**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

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| MIDWEST FENCE CORPORATION,<br><br>Plaintiff,<br><br>v.<br><br>UNITED STATES DEPARTMENT OF TRANSPORTATION, et al.,<br><br>Defendants. | Case No.: 1:10-cv-05627<br><br>Judge: Hon. Harry D. Leinenweber<br>Magistrate Judge: Hon. Morton Denlow |

**CORRECTED AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION, ROTHE DEVELOPMENT CORPORATION, AND JOHN SULLIVAN IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

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## INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff Midwest Fence Corp. (Midwest) challenges the constitutionality of the U.S. Department of Transportation's Disadvantaged Business Enterprise (DBE) program, and implementation of that program by the Illinois Department of Transportation (IDOT) and the Illinois State Toll Highway Authority (Tollway). Defendants IDOT and the Tollway implement the Federal DBE program in a discriminatory manner. A portion of the dollars allocated to federal *and* state-funded transportation projects must be paid to DBEs. Plaintiff's Statement of Facts (SOF) Vol. I, ¶ 1-2. Thus, prime contractors must consider race and sex when bidding for such contracts. Prime contractors must either (1) subcontract a percentage of dollars to minority- or women-owned firms, or (2) demonstrate that they made "good faith efforts" to do so. Plaintiff's SOF Vol. I, ¶ 78 (citing 49 C.F.R. § 26.53(a)). By subcontracting in this way, prime contractors are forced to discriminate against, and grant preferences to, subcontractors on the basis of race. If a prime contractor fails to document strict compliance with the programs' mandates, he is punished by having his bid rejected as nonresponsive, even if it is the lowest bid. *See id.* ¶ 129 (citing 49 C.F.R. Part 26, Appendix A, Section IV(D)(2))(the fact that there may be 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).

Neither IDOT nor the Tollway can prove the existence of widespread and systemic discrimination in the transportation construction industry that would justify their racial preferences. Further, IDOT's and the Tollway's discriminatory

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

## ARGUMENT

## I

## NEITHER IDOT NOR THE TOLLWAY CAN PRODUCE A STRONG BASIS IN EVIDENCE OF DISCRIMINATION SUFFICIENT TO SATISFY STRICT SCRUTINY

Plaintiff Midwest Fence Corp. challenges the constitutionality of the U.S. Department of Transportation's DBE program, and implementation of that program by IDOT and the Tollway. Both the IDOT and Tollway DBE Programs create classifications based on race and sex and distribute benefits and create burdens according to those classifications. *See* Plaintiff's SOF Vol. I, ¶ 65, 66, 74-79 (defining DBE by race and sex, and explaining contract DBE goals). All governmental action based on explicit racial classifications is subject to strict scrutiny to ensure that the personal, constitutional right to equal protection has not been infringed. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). Government may employ racial classifications only if they are narrowly tailored to further compelling governmental interests. *Id.*

Because offering government jobs to Americans on account of their race is so odious to the Constitution, the only accepted compelling interest that can justify such a radical act in public contracting programs is remedying the present effects of identified past illegal discrimination. *Adarand*, 515 U.S. at 237; *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505 (1989). This Circuit allows a state entity implementing the congressionally mandated DBE program to rely "on the federal government's compelling interest in remedying the effects of past discrimination in the national construction market." *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715, 720-21 (7th Cir. 2007). However, whether a state's DBE program is narrowly tailored to further Congress's remedial objective depends upon the presence or absence of discrimination in that state's transportation contracting industry. *Western States Paving Co., Inc. v. Washington State Dep't of Transp.*, 407 F.3d 983, 997-98 (9th Cir. 2005). If no such discrimination is present in Illinois, then IDOT's DBE program does not serve a remedial purpose; it instead provides an unconstitutional advantage to those contractors who the program favors on the basis of their race.[1] *Id.*

The Tollway, in particular, must identify discrimination in the Illinois transportation construction industry to justify its use of racial preferences. Unlike IDOT, the Tollway may not rely on the federal DBE Program as a compelling

