Nos. 14-36097 and 15-35003 (Cross-Appeal)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOUNTAIN WEST HOLDING CO., INC.,

Plaintiff - Appellant / Plaintiff - Appellee,

v.

THE STATE OF MONTANA;
MONTANA DEPARTMENT OF TRANSPORTATION;
MIKE TOOLEY, Director of the Montana Department of Transportation,

Defendants - Appellees / Defendants - Appellants,

and

PATTI McCUBBINS, MDT's Civil Rights Bureau Chief
and DBE Liaison Officer; named only in her official capacity,

Defendant.

On Appeal from the United States District Court
for the District of Montana, Billings
Honorable Dana L. Christensen, Chief District Judge

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION, CATO INSTITUTE, AND CENTER FOR EQUAL OPPORTUNITY IN SUPPORT OF PLAINTIFF - APPELLANT AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

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CONSENT OF THE PARTIES

Pursuant to Fed. R. App. P. 29(a), Amici Curiae Pacific Legal Foundation, Cato Institute, and Center for Equal Opportunity report that all parties have consented to the filing of this brief. The Circuit Advisory Committee Note to Rule 29-3 states that the timely filing of an amicus curiae brief without leave of this Court is permitted if all parties consent to the filing of the brief.

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INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized under the laws of the State of California to litigate matters affecting the public interest. PLF was founded in 1973 and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates cases involving public contracting, public education, and public employment, arguing in favor of equal treatment of all individuals, regardless of race, ethnicity, or gender, and against programs that grant special preferences to a select few on the basis of race and sex. PLF litigates to assure a color-blind society and against government action that undermines the Constitution's Equal Protection guarantee.

The Cato Institute is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, files amicus briefs with courts, conducts conferences, and publishes the annual *Cato Supreme Court Review*.

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and seeks to block the expansion of racial preferences and to prevent their use in, for instance, employment, education, and public contracting.

Amici have filed numerous amicus briefs with the Supreme Court of the United States involving racial preferences in public contracting, such as *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). Amici believe that their public policy perspectives and litigation experience provide an additional viewpoint on the issues presented in this case, which will be of assistance to this Court in its deliberations.

INTRODUCTION AND SUMMARY OF ARGUMENT

This amicus brief supports Appellant Mountain West Holding Company's (Mountain West) as-applied challenge to Montana's concededly race-conscious preferences for Disadvantaged Business Enterprises (DBEs) during fiscal years 2012 through 2014 (Montana DBE program). In this case, Montana used a single, flawed disparity study (the D. Wilson Consulting Group, LLC, *Disparity/Availability Study for the Montana Dep't of Transp.: Final Report* (Aug. 2009)[1] (Wilson Study)) to justify its sweeping use of racial preferences in transportation construction and engineering contracts.

[1] *Available at* https://www.mdt.mt.gov/other/research/external/docs/research_proj/disparity/final_report.pdf (last visited May 5, 2015).

The District Court stated the correct standard of review: all "[r]ace-conscious remedial programs [including Montana's] must be subject to strict scrutiny." *Mountain West Holding Co., Inc. v. Montana*, No. CV 13-49-BLG-DLC, 2014 WL 6686734, at *4 (D. Mont. Nov. 26, 2014). Yet the court erred when it concluded that Montana's DBE program met that standard. *Id.* at *7.

The central purpose of the Equal Protection Clause is to guarantee "race neutrality in governmental decisionmaking." *Miller v. Johnson*, 515 U.S. 900, 904 (1995). As a consequence, "[r]acial and ethnic distinctions of any sort are inherently suspect and call . . . for the most exacting judicial examination." *Id.* The exacting standard of strict scrutiny requires a "detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed." *Adarand*, 515 U.S. at 227. "Strict scrutiny must not be . . . feeble in fact." *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411, 2421 (2013). A court applying strict scrutiny thus imposes a heavy burden on any government entity using the "highly suspect tool" of race. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

Racial preferences are valid only if they are narrowly tailored to further a compelling governmental interest. *See, e.g.*, *Fisher*, 133 S. Ct. at 2419. A state implementing a valid federal DBE program "need not demonstrate an independent compelling interest for its DBE program." *Western States Paving Co., Inc. v. Wash. State Dep't of Transp.*, 407 F.3d 983, 997 (9th Cir. 2005). But narrow tailoring

requires Montana to show that (1) discrimination in the highway construction industry has occurred within the state, and (2) its remedial plan is limited to only those minority groups that have actually suffered discrimination. *See Western States Paving Co.*, 407 F.3d at 997-98. Montana's racial preferences fail on both accounts.

