UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LANDSCAPE CONSULTANTS OF TEXAS, INC., and METROPOLITAN LANDSCAPE MANAGEMENT, INC., *Plaintiffs*, v. CITY OF HOUSTON, TEXAS, and MIDTOWN MANAGEMENT DISTRICT, *Defendants*.	Civil Action No. 4:23-cv-03516

PLAINTIFFS' OPPOSITION TO DEFENDANT CITY OF HOUSTON'S SECOND MOTION TO DISMISS

Plaintiffs' civil rights challenge to Defendant City of Houston's Minority, Woman, and Small Business Enterprise (MWSBE) Program is not moot. In revising its MWSBE ordinance, Houston deliberately preserved the very race-based preferences that gave rise to this lawsuit nearly two years ago—and those same unconstitutional preferences continue to harm Plaintiffs today. Houston contends that it can evade Plaintiffs' challenge to this unconstitutional program by passing a revised MWSBE ordinance that continues to racially discriminate, but Houston cannot evade constitutional review by playing legislative shell games. It has been settled law for over forty years that merely replacing one unconstitutional ordinance

with another unconstitutional ordinance does not moot an ongoing civil rights lawsuit. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). Houston's motion should be denied.

STATEMENT OF FACTS

On September 19, 2023, Plaintiffs filed their Complaint, alleging that Houston's Program violates their right to equal protection guaranteed by the Fourteenth Amendment and their right to the full and equal benefit of the laws under 42 U.S.C. § 1981. Complaint, Dkt. 1. In their Complaint, and again in two summary judgment motions, Plaintiffs challenged the racial preferences for "minority business enterprise[s]" in Houston Code § 15-83(b), which sets race-based citywide percentage goals for awarding City contracts in construction, goods and nonprofessional services, and professional services. Dkt. 1 ¶ 16; Dkt. 44 at 8-13; Dkt. 68 at 8-13, 16-17. Under Houston Code § 15-82, minority business enterprises, or MBEs, are owned by a "minority person," which Houston defines along strict racial and ethnic lines as "a citizen or legal resident alien of the United States who is

a. Black American, which includes persons having origins in any of the black racial groups of Africa;

b. Hispanic American, which includes persons of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;

> c. Asian-Pacific American, which includes persons having origins from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Juvalu [sic], Nauru, the Federated States of Micronesia, or Hong Kong, or the region generally known as the Far East;
>
> d. Native American, which includes persons having origins in any of the original people of North America, American Indian, Eskimo, Aleut, Native Hawaiian; or
>
> e. Subcontinent Asian American, which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal, or Sri Lanka."

Houston Code § 15-82.

At the time Plaintiffs filed their Complaint, the citywide overall MWSBE goal for construction contracts was 34 percent, professional services contracts was 24 percent, and goods and nonprofessional services were each 11 percent. Dkt. 1 ¶ 20.

For almost a year, Houston repeatedly represented to this Court that it was on the verge of revising its MWSBE ordinance, and this Court accordingly delayed the upcoming trial. Dkt. 41-1, Hoyrd Aff. ¶ 5; Dkt. 71-2, Hoyrd Decl. ¶ 19; Dkt. 99; Dkt. 101. The Houston City Council finally passed Ordinance No. 2025-378 (revised ordinance) on May 7, 2025. Dkt. 105-1 at 10 of 19. The revised ordinance retains both the Program's racial classifications and its race-based contract goals.

The revised ordinance set new citywide MWSBE goals for Houston contracts. Most are similar or identical to the previous citywide goals, with one exception.

Non-professional services—the category in which Plaintiffs compete—***nearly doubled*** its minority and women-owned business enterprise goal:

Category	**Previous Goal**	**New Goal**
Construction	34%	34%
Professional Services	24%	26%
Goods	11%	15%
Non-professional services	**11%**	**19%**

Dkt. 105-1 at 4 of 19.

The revised ordinance also adopts the recent MGT disparity study's (MGT Study) "qualitative, quantitative and anecdotal data." *Id*. at 3-4 of 19. Yet, according to the MGT Study's findings, Hispanic American firms in the construction category were "overutilized," meaning they did not experience a disparity in earning Houston contracts relative to other racial groups. Dkt. 71-3 at 95 of 164.[1] Similarly, the MGT Study concluded that Asian American firms were overutilized in the professional services category, and women-owned business enterprises were overutilized in the goods category. *Id*. at 96 of 164, 99 of 164.

