships with DBE firms.

- As you would with any subcontractor, you should determine whether interested DBEs are capable to perform the work they are quoting consistent with the type of work they are certified to perform as a DBE.

- Use the form on page ___, DBE Interviews, to help determine whether the interested DBE is capable to perform the work it is quoting.

- A thorough investigation of a DBE's capabilities should include consideration of the following:

  a. The type and scope of work the DBE intends on quoting.

  b. The DBE's experience in performing the type of work it wishes to quote.

  c. The DBE's staff and its availability to perform on the project.

  d. The equipment the DBE has available to perform the work, or if the DBE does not own equipment, how it intends to obtain the necessary equipment.

  e. The DBE's current workload, including other contracts the DBE will be performing concurrently with this project.

  f. How the DBE plans to obtain the necessary materials, their creditworthiness and whether joint checks may be required.

  g. The DBE's intention to subcontract any of the work to a non-DBE.

  h. Information on the DBE's bonding capacity, including "Total Program" and "Largest Single Project."

  i. Your past experience working with the DBE may be considered.

  j. Ask for references from the DBE as to other prime contractors for which they have worked and check them out.

Step 3 – INVESTIGATE DBE CAPABILITIES TO PERFORM THE WORK

Now you need to determine whether interested DBEs are capable of performing the work they are interested in quoting. A DBE must perform a "commercially useful function," as defined by USDOT in 49 CFR § 26.55(c) and your State DOT DBE Special Provision. At some point the prime may be required to document that the DBE is performing a "commercially useful function."

In determining a DBE's capabilities to perform the work the following should be ascertained:

a. Is the work to be performed the DBE's usual type of work?

b. Will the DBE estimate the work himself, receive all material and sub quotes and negotiate and write P.O.'s and subcontracts?

c. Is there a clean split between what you are performing and what the DBE will perform?

d. Will the DBE manage and supervise the work with its own managers and superintendents?

e. Will the DBE perform the work with its own forces?

f. Will the DBE be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, and installing (where applicable) and paying for the material itself?

g. What work, if any, does the DBE intend to subcontract and is that amount consistent with industry practice? Work that a DBE subcontracts to a non-DBE does not count towards the contract goal.

h. If the DBE is subcontracting an unusual amount or does not intend to perform at least 30% of the work with its own forces, your State DOT will presume the DBE is not performing a commercially useful function (49 CFR § 26.55(c)(3)). Some state rules may require subcontractors to perform more than 30% of the subcontract with its own forces.

i. A DBE does not perform a commercially useful function if its role is limited to a "pass-through" for purposes of obtaining DBE participation.

ELEMENTS OF A CONTRACTOR COMPLIANCE PROGRAM

1. **Have you identified the person responsible for managing your DBE activities?**

2. **Are you familiar with the persons responsible for administering the DBE program for your State DOT?**

3. **Are you aware of the supportive services available to assist DBEs in your area?**

4. **Are you familiar with capable DBEs in your normal subcontract solicitation geographic area?**

5. **Are you seeking to understand any problems DBEs will have in bidding or successfully completing contracts with you?**

C. GOOD FAITH EFFORTS

You must make good faith efforts to meet the DBE contract goal, either by meeting the goal or by documenting adequate good faith efforts to meet the goal. You should make sincere and aggressive efforts to meet the DBE contract goal. If you do not meet the DBE contract goal, then you must document your adequate good faith efforts to meet the goal.

- You should not be automatically denied the award of a contract for not meeting DBE contract goals. Your State DOT does not have a quota for DBEs on USDOT-assisted contracts.

- Attempting to obtain a contract on the basis of documented good faith efforts should be your last resort. In other words, you should make sincere, intensive and aggressive efforts to meet the DBE contract goal and should resort to a good faith efforts submission only if your efforts do not produce DBE participation meeting the contract goal. However, as detailed in Subsection E, on USDOT assisted contracts, you are not required to use a DBE if the DBE price is excessive or unreasonable when compared to a non-DBE quote or self performing the work. However, if you reject an excessive DBE quote you may be determined to have not made a good faith efforts submission.

- You should also not be required to use a DBE you believe does not have the capabilities to perform the work.

- If it is necessary for you to make a "good faith effort" submission, DOCUMENT every step taken to satisfy your State DOT's good faith effort requirements and meet the contract DBE goal.

- You must be able to demonstrate in writing that you complied with the good faith effort requirements. Keep in mind that if you do not meet the contract DBE goal, you will need to convince the State DOT that it is appropriate to award the contract to you on the basis of your documented good faith efforts. As a result, the efforts discussed in Subsection D below

must be documented in case it is necessary to make a good faith effort submission.

- You must thoroughly understand the listed examples or types of actions which your State DOT will consider as part of your good faith efforts to obtain DBE participation. Keep in mind also that your State DOT will likely not consider its list to be exclusive or exhaustive.

- The following is the list of the types of good faith efforts found in the 49 CFR § 26. These actions are considered as good faith efforts:

  a. 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. The bidder must solicit this interest within sufficient time to allow the DBEs to respond to the solicitation. The bidder must determine with certainty if the DBEs are interested by taking appropriate steps to follow up initial solicitations.

  b. Selecting portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goals will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate DBE participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces.

  c. Providing interested DBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist them in responding to a solicitation.

  d. Negotiating in good faith with interested DBEs. It is the bidder's responsibility to make a portion of the work available to DBE subcontractors and suppliers and to select those portions of the work or material needs consistent with the available DBE subcontractors and suppliers, so as to facilitate DBE participation. Evidence of such negotiation includes the names, addresses, and telephone numbers of DBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why additional agreements could not be reached for DBEs to perform the work.

  e. A bidder using good business judgment would consider a number of factors in negotiating with subcontractors, including DBE subcontractors, and would take a firm's price and capabilities as

well as contract goals into consideration. However, the fact that there may be some additional costs involved in finding and using DBEs is not in itself sufficient reason for a bidder's failure to meet the contract DBE goal, as long as such costs are reasonable. Also, the ability or desire of a prime contractor to perform the work of a contract with its own organization does not relieve the bidder of the responsibility to make good faith efforts. Prime contractors are not required to accept higher quotes from DBEs if the price difference is excessive or unreasonable, however, state DOT approval is necessary in determining "excessive price" for a good faith effort determination.

f. Not rejecting DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The contractor's standing within its industry, membership in specific groups, organizations, or associations and political or social affiliations (for example union vs. non-union employee status) are not legitimate causes for the rejection or non-solicitation of bids in the contractor's efforts to meet the project goal.

g. Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by your State DOT or contractor. Such efforts would include introducing the DBE to professionals in these fields.

h. Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services. (See section on assisting DBEs below).

i. 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.

D. SPECIFIC PROJECT PARTICIPATION

1. PRE-ESTIMATE ACTIONS

The Pre-Estimate involves specific actions that you should take prior to beginning an estimate for a specific project. These actions will help in achieving your State DOT's DBE contract goals, or help in making qualifying good faith efforts.

- Review project specifications and provisions to see if there are any DBE program modifications specific to this project.

- Review the contract documents for the DBE goal on this project
- Review the online certified DBE directory for the list of certified DBEs

2. DEVELOP A DBE PARTICIPATION PLAN

The second step in estimating and bidding should be to develop a DBE Participation Plan. This plan will help you achieve the DBE contract goals, or will help you in documenting that you made adequate good faith efforts to meet the contract goals.

- Formulate a project-specific DBE Participation Plan when you decide to bid a project requiring DBE participation. This plan should address the following:

  a. Review of the Project's Special Provision for DBE contract goals.

  b. Determine items which may be subcontracted and quantify based on estimated dollar amounts.

  c. Quantify "traditional" subcontracted items. Identify and quantify "new" potential subcontracting opportunities.

  d. When practical, divide large (scope or quantity) items into potential smaller subcontracting opportunities and quantify.

  e. If your State DOT permits DBE participation by second tier subcontracts look for second tier subcontracting opportunities and quantify.

  f. Quantify potential material supply contracting opportunities. Determine the allowable DBE participation for material supply, i.e. 100% for materials or supplies purchased from a DBE manufacturer, and 60% for materials or supplies purchased from a DBE regular dealer. See 49 CFR § 26.55(e), attached as Appendix A, for additional information. See also your State DOT DBE Special Provision, refer to Appendix B.

  g. Determine the likely total DBE participation from all of the above items and compare to your State DOT's DBE contract goals.

     1. If the likely participation well exceeds your State DOT's DBE contract goals, begin implementing your DBE Participation Plan.

2. If the likely participation does not well exceed the DBE contract goals, alternate or additional efforts are required:

   - Investigate the possibility of subcontracting to DBEs work you would traditionally self-perform.

   - DOCUMENT steps 1 – 6 and the reason(s) for the potential shortfall.

3. GOOD FAITH EFFORTS

Closely monitor the DBE Participation Plan throughout the estimate stage to ensure your ability to submit your most competitive bid that is in full compliance with your State DOT's DBE contract goals and/or your State DOT good faith efforts requirements.

1. Identify Good Faith Effort requirements (See Section C above).

2. Determine if this Project Special Provision has any additional good faith efforts it expects you to make.

3. Generally, for each project, if you document each of the actions listed in your State DOT DBE Special Provision, you should satisfy the good faith efforts requirement.

4. IMPLEMENT YOUR DBE PARTICIPATION PLAN

The next step is to implement your DBE Participation Plan. Even if obtaining the DBE participation is not a problem, the implementation of the DBE Participation Plan is a good approach to take for any bid. Implementing your plan provides a thorough and methodical approach to obtaining adequate DBE participation. This process, if documented, should demonstrate good faith efforts adequately.

- You should begin implementing your DBE Participation Plan at the start of the estimating process

- Solicit from your list of certified/capable DBEs (See Section B above). Obtain a current DBE directory listing of certified firms from your State DOT. Review certified DBEs listed on the UCP web site. See Section B above.

- Should you anticipate that your list of certified/capable DBEs may be inadequate due to the specific nature of the project, you should consider:

  a. Consider expanding your search for DBEs to outside of your normal work discipline or geographic solicitation area.

  b. Contact your State DOT DBE supportive services or business assistance entity to obtain the names of additional DBE firms.

  c. Contacting available minority/women community organizations, contractor groups and State, federal and local minority/women assistance offices.

  d. Use minority/women community organizations, contractor groups and State, federal and local minority/women assistance offices to recruit additional DBEs.

- When soliciting interest from DBEs, notify them in a timely fashion to allow time to prepare proper quotes.

  a. The written notice should include:

     1. Your name, address, telephone number, fax number and email address.

     2. The project location and description and if you would be willing to make a site inspection with the DBE.

     3. A place where subcontractors can review bidding documents.

     4. Your representative to contact.

     5. Direction to contact you by email or fax to let you know whether they will be bidding.

     6. The date and time by which you must receive sub-bids or quotes and the location to which they must be delivered.

  b. Use email or fax, as appropriate.

  c. List items for which you are particularly interested in receiving quotes. If necessary to meet the goal, identify the items that could be broken down into smaller quantities.

d. Consider enclosing a checklist for the DBEs to check off the type(s) of work they are capable/certified to do and are interested in quoting.

- Follow up the initial solicitation of interest by contacting the DBEs to determine with certainty whether or not they are interested. If possible, document the reason for a "no quote".

- Provide interested DBEs with needed information about the plans, specifications, estimated quantities, schedule and the contract requirements.

- Negotiate in good faith with interested DBEs, not rejecting DBEs as unqualified without reasons based on a thorough investigation of their capabilities. Recognize that FHWA and your State DOT expects prime contractors to negotiate a reasonable price with higher quoting DBEs rather than simply reject the quote. You are not required to accept an excessive or unreasonable quote. If you are unable to reach an agreement with a DBE on a reasonable price, or if you reject a DBE's quote and that causes you to be unable to meet the DBE goal, you should be able to explain the reasons why an agreement was not reached. The federal regulations give an example of what constitutes negotiating in good faith with interested DBEs as follows:

  "A bidder using good business judgment would consider a number of factors in negotiating with subcontractors, including DBE subcontractors, and would take a firm's price and capabilities as well as contract goals into consideration. However, the fact that there may be some additional costs involved in finding and using DBEs is not in itself sufficient reason for a bidder's failure to meet the contract DBE goal, as long as such costs are reasonable. Also, the ability or desire of a prime contractor to perform the work of a contract with its own organization does not relieve the bidder of the responsibility to make good faith efforts. *Prime contractors are not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.*" 49 CFR 26, Appendix A, § IV-D(2).

- To determine what constitutes an excessive or unreasonable quote the prime should:
  - Compare proposal to bids submitted by other subcontractors.
  - Prepare your own internal estimate of the cost of performing the work.
  - Compare the bid to prices for similar work performed on other recent contracts.

- Remember, determining adequate GFE is an after the fact decision by the State DOT. If the reason you were unable to meet the goal is based primarily on the DBEs bid being excessive but your overall bid is substantially less than the next low bidder and/or the engineer's estimate, it might not be considered adequate.
- Direct interested DBEs to where they may obtain information about bonding, lines of credit or insurance required by the contract.

- Make efforts to assist interested DBEs in locating sources for obtaining necessary equipment, supplies, materials or related assistance or services.

- In making efforts to assist DBEs in these areas, the following might be helpful hints:

  - This effort is not expected to involve obtaining such items for the DBE. It is intended for you to provide information on and possible referrals to the DBE of sources with whom you may have had a long term working relationship.

  - This referral service and assistance may include directing the DBE to the source of such items you are currently negotiating with on a project specific basis.

5. QUOTE DOCUMENTATION

Quote documentation concerns receiving and documenting a DBE's quote. If the DBE's quote is out-of-line with other quotes and/or your own estimate, you should contact the DBE to verify its quote is correct.

- After determining that a DBE is certified and capable, be ready to receive its quote. Confirm the following:

  a. Company name, contact person and telephone number.

  b. Full scope of work being quoted.

  c. Addenda acknowledgment.

  d. DBE status and evidence of certification.

  e. Schedule requirements if possible.

  f. Any exclusions or special conditions of the quotation.

  g. Bond rate.

h. Quote price.

1. Occasionally you may receive quotes from DBEs with whom you have no prior experience. In addition to the information discussed in this Subsection, the following should be reviewed:

   a) Verify that the DBE is certified.

   b) Investigate the DBE's capabilities to perform the work (See section D step 3 above).

   c) Is the quote in-line with others received?

2. When receiving quotes from DBEs that are, under the particular facts and circumstances, substantially lower than other quotes and/or your own estimate, you should:

   a) Advise the DBE that its quote is substantially lower than others received and ask the DBE to double check its estimate. Do not reveal by how much the DBE's quote is low.

   b) Go over the scope of work.

   c) Check/compare quantities.

   d) Ask whether the DBE has received material quotes for the work to be performed.

   e) Ask about the DBE's schedule.

   f) Any adjustment in the quotation by the DBE should be accepted only after you are thoroughly satisfied the DBE's revised quote is legitimate and correct.

3. DO NOT SHOP THE DBE's QUOTE.

4. If a DBE quotes multiple items, find out from the DBE if the quote is good for each individual item or if the DBE will insist on being awarded all items it quotes. It may be possible to negotiate the use of the DBE quote for only those items for which the DBE's pricing is reasonable and not use the quote for those items where the DBE's pricing is unreasonable. DO NOT USE PIECES OR PARTS OF A

QUOTATION WITHOUT OBTAINING PERMISSION FROM THE DBE IN WRITING.

5. DO NOT accept a DBE quote from any entity other than the DBE contractor that proposes to perform the work!

6. DOCUMENT THE REASONS FOR ANY REJECTED QUOTATION.

7. Include in subcontract language the full details of the scope of work that is to be performed by the DBE for the price quoted. Details such as loading and unloading materials, storage of equipment and materials, supervision and inspection of work and all other details should be written into the subcontract.

6. EXCLUSIVITY ARRANGEMENTS

The federal regulations do not explicitly prohibit a DBE from having an exclusive relationship with a general contractor. Instead the regulations state that the DBE firm's relationships with prime contractors should be examined to determine whether a pattern of exclusive or primary dealings with a prime contractor compromises the independence of the potential DBE firm.

An exclusivity arrangement involves the situation where a DBE agrees to perform work for only one entity. These arrangements may cause questions regarding the independence of the DBE and its eligibility to be certified. To be safe, prime contractors should avoid setting up an exclusivity arrangement with a DBE.

7. BID CLOSE-OUT

The process of bid close-out involves the use of a DBE summary sheet to know where you stand in the bid with respect to meeting the DBE contract goal. A sample DBE summary sheet is attached. Some State DOTs require specific DBE goal information to be submitted with the bid others do not. In either case, this process organizes your DBE quotations and makes the process more effective.

- If it would be helpful, use a DBE Summary Sheet to determine where you stand in the bid and what it will take to meet the DBE goal. See the example form DBE Summary Sheet on page ___. Instructions for using the DBE Summary Sheet are on page __.

- If the low quote is not from a DBE subcontractor/supplier and you have not yet met your goal, search for reasonable DBE quotes based on

different mixture of bid item and quantities. The DBE Summary Sheet is set up to help you do this. You should obtain the DBEs permission to alter the item quantities on its quote or to select only portions of its quote. Remember, on USDOT assisted contracts, you are not required to use excessive or unreasonable quotes and may document good faith efforts in lieu of fully meeting the contract DBE goal.

- Your State DOT will have requirements of documents to be submitted either with the bid or after the bid. Usually those documents include some form of "DBE Commitment Agreement" for each DBE you intend to use to satisfy the contract DBE goal.

- The award of USDOT-assisted contracts for which a contract goal has been established requires all bidders/offerors to submit:

  a. the names and addresses of DBE firms that will participate in the contract;
  b. a description of the work that each DBE will perform;
  c. the dollar amount of the participation of each DBE firm participating;
  d. written documentation of the bidder/offeror's commitment to use a DBE subcontractor whose participation it submits to meet a contract goal;
  e. written confirmation from the DBE that it is participating in the contract as provided in the prime contractor's commitment; and
  f. if the contract goal is not met, evidence of good faith efforts.

- Copy all information submitted including your State DOT's DBE Listing page.

8. ADMINISTRATIVE RECONSIDERATION OF INADEQUATE GOOD FAITH EFFORTS

You may have your bid administratively reconsidered if your bid is rejected due to inadequate good faith efforts. The administrative reconsideration must provide you with the features described below.

- Under 49 CFR § 26.53 (d) your State DOT is required to have a procedure for reconsideration of good faith efforts by an official not involved in the initial determination that you did not make adequate good faith efforts to meet the DBE goal.

- If you desire to pursue administrative reconsideration of a rejected bid, then you should timely follow the reconsideration procedure in your State DOT DBE Special Provision.

ESTIMATING AND BIDDING CHECKLIST

1. **Do you have your State DOT's current DBE directory or certification list?**

2. **Do you know what qualifies as good faith efforts for your State DOT? If so, what efforts are mandatory?**

3. **Do you know how your State DOT counts DBE participation for: (1) material supply; (2) trucking; (3) joint ventures; and (4) furnish and install subcontracts?**

5. **Have you developed a plan to identify and contact DBEs, including contacting your State DOT, State supportive services or business assistance office, minority contractor associations and any other DBE Assistance Organizations?**

6. **Have you followed-up your initial written contact with DBEs and documented your contacts?**

7. **Have you selected portions of work for DBEs that will likely increase their participation?**

8. **Have you negotiated in good faith with interested DBEs?**

9. **Have you determined that the DBEs you plan to use will be able to manage, supervise and perform their work?**

10. **Have you checked DBE quotes to see if the quotes are unreasonably low or unreasonably high?**

11. **Have you completed the items on the DBE Summary Sheet?**
(See pages 27 and 28.)

DBE INTERVIEWS

Company Name:	
Interview Date:	
Point of Contact:	

Annual Sales Last Year	
Credit Line with Vendors	
$ of Largest Job	
Desc work on Largest Job	
Preferred Work Type	
Turnkey Work?	
Avg # Employees	
# Field Supervisors	
Equipment	
Own or Lease	
Approx # Pcs	
Current # of Active Projects	
Geographical Preferences	
Familiar with your State DOT Bidding	
Familiar with your State DOT Construction	
Internet & Email	
Other	
Other	

DBE SUMMARY SHEET

CONTRACT DBE % GOAL: _____%

TOTAL DBE $ TO MEET THE GOAL: $_____

SUBCONTRACTOR	DESCRIPTION	DBE SUB QUOTES	ADD TO DBE	DBE TOTAL AMOUNT IN BID
PAGE TOTALS				

INSTRUCTIONS FOR DBE SUMMARY SHEET

a. Write in the contract DBE percentage goal.

b. Calculate the total dollar amount of DBE Participation that is needed to meet the contract DBE goals. This will change as your total bid amount changes.

c. List every DBE quote you receive.

   1. Company Name.

   2. Description of Work.

   3. Quoted Price.

d. If the DBE submits the low quote:

   1. Put quote amount into "DBE Total Amount In Bid" column.

   2. Write a zero in the "Add to DBE" column.

e. If the DBE's quote is <u>not</u> the low quote:

   1. Put a zero in the "DBE Total Amount In Bid" column.

   2. Put the difference between the low bidder's quote and the DBE's quote in the "Add To DBE" column. This difference may be factored into estimating the total bid amount.

E. BUILDING THE PROJECT

1. EXECUTING DBE SUBCONTRACTS

If they are not already aware:

- Call DBEs you intend to use as soon as possible after the bid opening and let them know you intend to use them.

- Advise DBEs which items you intend to subcontract to them.

a. Subcontract Language

- Include the following additional provisions in the subcontract. Review these provisions with the DBE. Advise the DBE you expect it to manage, supervise and perform the work in question with its own organization and resources.

  Subcontractor agrees to perform a "commercially useful function" as defined in 49 CFR § 26.55, in connection with the work covered by this subcontract. In doing so, subcontractor agrees that it will be responsible for and will actually perform, manage and supervise the work covered by this subcontract and agrees that it will not sub-subcontract a significantly greater portion of the work than would be expected on the basis of normal industry practices. Subcontractor certifies that it has adequate resources to perform the work covered by this subcontract. The subcontractor agrees to prepare and submit all sub-tier subcontracts and material contracts to the contractor for approval. The contractor reserves the right to review and reject any and all sub-subcontracts, equipment leases and/or use of other contractor's personnel entered into between subcontractor and third parties that do not conform or comply with the provisions of this section, the terms of the prime contract or the requirements of the owner. Neither the approval of nor the failure on the part of the contractor to reject such arrangements shall relieve the subcontractor of any of its obligations under this agreement. In the event it is determined that the subcontractor fails to perform a "commercially useful function," due in whole to the actions of the subcontractor, the contractor shall have the right to terminate the subcontract, without penalty or liability, and contractor may recover from subcontractor any damages contractor may suffer as a result of subcontractor's failure to perform a "commercially useful function."

- Make the DBE subcontract contingent on your State DOT's initial and continued approval of the commercially useful function to be performed by the subcontractor. As a result, insert the following provision in the subcontract:

Under the provisions of the prime contract, the contractor is required to meet the specified DBE participation. Subcontractor acknowledges that the dollar amount of the subcontract is being used by contractor to meet the specified goal and warrants that it is a certified DBE under the owner's DBE- program. Subcontractor further agrees contractor shall have the right to terminate the subcontract for default pursuant to the provisions of this Agreement, without penalty or liability, if subcontractor is decertified as a DBE, and/or if for any reason the owner refuses to count any portion of the subcontract towards meeting the DBE goal due in whole to the actions of the subcontractor. Contractor shall be entitled to recover any damages from the subcontractor it may suffer as a result of subcontractor's decertification, including any increased costs attributable to obtaining a replacement DBE acceptable to the owner to complete the subcontract work.

b. Bond

- Will the DBE provide a bond? If so, will it be for the entire project or will it be in stages?

- If a bond waiver becomes necessary and you approve, review your bond waiver form with the DBE, advising it that both the DBE and your State DOT must approve the bond waiver form. You should then obtain approval from your State DOT.

c. Contract Execution

- Make sure the DBE has copies of all pertinent documents.

- Complete the subcontract, with any necessary revisions or amendments.

- Submit the completed subcontract documents to the DBE for execution, and establish a date by which you expect to receive an executed subcontract back from the DBE.

d. Meeting DBE Goals Through Second or Multiple Tier Subcontracts

The prime contractor is ultimately responsible for the actions of its subcontractors and any DBE second or multiple tier subcontractors, such as truckers and suppliers.. You should therefore ensure that any subcontract between a subcontractor and DBE second tier subcontractor contains the provision below.

- Keep in mind that you, as the prime contractor, are responsible for the actions of your subcontractor and the DBE second or multiple tier subcontractor.

Make sure the subcontract includes the following provision and that the subcontractor meets its obligations:

Under the provisions of the prime contract, the contractor is required to meet the specified DBE participation. Subcontractor agrees, as part of its subcontract obligations, to provide $ _____ of the DBE participation through a sub-tier contract between subcontractor and _____ (Name), of _____ (Address), who subcontractor has verified as a currently certified DBE, under the owner's DBE- program. Subcontractor agrees to comply with all applicable laws, regulations, prime contract documents, and this Agreement concerning DBE participation on the project.

Subcontractor agrees to fully cooperate with the contractor and owner in every respect to assure that the DBE goals are met and that the DBE, performs a commercially useful function. Failure to provide the required participation in compliance with the applicable laws, regulations, prime contract documents, and this Agreement shall constitute failure to comply with the provisions of this Agreement as provided under Section ___ of this Agreement.

EXECUTING DBE CONTRACTS CHECKLIST

1. **Have you made a post-bid contact with all the DBEs you included in your submission to your State DOT?**

2. **Do the DBEs understand their obligation to perform a commercially useful function?**

3. **Have you included the appropriate provisions in your subcontract requiring that the DBE remain certified and perform a commercially useful function?**

4. **Have you made any of your DBE participation by second or multiple tier subcontracts? If so, have you obligated your subcontractor to ensure that the sub-tier DBE performs a commercially useful function?**

2. PAYMENT, MONITORING AND DOCUMENTATION PROCEDURES

Some DBE subcontractors and DBE material suppliers cannot secure a bond at a competitive rate. If a DBE cannot secure a bond and the DBE agrees to the use of joint checks for material payments, submit the appropriate requests to your State DOT for written approval. Each DBE subcontract or DBE material contract may need to include the lien waiver form. When beginning a project, include an administration plan for proper documentation and payment procedures involving unbonded DBE subcontractors and suppliers as you would with any unbonded subcontractor or supplier.

To avoid claims by suppliers, second-tier subcontractors or laborers, a monitoring and documentation procedure should be established to verify that the following items are received from the unbonded subcontractor after each partial payment estimate and before the next payment is made:

- Require the DBE subcontractor to timely submit a copy of its certified payroll.

- Require the unbonded subcontractor/supplier to provide written verification that payment has been made to all material suppliers and

second tier subcontractors for work or services for which the unbonded subcontractor has received payment on the past pay estimate.

- Prior to the end of each partial payment period, the unbonded subcontractor should provide a certified affidavit of names of all persons or entities that provided labor, services and/or materials on behalf of the unbonded subcontractor.

- The unbonded subcontractor should provide proof of payment of union benefits and IRS payroll taxes shortly after the period ends.

- If the unbonded subcontractor fails to provide this information, you should seek to satisfy yourselves.

Under 49 CFR § 26.29, your State DOT is required to establish a prompt payment contract clause to require you, as the prime contractor, to pay subcontractors for satisfactory performance of their contracts no later than 30 days from receipt of each payment made to you. The state's prompt pay requirement may be more stringent than that required by the USDOT. The prime contractor should include in its subcontracts the same prompt pay clause requiring compliance with prompt pay requirements.

The USDOT DBE regulations require prime contractors to make prompt payments to all DBE and non-DBE firms that are performing work on the contract. Make sure to identify and comply with any prompt payment clause in the contract.

Prompt payment clauses may include a contract clause providing that the prime contractor will not be reimbursed for work performed by subcontractors unless and until the prime contractor ensures that the subcontractors are promptly paid for the work they have satisfactorily performed.

The USDOT DBE regulations also require the prompt and full return of retainage payments from you, as the prime contractor, to the subcontractor no later than 30 days after the subcontractor's work is satisfactorily completed and accepted by the state DOT.

3. General Counting Rules

When a DBE participates in a contract, you may count only the value of the work actually performed by the DBE toward DBE goals. A DBE's participation is counted toward DBE goals only if the DBE is performing a "commercially useful function." [49 CFR § 26.55(c) and your State DOT DBE Special Provision] The FHWA has made clear that it is the prime contractor's primary responsibility to make sure DBEs are performing a commercially useful function.

There are five key areas for a commercially useful function. Those are management/supervision, labor, equipment, materials and performance of the work.

- Count the entire amount of that portion of a contract that is performed by the DBE's own forces (49 CFR § 26.55 (a)). Do not count the amount a DBE subcontracts to a non-DBE firm. Include the cost of supplies and materials obtained by the DBE for the work of the contract, including supplies purchased or equipment leased by the DBE. DO NOT, however, count supplies or equipment the DBE purchases or leases from you or your affiliates (49 CFR § 26.55 (a) (1)). *Note: Even though the regulations refer to supplies or equipment purchased or leased from you or your affiliates, FHWA interprets this provision as including materials.*

- Count the entire amount of fees or commissions charged by a DBE for providing a bona fide service, such as professional, technical, consulting or managerial services, or for providing bonds or insurance specifically required for performance of a USDOT assisted contract, provided that the fee is reasonable and not excessive as compared with fees customarily charged for similar services (49 CFR § 26.55 (a) (2)).

- Does your State DOT DBE Special Provision permit a DBE subcontractor to enter into second tier subcontracts? If so, keep in mind that work subcontracted to a non-DBE does not count towards DBE goals.

DBE Material Manufacturer/Regular Dealer/Broker

This section discusses expenditures with DBEs for materials or supplies and how those expenditures are counted toward DBE goals as long as the DBE assumes the actual and contractual responsibility for the provision of the materials. If materials or supplies are obtained from a DBE manufacturer, count 100% of the cost of the materials or supplies toward DBE goals. If the materials or supplies are purchased from a DBE regular dealer, count 60% of the cost of the materials or supplies toward DBE goals.

The following is an example that can possibly show the difference under the requirements of the DBE program between a manufacturer, a regular dealer, and if there is a normal industry practice, a broker. The example is the furnishing of crushed aggregate meeting State DOTs specification for such items as Aggregate Base Course.

A DBE as its principal business and under its name produces on its premises crushed aggregate by taking natural rock and crushing, washing and screening such rock excavated on its premises into the size and gradation meeting certain State standard specifications. Under this set of circumstances, the DBE can be considered a manufacturer and the cost of the crushed aggregate produced can be credited 100% towards meeting the goal.

If, however, the same DBE obtains the same product from another source that performed that noted above, the DBE maybe considered a regular dealer of the product if it purchased this product in his/her name, he/she engages as its principal business in the purchase and sale of crushed aggregate to the general public, and owns and operates the necessary distribution equipment (since aggregate is considered a bulk item) to deliver the crushed aggregate. Under these circumstances, the DBE can be considered a regular dealer and 60% of the cost of the crushed aggregate purchased is credited towards the goal.

If the DBE firm doesn't meet all or any of the functions presented in defining a regular dealer in crushed aggregate but arranges or expedites transactions consistent with industry practice in the delivery of such materials, then the DBE (broker) services in the amounts of fees or commissions charged in the procurement and/or delivery of such materials can be credited towards the goal.

- If materials or supplies are obtained from a DBE manufacturer, count 100% of the cost of the materials or supplies toward DBE goals. For purposes of this paragraph, a manufacturer is a firm that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications. See 49 CFR § 26.55(e)(i)&(ii) in Appendix A and your State DOT DBE Special Provision in Appendix B (you should attach a copy of your State DOT DBE Special Provision to Appendix B).

- If the materials or supplies are purchased from a DBE regular dealer, count 60 percent of the cost of the materials or supplies toward DBE goals. For purposes of this section, a regular dealer is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business. . . . Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not regular dealers. See 49 CFR § 26.55(e)(iii)&(iv) in Appendix A and your State DOT DBE Special Provision in Appendix B.

- With respect to materials or supplies purchased from a DBE which is neither a manufacturer nor a regular dealer, count the entire amount of fees or commissions charged for assistance in the procurement of the materials and supplies, or fees or transportation charges for the delivery of materials or supplies required on a job site, toward DBE goals, provided you determine the fees to be reasonable and not excessive as compared with fees customarily allowed for similar services. See 49 CFR § 26.55(e)(2) in Appendix A and your State DOT DBE Special Provision in Appendix B.

Trucking - Your State DOT will likely consider:

- DBE receives credit for the total value of the transportation services it provides on the contract using trucks it owns, insures, and operates using drivers it employs.

- DBE who leases trucks from another DBE receives credit for the total value of the transportation services the lessee DBE provides on the contract.

DBE who leases trucks from a non-DBE is entitled to credit for the total value of transportation services provided by non-DBE lessees not to exceed the value of transportation services provided by DBE-owned trucks on the contract.(Some states do not count the non-DBE leased trucks towards the DBE credit. Make sure to verify your state's rule on this.)

4. ESTABLISHING DBE PERFORMANCE OF A COMMERCIALLY USEFUL FUNCTION ("CUF")

To refresh yourself on what constitutes a CUF refer to Section B – Step 3.

You can be better assured that the DBE will perform a commercially useful function, if you do the following.

- ***DBE Plan for Performing Work***

If you have not already done so, determine how the DBE will perform the work including:

a. Supervision (both on-site and off site).

b. Equipment utilization.

c. Negotiation of cost, determination of quality and quantity, ordering, installation and payment for materials.

d. Manpower utilization schedule.

- ***Coordination of the Work***

a. You should provide the DBE with overall project schedule information and how their work is integrated.

b. The DBE should prepare their own schedule and submit to you for approval.

5. MONITORING DBE PERFORMANCE OF A COMMERCIALLY USEFUL FUNCTION

It is important to understand what the FHWA and your State DOT considers important in determining whether a DBE has performed a commercially useful function.

To determine whether a DBE is performing a commercially useful function, your State DOT will evaluate the amount of work subcontracted, industry practices, whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing and the DBE credit claimed for its performance of the work, and other relevant factors.