First, Montana cannot show that its DBE program was limited in any sense of the word. Montana failed to produce any evidence that it considered available, workable race-neutral alternatives before resorting to racial preferences. Montana's failure to consider specific race-neutral alternatives is particularly unjustifiable given that the disparity study it commissioned recommended that approach. *See* Appellants' Excerpts of Record (ER) at 76 (recommending that Montana "develop a [race-neutral] small business program"). Additionally, Montana made no effort to limit its preferences only to those who have suffered discrimination within the state. Second, Montana claims that discrimination in its highway construction industry has occurred, based on woefully deficient anecdotal evidence. *See Mountain West*, 2014 WL 6686734, at *5. For these reasons, the court below erred in holding that the Montana DBE Program was narrowly tailored.

The decision below should be reversed.

ARGUMENT

I

MONTANA'S RACE-CONSCIOUS DBE PROGRAM IS NOT NARROWLY TAILORED

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

In *Western States*, this Court recognized that narrow tailoring "require[s] serious, good faith consideration of workable race-neutral alternatives." *Western States*, 407 F.3d at 993 (citing *Grutter*, 539 U.S. at 339). But it was unnecessary for this Court to determine whether Washington's DBE program satisfied this requirement, or any of the other narrow tailoring factors enumerated by the Supreme Court, because Washington failed to establish the existence of discrimination within its transportation construction industry. *Western States*, 407 F.3d at 1001.[2] Here, if the Court finds that Montana has met the strong basis in evidence standard by showing the presence of discrimination, the Court must consider the efficacy of alternative, race-neutral measures before considering whether race-based measures are necessary.

[2] 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).

Fisher, 133 S. Ct. at 2420; *see also Rothe Dev. Corp. v. Dep't of Def.*, 545 F.3d 1023, 1036 (Fed. Cir. 2008) ("Even where there is a compelling interest supported by a strong basis in evidence," the court must consider "the efficacy of alternative, race-neutral remedies.").

The importance of race-neutral alternatives to public contracting preferences like the DBE program at issue here has been largely shaped by three cases: *City of Richmond v. Croson*, *Grutter v. Bollinger*, and *Fisher v. Univ. of Tex.* These cases illustrate the Supreme Court's requirement that, before turning to racial preferences, government must prove that the effects of discrimination cannot be eradicated by race-neutral measures. In *Croson*, the City of Richmond's minority business enterprise program was not narrowly tailored, in part, because the City failed to consider *any* 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, 1574-87 (2013) (providing an extended analysis of the Supreme Court's increasing focus on race-neutral alternatives).

For this reason, 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 La Noue & 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* to require that local governments 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* La Noue & Marcus, *supra*, at 998 (In *Croson*, "Justice O'Connor did not describe the full extent of the requisite consideration of race-neutral alternatives."); *see also Adarand*, 515 U.S. at 237 (remanding with instructions that Court of Appeals consider "whether there was '*any* consideration of the use of race-neutral means' ") (emphasis added).

In *Grutter v. Bollinger*, the Court signaled its increasing disapproval of racial preferences and provided clearer guidance to both courts and the 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 (13 years from now). *See id.* 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 Equal. By Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1639 (2014) (Scalia, J., concurring) (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." 539 U.S. at 342.