[1] The United States argued in *Western States* that the federal DBE Program is not a narrowly tailored remedial measure unless its application is limited to those States in which the effects of discrimination are actually present. 407 F.3d at 998. Specifically, "The state would have to have evidence of past or current effects of discrimination to use race-conscious goals.". *Id.*

interest to justify its racial preferences because the Tollway's program is not congressionally mandated and the Tollway does not receive any federal funds. Plaintiff's SOF Vol. II, ¶ 14, 15. The Tollway's race-conscious affirmative action program is purely voluntary.[2] *See Midwest Fence Corp. v. U.S. Dep't of Transp.*, No. 10 C 5627, 2011 WL 2551179 (N.D. Ill. June 27, 2011) (Tollway instituted a voluntary program to increase participation of DBEs). The Tollway DBE Program must therefore independently satisfy strict scrutiny. *See Milwaukee Cnty. Pavers Ass'n v. Fiedler*, 922 F.2d 419, 424-25 (7th Cir. 1991) (state program is vulnerable to an equal protection challenge insofar as the state took the racial presumption in the federal regulations and applied it to programs not funded under and therefore not governed by the federal statute).

Thus this Court must examine under strict scrutiny whether IDOT's justification for racial preferences—its 2011 disparity study prepared by Mason Tillman Associates (IDOT Disparity Study)—identifies the presence of discrimination in the Illinois transportation construction industry. Plaintiff's SOF Vol. I, ¶ 23. The 2011 disparity study prepared by Mason Tillman Associates for the Tollway (Tollway Disparity Study) must also be scrutinized as part of this Court's strict scrutiny analysis to determine whether the Tollway properly relied on it to justify its DBE program.[3] Plaintiff's SOF Vol. II, ¶ 4.

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[2] *See* Plaintiff's SOF Vol. II, #23 (the Tollway sets race-conscious DBE participation goals on contracts without submitting reports to any oversight agency or committee).

[3] Apparently recognizing the flaws in the 2011 MTA Tollway Disparity Study, the Tollway has chosen not to rely on that study to justify its race-conscious DBE program. Plaintiff's SOF Vol. II, #2. Curiously, the Tollway instead relies on the old and stale 2006 NERA (continued...)

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

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

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

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

Statistical studies that do not measure a firm's capacity fail to provide a strong basis in evidence to support racial classifications. *See O'Donnell Constr. Co., v. District of Columbia*, 963 F.2d 420, 426 (D.C. Cir. 1992) (statistical disparity did not account for the size and ability of minority firms to take on large projects);

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[3] (...continued)
Disparity Study. Plaintiff's SOF Vol. I, ¶ 215; *see* Section I(C) of this brief (explaining why the 2006 NERA Disparity Study should be rejected as stale). Amici provide additional reasons here for why the MTA Tollway study should be abandoned in the event the Tollway attempts to "flip-flop" during these summary judgment proceedings.

*Western States*, 407 F.3d at 1000-01 (rejecting a statistical disparity because it did not account for factors that may have affected the relative capacity of minority firms to undertake contracting work); *Associated General Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 736 (6th Cir. 2000) (statistical disparities do not imply that government discriminated if they fail to account for the relative size of the firms, either in terms of their ability to do particular work or in terms of the number of tasks they have the resources to complete). The MTA disparity studies do not measure firm capacity, and cannot provide a strong basis in evidence of discrimination to support the use of race.

**1. The IDOT and Tollway Disparity Studies Do Not Measure Prime Contractor Capacity, Because Their Methodology Was Found to be Legally Deficient in *Rothe Dev. Corp. v. Dep't of Defense***

The MTA IDOT and Tollway Disparity Studies are deficient as a matter of law. Both omit an analysis of firm size when attempting to measure firm capacity, a methodology held to be fatally flawed by the Federal Circuit in *Rothe Dev. Corp. v. Dep't of Def.*, 545 F.3d 1023 (Fed. Cir. 2008). In *Rothe*, the court held that six disparity studies—including four by MTA, 545 F.3d at 1041—failed to provide a strong basis in evidence to justify racial preferences in contracting. 545 F.3d at 1045. The studies' failure "to account sufficiently for potential differences in size, or *relative capacity*, of the businesses included in those studies" contributed to the court's decision that the need for racial preferences was not justified. *Id.* at 1042-43. The court explained that "'qualified' firms may have substantially different capacities, and thus might be expected to bring in substantially different

amounts of business even in the absence of discrimination." *Id.* at 1043. For instance, a large firm with plants throughout the state has a larger capacity to do more contracting work than a small firm with only one plant. *See id.* (comparing multinational firm to sole proprietor). *Rothe* suggested that another way to understand firm capacity is by comparing a small micro-brewery with Budweiser. Both are *qualified* to sell beer, but they are not equally *available* to sell beer because Budweiser can produce more. *Id.*