The FHWA has made clear that your State DOTs should review the following five categories to determine whether the DBE is performing a commercially useful function:

- Management and Supervision
- Labor
- Equipment
- Materials and Supplies
- DBE Trucking

a. ***Management and Supervision*** – Your State DOT will likely consider:

- Scheduling work.
- Ordering equipment, materials and supplies.
- Preparing and submitting payrolls.
- Hiring and firing employees.
- Daily supervision and control of the work by a DBE's regularly employed superintendent.

Management and Supervision "Red Flags" In a presentation on DBE fraud, the following red flags on management and supervision were identified:

- Mere Performance of Administrative Duties By DBE
- DBE Provides Little or No Supervision of Work
- DBE's Superintendent Is Not a Regular Employee
- Supervision Is Performed by Personnel Associated With the Prime Contractor or Any Other Firm or Business
- DBE Firm's Owner Is Not Aware of the Status of the Work or the Performance of the Business
- Inquiries by your State DOT or FHWA Are Answered by the Prime Contractor

b. ***Labor*** – Your State DOT will likely consider:

- Workforce must be under direct supervision of the DBE firm.
- Workforce should be normally employed by the DBE and not be normally employed by a non-DBE.
- DBE hires and fires employees.
- Workforce must actually be doing the work.

Labor "Red Flags" In a presentation on DBE fraud, the following red flags on labor were identified:

- Movement of Employees Between Contractors
- Employee Paid by DBE and Prime
- Employee Working for Prime in Morning and DBE in Afternoon
- Employees Don't Know Who They Work For When Asked
- Superintendent Or Foreman Don't Work For DBE Firm

c. ***Equipment*** – Your State DOT will likely consider:

- The DBE owns or leases the equipment and has a written lease agreement.

- Only equipment that is specialized and on the project for other purposes may be utilized by the DBE with an operator who remains on the prime contractor's payroll. Approval from your State DOT must be obtained first.

- No credit towards the DBE goal is counted when the prime contractor leases equipment to the DBE.

Equipment "Red Flags" In a presentation on DBE fraud, the following red flags on equipment were identified:

- Equipment Used by DBE Firm Belongs to the Prime Contractor or Another Contractor With No Formal Lease Agreement

- Equipment Signs and Markings Cover Another Owner's Identity, Usually Through the Use of Magnetic Signs

- A DBE Trucking Business Utilizes Trucks Owned by the Prime Contractor

d. ***Materials and Supplies installed by DBE Subcontractors*** - Your State DOT will likely consider:

- DBE subcontractors installing materials must negotiate the cost, determine quantity and quality, arrange delivery, install and pay for the materials and supplies it utilizes.

- Invoices must be sent to the DBE, <u>not</u> to the prime contractor.

- Payments by joint checks must be approved in advance by your State DOT.

Materials "Red Flags" In a presentation on DBE fraud, the following red flags on materials were identified:

- Materials for the DBE Ordered, or Paid For, by the Prime Contractor
- Two Party Checks From Prime to DBE Subcontractor and Supplier or Manufacturer
- Materials or Supplies Necessary for the DBE Firm's Performance Are Delivered To, Billed to or Paid by Another Business
- A DBE Contractor Only Purchases Materials While Performing Little or No Work

e. Trucking - Your State DOT will likely consider:

- DBE must be responsible for the management and supervision of the entire trucking operation.
- DBE must itself own and operate at least one fully licensed, insured, and operational truck used on the contract.
- DBE receives credit for the total value of the transportation services it provides on the contract using trucks it owns, insures, and operates with drivers it employs.
- DBE who leases trucks from another DBE receives credit for the total value of the transportations services the lessee DBE provides on the contract
- DBE who leases trucks from a non-DBE is entitled to credit for the total value of transportation services provided by the non-DBE lessees not to exceed the value of transportation services provided by DBE-owned trucks

6. ASSISTANCE TO DBEs

There may be instances that in an effort to help a DBE develop his capabilities that you want to assist a DBE in some manner such as renting him equipment, or renting him a foreman to help train his foreman, or assistance in estimating a project. In order for anything along these lines to be done they must be transparent to all interested parties. The best way of achieving this is to spell out these items in the subcontract agreement and ask your DOT for written approval. If you don't feel comfortable bringing it up to

your DOT it probably is advisable not to do it. DBEs that need various forms of assistance should be encouraged to work with the state supportive services program.

The special provisions of the subcontract or material contract should dictate what you are doing, what the subcontractor is doing and what, if any assistance you will give the DBE. The following items are usually examined by your State DOT to verify the DBE is performing a commercially useful function:

a. Unloading and/or Hoisting Assistance

- If the DBE subcontractor quoted its work excluding the unloading and hoisting of materials, then the contract provision should exclude it from the scope of work and the contract dollar amount should also exclude it. If the unloading and hoisting is to be done by the prime, this should be spelled out in the DBE's subcontract. If not specified in the subcontract, your State DOT should be advised in advance that you will be providing the unloading and hoisting services.

b. Assistance with Equipment

In general, the DBE subcontractor must provide the necessary equipment to perform its work. The equipment can be owned by the DBE or leased from outside sources. If leased, there should be a written lease agreement. In most cases:

- Do <u>not</u> loan or provide your equipment to the DBE subcontractor unless your State DOT is made aware and approves of it.

- In an emergency situation (such as where equipment malfunction or unavailability make negatively impact safety, material integrity, time factors, or other concerns) you may provide your equipment to a DBE subcontractor for a short duration but be expected not to receive credit towards the goal for the amount of equipment rental.

- If the fair rental value of the equipment temporarily provided to the DBE is to be deducted from DBE participation toward the goal.

c. Assistance Ordering Materials and Supplies

- Do not count toward DBE goals the cost of materials or supplies the DBE purchased from you or your affiliate.

- Do not deal directly with the material supplier on matters that are the DBE's responsibility. For example, do not schedule, order or arrange delivery of materials for the DBE.

- The more material-intensive the DBE subcontract is, the more likely FHWA or your State DOT will carefully scrutinize the DBE's handling of the material supply portion of the subcontract.

d. Providing Early Payment or Cash Flow Assistance

Most small subcontractors and suppliers, including DBEs, run tight operations from a capital and cash flow standpoint. A DBE may have problems making budget, paying creditors and/or making payroll. Depending on the circumstances, it may be necessary to provide some financial assistance that is not in-line with the payment provisions of the subcontract. Should that happen:

- Approval from your State DOT is necessary.

- Special procedures to follow must be set up and can be worked out without sacrificing the CUF or the independence of your DBE subcontractor.

e. Mentor-Protégé Program

Within the context of the DBE Mentor-Protégé program, a mentor is typically defined as an experienced contractor acting in a position of trust whereby the contractor provides guidance, counseling and training to a DBE Protégé needing assistance in successfully pursuing highway construction work. The DBE Protégé is a firm that needs a Mentor to develop or expand the Protégé's expertise and experience.

The Mentor-Protégé program may provide incentives to you and the DBE with the goal of assisting the DBE to successfully enter the free enterprise system. The further development of DBEs includes, but is not limited to, assisting them to move into non-traditional areas of work and/or compete in the marketplace outside the DBE program, via the provision of training and assistance from you.

Types of assistance you may provide to a protégé DBE include:

- Financial Counseling
- Management Advisement
- Capital Formation
- Technical Assistance
- Record Keeping

To participate in a Mentor-Protégé program, you must obtain your State DOT's approval. Your State DOT will provide you with details of its Mentor-Protégé program. The details should include descriptions of the types of assistance you may provide to your DBE Protégé, program requirements and parameters, and how your assistance may count toward contract goals.

Consistent with the USDOT Mentor-Protégé program guidelines, as found in 49 CFR § 26, *Appendix D*, which is attached as part of the Tool Kit's Appendix A, your State DOT's program will stipulate that :

1. Any mentor-protégé relationship shall be based on a written development plan, approved by your State DOT, which clearly sets forth the objectives of the parties and their respective roles, the duration of the arrangement and the services and resources to be provided by the mentor to the protégé. The formal mentor-protégé agreement may set a fee schedule to cover the direct and indirect cost for such services rendered by the mentor for specific training and assistance to the protégé through the life of the agreement. Services provided by the mentor may be reimbursable under the FTA, FHWA, and FAA programs.

2. To be eligible for reimbursement, the mentor's services provided and associated costs must be directly attributable and properly allowable to specific individual contracts. Your State DOT may establish a line item for the mentor to quote the portion of the fee schedule expected to be provided during the life of the contract. The amount claimed shall be verified by your State DOT and paid on an incremental basis representing the time the protégé is working on the contract. The total individual contract figures accumulated over the life of the agreement shall not exceed the amount stipulated in the original mentor/protégé agreement.

DBEs involved in a mentor-protégé agreement must be independent business entities which meet the requirements for certification as defined in subpart D of this part. A protégé firm must be certified before it begins participation in a mentor-protégé arrangement. If your State DOT chooses to recognize mentor/protégé agreements, it should establish formal general program guidelines.

These guidelines must be submitted to the operating administration for approval prior to your State DOT executing an individual contractor/ subcontractor mentor-protégé agreement.

The USDOT limits awarding DBE credit to a non-DBE mentor firm for using its own protégé firm for:

- more than one half of its goal on any contract let by your State DOT; and
- more than every other contract performed by the protégé firm.

However, some State DOTs have sought USDOT waivers of these limitations.

It is important that you look to your State DOT for guidance, requirements and details concerning its Mentor-Protégé program.

7. CHANGE ORDERS AND DBE CONTRACT GOALS

Change orders have a much different connotation and affect on the project if DOT bid the contract as a "unit price" or as a "lump sum" contract. For purposes of this tool kit the following considerations are directed towards "unit bid" contracts. A change order is a written order detailing changes to the specified work quantities or increase or modification in the contract due to such changes as additional work beyond the original contract. Some of the factors that might be considered in the application of the DBE program requirements to extra or additional work are: the nature and scope of the additional work, the degree of completion of the contract, the availability of DBEs to perform the additional work and the prime contractor's existing contractual commitments If your state DOT should broadly use change orders to cover formal modifications such as administrative changes for revisions to and clarification of contract requirements, changes in contract time, final quantity determinations, etc., such changes may not involve apply the DBE requirements from the original contract. Some of the examples on applying the DBE program requirements to contract changes are:

- If a change order involves items of work already included in a DBE's subcontract or the work is materially the same as the work included in the DBE's subcontract, the DBE is to have the opportunity to perform the work unless it is documented that the DBE is unable or unwilling to perform the work.

- Likewise, if a change order involves items of work already included in a non-DBE's subcontract or the work is materially the same as the work included in the non-DBE's subcontract, the non-DBE should be given the opportunity to perform the work.

- If the change order involves extra or additional work outside the scope of the original contract and involves items of work not covered in the original contract, the prime contractor is to exercise GFEs in taking all necessary and reasonable steps to meet the DBE program contract requirements.

8. EMERGENCY PERFORMANCE OF DBE WORK

A number of situations could necessitate the emergency performance of your DBE subcontractor's work. If you must use your equipment and personnel to perform part of the DBE subcontractor's work, in most cases you should follow these procedures:

- Notify your State DOT and inform it that the emergency work will be or was performed with your equipment and forces and that you will deduct an appropriate amount from the DBEs participation toward the goal.

- Document the work performed and itemize the total direct cost of equipment, labor, supplies, etc.

- Prepare a change order to reduce the DBE subcontractor's scope of work and contract dollar amount.

- Meet with the DBE subcontractor and develop procedures to eliminate the necessity for other emergency performance of work.

- Exercise good faith efforts to get additional DBE participation if there is a shortfall.

- The performance of work under these circumstances should not be routine but the exception to normal operations.

Remember documentation must be accurate and complete so that the proper reduction is made to the DBE subcontractor's scope of work and dollar amount of contract. If possible get your State DOT's approval in advance. If that is not possible notify a representative of your State DOT that you plan to perform some of the DBE's work.

9. TERMINATION OF DBE CONTRACTOR

Termination of a DBE subcontractor is not an easy process. Consider doing so only as a last resort.

- Make sure and comply with any provisions in your subcontract including any notice provisions.

- Inform your State DOT if you become concerned with a DBE subcontractor's lack of performance or declining performance.

- Use a "Show Cause" Notice Letter if necessary, sending copies to your State DOT and the DBE subcontractor's surety company.

- Document the DBE's efforts or lack of efforts to comply with the 5-Day "Show Cause" Notice Letter.

- Your State DOT DBE Special Provision likely requires that prior to terminating or removing a DBE subcontractor named in your DBE commitment, you must demonstrate to the satisfaction of your State DOT that the DBE was not able or willing to perform.

- You must obtain State DOT approval prior to any termination of a DBE.

10. REPLACEMENT OF DBE

Following the termination of, or refusal to perform by, a DBE subcontractor or supplier, it may be necessary to replace the contract DBE with one or more new DBEs.

- Under 49 CFR § 26.53(f)(2), your State DOT is required to have in its DBE Special Provision that when a DBE subcontractor is terminated, or fails to complete its work on the contract for any reason, you must make good faith efforts to find another DBE subcontractor to substitute for the original DBE. These good faith efforts shall be directed at finding another DBE to perform at least the same amount of work under the contract as the DBE that was terminated, *to the extent needed* to meet the DBE contract goal.

- Since you are only required to replace a DBE to the extent needed to meet the contract DBE goal, thoroughly project your final DBE contract participation. This projection will indicate whether you have requirements to replace part or all of the lost DBE contract volume.

- If you will not have sufficient DBE participation to meet the contract DBE goal, meet with your State DOT to discuss the matter. Your State DOT may insist that you seek DBE participation of other work or may only require that you make good faith efforts to find a DBE subcontractor or supplier to complete the work remaining from the terminated contract.

11. FINAL DOCUMENTATION AND CERTIFICATION

Likely, your State DOT DBE Special Provision requires a final contract report or documentation of your DBE participation and likely requires managers or corporate officials to sign and certify the final contract DBE participation report. This certification must be accurate to avoid being accused of a false claim or a false statement.

Make sure you:

- Perform a final audit of DBE participation.
- Check the final audit.
- Be conservative in the totals of DBE participation.

BUILDING THE WORK / REQUIREMENTS TO COUNT DBE PARTICIPATION TOWARDS THE DBE GOALS CHECKLIST

1. **Have you established monitoring and documentation procedures for your unbonded subcontractors and suppliers?**

2. **Have you identified and complied with any prompt payment clause in the contract?**

3. **To ensure your DBEs perform a commercially useful function, have you:**

   a. **Obtained a Work Plan?**

   b. **Included DBEs in your weekly scheduling meetings?**

   c. **Obtained a schedule from your DBE?**

4. **Are you monitoring your DBEs' performance to make sure they are performing, managing and supervising the work?**

5. **Regarding management and supervision, are your DBEs:**

   a. **Scheduling, their work?**

   b. **Negotiating the price, determining quantity and quality, arranging for delivery, installing and paying for materials they install?**

   c. **Preparing and submitting payroll?**

   d. **Hiring and firing their own employees?**

   e. **Controlling the day-to-day work by their crews?**

6. **Regarding labor:**

   a. **Are crews under the direct supervision of the DBE foreman/superintendent?**

   b. **Are they normally employed by the DBE rather than being normally employed by a non-DBE?**

7. **Regarding equipment:**

   a. **Does the DBE own or does it have a written lease for the equipment?**

   b. **Is any equipment belonging to you or another non-DBE firm being utilized by the DBE? If so, is it a specialized piece of equipment that was on the job anyway, and has your State DOT given prior approval?**

8. **Regarding materials and supplies:**

   a. **Has the DBE negotiated the price?**

   b. **Has the DBE taken care of shop drawings?**

   c. **Has the DBE arranged for delivery and received the materials?**

   d. **Has the DBE installed the materials on this job?**

   e. **Has the DBE paid for the materials directly?**

   f. **Have you used joint checks to pay for materials? If so, did you obtain your State DOT approval first?**

APPENDIX

CONTENTS

	TAB
USDOT REGULATIONS – PARTICIPATION BY DBEs IN USDOT FINANCIAL ASSISTANCE PROGRAMS (49 CFR § 26)	A
Your State DOT DBE Special Provision	B
USDOT GUIDANCE CONCERNING GOOD FAITH EFFORTS	C
Your State DOT GUIDANCE CONCERNING GOOD FAITH EFFORTS	D
USDOT GUIDANCE ON COMMERCIALLY USEFUL FUNCTION	E
Your State DOT GUIDANCE ON COMMERCIALLY USEFUL FUNCTION	F

Testimony of Dennis Kim
President, EVS, Inc.

before the

House Transportation and Infrastructure Committee
"The Department of Transportation's Disadvantaged Business Enterprise Programs"

March 26, 2009

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My name is Dennis Kim and I am the president of EVS, Inc., an engineering consulting company in Eden Prairie, Minnesota. I immigrated to the United States in 1969 from South Korea. I joined the company in 1980 and took over the ownership in 1982 and currently have more than 20 employees. The focus of my company is civil and environmental engineering.

For the first 10 years of my life in the United States, I continued my education at the University of Minnesota and worked as an engineer with the State of Nebraska. Despite all of this American education, Caucasian professionals who I see at work meetings regularly ask me where I learned to speak English and are surprised that I speak it as well as I do. I have heard many comments about my English. Then they ask me if I am a U.S. citizen. A number of Caucasian people also express surprise when I mention that my son is studying political science instead of engineering. It seems that it is expected that Asians are supposed to study only mathematics or engineering.

I joined EVS, a four-person engineering company in Minneapolis, Minnesota with the dream of becoming a successful businessman. In 1982, I took over the company when the founder moved out of town. One of the ways in which I decided to grow my company was to get involved in government contracting. I first made this decision in 1984, when I obtained Disadvantaged Business Enterprise ("DBE") certification. It was a time consuming and painstaking process to prepare all the required paperwork. It was also difficult to put together acceptable applications when help was not easily available at that time. The DOT told me they had limited capacity and could not do much to help me.

Despite these difficulties, I am very proud to say that I now have 22 employees. Last year we had $2.5 million in revenue. I have been able to grow my business from just 4 employees in 1982 to now having 22 employees. I am very proud of what I have accomplished. In 1990 my company was a finalist for the American Society of Civil Engineers award for exemplary engineering work. A decision driving course I designed for Dakota County Technical College in 1998 is still used today to train police officers, fire fighters, commercial truck drivers and other law enforcement officials. The special pavement on the driving course that I designed can simulate winter driving conditions. Being able to drive in very harsh winter conditions is a crucial skill for anyone living in Minnesota, and especially for law enforcement officials who need to quickly respond to emergencies. I'm honored that I was able to play a role in helping the community in this way.

During lunch meetings with potential project partners, Caucasian engineers and consultants tell me that they are sure that I eat stinky Korean food at home. I have tried explaining to them that Korean food tastes good and smells different because it is cooked with ingredients that are not used in American food. They tell me that it still stinks. Now, I make sure that I don't bring Korean food to work. If I have it at home and have to see any colleagues soon after that, I make sure to brush my teeth, use mouthwash and drink milk in order to mask the smell of the Korean food as much as I can. I drink milk because I heard that it hides strong breath odors. I think this is outrageous. To me, Korean food doesn't smell any stronger than hamburgers and French fries. I'm deeply offended that I have felt forced to hide eating my Korean food.

The examples about food that I just described are only one example of the discrimination people have shown towards me because of my race. However, I do recognize that the United States has made a lot of progress and I'm very grateful for that. But there is still a lot of work to be done.

In 1998, I first learned of a subcontracting opportunity with a large engineering company in Minnesota. This company was competing for a contract with the Minnesota Department of Transportation. Our share of the contract was more than $150,000 for 2 phases of the contract. I believe that the total contract amount for the large engineering company was more than one million dollars. EVS had been chosen by this company because we had approached them about this project and there was a requirement of DBE participation.

The project was delayed over a year because the scope of the project has been expanded greatly after the first contract was awarded. There had been a number of issues with the project including expanded scope of work, delay of the work and engineering problems. In the middle of the project, the DOT expanded the scope of the project. Figuring out how the large engineering company and my company were going to accommodate this expansion took significant time. Another reason for the delay was a change in the project management team at the large engineering company and at the DOT – the new people on the project management team had to take a lot of time to become familiar with the project. None of these problems were the fault of my company or me. In fact, during the period of delay, I frequently tried to reach the large engineering company to learn what was going on and I was repeatedly put off and was never given any real information.

Finally, more than a year later, the engineering company and the Minnesota DOT summoned me for a meeting to discuss the project. When I walked into the room, there were 3 people from the engineering company and DOT – all male Caucasians. It was quickly obvious to me that they had already discussed and decided the fate of the project, including my role as a subcontractor. I knew that they already had met earlier because they were on agreement on every issue related to EVS. They told me that the problem was entirely my fault and I was wholly responsible for it. They told me that they were kicking me off the project, and since the problem was my fault they would only pay me a fraction of the money I earned on the project thus far. I felt that their reason for unfairly targeting me in this way is that I am Asian American. Had I been Caucasian they would not have done this to me. They kicked me off the project and replaced me with a Caucasian subcontractor.

I did not complain to anyone about this because I was afraid of retaliation and being labeled as an Asian whiner. I regularly heard Caucasian engineers and contractors complain about DBEs who they thought were complaining for no reason.

When the engineering company and the DOT kicked me off the project, I did not realize then that I had been blacklisted. I came to know this later on when I tried to compete for other projects. The reason for my rejection was consistently that this large engineering company and the Minnesota DOT staff gave me a bad reference and recommended against working with me. Again, I really believe this was because I am Asian American. I was an easy target, as a minority, to be bad mouthed by this large white prime contractor. Since then, I have never been able to procure a DOT contract in the same district where this issue had occurred.

I would welcome the opportunity to do more work with the DOT – in particular I am excited to work on wind energy projects. It's the new frontier and my firm is poised to do really well in this area.

My experience with discrimination has demonstrated to me how important the DOT DBE program is. While in the situation I described, the project goals were clearly not sufficient incentive to keep the large engineering company from discriminating, I do believe that in many other cases the program works. Without it, qualified minority business owners like me would have even less of a chance at getting DOT contracts.

Recently, since federal stimulus dollars have become available, I have contacted the Minnesota DOT about new projects. I have noticed that they have become much more user-friendly and I hope this will continue.

Moving forward, I recommend that all federal and state agencies be more proactive in thinking about small businesses, including DBEs. Instead of always forcing small businesses to compete against large companies, there should be a more even playing field. This can be accomplished by unbundling larger contracts or even having particular contracts that are only open for bids from small businesses. Competition among peers is fair, and of course competition in general is always a good thing. Forcing us to always compete against the big guys means we will almost never get a prime contract. Small businesses want to be a player on their own, but we need experience in managing projects on our own and not always under someone else's umbrella.

This is important because in addition to having the right skills, business is heavily relationship-oriented. When small businesses are always a subcontractor, even on small projects, we don't have the opportunity to build relationships with the key decision makers. Interaction and relationship-building with the key decision makers will help small businesses become prime contractors and grow their business. When the pool of qualified prime contractors increases, the effect is that competition increases – and in business, that is always a good thing.

I really hope that my story will motivate you to not only reauthorize the DBE program but to improve it.

Thank you.

The Statement of Don T. O'Bannon, Esq. Chairman of the Airport Minority Advisory Council (AMAC)

Before the Committee on Transportation and Infrastructure Of the United States House of Representatives

James L. Oberstar, Chairman

At the hearing on:

The Department of Transportation's Disadvantaged Business Enterprise Program

Thursday, March 26, 2009
11 O'Clock am

Statement of the
Airport Minority Advisory Council (AMAC)
for the Hearing on the Department of Transportation's Disadvantaged Business Enterprise Program
March 26, 2009
Before the U.S. House Committee on Transportation and Infrastructure.

Mr. Chairman and Members of the Committee, my name is Don O'Bannon. I am the Chair of the Airport Minority Advisory Council ("AMAC"). I am submitting this statement on the Federal Aviation Administration's (FAA) Disadvantaged Business Enterprise (DBE) program and the Airport Concessions Disadvantaged Business Enterprise (ACDBE) Program. AMAC appreciates this opportunity and we thank you for your consideration of our views.

I. Introduction

AMAC is the only national, non-profit organization dedicated to fostering the full and fair participation of minority- and women-owned businesses in airport contracting and concessions, and the inclusion of minorities and women in employment within the airport industry. One of AMAC's most important objectives is to eliminate the discrimination minority- and women-owned businesses continue to face in the airport contracting and concessions businesses. We also aim to raise awareness regarding the important economic benefits these businesses bring to the airports and communities in which they operate. Combined with its affiliate (the AMAC Educational Scholarship Program), AMAC represents thousands of individuals across the airport industry spectrum—including minority and women business owners, corporations, airport operators, and government officials. Dallas/Fort Worth International Airport, where I work, is particularly proud of the growth of our local DBE concession entrepreneurs.

Many of the successful prime concessionaires for DFW's new terminal D started as minority joint venture partners under the DBE program and were awarded several concession packages. The DBE partners' growth and success is a direct result of not only their individual business acumen but also the ACDBE joint venture program at DFW airport.

As this Committee is aware, racial and gender discrimination continue to represent a serious problem in our nation. Unfortunately, in my role as AMAC Chairman and through my experience in the airport industry, I routinely see the impact of discrimination against minority- and women-owned businesses in all aspects of airport contracting and concessions programs. Minority and women business owners have faced discrimination in contracting, credit, bonding, insurance, the purchase of supplies, and in their daily interactions with colleagues. As a result, robust airport contracting and airport concessions disadvantaged business enterprise programs (collectively, "airport DBE programs") continue to play a critical role in the effort to remedy discrimination in these arenas. My testimony will detail the impact of discrimination on DBE contracting and concession businesses and will address certain governmental policies that AMAC believes should be adopted as part of the FAA Reauthorization.

II. The Airport Disadvantaged Business Enterprise Program

The Airport Improvement Program includes codified small disadvantaged business programs to address airport contracting (49 CFR Part 26) and airport concessions (49 CFR Part 23).[1] With the exception of certain DOT rules that apply only

[1] DOT and FAA have joint responsibility for the airport DBE program. FAA's Office of Civil Rights has primary oversight responsibility for the program and for airport compliance. DOT has primary

to airport concessions, the airport DBE program regulations are synonymous to those that apply to federally-assisted surface transportation programs (e.g., the rules regarding goal setting or eligibility). The program is intended to ensure nondiscrimination in the award and administration of DOT-assisted contracts that address the needs of airports. It aims to remedy the long history of pervasive and continuing discrimination that studies show minorities and women still encounter in today's airport-related industries, and to ensure a level playing field on which they can compete for DOT-assisted contracts.

For these programs, Congress has established a national aspirational goal that 10% of FAA's federally assisted contracting (i.e., procurement, construction, or professional services contracts) is with firms certified as DBEs and that 10% of airport concessions are ACDBEs. Quotas are not permitted under the program and the goal is flexible, requiring only good faith efforts to comply. There are no penalties for failure to meet the 10% goal. All primary airports are required to develop and implement an FAA-approved DBE program plan with overall participation goals for their concessions and contracting. A firm (and its minority and women owners) seeking certification as a DBE must meet requirements with respect to (1) ownership and control, (2) personal net worth, and (3) size.

. The airport DBE programs were rewritten entirely in light of the Supreme Court's ruling in Adarand v. Pena[2] in order to ensure that the DBE program could meet strict constitutional scrutiny. The constitutionality of the DBE program has been upheld against facial challenges by every circuit court that has evaluated it.

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responsibility for developing rules and guidelines for the national DBE program and for considering appeals from state or local certification decisions.

[2] 515 U.S. 200 (1995).

III. Economic Benefits of Minority-Owned Businesses in Airports

Mr. Chairman, the firms that participate in the airport DBE programs are a particularly meaningful source of economic activity in the airport and broader community. In addition to providing important products and services to airports and the traveling public, the airport DBE program promotes entrepreneurship, employment, and economic growth.

For example, the University of North Texas recently conducted a revealing and illustrative study of the Dallas/Ft. Worth International Airport's (DFW) Airport's Disadvantaged, Minority- and Women-Owned Business Enterprise (DMWBE) Program.[3] For the period of September 29, 2006 through August 30, 2008, the study found that DMWBE concessionaires produced more than $350 million in gross revenue and DMWBE firms provided over $280 million in contracting services and procurement.[4] Regionally, DMWBE spending and concession operations generated an astounding $1.2 billion in economic activity—creating over 14,000 job years of employment and increasing labor income by more than $450 million.[5] The positive economic contribution of airport DBE firms is an untold story that should be documented and celebrated.

IV. Discrimination Continues to be a Problem in the DBE Industry

While the airport DBE contracting and concessions programs have started to address inequalities faced by minority- and women-owned firms, discrimination continues in the airport industry. There is abundant and compelling evidence demonstrating that there is an ongoing and urgent need for these programs to address

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[3] Terry L. Clower, Bernard L. Weinstein, Michael Seman, and Mehmet Adalar, Center for Economic Development and Research—University of North Texas, DFW International Airport's Disadvantaged, Minority- and Women-owned Business Enterprise Program: Detailed Findings and Updates (Feb. 2009).
[4] *Id.* at i-ii.
[5] *Id.*

current discrimination and the effects of past discrimination against minority- and women-owned firms.

In testimony before and statements submitted to Congress over the past six months,[6] AMAC has submitted twenty disparity studies.[7] Through detailed statistical and anecdotal evidence, these studies demonstrate the astounding pervasiveness of discrimination against women and minorities in the aviation industry, as well as every industry sector (e.g. professional services, heavy construction, etc.) with which airports

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[6] *FAA Reauthorization: Hearing Before the Subcomm. on Aviation of the H. Comm. on Transportation and Infrastructure,* 111th Cong. (Feb. 2009) (statement of Gene Roth, Executive Director of the Airport Minority Advisory Council); *Infrastructure Investment: Ensuring an Effective Economic Recovery Package Before H. Comm. on Transportation and Infrastructure*, 111th Cong. (Jan. 2009) (statement of Gene Roth, Executive Director of the Airport Minority Advisory Council); *Hearing Before the Subcomm. on Information Policy, Census and National Archives of the H. Comm. on Oversight and Gov't Reform*, 110th Cong. (Sept. 2008) (statement of Anthony Brown, Chairman of the Government Affairs Committee, Airport Minority Advisory Council); and *Business Start Up Hurdles in Under-Served Communities: Hearing Before S. Comm. on Small Bus. and Entrepreneurship*, 110th Cong. (Sept. 2008) (statement of Don O'Bannon, Chairman, Airport Minority Advisory Council).

[7] *Race, Sex and Business Enterprise: Evidence from Memphis, Tennessee*, Prepared for the Memphis-Shelby County Airport Authority, NERA Economic Consulting, December 18, 2008; *Final Report: Alaska Disadvantaged Business Enterprise Study—Availability and Disparity*, D. Wilson Consulting Group, LLC, June 6, 2008; *Race, Sex, and Business Enterprise: Evidence from the City of Austin: Final Report Prepared for the City of Austin, Texas*, NERA Economic Consulting, May 15, 2008; *Final Report for Development and Revision of Small, Minority and Women Business Enterprise Program, Nashville International Airport (BNA)*, Griffin and Strong, PC, September 19, 2007; *Disadvantaged Business Enterprise Availability Study*, prepared for the Maryland Department of Transportation, NERA, separate studies for: Maryland Aviation Administration, Maryland Transit Administration, and State Highway Administration, November 2, 2006; *Anecdotal Evidence of Race and Sex Disparities in the Washington State Department of Transportation's Contracting Market Place*, Colette Holt & Associates, July 2006; *Race, Sex and Business Enterprise: Evidence from Denver, CO*, NERA Economic Consulting, May 5, 2006; *Race, Sex and Business Enterprise: Evidence from the State of Maryland*, NERA Economic Consulting, March 8, 2006; *Race, Sex and Business Enterprise: Evidence from the State of Washington*, Prepared for Washington State Department of Transportation, NERA, October 20, 2005; *Race, Sex and Business Enterprise: Evidence from the State of Minnesota*, NERA Economic Consulting and Colette Holt and Associates, September 27, 2005; *State of New Jersey Disparity Study of Procurement of Professional Services, Other Services, Goods and Commodities*, MGT, June 13, 2005; *The City of Phoenix, Minority-Women-Owned and Small Business Enterprise Program Update Study*: Final Report, MGT of America, April 21, 2005; *Disadvantaged Business Enterprise Availability Study*, prepared for the Missouri Department of Transportation, NERA, November 26, 2004; *Disadvantaged Business Enterprise Availability Study*, prepared for the Illinois Department of Transportation, NERA, August 16, 2004; *North Carolina Department of Transportation Second* Generation Disparity Study: Final Report, MGT of America, Inc., March 30, 2004; *Disparity Study for the Commonwealth of Kentucky*, Griffin and Strong, P.C., March 2003; *Broward County Small Disadvantaged Business Enterprise (SDBE) Disparity Study*, MGT of America, Inc., April 3, 2001; *The Utilization of Minority Business Enterprises by The State of Maryland*, NERA Economic Consulting, January 8, 2001; and *Dallas /Fort Worth International Airport Board Disparity Study Final Report*, MGT of America, October 17, 2000.

and other transportation agencies conduct business. These twenty studies represent every region of the country, including both urban and rural areas. In addition, these studies demonstrate that the discrimination faced by women and minority groups, including but not limited to African-Americans, Hispanic Americans, Asian Americans, Subcontinent Asian Americans, and Native Americans comes in a variety of different forms. Each of the studies provides significant quantitative evidence of discrimination against minority- and women-owned businesses dealing in the industries that are integral to airport contracting. With my testimony today, I have provided six of these studies and I ask that they be included in the record.[8]

In order to demonstrate the seriousness of this issue to the Committee, I would like to cite just a few of the myriad of examples of discrimination contained in these studies:

- In a disparity study of the Metro Nashville Airport Authority, researchers found that all minority- and women-owned firms were significantly underutilized in the private construction sector, with disparity indices of 0.003 and 0.28, respectively. In addition, Native American and Asian American construction firms were not utilized at all, despite being available.[9]
- In a study conducted on the State of New Jersey's FY 2000-2004 procurement practices, researchers found that, DBE vendor utilization in the category of professional services, as measured in terms of unique vendors, increased from

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[8] *Evidence from Denver, CO; Race, Sex and Business Enterprise: Evidence from the State of Maryland; The City of Phoenix, Minority- Women-Owned and Small Business Enterprise Program Update Study: Final Report; Broward County Small Disadvantaged Business Enterprise (SDBE) Disparity Study; Final Report for Development and Revision of Small, Minority and Women Business Enterprise Program, Nashville International Airport*; and *Dallas /Fort Worth International Airport Board Disparity Study Final Report.*

[9] *Final Report for Development and Revision of Small, Minority and Women Business Enterprise Program, Nashville International Airport (BNA)*, at 4-10.

