RACIAL PREFERENCES IN ECONOMIC BENEFITS: FROM WIDELY ACCEPTED TO LEGALLY INDEFENSIBLE*

GEORGE R. LA NOUE**

As the United States began to emerge from its long history of legal segregation and racial discrimination, the question of appropriate remedies for that past became the center of many political and legal controversies. After the Supreme Court found school segregation unconstitutional in 1954,[1] it took decades of litigation to determine what actions local school authorities could or could not take to desegregate.[2] Similarly, applying the 1964 Civil Rights Act provisions barring discrimination in federally subsidized programs (Title VI) and employment (Title VII) has required extensive judicial consideration.

Beginning in the 1970s, American governments began to use racial preferences to distribute economic benefits and public procurements. Race-neutral programs designed to abolish or ameliorate racial inequality were almost always upheld by courts when challenged, but litigation outcomes for race-preferential programs were mixed. The outcomes often depended on the specific legislative context and the resources plaintiffs and defendants could bring to their cases. These ambiguous precedents failed to offer clear-cut guidance to governments considering remedies for racial problems.

---

* Note from the Editor: The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. To join the debate, please email us at info@fedsoc.org.

** George R. La Noue is Professor Emeritus of Political Science and Professor Emeritus of Public Policy at the University of Maryland, Baltimore County. He has served as a trial expert in twenty cases involving public procurement preferences. For thirty years, he was Director of the Project on Civil Rights and Public Contracts at UMBC, which recently contributed 289 public contracting disparity studies to the Library of Congress. He has been a consultant to nine governments and trial expert in thirty cases where the validity of disparity studies was at issue.

[1] Brown v. Board of Education, 347 U.S. 483 (1954).

[2] *See, e.g.*, Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701 (2007).

The award of government contracts, also known as procurement, is an economically important and universally relevant arena in which the battle over race-preferential government benefits has played out. Government entities at the federal, state, and local levels across the country contract with outside firms to provide all sorts of goods and services, from new chairs to new roads.

In 1989, the Supreme Court ruled that racial preferences in government procurement must satisfy strict scrutiny.[3] Subsequent lower court decisions nevertheless varied, with governments and courts latching on to dicta in the Court's *Croson* opinion to use questionable statistical arguments to support racial preferences.[4]

But in recent years, the judiciary has adopted far-reaching rules invalidating race-preferential procurement and economic benefit programs in public and private institutions. This trend predates the Supreme Court's decisions in the *Students for Fair Admissions* cases invalidating racial preferences in college admissions. In 2021, the Biden administration implemented through the American Rescue Plan Act a number of Covid-19 relief programs that were racially targeted. Lower courts halted the programs on equal protection grounds.[5] There are more cases in progress challenging the government's use of racial preferences in awarding contracts or other economic benefits.[6] Given the trend away from allowing such preferences, along with the Supreme Court's reasoning in *SFFA*, the challengers' position is stronger now than it was even a few years ago. Racial preferences in awarding government economic benefits have become very difficult to defend.

I. HOW RACE BECAME A FACTOR IN THE AWARD OF PUBLIC CONTRACTS

Public contracting has proved a critical arena in which the basic standards have been established for judicial review of benefit programs that use race as a decisive factor. Federal, state, and local procurements amount to trillions of dollars and millions of contracts. Though governments historically treated such contracts as opportunities for patronage, modern government procurement processes have become more professionalized by the creation of rules to prevent political interference and other forms of discrimination in contract

[3] *See infra* section II.
[4] *See infra* section III.
[5] *See infra* section IV.
[6] *See infra* section V.

awards. Those rules, however, created a problem for interest groups and politicians who thought that equity or constituent demands required granting specific shares of public contracting dollars to minority- and women-owned business enterprises (MWBEs).[7]

Starting in the 1970s, programs creating advantages in the form of quotas or enforceable goals for MWBEs seeking public contracts became widespread. How many of these programs are there today? There is no definitive answer. One Google search found that 47 states, plus Washington, DC, and Puerto Rico, have MWBE certification programs. There are many more such programs sponsored by cities, counties, special districts, educational institutions, and corporations.

In 1977, Rep. Parren Mitchell, a founder of the Congressional Black Caucus and chair of the House Small Business Committee, attached an amendment to a public works bill that compelled state and local governments seeking federal grants to set aside 10% of those funds for minority-owned firms. In 1983, Congress authorized the Disadvantaged Business Enterprise (DBE) program, which required state and local governments receiving federal transportation funding for highways, airports, and seaports to expend at least 10% of those funds on DBEs. Some DBE programs as administered are race-neutral, but some are not.[8] In 1988, the federal 8(a) program was begun, permitting the Small Business Administration to set aside federal contracts for minority-owned firms.