In *Rothe*, the four defective MTA disparity studies tried to account for the relative sizes of contracts awarded to minority-owned firms by measuring the utilization of those businesses in terms of contract-dollars directed to them. *Rothe*, 545 F.3d at 1043. But none of the studies took into account the relative sizes of the firms themselves. *Id.* The studies only measured the availability of minority-owned firms by the percentage of firms in the market owned by minorities, instead of by the percentage of total marketplace capacity those firms could provide. *Id.* In other words, there was no way to know whether a disparity measured in dollars was due to discrimination, or whether it was because a small firm could not compete with a large one. The IDOT and Tollway MTA Disparity Studies measure availability the same way.

First, the 2011 MTA IDOT and Tollway Disparity Studies assert that "[u]nder a fair and equitable system of awarding contracts, the proportion of contract dollars awarded to M/WBEs would be approximate to the proportion of available M/WBEs in the relevant market area." Plaintiff's Ex. 44, 2011 MTA IDOT Disparity Study at 1-6; Plaintiff's Ex. 43, 2011 MTA Tollway Disparity Study at 1-

7. *Rothe* quoted the same language from the MTA New York City Disparity Study that the court rejected. *See* 545 F.3d at 1044 (study did not measure capacity as evidenced by study's assertion that: "Under a fair and equitable system of awarding contracts, the proportion of *contract dollars* awarded to M/WBEs would be approximate to the proportion of *available M/WBEs* in the relevant market area.") (emphasis in original).

Second, MTA's decision to limit its analysis to smaller contracts mirrors the approach rejected by the Federal Circuit. *Rothe*, 545 F.3d at 1044. The 2011 MTA Tollway Disparity Study reported that the majority of the Tollway's construction prime contracts were valued at over $1,000,000. Plaintiff's Ex. 43, MTA Tollway Disparity Study at 7-9, 7-10. Nevertheless, the analysis of competitive bid contracts was capped at $1,000,000 for construction, because MTA claimed such a cap would ensure that the contracts were within the capacity level of available M/WBEs. *Id.* Similarly, the MTA IDOT Disparity Study was limited to contracts valued at $500,000. Plaintiff's Ex. 44, MTA IDOT Disparity Study at 8-3. *Rothe* rejected this approach. 545 F.3d at 1044. The court explained that "while these parameters may have ensured that each minority-owned business in the stud[y] met a capacity threshold—i.e., had the capacity to bid for and to complete any one contract—these parameters simply fail to account for the relative capacities of businesses to bid for *more than one contract at a time*." *Id.*

MTA acknowledges *Rothe*'s requirement for an analysis of relative capacity, but wrongly claims that the addition of a regression analysis corrects any defects.

*See* Plaintiff's Ex. 44, 2011 MTA IDOT Disparity Study at 7-10 (claiming its regression analysis satisfies *Rothe*'s requirement that disparity studies must examine relative capacity). In *Rothe*, the court noted that MTA's defect might have been corrected through a regression analysis, but only if that analysis "determine[d] whether there was a statistically significant correlation between the *size of a firm* and the *share of contract-dollars awarded to it*." *Rothe*, 545 F.3d at 1044 (emphasis added); *see also* Plaintiff's SOF Vol. I, ¶ 217 (Defendants' Expert Jon Wainwright admitted a regression analysis cannot prove discrimination). MTA does not address the substance of *Rothe*'s analysis by merely stating that *Rothe* "opined that a regression analysis could be used to control for relative capacity." MTA does not explain what parameters must be analyzed through regression to correct its flawed approach.[4] *See* Plaintiff's Ex. 44, 2011 MTA IDOT Disparity Study at 11-6 (regression analysis conducted for business ownership, business earnings, and business loan denials, but omitting analysis of size of firm and share of contract dollars); Ex. 43, 2011 MTA Tollway Disparity Study at 11-6 (same). MTA's approach to disparity studies is fatally flawed because MTA "fail[s] to account for the relative capacities of businesses to bid for *more than one contract at a time*." *Rothe*, 545 F.3d at 1044.

