PACIFIC LEGAL FOUNDATION

March 3, 2015

Mr. Matthew Garret, Director
Oregon Department of Transportation
355 Capitol Street NE, MS 11
Salem, OR 97301-3871

Mr. Michael Cobb
Office of Civil Rights
Oregon Department of Transportation
355 Capitol Street NE, MS 11
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Keen Independent Research
100 Fillmore Street, 5th Floor
Denver, CO 80206

Re: 2016 Disparity Study

Dear Mr. Garret, Mr. Cobb, and Keen Independent Researchers:

It has come to our attention that the Oregon Department of Transportation (ODOT) has retained a private consulting firm from Colorado to perform a disparity study to analyze "whether there is a level playing field for minority- and women-owned firms in the transportation contracting industry and in its own contracts." We also understand that you are accepting public comments, and, therefore, we respectfully offer the following points for your consideration.

ODOT implements the Federal Disadvantaged Business Enterprise Program (DBE) in a manner that strongly encourages prime contractors to discriminate against some subcontractors, and prefer others, on the basis of their race. We would like to take this opportunity to urge that ODOT cease engaging in such discrimination. There is much ODOT could do to ensure true equal opportunity and nondiscrimination.

Racial Preferences Are Presumptively Unconstitutional

Using classifications and setting goals or requiring set-asides of particular racial (hereafter "racial" may be understood to include "ethnic" and "gender") percentages inevitably encourage discrimination as a means to meet them, thus triggering strict constitutional scrutiny. *See Fisher v.*

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Univ. of Tex. at Austin, 133 S. Ct. 2411, 2419 (2013) ("[A]ny official action that treats a person differently on account of his race or ethnic origin is inherently suspect"); *see also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) ("[A]ll racial classifications . . . must be analyzed by a reviewing court under strict scrutiny."); *Western States Paving Co., Inc. v. Washington State Dep't of Transp.*, 407 F.3d 983, 990 (9th Cir. 2005) (same).

Once strict scrutiny is triggered, classifications and preferential treatment are allowed only if there is a "compelling interest" (in the contracting context, this means remedying discrimination in the program involved) and the preferential treatment is "narrowly tailored" to that interest. *See Western States*, 407 F.3d at 990 ("[Racial] classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.") (citing *Adarand*, 515 U.S. at 227). In the jurisdiction of the Ninth Circuit Court of Appeals, which includes Oregon, the federal DBE program's "race-conscious measures can be constitutionally applied only in those States where the effects of discrimination are present." *Western States*, 407 F.3d at 996.

Courts have held that a disparity study does not necessarily offer evidence of discrimination, let alone proof of discrimination. For instance, in *Rothe Dev. Corp. v. Dep't of Def.*, a federal appeals court found fatal defects in six disparity studies put forward by the federal government to justify its contracting preferences. 545 F.3d 1023, 1042-43 (Fed. Cir. 2008).

Racial Preferences Are Unfair and Haven't Changed "Underutilization"

Programs that prefer contractors on the basis of race, ethnicity, and sex are divisive, unfair, and have not worked in Oregon to eliminate reports of "substantial underutilization." The Supreme Court has repeatedly observed that racial classifications carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may promote notions of racial inferiority and lead to politics of racial hostility. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989). "[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relation to individual worth." *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 298 (1978) (opinion of Powell, J.).

These dangers are present within the Oregon transportation construction industry, where ODOT continues to enforce a curious hodgepodge of racial preferences. On federally assisted construction subcontracts ODOT currently grants racial preferences across the state to African American and Subcontinent Asian DBEs, but not to DBEs owned by Hispanic Americans, Native Americans, Asian Pacific Americans, or whites. Yet ODOT's 2011 Disparity Study Update reported substantial underutilization of subcontracting firms owned by: (1) Asian Pacific Americans and white women in ODOT's Region 1; (2) Native Americans in ODOT's Region 2; (3) Hispanic Americans, Native

Americans, and Asian Pacific Americans in ODOT's Region 3; and (4) Asian Pacific Americans and Native Americans in ODOT's Region 4.

It is clear that ODOT's race-conscious subcontracting goals provide unfair racial preferences to some racial minorities at the expense of others. *See Western States*, 407 F.3d at 999 (warning that an unjustified race-conscious DBE program may provide some minorities with an unconstitutional competitive advantage over other minorities). Indeed, the ODOT 2011 Disparity Study Update reports that interviewed stakeholders were "uniformly critical" about racial preferences being offered to African Americans and Asians.[1] ODOT 2011 Disparity Study Update at 7-13. Stakeholders did not think that the policy was fair, because it pitted groups against each other, there were not enough Asian and African American companies to meet the goals, and the same few vendors obtain most of the contracts. *Id.*

Perhaps this is why ODOT's continuing use of racial preferences has not worked. Since 2008, ODOT has granted racial preferences to the same groups it proposes now.