0.62 percent during the pre-minority business program period to 1.10 percent in the period after the program was enacted. Researchers noted that "any shifts in underutilization can be characterized only within degrees of underutilization—more underutilized or less underutilized—but substantially underutilized in any case."[10]

- Studies have consistently found regression analysis demonstrates that minorities and women earn substantially and significantly less their white male counterparts. One disparity study noted that "such disparities are symptoms of discrimination in the labor force that, in addition to its direct effect on workers, reduce the future availability of DBEs by stifling opportunities for minorities and women to progress through precisely those internal labor markets and occupational hierarchies that are most likely to lead to entrepreneurial opportunities in the first place."[11]
- Research also indicates that there are statistically significant and large business formation disparities for minorities and women. A Minnesota study found that business formation for African-Americans is 53 percent to 63 percent lower than business formation for white males. The study further notes that "this suggests that minorities and women are substantially and significantly less likely to own their own businesses as the result of discrimination."[12]
- Studies have established widespread discrimination in the credit market. One study found that 40 percent of African Americans and 50 percent of Hispanic

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[10] *State of New Jersey Disparity Study of Procurement of Professional Services, Other Services, Goods and Commodities*, at ii-xi.
[11] *Evidence from the State of Washington*, at 28.
[12] *Race, Sex and Business Enterprise: Evidence from the State of Minnesota*, at 35-37.

Americans were denied for loans, in comparison to 7.8 percent of non-minority males. In addition, once loans were approved, most minorities and women paid a higher interest rate than white males.[13]

- One study found that DBE participation dropped to virtually zero on federally-assisted contracts during a time when the program was enjoined. Researchers stated that "it appears that the mere fact of adopting a DBE program—whether or not goals are being set on any given contract—increases DBE participation."[14]

While statistical analyses present compelling evidence of discrimination, they do not tell the entire story. We can much better understand the seriousness of these statistics from stories that are told by the businesses themselves. Many of the studies also present extensive anecdotal evidence of discrimination, which gives life to the statistics and makes clear how discrimination actually works and how it specifically impacts minority and women owned businesses at every stage of the process. These anecdotes are the stories of individuals who struggle with discrimination as they seek to build their businesses, support their families, and contribute to our national economy. Here are just a few examples:

- A white woman business owner has experienced degrading treatment from contractors. In one instance, a contractor refused to pay her and gave her the impression that his refusal to pay was because of her gender.[15]
- An Alaska Native construction specialty contractor discussed specific experiences during a walk-through of a potential job site. He reported that the prime

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[13] *Final Report for Development and Revision of Small, Minority and Women Business Enterprise Program, Nashville International Airport (BNA),* at 9-10.
[14] *Race, Sex and Business Enterprise: Evidence from the State of Minnesota*, at 17-18.
[15] *Final Report: Alaska Disadvantaged Business Enterprise Study—Availability and Disparity*, at 8-26.

contractor regularly said "the reason you're here is because you're a minority," and explicitly stated his opinion that minority businesses were not qualified. He also reported that during a project, his company's equipment was regularly turned on during the night, causing the batteries to die and the project to be delayed. No non-minority contractors experienced this problem.[16]

- A Hispanic contractor reported that a general contractor called him to express that he "did not want any Mexicans on the job," and that he has been called "'Wetback', 'brown like s**t,' 'dumb Mexican,' 'little Mexican,' [and] 'my little Mexican friend.'" [17]
- A white woman business owner reported that she encounters people who assume that she is a "front" for a male-owned business, or that she is not qualified until she dispels the notions by demonstrating her expertise. Men she encounters on particular jobs have asked her, "What are you doing here?" [18]
- An African American business man reported that people assume that he does not understand relatively simple matters related to his work. At one time, he was bidding a concrete job and the individual he was interacting with spoke to him very slowly, explaining that he wanted to make sure the African American business man understood. He was under the impression that this lack of confidence in his ability to understand was because of his race.[19]

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[16] *Final Report: Alaska Disadvantaged Business Enterprise Study—Availability and Disparity*, at 8-27 to 8-28.
[17] *City of Phoenix, Minority-, Women-Owned and Small Business Enterprise Program Update Study: Report*, at 6-26.
[18] *Final Report for Development and Revision of Small, Minority, and Women Business Enterprise Program, Nashville International Airport*, at 169-170.
[19] *Final Report for Development and Revision of Small, Minority, and Women Business Enterprise Program, Nashville International Airport*, at 171.

- An African American contractor said he has experienced prime contractors choosing to increase their workforce and equipment so that they can self-perform rather than hiring minority contractors.[20]
- A female engineer reported being dismissed as a serious professional. She has been asked by men in the transportation industry, "When are you going to stop taking this so seriously and get married?" and advised that she should behave as if she is gay if she wishes to work in the male-dominated field.[21]
- One minority contractor stated that he is treated unprofessionally by majority firms. At one presentation to a general contractor, the minority contractor was never offered a seat, and the general contractor joked and laughed about the fact that he believed he had a way of "getting around" the DBE ordinance and had already chosen another company to work with.[22]
- A minority contractor has experienced stigma associated with being a DBE and said that he encounters discrimination often. He has encountered the attitude that minorities are better-suited to be janitors or plumbers than architects. He perceives that his firm gets less credit than non-minority owned firms when projects are successful, and disproportionate criticism when projects are not successful.[23]

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[20] *North Carolina Department of Transportation Second Generation Disparity Study: Final Report*, at 6-24.
[21] *Anecdotal Evidence of Race and Sex Disparities in the Washington State Department of Transportation's Contracting Market Place*, at 4.
[22] *Race, Sex, and the Business Enterprise: Evidence from the City of Austin: Final Report*, at 231.
[23] *Race, Sex, and the Business Enterprise: Evidence from the City of Memphis: Final Report*, at 261.

These studies provide a strong statistical and anecdotal record of evidence of pervasive discrimination against minorities and women and demonstrate that there is a continuing need for the airport contracting and concessions DBE programs. AMAC strongly urges Congress to continue to investigate and document the continuing impact of discrimination against minority- and women-owned businesses in airport-related industries.

V. Program Improvements and Contained in H.R. 915

Mr. Chairman, we would like to thank you for addressing two issues related to the DBE program in H.R. 915. First, many DBE firms are small, family-owned operations that spend considerable resources to complete the DBE certification program. Although the airport DBE program is governed by a single set of federal regulations, certifying officials often interpret and apply these rules differently. Section 135 of the bill would greatly ameliorate this problem by directing DOT to establish a mandatory certification training program and requiring those involved persons who are responsible for DBE eligibility and certification to complete the training.

Second, Section 137 of H.R. 915 contains a provision which is strongly supported by AMAC and which addresses another aspect of DBE program eligibility, the personal net worth (PNW) cap contained in DOT regulations.[24] Under the regulations, in order to be regarded as economically disadvantaged for the purposes of DBE certification, the minority or woman owner(s) of the firm must have a PNW that does not exceed $750,000. The PNW cap is based on a standard used in a Small Business Administration (SBA) federal contracting program and has not been adjusted for inflation since it was

[24] 49 C.F.R. Part 23.35; 49 C.F.R. Part 26.67.

first adopted two decades ago. The PNW formula also does not take into account the realities of operating an airport contracting or concession business, which is generally more expensive than a typical storefront operation. Section 137, directs DOT to issue final regulations to initially adjust the PNW for the inflation that has occurred since 1989 and then to adjust the PNW for inflation each year thereafter. AMAC believes this provision is an excellent addition to H.R. 915 as well as a matter of economic common sense and fairness.

I also want to stress that AIP is an important source of funding for airport capital projects, especially for smaller airports that are less able to access private capital markets. AMAC strongly urges reauthorization of the AIP program at a funding level that allows the program to encourage and support critical airport infrastructure needs. In addition, the multiple short-term extensions that have been enacted over the last 18 months drastically limit the ability to plan and execute important airport infrastructure programs. As such, AMAC would like to urge Congress to act quickly to enact H.R. 915.

VII. Conclusion

Mr. Chairman, AMAC greatly appreciates the House Transportation and Infrastructure Committee's leadership on the important issues of diversity and inclusion in the airport industry. We thank you for this opportunity to provide testimony before the esteemed panel and for your consideration of our comments and suggestions. We look forward to working with the Committee going forward.

Testimony
Committee on Transportation and Infrastructure
United States House of Representatives
The Department of Transportation's
Disadvantaged Enterprise Program
March 26, 2009

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Chairman Oberstar, Congressman Mica, and Members of the Committee:
Thank you for the opportunity to appear here today. My name is Joann Payne and I am President of Women First National Legislative Committee. Women First National Legislative Committee is a nonpartisan, national grassroots advocacy group that aggressively promotes and protects the interests of women owned businesses certified in the United States Department of Transportation Disadvantaged Business Enterprise (DBE) Program.

Introduction

It has been seventeen years since I last testified before this Committee concerning the authorization of the Disadvantaged Business Enterprise (DBE) Program. I guess today should be headlined DBE the Sequel.

Mr. Chairman, I wish with all my heart I could look you straight in the eye and say to you that the Committee does not need to authorize the DBE Program but sadly I can not testify to that statement.

In 2001, Women First submitted an amicus brief to the Supreme Court in *Adarand Construction v. Mineta.* In the brief, it said, "they have experienced firsthand the detrimental effects of the discriminatory practices, which, to this day, continue to plague the construction industry. As a result of this discrimination, the ability of women owned businesses to compete for government contracts in the transportation related area has been severely hampered." [1]

And in 2009, those words are still true.

In 2004, during the Transportation Authorization process, Senator Max Baucus on behalf of Women First submitted for the record 15 letters from women-owned DBE firms from different states who had continued to face discrimination in the highway, airport and transit construction industry.

And in 2009, the words in those letters are still true today.

I am here to give voice to women-owned DBEs who continue to face discrimination on a daily basis.

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[1] Brief of Women First National Legislative Committee, et al, *Amici Curiae* In Support of Affirmance of the Tenth Circuit Court of Appeals.

In surveying DBE's across the country regarding discrimination they have faced, I was not surprised by the anecdotal evidence of discrimination that was sent to me as these women owned businesses continue to face a number of the same challenges they have been facing for years.

Said one DBE, "When I applied for my first business line of credit the bank's loan officer actually said, 'Couldn't you get a man to co-sign? Your husband perhaps?' It took me a moment to register this flagrant disregard for about a half-dozen federal laws and banking regulations, and this guy's casual admission that unlawful discrimination is his bank's routine and pervasive policy. Calming myself, I pointed out that having my husband co-sign would make little sense, since he had no involvement with my company or the construction industry, not to mention that my own personal credit score was better than his. The bank officer said, 'Still, we'd be a lot more comfortable with a man's name on the application.'"

Another DBE from Indiana told me that "I own my companies 100% but I still face discrimination. Some of it is merely insulting and annoying, such as when a project's resident engineer won't speak to me on the job site but directs all his comments to the (male) foreman standing two feet to my left. Other things though affect my bottom line and are not so easily dismissed."

A women-owned DBE from Illinois wrote, "My Company is twenty-three years old and I have been in highway construction since 1971, yet I still deal with discrimination on a regular basis."

Another woman who has been in business for over twenty years was applying for certification in her state with a different city agency. The person reviewing the certification was in the DBE's office and the reviewer looked up at her and said that "all white women were fronts."

A DBE from Michigan wrote that she is still asked after 25 years in business as a contractor, 'Who runs the Company?' 'Who should I call?' Her response is, "I run my Company and proud of it."

A DBE in Delaware wrote she had a disagreement with one of her prime contractors. The Prime kept calling her office, but always asking to talk with the male foreman rather than her. This went on for several months. The foreman kept telling the contractor he needed to talk to the boss. The prime contractor decided to take a different approach so he called the DBE's home phone and left a message—for her husband.

Her husband had nothing to do with the project. The contractor said in the message, again, left for her husband, that they needed to sit down and talk about this to get it straightened out, and "we don't have to have your wife involved." When this failed to get a meeting, the prime contractor had no other choice but to meet with the boss, the woman who owns the company, to resolve the issue and the first thing he said to her was, 'I am sorry this has taken so long but I don't like dealing with women."

Program Overview

The DBE Program is a competitive small business program that is an innovative goal setting economic development program that produces results year after year.
The program:

- Creates jobs—approximately 100,000 jobs are created by DBE companies annually;
- Serves as an engine of growth for our nation's economy;
- Establishes a tax base from women and minority owned businesses;
- Promotes competition in an industry where there was very little for years;
- Levels the playing field by opening access;
- Promotes diversity

The DBE Program has proven to be an equal opportunity program, which benefits all Americans by promoting the development and competitiveness of America's small businesses. In fact, the DBE Program is the most successful small business contracting program for women. For example, the DBE Program has significantly increased the percentage of women owned construction firms. Women DBE participation has increased from 1.6% in 1986 to over 6% in 2008.

The DBE Program shows the government's commitment to its citizens on the notion that we all can, must and should contribute when given the chance.

If the Program Does Not Continue

In representing women-owned DBEs for twenty three years, I have heard women discuss the problems they face in the construction industry with Members of Congress and the Administration. These women, everyday, have to face the assumption by others that they can not do the work and run their businesses. Women owned businesses still have problems obtaining loans and bonding and after years in business they still have to explain that they are the boss to men on the jobs who refuse to believe that a woman can be the boss.

If the DBE Program were not to continue, I believe not just women and minority owned companies will be severely affected, but small majority owned sub-contracting businesses will be affected as well.

The only small business program in the highway, airport and transit industries will disappear. There would be no reason for sub-contract work even to majority firms thus competition would be eliminated and prices will climb.

The trend of the industry the last several years has been the prime contractors are doing more of the work in-house. For example, a women-owned DBE in Minnesota told me that in her state, because of a court ordered injunction, the Minnesota's DOT DBE Program was suspended for approximately two years.
Prior to this injunction, the Minnesota DBEs participation rate was 11% during the injunction period, participation dropped to 2%.
Much of the DBE work was absorbed by large prime contractors rather than going to specialty contractors. Most majority prime contractors returned to the same "good old boy" policy of exclusion.

In 1998, Congress again looked at the DBE Program specifically in states that had dismantled affirmative action programs and left it up to the marketplace to determine who would get contracts.

For example, less than one year after the state of Michigan dropped its state M/WBE program, the percentage of highway construction projects fell to zero even though DBE's participation in the federal program was at 13%. [2]

In Idaho, for state funded contracts, the rate of M/WBE's participation held steady in 2004 from 6.17% to 2005 at 6.29% to 2006 at 6.20% and when Idaho went to a race-gender neutral program, the M/WBE participation rate in 2007 dropped to 3.96%.[3]

In California, a state of great diversity which ranks amongst the ten largest economies in the world, the California Department of Transportation (Caltrans) discontinued setting DBE goals on federally-funded contracts on May 1, 2006. Their disparity analysis, written in 2007, compares utilization of minority- and women-owned firms for federal funded contracts when DBE contract goals are in place to what happened when the program was discontinued in 2006.

From 2002 through April 2006, total utilization of certified DBEs on federally funded contracts was 9.0 %. Since 1998, Caltrans has implemented only race- and gender-neutral measures on state-funded contracts. State funded contracts during this same time period was 6.7% for M/WBE companies.

After May 2006, when California discontinued setting DBE goals, certified DBE's participation in federally funded contracts was 4.9%, with WBEs participation at only .1%. Furthermore, the report went on to state that after May 2006, "Utilization of certified DBEs substantially decreased."[4]

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[2] S1409, S1404 Statements by Senators Kerry and Baucus
[3] Idaho Department of Transportation
[4] Availability and Disparity Study California Department of Transportation, June 2007

It is very clear from the chart below that there is a great discrepancy between the participation of women and minority owned businesses in the federal DBE program and the state funded program. Most states do not have an affirmative action highway, transit, and airport contracting programs. Those states that do have contracting programs, they are usually for all small businesses and do not require specific goals on contracts.

Past history and present DBE participation percentages on state funded projects reflect what will happen if the DBE programs do not continue. I believe within two years the participation of women and minority owned businesses will drop nationally to approximately 2% based on past history and present reality.

2007, 2008 Federal DBE Participation[5]
2007, 2008 State Funded M/WBE Participation[6]

STATE	*FEDERAL 2007*	*FEDERAL 2008*	*STATE 2007*	*STATE 2008*
ARKANSAS	8.5%	8.7%	1.0%	1.0%
CALIFORNIA*	10%		3.0%	
FLORIDA**	7.5%		9.4%	
IDAHO	7.39%		3.96%	
MICHIGAN	10.6%		2.0%	
MINNESOTA	8.6%		2.0%	
NEVADA	5.9%		2.0%	
NEW YORK***	3.0%	10%	3.0%	3.0%
VIRGINIA	10.2%	9.8%	.297%	.25%
WASHINGTON	12.3%	13%	3.6%	

**CalTrans does not keep records, but estimated 3%*
***Florida has an outstanding Human Resources Department that grades its prime contractors by their DBE participation rates.*
****New York DOT had reporting problems in 2007 and feels that the 3% is a low estimate.*

[5] Federal DBE Participation rates provided by each state's Department of Transportation
[6] State DBE Participation rates provided by the state agency that oversees the DBE program.

Conclusion

I had a member of the Women First Board of Trustees tell me when asked why she still felt the burn of discrimination after years in business. She said to me that when she attends meetings there are very few women, if any, around the table.

She thinks, "Well it will be ok because I am at the table, I know these people, I've worked with them and I make a pretty good living—so why do I sill feel the subtle discrimination—and then I realized why."

She told me, "It's because I am not like them, I will never be like them, I am different and they don't understand the importance of that." I have thought about her statement a lot and I believe this awareness should empower her and other women owned businesses because they contribute and make better an industry that is vital to our country's daily life. And it also why diversity is so important in the highway industry and in our nation. Our diversity is what strengthens and binds us together. We are a government for all the people and all of our people deserve a chance to compete and to contribute.

Recently, in Minnesota, a Minneapolis-based DBE told a local radio station about work that she and other women and minority owned firms performed on par with any other contractor on the same project. "I think we've been given a chance to show that if a contractor can value the DBE's experience. . . We can add value to the final product and to the taxpayers of Minnesota." [7]

Mr. Chairman, I think that says it all.

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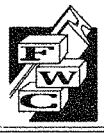
[7] Minnesota Public Radio Interview with Susan Rani, Rani Engineering, December 8, 2008



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Federation of Women Contractors

WRITTEN TESTIMONY OF
BETH DORIA
FEDERATION OF WOMEN CONTRACTORS

HEARING ON
THE DEPARTMENT OF TRANSPORTATION'S
DISADVANTAGED BUSINESS ENTERPRISE PROGRAMS

BEFORE THE
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
UNITED STATES HOUSE OF REPRESENTATIVES

March 26, 2009

Introduction

Good afternoon, Chairman Oberstar and members of the Committee. My name is Beth Doria and I serve as Executive Director of the Federation of Women Contractors. Thank you for the opportunity to present written testimony in support of the need to continue the DBE program.

The Federation of Women Contractors (FWC) has been in existence since 1989, serving over 100 women-owned construction firms in Illinois. In addition, FWC serves in a leadership position for the Alliance of Minority and Female Contractor Associations, which aggregately serves over 1000 women- and minority-owned construction firms in the state.

A substantial number of these contractors are DBE certified and struggle, on a daily basis, to win contract awards. The biggest problems for DBE contractors are the personal net worth and gross revenues restrictions. These limits negatively impact a contractor's ability to access needed capital, secure lines of credit, and obtain required bonding. Additionally, in a trade where equipment purchases can easily exceed several million dollars each, obtaining equipment financing when you can only show a personal net worth of less than $750,000 is most often impossible. And, nationwide, these restrictions severely limit the available pool of qualified DBE contractors for state and federal procurement.

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In addition to the barriers listed above, women in the trades meet massive resistance and various forms of pervasive discrimination. There remain persistent obstacles, largely related to the fears and prejudices of the men we work with:

- Refusal by general contractors to work with women and minority contractors
- Utilization of women and minority contractors only when goals demand they do so
- Deliberate withholding of payment to subcontractors
- Holding of retention way beyond terms of contract
- Unnecessary bonding requirements on contracts

And these obstacles are amplified for women of color.

Throughout the past several years in Illinois, various challenges to both the DBE and M/WBE programs have been brought forth[1]. In the course of defending those programs, both anecdotal and statistical evidence was presented supporting the disparate utilization of M/W/DBE's in the state and the continued widespread discriminatory practices by general contractors.

These same practices continue to exist today, partially because of the state's economic crisis and its failure to have adequate staff for compliance monitoring. Bid shopping, false listings of DBE subcontractors on projects, and loose monitoring of "good faith efforts", are all tactics utilized by majority contractors to circumvent the proper utilization of DBE contractors on projects. These practices are persistent and pervasive, and oftentimes blatant.

The existing DBE programs, although outdated, are often the only opportunity for qualified women- and minority-owned companies to participate on transportation-funded projects. Without the DBE program, there is no doubt there would be no participation by disadvantaged business enterprises on projects, at all. One need only look at recent statistics in states where M/WBE programs no longer exist to see the negative impact it has had on participation.

Additionally, the advantages of diverse participation in these programs far outweigh the negatives. Minorities and women generally hire other minorities and women and, therefore, sustain many disadvantaged communities by employing local workers. The social impact of restricting growth for these companies will likely become an additional statistic in the unemployment and Medicaid programs. Given the fact that the majority of economic growth occurs with small businesses, an appropriate business response would be to continue programs that sustain these employers.

On behalf of the entire DBE community in Illinois, I implore you to consider the widespread devastation eliminating the DBE program would have to the already-frail economic status of the country.

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[1] Builders Association of Greater Chicago vs. City of Chicago, 96 C 1122; Northern Contracting, Inc. vs. State of Illinois, Illinois Dept. of Transportation, No. 05-3981, U. S. Court of Appeals for the Seventh Circuit

STATEMENT OF JOEL SZABAT
DEPUTY ASSISTANT SECRETARY
FOR TRANSPORTATION POLICY
U.S DEPARTMENT OF TRANSPORTATION

BEFORE THE

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
U.S. HOUSE OF REPRESENTATIVES
MARCH 26, 2009

Disadvantaged Business Enterprise Program

Chairman Oberstar, Ranking Member Mica, and Members of the Committee.

Thank you for inviting the U. S. Department of Transportation (DOT) here today to discuss our Disadvantaged Business Enterprise (DBE) program.

My name is Joel Szabat and I am the Deputy Assistant Secretary for Transportation Policy. With me today is Robert Ashby, the Deputy Assistant General Counsel for Regulation and Enforcement. Mr. Ashby has worked closely with our DBE program since its inception, and has been the primary drafter of the Department's regulations on the subject.

The DBE program, enacted in 1983 as part of the Surface Transportation Assistance Act (STAA) of 1982, was designed as a vehicle to increase the participation by small businesses owned and controlled by socially and economically disadvantaged individuals in federally assisted state and local contracts. Three major DOT operating administrations are involved in the DBE program: the Federal Highway Administration, the Federal Aviation Administration and the Federal Transit Administration.

An individual must be socially and economically disadvantaged to qualify his or her firm as a DBE. All *bona fide* African-American, Asian-American, Hispanic-American, Native-American and women-owned businesses are rebuttably presumed to be disadvantaged. Others may qualify on a case-by-case basis. The personal net worth of a DBE owner can not exceed $750,000, and the total gross receipts to a DBE can not exceed a $22.41 million annual average.

In Fiscal Year 2008, DOT distributed more than $40 billion in formula and other grant funds, which resulted in over $30 billion in contracting and subcontracting opportunities for small and disadvantaged businesses. DBEs were awarded $3.3 billion in contracts, representing over 11% of the total DOT assisted contracting.

The success of the DBE program is not measured solely in dollars or percentages. Across the country, DBEs are growing to the point of graduating from the program and, in many cases, becoming respected prime contractors.

For example:

- Myles Construction Company, after receiving assistance from the South Carolina DOT Business Development Center, advanced from subcontractor to prime contractor status, and recently was the low bidder on a project totaling $1.7 million dollars.
- In Illinois, Millennia Professional Services, a Hispanic-owned DBE engineering consulting firm, was founded and certified in 2004 by four partners working out of their basements. They started with two full-time employees and revenue of $76,000 in 2004, grew to 10 full-time employees, eight part-time employees, revenue of $1,408,000, and were awarded their first project as a prime consultant by 2007.

- In 2008, Millennia landed their second project as a prime consultant, employed nine full-time employees and 21 part-time employees, and had revenue of $2.0 million. They currently specialize in construction architecture.

We would like to provide for the record a selection of additional "success stories" that illustrate the benefits of the DBE program to individual firms and the innovate steps that many States are taking to help DBEs grow and prosper.

The DBE program in its present form has been an important part of DOT's financial assistance programs since 1999, and its antecedents reach back to 1980. Congress has enacted DBE or similar program requirements as part of every highway/transit authorization act since 1983, and similar requirements for airport programs were first codified in 1987. This is a program that has received bipartisan support from Administrations and Congresses controlled by both major parties.

In 1999, the Department issued a revised DBE regulation intended to meet the most stringent "strict scrutiny" constitutional requirements articulated for programs of this kind by the Supreme Court. Since then, every Federal court that has reviewed the DBE rule has found it to be constitutional. We would like to provide for the record a summary of those cases.

Why is the program constitutional? The courts speak of two requirements for the DBE program. First, there must be a compelling need for the program, such as the need to combat discrimination and its continuing effects. Second, the administration of the program must be narrowly tailored to address discrimination and its effects. The DBE regulation that the Department issued in 1999 focused on this second requirement.

In that rule, which continues, with minor modifications, to govern the program, we forbade the use of DBE set-asides and quotas. Only individuals who are genuinely socially and economically disadvantaged are eligible to participate, something we made clear by imposing a limit on the personal net worth of participants. Women or members of minority groups who are too wealthy do not get to participate, while individuals who are

not members of one of the designated groups can participate if they make an individual case that they are socially and economically disadvantaged.

We told state and local governments to use the best evidence available to estimate the DBE participation they could expect to obtain if there were a nondiscriminatory level playing field. This evidence-based estimate, and not some arbitrarily chosen number, must be the basis for each DOT recipient's annual program goal. We then told our recipients that they must achieve as much as possible of that annual goal through what we call "race-neutral" means, not involving the use of techniques that are based on the race or gender of business owners. Outreach, technical and bonding assistance, unbundling of contracts, and small business programs are among the race-neutral measures that we encourage recipients to use.

Only where a state or local government determines that it cannot achieve its "level playing field" goal solely through the use of race-neutral means does that government employ what we call "race-conscious" means, such as setting contract-specific goals for DBEs. Where there is a contract goal, we insisted that what matters in awarding a contract is that bidders make good faith efforts to use DBEs, which they can do either by meeting a goal or by documenting the efforts they made to meet the goal. We've made it very clear that nobody is required simply to "hit the number" in order to get a contract.

There is a great deal of flexibility in the DBE program. This flexibility allows recipients to implement their program without setting race conscious contract goals when not needed to ensure a discrimination-free market, and some recipients have all race-neutral programs. Where needed to narrowly tailor the program, the Department will grant waivers to recipients to permit them to focus their race-conscious goals only on groups for which there is evidence from a disparity study of underutilization. We have recently granted such waivers to California and Oregon. As provided in the DBE rule, recipients are not penalized for failing to meet their goals, though we use any shortfalls in evaluating program success and working with recipients to improve their programs.

Courts have noted these features of our regulation as reasons for finding that the DBE program meets the narrow tailoring requirement. But a narrowly tailored program passes constitutional muster only when there is a compelling need for having the program in the first place. That is where this Committee and the Congress as a whole come in. Congress is responsible for determining that there is a compelling need to continue the program.

During the 1998 consideration of a highway/transit reauthorization bill, Congress looked in detail at the need for the DBE program. Many members affirmed that discrimination against women and minorities persists, citing not only their own experience in their states and districts but evidence from sources like disparity studies. Members cited differences between the percentage of businesses that minorities or women own and the percentage of construction earnings that they receive. Members spoke of the differences between the loan amounts and terms received by white as compared to minority firms, and of the particularly difficult times minority and women-owned firms have in obtaining financing. Tellingly, members cited examples where minority and women-owned business

participation fell dramatically when goal-based programs were eliminated, or of situations in which, within a jurisdiction, DBE participation in Federal contracts was markedly more robust than the participation in state or locally-funded contracts that did not involve race- or gender-conscious programs. We would like to provide a copy of the 1998 debate for the record.

Those Congressional debates took place 11 years ago. What is the situation now? The Department believes strongly that, while substantial progress has been made, discrimination and its effects continue to exist today and to distort contracting opportunities for DBEs. While race-neutral programs have had heartening successes in some places, it is clear to us that there is a compelling need to continue to make race-conscious measures available, since use of this tool is often the only means of redressing the inequities we see in the transportation contracting marketplace.

One way we have of assessing the need for race-conscious measures is to look at the way that our recipients have structured their goals. Under our rules, recipients must meet as much of their overall goals as their evidence tells them they can through race-neutral measures. For meeting the remainder of their overall goal they have to rely on race-conscious measures. This means that if they could not use race-conscious measures, they would be unable to achieve levels of DBE participation consistent with a discrimination-free competitive environment. They would be unable to redress the effects of discrimination.

From 2004 – 2008, FHWA recipients and large FTA and FAA recipients of which we have current records have set overall annual goals in some 619 instances. In 81 percent of these cases, recipients have found it necessary to establish race-conscious goals.
This means that, eight out of ten times, our recipients, if denied the availability of race-conscious goals, would have left unremedied the effects of discrimination on small, disadvantaged business. Moreover, in 69 percent of these cases, the race-conscious component of the goal was needed to make up the majority of the entire overall goal. In the absence of race-conscious goals, the gap between a level playing field and the reality facing DBEs trying to find work with our recipients would have been significantly larger.

We would like to provide for the record a chart displaying the use of race-conscious goals by recipients in all three operating administration's programs, as well as the recipient-by-recipient data about DBE goals and achievements on which this chart is based.

As the result of a court decision (Western States Paving Co. v. United States and Washington State Department of Transportation, 407 F. 3d 983 ((9 th Cir., 2005)), we have had something of a laboratory experiment of the effect of denying race-conscious tools to recipients. This decision in effect prohibited jurisdictions in the 9th Federal Judicial Circuit from using race-conscious measures until they had conducted disparity studies. Meanwhile, recipients in the 9th Circuit had to use all race-neutral programs. When we observe notable decreases in the participation of DBEs coinciding with the sudden unavailability of race-conscious measures, we see the footprints of continuing discrimination.

We've looked at the DBE participation records of recipients in the 9th Circuit and we found the following: in the highway program, seven of the nine states' DBE participation declined between 2004 and 2007. Among airports, 18 of 28 experienced declines, as did seven of nine transit authorities. We would like to provide for the record charts displaying the information on which this calculation is based.

Not only has overall participation declined, but we have noted many cases in which recipients who were forced by the Western States decision to suspend the use of race-conscious have had difficulty in achieving DBE participation consistent with the nondiscriminatory level playing field they had estimated in setting their overall goals. For example, in 2007 and 2008, Arizona DOT set overall goals of 9.1 and 9.9 percent, and was able to achieve only 3.8 and 3.1 percent, respectively. California DOT set goals of 10.5, 10.5, and 13.5 percent in 2006, 2007, and 2008 and obtained only 8.2, 6.6., and 4.6 percent DBE participation in those respective years. Sound Transit goals were 15 and 13 percent in 2007 and 2008; its achievements were 8.6 and 6.8 percent in those years. Portland's airport set goals of 7.3 and 4 percent in 2007 and 2008, achieving only 2 and 1.1 percent DBE participation in those years. Our recipients' job is to ensure their Federally-assisted contracting programs provide nondiscriminatory access to business opportunities on a level playing field, as defined by their overall goals. Take away the ability to use race-conscious goals, and the recipients can't, in many cases, get that important job done

The effect of the loss of DBE contract goals is very evident to small disadvantaged businesses as they seek business day-to-day. DBEs describe a dramatic drop off in the opportunities to compete for business when race-conscious measures become unavailable. For example, when race-conscious goals were suspended in California following the Western States decision, a DBE contractor told State officials, since "there's no DBE participation goal, our phones have stopped ringing…we don't get calls any more." Another DBE contractor spoke of about a roughly 50% drop off in calls. A woman-owned construction business added that "where there are no goals, I can tell you that the fax machines stop…The next day I got no faxes, the phone didn't ring, asking for my bid. I used to get maybe 20 faxes a day…now I might get three a week."

A lot of the barriers that create the disadvantages that the DBE program is intended to remedy are well known: lack of access to capital, bonding, insurance, and other resources. Some examples include:

- An Idaho woman contractor commented that, despite good credit, it took her firm five years to get financing that a male acquaintance got after three months in business.

- A Texas minority contractor related being turned down for a $20,000 line of credit by a major bank even though he had a $20,000 CD to back up the loan.

- Several California contractors mentioned that prime contractors often imposed higher bonding or insurance requirements than the state required, blocking them from participation.

- One female contractor in California commented that "minorities and women have a much harder time getting capital, getting bonding, getting insurance...in bonding... women are still asked to have their husbands sign at the bank..."

- A minority contractor in Washington State told of the following situation he had encountered in trying to get financing:

  "My first commercial loan, I applied for a...line of credit, and I was turned down...And one of my white employees [said] 'Let me see your financial statements'...He walked down to same bank and walked into the same office and talked to the same loan officer and got a call three days later saying 'You've got the loan'...We walked into the bank...and the bank officer doesn't know who I am...and says to [the white employee] 'You're the kind of businessman we're looking for. I love your financials. We want to do business with you'...And then [my employee] says 'Let me introduce you to Mr. ___, who was here less than a week ago...' From then on, until I got much bigger, I never went into a bank without...a white employee."

As in the Washington State contractor's case, blatantly discriminatory attitudes sometimes play a role. In Idaho, for example, a female business owner related that a prime contractor would not give her specifications or allow her to bid on a private sector project because of her gender. A Hispanic contractor said it was not allowed to provide a proposal on a private contract because of ethnicity, the prime contractor explaining that it did not trust his work ethic. A Native American firm reported harassment of female construction workers that caused them to quit. Another female contractor said that "some contractors think we should not, as women, be on the job." She also mentioned that "comments and attitudes...wisecracks" often create a hostile workplace environment that affects her bidding, negotiating, and getting a job.