II. Early Judicial Evaluation of Race Preferential Procurement Programs

The Fifth Amendment has been interpreted to require equal protection of the laws by the federal government, and the Fourteenth Amendment specifically declares that state (and, by extension, local) governments must give all persons equal protection of the laws. Title VI of the 1964 Civil Rights Act bars racial discrimination in all public and private programs receiving federal assistance.

The plain text of these laws bans all forms of racial discrimination by all governments in spending public funds. So how do so many race-preferential

---

[7] *See generally* George R. La Noue, Local Officials' Guide to Minority Business Programs and Disparity Studies (National League of Cities, rev. ed. 1994).

[8] *See generally* George R. La Noue, *Follow the Money: Who Benefits from the Federal Aviation Administration's DBE Program?*, 38 Am. Rev. Pub. Admin. 480 (2008).

procurement programs survive? For one thing, they often enjoy strong political support. Furthermore, courts have disagreed about whether the Fourteenth Amendment permits race-conscious government programs aimed at ending the subordinate role of some racial groups, particularly blacks, resulting from past discrimination in our society. Court decisions regarding procurement preferences have played a major role in establishing the controlling judicial precedents interpreting that Amendment.

Litigation challenging procurement preferences is complex, lengthy, and costly. In some early cases, plaintiffs were successful, but only after weeks-long trials featuring extensive expert testimony.[9] These cases were brought by large construction associations that could afford the upfront expenses. But after a while, these organizations became aware of unfavorable local political climates and withdrew from litigation—they thought it was better to build bridges than burn them. Further, the governments sued typically had considerably more resources for their defense than did plaintiffs for their challenges.

Eventually, a challenge to a procurement preference reached the Supreme Court. The Court's 1989 decision in *City of Richmond v. Croson* is the most important case about racial preferences in government contracting. Richmond, the capital of the Confederacy in the 19th century, had seen important demographic and political changes in the 20th. Its city council had become majority African-American, and it passed an ordinance requiring that thirty percent of all municipal procurement dollars be set aside for minority-owned firms. J.A. Croson, an Ohio based company, had won a small contract to install urinals in the city jail, but if forced to subcontract to minority firms, it would have lost money. Croson's challenge to this requirement, backed by the Associated General Contractors of America, yielded the decision that set the standard for evaluating all preferential procurement programs. After a series of appeals, the Supreme Court found that the city's thirty percent set-aside for minority-owned firms violated the Fourteenth Amendment.[10]

In explaining that decision, Justice Sandra Day O'Connor's plurality opinion set some important rules. It determined that government use of racial criteria for awarding benefits is subject to strict scrutiny.[11] This test requires

---

[9] *See, e.g.*, Associated Gen. Contractors v. City of Columbus, 936 F. Supp. 1363 (S.D. Ohio 1996); Contractors Ass'n of Eastern Pa. v. City of Phila., 735 F. Supp. 1274 (E.D. Pa. 1990), *aff'd*, 945 F.2d. 1260 (3d Cir. 1991); Builders Ass'n of Greater Chi. v. Cnty. of Cook, 123 F. Supp. 2d 1087 (N.D. Ill. 2000), *aff'd*, 256 F.3d 642 (7th Cir. 2001); Builders Ass'n of Greater Chi. v. City of Chi., 298 F. Supp. 2d 725 (N.D. Ill. 2003).

[10] City of Richmond v. Croson, 488 U.S. 469 (1989).

[11] *Id.* at 472.

judges to avoid deferring to legislative or executive findings, and instead to examine rigorously the proffered evidence of the need for racial preferences. The program in question must be more than just politically desirable or beneficial to some members of the community. Given the constitutional requirement of equal treatment of persons without regard to race, the challenged program must be aimed at a *compelling interest* of remedying current identified governmental discrimination.[12] Further, program design must be *narrowly tailored* to achieve that interest and thus must avoid including groups or persons not recently injured or extending longer than necessary to remedy the identified problem.[13] Although it did not prove true in this context that strict scrutiny was strict in theory and fatal in fact,[14] it was a high judicial bar for programs with racial preferences.

In *Croson*, the Court noted, "There was no direct evidence of race discrimination on the part of the city in letting [prime] contracts or any evidence that the city's prime contractors had discriminated against minority-owned subcontractors."[15] Also, "There is nothing approaching a prima facie case of a constitutional or statutory violation by anyone in the Richmond construction industry."[16] The Court went on to state that "the city does not even know how many MBE's in the relevant market are qualified to undertake prime or subcontracting work in public construction projects."[17] Additionally, "[w]hile the States and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination, they must identify that discrimination . . . with some specificity before they may use race conscious relief."[18] Finally, "[w]here such discrimination occurs [against a specific firm], a city would be justified in penalizing the discriminator and providing appropriate relief to the victim of discrimination."[19] Without such specific findings, though, Justice O'Connor was concerned that "[t]he dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement

---

[12] *Id.* at 485.