Fisher continued the trajectory away from race-based governmental decisionmaking, emphasizing that strict scrutiny now imposes on government "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). Montana must prove that its race-based program is *necessary*, and this Court owes it no deference on this matter. *Fisher*, 133 S. Ct. at 2420. (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.) (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986)).[3]

B. Montana Failed to Consider Race-Neutral Alternatives

Montana must show that it resorted to explicit racial preferences only after pursuing a "serious, good faith consideration of workable race-neutral alternatives." *Grutter*, 539 U.S. at 339. Here, the Wilson Study offers persuasive evidence that Montana did not try to attain the maximum portion of its overall goal using available

[3] The Federal DBE regulations also require that states narrowly tailor their DBE programs by using race-neutral means to ensure the greatest possible DBE participation. *See* 49 C.F.R. § 26.51(a) (Recipients of federal aid "must meet the maximum feasible portion of [their] overall goal by using race-neutral means of facilitating DBE participation.").

and workable race-neutral measures. The study recommended specific race-neutral alternatives that Montana never implemented. *See* ER 87-89 (recommending implementation of a small business development program and strengthening its compliance section).

Montana did not offer any evidence about which race-neutral programs were considered and rejected, or why it deemed those programs unworkable. ER 116-126. Other states have successfully implemented race-neutral measures to combat prior discrimination in the construction industry. Montana's failure to try to emulate these states demonstrates a lack of good faith in administering the federal program. *See, e.g., Associated Gen. Contractors of Am., San Diego Chapter, Inc. v. Cal. 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, to 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).[4] New Jersey's Emerging Small Business Enterprise program has enabled that state to meet almost *all* of its DBE goals through a race-neutral program. Joseph M. Amico, *Affirmative Action in Construction Contracting and New Jersey's 'Emerging Small*

[4] *Available at* http://www.soundtransit.org/Documents/pdf/working/diversity/3-Year%20Overall%20Goal%20and%20Methodology%20Document.pdf (last visited May 5, 2015).

Business Enterprise' Program, 16 Rutgers Race & L. Rev. 79, 104 (2015). Under that program, New Jersey establishes attainment goals for *all* state-certified small and economically disadvantaged firms, not just those owned by individuals of a certain race or sex. *See id.* at 105 (describing New Jersey's race-neutral contracting measures).

Federal regulations provide more examples of race-neutral measures including, but not limited to: "Arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate participation by DBEs and other small businesses and by making contracts more accessible to small businesses." 49 C.F.R. § 26.51(b)(1). The United States Commission on Civil Rights has proposed additional race-neutral contracting objectives, from enforcing current nondiscrimination laws to expanding contracting opportunities in underutilized geographic regions. U.S. Comm'n on Civil Rights, *Federal Procurement After Adarand*, at 31 (Sept. 2005).[5]

Indeed, in public contracting, race-neutral measures should always be sufficient to remedy discrimination (which is the only compelling interest advanced for preferences in contracting), because nondiscrimination can be assured through greater transparency—that is, by widely publicizing bidding opportunities and, after the

[5] *Available at* http://www.usccr.gov/pubs/080505_fedprocadarand.pdf (last visited May 5, 2015).

contract has been awarded, the terms of that contract. *See* Roger Clegg, *Unfinished Business: The Bush Administration and Racial Preferences*, 32 Harv. J.L. & Pub. Pol'y 971, 975-77 (2009) (discussing how transparency in contracting would allow for the detection and elimination of discrimination). Most states award general contracts through a process of public competitive bidding. Competitive bidding requires interested contractors to submit sealed bids by a specified date and time. It also requires the government agency to open all bids publicly and to award the contract to the lowest responsive and responsible bidder. Competitive bidding laws protect taxpayers, prevent excessive costs and corrupt practices, and provide open and honest competition in bidding for public contracts. *Danis Clarkco Landfill Co. v. Clark Cnty. Solid Waste Mgmt. Dist.*, 653 N.E.2d 646, 656 (Ohio 1995). Open bidding also protects bidders from charges of discrimination, fraud, or collusion. *Id.*

Availing the subcontracting process to public competitive bidding would likewise remedy and eliminate overt discrimination, as well as the concerns of nonminority subcontractors that preferences are still being granted to their minority competitors. *See* Christine Chambers Goodman, *Disregarding Intent: Using Statistical Evidence to Provide Greater Protection of the Laws*, 66 Alb. L. Rev. 633, 691 (2003) (discussing measures to remedy discrimination without violating competitive bidding laws). By widely publicizing all bidding opportunities in advance, and using competitive bidding procedures, government can ensure that both

prime contracts and subcontracts are awarded fairly. This process truly meets Chief Justice Roberts' maxim that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (plurality opinion).