One of the most important barriers to participation encountered by minority and women-owned contractors is their lack of access to the informal networks of communication and relationship that are so important to success in the contracting business. In California, a female contractor said "There's still very much an old boy network ...and if you're not an old boy, you're not in that network [and] there's a lot of information you don't get. [At the] golf course...information flows." An Asian DBE owner said prime contractors always use the same subcontractors and "don't see any reason of cultivating relationships [with and] providing jobs to new DBE firms ....." Another DBE firm owner commented that the "number one thing [that] puts DBEs at a disadvantage" is lack of access to decision makers, who "maybe ... go out to drinks every once in a while...or see each other on the golf course." Non-DBEs, a trade association commented, do not trust DBE firms because they do not know them. Another trade association representative commented that "Lots of

things get done with back slapping and who knows who and if you're not in that group you might as well not come to the party."

Similarly, in Idaho, a DBE said that people get comfortable working with other people and they socialize outside of work on hunting trips, for example. An Idaho Hispanic contractor described the network there as "white guys that have been running around with the same white guys that have controlled the money in the valley for [many] years." In Illinois, a female contractor recounted going to the meeting of her local contractors' association; she was the only woman present out of over 200 attendees, and no one would talk to her.

In our experience in operating this program for nearly 30 years, possibly the most important function it performs is to address the lack of access by minority and women contractors to these crucial informal networks. Many prime contractors do not regularly socialize with African-American, Hispanic, Asian, female etc. contractors. But when there is a race-conscious goal on a contract, they are required to make good faith efforts that involve contacting DBE firms whose owners may not be part of their normal circle. This is a very beneficial way of introducing prime contractors to DBEs and, hopefully, beginning to create business relationships that will lead to opportunities for DBEs to get the work the need to succeed.

When we're examining evidence of the continuing compelling need for a race-conscious DBE program, one of the most important sources we have are disparity studies conducted around the country. These studies are very useful for providing detailed evidence of the ongoing presence of discrimination as well as the current effects of past discrimination. They examine, in a statistically sophisticated way, the differences between the availability and actual use of disadvantaged businesses and the degree to which these differences can be attributed to discriminatory distortions in the marketplace.

These studies paint an indelible picture of a nationwide problem, not limited to any particular minority group or any region of the country. While there are some differences among state and local jurisdictions, that picture is one of consistent underutilization of all the groups the DBE statutes and DOT's regulation presume to be disadvantaged. That is powerful evidence of discrimination. We would like to provide for the record a chart summarizing the underutilization findings of a significant number of disparity studies that have come to our attention, and we have in addition provided copies of these studies to the Committee.

Disparity studies also perform another important function, by collecting first-hand stories of how discrimination affects individual people trying to compete on an uneven playing field, some of which I have mentioned in this statement. These stories put an important human face on the abstractions and statistics that so often dominate the debate about race-conscious programs. We would like to provide for the record a summary of some of the real-world experience DBEs have had with discrimination and other barriers to participation in the marketplace that necessitate something like the DBE program.

In our experience, DBE companies are often reluctant to complain to us or to state or local governments about discriminatory treatment, for fear that rocking the boat will make it very difficult for them to get work. DBEs who participated in the disparity study process were often spoke of this fear of retaliation.. For example, an Austin, Texas contractor said that minorities and women who experienced discrimination "hesitate to use complaint procedures of public entities because they will get blackballed." Another experienced retaliation for bringing what he felt was a one-sided contract to Texas DOT's attention, in that it was never interviewed for another contract for which the firm was perfectly qualified.

There are complaints that cast light on potentially discriminatory situations in various jurisdictions. From 2005 to the present, the Department itself has received 34 complaints alleging discrimination against DBEs in the highway, airport, and transit programs.

For example, a DBE owner alleged that a large prime contractor only used the DBE firm to secure a contract and that the DBE's work never actually materialized. The Department's OIG investigated and found that the prime contractor had falsely represented that it met DBE requirements. In another case, a DBE alleged that a prime contractor committed to use a DBE just long enough to get a contract, and then quickly replaced the DBE with a non-DBE contractor. Other complaints have raised a variety of issues, such as improper goal-setting practices, exclusion of minority-owned bidders, harassment of DBE firms, failure of bidders on prime contracts to make good faith efforts to secure DBE participation. We would like to provide for the record a chart summarizing examples of both open and closed complaints that our agencies have received.

We believe that the information that is available, both the statistical evidence and the anecdotal stories, clearly indicate that there is a continuing need for our DBE programs to combat discrimination and the current impacts of past discrimination nation wide. The Department of Transportation has a compellingly necessary, quite successful, and narrow-tailored program to redress discrimination and its continuing effects in DOT-assisted contracting. We are continually working to improve it. We have held a series of large stakeholder meetings in the last several months, and have issued guidance and rulemaking documents inspired by the participants' comments. The stakeholders include representatives from the prime contracting, DBE, and state and local government communities. We would ask the Committee to take notice of statements on this subject that have been made by members of Congress or witnesses at hearings in recent years, and would like to provide for the record a list of links to statements and information that have been presented to Congress on this subject. We also would like to provide for the record a series of publications in the media that have discussed the persistence of discrimination and barriers to the success small disadvantaged business, as well as the effects of the termination of race-conscious goals on the opportunities of DBEs.

Recently, we have issued a final rule to adjust the small business size standards in the rule for inflation. We are also considering how to respond to concerns expressed in the stakeholder meetings about such issues as ways of streamlining the certification process for companies that wish to work in more than one State, and reducing the frequency of

recipients' overall goal submissions to the Department. We would like to provide for the record a copy of the final rule.

If the DBE program is to work well, it's crucial to ensure that its operations are transparent and honest. Our Office of Inspector General (OIG) has made rooting out DBE fraud one of its priorities, and its successes in obtaining civil settlements and criminal indictments and convictions is fair warning to those who would try to take improper advantage of the program. During the last 5 years (October 1, 2003 through September 30, 2008), OIG investigations of DBE fraud allegations have resulted in 49 indictments, 43 convictions, nearly $42 million in recoveries and fines, and 419 months of jail sentences. Through conferences, publications, and videos, OIG has also carried out an aggressive fraud awareness program. We would like to submit for the record some examples of the kinds of enforcement actions that have resulted from OIG investigations of DBE fraud.

DOT's other agencies are also working to ensure accountability and transparency in the DBE program. The Federal Transit Administration is engaged in a series of oversight visits to certifying agencies. the Federal Highway Administration and Federal Aviation Administration have stepped up operational oversight of the DBE program in their areas of responsibility. We intend to continue this important process of getting information to help us improve the program.

With significant additional transportation funding becoming available quickly because of the American Recovery and Reinvestment Act (ARRA), the Department has an unparalleled chance to make sure that DBEs have a nondiscriminatory opportunity to participate in the recovery from the current recession. Congress made clear that the DBE program applies to ARRA-funded projects, and the Department has issued guidance emphasizing this to our state and local partners. The DBE program will allow us to ensure that all American businesses benefit, without being held back by discrimination, from this opportunity.

Thank you again, and Mr. Ashby and I will be happy to respond to any questions you may have.

U.S. House of Representatives
Committee on Transportation and Infrastructure
Washington, DC 20515

James L. Oberstar
Chairman

David Heymsfeld, Chief of Staff
Ward W. McCarragher, Chief Counsel

John L. Mica
Ranking Republican Member

James W. Coon II, Republican Chief of Staff

March 31, 2009

The Honorable Joel Szabat
Acting Assistant Secretary for Transportation Policy
U.S. Department of Transportation
1200 New Jersey Avenue, SE
Washington, D.C. 20590

Dear Acting Assistant Secretary Szabat:

On March 26, 2009, the Committee on Transportation and Infrastructure held a hearing on **The Department of Transportation's Disadvantaged Business Enterprise Programs.**

Attached are questions to answer for the record submitted by Rep. Grace F. Napolitano. I would appreciate receiving your written response to these questions within 14 days so that they may be made a part of the hearing record.

Sincerely,

Jim Oberstar

James L. Oberstar
Chairman

JLO:pk
Attachment

MARCH 26, 2009
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
HEARING ON
THE DEPARTMENT OF TRANSPORTATION'S
DISADVANTAGED BUSINESS ENTERPRISE PROGRAMS

QUESTIONS FOR THE RECORD FROM REP. GRACE F. NAPOLITANO TO:
THE HONORABLE JOEL SZABAT
ACTING ASSISTANT SECRETARY FOR TRANSPORTATION POLICY
U.S. DEPARTMENT OF TRANSPORTATION

Questions regarding California DBE Program Application

1. Caltrans has recently received interim approval from the Federal Highway Administration (FHWA) to proceed with a DBE program that does not include Hispanic and subcontinent Asian contractors in the race conscious program category. Why were Hispanic and subcontinent Asian contractors not included in the race conscious program category and do you feel this was a mistake?

2. Why was Caltrans only granted interim approval for their DBE program? What was lacking in their application? What must be done for Caltrans to complete their application with Hispanic and subcontinent Asian contractors included in the race conscious program category? How is the Department working with Caltrans to solve this problem?

March 26, 2009
Committee on Transportation and Infrastructure
HEARING on
The Department of Transportation's
Disadvantaged Business Enterprise Programs

Questions for the Record from Rep. Grace F. Napolitano to:
The Honorable Joel Szabat
Acting Assistant Secretary for Transportation Policy

Questions regarding California DBE Program Application

QUESTION 1. Caltrans has recently received interim approval from the Federal Highway Administration (FHWA) to proceed with a DBE program that does not include Hispanic and subcontinent Asian contractors in the race conscious program category. Why were Hispanic and subcontinent Asian contractors not included in the race conscious program category and do you feel this was a mistake?

RESPONSE: A recent federal court decision had the effect of requiring West Coast states to conduct disparity studies before resuming the use of race-conscious goals. A disparity study conducted by Caltrans revealed that while several groups presumed disadvantaged under the Department of Transportation's DBE program were underutilized, Hispanics and Subcontinent Asian Americans were not. Based on this evidence, Caltrans applied to the U.S. Department of Transportation for a waiver of a regulatory requirement that all DBEs be included in race-conscious goals. The waiver was also needed to ensure that Caltrans' implementation of its program was narrowly tailored to meet the standards set in the recent court case. The Department granted this request, since the evidence supported it, and Caltrans' race-conscious goals are not, therefore, required to include these two groups.

QUESTION 2. Why was Caltrans only granted interim approval for their DBE program? What was lacking in their application? What must be done for Caltrans to complete their application with Hispanic and subcontinent Asian contractors included in the race conscious program category? How is the Department working with Caltrans to solve the problem?

RESPONSE: Caltrans was granted conditional approval of the methodology used in establishing its overall goal in view of the need for the agency to begin promptly its use of race-conscious goals, particularly in light of projects being expedited with the use of American Recovery and Reinvestment Act funds. Caltrans had delayed its use of race-conscious goals for some

time after the Department of Transportation's decision to grant a program waiver based on the results of the study. The conditional nature of the approval was designed to emphasize to Caltrans the importance of responding in a timely manner to the request of the Federal Highway Administration (FHWA) for additional information to support the overall goal Caltrans had chosen. FHWA will convert the interim approval to a final approval when it completes its review of the additional information provided by Caltrans.

Under the program waiver, Caltrans will not include Hispanic and Subcontinent Asian American contractors in its race-conscious goals. If, in the future, evidence shows that the two groups are underutilized (i.e., that there are statistically significant disparities between availability and utilization) then Caltrans' race-conscious goals would once again include them.

DOT DBE Congressional Hearing Testimony

By Anthony Thompson

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Underutilized or Disadvantaged?

Why is it that, despite a decade of record revenues and employment growth in the St. Louis construction industry, we see ongoing unrest over the lack of minority business participation in public construction projects? Why, after years of disadvantaged business enterprise (DBE) programs are so many minority-owned firms still struggling to survive or prosper? One reason is that racial and gender discrimination are still problems in our nation.

Despite this, the interest on the part of owners and community stakeholders seems sincere. Yet the largest public projects in the country continue to fall well below the goals set by their own boards.

Some minority-owned businesses thrive in America. Success varies widely across categories in the minority business community. The technology industry has offered great opportunities for David Steward of World Wide Technologies and Kelvin Westbrook of Millennium Digital two minority business owners whose exemplary firms rival any competitor. The Kwame Building Group has grown and survived multiple challenges and obstacles and still managed to become one of the most successful DBE firms in the construction industry working on multiple transit and transportation projects from Seattle to Pittsburgh and Dallas to St. Louis.

But we can't assume that all minority or DBE firms are doing well just because a couple are successful. Each industry has its own unique challenges and I believe none is more challenging than the design and construction industry. With second and third generation transitions among white family business owners in full swing and a curious dynamic of "minority inclusion" efforts in place, the local construction industry is an anomaly in terms of minority business success.

Consider this. For a small minority- or woman-owned business to become certified to compete for what is typically a small portion of a construction contract; the owner must complete exhausting forms that expose his or her business and personal financial history, tax returns and financial statements to bureaucratic strangers. Certification requires many hours of work and much exposure, simply to validate ethnicity or gender. Given the threat of identify theft these days, most privately owned companies would bristle at that level of intrusion.

Then, after a considerable expenditure of time and money, the firm is *not* put on a list for prime or lead contract opportunities. Instead, they are usually only eligible to be a *subcontractor* on a prime contract typically held by a white-owned business. In some cases, the prime contractor is less qualified than the minority contractor, who they are soliciting for sub work simply to meet minority inclusion requirements. The white prime contractor does not complete a form or share any highly confidential and personal financial information to be considered for a major prime contract.

This is not the best way to promote greater minority participation. The very businesses these programs are designed to help are disadvantaged from the start by a system that requires them to spend more time, money and resources than their white colleagues, for lesser opportunities.

However, most minority-owned firms don't mind the effort it takes to become certified. In fact, most small businesses would not exist or prosper if not for these programs. And let me just say that none of us support companies that take advantage of these programs. Fronts and frauds are unacceptable and should be excluded from participation. Still, it is important to understand that most majority firms have huge advantages when utilizing a disadvantaged business enterprise.

Initiatives implemented to improve cash flow for DBE's assist cash flow for the majority firm as well. Therefore the DBE program is often as much an advantage to the majority firm as it is to the DBE firm.

So how do we fix this complicated dilemma? We need to keep our eye on the ball of working to address discrimination and facilitate the development of strong, viable and competitive minority and women owned businesses. And we need to limit administrative burdens on DBEs while simultaneously taking on fraud and abuse. This leads me to a potential solution. If you do what you have always done, you will get the results you have always gotten. The DBE program is not the problem, but I believe in can be implemented far more effectively to meet its real purpose. So let's try something different.

The Mentor/Protege Program at Busch Stadium is a shining example of success, one that is bound to become a national model. This program has provided meaningful, growth-building contracts to more than 60 local minority and woman-owned enterprises (M/WBE). Most importantly, the positive impact goes far beyond the initial contracts or any statistical goals. The program actually helps firms gain the skills they need to be successful and profitable in the long run.

So what has made this DBE program highly successful, while others have failed?

First, we have a solid commitment from the Cardinals, the private owner of the project, inspired by a similar commitment from Major League Baseball (MBA). To achieve the Cardinals' inclusion goal, every prime contractor had strong incentives not only to team with a minority or woman-owned firm certified through the DBE program but also to be actively ***involved*** in that firm's work throughout the project.

One-on-one mentor/protégé relationships were created, and written, monitored action plans were established to ensure that the M/WBE firms learned the rigors of working on a large project.

Secondly, we built in extensive oversight, follow-up and support from Hunt Construction in association with Kwame Building Group, the general contracting team on the stadium project. April Brown-Hendricks of my firm, Kwame Building Group, manages the program and provides training workshops and support for the M/WBE firms. The involvement from the top down has given the program real depth. MoDot liked it so much, they hired April to head a similar program on a local highway project and recently hired her directly for their department.

The goal was to leave the market stronger, to leave stronger minority subs capable of doing more work, and capable of doing it in a more efficient manner. We succeeded.

The key to this program's success is that it's neither voluntary nor a mandatory set-aside. The Mentor/Protégé program works because it combines both commitment and desire, and goes well beyond the cliché reasons to not do business with small minority or woman-owned firms. At Busch Stadium and MoDot, the owner is committed to inclusion, the prime contractors/mentors are enthusiastically involved and the protégés are receiving extensive training and support to help them grow and stay successful.

So next time you hear "there just aren't enough good minority-owned firms," try thinking outside the box for a moment. Instead of just setting goals that may or may not even be met, let's ask our public agencies to provide *real* opportunities – even prime contracts – to our most promising minority- and woman-owned businesses. Let's ensure that our young minority and woman entrepreneurs and workers are truly on level footing with their white male peers. Let's build an industry where we can share expertise and grow all of our businesses. After all, DBE firms want the same thing as majority firms, they are placed at a disadvantage by bureaucrats, thus the term disadvantaged has a stigma associated that sends the wrong message of inadequacy. The real term should be changed for good to "underutilized business enterprise" or UBE.

And we can do this by being FAIR! That is how we will build a better America.

NERA
Economic Consulting

Testimony Concerning the Challenges Faced by Disadvantaged Business Enterprises in the Transportation Sector

Testimony of Dr. Jon S. Wainwright, Vice President, NERA Economic Consulting, 1006 E. 39th St., Austin, Texas 78751, (512) 371-8995

Before the Committee on Transportation and Infrastructure

United States House of Representatives

March 26, 2009

Chairman Oberstar, Ranking Member Mica, and Members of the Committee:

Thank you for the invitation to appear here today. My name is Jon Wainwright. I hold a Ph.D. in economics from the University of Texas at Austin. Currently, I am a Vice President with NERA Economic Consulting, in Chicago, Illinois and Austin, Texas.

NERA is a global firm of experts dedicated to applying economic, finance, and quantitative principles to complex business and legal challenges. For nearly half a century, NERA's economists have been creating strategies, studies, reports, expert testimony, and policy recommendations for government authorities and the world's leading law firms and corporations. We bring academic rigor, objectivity, and real world industry experience to bear on issues arising from competition, regulation, public policy, strategy, finance, and litigation. NERA's clients value our ability to apply and communicate state-of-the-art approaches clearly and convincingly, our commitment to deliver unbiased findings, and our reputation for quality and independence. Our clients rely on the integrity and skills of our unparalleled team of economists and other experts backed by the resources and reliability of one of the world's largest economic consultancies. With its main office in New York City, NERA serves clients from over 20 offices across North America, Europe, and Asia Pacific.

I would like to ask the Committee's permission to include my entire testimony in the record as if read in full and to supplement my testimony with additional material if needed.

I. Introduction

For twenty years, I have devoted the greater part of my professional life to studying race and sex discrimination and its impact on business enterprise and entrepreneurship in the United States. During this time I have served as the project director and principal investigator for almost 30 studies of business discrimination against minorities and women undertaken since 2000 and prior to that time worked on perhaps a dozen more. I have authored a book on the subject and provided expert testimony in federal and state courts on these and other labor and business related matters on 13 occasions.

I was fortunate to have been mentored at the start of my career by two of the country's leading scholars in this field—Dr. Ray Marshall, Professor Emeritus at the Lyndon B. Johnson School of Public Affairs at The University of Texas at Austin and former United States Secretary of Labor, and Dr. Andrew Brimmer, former member of the Board of Governors of the Federal Reserve, former Assistant Secretary of Commerce, and Professor Emeritus at the University of Massachusetts, Amherst.

A key lesson I absorbed from these men was expressed by Professor Marshall in this way:

> "Institutionalized discrimination in business transactions is deeply rooted in the American economy. There can be no doubt that business discrimination inflicts serious damage on the society, polity, and economy. Governments have a responsibility to improve public understanding of the seriousness of this problem and to take positive steps to address it. These positive steps must include public education, specifically outlawing this form of discrimination, using governments' purchasing power to help those who are being discriminated against while rewarding those who do not discriminate, and developing race neutral programs to help all small businesses."[1]

If you accept that discrimination in business transactions has become institutionalized in the American economy, then it is difficult to argue with the logic of Dr. Marshall's conclusions.

During the last twenty years, the primary bulwark against business discrimination has been the policy of using public sector purchasing power to support the entrepreneurial endeavors of DBEs and other historically underutilized businesses and to promote fair and full access to government contracting and procurement opportunities as well as to mitigate the impact of business discrimination in the private sector. The Department of Transportation's Disadvantaged Business Enterprise (DBE) Program[2] is a key example of such policies at the federal level.

II. Constitutional Challenges Facing the USDOT DBE Program

The USDOT DBE Program, like other affirmative public contracting programs, is subject to the highest and strictest standards of constitutional scrutiny.[3] It is important, therefore, that the DBE studies used to assess the scope of business discrimination and the presence of DBEs in the markets of state DOTS, airports, and transit agencies are of high quality—

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[1] Ray Marshall, "Minority and Female Business Development After *Croson*," Working Paper, 2000.

[2] 49 C.F.R. Part 26.

[3] *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Adarand v. Peña*, 515 U.S. 200 (1995) (*Adarand III*).

independent and objective, academically rigorous, and incorporating as much relevant evidentiary data as possible. It is equally important that these DBE studies are carried out by economic and statistical experts who can be qualified in federal court to testify regarding their data, methods, and findings.

In 1999, Congress reviewed and revised the DBE Program's authorizing statute and implementing regulations. To date, every court that has considered the issue has found the DBE regulations to be constitutional on their face.[4] Whether the DBE Program can withstand an "as applied challenge," however, appears to turn at least in part on whether the public sector defendant went to court prepared with a high quality DBE study and testifying expert.

For example, when the DBE programs at Minnesota DOT (*Sherbrooke*) and Illinois DOT (*Northern Contracting*) were challenged, good DBE studies and qualified experts played crucial roles in successfully defending the constitutionality of the DBE program as applied by each agency. In contrast, when the DBE program at Washington State DOT was challenged (*Western States*), no study or expert was proffered at all. As a result, the Ninth Circuit lacked the benefit of any guidance on the correct economic analysis of discrimination and made several serious errors as a result.[5] Although unrelated to the USDOT DBE Program, a similar situation recently occurred in the Federal Circuit Court of Appeals in the *Rothe* case concerning the Department of Defense Program for Small Disadvantaged Businesses.[6] Here again, the defendants proffered no study of their own nor an expert to testify about such a study and once again, the court made several serious errors in its economic reasoning, concluding, for example, that factors such as firm size should be factored into estimates of DBE availability.

III. Findings and Conclusions from NERA's DBE Studies Completed Since 2000

I would like to address the remainder of my remarks today to the state of DBEs as documented in 16 studies and related research I have directed at NERA in the last 10

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[4] *See, e.g., Adarand Constructors, Inc. v. Slater,* 228 F.3d 1147 (10th Cir. 2000), *cert. granted,* 532 U.S. 941, *then dismissed as improvidently granted,* 534 U.S. 103 (2001) ("*Adarand VII*"); *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation,* and *Gross Seed Co. v. Minnesota Department of Transportation,* 345 F.3d. 964 (8th Cir. 2003), *cert. denied,* 541 U.S. 1041 (2004); *Western States Paving Co., Inc. v. Washington Department of Transportation,* 407 F.3d 983 (9th Cir. 2005), *cert. denied,* 546 U.S. 1170 (2006); *Northern Contracting, Inc. v. Illinois Department of Transportation,* 473 F.3d 715 (7th Cir. 2007) ("*Northern Contracting III*").

[5] For more on this, *see* Colette Holt and Jon Wainwright "*Western States Paving Company v. Washington State Department of Transportation*: Ninth Circuit Upholds Federal Disadvantaged Business Enterprise Program for Transportation Contracts But Strikes Down State's Implementation of Program Regulations," American Bar Association, Section of Antitrust Law, *The Transportation Antitrust Update,* No. 16 (Spring), 2007.

[6] *Rothe Development Corporation v. U.S. Department of Defense,* 545 F.3d 1023 (Fed. Cir. 2008) ("*Rothe VII*").

years, and the implications of these findings for the continuing need for the public sector to use its purchasing power to help remedy the ill effects of business discrimination.

Each of these studies includes one or more entities participating in the USDOT's DBE Program through a state department of transportation, a transit authority, or an airport. With the Committee's permission, I would be pleased to provide copies of all sixteen studies for entry into the record.[7]

It is important to acknowledge as well the enormous amount of relevant evidence that already appears in the Congressional record. A useful synopsis of this evidence was provided by the Tenth Circuit Court of Appeals in their decision in *Adarand Constructors*.[8] Additionally, the U.S. Senate Committee on Small Business and Entrepreneurship, for example, held hearings in May 2007 and September 2008 regarding closely related subject matter. The Subcommittee on Information Policy, Census, and National Archives of the U.S. House Committee on Oversight and Government Reform held a hearing in last September as well on how information policy affects competitive viability in minority contracting.

The DBE studies I have submitted for the record span a wide range of geographic locations—from Pennsylvania in the North, Texas and Tennessee in the South, Maryland in the East, Washington and Colorado in the West, to Illinois, Minnesota, and Missouri in the Midwest. Of the 75 members of this Committee, 50 hail from states represented in the studies we have submitted.

Despite the geographic diversity our studies represent, the findings from these studies show far more similarities than differences—minority-owned businesses and women-owned businesses throughout the nation continue to face large disparities in almost every aspect of business enterprise activity that can be quantified.

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[7] Memphis International Airport, 2008; City of Austin, Texas (including Austin-Bergstrom International Airport), 2008; Illinois State Toll Highway Authority, 2006; Maryland Department of Transportation, State Highway Administration, 2006; Maryland Department of Transportation, Maryland Aviation Administration, 2006; Maryland Department of Transportation, Maryland Transit Administration, 2006; City and County of Denver (including Denver International Airport), 2006; St. Louis Regional Transit, 2005; Washington Department of Transportation, 2005; Minnesota Department of Transportation, 2005; Missouri Department of Transportation, 2004; Illinois Department of Transportation, 2004; Minnesota Department of Transportation, 2000; Southeastern Pennsylvania Transportation Authority, 2000a, 2000b; Chicago Metra, 2000. All but the two SEPTA studies were produced in collaboration with Colette Holt & Associates.

[8] *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1166-1175 (10th Cir. 2000) (discussing evidence before Congress of business discrimination against minorities in the construction industry in enacting the Disadvantaged Business Enterprise Program for federal-aid transportation contracts, Pub.L. No. 100-17, 101 Stat. 132 (1987), Pub.L. No. 102-240, 105 Stat. 1914 (1991) and Pub.L. No. 105-178, 112 Stat. 107 (1998), and the implementing regulations at 49 CFR Part 26 (1999)).

III.A. Data from the Survey of Business Owners

One important source of data that we draw upon in our DBE studies is the Census Bureau's Survey of Business Owners (SBO), performed every five years. According to the most recent data available from the SBO, there are substantial disparities between the share of minorities in the general population and their share of the business population. Specifically:

- Although African Americans comprised 12.7 percent of the U.S. population, they accounted for only 5.3 percent of its businesses.
- Although Hispanics and Latinos comprised 13.4 percent of the population, they accounted for only 7.0 percent of the businesses.
- Although women comprised 50.9 percent of the population, they accounted for only 28.9 percent of the businesses.

Moreover, the minority and female share of business sales and receipts is far lower than their share of the business population.

- Although African Americans comprised 5.3 percent of all U.S. businesses, they earned only 1.0 percent of sales and receipts.
- Although Hispanics and Latinos comprised 7.0 percent of all businesses, they earned only 2.5 percent of sales and receipts.
- Although women comprised 28.9 percent of all businesses, they earned only 10.7 percent of sales and receipts.

Similar disparities are observed for other minority groups as well. Asians and Pacific Islanders comprised 5.0 percent of the business population yet earned only 3.8 percent of sales and receipts. Native Americans comprised 0.9 percent of all businesses but earned only 0.3 percent of sales and receipts.

These disparities between the size of the minority and female business populations and their share of sales and receipts are very large. They are also statistically significant, meaning they are unlikely to result from chance alone. While the exact proportions vary, large and statistically significant disparities are observed in all 50 states and the District of Columbia, for all minority groups—African-Americans, Hispanics and Latinos, Asians and Pacific Islanders, and Native Americans—as well as for women. These disparities are found in the Construction sector as well as in the economy as a whole. This is documented below in Tables 1A through 2F. Similar findings from current and past SBO reports appear in most of NERA's DBE studies.

III.B. Public Use Microdata Samples and Current Population Survey Data

It is fair to ask whether the disparities documented in the SBO data result primarily from discrimination, either past, present or both, or whether they result from other, potentially non-discriminatory, factors.[9]

Our DBE studies have put such questions to the test using the public use microdata samples (PUMS) from the two most recent decennial censuses, as well as microdata from the *Current Population Survey* (CPS) through 2006. The advantage of the PUMS and CPS data is that they allow us to compare these percentages while holding a wide variety of other, potentially non-discriminatory, factors constant, such as industry, geography, education, age, and labor market status.[10]

Like the SBO, the PUMS and CPS data sources show large and statistically significant disparities between the percentage of minorities and women who choose to form businesses and the percentage of comparable non-minority males who choose to form businesses. Such disparities are observed for the nation as a whole and throughout the states, and in the economy as a whole as well as across different industry sectors, including construction and construction-related professional services.

As shown below in Table 3A, our DBE studies have found that even when these other attributes are held constant using regression analysis, the disparities between African-Americans, Hispanics and Latinos, Asians and Pacific Islanders, and Native Americans, and women business owners on the one hand and their non-minority male counterparts on the other, tend to remain large, adverse, and statistically significant. Out of the 49 cases included in Table 3A, 46 show disparities and 45 show large disparities.

Furthermore, even for those minorities and women who manage against the odds to form their own businesses, their entrepreneurial earnings tend to lag far behind their non-minority male counterparts. As shown below in Table 3B, minority and female business owner earnings in construction and construction-related professional services average almost 25 percent lower than their non-minority male counterparts, again even when other attributes are held constant. For African Americans, Native Americans, and non-minority women, the disparities are even larger.

In sum, the evidence gathered from PUMS and CPS data sources, as documented below and in our many DBE studies, strongly suggests that business discrimination is the principal explanation for the disparities in the SBO data.

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[9] This was the subject of a book I authored, *Racial Discrimination and Minority Business Enterprise: Evidence from the 1990 Census*, New York and London: Garland Publishing, 2000. As all of the studies submitted for the record attest, similar results are observed using the 2000 decennial census data.

[10] We have also tested the hypothesis, with similar results, including additional factors such marital and family status, immigration status, ability to speak English, military service and veteran status, disability status, and asset levels.

III.C. Data from the National Survey of Small Business Finances

One particular manifestation of business discrimination is denial of access to credit. One of the primary concerns voiced by minority and women entrepreneurs is disproportionate difficulty accessing commercial capital and credit. If such discrimination exists, not only would it hamper the ability of these entrepreneurs to succeed, it could also prevent them from starting their own businesses in the first place.

In our DBE studies we have used the *National Survey of Small Business Finances* (SSBF), a joint effort of the Federal Reserve Board and the Small Business Administration, to test for the existence of discrimination in the small business credit market during the 1993 to 2003 period. These surveys are based on a large representative sample of firms with fewer than 500 employees.[11]

The SSBF data provide qualitative and quantitative evidence consistent with the presence of discrimination against DBEs in the credit market for small businesses. Using the SSBF, we find that after controlling for a large number of financial and other characteristics of the firms, African-American-owned firms, Hispanic or Latino-owned firms, and to a lesser extent other minority-owned firms are substantially and statistically significantly more likely to be denied credit than are nonminority-owned firms. We find some evidence in the SSBF that women as well are discriminated against in the credit market. The principal findings from the SSBF are as follows:

- A larger proportion of minority-owned firms than nonminority-owned firms report that credit market conditions are a serious concern.
- A larger share of minority-owned firms than nonminority-owned firms believes that the availability of credit is the most important issue likely to confront them in the upcoming year.
- Minority-owned firms were more likely to report that they did not apply for a loan over the preceding three years because they feared the loan would be denied.
- *When minority-owned firms did apply for a loan their loan requests were substantially more likely to be denied than non-minorities, even when differences like firm size and credit history are accounted for.*
- *When minority-owned firms did receive a loan they were obligated to pay higher interest rates on the loans than was true of comparable nonminority-owned firms.*

[11] The 1993 and 1998 surveys deliberately oversampled minority-owned and women-owned firms but the 2003 survey unfortunately did not. The 2003 survey took other steps, however, to increase the likelihood that minority-owned and women-owned firms were captured in the sampling frame. For more details, see National Opinion Research Center, *The 2003 Survey of Small Business Finances: Methodology Report*, Chicago, NORC, p. 11.

- There is no evidence that discrimination in the market for credit is significantly different in different regions of the country, or in the construction industries than it is in the nation or the economy as a whole.

- There is no evidence that the level of discrimination in the market for credit has diminished between 1993 and 2003, the most recent year for which data are available.

The SSBF is designed to produce estimates for the U.S. as a whole and for multi-state census regions. As a check on the findings above, and in order to produce results for specific states and metropolitan areas, we have conducted our own surveys—closely following the SSBF survey instrument—to supplement to national SSBF.

NERA has conducted these state and local credit market surveys on nine occasions between 1999 and 2007. Geographic locations include the Chicago metropolitan area in 1999, the State of Maryland in 2000, the Jacksonville, Florida metropolitan area in 2002, the Baltimore-Washington, DC metropolitan area in 2003, the St. Louis metropolitan area in 2004, the Denver metropolitan area in 2005, the State of Maryland (again) in 2005, the State of Massachusetts in 2005, and the Memphis, TN-MS-AR metropolitan area in 2007. The Chicago, Jacksonville, Baltimore, St. Louis, and Denver surveys focused on construction and construction-related industries, while the two Maryland surveys, the Massachusetts surveys and the Memphis surveys included other goods and services as well.[12]

In Table 3C below, I have combined the results of these nine NERA surveys together in a consistent format and re-estimated the basic loan denial regression model on this larger file. These results are remarkably similar to results seen in the national SSBF. For example, loan denial probabilities for African-American-owned firms compared to nonminority male-owned firms are 29 percentage points higher—even when assets, liabilities, creditworthiness measures such as bankruptcies, judgments, and delinquencies, and other firm and owner characteristics are held constant.