[4] In fact, the 2011 MTA Disparity Studies cite as authority the 2004 district court's decision in *Rothe* that was vacated by *Rothe Dev. Corp. v. Dep't of Def.*, 413 F.3d 1327, 1339 (Fed. Cir. 2005), not the final 2008 appellate decision that rejected the four MTA studies. *See* Plaintiff's Ex 44, 2011 MTA IDOT Disparity Study at 7-10 (noting *Rothe*'s requirement for regression analysis, but citing to the district court decision in footnote 3.)

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

It is undisputed that the MTA Disparity Studies do not measure subcontractor capacity. *See* Plaintiff's SOF Vol. I, ¶ 233-34 (MTA did not account for the size of contracts that DBEs are able to perform). Without any citation to case law, the disparity studies contain the following legal conclusion: "*Croson* does not require a measure of subcontractor capacity; therefore, it is not necessary to address capacity issues in the context of subcontractors." Plaintiff's Ex. 44, MTA IDOT Disparity Study, at 7-20; Plaintiff's Ex. 43, MTA Tollway Disparity Study, at 7-18. Because the Supreme Court did not limit its holding in *Croson* to prime contractors, the failure to measure subcontractor capacity is another fatal flaw in the disparity studies at issue in this case.

*Croson* invalidated the City of Richmond's *subcontractor* goals plan that required prime contractors to whom the city awarded construction contracts to subcontract at least 30% of the dollar amount of the contract to one or more minority-owned businesses. *Croson*, 488 U.S. at 477. Although the plaintiff in *Croson* submitted a bid as a prime contractor, the dispute centered around the plaintiff's inability to meet the 30% set-aside goal for minority subcontractors. *Id.* at 482-84. The City of Richmond argued that racial preferences to minority subcontractors were justified due to a disparity between the number of prime contracts awarded to minority firms and the minority population of the city of Richmond. *Croson*, 488 U.S. at 501. MTA's argument that Croson does not require an analysis of subcontractor capacity would only be correct if the Court

had in fact accepted the City of Richmond's statistical focus on prime contractors. But it did not.

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

*Croson* makes it clear that if government relies on statistical disparities to infer discrimination, the relevant comparison must be between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors "actually engaged by the locality *or the locality's prime contractors*." 488 U.S. at 509 (emphasis added). The IDOT and Tollway MTA

Disparity Studies cannot justify the State's racial preferences because they fail to account for subcontractor capacity—*Croson*'s requirement of "ability" to perform.

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

With their MTA disparity studies discredited, IDOT and the Tollway may not base their current race-conscious programs on old disparity studies. The DBE availability studies prepared in 2004 and 2006 by National Economic Research Associates (NERA) are based on data that is too remote in time to be applicable to current contracting programs. The 2004 NERA study prepared for IDOT was based on an analysis of contracts from 1996-2000, which is from fourteen to eighteen years ago. Plaintiff's Ex. 54, 2004 NERA Disparity Study at 8. NERA supplemented the data with material from the 2000 decennial census, which is also fourteen years old. *Id.* at 49 (citing the 2000 Public Use Microdata Samples). The 2006 NERA Disparity Study prepared for the Tollway is based on data from the 2000 decennial census which is fourteen years old; the 2002 Survey of Business Owners and Self-Employed Persons, which is sixteen years old, and contract data from fiscal years 2000 to 2005, which is nine to fourteen years old. Plaintiff's Ex. 56, 2006 NERA Disparity Study, 4, 6, 57. The Tollway continues to rely upon this study to justify its ongoing use of racial preferences.

In a 2006 report, the United States Commission on Civil Rights declared that data in disparity studies more than five years old is "too outdated to justify preferential awards given today." U.S. Commission on Civil Rights, *Disparities as*