[13] *Id.* at 486.

[14] *See* Gerald Gunther, *The Supreme Court, 1971 Term - Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

[15] *Croson*, 488 U.S. at 480.

[16] *Id.* at 500.

[17] *Id.* at 502.

[18] *Id.* at 504.

[19] *Id.* at 509.

would be lost in a mosaic of shifting preferences based on inherently unmeasurable clams of past wrongs."[20]

III. THE DEVELOPMENT OF THE DISPARITY STUDY INDUSTRY AND ITS SHORTCOMINGS

Justice O'Connor's admonitions in *Croson* should be read to severely limit race-preferential procurement programs to extreme cases. But few governments took them seriously because Justice O'Connor went on to say:

> Where there is a significant statistical disparity between the number of *qualified* minority contractors *willing* and *able* to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise.[21]

Governments latched on to this paragraph, leading to a massive investment in so-called disparity studies, which sought to create a predicate for the creation or continuation of MWBE programs.

More than 600 such studies were commissioned over the ensuing years, at an estimated cost of more than 300 million dollars. Almost no academic institutions attempted procurement disparity studies, though they had research centers with the necessary capacity. A few of the early studies were performed by national accounting companies or involved major scholars, but eventually the overwhelming majority of studies were completed by a handful of for-profit consultants who understood the results the market demanded.[22] A recent article in the *Review of Black Political Economy* concluded that, "In practice, these firms are contracted to find evidence of disparity and there is institutional pressure on these firms to find it—they have failed if they do not find it or if they find the 'wrong' disparity (with the wrong group). These are not academically neutral studies."[23]

For a disparity study to adequately address the *Croson* stipulations and raise an "inference" that there is discrimination that is remediable by a

---

[20] *Id.* at 505-506.

[21] *Id.* at 509 (emphases added).

[22] Dorothy Gaiter, *Court Ruling Makes Discrimination Studies a Hot Industry*, WALL ST. J., Aug. 8, 1993.

[23] Maria Lungu et al., *Disparity Studies: Isomorphic Discrimination?*, REV. BLACK POL. ECON., at 3 (2023), *available at* https://www.researchgate.net/profile/Maria-Lungu-8/publication/368301835_Disparity_Studies_Isomorphic_Discrimination/links/642726f666f8522c38e94767/Disparity-Studies-Isomorphic-Discrimination.pdf.

MWBE preference, it must analyze the utilization of firms that are comparably "qualified," "willing," and "able." This is no easy task, and it requires that analysts answer several key questions.[24]

First, how should the number of "qualified" firms be measured? Firms are qualified or unqualified according to the requirements of a specific procurement. For large governments, measuring this variable would necessitate examining qualification requirements for hundreds of contracts and the qualifications of hundreds of firms seeking them.

Second, how should the number of "willing" firms be determined? Public procurement is not a lottery, but is essentially a competition.[25] To enter this competition, a firm must produce a bid, which costs time and money. Firms are constantly deciding which competitions they should enter, depending on the costs and potential benefits of doing so in a potential contract. A well-run firm will be selective about which contracts it bids for—which competitions it enters. A string of bad decisions can lead to a firm's bankruptcy. Thus, the number of "willing" firms cannot simply be equated with the number of firms in a geographical area. Only if a firm bids is there evidence it is "willing" to assume the risks and responsibilities of a particular contract.

Third, how should the number of firms that are "able" or have the capacity to complete a job be measured? A firm's supply of capital or skilled employees may be limited. Some contracts require performance bonds, insurance, or other fiscal requirements. A firm that has the ability to complete a

---

[24] A version of this discussion of availability can be found in George R. La Noue, *Legal Standards for Affirmative Action in Government Contracting*, *in* HOUSTON COMMUNITY COLLEGE STUDY OF AVAILABILITY AND UTILIZATION, Dec. 2023.

[25] *See, e.g.*, *Associated Gen. Contractors v. Columbus*, 936 F. Supp. 1363. The city had created its MWBE program based on multiple disparity studies. It based availability on firms included in various lists, including a city vendor list. The court found, however:

> The city maintains records of all firms which have submitted bids on prime contracts. This would be a ready source of information regarding the identity of firms which are qualified to provide contracting services as prime contractors. . . . On prime contracts only firms which submit bids are "available." "The concept of investigating discrimination in the award of prime contracts by indirect statistical analysis is inappropriate in this case. The process of awarding prime contracts is not the equivalent of a lottery in which each bidder has an equal chance to win. Prime contracts are awarded to the lowest responsible bidder."