In NERA's own surveys we found statistically significant loan denial disparities for Hispanic or Latino-owned firms and nonminority female-owned firms as well as for African-American-owned firms. Denial rates were 18-24 percentage points higher for Hispanic or Latino-owned firms and 5-9 percentage points higher for nonminority female-owned firms than for their nonminority male-owned counterparts. Significant loan denial disparities were also observed for Native American-owned firms in some cases (18-19 percentage points higher).

Finally, as shown in Table 3D, we modeled the rate of interest charged, conditional upon receiving loan approval, using NERA's nine-jurisdiction dataset. Once again, the results

[12] NERA's Chicago, Maryland I, and Jacksonville survey questionnaires followed the format of the 1993 SSBF while our Baltimore, St. Louis, Denver, Maryland II, Massachusetts, and Memphis surveys followed the format of the 1998 SSBF questionnaire.

are similar to what is observed in the national SSBF. African-Americans pay approximately 1.7 percentage points more, on average, for their business credit than do nonminority males, declining slightly to 1.5 percentage points when creditworthiness and other firm and owner controls are accounted for.

On the basis of the foregoing, I conclude that the evidence of credit discrimination from NERA's nine local credit market surveys conducted throughout the nation between 1999-2007 is entirely consistent with the results obtained using the national SSBF data from the 1993-2003 SSBF files.

III.D. Qualitative/Anecdotal Evidence of Discrimination

In addition to the statistical evidence of business discrimination described above, the numerous studies we have conducted in recent years also found extensive qualitative or "anecdotal" evidence of discrimination against minorities and women, particularly in the key DBE Program sectors of construction and construction-related professional services. In conjunction with my long time colleague, attorney Colette Holt of Colette Holt & Associates in Chicago, we have conducted surveys and in person interviews with hundreds of DBEs and non-DBEs, and the results are strikingly similar across the country.

In general, minorities and women reported that they still encounter significant barriers to doing business in the public and private sector market places, as both prime contractors and subcontractors. They often suffer from stereotypes about a suspected lack of competence and are subject to higher performance standards than similar nonminority men. They also encounter discrimination in obtaining loans and surety bonds; receiving fair price quotes from suppliers; working with trade unions; obtaining public and private sector prime contracts and subcontracts; and being paid promptly.

Significantly, there is also general agreement among DBEs that without the use of affirmative remedies such as the USDOT DBE Program, minorities and women would receive few if any opportunities on government contracts, as is the case on public sector projects without DBE goals and as is especially the case on private sector projects. Our own research has documented time and again that prime contractors who use DBEs on projects with goals rarely use them—or even solicit them—in the absence of such goals.

Thus, the continued operation of federal, state, and local efforts to ensure equal access to the public contracting process is essential to the competitive viability of minority-owned and women-owned business enterprises.

IV. Conclusion

It is fairly easy to specify in a general way the economic consequences of the USDOT DBE Program. It has improved economic opportunities for minorities and women in business and therefore improved the competitiveness and efficiency of the American

economy. It has also focused public attention on discrimination against minority and female businesses for reasons unrelated to their qualifications or performance.

The DBE Program and similar public sector programs, standing alone, will not solve the problem of business discrimination. The private sector, which is far larger in terms of economic activity and scope, must take on more responsibility for eliminating business discrimination as well. Some major corporations have begun to take important steps down this road by developing genuine supplier diversity initiatives, but these companies are still the exception rather than the rule.

I am optimistic that the statistical and anecdotal evidence will one day show that the DBE Program is no longer needed, because minority-owned and women-owned businesses will have achieved competitive parity with their nonminority male-owned counterparts. However, my own research and that of my colleagues demonstrates that this day has not yet arrived.

Thank you. I will be pleased to answer any questions.

Table 1A. Percentage of Firms and Sales and Corresponding Disparity Ratios, All Firms and Employer Firms, African American, All Industries, 2002

State	Percentage of All Firms	Percentage of All Sales	Percentage of All Employers	Percentage of All Employer Sales	Disparity Ratio-All Firms	Disparity Ratio Employers
Alabama	9.26%	0.62%	2.96%	0.46%	*0.07*	*0.16*
Alaska	1.49%	0.18%	0.66%	0.14%	*0.12*	*0.22*
Arizona	1.66%	0.16%	0.66%	0.13%	*0.10*	*0.19*
Arkansas	4.28%	0.27%	1.38%	0.18%	*0.06*	*0.13*
California	3.88%	0.35%	1.48%	0.26%	*0.09*	*0.18*
Colorado	1.52%	0.20%	0.68%	0.16%	*0.13*	*0.24*
Connecticut	3.42%	0.19%	0.97%	0.14%	*0.05*	*0.14*
Delaware	6.70%	0.18%	1.97%	0.11%	*0.03*	*0.06*
Dist. Columbia	25.86%	1.47%	9.23%	1.28%	*0.06*	*0.14*
Florida	6.63%	0.53%	1.95%	0.36%	*0.08*	*0.19*
Georgia	13.41%	0.77%	3.88%	0.55%	*0.06*	*0.14*
Hawaii	0.82%	0.12%	0.31%	0.10%	*0.15*	*0.33*
Idaho	0.31%	0.08%	0.34%	0.07%	*0.26*	*0.21*
Illinois	7.17%	0.43%	1.73%	0.35%	*0.06*	*0.20*
Indiana	3.24%	0.35%	1.28%	0.31%	*0.11*	*0.24*
Iowa	0.68%	0.11%	0.35%	0.10%	*0.16*	*0.29*
Kansas	2.04%	0.16%	0.96%	0.13%	*0.08*	*0.13*
Kentucky	2.52%	0.39%	0.92%	0.35%	*0.15*	*0.38*
Louisiana	12.24%	0.59%	3.55%	0.40%	*0.05*	*0.11*
Maine	0.24%	0.04%	0.10%	0.03%	*0.18*	*0.33*
Maryland	15.65%	1.25%	4.23%	0.92%	*0.08*	*0.22*
Massachusetts	2.27%	0.19%	0.87%	0.15%	*0.08*	*0.18*
Michigan	6.03%	0.54%	1.68%	0.47%	*0.09*	*0.28*
Minnesota	1.77%	0.15%	0.46%	0.12%	*0.08*	*0.27*
Mississippi	13.33%	0.94%	4.39%	0.59%	*0.07*	*0.13*
Missouri	3.81%	0.30%	1.73%	0.24%	*0.08*	*0.14*
Montana	0.22%	0.03%	n/a	n/a	*0.13*	
Nebraska	1.44%	0.10%	0.62%	0.09%	*0.07*	*0.14*
Nevada	2.56%	0.29%	1.08%	0.23%	*0.11*	*0.22*
New Hampshire	0.37%	0.07%	0.23%	0.06%	*0.19*	*0.26*
New Jersey	5.12%	0.38%	1.86%	0.31%	*0.07*	*0.16*
New Mexico	1.13%	0.29%	0.50%	0.27%	*0.26*	*0.53*
New York	7.58%	0.43%	1.81%	0.31%	*0.06*	*0.17*
North Carolina	8.11%	0.59%	3.07%	0.45%	*0.07*	*0.15*
North Dakota	0.14%	0.03%	n/a	n/a	*0.24*	
Ohio	4.36%	0.40%	1.56%	0.34%	*0.09*	*0.22*
Oklahoma	2.55%	0.23%	0.96%	0.18%	*0.09*	*0.19*
Oregon	0.74%	0.15%	0.39%	0.13%	*0.20*	*0.34*
Pennsylvania	2.83%	0.22%	1.17%	0.18%	*0.08*	*0.16*
Rhode Island	n/a	n/a	n/a	n/a		
South Carolina	9.77%	0.63%	3.31%	0.42%	*0.06*	*0.13*
South Dakota	0.18%	0.10%	0.11%	0.10%	*0.58*	*0.90*
Tennessee	5.90%	0.40%	2.16%	0.29%	*0.07*	*0.14*
Texas	5.12%	0.35%	1.79%	0.26%	*0.07*	*0.14*
Utah	0.34%	0.13%	0.15%	0.13%	*0.38*	*0.86*

State	Percentage of All Firms	Percentage of All Sales	Percentage of All Employers	Percentage of All Employer Sales	Disparity Ratio-All Firms	Disparity Ratio Employers
Vermont	0.29%	0.05%	0.15%	0.05%	*0.18*	*0.33*

Table 1A. Percentage of Firms and Sales and Corresponding Disparity Ratios, All Firms and Employer Firms, African American, All Industries, 2002, cont'd

State	Percentage of All Firms	Percentage of All Sales	Percentage of All Employers	Percentage of All Employer Sales	Disparity Ratio-All Firms	Disparity Ratio Employers
Virginia	7.77%	0.67%	3.39%	0.55%	*0.09*	*0.16*
Washington	1.49%	0.23%	0.84%	0.21%	*0.16*	*0.25*
West Virginia	1.30%	0.11%	0.39%	0.08%	*0.08*	*0.22*
Wisconsin	1.70%	0.15%	0.76%	0.12%	*0.09*	*0.16*
Wyoming	0.28%	0.03%	0.24%	0.02%	*0.10*	*0.10*

Notes: The disparity ratio is derived by dividing the percentage of sales by the corresponding percentage of firms. A disparity ratio of zero indicates complete disparity while a value of 1 indicates parity. Disparity ratios in italics are statistically significant at a 1-in-100 probability level. "n/a" indicates data was suppressed by Census for statistical reason and/or to protect confidentiality.

Table 1B. Percentage of Firms and Sales and Corresponding Disparity Ratios, All Firms and Employer Firms, Hispanic or Latino, All Industries, 2002

State	Percentage of All Firms	Percentage of All Sales	Percentage of All Employers	Percentage of All Employer Sales	Disparity Ratio-All Firms	Disparity Ratio Employers
Alabama	0.82%	0.28%	0.90%	0.26%	*0.34*	*0.29*
Alaska	2.00%	0.37%	1.85%	0.34%	*0.19*	*0.18*
Arizona	9.21%	1.32%	5.30%	1.10%	*0.14*	*0.21*
Arkansas	1.00%	0.23%	0.84%	0.20%	*0.23*	*0.24*
California	14.70%	2.04%	7.06%	1.68%	*0.14*	*0.24*
Colorado	5.17%	1.33%	3.48%	1.21%	*0.26*	*0.35*
Connecticut	3.12%	0.33%	1.70%	0.28%	*0.11*	*0.16*
Delaware	1.38%	0.12%	0.72%	0.09%	*0.09*	*0.12*
Dist. Columbia	4.60%	0.51%	3.18%	0.48%	*0.11*	*0.15*
Florida	17.33%	3.80%	11.09%	3.27%	*0.22*	*0.29*
Georgia	2.71%	0.57%	1.66%	0.48%	*0.21*	*0.29*
Hawaii	3.12%	0.73%	2.05%	0.66%	*0.23*	*0.32*
Idaho	2.28%	0.48%	1.82%	0.41%	*0.21*	*0.23*
Illinois	4.13%	0.64%	2.69%	0.57%	*0.16*	*0.21*
Indiana	1.26%	0.16%	0.81%	0.14%	*0.13*	*0.17*
Iowa	0.65%	0.12%	0.58%	0.11%	*0.19*	*0.19*
Kansas	1.90%	0.29%	1.47%	0.25%	*0.15*	*0.17*
Kentucky	0.70%	0.27%	n/a	n/a	*0.39*	
Louisiana	2.33%	0.60%	1.63%	0.56%	*0.26*	*0.34*
Maine	0.54%	0.15%	0.32%	0.13%	*0.28*	*0.41*
Maryland	3.46%	0.64%	2.00%	0.54%	*0.19*	*0.27*
Massachusetts	2.83%	0.32%	1.41%	0.26%	*0.11*	*0.19*
Michigan	1.34%	0.40%	0.90%	0.39%	*0.30*	*0.43*
Minnesota	0.90%	0.10%	0.57%	0.08%	*0.11*	*0.14*
Mississippi	0.71%	0.15%	0.56%	0.13%	*0.21*	*0.22*
Missouri	0.83%	0.15%	0.63%	0.14%	*0.18*	*0.22*
Montana	0.96%	0.22%	n/a	n/a	*0.23*	
Nebraska	1.35%	0.31%	0.94%	0.29%	*0.23*	*0.31*
Nevada	5.75%	1.11%	3.18%	0.96%	*0.19*	*0.30*
New Hampshire	0.73%	0.21%	0.65%	0.18%	*0.28*	*0.28*
New Jersey	7.03%	0.85%	3.78%	0.73%	*0.12*	*0.19*
New Mexico	21.73%	5.40%	15.08%	4.83%	*0.25*	*0.32*
New York	9.58%	0.71%	3.26%	0.56%	*0.07*	*0.17*
North Carolina	1.41%	0.30%	1.09%	0.25%	*0.21*	*0.23*
North Dakota	0.41%	0.04%	0.25%	0.03%	*0.09*	*0.13*
Ohio	0.87%	0.14%	0.67%	0.13%	*0.16*	*0.19*
Oklahoma	1.87%	0.58%	1.40%	0.53%	*0.31*	*0.38*
Oregon	2.12%	0.56%	1.56%	0.52%	*0.26*	*0.34*
Pennsylvania	1.26%	0.18%	0.72%	0.15%	*0.14*	*0.21*
Rhode Island	3.91%	0.32%	1.20%	0.20%	*0.08*	*0.17*
South Carolina	1.03%	0.27%	0.90%	0.25%	*0.26*	*0.28*
South Dakota	0.51%	0.20%	0.49%	0.19%	*0.40*	*0.39*
Tennessee	0.95%	0.23%	0.92%	0.21%	*0.24*	*0.23*
Texas	18.41%	2.33%	9.47%	1.88%	*0.13*	*0.20*
Utah	2.68%	0.38%	1.82%	0.32%	*0.14*	*0.17*

State	Percentage of All Firms	Percentage of All Sales	Percentage of All Employers	Percentage of All Employer Sales	Disparity Ratio-All Firms	Disparity Ratio Employers
Vermont	0.62%	0.10%	0.35%	0.08%	*0.15*	*0.22*

Table 1B. Percentage of Firms and Sales and Corresponding Disparity Ratios, All Firms and Employer Firms, Hispanic or Latino, All Industries, 2002, cont'd

State	Percentage of All Firms	Percentage of All Sales	Percentage of All Employers	Percentage of All Employer Sales	Disparity Ratio-All Firms	Disparity Ratio Employers
Virginia	3.59%	0.62%	1.79%	0.53%	*0.17*	*0.30*
Washington	2.20%	0.34%	1.74%	0.30%	*0.16*	*0.18*
West Virginia	0.57%	0.22%	0.81%	0.20%	*0.38*	*0.25*
Wisconsin	0.95%	0.22%	0.77%	0.21%	*0.23*	*0.27*
Wyoming	2.49%	0.66%	1.95%	0.63%	*0.26*	*0.32*

Notes: See Table 1A.

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Table 1C. Percentage of Firms and Sales and Corresponding Disparity Ratios, All Firms and Employer Firms, Asians, All Industries, 2002

State	Percentage of All Firms	Percentage of All Sales	Percentage of All Employers	Percentage of All Employer Sales	Disparity Ratio-All Firms	Disparity Ratio Employers
Alabama	1.38%	0.56%	2.17%	0.53%	*0.41*	*0.24*
Alaska	3.07%	0.91%	4.05%	0.82%	*0.30*	*0.20*
Arizona	2.68%	0.73%	3.36%	0.67%	*0.27*	*0.20*
Arkansas	0.96%	0.37%	1.84%	0.36%	*0.39*	*0.19*
California	12.77%	4.50%	15.24%	4.17%	*0.35*	*0.27*
Colorado	2.35%	0.64%	2.94%	0.58%	*0.27*	*0.20*
Connecticut	2.38%	0.48%	3.24%	0.41%	*0.20*	*0.13*
Delaware	2.98%	0.53%	3.96%	0.49%	*0.18*	*0.12*
Dist. Columbia	5.11%	0.94%	10.11%	n/a	*0.18*	
Florida	2.68%	1.04%	3.78%	0.99%	*0.39*	*0.26*
Georgia	3.99%	1.08%	5.97%	1.00%	*0.27*	*0.17*
Hawaii	45.28%	18.88%	43.92%	17.73%	*0.42*	*0.40*
Idaho	0.91%	0.39%	1.29%	0.38%	*0.43*	*0.29*
Illinois	4.64%	1.27%	5.43%	1.19%	*0.27*	*0.22*
Indiana	1.40%	0.54%	2.11%	0.52%	*0.38*	*0.24*
Iowa	0.76%	0.20%	1.12%	0.18%	*0.26*	*0.16*
Kansas	1.62%	0.39%	2.36%	0.36%	*0.24*	*0.15*
Kentucky	1.08%	0.48%	1.89%	0.47%	*0.45*	0.25
Louisiana	2.50%	0.55%	3.07%	0.47%	*0.22*	*0.15*
Maine	0.62%	0.27%	1.28%	0.26%	*0.45*	*0.21*
Maryland	5.90%	1.89%	7.44%	1.76%	*0.32*	*0.24*
Massachusetts	3.21%	0.77%	3.76%	0.72%	*0.24*	*0.19*
Michigan	2.09%	0.64%	2.80%	0.60%	*0.31*	*0.21*
Minnesota	1.73%	0.38%	1.61%	0.35%	*0.22*	*0.22*
Mississippi	1.56%	0.87%	2.34%	0.79%	*0.56*	*0.34*
Missouri	1.45%	0.42%	2.19%	0.40%	*0.29*	*0.18*
Montana	0.51%	0.22%	0.90%	0.22%	*0.44*	0.24
Nebraska	1.00%	0.49%	1.53%	0.49%	*0.49*	*0.32*
Nevada	5.23%	1.35%	5.37%	1.17%	*0.26*	*0.22*
New Hampshire	1.22%	0.43%	2.07%	0.39%	*0.35*	*0.19*
New Jersey	7.33%	2.18%	8.46%	2.06%	*0.30*	*0.24*
New Mexico	1.73%	0.73%	2.52%	0.69%	*0.42*	*0.27*
New York	8.50%	1.76%	8.40%	1.58%	*0.21*	*0.19*
North Carolina	2.13%	0.58%	2.84%	0.54%	*0.27*	*0.19*
North Dakota	0.49%	0.25%	0.97%	0.25%	*0.52*	*0.26*
Ohio	1.68%	0.57%	2.71%	0.54%	*0.34*	*0.20*
Oklahoma	1.57%	0.47%	2.28%	0.42%	*0.30*	*0.18*
Oregon	3.02%	0.87%	3.42%	0.76%	*0.29*	*0.22*
Pennsylvania	2.59%	0.69%	3.17%	0.63%	*0.27*	*0.20*
Rhode Island	1.75%	0.49%	1.78%	0.44%	*0.28*	*0.25*
South Carolina	1.51%	0.81%	2.47%	0.79%	*0.54*	*0.32*
South Dakota	0.43%	0.15%	0.46%	0.14%	*0.34*	*0.31*
Tennessee	1.59%	0.50%	2.86%	0.47%	*0.31*	*0.16*
Texas	4.49%	1.14%	5.99%	1.04%	*0.25*	*0.17*
Utah	1.46%	0.48%	1.81%	0.45%	*0.33*	*0.25*

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State	Percentage of All Firms	Percentage of All Sales	Percentage of All Employers	Percentage of All Employer Sales	Disparity Ratio-All Firms	Disparity Ratio Employers
Vermont	0.60%	0.17%	1.00%	n/a	*0.28*	

Table 1C. Percentage of Firms and Sales and Corresponding Disparity Ratios, All Firms and Employer Firms, Asians, All Industries, 2002, cont'd

State	Percentage of All Firms	Percentage of All Sales	Percentage of All Employers	Percentage of All Employer Sales	Disparity Ratio-All Firms	Disparity Ratio Employers
Virginia	5.75%	1.38%	6.05%	1.27%	*0.24*	*0.21*
Washington	5.75%	1.59%	6.01%	1.46%	*0.28*	*0.24*
West Virginia	1.09%	0.51%	2.12%	0.50%	*0.47*	*0.23*
Wisconsin	1.26%	0.34%	1.61%	0.32%	*0.27*	*0.20*
Wyoming	0.76%	0.25%	1.34%	0.24%	*0.33*	*0.18*

Notes: See Table 1A.

Table 1D. Percentage of Firms and Sales and Corresponding Disparity Ratios, All Firms and Employer Firms, American Indians and Alaska Natives, All Industries, 2002

State	Percentage of All Firms	Percentage of All Sales	Percentage of All Employers	Percentage of All Employer Sales	Disparity Ratio-All Firms	Disparity Ratio Employers
Alabama	0.94%	0.18%	0.69%	0.16%	*0.19*	*0.23*
Alaska	8.29%	6.02%	4.76%	6.07%	*0.73*	*1.28*
Arizona	1.72%	0.17%	0.49%	0.14%	*0.10*	*0.29*
Arkansas	1.09%	0.19%	0.50%	0.16%	*0.18*	*0.31*
California	1.31%	0.14%	0.54%	0.11%	*0.11*	*0.20*
Colorado	0.85%	0.14%	0.50%	0.11%	*0.16*	*0.23*
Connecticut	0.40%	0.04%	n/a	n/a	*0.09*	
Delaware	n/a	n/a	n/a	n/a		
Dist. Columbia	0.47%	0.05%	0.33%	0.05%	*0.10*	*0.14*
Florida	0.64%	0.06%	0.23%	0.04%	*0.09*	*0.16*
Georgia	0.66%	0.08%	0.42%	0.06%	*0.12*	*0.15*
Hawaii	0.90%	0.15%	n/a	n/a	*0.17*	
Idaho	0.94%	0.28%	0.54%	0.26%	*0.30*	*0.48*
Illinois	0.35%	0.04%	0.20%	0.03%	*0.11*	*0.16*
Indiana	0.45%	0.05%	0.27%	0.05%	*0.12*	*0.17*
Iowa	0.27%	0.04%	n/a	n/a	*0.13*	
Kansas	0.79%	0.15%	0.60%	0.14%	*0.20*	*0.24*
Kentucky	0.44%	0.03%	0.15%	0.02%	*0.06*	*0.11*
Louisiana	0.82%	0.10%	0.30%	0.08%	*0.12*	*0.27*
Maine	0.50%	0.06%	0.32%	0.05%	*0.13*	*0.15*
Maryland	0.81%	0.11%	0.35%	0.09%	*0.13*	*0.24*
Massachusetts	0.40%	0.06%	0.24%	0.05%	*0.14*	*0.20*
Michigan	0.73%	0.09%	0.40%	0.08%	*0.12*	*0.19*
Minnesota	0.62%	0.07%	0.43%	0.06%	*0.11*	*0.15*
Mississippi	0.36%	0.05%	n/a	n/a	*0.12*	
Missouri	0.75%	0.08%	0.39%	0.06%	*0.10*	*0.14*
Montana	1.98%	0.48%	1.26%	0.43%	*0.24*	*0.34*
Nebraska	0.29%	0.03%	0.11%	0.03%	*0.11*	*0.25*
Nevada	1.12%	0.14%	0.59%	0.10%	*0.13*	*0.17*
New Hampshire	0.42%	0.06%	0.29%	0.05%	*0.15*	*0.17*
New Jersey	0.37%	0.03%	0.18%	0.02%	*0.09*	*0.14*
New Mexico	4.99%	0.52%	1.14%	0.45%	*0.11*	*0.39*
New York	0.65%	0.04%	0.23%	0.03%	*0.06*	*0.13*
North Carolina	0.93%	0.10%	0.55%	0.07%	*0.11*	*0.14*
North Dakota	1.50%	0.29%	0.55%	0.26%	*0.19*	*0.48*
Ohio	0.38%	0.05%	0.20%	0.05%	*0.14*	*0.23*
Oklahoma	5.86%	1.28%	3.53%	1.10%	*0.22*	*0.31*
Oregon	1.02%	0.14%	0.53%	0.10%	*0.13*	*0.20*
Pennsylvania	n/a	n/a	n/a	n/a		
Rhode Island	0.51%	0.04%	0.13%	0.02%	*0.08*	*0.19*
South Carolina	0.49%	0.06%	0.32%	0.05%	*0.12*	*0.16*
South Dakota	1.87%	0.22%	0.73%	0.21%	*0.12*	*0.28*
Tennessee	0.78%	0.15%	0.38%	0.12%	*0.19*	*0.32*
Texas	0.93%	0.17%	0.61%	0.15%	*0.19*	*0.25*
Utah	0.59%	0.06%	0.36%	0.05%	*0.09*	*0.13*

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State	Percentage of All Firms	Percentage of All Sales	Percentage of All Employers	Percentage of All Employer Sales	Disparity Ratio-All Firms	Disparity Ratio Employers
Vermont	0.41%	0.11%	0.18%	0.10%	*0.27*	*0.54*

Table 1D. Percentage of Firms and Sales and Corresponding Disparity Ratios, All Firms and Employer Firms, American Indians and Alaska Natives, All Industries, 2002, cont'd

State	Percentage of All Firms	Percentage of All Sales	Percentage of All Employers	Percentage of All Employer Sales	Disparity Ratio-All Firms	Disparity Ratio Employers
Virginia	0.50%	0.08%	0.36%	0.07%	*0.17*	*0.19*
Washington	1.23%	0.22%	0.72%	0.19%	*0.18*	*0.27*
West Virginia	0.36%	0.04%	0.30%	0.03%	*0.11*	*0.09*
Wisconsin	0.64%	0.10%	0.35%	0.09%	*0.15*	*0.25*
Wyoming	1.12%	0.18%	0.87%	0.15%	*0.16*	*0.18*

Notes: See Table 1A.

Table 1E. Percentage of Firms and Sales and Corresponding Disparity Ratios, All Firms and Employer Firms, Native Hawaiians and Pacific Islanders, All Industries, 2002

State	Percentage of All Firms	Percentage of All Sales	Percentage of All Employers	Percentage of All Employer Sales	Disparity Ratio-All Firms	Disparity Ratio Employers
Alabama	0.03%	0.00%	0.01%	0.00%	*0.06*	*0.24*
Alaska	0.24%	0.02%	0.22%	n/a	*0.09*	
Arizona	0.09%	0.01%	0.07%	0.01%	*0.13*	*0.14*
Arkansas	0.03%	0.00%	n/a	n/a	*0.09*	
California	0.24%	0.04%	0.15%	0.03%	*0.18*	*0.22*
Colorado	0.08%	0.01%	0.05%	0.01%	*0.11*	*0.16*
Connecticut	0.06%	0.02%	n/a	n/a	*0.36*	
Delaware	0.03%	n/a	n/a	n/a		
Dist. Columbia	n/a	n/a	n/a	n/a		
Florida	0.10%	0.01%	0.04%	0.00%	*0.07*	*0.13*
Georgia	0.03%	0.00%	0.03%	0.00%	*0.13*	*0.08*
Hawaii	8.42%	2.16%	4.26%	1.98%	*0.26*	*0.46*
Idaho	0.08%	0.01%	n/a	n/a	*0.15*	
Illinois	0.07%	n/a	n/a	n/a		
Indiana	0.03%	0.02%	n/a	n/a	*0.61*	
Iowa	0.01%	0.00%	0.00%	n/a	*0.39*	
Kansas	0.02%	0.01%	n/a	n/a	*0.42*	
Kentucky	0.02%	n/a	0.00%	n/a		
Louisiana	n/a	n/a	n/a	n/a		
Maine	n/a	n/a	n/a	n/a		
Maryland	0.02%	n/a	0.04%	0.01%		*0.24*
Massachusetts	n/a	n/a	n/a	n/a		
Michigan	0.03%	0.00%	n/a	n/a	*0.17*	
Minnesota	n/a	n/a	n/a	n/a		
Mississippi	0.07%	0.00%	n/a	n/a	*0.07*	
Missouri	0.02%	0.01%	n/a	n/a	*0.35*	
Montana	0.04%	0.00%	n/a	n/a	*0.12*	
Nebraska	0.01%	n/a	0.00%	0.00%		
Nevada	0.18%	0.04%	n/a	n/a	*0.20*	
New Hampshire	0.01%	n/a	n/a	n/a		
New Jersey	0.06%	0.00%	n/a	n/a	*0.07*	
New Mexico	0.10%	0.02%	n/a	n/a	*0.19*	
New York	0.18%	0.01%	0.04%	n/a	*0.04*	
North Carolina	0.03%	0.00%	n/a	n/a	*0.07*	
North Dakota	0.00%	n/a	0.00%	0.00%		
Ohio	n/a	n/a	n/a	n/a		
Oklahoma	0.10%	0.00%	0.03%	0.00%	*0.05*	*0.10*
Oregon	0.12%	0.02%	0.08%	0.02%	*0.18*	*0.21*
Pennsylvania	0.03%	0.00%	n/a	n/a	*0.13*	
Rhode Island	n/a	n/a	n/a	n/a		
South Carolina	0.01%	0.00%	n/a	n/a	*0.29*	
South Dakota	0.02%	n/a	0.01%	n/a		
Tennessee	n/a	n/a	n/a	n/a		
Texas	0.08%	0.00%	n/a	n/a	*0.05*	
Utah	0.22%	0.10%	0.18%	0.10%	*0.47*	0.58

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State	Percentage of All Firms	Percentage of All Sales	Percentage of All Employers	Percentage of All Employer Sales	Disparity Ratio-All Firms	Disparity Ratio Employers
Vermont	n/a	n/a	n/a	n/a		

Table 1E. Percentage of Firms and Sales and Corresponding Disparity Ratios, All Firms and Employer Firms, Native Hawaiians and Pacific Islanders, All Industries, 2002, cont'd

State	Percentage of All Firms	Percentage of All Sales	Percentage of All Employers	Percentage of All Employer Sales	Disparity Ratio-All Firms	Disparity Ratio Employers
Virginia	0.08%	0.03%	0.07%	n/a	*0.32*	
Washington	0.16%	0.05%	0.09%	0.05%	*0.33*	*0.55*
West Virginia	0.01%	n/a	0.00%	0.00%		
Wisconsin	0.03%	0.00%	0.01%	0.00%	*0.03*	*0.12*
Wyoming	0.04%	0.00%	0.00%	0.00%	*0.04*	

Notes: See Table 1A. The Employer disparity ratio for Utah is statistically significant at a 1-in-10 probability level.

Table 1F. Percentage of Firms and Sales and Corresponding Disparity Ratios, All Firms and Employer Firms, Women, All Industries, 2002

State	Percentage of All Firms	Percentage of All Sales	Percentage of All Employers	Percentage of All Employer Sales	Disparity Ratio-All Firms	Disparity Ratio Employers
Alabama	26.43%	4.29%	15.77%	3.87%	*0.16*	*0.25*
Alaska	26.24%	5.08%	18.87%	4.53%	*0.19*	*0.24*
Arizona	28.79%	4.83%	16.60%	4.26%	*0.17*	*0.26*
Arkansas	23.74%	3.85%	14.92%	3.50%	*0.16*	*0.23*
California	29.93%	4.92%	17.18%	4.25%	*0.16*	*0.25*
Colorado	29.08%	4.25%	18.36%	3.69%	*0.15*	*0.20*
Connecticut	27.23%	3.14%	14.66%	2.68%	*0.12*	*0.18*
Delaware	24.14%	1.74%	14.86%	1.45%	*0.07*	*0.10*
Dist. Columbia	33.23%	2.25%	17.92%	n/a	*0.07*	
Florida	28.41%	5.70%	18.09%	5.01%	*0.20*	*0.28*
Georgia	29.09%	4.06%	17.02%	3.60%	*0.14*	*0.21*
Hawaii	30.18%	6.91%	19.32%	6.17%	*0.23*	*0.32*
Idaho	23.71%	4.42%	13.72%	3.96%	*0.19*	*0.29*
Illinois	29.74%	4.08%	16.53%	3.69%	*0.14*	*0.22*
Indiana	27.39%	3.41%	14.77%	3.07%	*0.12*	*0.21*
Iowa	26.98%	3.17%	14.04%	2.86%	*0.12*	*0.20*
Kansas	27.18%	3.02%	15.78%	2.68%	*0.11*	*0.17*
Kentucky	25.66%	3.33%	15.01%	2.95%	*0.13*	*0.20*
Louisiana	26.43%	3.76%	15.54%	3.36%	*0.14*	*0.22*
Maine	24.01%	4.40%	14.88%	3.83%	*0.18*	*0.26*
Maryland	30.98%	4.63%	17.24%	3.99%	*0.15*	*0.23*
Massachusetts	28.73%	3.57%	15.88%	3.07%	*0.12*	*0.19*
Michigan	29.59%	3.68%	15.61%	3.29%	*0.12*	*0.21*
Minnesota	27.92%	3.52%	14.71%	3.15%	*0.13*	*0.21*
Mississippi	25.11%	4.79%	15.67%	4.27%	*0.19*	*0.27*
Missouri	27.41%	4.14%	16.69%	3.80%	*0.15*	*0.23*
Montana	24.42%	4.79%	16.41%	4.16%	*0.20*	*0.25*
Nebraska	26.61%	4.16%	14.95%	3.91%	*0.16*	*0.26*
Nevada	28.13%	5.86%	15.36%	5.17%	*0.21*	*0.34*
New Hampshire	24.74%	4.99%	15.80%	4.56%	*0.20*	*0.29*
New Jersey	26.13%	4.19%	15.46%	3.79%	*0.16*	*0.24*
New Mexico	30.91%	5.44%	18.54%	4.81%	*0.18*	*0.26*
New York	29.59%	4.10%	15.74%	3.55%	*0.14*	*0.23*
North Carolina	27.06%	4.43%	16.14%	4.02%	*0.16*	*0.25*
North Dakota	23.25%	3.12%	11.87%	2.74%	*0.13*	*0.23*
Ohio	28.12%	3.61%	15.11%	3.23%	*0.13*	*0.21*
Oklahoma	25.73%	4.69%	15.97%	4.25%	*0.18*	*0.27*
Oregon	29.49%	4.21%	16.30%	3.66%	*0.14*	*0.22*
Pennsylvania	25.98%	4.09%	15.28%	3.76%	*0.16*	*0.25*
Rhode Island	26.52%	5.48%	14.40%	4.92%	*0.21*	*0.34*
South Carolina	26.22%	4.29%	15.55%	3.86%	*0.16*	*0.25*
South Dakota	22.40%	2.58%	13.61%	2.31%	*0.12*	*0.17*
Tennessee	25.96%	4.04%	14.78%	3.61%	*0.16*	*0.24*
Texas	27.02%	3.63%	17.43%	3.18%	*0.13*	*0.18*
Utah	25.12%	4.06%	12.69%	3.66%	*0.16*	*0.29*

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State	Percentage of All Firms	Percentage of All Sales	Percentage of All Employers	Percentage of All Employer Sales	Disparity Ratio-All Firms	Disparity Ratio Employers
Vermont	26.26%	3.64%	13.41%	3.00%	*0.14*	*0.22*

Table 1F. Percentage of Firms and Sales and Corresponding Disparity Ratios, All Firms and Employer Firms, Women, All Industries, 2002, cont'd

State	Percentage of All Firms	Percentage of All Sales	Percentage of All Employers	Percentage of All Employer Sales	Disparity Ratio-All Firms	Disparity Ratio Employers
Virginia	29.66%	3.96%	17.35%	3.52%	*0.13*	*0.20*
Washington	29.40%	3.88%	16.21%	3.41%	*0.13*	*0.21*
West Virginia	27.68%	3.82%	14.76%	3.38%	*0.14*	*0.23*
Wisconsin	26.49%	4.03%	14.99%	3.75%	*0.15*	*0.25*
Wyoming	24.38%	3.37%	15.63%	n/a	*0.14*	

Notes: See Table 1A.