*Evidence of Discrimination in Federal Contracting*, at 76 (2006).[5] Courts have refused to consider stale evidence of discrimination proffered to justify race-conscious programs. In *Brunet v. City of Columbus*, 1 F.3d 390, 409 (6th Cir. 1993), *cert. denied sub nom. Brunet v. Tucker*, 510 U.S. 1164 (1994), the court held that where evidence is "too remote to support a compelling governmental interest to justify the affirmative action plan," it must be struck down. *Brunet* rejected an affirmative action plan providing preferential hiring to females because it relied on evidence of past discrimination that was fourteen years old. *Id.* at 409. *See Middleton v. City of Flint, Mich.*, 92 F.3d 396, 409 (6th Cir. 1996), *cert. denied,* 520 U.S. 1196 (1997) ("evidence of past discrimination that is too remote in time will not support a claim of compelling state interest when other evidence is adduced to show the governmental body has taken serious steps in subsequent years to reverse the effects of past discrimination.") In *Rothe*, the Federal Circuit held that, with regard to disparity studies, the government may "rely on the most recently available data so long as that data is reasonably up-to-date." 545 F.3d at 1039. In *Hammon v. Barry*, 826 F.2d 73, 76-77 (D.C. Cir. 1987), the Court of Appeals for the District of Columbia Circuit found that discriminatory conduct occurring eighteen years prior to the institution of an affirmative action plan was insufficient to justify the plan.

The 2004 and 2006 NERA studies are based on contract and census data that is from nine to eighteen years old. This evidence is too remote to justify

[5] *Available at* http://www.usccr.gov/pubs/DisparityStudies5-2006.pdf (last visited Aug. 4, 2014).

current race- and sex-conscious programs, and thus, does not provide the required strong basis in evidence necessary to justify the racial preferences given by IDOT's and the Tollway's DBE programs.

## II

## THE IDOT AND TOLLWAY DBE PROGRAMS FAIL THE NARROW TAILORING PRONG OF STRICT SCRUTINY

Even if IDOT and the Tollway can establish a strong basis in evidence of the ongoing effects of discrimination in relevant public contracting, they cannot prove that the race-conscious DBE goals are narrowly tailored to achieve a legitimate government interest. In *Fisher*, the Court reiterated that even if the government can establish that its implementation of racial preferences is justified by a compelling interest, there must still be a further judicial determination that the race-conscious measures "meet[] strict scrutiny in its implementation." 133 S. Ct. at 2419-20. The most fundamental element of narrow tailoring is the consideration of race neutral means to prevent or remedy any remaining discrimination.[6] *See Croson*, 488 U.S. at 507 (set-aside plan not narrowly tailored where there was no consideration of race-neutral means); *Rothe*, 545 F.3d at 1036 ("[E]ven where there is a compelling interest supported by a strong basis in evidence," the court must consider "the efficacy of alternative, race-neutral

[6] Narrow tailoring analysis commonly involves consideration of six factors: (1) the necessity of relief; (2) the efficacy of alternative, race-neutral remedies; (3) the flexibility of relief, including the availability of waiver provisions; (4) the relationship of the stated numerical goals to the relevant market; (5) the impact of relief on the rights of third parties; and (6) the overinclusiveness or underinclusiveness of the racial classification. *Adarand*, 515 U.S. at 238-39; *Croson*, 488 U.S. at 506; *United States v. Paradise*, 480 U.S. 149, 171 (1987) (plurality opinion).

remedies."). Race neutral alternatives are policies which benefit all small businesses, regardless of the race, ethnicity, or gender.

### A. Government Bears the Burden to Establish That Reasonable and Workable Race-Neutral Measures Have Failed to Eradicate the Effects of Discrimination

The importance of race neutral alternatives to public contracting preferences like the DBE programs at issue here has been largely shaped by three cases: *Croson*, *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Fisher*. These cases illustrate the Supreme Court's requirement that government prove that all reasonable race-neutral measures cannot eradicate the effects of discrimination before turning to racial preferences. In *Croson*, the City of Richmond's minority business enterprise program was not narrowly tailored, in part because the City failed to consider race neutral alternatives before imposing race-conscious goals on Richmond's public construction contracts. *See* 488 U.S. at 507; *see also* Stephen M. Rich, *Inferred Classifications*, 99 Va. L. Rev. 1525, 1574-1587 (2013) (providing an extended analysis of the Supreme Court's increasing focus on race-neutral alternatives).

In *Croson*, the City of Richmond failed to consider *any* race neutral alternatives at all. 488 U.S. at 507. So the Court did not discuss in detail the kind of consideration that government must give to race-neutral measures before turning to race-conscious ones. George LaNoue & Kenneth L. Marcus, *"Serious Consideration" of Race-Neutral Alternatives in Higher Education*, 57 Cath. U. L. Rev. 991, 999 (2008). Thus, some courts interpreted *Croson* as requiring local governments to merely "consider" race-neutral alternatives—but not exhaust

them—before implementing race-conscious remedies. *See Peightal v. Metro. Dade Cnty.*, 26 F.3d 1545, 1557 (11th Cir. 1994) (An initial narrow tailoring inquiry is whether the government "considered the use of race-neutral means."); *see also* LaNoue & Marcus, *supra*, at 998 (In *Croson*, "Justice O'Connor did not describe the full extent of the requisite consideration of race-neutral alternatives.").