Id. at 1389, 1400. The court concluded, "There was no evidence that the city ever failed to award a prime contract to a minority firm that was the lowest bidder." *Id.* at 1372. In fact, the Columbus studies never even investigated which firms submitted bids, how often, or on what size contracts.

job in April may not have that ability in November because of other commitments. Some firms work only as prime contractors, some as subcontractors, and some as both.

These three factors together indicate the availability of firms for particular contracts, and the key to any disparity study is accurately calculating availability. If availability data are incorrect, the subsequently calculated disparity ratios will be incorrect. Few jurisdictions have the necessary data in accessible formats prior to commissioning a disparity study. Calculating how many comparable firms are qualified, willing, and able to complete a contract is complicated, time-consuming, and expensive.

Consequently, the for-profit companies which dominate the disparity study mini-industry sought easily accessible data. First, they relied on census data, but this data merely reports the total number of firms in industry categories in a geographical area, not whether they are available for the actual contracts a government offers in a particular time period. Second, some studies sought to use Dun & Bradstreet (D&B) databases, which raises a few problems. For one, they exclude many smaller firms. Further, the D&B lists do not have information about whether a firm is qualified, willing, and able to compete for a specific government procurement. Moreover, D&B data are considered proprietary, so neither the plaintiff nor the court can examine that data in raw form. Consequently, many disparity study firms switched to compiling the names of firms on existing lists (trade association membership, registered vendors, certified MWBEs, etc.) and using the resulting compilations to measure availability. But even assuming the source lists are current and accurate, they do not distinguish which firms have the characteristics to compete for specific government contracts in a particular time frame. When disparity study firms are forced to provide their availability lists in litigation, the inadequacy of their availability measures to meet the *Croson* requirements is evident.[26]

Even if a disparity study produces a valid disparity ratio—one based on careful availability measures that show minority- or women-owned firms are not receiving the statistically expected number of contracts or dollars awarded—that alone does not create a compelling interest sufficient to support an MWBE program without other kinds of evidence. A basic premise in statistical analysis is that a correlation, without more, does not lead to a spe-

[26] *See generally* George R. La Noue, *Who Counts?: Determining the Availability of Minority Businesses for Public Contracting After* Croson, 21 HARV. J.L. & PUB. POL'Y 793 (1998).

cific conclusion of causation. *Croson* recognizes that principle by saying disparity analysis may give rise to "an *inference* of discriminatory exclusion."[27] In short, a well done disparity analysis can creates hypotheses that should be followed up, but not a certain conclusion that there is specific discrimination that enables a race-preferential program to survive strict scrutiny.

IV. RECENT FEDERAL COURT RULINGS ON RACE-BASED ECONOMIC BENEFITS, AND THE PROBABLE IMPACT OF *SFFA*

In *Students for Fair Admissions v. President and Fellows of Harvard College* and *Students for Fair Admissions v. University of North Carolina*, the U.S. Supreme Court held that racial preferences in college admissions violate the Fourteenth Amendment and Title VI.[28] But even before the Supreme Court handed down this decision in 2023, racial preferences connected to public economic benefits were being struck down by lower federal courts.

In 2021, U.S. Department of Agriculture Secretary Thomas Vilsack announced that USDA would immediately forgive 13,000 to 15,000 loans to non-white food producers at a potential cost of up to $4 billion.[29] It was labeled Covid-19 relief, but the context of the new policy suggested a broader purpose. USDA declared that the Biden-Harris Administration was committed "to equity across the Department by removing systemic barriers and building a workforce more representative of America."[30] The program of race-based debt relief only for minority farmers and ranchers was halted by

---

[27] *Croson*, 488 U.S. at 509.

[28] 600 U.S. 181 (2023) (*SFFA*).

[29] *A Hearing to Review the State of Black Farmers in the U.S. Before the H. Comm. on Agric.*, 117th Cong., transcript at 6, 123 (2021), *available at* https://www.congress.gov/117/chrg/CHRG-117hhrg46332/CHRG-117hhrg46332.pdf. *See also* George R. La Noue, *The Race Card in ARPA's Food Supply Deck*, 22 FEDERALIST SOC'Y REV. 184, 189-91 (2021), *available at* https://fedsoc.org/fedsoc-review/the-race-card-in-arpa-s-food-supply-deck.