Table 2A. Percentage of Firms and Sales and Corresponding Disparity Ratios, All Firms and Employer Firms, African Americans, Construction Industries, 2002

State	Percentage of All Firms	Percentage of All Sales	Percentage of All Employers	Percentage of All Employer Sales	Disparity Ratio-All Firms	Disparity Ratio Employers
Alabama	5.71%	1.09%	3.12%	0.74%	*0.19*	*0.24*
Alaska	0.44%	0.13%	0.23%	0.11%	*0.30*	*0.46*
Arizona	0.57%	0.10%	0.20%	0.09%	*0.18*	0.45
Arkansas	2.60%	1.38%	n/a	n/a	0.53	
California	2.10%	0.47%	1.05%	0.40%	*0.22*	*0.38*
Colorado	0.65%	0.24%	n/a	n/a	*0.36*	
Connecticut	2.13%	0.39%	0.97%	0.28%	*0.18*	*0.28*
Delaware	n/a	n/a	n/a	n/a		
Dist. Columbia	34.90%	n/a	17.16%	7.05%		*0.41*
Florida	4.15%	0.59%	1.67%	0.45%	*0.14*	*0.27*
Georgia	6.19%	1.68%	2.96%	1.42%	*0.27*	*0.48*
Hawaii	n/a	n/a	n/a	n/a		
Idaho	n/a	n/a	n/a	n/a		
Illinois	2.79%	0.80%	0.94%	0.74%	*0.29*	*0.79*
Indiana	0.89%	0.97%	0.65%	1.02%	*1.09*	*1.57*
Iowa	0.22%	0.15%	0.13%	0.14%	*0.68*	*1.04*
Kansas	1.09%	0.52%	1.17%	0.48%	*0.48*	*0.41*
Kentucky	n/a	n/a	n/a	n/a		
Louisiana	9.90%	1.34%	2.92%	0.77%	*0.14*	*0.26*
Maine	0.04%	n/a	0.04%	n/a		
Maryland	7.12%	2.05%	2.69%	1.82%	*0.29*	*0.68*
Massachusetts	1.18%	0.55%	0.59%	0.51%	*0.47*	*0.87*
Michigan	1.64%	1.33%	0.85%	1.32%	*0.81*	*1.55*
Minnesota	0.73%	0.18%	0.11%	0.15%	*0.25*	*1.40*
Mississippi	10.47%	2.14%	5.65%	0.98%	*0.20*	*0.17*
Missouri	1.50%	0.62%	0.77%	0.60%	*0.41*	*0.78*
Montana	n/a	n/a	n/a	n/a		
Nebraska	0.51%	n/a	0.54%	n/a		
Nevada	1.18%	0.37%	n/a	n/a	*0.31*	
New Hampshire	n/a	n/a	n/a	n/a		
New Jersey	2.42%	0.58%	1.31%	0.47%	*0.24*	*0.36*
New Mexico	0.60%	0.16%	n/a	n/a	*0.27*	
New York	4.86%	0.77%	1.52%	0.67%	*0.16*	*0.44*
North Carolina	4.22%	0.87%	n/a	n/a	*0.21*	
North Dakota	0.00%	0.00%	0.00%	0.00%		
Ohio	2.04%	1.45%	1.37%	1.50%	*0.71*	*1.10*
Oklahoma	1.41%	0.32%	0.26%	0.16%	*0.23*	*0.61*
Oregon	0.41%	0.30%	0.38%	0.31%	*0.74*	*0.80*
Pennsylvania	1.41%	0.38%	0.54%	0.35%	*0.27*	*0.64*
Rhode Island	n/a	n/a	n/a	n/a		
South Carolina	6.65%	1.44%	3.95%	0.99%	*0.22*	*0.25*
South Dakota	n/a	n/a	n/a	n/a		
Tennessee	2.72%	0.70%	1.39%	0.57%	*0.26*	*0.41*
Texas	2.16%	0.57%	0.92%	0.41%	*0.26*	*0.45*
Utah	0.25%	0.03%	0.02%	n/a	*0.12*	

State	Percentage of All Firms	Percentage of All Sales	Percentage of All Employers	Percentage of All Employer Sales	Disparity Ratio-All Firms	Disparity Ratio Employers
Vermont	n/a	n/a	n/a	n/a		

Table 2A. Percentage of Firms and Sales and Corresponding Disparity Ratios, All Firms and Employer Firms, African Americans, Construction Industries, 2002, cont'd

State	Percentage of All Firms	Percentage of All Sales	Percentage of All Employers	Percentage of All Employer Sales	Disparity Ratio-All Firms	Disparity Ratio Employers
Virginia	4.10%	1.05%	2.71%	0.88%	*0.26*	*0.33*
Washington	0.55%	0.28%	n/a	n/a	*0.52*	
West Virginia	0.54%	0.94%	0.29%	0.97%	*1.73*	*3.32*
Wisconsin	0.54%	0.40%	n/a	n/a	*0.75*	
Wyoming	0.13%	n/a	n/a	n/a		

Notes: The disparity ratio is derived by dividing the percentage of sales by the corresponding percentage of firms. A disparity ratio of zero indicates complete disparity while a value of 1 indicates parity. Disparity ratios in italics are statistically significant at a 1-in-20 probability level or better. The Employer disparity ratio for Arizona and the All Firms disparity ratio for Arkansas are statistically significant at a 1-in-10 probability level.

Table 2B. Percentage of Firms and Sales and Corresponding Disparity Ratios, All Firms and Employer Firms, Hispanic or Latino, Construction Industries, 2002

State	Percentage of All Firms	Percentage of All Sales	Percentage of All Employers	Percentage of All Employer Sales	Disparity Ratio-All Firms	Disparity Ratio Employers
Alabama	1.23%	0.44%	1.32%	0.28%	*0.36*	*0.21*
Alaska	2.20%	0.86%	2.50%	0.81%	*0.39*	*0.32*
Arizona	11.66%	2.73%	6.97%	2.47%	*0.23*	*0.35*
Arkansas	1.50%	0.76%	0.44%	0.66%	*0.51*	*1.48*
California	15.38%	4.30%	8.25%	3.71%	*0.28*	*0.45*
Colorado	7.35%	2.61%	5.50%	2.22%	*0.36*	*0.40*
Connecticut	3.50%	0.64%	1.67%	0.44%	*0.18*	*0.26*
Delaware	1.16%	0.58%	0.25%	0.36%	*0.50*	*1.45*
Dist. Columbia	19.76%	n/a	10.65%	n/a	n/a	
Florida	17.44%	5.15%	8.25%	3.90%	*0.30*	*0.47*
Georgia	5.77%	1.39%	1.95%	0.62%	*0.24*	*0.32*
Hawaii	3.40%	1.31%	3.05%	n/a	*0.38*	
Idaho	2.01%	1.63%	1.93%	1.67%	*0.81*	*0.87*
Illinois	4.52%	1.52%	2.24%	1.38%	*0.34*	*0.61*
Indiana	1.67%	0.73%	0.97%	0.62%	*0.44*	*0.64*
Iowa	0.73%	0.29%	0.46%	0.18%	*0.39*	*0.40*
Kansas	2.49%	1.53%	n/a	n/a	*0.61*	
Kentucky	0.79%	0.43%	0.41%	0.32%	*0.55*	*0.77*
Louisiana	3.23%	1.84%	0.82%	1.70%	*0.57*	*2.07*
Maine	0.31%	0.33%	0.28%	0.37%	*1.04*	*1.34*
Maryland	8.43%	1.89%	3.13%	1.44%	*0.22*	*0.46*
Massachusetts	2.05%	0.75%	1.15%	0.67%	*0.37*	*0.58*
Michigan	1.33%	0.75%	0.95%	0.70%	*0.57*	0.73
Minnesota	0.88%	0.42%	0.67%	0.35%	*0.47*	*0.52*
Mississippi	0.75%	0.57%	0.31%	0.49%	*0.76*	*1.59*
Missouri	0.72%	0.43%	0.68%	0.41%	*0.59*	*0.60*
Montana	n/a	n/a	n/a	n/a		
Nebraska	1.35%	0.33%	n/a	n/a	*0.24*	
Nevada	7.05%	2.70%	3.93%	2.64%	*0.38*	*0.67*
New Hampshire	n/a	n/a	n/a	n/a		
New Jersey	6.97%	2.13%	3.33%	1.83%	*0.31*	*0.55*
New Mexico	29.50%	17.20%	25.44%	15.39%	*0.58*	*0.60*
New York	7.59%	1.72%	2.74%	1.48%	*0.23*	*0.54*
North Carolina	2.26%	1.11%	1.32%	0.72%	*0.49*	*0.55*
North Dakota	n/a	n/a	n/a	n/a		
Ohio	0.76%	0.32%	0.58%	0.27%	*0.42*	*0.47*
Oklahoma	2.27%	1.03%	1.49%	0.82%	*0.46*	*0.55*
Oregon	1.69%	1.10%	1.92%	1.10%	*0.65*	*0.57*
Pennsylvania	1.22%	0.36%	0.65%	0.28%	*0.29*	*0.44*
Rhode Island	n/a	n/a	n/a	n/a		
South Carolina	1.41%	0.67%	1.13%	0.58%	*0.48*	*0.51*
South Dakota	n/a	n/a	n/a	n/a		
Tennessee	1.47%	0.34%	0.71%	0.22%	*0.23*	*0.31*
Texas	30.86%	7.30%	11.30%	4.71%	*0.24*	*0.42*
Utah	2.78%	0.77%	1.60%	0.68%	*0.28*	*0.43*

State	Percentage of All Firms	Percentage of All Sales	Percentage of All Employers	Percentage of All Employer Sales	Disparity Ratio-All Firms	Disparity Ratio Employers
Vermont	n/a	n/a	n/a	n/a		

Table 2B. Percentage of Firms and Sales and Corresponding Disparity Ratios, All Firms and Employer Firms, Hispanic or Latino, Construction Industries, 2002, cont'd

State	Percentage of All Firms	Percentage of All Sales	Percentage of All Employers	Percentage of All Employer Sales	Disparity Ratio-All Firms	Disparity Ratio Employers
Virginia	7.24%	1.99%	2.10%	1.41%	*0.28*	*0.67*
Washington	1.67%	0.76%	1.78%	0.76%	*0.45*	*0.43*
West Virginia	0.35%	0.96%	0.41%	1.02%	*2.75*	*2.50*
Wisconsin	0.70%	0.37%	0.58%	0.35%	*0.53*	*0.61*
Wyoming	1.23%	0.44%	1.32%	0.28%	*0.36*	*0.21*

Notes: See Table 2A. The Employer disparity ratio for Michigan is statistically significant at a 1-in-10 probability level.

Table 2C. Percentage of Firms and Sales and Corresponding Disparity Ratios, All Firms and Employer Firms, Asians, Construction Industries, 2002

State	Percentage of All Firms	Percentage of All Sales	Percentage of All Employers	Percentage of All Employer Sales	Disparity Ratio-All Firms	Disparity Ratio Employers
Alabama						
Alaska	1.73%	0.43%	0.67%	0.32%	*0.25*	0.48
Arizona	0.55%	0.14%	n/a	n/a	*0.25*	
Arkansas	n/a	n/a	n/a	n/a		
California	4.77%	1.55%	3.57%	1.30%	*0.32*	*0.36*
Colorado	0.88%	0.21%	0.54%	0.17%	*0.24*	*0.31*
Connecticut	0.30%	0.26%	0.27%	0.27%	*0.86*	*1.01*
Delaware	n/a	n/a	n/a	n/a		
Dist. Columbia	2.69%	n/a	6.80%	n/a		
Florida	0.75%	0.36%	0.45%	0.35%	*0.48*	*0.78*
Georgia	0.69%	0.40%	n/a	n/a	*0.58*	
Hawaii	37.27%	27.68%	35.62%	27.67%	*0.74*	*0.78*
Idaho	0.31%	0.16%	0.24%	0.14%	*0.51*	*0.58*
Illinois	0.80%	0.60%	0.65%	0.59%	*0.74*	*0.90*
Indiana	0.35%	0.08%	n/a	n/a	*0.23*	
Iowa	n/a	n/a	n/a	n/a		
Kansas	0.32%	0.06%	n/a	n/a	*0.19*	
Kentucky	0.17%	0.27%	0.20%	0.29%	*1.62*	*1.50*
Louisiana	0.63%	0.21%	n/a	n/a	*0.34*	
Maine	n/a	n/a	n/a	n/a		
Maryland	4.14%	1.28%	1.49%		*0.31*	
Massachusetts	1.21%	1.03%	0.54%	1.03%	*0.85*	*1.90*
Michigan	0.34%	0.25%	0.26%	0.24%	0.72	*0.95*
Minnesota	0.47%	0.44%	n/a	n/a	*0.92*	
Mississippi	n/a	n/a	n/a	n/a		
Missouri	0.23%	0.29%	0.23%	n/a	*1.22*	
Montana	0.18%	0.15%	n/a	n/a	*0.87*	
Nebraska	n/a	n/a	n/a	n/a		
Nevada	1.11%	0.48%	0.70%	0.47%	*0.44*	*0.66*
New Hampshire	n/a	n/a	n/a	n/a		
New Jersey	1.33%	0.77%	0.89%	n/a	*0.58*	
New Mexico	n/a	n/a	n/a	n/a		
New York	4.12%	1.15%	1.93%	1.03%	*0.28*	*0.53*
North Carolina	0.53%	0.34%	0.40%	0.31%	*0.65*	*0.76*
North Dakota	n/a	n/a	n/a	n/a		
Ohio	0.43%	0.39%	n/a	n/a	*0.91*	
Oklahoma	0.57%	0.10%	n/a	n/a	*0.18*	
Oregon	0.86%	0.30%	0.67%	0.25%	*0.35*	*0.38*
Pennsylvania	0.72%	0.23%	0.23%	0.20%	*0.32*	*0.88*
Rhode Island	0.38%	0.25%	0.06%	n/a	*0.67*	
South Carolina	n/a	n/a	n/a	n/a		
South Dakota	n/a	n/a	n/a	n/a		
Tennessee	0.47%	0.16%	0.32%	0.13%	*0.35*	*0.39*
Texas	1.02%	0.40%	0.69%	0.36%	*0.39*	*0.52*
Utah	0.42%	0.66%	n/a	n/a	*1.57*	

State	Percentage of All Firms	Percentage of All Sales	Percentage of All Employers	Percentage of All Employer Sales	Disparity Ratio-All Firms	Disparity Ratio Employers
Vermont	n/a	n/a	n/a	n/a		

Table 2C. Percentage of Firms and Sales and Corresponding Disparity Ratios, All Firms and Employer Firms, Asians, Construction Industries, 2002, cont'd

State	Percentage of All Firms	Percentage of All Sales	Percentage of All Employers	Percentage of All Employer Sales	Disparity Ratio-All Firms	Disparity Ratio Employers
Virginia	3.14%	0.86%	1.28%	0.58%	*0.27*	*0.45*
Washington	2.10%	1.09%	1.72%	1.06%	*0.52*	*0.62*
West Virginia	0.15%	0.15%	n/a	n/a	*0.96*	
Wisconsin	0.21%	0.06%	n/a	n/a	*0.26*	
Wyoming	0.13%	n/a	n/a	n/a		

Notes: See Table 2A. The Employer disparity ratio for Alaska and the All Firms disparity ratio for Michigan are statistically significant at a 1-in-10 probability level.

Table 2D. Percentage of Firms and Sales and Corresponding Disparity Ratios, All Firms and Employer Firms, Amer. Indians and Alaska Natives, Construction Industries, 2002

State	Percentage of All Firms	Percentage of All Sales	Percentage of All Employers	Percentage of All Employer Sales	Disparity Ratio-All Firms	Disparity Ratio Employers
Alabama	1.30%	0.56%	1.31%	0.53%	*0.43*	*0.40*
Alaska	5.08%	15.03%	5.24%	15.67%	*2.96*	*2.99*
Arizona	2.05%	0.56%	0.80%	0.51%	*0.27*	0.64
Arkansas	1.81%	1.53%	1.19%	1.51%	*0.84*	*1.26*
California	2.15%	0.70%	1.27%	0.62%	*0.33*	*0.49*
Colorado	1.18%	0.31%	0.87%	0.24%	*0.26*	*0.28*
Connecticut	0.53%	0.09%	n/a	n/a	*0.16*	
Delaware	n/a	n/a	n/a	n/a		
Dist. Columbia	0.75%	n/a	0.00%	0.00%		
Florida	1.00%	0.17%	n/a	n/a	*0.17*	
Georgia	1.03%	0.17%	0.26%	0.03%	*0.16*	*0.12*
Hawaii	0.54%	n/a	n/a	n/a		
Idaho	1.47%	0.84%	n/a	n/a	*0.57*	
Illinois	0.33%	0.13%	0.22%	0.12%	*0.39*	*0.55*
Indiana	0.20%	0.23%	n/a	n/a	*1.16*	
Iowa	n/a	n/a	n/a	n/a		
Kansas	1.21%	0.71%	0.90%	0.69%	*0.59*	*0.77*
Kentucky	n/a	n/a	n/a	n/a		
Louisiana	1.05%	0.29%	n/a	n/a	*0.28*	
Maine	0.81%	0.18%	n/a	n/a	*0.22*	
Maryland	2.07%	0.32%	n/a	n/a	*0.15*	
Massachusetts	0.67%	0.07%	0.29%	0.05%	*0.11*	*0.18*
Michigan	0.95%	0.34%	0.48%	0.31%	*0.36*	*0.65*
Minnesota	0.66%	0.21%	0.42%	0.20%	*0.32*	*0.48*
Mississippi	0.38%	0.03%	n/a	n/a	*0.08*	
Missouri	1.36%	0.39%	n/a	n/a	*0.28*	
Montana	2.30%	1.91%	1.81%	1.99%	*0.83*	*1.10*
Nebraska	0.33%	0.29%	0.20%	0.28%	*0.86*	*1.36*
Nevada	2.07%	0.29%	1.10%	0.26%	*0.14*	*0.23*
New Hampshire	0.79%	0.38%	n/a	n/a	0.47	
New Jersey	0.38%	n/a	0.16%	n/a		
New Mexico	n/a	n/a	n/a	n/a		
New York	0.96%	0.19%	0.38%	0.14%	*0.20*	*0.37*
North Carolina	1.34%	0.48%	0.95%	0.38%	*0.36*	*0.40*
North Dakota	1.93%	1.02%	1.68%	1.00%	*0.53*	*0.60*
Ohio	0.48%	0.15%	n/a	n/a	*0.32*	
Oklahoma	8.30%	5.39%	5.00%	4.75%	*0.65*	*0.95*
Oregon	1.36%	0.64%	1.03%	0.60%	*0.47*	*0.58*
Pennsylvania	0.37%	0.08%	0.23%	0.07%	*0.21*	*0.28*
Rhode Island	n/a	n/a	n/a	n/a		
South Carolina	0.58%	0.17%	n/a	n/a	*0.29*	
South Dakota	2.65%	1.74%	1.85%	1.79%	*0.66*	*0.97*
Tennessee	1.03%	0.35%	n/a	n/a	*0.34*	
Texas	1.09%	0.57%	0.91%	0.54%	*0.53*	*0.60*
Utah	0.92%	0.22%	0.48%	0.18%	*0.23*	*0.37*

State	Percentage of All Firms	Percentage of All Sales	Percentage of All Employers	Percentage of All Employer Sales	Disparity Ratio-All Firms	Disparity Ratio Employers
Vermont	0.91%	0.38%	0.31%	0.27%	*0.42*	*0.85*

Table 2D. Percentage of Firms and Sales and Corresponding Disparity Ratios, All Firms and Employer Firms, Amer. Indians and Alaska Natives, Construction Industries, 2002, cont'd

State	Percentage of All Firms	Percentage of All Sales	Percentage of All Employers	Percentage of All Employer Sales	Disparity Ratio-All Firms	Disparity Ratio Employers
Virginia	0.75%	0.30%	0.40%	0.20%	*0.40*	*0.50*
Washington	1.06%	0.66%	0.92%	0.63%	0.62	*0.68*
West Virginia	0.55%	0.13%	0.09%	0.12%	*0.24*	*1.33*
Wisconsin	0.57%	0.32%	0.31%	0.31%	*0.55*	*1.00*
Wyoming	1.82%	0.84%	n/a	n/a	*0.46*	

Notes: See Table 2A. The Employer disparity ratio for Arizona and the All Firms disparity ratio for New Hampshire and Washington are statistically significant at a 1-in-10 probability level.

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Table 2E. Percentage of Firms and Sales and Corresponding Disparity Ratios, All Firms and Employer Firms, Native Hawaiians and Pac. Islanders, Construction Industries, 2002

State	Percentage of All Firms	Percentage of All Sales	Percentage of All Employers	Percentage of All Employer Sales	Disparity Ratio-All Firms	Disparity Ratio Employers
Alabama	0.00%	n/a	0.01%	n/a		
Alaska	n/a	n/a	n/a	n/a		
Arizona	0.14%	n/a	n/a	n/a		
Arkansas	n/a	n/a	n/a	n/a		
California	n/a	n/a	n/a	n/a		
Colorado	0.14%	0.03%	0.09%	n/a	*0.24*	
Connecticut	n/a	n/a	n/a	n/a		
Delaware	0.00%	0.00%	0.00%	0.00%		
Dist. Columbia	0.06%	n/a	0.00%	0.00%		
Florida	n/a	n/a	n/a	n/a		
Georgia	0.03%	0.03%	0.07%	0.03%	0.89	0.44
Hawaii	12.87%	4.66%	n/a	n/a	*0.36*	
Idaho	n/a	n/a	n/a	n/a		
Illinois	n/a	n/a	n/a	n/a		
Indiana	n/a	n/a	n/a	n/a		
Iowa	0.01%	n/a	n/a	n/a		
Kansas	0.00%	0.00%	0.00%	0.00%		
Kentucky	0.01%	n/a	n/a	n/a		
Louisiana	0.00%	n/a	0.01%	n/a		
Maine	0.01%	n/a	0.04%	n/a		
Maryland	0.01%	n/a	0.01%	n/a		
Massachusetts	n/a	n/a	n/a	n/a		
Michigan	0.00%	n/a	0.01%	n/a		
Minnesota	n/a	n/a	n/a	n/a		
Mississippi	0.02%	0.02%	0.02%	n/a	0.74	
Missouri	n/a	n/a	n/a	n/a		
Montana	0.00%	0.00%	0.00%	0.00%		
Nebraska	0.01%	n/a	0.00%	0.00%		
Nevada	0.06%	n/a	n/a	n/a		
New Hampshire	n/a	n/a	n/a	n/a		
New Jersey	0.03%	n/a	0.07%	n/a		
New Mexico	0.01%	n/a	0.02%	n/a		
New York	n/a	n/a	n/a	n/a		
North Carolina	0.01%	0.00%	n/a	n/a	0.47	
North Dakota	0.00%	0.00%	0.00%	0.00%		
Ohio	n/a	n/a	n/a	n/a		
Oklahoma	0.50%	0.06%	n/a	n/a	*0.11*	
Oregon	0.08%	0.09%	n/a	n/a	1.05	
Pennsylvania	n/a	n/a	n/a	n/a		
Rhode Island	0.02%	n/a	0.00%	0.00%		
South Carolina	n/a	n/a	n/a	n/a		
South Dakota	0.00%	0.00%	0.00%	0.00%		
Tennessee	0.00%	n/a	0.01%	n/a		
Texas	n/a	n/a	n/a	n/a		
Utah	0.17%	0.82%	n/a	n/a	*4.85*	

State	Percentage of All Firms	Percentage of All Sales	Percentage of All Employers	Percentage of All Employer Sales	Disparity Ratio-All Firms	Disparity Ratio Employers
Vermont	0.00%	0.00%	0.00%	0.00%		

Table 2E. Percentage of Firms and Sales and Corresponding Disparity Ratios, All Firms and Employer Firms, Native Hawaiians and Pac. Islanders, Construction Industries, 2002, cont'd

State	Percentage of All Firms	Percentage of All Sales	Percentage of All Employers	Percentage of All Employer Sales	Disparity Ratio-All Firms	Disparity Ratio Employers
Virginia	0.02%	n/a	0.05%	n/a		
Washington	0.13%	n/a	0.18%	n/a		
West Virginia	0.00%	0.00%	0.00%	0.00%		
Wisconsin	n/a	n/a	n/a	n/a		
Wyoming	0.03%	n/a	0.00%	0.00%		

Notes: See Table 2A. The Employer disparity ratio for Georgia is statistically significant at a 1-in-10 probability level.

Table 2F. Percentage of Firms and Sales and Corresponding Disparity Ratios, All Firms and Employers Firms, Women, Construction Industries, 2002

State	Percentage of All Firms	Percentage of All Sales	Percentage of All Employers	Percentage of All Employer Sales	Disparity Ratio-All Firms	Disparity Ratio Employers
Alabama	7.45%	3.97%	6.96%	3.75%	*0.53*	*0.54*
Alaska	10.30%	8.39%	n/a	n/a	*0.81*	
Arizona	7.47%	4.69%	7.23%	4.34%	*0.63*	*0.60*
Arkansas	7.37%	4.05%	5.55%	4.11%	*0.55*	0.74
California	5.98%	4.97%	5.65%	4.95%	*0.83*	*0.88*
Colorado	7.85%	3.99%	7.32%	3.89%	*0.51*	*0.53*
Connecticut	6.85%	5.69%	7.03%	5.68%	*0.83*	*0.81*
Delaware	5.19%	4.30%	7.36%	n/a	*0.83*	
Dist. Columbia	5.25%	n/a	10.36%	n/a		
Florida	8.33%	5.31%	7.38%	5.05%	*0.64*	*0.68*
Georgia	6.96%	3.76%	6.49%	3.53%	*0.54*	*0.54*
Hawaii	8.03%	3.62%	5.93%	3.56%	*0.45*	0.60
Idaho	6.89%	4.92%	5.88%	4.97%	0.71	*0.84*
Illinois	8.92%	7.87%	10.83%	8.12%	0.88	*0.75*
Indiana	7.45%	4.32%	5.85%	4.36%	*0.58*	*0.75*
Iowa	6.74%	4.59%	4.60%	4.60%	*0.68*	*1.00*
Kansas	6.57%	4.57%	n/a	n/a	*0.70*	
Kentucky	7.62%	5.30%	6.75%	5.29%	*0.70*	*0.78*
Louisiana	7.06%	5.64%	7.89%	5.66%	*0.80*	*0.72*
Maine	6.12%	5.45%	5.47%	5.32%	*0.89*	*0.97*
Maryland	8.14%	5.46%	7.75%	5.40%	*0.67*	*0.70*
Massachusetts	6.44%	4.00%	6.31%	3.98%	*0.62*	*0.63*
Michigan	8.01%	4.98%	6.49%	4.94%	*0.62*	*0.76*
Minnesota	6.61%	3.98%	6.49%	3.93%	*0.60*	*0.61*
Mississippi	5.14%	5.70%	6.12%	5.07%	*1.11*	*0.83*
Missouri	8.21%	5.50%	8.05%	5.57%	*0.67*	*0.69*
Montana	7.09%	5.34%	7.35%	5.49%	0.75	*0.75*
Nebraska	4.55%	3.13%	4.22%	3.21%	*0.69*	0.76
Nevada	9.79%	5.22%	9.21%	5.09%	*0.53*	*0.55*
New Hampshire	3.38%	4.64%	3.35%	5.22%	*1.37*	*1.56*
New Jersey	7.37%	7.55%	7.76%	7.78%	*1.02*	*1.00*
New Mexico	10.34%	6.92%	n/a	n/a	*0.67*	
New York	8.11%	6.65%	8.51%	6.71%	*0.82*	*0.79*
North Carolina	8.05%	5.30%	7.64%	5.24%	*0.66*	*0.69*
North Dakota	4.80%	n/a	5.56%	n/a		
Ohio	7.55%	5.05%	8.00%	5.16%	*0.67*	*0.65*
Oklahoma	7.37%	5.40%	6.61%	5.69%	*0.73*	*0.86*
Oregon	6.29%	3.72%	5.84%	3.60%	*0.59*	*0.62*
Pennsylvania	6.18%	4.79%	7.01%	4.98%	*0.77*	*0.71*
Rhode Island	6.96%	10.55%	7.80%	11.20%	*1.52*	*1.44*
South Carolina	6.66%	5.45%	5.55%	5.50%	*0.82*	*0.99*
South Dakota	6.48%	4.21%	3.90%	4.26%	*0.65*	*1.09*
Tennessee	8.30%	3.99%	6.40%	3.69%	*0.48*	*0.58*
Texas	7.22%	5.15%	9.19%	5.18%	*0.71*	*0.56*
Utah	6.66%	3.61%	5.06%	3.59%	*0.54*	*0.71*

State	Percentage of All Firms	Percentage of All Sales	Percentage of All Employers	Percentage of All Employer Sales	Disparity Ratio-All Firms	Disparity Ratio Employers
Vermont	6.20%	n/a	2.67%	n/a		

Table 2F. Percentage of Firms and Sales and Corresponding Disparity Ratios, All Firms and Employers Firms, Women, Construction Industries, 2002, cont'd

State	Percentage of All Firms	Percentage of All Sales	Percentage of All Employers	Percentage of All Employer Sales	Disparity Ratio-All Firms	Disparity Ratio Employers
Virginia	6.81%	4.59%	6.97%	4.58%	*0.67*	*0.66*
Washington	6.87%	3.37%	5.42%	3.26%	*0.49*	*0.60*
West Virginia	6.03%	7.84%	7.75%	7.96%	*1.30*	*1.03*
Wisconsin	6.52%	5.63%	5.49%	5.87%	*0.86*	*1.07*
Wyoming	7.77%	6.60%	9.07%	6.69%	*0.85*	*0.74*

Notes: See Table 2A. The Employer disparity ratio for Arkansas, Hawaii, and Nebraska and the All Firms disparity ratio for Idaho, Illinois, and Montana are statistically significant at a 1-in-10 probability level. "n/a" indicates data was suppressed by Census for statistical reason and/or to protect confidentiality.

Table 3A. Actual and Potential Business Formation Rates, Construction and Construction-Related Industries

Race/Sex, Location, Transportation Mode	Business Formation Rate (%)	Expected Business Formation Rate (%)	Disparity Ratio
Austin, TX MSA (Airport)	(1)	(2)	(3)
African-American	17.7	27.4	0.646
Hispanic or Latino	10.8	18.4	0.587
Asian	18.6	24.2	0.769
Native American	39.3	46.9	0.838
Nonminority female	11.7	24.2	0.483
All minority and female	11.5	20.1	0.572
Chicago, IL MSA (Highways)			
African-American	20.2	16.0	n/a
Hispanic or Latino	10.5	18.1	0.580
Asian	9.9	15.6	0.635
Native American	8.0	16.0	0.500
Nonminority female	11.0	19.5	0.564
All minority and female	12.1	20.8	0.582
Colorado (Airport)			
African-American	30.3	23.4	n/a
Hispanic or Latino	7.3	19.8	0.369
Asian	12.4	18.1	0.685
Native American	3.3	11.3	0.292
Nonminority female	12.5	21.0	0.595
All minority and female	10.3	18.9	0.545
Maryland (Highways, Transit, Airport)			
African-American	11.3	21.1	0.536
Hispanic or Latino	7.1	14.7	0.483
Asian	16.8	22.8	0.737
Native American	7.2	15.2	0.474
Nonminority female	9.5	18.0	0.528
All minority and female	10.0	18.6	0.538
Memphis, TN-MS-AR MSA (Airport)			
African-American	14.6	24.3	0.601
Hispanic or Latino	12.6	20.2	0.624
Asian	0.0	5.6	0.000
Native American	28.8	36.4	0.791
Nonminority female	21.9	30.5	0.718
All minority and female	15.8	24.4	0.648

Table 3A. Actual and Potential Business Formation Rates, Construction and Construction-Related Industries, cont'd

Race/Sex, Location, Transportation Mode	Business Formation Rate (%)	Expected Business Formation Rate (%)	Disparity Ratio
Missouri (Highways)	(1)	(2)	(3)
African-American	13.91	23.21	0.599
Hispanic or Latino	12.86	22.46	0.573
Asian	11.70	17.50	0.669
Native American	28.47	16.47	n/a
Nonminority female	19.21	22.91	0.838
All minority and female	18.13	24.00	0.755
Minnesota (Highways)			
African-American	4.6	14.3	0.322
Hispanic or Latino	11.5	19.1	0.602
Asian	16.1	21.8	0.739
Native American	6.5	14.5	0.448
Nonminority female	16.8	25.3	0.664
All minority and female	15.1	23.2	0.651
Philadelphia, PA MSA (Transit)			
All minority and female	13.2	18.1	0.729
Washington State (Highways)			
African-American	5.5	25.5	0.216
Hispanic or Latino	10.5	18.1	0.580
Asian	13.4	19.0	0.705
Native American	13.3	20.9	0.636
Nonminority female	14.5	18.7	0.775
All minority and female	14.4	20.7	0.696

Notes The figure in column (1) is the average self-employment rate weighted using PUMS population-based person weights. The figure in column (2) is derived by inflating the figure in column (1) according to the corresponding coefficient from the business formation regression analysis, which holds constant industry, geography, education, age, and labor market status. Column (3) is column (1) divided by column (2). "n/a" indicates no adverse disparity observed. If there is parity in the relevant marketplace, then the disparity ratio will equal 1.000 because the expected business formation rate (that is, the business formation rate that would be observed in a non-discriminatory marketplace) will be equivalent to the actual business formation rate. In cases where adverse disparities are present in the relevant marketplace, then the disparity ratio will be less than 1.000 because expected business formation rates will exceed current business formation rates.