The Montana DBE program is unconstitutional because Montana cannot meet its "ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice." *Fisher*, 133 S. Ct. at 2420.

C. Montana's DBE Program Benefits Groups Who Never Suffered Discrimination

The District Court recognized that Montana provided racial preferences to all groups on construction subcontracts, even though the Wilson Study reported "overutilization" of all groups on those contracts. *Mountain West*, 2014 WL 6686734, at *2. Nevertheless, the court ruled that the program was narrowly tailored. *Id.* at *5. The court's holding is erroneous because (1) it relied upon unenforceable "guidance" from the U.S. Department of Transportation (USDOT) that was not intended to address the situation presented in this case; (2) USDOT approval, and compliance with federal guidelines, cannot shield the program from this Court's constitutional scrutiny; and (3) the Constitution requires states to narrowly tailor their programs to

remedy purported discrimination, not to satisfy federal regulations or agency guidance.

"'Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.'" *Parents Involved*, 551 U.S. at 720 (quoting *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003)). For instance in *Croson*, the Court inferred improper motive from the absence of a strong basis in evidence to support particular aspects of a city's minority-contractor preference scheme. The city presented "absolutely no evidence of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the Richmond construction industry." 488 U.S. at 506. Yet these groups were awarded preferences. This "random inclusion of racial groups," unsupported by any evidence of prior discrimination, "strongly impugns the city's claim of remedial motivation." *Id.*

Montana violated this precept by setting race- and sex-based goals on subcontracts for certain minority groups and women without appropriate statistical findings that identified any actual discrimination. The District Court excused this narrow tailoring defect by noting that the federal DBE "guidelines" do not require states to distinguish between the different types of contracts within the transportation contracting industry. *Mountain West*, 2014 WL 6686734, at *5 (citing *AGC, San Diego*, 713 F.3d at 1199). The "guidelines" the District Court and the panel in

AGC, San Diego relied upon are not federal regulations, but rather a nonbinding document entitled, "*Tips for Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program*."[6] That document warns as follows: "Like all guidance material, these tips on goal-setting are not, in themselves, legally binding or mandatory, and do not constitute regulations." *Tips for Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program*, at 1.[7] It also states that "it is not intended to represent an exhaustive list of techniques for goal-setting." *Id.* Nowhere do the "Tips" discuss the situation where a disparity study shows possible discrimination in one category of contracts, but not others.

Montana's program is not shielded from constitutional scrutiny by the mere fact that the State followed the federal regulations—or guidelines—and its program was approved by USDOT. This Court invalidated Washington's race-conscious DBE program in *Western States*, even though the state program had been approved by USDOT, 407 F.3d at 999 n.10, and complied with the federal regulations, *id.* at 996 n.7, because it "failed to meet its burden of demonstrating that its DBE program [was]

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[6] The panel in *AGC San Diego*, 713 F.3d at 1199, referenced "guidelines" by citing to *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715, 723 (7th Cir. 2007), where that court was specifically discussing the U.S. Department of Transportation guidelines, *Tips for Goal-Setting in the Disadvantaged Business Enterprise (DBE) Program*.

[7] *Available at* http://www.faa.gov/about/office_org/headquarters_offices/acr/bus_ent_program/training_conf/media/Tips%20for%20Goal%20Setting.pdf (last visited May 5, 2015).

narrowly tailored to further Congress's compelling remedial interest." *Id.* at 1003. *See Shaw v. Reno*, 509 U.S. 630, 654 (1993) (private parties may challenge the constitutionality of a state's redistricting plan, even after it has been approved by the U.S. Attorney General). Neither following federal regulations, nor the stamp of approval of a government agency, assure that a state's race-conscious DBE program is constitutional because the Constitution's primary purpose is to establish *limited* legitimate action by the federal government. *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316 (1936) (the primary purpose of the Constitution is to grant only certain legislative powers to the federal government); *see also Adarand*, 515 U.S. at 227 ("[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."). Montana's DBE program gave preferences on construction subcontracts to groups for whom there was no evidence of discrimination and, thus, the program was fatally overinclusive.