[30] *See* Zach Ducheneaux, *American Rescue Plan Socially Disadvantaged Farmer Debt Repayments*, USDA (Mar. 26, 2021), https://www.farmers.gov/blog/american-rescue-plan-socially-disadvantaged-farmer-debt-payments. *See A Hearing to Review the State of Black Farmers in the U.S. Before the H. Comm. on Agric.*, 117th Cong. (2021) (testimony of Thomas J. Vilsack, Sec'y of Agric.), *written testimony available at* https://www.congress.gov/117/meeting/house/111400/witnesses/HHRG-117-AG00-Wstate-VilsackT-20210325.pdf. *See also* Statement, The White House, Fact Sheet: President Biden Signs Executive Order Advancing Diversity, Equity, Inclusion, and Accessibility in the Federal Government (June 25, 2021), *available at* https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/25/fact-sheet-president-biden-signs-executive-order-advancing-diversity-equity-inclusion-and-accessibility-in-the-federal-government/.

several district courts in different parts of the country.[31] The Department of Justice did not appeal those decisions.

Also in 2021, a Covid-19 relief program that prioritized federal funds for restaurants owned by minorities and women was found unconstitutional. The House Small Business Committee, chaired by former chair of the Congressional Hispanic Caucus Nydia Velazquez, found that during the pandemic "women—especially mothers and women of color—are exiting the workforce at alarming rates," and that "eight out of ten minority businesses are on the brink of closure."[32] The consequence of this prioritization was that the $29 billion in restaurant relief funds were running out before white male owners could even have their applications considered. In *Vitolo v. Guzman,* the Sixth Circuit found the race- and sex-based priority unconstitutional and, moreover, outlined standards for establishing a compelling interest:

> The government has a compelling interest in remedying past discrimination only when three criteria are met:
>
> First, the policy must target a specific episode of past discrimination. It cannot rest on a "generalized assertion that there has been past discrimination in an entire industry."
>
> Second, there must be evidence of *intentional* discrimination in the past. Statistical disparities don't cut it, although they may be used as evidence to establish intentional discrimination.
>
> Third, the government must have had a hand in the past discrimination it now seeks to remedy.[33]

Again, the DOJ did not appeal.

Important questions have been raised about the scope of the Supreme Court's decision in *SFFA*, and whether and how it extends beyond the higher education context.[34] The Court did not directly address any public procurement program, but almost all of them receive federal funds and so are subject

---

[31] Wynn v. Vilsack, 545 F. Supp. 3d 1271 (M.D. Fla. 2021); Faust v. Vilsack, 519 F. Supp. 3d 470 (E.D. Wisc. 2021); Miller v. Vilsack, No. 4:21-CV-00595, 2021 WL 1115194 (N.D. Tex. 2021).

[32] *Help is On the Way: Budget Reconciliation Moves the American Rescue Plan Forward*, House Comm. on the Budget (Feb. 19, 2021), https://democrats-budget.house.gov/resources/reports/help-way-budget-reconciliation-moves-american-rescue-plan-forward.

[33] Vitolo v. Guzman, 999 F.3d 353, 361 (6th Cir. 2021) (Thapar, J.) (internal citations omitted).

[34] *See, e.g.*, *DEIA Initiatives in the Workplace Post-SFFA*, FREEDOM OF THOUGHT (Oct. 26, 2023), https://freedomofthought.fedsoc.org/deia-initiatives-in-the-workplace-post-sffa; Jonathan Berry, *Implications for Philanthropy: U.S. Supreme Court Ruling on Affirmative Action in Higher*

to the Fifth and Fourteenth Amendments' or Title VI's equal protection provisions. The Court insisted that the only way race preferential admissions can have a compelling interest is if they remedy specific constitutional or statutory violations.[35] The *Croson* decision had suggested the same standard in the procurement context.[36]

On July 19, 2023, following up on *Vitolo* and also incorporating *SFFA*, a federal district court in the Eastern District of Tennessee held unconstitutional the race preferences in the federal contracting 8(a) program.[37] Under the 8(a) program, the Small Business Administration (SBA) can set aside procurements in any federal agency for "socially and economically" disadvantaged firms.[38] In practice, this has meant businesses owned by racial and ethnic minorities, and indeed SBA long maintained a "presumption" that all minority-owned firms were socially and economically disadvantaged.[39] This presumption was based on a list of countries of origin, which has not changed in decades.[40] In *Ultima Services Corporation v. U.S. Department of Agriculture*, the court ruled that the program lacked a compelling interest and was not narrowly tailored because it did not purport to remedy specific past discrimination against the beneficiary firms.[41] The SBA responded by giving up its presumption and replacing it with a purportedly race-neutral individual essay application process—similar to the one *SFFA* suggests might pass constitutional muster in college admissions.[42]