Source: 2000: Five Percent PUMS.

Table 3B. Actual and Potential Business Owner Earnings, Construction and Construction-Related Industries

Race/Sex, Location, Transportation Mode	Business Earnings Deficit (%)
Austin, TX MSA (Airport)	(1)
African-American	-33.8
Hispanic or Latino	n/a
Asian	-6.9
Native American	-35.3
Nonminority female	-50.5
Chicago, IL MSA (Highways)	
African-American	-29.2
Hispanic or Latino	-14.7
Asian	-5.7
Native American	-36.8
Nonminority female	-51.2
Colorado (Airport)	
African-American	-29.0
Hispanic or Latino	n/a
Asian	-5.7
Native American	-36.8
Nonminority female	-51.3
Maryland (Highways, Transit, Airport)	
African-American	-27.9
Hispanic or Latino	-18.8
Asian	-3.8
Native American	-38.0
Nonminority female	-43.7
Memphis, TN-AR-MS MSA (Airport)	
African-American	-30.1
Hispanic or Latino	-19.0
Asian	-4.1
Native American	-38.4
Nonminority female	-44.0
Missouri (Highways)	
African-American	-17.5
Hispanic or Latino	-12.3
Asian	-1.6
Native American	-14.9
Nonminority female	-47.4
Minnesota (Highways)	
African-American	-29.0
Hispanic or Latino	-14.5
Asian	-5.6
Native American	-36.7

Race/Sex, Location, Transportation Mode	Business Earnings Deficit (%)
Nonminority female	-51.3

Table 3B. Actual and Potential Business Owner Earnings, Construction and Construction-Related Industries, cont'd

Race/Sex, Location, Transportation Mode	Business Earnings Deficit (%)
Philadelphia, PA MSA (Transit)	
All minority and female	-38.3
Washington State (Highways)	(1)
African-American	-33.8
Hispanic or Latino	-14.7
Asian	-6.9
Native American	-35.4
Nonminority female	-50.5

Notes The figure in column (1) is the percentage by which minority or female business owner earnings are lower than comparable non-minority male earnings, based on results of the business owner earnings regression analysis, which holds constant industry, geography, education, age, and labor market status.

Source: Five Percent Decennial Census PUMS.

Table 3C. Excess Loan Denial Rates–Nine Jurisdictions

Race/Sex	(1)	(2)
	Most Recent Application (%)	*Last Three Years (%)*
African-American	28.9	29.3
Hispanic or Latino	17.8	24.4
Asian and Pacific Islander	4.2	0.3
Native American	8.7	18.8
Nonminority female	4.6	8.6

Source: NERA Credit Market Surveys, 1999-2007.

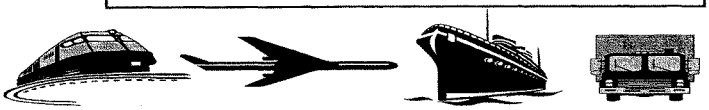
Table 3D. Excess Cost of Credit–Nine Jurisdictions

Race/Sex	(1)	(2)
	Most Recent Application (Int. Rate % Points)	*Last Three Years (Int. Rate % Points)*
African-American	1.683	1.491
Hispanic or Latino	0.820	0.895
Asian and Pacific Islander	1.221	0.789
Native American	1.241	1.008
Nonminority female	0.046	0.018

Source: NERA Credit Market Surveys, 1999-2007.

Spring 2007 Issue No. 16

THE TRANSPORTATION ANTITRUST UPDATE



Transportation Industry Committee • Section of Antitrust Law • American Bar Association

IN THIS ISSUE:

Volvo Trucks North America v. Reeder-Simco GMC: Robinson-Patman Act Verdict Reversed Because Plaintiff in Competitive Bidding for Special Order Trucks Did Not Show Actual Competition or Competitive Injury
by Terri L. Bowman 3

Canadian National Railway Company v. Western Canadian Coal Corporation: The Start of Something New?
by François Tougas 7

Western States Paving Company v. Washington State Department of Transportation: Ninth Circuit Upholds Federal Disadvantaged Business Enterprise Program for Transportation Contracts But Strikes Down State's Implementation of Program Regulations
by Colette Holt and Jon Wainwright 9

U.S. Department of Transportation Rejects Antitrust Immunity for Northwest/KLM Addition to SkyTeam Alliance
by James V. Dick 15

An Economic Analysis of How Antitrust-Immunized Alliances Have Affected Transatlantic Competition
by James D. Reitzes and Dorothy Robyn 18

The Transportation Committee WEBSITE is located at http://www.abanet.org/antitrust/committees/transportation/welcome.html. Our website includes pages with reports of recent developments, announcements of upcoming meetings, and useful links. Back issues of this newsletter are available as well. We invite you to visit the website and provide us with your feedback.

Note from the Chair

In this issue of our newsletter, we lead off with an analysis of the Supreme Court's 2006 decision in *Volvo Trucks North America v. Reeder-Simco GMC*, which applied Robinson-Patman Act jurisprudence in the context of competitive bidding. Next, François Tougas comments on *Canadian National Railway Company v. Western Canadian Coal Corporation*, the first case in which a railway governed by the Canada Transportation Act has filed an application for judicial review of final offer arbitration. Colette Holt and Jon Wainwright write about the Ninth Circuit's decision in *Western States Paving Company v. Washington State Department of Transportation*, which upheld the federal Disadvantaged Business Enterprise Program for transportation contracts but struck down the State of Washington's implementation of program regulations. Our final two articles discuss the decision by the United States Department of Transportation ("DOT") to reject

The Transportation Antitrust Update Spring 2007 – Issue No. 16

WESTERN STATES PAVING COMPANY v. WASHINGTON STATE DEPARTMENT OF TRANSPORTATION

Ninth Circuit Upholds Federal Disadvantaged Business Enterprise Program for Transportation Contracts But Strikes Down State's Implementation of Program Regulations

Colette Holt* and Jon Wainwright**

In a challenge to the constitutionality of the Disadvantaged Business Enterprise ("DBE") Program for federally-assisted U.S. Department of Transportation ("USDOT") contracts,[1] the Ninth Circuit Court of Appeals held that the statute adopting the Program[2] and the federal implementing regulations[3] satisfied strict constitutional scrutiny on their face. At the same time, however, the court struck down the 2000 implementation of that Program by the Washington Department of Transportation ("WSDOT"), finding that it was not sufficiently narrowly tailored.

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1 *Western States Paving Co., Inc. v. Washington State Dep't of Transp.*, 407 F.3d 983 (9th Cir. 2005).

2 Transportation Equity Act for the Twenty-First Century ("TEA-21"), Pub. L. No. 105-178, 112 Stat. 107 (1998).

3 49 C.F.R. pt. 26 (2007).

Factual Background and Procedural History

The plaintiff, Western States Paving Co., Inc. ("Western States"), was a non-DBE asphalt and paving subcontractor. It alleged that it had submitted the lowest quotes on two WSDOT projects, but lost the subcontracts because the prime contractors chose to utilize DBEs to meet the subcontract goals pursuant to Part 26 of Chapter 49 of the Code of Federal Regulations. Western States filed suit to enjoin the operation of WSDOT's USDOT-approved federal fiscal year 2000 goal and for damages related to denial of the subcontracts. USDOT intervened to defend the constitutionality of the statute and implementing regulations.

The United States District Court for the Western District of Washington entered summary judgment for the federal and state defendants. It held that Congress had established a compelling interest in remedying nationwide discrimination against DBEs in the highway construction industry, and that the implementing regulations were facially constitutional. The district court further held that WSDOT met its legal obligations by complying with the federal regulations; WSDOT was not required to independently establish that its Program satisfied strict scrutiny.

On appeal, the United States Court of Appeals for the Ninth Circuit affirmed the district court's holding as to USDOT, agreeing that Congress met its constitutional burdens, but reversed and directed the entry of judgment as against the state defendants. The court found that WSDOT's DBE goal was not separately supported with controlled, statistical evidence of discrimination and therefore was not narrowly tailored to remedy discrimination in its marketplace.

Analysis

Federal Regulations Upheld as Facially Constitutional

The Ninth Circuit held that the statute adopting the DBE Program and the implementing regulations met both prongs of strict scrutiny.[4] In harmony with every other court that has considered the question, the court held that Congress established its compelling interest in remedying discrimination in the highway construction industry through ample statistical and anecdotal evidence of discrimination. The evidence before Congress included:

- Disparities between the earnings of minority-owned firms and white-owned firms;
- Disparities between the loans received by black business owners compared to similar white business owners;
- The large decline in minorities' participation in the construction industry when affirmative action programs were struck down or abandoned; and
- Discrimination by prime contractors, trade unions, business networks, suppliers and sureties against minority contractors.

The court concluded that:

> Although Congress did not possess evidence that minorities suffer discrimination in every State's public contracting market, Congress need not undertake such an onerous task when enacting legislation that is applicable on a nationwide basis. . . . 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.[5]

The regulations also satisfied the narrow tailoring requirement. The maximum feasible portion of the recipient's DBE goal must be achieved through race-neutral means. The Program is flexible; there are no quotas and contractors' good faith efforts to meet goals are recognized. The statute is subject to periodic review and reauthorization, and grantees must tailor their goals to their specific marketplaces. The burden on non-DBEs is permissible and minimal: white males can qualify as DBEs if they can prove their social disadvantage, and the personal net worth limit ensures that "wealthy" minorities do not receive a windfall. "Overall," the court found, "[the statute] and its implementing regulations possess all the features of a narrowly tailored remedial program."[6]

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4 The Program's inclusion of women in addition to racial and ethnic minorities in the definition of presumptively "socially disadvantaged individuals" required discussion of the standard of review applicable to sex-conscious measures. While gender-based classifications must be supported by an "exceedingly persuasive justification" and "substantially related to the achievement of that underlying objective, in this case the application of intermediate scrutiny of the inclusion of women in the DBE program would not change the outcome." 407 F.3d at 987 n.1, citing *United States v. Virginia*, 518 U.S. 515, 524 (1996).

5 407 F.3d at 992-93.

6 *Id.* at 995.

WSDOT's Implementation Struck Down as Insufficiently Narrowly Tailored

Turning to the plaintiff's challenge to WSDOT's implementation of the Program, the Ninth Circuit first rejected the State's position that compliance with the federal regulations insulated it from strict scrutiny.[7] The court agreed with the analysis of the Eighth Circuit in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*,[8] which held that although a recipient need not have an independent compelling interest for its DBE Program, courts must nevertheless undertake an "as applied" inquiry into whether the State's Program is narrowly tailored to its marketplace. In upholding the Minnesota Department of Transportation's DBE goal-setting based upon its Availability Study, the Eighth Circuit stated, "[t]o the extent the federal government delegates this tailoring function, a State's implementation becomes critically relevant to a reviewing court's strict scrutiny."[9]

The Ninth Circuit was persuaded by USDOT's argument that race-conscious goals can be applied only in those localities where the effects of discrimination are present: "As the United States correctly observed in its brief and during oral argument, it cannot be said that TEA-21 is a narrowly tailored remedial measure unless its application is limited to those States in which the effects of discrimination are actually present."[10] The court required WSDOT to prove not only that discrimination had current effects in its market but also that such discrimination affected all of the presumptively socially disadvantaged groups included in the federal regulations.[11] "[E]ach of the principal minority groups benefited by Washington's DBE program . . . must have suffered discrimination within the State."[12]

The Ninth Circuit rejected WSDOT's goal-setting methodology, even though that methodology closely tracked the Sample Program[13] developed by USDOT. The State had chosen option one in 49 CFR § 26.45(c) to determine its step one base figure of DBE availability: dividing the number of certified DBEs by the total number of establishments in the Census Bureau's *County Business Patterns* database. In step two, the State had followed the USDOT's guidance and adjusted the base figure of 11.17% to 14%, based upon the average of the step one estimate averaged with the median (18%) of prior years' DBE participation,[14] without an explanation of how this figure reflected expected DBE availability in a race-neutral market. WSDOT was unable to make an adjustment for discriminatory barriers in obtaining bonding and financing or for the effects of past or present discrimination because it lacked statistical studies of such discrimination. WSDOT then projected that it would achieve the 14% goal through 9% DBE participation from race-neutral means, based upon its utilization on state-funded contracts

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7 The plaintiff conceded that Washington's Program comports with the regulations.

8 345 F.3d 964, 970 (8th Cir. 2003), *cert. denied*, 124 S. Ct. 2158 (2004).

9 345 F.3d at 971.

10 407 F.3d at 998.

11 The opinion recognizes in the discussion of Congress' narrow tailoring that the federal regulations do not permit disaggregated goals by race, ethnicity and gender. *Id.* at 990.

12 407 F.3d at 999.

13 *See* http://osdbuweb.dot.gov/documents/pdf/dbe/SampleDB.pdf.

14 *See Tips for Goal Setting in the Disadvantaged Business Enterprise (DBE) Program*, available at http://osdbuweb.dot.gov/business/dbe/tips.cfm ("[C]alculate your median past participation percentage and use that figure to adjust your Step One Base Figure by taking the average of your median past participation figure and your Step One Base Figure.").

without goals, and 5% DBE participation from race-conscious subcontracting goals.

Lacking other statistical evidence of discrimination, the State could rely only upon the gap between its estimate of 14% and the 9% DBE participation of DBEs on contracts without affirmative action remedies. The Ninth Circuit, however, held that WSDOT's 14% figure reflected the effects of the DBE Program, and thus was not indicative of DBE utilization in a race-neutral market. "Indeed, even in States in which there has never been discrimination, the proportion of work that DBEs receive on contracts that lack affirmative action requirements will be lower than the share that they obtain on contracts that include such measures because minority preferences afford DBEs a competitive advantage."[15] According to the Ninth Circuit, the only figure upon which WSDOT could "plausibly rely to demonstrate discrimination is the disparity between the proportion of DBE firms in the state (11.17%) and the percentage of contracting funds awarded to DBEs on race-neutral contracts (9%)."[16] The court found that this "oversimplified statistical evidence" was "entitled to little weight, however, because it [did] not account for factors that may affect the relative capacity of DBEs to undertake contracting work."[17] According to the Ninth Circuit, the fact that DBEs may be smaller, less experienced and more expensive than non-DBEs may explain the difference. To the extent that this "small disparity has any probative value, it is insufficient, standing alone, to establish the existence of discrimination against DBEs."[18] What is necessary is statistical significance.

15 407 F.3d at 1000.

16 *Id.*

17 *Id.*

18 *Id.* at 1001.

The State did not rely upon any anecdotal evidence of discrimination in Washington's transportation marketplace in setting its goal. According to the Ninth Circuit, the affidavits required from applicants for DBE certification attesting that they have suffered discrimination established no more than general assertions of societal bias.[19] The court concluded that:

> The record is therefore devoid of any relevant evidence suggesting that minorities currently suffer – or have ever suffered – discrimination in the Washington transportation contracting industry. . . . The "exact connection" between means and ends that is a prerequisite to the use of racial classifications is demonstrably absent from Washington's DBE program.[20]

Dissent

While agreeing with the majority that Congress met its constitutional burden, the dissent took issue with the holding that WSDOT must independently establish discrimination in the State. "[O]nly when the state exceeds its federal authority is it susceptible to an as-applied constitutional challenge."[21] Since the majority relies heavily upon *Sherbrooke*, it should follow that court's inquiry into whether the state complied with the regulations not impose the additional requirement that the discrimination already found by Congress must also be proved to exist in Washington. A contractor who is concerned that certain minorities are receiving a "windfall" should challenge the certification of those firms, "not file a federal lawsuit."[22]

19 *Id.* at 1002.

20 *Id.*

21 *Id.* at 1004.

22 *Id.* at 1005.

Implications

With *Western States*, the Ninth Circuit is the eighth court to find the DBE Program to be constitutional on its face. In view of the unanimous rejection of the argument that the DBE program *per se* fails strict scrutiny, and the Ninth Circuit's imposition of the requirement that recipients identify discrimination in their local markets, it is likely that the focus of anti-affirmative action efforts will shift to grantees' (often *pro forma*) adoption of annual goals.

It is unclear how much evidence of discrimination in a recipient's jurisdiction is necessary. The Ninth Circuit somewhat collapsed the requirement of "strong evidence" of discrimination to establish a compelling interest with the requirement that the remedy be narrowly tailored to that evidence. Although the federal implementing regulations explicitly disavow the need for grantees to conduct disparity studies, the Ninth Circuit demanded evidence closely resembling a disparity study.

Perhaps this merely illustrates that when a party presents no evidence and no expert testimony the court then lacks guidance on the correct economic and legal analysis of discrimination. As a result, the Ninth Circuit made several serious errors:

- Contrary to the Ninth Circuit's assertion that a state is "required" to adjust its base figure of DBE availability to account for the effects of discrimination, the federal implementing regulations mandate only *consideration* of such an adjustment.[23]
- Factors affecting the competitiveness of DBEs, such as firm revenues, length of time in operation, and bonding capacity, are infected by discrimination. It has long been established that proper statistical analysis should not control for the variables affected by the behavior sought to be isolated. As recognized by the Tenth Circuit Court of Appeals in holding that Denver's local Minority and Women Business Enterprise program met strict scrutiny, DBEs may be smaller, newer and otherwise less competitive because of the very discrimination sought to be remedied by the adoption of the Program. It is simply wrong to use the outcomes of discrimination as the measure of a race-neutral market.[24]
- The disparity between the estimated 11.17% DBE availability and the actual 9% utilization of DBEs on contracts without goals is not "small." On the contrary, a disparity of .8 would be considered "large" pursuant to, for example, the Equal Employment Opportunity Commission's four-fifths rule.[25]

What WSDOT lacked was the type of expert statistical evidence that the Minnesota Department of Transportation ("MNDOT") presented in support of the Program upheld in

[23] 407 F.3d at 989; *cf.* 49 CFR §226.45(d)(3) (2007) ("If you *attempt* to make an adjustment to your base figure to account for the continuing effects of past discrimination (often called the "but for" factor) or the effects of an ongoing DBE program, the adjustment must be based on demonstrable evidence that is directly and logically related the effect for which the adjustment is sought.") (emphasis added).

[24] *See, e.g., Concrete Works of Colo., Inc. v. City & County of Denver*, 321 F.3d 950, 981, 983 (10th Cir. 2003), *cert. denied*, 124 S. Ct. 556 (2003) ("M/WBE construction firms are generally smaller and less experienced *because* of discrimination.... Additionally, we do not read *Croson* to require disparity studies that measure whether construction firms are able to perform a *particular contract*.") (emphasis in the original).

[25] 29 C.F.R. § 1607.4(d) (2007).

Sherbrooke.[26] The MNDOT Availability Study provided a comprehensive, market-wide estimate of DBE availability weighted by the geographic and product markets in which MNDOT did business.[27] This addresses the court's concern that DBEs may not be located where WSDOT's prime contractors awarded subcontracts. The study further provided a detailed step 2 analysis of statistical disparities in DBEs' formation and earnings relative to similarly situated non-DBEs and summarized the anecdotal evidence extant in that jurisdiction. Thus, the *Sherbrooke* court had ample evidence of DBEs' availability to perform on MNDOT contracts and subcontracts as well as evidence of the discriminatory barriers those firms faced in pursuing those contracts and subcontracts.

There is also the interesting question of the correct response when a recipient determines that not all the enumerated groups have suffered discrimination in its market. Must the recipient petition USDOT for a waiver of the prohibition against separate goals for racial and ethnic minorities and white women? Or will such a finding prohibit the operation of race-conscious goals for any group, given the regulations' prohibition against separate goals? The Ninth Circuit has voiced "concerns about the haphazard inclusion of minority groups in affirmative action programs ostensibly designed to remedy the effects of discrimination. . . . The overly inclusive designation of benefited minority groups was a 'red flag' that the legislation is not narrowly tailored."[28] The court's concern about the application of TEA-21's "laundry list" of racial and ethnic minorities to particular markets suggests that serious consideration must be given to a waiver petition to permit the use of disaggregated subcontracting goals to remedy identified discrimination in a particular jurisdiction.

At a minimum, *Western States* counsels that the USDOT Sample Plan must be significantly customized to withstand strict scrutiny. It is not enough to plug the step one availability estimate into a formula without consideration of the effects of discrimination on the analysis. While the opinion affirms that the step two adjustment is the appropriate point at which to undertake this inquiry, a conceptually rigorous model must be applied. That does not mean that an adjustment is always warranted or supportable, but there must be evidence of and discussion of discrimination in the goal-setting submission. The court's analysis also casts doubt on the value of using the recipient's past levels of DBE utilization as a measure of the availability of DBEs "but for" discrimination. In any event, any adjustment undertaken must be statistically valid. It must be a quantifiable representation of the qualitative judgment whether the ongoing effects of past or current discrimination continue to impede DBEs' full and fair access to the recipient's market.

In sum, recipients can no longer assume that compliance with USDOT's guidance or USDOT's approval of their goal-setting methodology provides a safe harbor. It would be prudent to draft future submissions to ensure that they are based upon defensible statistical and anecdotal evidence that narrowly tailors the goals to their jurisdictions. If WSDOT had presented a *Sherbrooke*-type study and proffered expert testimony in support of its analysis, the Ninth Circuit may very well have upheld the Program.

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26 To its credit, WSDOT had already commissioned such a study, which formed the basis for its FFY 2006 DBE goal submission.

27 The authors were counsel and principal investigator, respectively, on the MNDOT Study.

28 407 F.3d at 998.

U.S. House of Representatives
Committee on Transportation and Infrastructure
Washington, DC 20515

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April 21, 2009

Dr. Jon Wainwright
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Dear Dr. Wainwright:

On March 26, 2009, the Committee on Transportation and Infrastructure held a hearing on **The Department of Transportation's Disadvantaged Business Enterprise Programs.**

Attached are questions to answer for the record. I would appreciate receiving your written response to these questions within 14 days so that they may be made a part of the hearing record.

Sincerely,

James L. Oberstar
Chairman

JLO:pk
Attachment

MARCH 26, 2009
COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE
HEARING ON
THE DEPARTMENT OF TRANSPORTATION'S
DISADVANTAGED BUSINESS ENTERPRISE PROGRAMS

QUESTIONS FOR THE RECORD
DR. JON WAINWRIGHT
VICE PRESIDENT
NERA ECONOMIC CONSULTING

Some people have argued that the statistical evidence in disparity studies should be adjusted for something they call "capacity." By this they often seem to mean that disparity study statistics should be adjusted for the size of firms or size of contracts firms have completed in the past. Based upon your experience as an expert in the field of economics, do you agree?

Question: Some people have argued that the statistical evidence in disparity studies should be adjusted for something they call "capacity." By this they often seem to mean that disparity study statistics should be adjusted for the size of firms or size of contracts firms have completed in the past. Based upon your experience as an expert in the field of economics, do you agree?

Answer: No.

The main problem with the argument that statistical evidence in disparity studies should be adjusted for so-called "capacity" measures is that such an approach prevents accurate measurement of the existence of discrimination. Many, if not all, "capacity" indicators are themselves impacted by discrimination. Therefore, it is not good social science to limit availability measures by factors such as firm age, revenues, or numbers of employees. Moreover, disparity studies already adjust for more appropriate measures related to "capacity" such as geographic market and industry code.

The reality is that large, adverse statistical disparities between minority-owned or women-owned businesses and non-minority male-owned businesses have been documented in numerous research studies and reports since *Croson*.[1] Business outcomes, however, can be influenced by multiple factors, and it is important that disparity studies examine the likelihood of whether discrimination is an important contributing factor to observed disparities.

One traditional way that the linkage between statistical disparities and discrimination has been established is to consider the size of the observed disparities. That is, the larger the disparity, the less likely it becomes that non-discriminatory factors can account for the entire difference. Another traditional way that the linkage between statistical disparities and discrimination has been established is through the introduction of qualitative, or "anecdotal," evidence. If the thrust of such qualitative evidence is consistent with the statistical disparities observed, the case for the linkage is strengthened.

Some critics of DBE and MWBE programs and some courts have criticized the evidentiary value of disparity statistics, claiming that the availability measure in the disparity statistic does not factor in "capacity" or, stated another way, claiming that availability statistics may include firms that are not "qualified, willing, and able" to perform the work. For several reasons, such criticisms are unwarranted and unscientific.

First, terms such as "capacity," "qualifications," and "ability" are not well defined in any statistical sense. Does "capacity" mean revenue level, employment size, or bonding limits? Does "qualified" or "able" mean possession of a business license, certain amounts of training, or types of work experience? Also, does the meaning of such terms differ from industry to industry, state to state, or through time?

Second, it is important to understand that when measuring the existence of discrimination, the statistical method used should not improperly limit the availability measure by incorporating

[1] Enchautegui, *et al.* 1996.

factors that are themselves impacted by discrimination such as, firm age, revenues, bonding limits, or numbers of employees.

In understanding this problem, it is helpful to consider an extreme example where discrimination has prevented the emergence of any minority-owned firms. Suppose that racial discrimination was ingrained in a state's highway construction market. As a result, few minority construction employees are given the opportunity to gain managerial experience in the business; minorities who do end up starting construction firms are denied the opportunity to work as subcontractors for non-minority prime contractors; and non-minority prime contractors place pressure on unions not to work with minority firms and on bonding companies and banks to prevent minority-owned construction firms from securing bonding and capital. In this example, discrimination has essentially prevented the emergence of a minority highway construction industry with "capacity." Those minority firms that exist at all will be smaller and have lower revenues and employees than firms that are not subject to the same discrimination.

In this situation, excluding firms from an availability measure based on their "capacity" in a discriminatory market would preclude a government agency from doing anything to rectify the continuing support of a clearly discriminatory system with public dollars. There is no recognition that discrimination has prevented the emergence of "qualified, willing and able" minority firms. Without such firms, there can be no statistical disparity.

Therefore, focusing on the "capacity" of businesses in terms of employment, revenue, bonding limits, number of trucks, and so forth is simply wrong as a matter of economics because it can obscure the existence of discrimination. A truly "effective" discriminatory system would lead to a finding of no "capacity," and under the "capacity" approach, a finding of no discrimination. Consider, for example, using revenue as the measure of qualifications. Revenues simply measure the value of contracts that firms are receiving. If minority-owned and women-owned businesses are subject to marketplace discrimination, their revenues will be smaller than nonminority male-owned businesses because they will be less successful at obtaining work. Using revenues as a measure of DBE availability in contracting is like using pay as a measure of qualifications in an equal-pay case. Revenue, like pay, measures the extent to which a firm has succeeded in the marketplace—it does not measure the ability to succeed and should not be used in such a manner.

Of course, the government is not so helpless in the face of the current effects of discrimination, and governments have quite rightly responded to the existence of discrimination by instituting programs like the DBE program enacted by Congress and administered by the Department of Transportation. Interestingly, the existence of these types of programs in the public sector even while such programs are relatively rare in the private sector, has resulted in a situation where minority firms may more available for public sector work than for private sector work, despite the relatively greater bureaucratic barriers to entry (*e.g.*, certification requirements, reporting requirements, etc.) precisely because of the efforts to remedy discrimination in the public sector.

Third, in dynamic business environments, and especially in the construction sector, such "qualifications" or "capacity" can be obtained relatively easily. It is well known that small construction companies can expand rapidly as needs arise by hiring workers and renting

equipment. Many general contractors subcontract the majority of a project. Subcontracting is one important source of this elasticity, as has been noted by several academic studies. Bourdon and Levitt, for example, in their study of construction labor markets, observed that:

> "One of the unique aspects of the construction industry is the prevalence of subcontracting. Construction projects are undertaken by a multitude of firms assembled for brief periods of time on a site then disbanded. General contractors can undertake projects of considerable scale without large amounts of direct labor or fixed capital; subcontractors can start with one or two employees and bid only on particularly highly specialized contracts."[2]

Thus, the "capacity" and "qualifications" of firms in the construction sector are highly elastic. Firms grow quickly when demand increases and shrink quickly when demand decreases.

Academic studies have also found that, absent discrimination, entry into the construction industry is not difficult. Bourdon and Levitt attribute this to subcontracting opportunities.[3] Eccles observes that entry is easy based on the large number of small firms and that capital requirements for fixed assets are small.[4] Gould, who followed the careers of six construction contractors, also demonstrates ease of entry.[5] He further notes that there is movement between small and large firms not only via subcontracting but also by experienced staff at larger firms leaving to form smaller new firms. Similar kinds of elasticity exist as well in many industries beyond construction.

Fourth, even where "capacity"-type factors have been controlled for in statistical analyses, results consistent with business discrimination are still typically observed. For example, many jurisdictions have demonstrated that large and statistically significant differences in commercial loan denial rates between minority and non-minority firms were evident even when detailed balance sheet and creditworthiness measures were held constant.[6] Similarly, economists using the decennial census data have demonstrated that statistically significant disparities in business formation and business owner earnings between minorities and non-minorities remain even after controlling for a host of additional factors including educational achievement, labor market experience, marital status, geographic mobility, number of workers in the family, number of children, immigrant status, disability status, veteran status, interest and dividend income, labor market attachment, industry, geographic location, and local labor market variables such as the unemployment rate, population growth rate, government employment rate, or per capita income.[7]

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[2] Bourdon and Levitt, 1980.

[3] *Ibid.*

[4] Eccles, 1981.

[5] Gould, 1980.

[6] Such evidence appears, for example, in each of the NERA disparity studies submitted to the Committee for the record.

[7] Wainwright, 2000.

Noted labor economist and former U.S. Secretary of Labor Ray Marshall, in partnership with former Federal Reserve Board Governor Andrew Brimmer, conducted one of the first post-*Croson* disparity studies, for the City of Atlanta in 1990. Drawing on that experience, Marshall summarizes well the arguments against using the outcomes of discrimination to measure "capacity"[8]

> The problem of establishing statistical proof of whether or not minority contractors are "qualified, willing and able" is particularly challenging. *Croson* provides limited guidance on this question.... Unfortunately, this lack of guidance has made it possible for courts and opponents of [DBE and MWBE] programs to argue that the failure to produce perfect statistical evidence—*i.e.*, timely and highly specific, and methodologies that control for everything except discrimination—invalidates these programs despite the fact that the most reliable statistics and the most appropriate methodologies confirm the persistence of discrimination. Our evidence for Atlanta suggests that even highly qualified black contractors are disadvantaged relative to similarly situated white contractors.... Once contractors are able to obtain contracts, they usually are able to expand their capacity.
>
> In a dynamic business environment, it would be difficult to argue, as some critics have, that qualifications are determined mainly by size.... Moreover, as the Tenth Circuit Court of Appeals observed in *Adarand VII*, there is no credible evidence that minority contractors who have been hired under [DBE or MWBE] programs have lacked adequate qualifications.
>
> Nevertheless, analyses of available data for business owners that enable personal characteristics and other factors to be controlled for [generate results that remain] compatible with racial exclusion. There therefore is no credible evidence that the large disparities in the utilization of minority contractors can be explained by the lack of qualifications or the unwillingness to contract. Indeed, strong historical, anecdotal and survey evidence ... demonstrates that minority contractors are more willing than white males to contract with governmental entities, even though they recognize that public contracting is less desirable than the mainstream private sector, where their opportunities are greatly restricted.

To summarize, there are several reasons why I do not agree that the statistical analysis in disparity studies should adjust for "capacity." These reasons include that the term "capacity" has been ill-defined; that small firms, particularly in the construction industry, are highly elastic with regard to ability to perform; and that many disparity studies have shown that even when "capacity" and "qualifications" type factors are held constant in statistical analyses, evidence of disparate impact against DBE and MWBE firms tends to persist. However, the most important reason I disagree with the use of "capacity" to limit measures of availability and other measures of disparity is that most, if not all, identifiable indicators of capacity are themselves impacted by discrimination.

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[8] Marshall, 2002.

References

Bourdon, Clinton C. and Raymond E. Levitt. 1980. *Union and open-shop construction, compensation, work practices, and labor markets.* Lexington Books: Lexington, Massachusetts.

Eccles, Robert G. 1981. "Bureaucratic versus Craft Administration: The Relationship of Market Structure to the Construction Firm." *Administrative Science Quarterly*. Vol. 26.

Enchautegui, Maria E., Michael Fix, Pamela Loprest, Sarah von der Lippe, Douglas Wissoker. 1996. *Do minority-owned businesses get a fair share of government contracts?* Washington, DC.: The Urban Institute.

Gould, Frederick Elliot. 1980. "Investigation in Construction Entrepreneurship," Masters Thesis, MIT, May.

Marshall, Ray. 2002. "The economics of discrimination as applied to business development," in Horowitz, Irving Louis, ed., *Eli Ginzberg: The Economist as a Public Intellectual.* New Brunswick, NJ: Transaction Publishers, 67-106.

Wainwright, Jon S. 2000. *Racial discrimination and minority business enterprise, evidence from the 1990 Census*, Studies in Entrepreneurship Series. Edited by S. Bruchey. New York, Garland Publishing.

Index of Additional Items Submitted for the Record by Dr. Jon S. Wainwright for the Committee on Transportation and Infrastructure hearing on the Department of Transportation's Disadvantaged Business Enterprises Program, held on March 26, 2009

(The full text of the following materials are held on file at the Committee editorial office)

- Marshall, Ray, "Minority and Female Business Development after *Croson*," Discussion Paper (June 29, 2000).
- Northern Contracting, Inc. v. the State of Illinois, Report of Defendant's Expert, Dr. Jon S. Wainwright (September 1, 2004).

Testimony of Richard White,
Vice President of Properties and Business Development,
Memphis-Shelby County Airport Authority
Chairman of the Business Diversity Committee, Airports Council International-North America

before the

House Transportation and Infrastructure Committee

"The Department of Transportation's Disadvantaged Business Enterprise Programs"

March 26, 2009

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Chairman Oberstar, Ranking Member Mica, and members of the House Transportation and Infrastructure Committee, thank you for allowing me to participate in this important hearing. My name is Richard White, and I am Vice President of Properties and Business Development at the Memphis-Shelby County Airport Authority (MSCAA). Today I am testifying in my capacity as the Chairman of Airports Council International-North America's (ACI-NA's) Committee on Business Diversity. ACI-NA's 366 member airports enplane more than 95 percent of the domestic and virtually all of the international airline passenger and cargo traffic in North America. Nearly 400 aviation-related businesses who provide goods and services to airports are also members of ACI-NA.