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

*Fisher*, the most recent Supreme Court case concerning racial preferences, emphasizes that strict scrutiny now imposes "the *ultimate burden* of demonstrating, before turning to racial classifications, that available, workable

race-neutral alternatives *do not suffice*." 133 S. Ct. at 2420 (emphasis added). On this point neither IDOT nor the Tollway are entitled to any deference. *Id.* Thus, this Court must verify that it is "necessary" for IDOT and the Tollway to use race to remedy discrimination. *See id.* Government may not consider race if a nonracial approach could promote the substantial interest about as well and at tolerable administrative expense as racial preferences. *Id.* (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986)). Accordingly, before this Court may uphold the IDOT and Tollway DBE programs as constitutional, it must ultimately be satisfied—through a searching examination—that no workable race-neutral alternatives can remedy the discrimination these agencies must first have identified. *Id.*

### B. IDOT and the Tollway Cannot Meet Their Ultimate Burden of Proving That Reasonable and Workable Race-Neutral Measures Have Failed To Eradicate the Effects of Discrimination

The federal DBE regulations require recipients of federal funds, such as IDOT, to obtain the "maximum feasible portion" of its overall DBE goal "by using race-neutral means." 49 C.F.R. § 26.51(a). Moreover, *Fisher* imposes on IDOT and the Tollway "the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice." 133 S. Ct. at 2420. Both agencies cannot meet this burden.

The Tollway does not set an overall DBE participation goal. Plaintiff's SOF Vol. II, ¶ 22. It is thus impossible for the Tollway, let alone this Court, to determine if any of the Tollway's race-neutral measures have been effective in

attaining any goal. That means there is no way for the Tollway to prove that its program is narrowly tailored.

In addition, the Tollway and IDOT ignored the recommendations contained in the 2011 MTA disparity studies that they implement certain workable race-neutral measures. The MTA Tollway disparity study recommends that the Tollway establish a Small Local Business Enterprise Program and provides seven specific measures that should be incorporated into the program. Plaintiff's Ex. 43, 2011 MTA Tollway Disparity Study at 12-12 - 12-21. The disparity study further recommends seventeen other measures to assist in achieving an overall DBE participation goal (a goal the Tollway has never set). *Id.* Fourteen of those recommended measures are race neutral, such as an expanded "unbundling" policy for contracts, establishing a direct purchase program to reduce high bond requirements, revising insurance requirements to ensure that small contracts do not carry a disproportionately high level of coverage, etc. *See id.* But the Tollway has not implemented those measures. *See* Plaintiff's SOF Vol. II, ¶ 68 (the Tollway admits it is not following the findings and recommendations of the 2011 MTA study). In fact, the Tollway currently offers only six race-neutral measures, and provides no comprehensive description of what they are.[7] Plaintiff's SOF Vol. II, ¶ 21.

[7] Unlike IDOT, the Tollway has no reports documenting its race-neutral measures, such as the Overall Goal reports that IDOT provides to the FHWA. Plaintiff's SOF Vol. II, #21; *see* Illinois Tollway, *available at* http://www.illinoistollway.com/doing-business/diversity-programs (last visited Aug. 4, 2014) (providing list of a diversity measures, few of which are race-neutral programs).

IDOT's DBE program contained ten race-neutral measures in 2010. Plaintiff's Ex. 64, IDOT 2010 Overall Goal Setting Report at 8-10 (IDOT 001695-97). But MTA evaluated IDOT's program, and recommended that IDOT implement an *additional* eight pre-award, and four post-award, race-neutral measures. Plaintiff's Ex. 44, 2011 MTA IDOT Disparity Study at 12-7 - 12-11. After receiving MTA's recommendation, IDOT instead *reduced* the number of its race-neutral alternatives to six. Plaintiff's Ex. 64, IDOT 2012-2015 Overall DBE Goal Setting Report at 12-15 (IDOT 001711-14). One of those remaining measures, the Mentor Protege Program, is not race-neutral at all, because it is offered only to DBEs. *Id.* at 12 (IDOT 001711). Another of IDOT's race-neutral measures, the Small Business Initiative, is enforced haphazardly. The Small Business Initiative allows IDOT to offer small race-neutral prime contracts to small subcontracting firms. Plaintiff's SOF Vol. I, ¶ 141. This allows them to work as general contractors on work items that would normally be subcontracted as part of a large prime contract. *Id.* ¶ 142. Before several of these race-neutral measures were even attempted, IDOT replaced them with race-conscious DBE contract goals. *Id.* ¶ 143.