Education, PHILANTHROPY ROUNDTABLE (Nov. 1, 2023), https://www.philanthropyroundtable.org/wp-content/uploads/2023/11/Toolkit_Implications-for-Philanthropy.pdf; Lara A. Flath et al., *The Supreme Court's Affirmative Action Opinion Continues To Spawn Challenges to DEI Programs*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP (Dec. 13, 2023), https://www.skadden.com/insights/publications/2023/12/2024-insights/esg/the-supreme-courts-affirmative-action-opinion; Francesca L. Odell et al., *How Boards Should Be Thinking about the Supreme Court's SFFA Affirmative Action Decision*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 14, 2024), https://corpgov.law.harvard.edu/2024/02/14/how-boards-should-be-thinking-about-the-supreme-courts-sffa-affirmative-action-decision/.

[35] *SFFA*, 600 U.S. at 252-53.

[36] 488 U.S. at 500.

[37] Ultima Servs. Corp. v. U.S. Dep't of Agric., 2:20-CV-00041-DLC-CRW, 2023 WL 4633481 (E.D. Tenn. 2023).

[38] *Id.* at **3-4.

[39] *Id.* at *4.

[40] *See* 13 C.F.R. § 124.103(b)(1) (2023).

[41] *Ultima Servs. Corp.*, 2023 WL 4633481, at *12.

[42] Notice of Compliance, *Ultima Servs. Corp.*, 2023 WL 4633481 (filed Aug. 29, 2023). *See SFFA*, 600 U.S. at 230-31.

V. How Will the Shifting Legal Landscape Affect Ongoing Litigation Over Race-Preferential Procurement?

A. Nuziard v. Minority Business Development Agency

The Minority Business Development Agency (MBDA) is a federal agency which, under the Biden administration, created regional centers across the country to provide assistance to business owners. Those centers had a policy of providing services only to firms whose owners' identities were consistent with a federal list of racial and ethnic minorities. When white business owners approached these centers for help, they were rejected because of their race. Jeffrey Nuziard in Texas, along with other business owners from Florida and Wisconsin, represented by the Wisconsin Institute for Law and Liberty (WILL), sued to enjoin the MBDA's race-exclusive policy in 2023.[43]

A few weeks before the *SFFA* decision was announced, a United States District Court in Texas issued a preliminary injunction finding that the policy violated the Fifth Amendment's equal protection guarantee.[44] The DOJ responded to this ruling by putting into the record several expert reports. They covered statistical analysis of disparities in federal procurement, a meta-analysis of a sample of state and local disparity studies, and an expert report based on anecdotes about and statistics related to procurement disparities in Texas. That was an enormous amount of material to analyze and rebut. The case record totaled 4,456 pages. WILL decided to forgo an expert rebuttal and focused its reply on the fact that none of the material in the DOJ's expert reports identified the constitutional or statutory violations *SFFA* requires to support a racial preference.[45]

On March 5, 2024, Judge Mark T. Pittman delivered a 93-page ruling finding the MBDA regional centers' race-exclusive policy unconstitutional and issuing a permanent injunction.[46] The court found that two meta-analysis studies introduced by DOJ—which detailed disparities in the private credit market and disparities in private contracting—were flawed and did not provide the evidence of illegal discrimination that *SFFA* requires to support

---

[43] Complaint, Nuziard v. Minority Bus. Dev. Agency, 676 F. Supp. 3d 473 (N.D. Tex., filed June 5, 2023) (No. 4:23-CV-0278-P).

[44] *Nuziard*, 676 F. Supp. 3d at 485.

[45] Plaintiffs' Reply Brief in Support of their Motion for Summary Judgment, *Nuziard*, 676 F. Supp. 3d 473 (filed Dec. 1, 2023) (No. 4:23-CV-0278-P).

[46] Nuziard v. Minority Bus. Dev. Agency, 4:23-cv-00278-P, 2024 WL 965299 (N.D. Tex. Mar. 5, 2024).

race-conscious remedies.[47] DOJ had also introduced a third disparity study on government prime contracting, and the court found that because that study provided "robust empirics" and focused on discrimination by the government, it could support a compelling interest.[48] The opinion does not reflect any examination of whether that third study controlled for whether firms were qualified, willing, and able (*Croson*'s availability variables), and there was no plaintiffs' expert report to rebut the study's findings.[49]