DBE Overview

Nearly thirty years ago, in order to remedy past discrimination, the Department of Transportation established a minority-and women-owned business enterprise program for highway, airport, and transit programs. In 1987, Congress and the Reagan Administration explicitly applied the Disadvantaged Business Enterprise (DBE) program to airport contractors (Part 26) and concessionaries (Part 23).

Under the statutory requirements, any airport that receives federal funding is required to maintain a DBE program. As noted above, the contractors' program covers projects funded through the Airport Improvement Program (AIP). The Airport Concessionaire Disadvantaged Business Enterprise (ACDBE) covers businesses located at the airport that sell consumer goods and services, and those businesses associated with airport concessions, including advertising and management contractors.

There are also regulations governing rental-car concessions. Each airport must establish DBE goals for the rental-car concessions operating on that airport property. There has been some discussion of a national goal program for rental care companies. If national goals are established, the rental-car companies would be responsible to the FAA, and not the airports, for establishing and meeting the DBE concession goals. Furthermore, these goals would be monitored by the FAA, not the airports.

Last year, the FAA held informal discussions to examine the viability of establishing "national" goals for DBE participation in airport rental-care concessions. They have not, to date, issued a notice of proposed rulemaking on this proposal.

In addition, as part of the DBE oversight process, the FAA Civil Rights Office reviews the Part 26 DBE goal-setting methodology submitted by approximately 850 airports each year to ensure compliance with DOT's DBE regulations. They also review the Part 23 goal-setting methodology submitted by approximately 350 primary airports every 3 years on a staggered basis.

Just as Congressional and regulatory reviews, along with court decisions, bring about changes in the system, airports find themselves constantly reviewing, revising and seeking new ways to improve the program. DBE programs are not static - they can't afford to be. As our airports and communities grow and change, so too must the DBE program in order to address the needs of the community.

Airports are an integral part of their community – they not only provide an economic gateway for business and goods to move in and out of the community but remember, we live, work and raise our families in these same communities. As such, ensuring inclusion is an ongoing concern, not only in our long term project planning, but in the day-to-day work of the airport. We strive to not only meet the letter of the law, but to embrace the 'spirit' of the law, as well. We learn from experience what works and what does not; as we welcome and educate new employers to the area; and as times and circumstances change, the program and the steps we take to make it work do as well.

Role of ACI-NA Business Diversity Committee

This is where ACI-NA's Business Diversity Committee plays a vital role. The Committee provides us with a forum to develop proactive outreach and educational programs, and to share information on best practices that allow maximum participation of MWDBE Businesses. It also provides us with access to technical experts from the FAA, the legal community and the financial community who help educate us on the program and the impact of regulatory, legislative and legal changes, as well as what we, as airports, need to do to address these changes.

The Business Diversity Committee also works regularly with ACI-NA's Legal, Commercial, Insurance and Finance Committees on a range of issues, including diversity studies and how to find the best consultants; how to respond to changes brought about by court decisions; and insurance and bonding issues that impact both airports and DBEs. Next month, we are scheduled to meet to discuss joint ventures and the best ways to foster them.

We also produced a comprehensive white paper providing an orientation on Airport DBE programs for our members outlining the program, its origins, and examples of successful implementation strategies.

In 2007, we conducted a Disadvantaged Business Enterprise Program Survey, where we asked our members to rank the top five practices that help make their DBE programs successful, as well as the five biggest obstacles that challenged their program's success. This is yet another example of the work of the ACI-NA Business Diversity Committee to provide ACI-NA airports with information and guidance on ways to improve their programs.

I would like to share the results of that survey with you. It found the best practices to be, in order of importance:

1) having contract goals;
2) airport management or governing board support;
3) using direct contracts, joint ventures or subleases;
4) aggressive outreach and marketing, and
5) working with prime contractors to identify DBEs.

The five greatest obstacles indentified in the survey, again ranked in order of importance, were

1) finding certified DBEs;
2) potential DBEs do not apply for certification;
3) prime contractors unwillingness to go beyond contract requirements;
4) indentifying DBEs who have airport experience, and
5) hesitancy of airport prime contractors to look at new ways to increase participation.

<u>The Importance of Developing a Unified Certification Program</u>

Finding certified DBEs has been, and continues to be, a major barrier. Airports across the country worked with their states to create strong, state Unified Certification Programs (UCPs). The UCPs provide 'one-stop shopping' for certification as a DBE, and that certification is then recognized

and accepted throughout the state. It is a good program and helpful in identifying potential DBEs.

Despite the availability of this 'one stop' certification process, however, we have found it necessary to continue vigorous outreach efforts in our communities to inform and educate companies and to urge them to apply. In February of this year, ACI-NA joined the Airport Minority Council (AMAC) and the American Association of Airport Executives (AAAE) in sending a letter to DOT and FAA asking them to partner with us in order to take the next step forward on the UCP program - the development of uniform certification forms and uniform training. We strongly believe this needs to happen if we are to ensure that DBE/ACDBEs with limited resources have opportunities for contracts in more than one state, as well as to ensure that they receive consistent answers to their questions regarding the program regulations.

The letter is based on our collective experience as we have found that states are modifying the USDOT prescribed certification application as well as the Small Business Administration's (SBA's) Personal Net Worth (PNW) forms. We have encountered issues with the information gathered during on-site visits which can differ from state to state, as well as finding that DBEs/ACDBEs are receiving different answers to the same questions concerning certification. The DOT and the FAA have reached out to us, and we are in the process of scheduling a meeting to discuss the issue.

You can imagine how frustrating it is for a small firm, new to the DBE process, based near the border of the neighboring state (or two) having to fill out separate certification applications, answer different questions or receive different and possibly conflicting answers to the same questions, depending on which state program they consult for guidance. It doesn't make sense, and it is a deterrent to companies seeking and obtaining certification.

The creation and publication of appropriate protocols for ensuring compliance, including information about what DBE/ACDBEs can do if they believe that a certifying entity is not following the national forms or standards during the certification process, is a necessary step to ensure the program continues to work as it was designed. We also recommended that a training program be developed to ensure consistency. And we commend this Committee for including a provision in HR 915 that establishes a mandatory certification training program.

Airports and DBEs

MSCAA and our sister airports across the country have taken many steps to ensure DBE participation in contracting. I would like to provide some practical examples of the steps the airport community has taken and continues to take to make the program work. I think it will give this committee a better understanding of how the program can work, as well as restating our commitment to running successful programs.

In order to ensure a strong pool of DBE companies, many airports hold outreach events in their communities to provide information about the program as well as to explain the UCP process. The Wayne County Airport Authority, which governs the Detroit Airport, took extra steps to ensure good turnouts at their outreach sessions by providing a special incentive. They offered free membership to their vendor's list for all those who attended. Membership in the Michigan Intergovernmental Trade Network (MITN) ensures notification of specific bidding opportunities via facsimile or electronic mail. This is one of the reasons why the Authority, in 2006, was able to surpass its DBE goal of 20% - in fact they ended up at 32% - and this translated to revenues of over $65.9 million for DBE firms.

At Dallas-Fort Worth (DFW), for the four-month period covering April to July of 2004, the Airport held twelve outreach events or meetings explaining the potential opportunities for retail and food and beverage concessionaires in their new Terminal D. Because of this aggressive outreach effort, the Airport was able to far exceed its participation goals.

DFW also has a Small Contractors Development Training Workshop, an eight week course, designed to provide technical training for minority and women owned businesses. The curriculum includes workshops on a variety of topics including business development, financial management, insurance and bonding.

At MSCAA, like many other airports, we hold pre-bid conferences to provide information and guidance on upcoming contracts. It's an opportunity to ask questions and meet potential business partners for both prime and subcontractors.

Mentor Protégé programs also work well for helping DBEs. As the name implies, the purpose is to link up companies with limited or no experience

with those with more experience. The joint effort not only further develops DBEs, but can also assist them in moving into non-traditional areas of work and/or compete in the marketplace outside the DBE program.

DFW Airport instituted a mentor protégé program in its marketing department. Alpha Business, one of the early members, is a small African-American female-owned public relations and advertising firm. They participated in the program for three years and are now a joint venture partner on DFW's business-to-business and business-to-consumer contract with Moroch, an international, full-service agency specializing in integrated marketing.

In 2000, six of the seven DBE architecture firms in the Indianapolis area created an umbrella entity called ARCHonsortium. This pooling of experience and skills allowed them to bid and win the contract for the design of the $100 million parking garage and ground transportation center at the new midfield terminal at the Indianapolis Airport. It also earned them a 10% role in a joint venture that was created for the new terminal building and concourse. By joining together firms increase their capacity and capabilities as well as becoming more cost competitive.

San Francisco International Airport underwent a $22 million redevelopment of its concession program, known as the San Francisco Marketplace, earlier this decade. At an informational meeting on the project, about three hundred people were present – half of whom represented minority or women-owned firms, and close to 20 ended up participating in the project. When the Marketplace opened it featured 45 new concessions of which 80% were locally-owned. A majority of the DBEs in the Marketplace when it opened were under direct leases as owners/operators. SFO has reported that there are several features that make its DBE program unique and effective. These include:

- Principal Concession Concept – whereby Prime concessionaires subleased to small DBE's and provided training and management assistance to help DBE's get started in Airport operations. As a result – many DBE's were awarded concessions without the help of a prime contractor;

- Airport Concession Loan Program – Financial assistance was provided to DBEs for capital improvements to their airport locations in the new redevelopment;

- Airport Surety Bond Program – The Airport assisted DBE's with obtaining performance bonds on concession operations; and

- DBE guidelines were established to ensure the DBE's are owners/operators for their shops.

At Las Vegas' McCarran International Airport, they point to the success of Ayala's Inc. This DBE started with one shop at the airport and now has eight operations there and at Denver International Airport. At MSCAA, I like to point to Lenny's Sub Shop, which started with one single store, and now has the highest grossing shop on a per square foot basis at the Airport.

Many airports also have DBE programs for projects that are not funded with federal money, including those funded with the receipts of the Passenger Facility Charge (PFC) user fee. One example is right here in Congress' own backyard. The Metropolitan Washington Airport Authority (MWAA) runs an extensive Local Disadvantaged Business Enterprise (LDBE) program. The program, which is focused on small businesses located within a 100 mile range of the District of Columbia's zero mile marker, has a clearly defined Business Diversity Policy. That policy is to "aggressively seek the participation of small, disadvantaged, minority and women-owned businesses in its contracting opportunities through all lawful means."

To ensure that the program is vibrant and busy, MWAA uses a number of tools, including undertaking extensive outreach. They host Annual Business Opportunity Seminars; participate in regional procurement fairs and small business conferences; provide advanced notifications/forecasts of upcoming opportunities to small minatory and women-owned business enterprise firms; newsletters, and email alerts.

Another important step they have taken to ensure participation is to relax bonding and insurance requirements for contracts valued at $100,000 or below, thereby clearing a financial hurdle many DBEs face.

At MSCAA, we also have a Business Diversity Development Program for projects done with nonfederal money. The program is being revised, based on the results of the diversity study completed at the end of last year. The study found that work remains to be done in our region in order to achieve our goal of a truly level playing field, and it provides a number of recommendations for

change that we are putting into place. My colleague Sara Hart, Vice President and General Counsel for MSCAA is here with me today, and will be happy to provide a brief overview of the study and answer any questions you may have. I mentioned earlier.

The examples I have provided are only a small sample of what airports are doing to ensure a level playing field, help erase the artificial barriers to participation DBEs face, and to encourage and promote the program. I am sure members of this Committee, in talking with their own airports, will learn of additional, innovative ideas being used to enhance and encourage the participation of DBEs at airports.

One of my colleagues likes to say that having a good DBE program is a always a work in progress. ACI-NA stands committed to work with this Committee and this Congress to continue this important work.

Thank you.

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Condensed Executive Summary
Memphis-Shelby County Airport Authority
2008 Disparity Study Conducted by NERA Economic Consulting

To: House Transportation and Infrastructure Committee
"The Department of Transportation's Disadvantaged Business Enterprise Programs"
From: Sara L. Hall, Vice-President and General Counsel
Memphis-Shelby County Airport Authority
Date: March 26, 2009
Re: Executive Summary of the 2008 Memphis Disparity Study

The Memphis Shelby County Airport Authority ("MSCAA") has a long record of commitment to including minority-owned, women-owned, and disadvantaged business enterprises (M/W/DBEs) in contracting and procurement. In 2004, MSCAA contracted with NERA Economic Consulting, an international firm of economists providing disparity studies to governments and corporations, to prepare a new disparity study for MSCAA ("2008 Memphis Study"). For this study, NERA considered whether discrimination existed for the following federally defined and identified groups: Blacks; Hispanics; Asians, which includes the sub-continent of India; Native Americans; and women.

The 2008 Memphis Study results demonstrate that MSCAA provides significant opportunities for M/W/DBEs in the Memphis area but that the demand for and utilization of M/W/DBEs still shows discrimination in the marketplace, particularly the private sector, where contracting and procurement activities are rarely subject to M/W/DBE requirements. As a result, minorities and women continue to be under-represented and under-utilized in the Memphis study area in MSCAA and non-MSCAA contracting as well as in business ownership and earnings. The 2008 Memphis Study validated the progress that has been made through MSCAA's affirmative action programs and verified the continued existence of discrimination against women and minorities in the marketplace.

The 2008 Memphis Study conducted by NERA was comprehensive and in-depth. Six years of MSCAA prime contract and subcontract records were analyzed. In all, the study database of MSCAA spending included 399 prime contracts and 848 associated subcontracts with a total overall dollar value of $426.4 million, and $486.0 million in Concessions revenues. Revenue data was analyzed from MSCAA prime contractors; M/W/DBE and non-M/W/DBE subcontractors; sub-consultants; suppliers; and airport concessionaires. The entire 318 page 2008 Memphis Study is contained in the Committee's record. The Executive Summary is on study pages one through nineteen and attached for your review.

When statistical data, gathered and confirmed by NERA, was used to compare the availability of D/M/DBEs in the Memphis metropolitan statistical area ("MSA") to their utilization in MSCAA contracts, statistically significant disparities were evident for all minority groups.

Table C1, Overall Disparity Results- Construction, A&E, Services and Commodities, details these disparities by minority group and procurement category on page twelve of the attached Executive Summary with the overall totals as follows:

Table C1 Excerpt. Overall Disparity Results-Procurement

Procurement Category	M/W/DBE Utilization	M/W/DBE Availability	Disparity Ratio
All Procurement	17.07	33.76	50.6
Construction	18.69	27.99	66.8
Architecture &Engineering	13.88	34.32	40.5
Services	15.58	45.31	34.4
Commodities	6.53	32.31	20.2

Note: The Disparity Ratio represents utilization over availability.

The 2008 Memphis Study data demonstrated large, adverse and statistically significant wage disparities for all minority groups and for white women. Likewise, large, adverse and statistically significant business owner earnings disparities were observed. For example, although 19.4 percent of all firms in the Memphis MSA are owned by blacks, they earn less than one percent (.84%) of all sales and receipts. Study data also confirmed acutely large disparities for other minority groups and women in the Memphis MSA.

The interview evidence portion of the 2008 Memphis Study included a large-scale mail survey of both M/W/DBEs and non-M/W/DBEs, seven group sessions totaling 50 M/W/DBE and 31 non-M/W/DBE business owners, and one-on-one interviews with 81 business owners. The results of the surveys and interviews supported the 2008 Memphis Study's extensive statistical data and represented compelling evidence of the continued existence of discrimination in the marketplace. Even when compared to firms of like size and owner characteristics, M/W/DBEs in MSCAA markets were found to suffer discrimination in large numbers and statistically significantly greater frequency than non-M/W/DBEs.

In both survey and interview responses, the 2008 Memphis Study indicates that M/W/DBEs continue to suffer discriminatory barriers to MSCAA and other public and private contracts, including perceptions of M/W/DBE incompetence, being subject to higher performance standards, discrimination in loan and bond access, and paying higher prices for supplies. The survey results also revealed that M/W/DBE firms that have been hired in the past by non-M/W/DBE prime contractors to work on public contracts with M/W/DBE goals are rarely hired or even solicited to work on projects without goals.

The 2008 Memphis Study data demonstrates greater utilization of D/M/WBEs in Memphis airport contracts than that of the Memphis marketplace in general. Despite our best efforts, the 2008 Memphis Study demonstrates significant evidence of disparity in MSCAA contracting and procurement and Airport Concession activity, despite the presence of the DBE, BDD and ACDBE Programs.

Written Testimony of:

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Submitted for the Committee on Transportation and Infrastructure Hearing conducted on March 26, 2009 regarding "The Department of Transportation's Disadvantaged Business Enterprise Programs"

April 9, 2009

The Honorable James L. Oberstar, Chairman
The Honorable John L. Mica, Ranking Member
U.S. House of Representatives Committee on Transportation and Infrastructure
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I. ORGANIZATIONAL BACKGROUND

Founded in 1991, the Asian American Justice Center ("AAJC") works to advance the human and civil rights of Asian Americans through advocacy, public policy, public education and litigation. AAJC is one of the nation's leading experts on issues of importance to the Asian American community, including equal opportunity, anti-Asian violence prevention/race relations, census, immigrant rights, immigration, language access, television diversity and voting rights. AAJC works with its affiliates, the Asian American Institute in Chicago, the Asian Law Caucus in San Francisco and the Asian Pacific American Legal Center in Los Angeles to enact a sweeping range of programs on critical national issues that enrich, enhance and serve our communities all across the country.

AAJC has a long history of dealing with the adverse impact of United States laws, policies, regulations, and procedures on minority contractors and small businesses, having published a report in 1997 on the plight of Asian American businesses in public contracting,[1] filed an amicus curiae brief in *Adarand Constructors, Inc. v. Mineta,*[2] partnered with community organizations to reinstate Asian Americans as a presumptive minority group in the city of Chicago's women and minority public contracting program and the recent release of a handbook and follow-up report on the disparate treatment of Asian Americans in public contracting.[3] In addition, AAJC recently launched the Asian American Contractor Empowerment Project ("AACEP"), a project which seeks to build alliances with Asian American business associations and other advocates of small and disadvantaged businesses in order to strengthen and preserve Asian American participation in government business and contracting programs.

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[1] Asian Pacific Americans and Public Contracting: A Report by the National Asian Pacific American Legal Consortium (1997), available at http://65.36.162.215/files/minority_business_programs.pdf.
[2] 534 U.S. 103 (2001).
[3] *Equal Access: Unlocking Government Doors for Asian American Businesses*, Asian American Justice Center, ISBN 1-932526-11-0 (2008)

II. SUPPORT OF THE U.S. DEPARTMENT OF TRANSPORTATION'S DISADVANTAGED BUSINESS ENTERPRISE PROGRAM

AAJC supports the U.S. Department of Transportation's ("DOT") Disadvantaged Business Enterprise ("DBE") program which was the subject of the Committee on Transportation and Infrastructure's hearing on Thursday, March 26, 2009.

Disparity studies and anecdotal evidence make it clear that Asian Americans have unequal access to government contracting opportunities. Asian American business owners cannot fairly compete for DOT contracts without the DBE program, as the discrimination they face is simply too formidable. Disadvantaged, minority and women business enterprise procurement programs are the most effective method for giving Asian American businesses a fair opportunity to put their considerable talents and abilities to work. Without disadvantaged, minority and women business enterprise procurement programs, equal access to business opportunities created through federal funding, including the new stimulus package dollars, cannot be realized.

III. EVIDENCE OF DISCRIMINATION AGAINST ASIAN AMERICAN BUSINESSES

Asian American business owners, similar to other minorities, have faced a long history of racial and national origin discrimination.

A. Asian Americans Continue to Face Both Intentional and Institutional Discrimination:

- Asian Americans are still excluded from the "old boys' networks" that provide access to lucrative government contracting opportunities. This includes, but is not limited to, exclusion from networking events where contracting deals are often made.
- Asian Americans continue to suffer from the damage caused by the model minority myth – a stereotype that assumes all Asian Americans are wealthy and educated, and therefore are not subject to discrimination.
- Asian Americans in the workplace are disproportionately complimented on their English-speaking skills and asked whether they are U.S. citizens – inherently implying that Asian Americans are not "true" Americans.
- Asian Americans in the workplace are often perceived to be less vocal than their Caucasian colleagues and are assumed to lack leadership skills, and therefore do not reach a company's highest ranks – making it impossible to ever break the glass ceiling.
- On average, Asian American firms receive only 72 cents for every dollar in revenues received by white firms, and the respective figure for payroll is only 66 cents for every dollar. In other words, Asian American firms are typically smaller than non-Hispanic white firms

B. Testimonials of Discrimination from Asian American Contractors who have Attempted to Procure Contracts from the DOT Highlight the Necessity of the DBE Program:

- Asian American contractor and DBE registrant Dennis Kim, who testified at the U.S. Department of Transportation's hearing on March 26 and has submitted full testimony under separate cover, was discriminated against, because of his race, by the Minnesota DOT and one of its large, Caucasian-owned prime contractors. These two entities along with other Caucasian colleagues regularly insult Mr. Kim's Korean food, comment on his English speaking skills and ask him if he is a U.S. citizen. Given this, it is not surprising but is still entirely unacceptable that the Minnesota DOT and its large, Caucasian-owned prime contractor blacklisted Mr. Kim, preventing him from procuring any more DOT contracts in that particular district.[5]

- An Asian American contractor from the western United States, also a DBE registrant, requested anonymity in describing the discrimination he faces from his state's DOT, as he fears that revealing his identity will spark retaliation from the DOT and its Caucasian-owned prime contractors. He has told AAJC the following[6]:
    - His state's DOT hoards projects so it can complete them on its own and charge the federal government higher prices – even though a DBE would charge a much lower price:
        - For example, if a project is worth $1M or more, the DOT will do the entire project itself and will not put any DBE goals on such a project
        - Further, a private consultant could do the same projects for 15% less – resulting in a 7% savings for the federal government
    - The DOT does not even consider him a DBE because he is Asian American and he is an engineer. This is well-known among Asian American business owners in that community. Further, the DOT does not notify Asian American DBEs of contracting opportunities; only non-Asian American construction companies are informed.

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[4] *Equal Access: Unlocking Government Doors for Asian American Businesses*, Asian American Justice Center, ISBN 1-932526-11-0 (2008).

[5] Testimony of Mr. K. Dennis Kim, submitted electronically to pam.keller@mail.house.gov (March 24, 2009).

[6] In preparation of this testimony, AAJC contacted Asian American DBEs in multiple regions across the U.S. to determine if they had faced discrimination in doing business with the DOT.

- The DOT has a large amount of airport design work, but the related contracts are only given to Caucasian-owned companies;
- The DOT only contacts him if they are desperate to complete a project on time and need his help as a last resort;
- He feels that there is no point in even sharing his story because the discrimination by his state's DOT is so rampant and deeply imbedded. He has resigned himself to always facing discrimination.

- An Asian American DBE contractor who is certified in two contiguous states also requests anonymity because of fear of retaliation from the DOT and its large prime contractors[7]:

  - This contractor explained they tried to bid on an airport expansion project in the last couple of years. They found out there was no reciprocity between the contiguous states. The contractor immediately started the application process for obtaining DBE certification in the other state. Timing was of the essence.

  - Among the laundry list of documentation that this Asian American contractor was asked to produce was the original and/or certified birth certificates of their father and his parents, all born in the early twentieth century. The Asian American contractor did everything as asked but could not obtain these records within the deadline. In their own words, the Asian American contractor explained,

    > "In 1902, there were only two racial categories for birth certificates: Black or White. It was an advantage at that time to [choose the category of] White. [My father's] mother's birth certificate reads her DOB and her father's birthplace of Japan. *It was obvious he was a descendent of Japanese heritage.* It took a lot of time to gather the documentation. The goal of the consulting agency is to turn an application around in 30 days. That is almost impossible when you will never be able to acquire the documentation they want, coupled with the convenient unavailability of the consulting agent.
    >
    > *It was painfully obvious to me that my skin was not the right color* to get that approval so we declined to bid on the job and I filed the months of

[7] Id.

documentation away for a future battle." (emphasis added)

IV. CONCLUSION

Constitutional guarantees and anti-discrimination laws on their own have not achieved true equality of opportunity for all Americans. Discrimination still persists within our society and our social institutions. Equal opportunity programs over the past thirty years have helped to lower some of the discriminatory barriers confronting women, Asian Americans, and other minorities. To eradicate those barriers completely, we need to continue those programs and implement new ones where needed. Such programs have been proven effective against both intentionally and unintentionally discriminatory practices.

Index Of Reports Submitted for the Record of the Committee on Transportation and Infrastructure Hearing on the Department of Transportation's Disadvantaged Business Enterprise Program, held on March 26, 2009

(The full text of the following reports are held on file at the Committee editorial office)

- "Alaska Disadvantaged Business Enterprise Study: Availability and Disparity," prepared by D. Wilson Consulting Group, LLC for the Alaska Department of Transportation and Public Facilities (June 6, 2008).
- "The City of Phoenix Minority-, Women-Owned, and Small Business Enterprise Program Update Study," prepared by MGT of America, Inc., in association with Fields & Brown, Attorneys at Law (April 21, 2005).
- "Availability and Disparity Study," prepared by CRA International for the California Department of Transportation (June 29, 2007).
- "Race, Sex, and Business Enterprise: Evidence from Denver, Colorado," prepared by NERA Economic Consulting for the City and County of Denver, Colorado (May 5, 2006).
- "The City of Bridgeport Disparity Study Regarding Minority Participation in Contracting," prepared by Mason Tillman Associates, Ltd. For the City of Bridgeport, Connecticut (August 2005).
- "Broward County Small Disadvantaged Business Enterprise Disparity Study," prepared by MGT of America, Inc. for Broward County Board of County Commissioners (April 3, 2001).
- "Georgia Department of Transportation Disparity Study," prepared by Boston Research Group, Inc., in association with Holland and Knight, LLP and Alexander At'Ta Associates, Inc. (March 2005).
- "A Study to Determine DBE Availability and Analyze Disparity in the Transportation Contracting Industry in Idaho," (December 14, 2007).
- "Kansas Department of Transportation Availability and Goal Setting Study," prepared by MGT of America, Inc. for Harold Benoit, Chief, Office of Engineering Support (March 27, 2003).
- "Race, Sex, and Business Enterprise: Evidence from the State of Illinois and the Chicago Metropolitan Area," prepared by NERA Economic Consulting for the Illinois State Toll Highway Authority (June 20, 2006).
- "Race, Sex, and Business Enterprise: Evidence from the State of Maryland," prepared by NERA Economic Consulting for the Maryland Department of Transportation (March 8, 2006).
- "Race, Sex, and Business Enterprise: Evidence from the State of Minnesota," prepared by NERA Economic Consulting and Colette Holt & Associates for the Minnesota Department of Transportation (September 27, 2005).
- "Disadvantaged Business Enterprise Availability Study," prepared by NERA Economic Consulting and Colette Holt & Associates for the Missouri Department of Transportation (November 26, 2004).
- "State of New Jersey Construction Services Disparity Study 2000-2002," prepared by Mason Tillman Associates, Ltd. For the Disparity Study Commission (October 2005).
- "City of New York Disparity Study," prepared by Mason Tillman Associates for the City of New York (January 2005).
- "Availability and Disparity Study," prepared for the Nevada Department of Transportation.

- "North Carolina Department of Transportation Second Generation Disparity Study," prepared by MGT of America for Andrea L. Harris, President, North Carolina Institute of Minority Economic Development (March 30, 2004).
- "A Second-Generation Disparity Study for the City of Dayton, Ohio," prepared by MGT of America for the City of Dayton, Ohio (August 8, 2008).
- "The State of Oregon Department of Transportation Disparity and Availability Study," prepared by MGT of America for the State of Oregon, Department of Transportation (October 31, 2007).
- "Disadvantaged Business Enterprise Availability Study: Purchasing," prepared by NERA, Inc. for the Southeastern Pennsylvania Transportation Authority (March 13, 2000).
- "Race, Sex, and Business Enterprise: Evidence from Memphis, Tennessee," prepared by NERA Economic Consulting for the Memphis-Shelby County Airport Authority (December 18, 2008).
- "Dallas/Fort Worth International Airport Board Disparity Study," prepared by MGT of America for the Dallas/Fort Worth International Airport Board (October 17, 2000).
- "A Procurement Disparity Study of the Commonwealth of Virginia," prepared by MGT of America for Edward L. Hamm, Jr., Director, Department of Minority Business Enterprise (January 12, 2004).
- "Race, Sex, and Business Enterprise: Evidence from the State of Washington," prepared by NERA Economic Consulting for the Washington State Department of Transportation (October 20, 2005).

Index of Additional Materials Submitted for the Record by the U.S. Department of Transportation for the Committee on Transportation and Infrastructure hearing on the Department of Transportation's Disadvantaged Business Enterprise Program, held on March 26, 2009

(The full text of the following materials are held on file at the Committee editorial office)

- DBE Success Stories
- Summaries of court decisions upholding constitutionality of U.S. Department of Transportation DBE rules
- Congressional Record history of 1998 debates on reauthorization of DBE program
- Summary chart of race-neutral and race-conscious goals in DOT DBE Program
- FHWA recipient-by-recipient record of DBE goals and achievements
- FAA recipient-by-recipient records of DBE goals and achievements
- FTA recipient-by-recipient records of DBE goals and achievements
- Charts comparing FHWA, FTA, and FAA DBE participation among 9th Circuit recipients in 2004 and 2007
- List of disparity and availability studies provided for the record
- Chart showing groups found underutilized in disparity studies
- Summary of anecdotal evidence from disparity studies
- Chart with examples of DBE complaints received by DOT
- DOT final rule on size standard adjustments
- Compilation of publications concerning barriers to participation by small disadvantaged businesses
- Examples of Office on Inspector General investigations of DBE fraud
- List of links to other testimony on related subjects

Written Testimony on The Department of Transportation's Disadvantaged Business Enterprise Programs

Hearing: Thursday, March 26, 2009

Women Construction Owners & Executives, USA (WCOE) is a national association representing women owners and executives in the construction industry. We thank you for the opportunity to submit this testimony on the issue of the Disadvantaged Business Enterprise Program within the U.S. Department of Transportation. Women business owners continue to face additional barriers of socio-economic stereotyping, which inhibit their ability to obtain capital, contracts, bonding, and access to market opportunities. This is especially true in nontraditional fields, such as construction. WCOE is celebrating our 25th anniversary this year as we continue to advocate for laws and regulations that help all small businesses, particularly those that will create a level playing field for women business owners.

Twenty- two years ago, we testified before a Congressional Subcommittee on the issue of DBE goals and the discrimination and disparity that existed in the federal procurement arena with women owned companies. While there has been some improvement, I am disappointed to say that many things have stayed the same.

Only two weeks ago in Houston, Texas, one of our members had an informal conversation with a local judge who, when he learned she ran a construction company, reminisced about the day when "women used to be happy staying at home and raising a family". Clearly this attitude still pervades in society where women are not perceived as legitimate business owners or working for anything other than "pin money".

This last week a number of our members met with the US Department of Commerce. During the presentation, one of the speakers told us we should "take this information back to our CEOs to see if we would be interested in doing more government business". We ARE the CEOs and presidents of our respective companies. While we are certain this was not intentionally meant as a discriminatory statement, it only further demonstrates that stereotypes and assumptions about women business owners in the construction industry still create challenges for women businesses seeking to obtain work.

Most of our members would be considered small businesses with gross receipts between $3-$25 million per year. Yet, we also have members who are both subcontractors and general contractors and perform work from $35 million-$100 million per year. ALL of our women will tell you that barriers still exists, that bid opportunities are not equally available and women owned business must actually be better than their male counterparts to get the work.

One of the true barriers to the growth of women owned businesses is the DOT DBE program's self imposed cap on net worth. An individual cannot exceed a net worth of more than $750,000 or it will no longer qualify as a DBE. However, the value of the owner's pension plan counts toward that net worth value. There are many other unsound business assumption included in the net worth calculations.

In construction, we must be able to bond projects. Our bonding capability is based on our net worth. If you restrict us to a net worth of $750,000, you restrict us to never growing beyond a certain size. When the SBA considers a prime contractor to be "small" with gross receipts of $33 million per year, there is no way a DBE with a net worth of only $750,000 can even compete with these other small businesses, let alone a "large" business. The DBE program is a program designed to keep DBE businesses small.

Several of our members have been removed from the DBE program because their

personal net worth exceeds $750,000. Originally the thought by Congress was that when a business exited this program, they should be able to compete on an equal footing with other contractors. However, several of our members have been told by general contractors, with whom they have done construction work for years, there will be no more bid opportunities because these members are no longer DBEs. These are the same women whose companies were qualified and performed quality work for these general contractors last year. However, now the general contractors do not call with bid opportunities and the women business itself is not large enough to compete as either a larger subcontractor or as a prime contractor. These types of comments from general contractors continue to emphasize the inherent discrimination and stereotyping of women businesses owners in the construction industry.

WCOE recommends that you consider not only maintaining the current DBE goals, but eliminate the continual barriers imposed by the program so that DBE contractors can actually grow their companies to a size of self sufficiency. This can be done by increasing the personal net worth cap to $3 million and index that number annually going forward. The value of retirement accounts should not be counted toward an individual's net worth and the DOT should revisit other components and assumptions in calculating net worth. DBEs must be allowed to engage in sound business practices to grow their businesses.

One of the other clear problems with the DBE program is where disparity studies have been completed by various businesses and subsequently disqualified. With no standards or guidelines for what should be considered in a disparity study, too many companies perform disparity studies, only to have them later disqualified. National guidelines and standards need to be created for disparity studies. These guidelines should be set by the Transportation Research Board of the National Academy of Sciences and provide clear guidance to recipients to ensure that disparity/availability studies are consistent between recipients.

Women Construction Owners and Executives, USA knows that DBE goals are critical to creating equal opportunity in bidding on construction projects and in creating a level playing field upon which women and minorities can compete. WCOE has never supported quotas, but strongly supports a strong goals program which include the disqualification of prime contractors who do not engage in a genuine good faith effort to solicit bids from DBEs in a timely manner.

Again, we thank you for the opportunity to provide this testimony. Should you have any additional questions that we can answer for you, please do not hesitate to contract us.

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