The minimum efforts of IDOT and the Tollway to contrive only six race-neutral measures pale in comparison with the efforts of other jurisdictions, and demonstrate their lack of good faith in administering the federal program. *See, e.g.*, *Associated Gen. Contractors of Am., San Diego Chapter, Inc. v. California Dep't of Transp.*, 713 F.3d 1187, 1199 (9th Cir. 2013) (the California Department of Transportation DBE Program increased from 45 race-neutral measures in 2008,

and reached 150 in 2010); Washington Sound Transit Disadvantaged Business Enterprise (DBE) Program Proposed Amended Three-Year Overall Goal & Methodology for Federal Fiscal Years 2014 Through 2016, at 8 (2013) (providing 22 race-neutral measures).[8] The sheer number of an agency's race-neutral alternatives may not in itself establish that an agency has satisfied *Fisher*'s narrow tailoring burden. But an agency with many alternatives at least can demonstrate that it is "experimenting with a wide variety of alternative approaches" in compliance with *Grutter*. *Grutter,* 539 U.S. at 342. Neither IDOT nor the Tollway can make that claim. Moreover, there is nothing in the record showing that IDOT and the Tollway ever evaluated their race-neutral measures, or revised them for increased effectiveness, as *Fisher* requires. *Fisher*, 133 S. Ct. at 2420; *see* Plaintiff's SOF Vol. I, ¶ 23, 25 (With respect to narrow tailoring, the Federal Defendants' expert witness has no opinions, IDOT's expert witness's opinions are confined to the recommendations in the 2011 MTA IDOT Disparity Study).

Finally, IDOT and the Tollway's low or nonexistent race-neutral DBE participation goals demonstrate their superficial desire to increase subcontractor participation through race-neutral measures. The Tollway has *no* overall race-neutral or race-conscious DBE participation goal at all. Plaintiff's SOF Vol. II, ¶ 22. In 2010, IDOT's overall DBE participation goal was 22.77%, with 4.12% to be achieved through racial neutral measures. Plaintiff's Ex. 64, IDOT 2010

[8] *Available at* http://www.soundtransit.org/Documents/pdf/working/diversity/3-Year%20Overall%20Goal%20and%20Methodology%20Document.pdf (last visited Aug. 4, 2014).

Overall DBE Goal Setting Report at 11 (IDOT 001698). IDOT's current overall DBE participation goal is still 22.77%. Plaintiff's Ex. 64, IDOT 2012-2015 Overall DBE Goal Setting Report at 12 (IDOT 001711). But now, corresponding to its reduction of race-neutral alternatives, only 3.42% is to be achieved through race neutral measures. *Id.* This minuscule race-neutral component does not demonstrate a sincere effort to increase race-neutral participation.

Neither IDOT nor the Tollway can satisfy their burden under the narrow tailoring prong of strict scrutiny to prove that workable race-neutral alternatives cannot remedy the effects discrimination.

## CONCLUSION

For the foregoing reasons, Amici Curiae Pacific Legal Foundation, Rothe Development, and John Sullivan respectfully request that this Court grant summary judgment in favor of Plaintiff Midwest Fence, and hold that the race-conscious measures in the IDOT and Tollway DBE Programs are unconstitutional.

DATED: August 12, 2014.

Respectfully submitted,

/s/ Ralph W. Kasarda
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**CERTIFICATE OF SERVICE**

I hereby certify that on August 12, 2014, I electronically filed the foregoing CORRECTED AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION, ROTHE DEVELOPMENT CORPORATION, AND JOHN SULLIVAN IN SUPPORT OF PLAINTIFF'S MOTIONS FOR SUMMARY JUDGMENT with the Clerk of the Court for the United States District Court for the Northern District of Illinois by using the CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Ralph W. Kasarda
RALPH W. KASARDA