Next, Judge Pittman moved to the narrow tailoring prong of his strict scrutiny analysis, finding that the racial and ethnic presumptions informing the minorities list MBDA relied on "comprise a bizarre amalgam that is often arbitrary."[50] Citing *SFFA*'s statement that "race may never be used as a 'negative' and . . . may not operate as a stereotype," the court concluded that MBDA's use of race involved both negatives and stereotypes.[51] Judge Pittman noted that the MBDA racial presumptions had no "logical endpoint," a criterion for narrow tailoring under *SFFA*.[52] Further, MBDA had not considered using race-neutral remedies to ameliorate the business inequalities it saw in society. While hesitant to issue a nationwide injunction, the court concluded that was the proper remedy, since the MBDA service centers are scattered across the nation and all followed the same racially exclusionary policy.[53]

Coupled with the ruling in *Ultima* about the inadequacy of the minority lists used to support governmental preferences,[54] *Nuziard* will make it very difficult for the many state and local programs to defend their use of the same lists to define their MBE programs.

B. Mid-America Milling v. U.S. Department of Transportation

---

[47] *Id.* at **26-27, **30-32.

[48] *Id.* at *33.

[49] This contrasts with other circuit courts' evaluations of disparity studies, which have found that the characteristics of MWBEs and non-MWBEs are different, and that disparity analysis should control for those differences. *See, e.g.*, Mich. Road Builders Ass'n, Inc. v. Milliken, 834 F.2d 583, 592 (6th Cir. 1987); Associated Gen. Contractors, Inc. v. Drabik, 214 F.3d 730, 736 (6th Cir. 2000); Eng'g Contractors Ass'n of S. Fla. v. Dade Cnty., 122 F.3d 895, 917 (11th Cir. 1997); W. States Paving, Inc. v. Wash. Dep't of Transp., 407 F.3d 983, 1000-01 (11th Cir. 2005).

[50] *Nuziard*, 2024 WL 965299, at *4 n.10.

[51] *Id.* at *33 (quoting *SFFA*, 600 U.S. at 281).

[52] *Id.* at *37 (quoting *SFFA*, 600 U.S. at 212).

[53] *Id.* at *45.

[54] *See Ultima*, 2023 WL 4633481; *supra* notes 32-37 and accompanying text.

In *Mid-America Milling Company v. U.S. Department of Transportation*, WILL is representing companies challenging the use of federal DBE goals in Kentucky and Indiana.[55] The case may have national implications: the plaintiff companies operate in multiple states covering multiple circuits and are challenging a federal policy.

The DBE program has been in place since the 1980s and requires set-asides of federal transportation contracts for "disadvantaged business enterprises."[56] In its current manifestation, the 2021 Infrastructure Investment and Jobs Act requires that 10% of the more than $37 billion of new surface transportation funding go to DBEs. The Act uses the same presumptions about which firms are socially and economically disadvantaged as did SBA's 8(a) program prior to the *Ultima* case.[57] The *Ultima* decision invalidating that presumption for the SBA, the *Nuziard* decision invalidating it for the MBDA, and *SFFA*'s critique of the concept that a person's country of origin should confer advantages or disadvantages[58] will all make it difficult to defend the DBE program.

In two DBE cases from the early 2000s, under-resourced plaintiffs represented by small firms lost when they sought summary judgments, which turned out not to be an appropriate procedure for rebutting complex state disparity studies.[59] If WILL is successful in showing that the DBE program was never based on evidence of violations that would satisfy *SFFA* or *Vitolo*, even accurate state findings of statistical disparities or DBE availability will not justify setting DBE goals on specific contracts, and so conventional disparity studies will become completely unnecessary.

C. Other Impacts

---

[55] Complaint, Mid-America Milling Co., LLC v. U.S. Dep't of Transp., No. 3:23-cv-00072 (E.D. Ky. 2023) (*MAMCO*).

[56] *See supra* Section I.

[57] Infrastructure Investment and Jobs Act, Pub L. No. 117-58, § 11101(e), 135 Stat. 429, 449 (2021). *See supra* Sections I, IV.

[58] 600 U.S. at 216-18.

[59] *See* Sherbrooke Turf Inc. v. Minn. Dep't of Transp., 345 F.3d 964, 969-70, 973-74 (8th Cir. 2003). *But see W. States Paving*, 407 F.3d 1000-01 (citing Maryland Troopers Association v. Evans, 993 F.2d 1072 (4th Cir. 1993); Coral Constr. Co. v. King Cnty., 941 F.2d 910 (9th Cir. 1991); *Drabik,* 214 F.3d 730; O'Donnell Constr. Co. v. D.C., 963 F.2d 420 (D.C. Cir. 1992)) (finding that states' evidence that proportion of minority firms who won contracts was lower than their proportion in the state did not suffice to show discrimination because it failed to address availability).