Montana should have sought a waiver from USDOT if it believed the federal guidance or regulations did not authorize a program narrow tailored to the specific findings of discrimination within the State. One objective of the DBE program is to ensure that it is narrowly tailored in accordance with applicable law. 49 C.F.R. § 26.1(c). The federal DBE program itself is narrowly tailored, in part, because of its "substantial flexibility" in allowing a state to "obtain waivers or exemptions from any

requirement." *Sherbrooke Turf, Inc. v. Minn. Dep't of Transp.*, 345 F.3d 964, 972 (8th Cir. 2003). State recipients of federal aid may apply for an exemption from "any provision" in the DBE regulations, "for the purpose of authorizing you to operate a DBE program that achieves the objectives of [the DBE program]." 49 C.F.R. § 26.15(a)-(b). Thus, the District Court erred in holding that the federal regulations do not allow Montana to narrowly tailor its program by category of contract. On the contrary, to accomplish the objectives of the DBE program, and comply with constitutional equal protection principles, Montana is required to do so. Instead, Montana conceded that it chose not to seek a waiver to ensure its program was narrowly tailored. ER 332.

Contrary to the District Court's holding, narrow tailoring *does* require a race-conscious program to distinguish between different types of contracts whenever the discrimination to be remedied differed among types of contracts. For example, in *Associated Gen. Contractors of California, Inc. v. Coal. for Econ. Equity*, 950 F.2d 1401, 1417 (9th Cir. 1991) (*Coal. for Econ. Equity*), this Court held that a race-conscious affirmative action contracting program *was* narrowly tailored, precisely because it *did* distinguish between certain contracts. *Id.* (approving the program as narrowly tailored because Black-owned medical services firms, and Asian- or Latino-owned architectural/engineering or computer system firms *did not* receive preferences on particular types of contracts).

II

MONTANA FAILED TO ESTABLISH THE PRESENCE OF DISCRIMINATION IN ITS TRANSPORTATION CONTRACTING INDUSTRY

The District Court erred by permitting race-based government action on the vague and flimsy basis that "anecdotal evidence suggested that various forms of discrimination existed within Montana's transportation contracting industry." *Mountain West*, 2014 WL 6686734, at *3. The Wilson Study's anecdotal evidence should not be construed as evidence of discrimination, because it is unverified, it suffers from low response bias, and only four of the individuals interviewed claimed to have experienced discrimination.

Anecdotal evidence "rarely, if ever" can "show a systemic pattern of discrimination necessary for adoption of an affirmative action plan." *Coral Constr. Co. v. King Cnty.*, 941 F.2d 910, 919 (9th Cir. 1991). At best, anecdotal evidence amounts to unsubstantiated and subjective perceptions, and is "of little probative value in establishing identified discrimination." *Croson*, 488 U.S. at 500. Montana offers no assurance that the anecdotal information contained in the Wilson Study was verified, and in fact, all of the anecdotes were reported anonymously. ER 296. Verification is vital because

> [w]ithout corroboration, the Court cannot distinguish between allegations that in fact represent an objective assessment of the situation, and those that are fraught with heartfelt, but erroneous, interpretations of events

> and circumstances. The costs associated with the imposition of race, ethnicity, and gender preferences are simply too high to sustain a patently discriminatory program on such weak evidence.

Eng'g Contractors Ass'n of S. Fla., Inc. v. Metro. Dade Cnty., 943 F. Supp. 1546, 1584 (S.D. Fla. 1996). Thus, "anecdotal evidence, interviews, and affidavits must be from reliable and trustworthy sources, and should include counter explanations and rebuttals from sources accused of bias." ER 296 (Appellant's Expert Report quoting Mitchell Rice, *Justifying State and Local Government Set-Aside Programs Through Disparity Studies in the Post-Croson Era*, 52 Pub. Admin. Rev. 485 (1992)). Proving discrimination is often complex and requires a detailed examination of the facts as viewed from the perspective of each of the individuals concerned. *Eng'g Contractors*, 943 F. Supp. at 1579. Persons providing anecdotes rarely have such information, or withhold it, *id.*, and no such evidence was presented in this case.