Race-Conscious Goals Must Be Based on Actual Discrimination, not Societal Discrimination

A state must identify public or private discrimination with some specificity before it may resort to race-conscious relief. *Croson*, 488 U.S. at 504. *Croson* is clear that discrimination identified with "some specificity" does not include societal discrimination. *See id.* at 497 ("societal discrimination" is an inadequate basis for race-conscious classifications).

Examples of societal discrimination provided by the Supreme Court include: (1) the past exclusion of minorities from skilled construction trade unions and training programs that prevented minorities "from following the traditional path from laborer to entrepreneur;" (2) deficiencies in working capital; (3) inability to meet bonding requirements; (4) unfamiliarity with bidding procedures; (5) disability caused by an inadequate track record. *Id.* at 498-99. Societal discrimination also includes the intergenerational effects of segregated education. *Podberesky v. Kirwan*, 38 F.3d 147, 157 (4th Cir. 1994).

Thus, to identify the effects of systemic discrimination, that would justify the implementation of race-conscious remedies, disparity studies must account for the effects of mere societal

[1] The stakeholder pool included DBEs and non-DBEs, prime contractors and subcontractors, construction and professional services firms, members of various business organizations, including the Associated General Contractors, National Association of Minority Contractors, Organization Association of Minority Entrepreneurs, and the Hispanic Chamber of Commerce. ODOT 2011 Disparity Study Update at 7-10.

discrimination. *Peightal v. Metro. Dade Cnty.*, 26 F.3d 1545, 1562 (11th Cir. 1994) (citing *United States v. City & Cnty. of San Francisco*, 696 F. Supp. 1287, 1303 (N.D. Cal. 1988). ODOT's 2011 Disparity Study Update did not account for the effects of societal discrimination. *See* ODOT's FFY 2013 DBE Goal Methodology at 8 (the FFY 2013 goal "was not adjusted based on access to credit and financing and other barriers to DBEs"). ODOT's continued reliance on studies that do not account for societal discrimination renders ODOT's goal setting analysis legally suspect. *See Western States*, 407 F.3d at 1002 (societal discrimination cannot justify a state's race-conscious DBE program).

ODOT Should Implement A Race-Neutral Program

For the reasons given in testimony that the Center for Equal Opportunity(CEO) delivered to the U.S. Commission on Civil Rights in 2006, CEO and Pacific Legal Foundation believe ODOT's DBE program should be race-neutral.[2] As CEO's testimony makes clear, there is no justification for such classifications and preferences in 2015. Since any remedial interest can be achieved by nondiscriminatory means, the use of racial preferences is not narrowly tailored and is, therefore, unconstitutional. To the extent ODOT is concerned that two racial groups may face discrimination in the transportation construction industry, there are effective responses that do not require race-conscious goal setting.

At every step of the contracting process, there are better tailored remedies than using racial preferences. If small minority firms are excluded from bidding because of unrealistic or irrational bonding or bundling requirements, then those requirements should be changed for all companies, regardless of the owner's race. If companies who could submit bids are not doing so, then the publication and other procedures used in soliciting bids should be opened up to all potential bidders, regardless of race. And, finally, if it can be shown that bids are denied to the lowest bidder because of race, safeguards should be put in place to detect discrimination and punish it with sanctions. Those safeguards and sanctions should protect all companies from race discrimination. This should be applied to the award of both prime contracts and subcontracts. A study that the U.S. Commission on Civil Rights published in 2005 does a very good job of collecting and discussing even more race-neutral alternatives. U.S. Comm'n on Civil Rights, *Federal Procurement after Adarand* (2005).

Contracts are not like hiring, promoting, or even university admissions, where there is an irreducible and significant amount of subjectivity in the decisionmaking. Contracting is an area that can be made transparent, allowing ODOT and its regional offices to detect and remedy discrimination. As

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[2] This testimony was published by the Commission in May, 2006, as part of a briefing report on *Disparity Studies as Evidence of Discrimination in Federal Contracting*, and can be downloaded from its website, www.usccr.gov).

Chief Justice Roberts wrote, "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

Thank you in advance for consideration of our concerns. Please feel free to contact us if you have any questions or would care to discuss this matter further.

Sincerely,

ROGER CLEGG
President and General Counsel
Center for Equal Opportunity

RALPH W. KASARDA
Staff Attorney
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