There is another, less visible potential impact of *SFFA* and perhaps *Vitolo*. Governments which passed legislation requiring MWBE goals may now be hesitant to actually place those goals on specific contracts if that might provoke litigation undermining their whole regime of race preferences. Also, governments which contemplate commissioning or adopting disparity studies may now have second thoughts, if the studies would have to show they committed constitutional or statutory violations to effectively defend their preferential programs. The application of truly strict scrutiny to these programs might chill their creation altogether.

When district and appeals courts rule against racial preferences, other lower courts might disagree. But when the Supreme Court rules, its precedents are binding. *SFFA*'s majority opinion cites *Croson* and announces clearly that racial preferences can only be used to remedy specific constitutional or statutory violations.[60] It is unlikely that this string of defeats for race-based economic benefits and procurement preferences will be overturned. The DOJ seems to accept that reality by declining to appeal its losses. Improved disparity studies may still be useful in identifying problems in a procurement system, but it is unlikely they will ever again be sufficient to provide a compelling interest or narrow tailoring for MWBE programs as they currently exist.

VI. CONCLUSION

There have been concerted efforts to end specific discrimination in employment and housing. But there have been no efforts by public or private litigators to end particular procurement discrimination against MWBEs. In the government contracting context, litigation over discrimination—including disparity studies conducted for the purpose—has always been about the desire of governments to create or maintain programs to help minority groups they wished to support. Consequently, these race-preferential programs benefitted firms that were not themselves proved victims of discrimination, and they harmed firms that had not discriminated. Any program that is so over-inclusive is not narrowly tailored.

Hundreds of procurement disparity studies have been conducted, and it is remarkable that they almost never identified any particular perpetrator or

[60] *See SFFA*, 600 U.S. at 226, 248-50, 260, 317 (2023) (citing *Croson*).

instance of discrimination which might have been a constitutional or statutory violation remediable by a race-preferential program. There are two reasons for that significant omission. First, disparity study firms did not want to accuse their government funders of legal violations in their procurement processes. Second, if such violations had been identified, a narrowly tailored remedy would have had to be more focused on the specific victimized firms and involve monetary indemnifications the governments did not wish to make. Set-aside programs for all MWBEs were more desirable politically.

SFFA's reiteration of the requirement that a constitutional or statutory violation must undergird the use of a race-conscious remedy may lead to new outcomes in litigation over MWBE preferences. Not only may it be easier and quicker for plaintiffs to shut down these programs by forcing defendants to admit that relevant violations have not occurred, but firms disadvantaged by past preferential programs may also seek financial remedies. Sometimes, those may be firms owned by minorities who were not included in a previous MWBE program,[61] but more often they will be white male or stockholder owned firms disadvantaged by the programs.

Successful challenges to group-based presumptions will impact almost all MWBE programs. Eligibility for such programs has been based only on government certification that a firm is majority-owned by racial minorities or women, regardless of whether there is any evidence that the firm or the person benefitting had experienced discrimination in the award of government contracts.[62] After *SFFA* and other decisions invalidating racial preferences in government-run or -funded programs, firms will have to produce individualized evidence of discrimination to justify preferences. This will reduce the number of MWBEs eligible for preferences, and perhaps political support for these programs as well.

In *SFFA*, Chief Justice Roberts stated bluntly for the majority, "The way to end discrimination is to end it. All of it." That sounds like the death knell for virtually all existing race-preferential procurement plans.

---

[61] *See, e.g.*, Hispanic Chamber of Commerce v. City of Milwaukee, No. 12-cv-545 (E.D. Wisc. 2012) (challenge brought by minority groups against MWBE program which preferred only black- and women-owned firms).

[62] *See generally* George R. La Noue, *Defining Social and Economic Disadvantage: Are Governmental Preferential Business Certification Programs Narrowly Tailored?*, 12 UNIV. MD. L.J. OF RACE, RELIGION, GENDER & CLASS 2, 274-319 (2012).

Other Views:

- Statement, The White House, Presidential Actions: Executive Order On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government (Jan. 20, 2021), *available at* https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/.
- Connor Maxwell et al., *A Blueprint for Revamping the Minority Business Development Agency*, CTR. FOR AM. PROGRESS (July 31, 2020), https://www.americanprogress.org/article/blueprint-revamping-minority-business-development-agency/.
- Katherine Franke & Ting Ting Cheng, *The ERA Brief—June 2021*, COLUM. L. SCH. CTR. FOR GENDER & SEXUALITY L. (June 1, 2021), https://gender-sexuality.law.columbia.edu/content/why-do-we-need-era-new-decision-6th-circuit-answers-question.