The anecdotal evidence offered by Montana exemplifies these shortcomings. The low participation rate at hearings and personal interviews collecting anecdotal evidence infected the Wilson Study's anecdotal evidence with response bias. *See* Jeffrey M. Hanson, *Hanging by Yarns?: Deficiencies in Anecdotal Evidence Threaten the Survival of Race-Based Preference Programs for Public Contracting*, 88 Cornell L. Rev. 1433, 1466 (2003) (citing numerous studies warning that when a response rate drops below 50%, the information gathered is highly suspect). The Wilson Study itself noted that, despite extensive advertising, "attendance at hearings [to collect

anecdotes of discrimination] was very poor." ER 78, 294. The four hearings conducted in major Montana cities (Billings, Helena, Missoula, and Bozeman) generated a combined attendance of six people. *Id.* Only two testified. *Id.* And out of 307 firms contacted, only 59 agreed to personal interviews, and many failed to answer every question. ER 295.

The District Court found that the Wilson Study uncovered "substantial anecdotal evidence" of a "good ole boy network" proving discrimination in Montana's transportation contracting market. *Mountain West*, 2014 WL 6686734, at *6. This finding is greatly exaggerated, and inaccurate. The Wilson Study relied on the 59 personal interviews to support its conclusion, but 36 of those interviewed said only that "prime contractors show[ed] favoritism to some firms on projects." Wilson Study, at 7-20. This evidence is both vague and unpersuasive. Favoritism is not the same thing as discrimination against a constitutionally protected class. *See Randle v. City of Aurora*, 69 F.3d 441, 451 n.14 (10th Cir. 1995) (favoritism does not violate civil rights laws); *Noga v. Costco Wholesale Corp.*, 583 F. Supp. 2d 1245, 1257 (D. Or. 2008) ("Favoritism and unfair treatment, unless based on a prohibited classification, do not violate Title VII."); *see also Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1290 (9th Cir. 2000) (favoritism of managers is not age discrimination). By the Wilson Study's own analysis, "many of the firms indicated that the favoritism was based upon established working relationships [with the prime contractor]," not

racial bias. *Id.*; ER 296. The remedy for such "favoritism" is a race-neutral program aimed at building relationships between prime contractors and firms with less experience.

What is more, the 59 responses consisted of 29 by Caucasian men, 22 by Caucasian women, 6 by Native Americans, and 2 by "other." ER 80. The study was tellingly devoid of evidence that *any* black, Hispanic, or Asian-owned firms were discriminated against in Montana's transportation industry. *Id.*; *see* ER 295 (Appellant's Expert Report noting: "No Black American, Asian-American or Hispanic-American owners were interviewed."). The scant evidence makes it impossible to draw any conclusions regarding the existence of racial discrimination in the Montana's transportation industry. Because the government bears the burden of proof to justify race-based decisionmaking, *Fisher*, 133 S. Ct. at 2420, this means that Montana's race-conscious program is not narrowly tailored.

As to the four firms, out of 27, that purport to have experienced some unidentified sort of "discriminatory action," ER 80, 295, two were owned by Native Americans, and two by Caucasian women. Wilson Study, at 7-20 (Table 7-8). The District Court failed to mention that four Native Americans and 19 Caucasian women reported that their firms had *not* experienced discrimination. *Id.* None of the firms owned by other groups claimed that they were subject to any type of discrimination. Thus, when viewed in the aggregate, the evidence in the Wilson Study does not

resemble anything close to a "good ole boy network," and cannot justify racial preferences.

CONCLUSION

For these reasons, Amici Pacific Legal Foundation, Cato Institute, and Center for Equal Opportunity respectfully request that this Court reverse the decision of the district court, and hold that the Montana Disadvantaged Business Enterprise program violates the Equal Protection Clause of the Fourteenth Amendment.

DATED: May 8, 2015.

Respectfully submitted,

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Counsel for Amici Curiae
Pacific Legal Foundation, Cato Institute,
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CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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

s/ Ralph W. Kasarda
RALPH W. KASARDA

CERTIFICATE FOR BRIEF IN PAPER FORMAT

(attach this certificate to the end of each paper copy brief)

9th Circuit Case Number(s): 14-36097 and 15-35003

I, Ralph W. Kasarda, certify that this brief is identical to the version submitted electronically on May 8, 2015.

DATED: May 8, 2015.

s/ Ralph W. Kasarda
RALPH W. KASARDA