Despite this, the revised ordinance does not amend Houston Code § 15-82's definition of "minority person." *See* Dkt. 105-1 at 14 of 19; Dkt. 102-1 at 70 of 219 (showing redlined edits to Houston Code Article V, § 15-82). Hispanic-owned firms remain eligible for preferential treatment when bidding on construction contracts,

[1] Plaintiffs do not concede that the MGT Study or its conclusions regarding underutilization and overutilization of MWBEs constitute evidence of race-based discrimination in Houston public contracting.

just as Asian American-owned firms are not excluded from preferential treatment when bidding on professional services contracts. The decision to keep the racial classifications and race-based preferences as-is in the revised ordinance was intentional; as Mayor Pro Tem Castex-Tatum noted during the final City Council vote:

> What we're voting on today will allow the city to adopt the data of the disparity study from 2023. We will be able to maintain our current MBE and WBE categories. What we found over the last 40 days is that's where we've had most of the conversations and where people have been the most concerned about our programs. So, we are maintaining that current MBE and WBE categories as they have been in the city.

Dkt. 102-2, Ex. B at 2 of 9.

On May 8, 2025—one day ***after*** the revised ordinance passed—Plaintiff Landscape Consultants received an email from the Houston Office of Business Opportunity's Contract Compliance Division regarding Landscape Consultants' progress in meeting the 11 percent MWSBE goal for an ongoing city contract. Ex. A. The email threatened Landscape Consultants with enforcement actions, including up to a 5-year suspension under Houston Code § 15-85, if it does not fulfill the 11 percent MWSBE goal or demonstrate acceptable good faith efforts. *Id*.

STANDARD OF REVIEW

The burden of proof in a motion to dismiss for mootness under Fed. R. Civ. P. 12(b)(1) is on the party asserting mootness. *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 189 (2000). This "heavy burden"

requires the party asserting mootness to persuade the court that the challenged conduct "cannot reasonably be expected to start up again." *Id*.

ARGUMENT

I. The Revised Ordinance Does Not Moot Plaintiffs' Claims

a. Houston's racially discriminatory MWSBE program lives on

Though Houston claims it "effectively repealed and replaced" its prior ordinance, the revised ordinance does not alter the unconstitutional and illegal racial classifications and race-based preferences challenged by Plaintiffs. The overly broad and stereotyping definition of "minority persons" in Houston Code § 15-82 is untouched by the revised ordinance. *See* Dkt. 105-1 at 14 of 19; Dkt. 102-1 at 70 of 219 (showing redlined edits to Houston Code Article V, § 15-82). The citywide goals for public contracts remain in place for all minority-owned businesses—a decision the Houston City Council made *despite* its own evidence that some minority-owned businesses should be excluded. Dkt. 102-2, Ex. B at 2 of 9. Put another way, based on the data in the MGT Study adopted by Houston, both white- and Hispanic-owned businesses face no statistical disparities in earning Houston public contracts, yet Hispanic-owned businesses qualify for a racial preference and white-owned businesses do not. The Program's racial discrimination lives on in the revised ordinance.

The new ordinance is also significant for what it does *not* do. It does not identify any specific, identified instances of racial discrimination that violated the Constitution or a statute to justify the continued use of race-based preferences in the award of public contracts. *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181, 207 (2023). It also does not relieve Plaintiffs from the ongoing harm of being unable to compete on an equal footing in the bidding process due to the race of their owner. *Ne. Fla. Chapter of the Assoc. Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993).

Houston's revisions are window dressing, not meaningful reform. The adoption of the MGT Study and the vague promise of a future veteran- and small-business program do nothing to change the heart of the MWSBE Program: race-based preferences for minority-owned businesses remain fully intact. Dkt. 105-1, Ex. A at 2-4 of 19. There is nothing "major" or "substantial" at all about Houston's revised ordinance; it's the second verse, same as the first.

b. Plaintiffs continue to be injured by the MWSBE ordinance

Houston contends that "Plaintiffs' pleaded injury can no longer be traced to the City's MWSBE ordinance, which has never been applied to them." Dkt. 105 at 11. That's both factually wrong and legally irrelevant.

Factually, Houston enforced the MWSBE ordinance against Plaintiff Landscape Consultants just *one day* after passing the revised ordinance. Ex. A. On

May 8, 2025, Houston's OBO Contract Compliance Division emailed Plaintiff Landscape Consultants' general manager regarding an ongoing contract with the City. The email states in part that "[o]ur records indicate that your firm is not in compliance with the MWSDBE provisions" for the ongoing contract and notes:

> Section 15-85 of the City of Houston's Code of Ordinances (the "Code[”]) states: "After execution of a contract or receipt of a purchase order, the contractor shall comply with the submitted plan, unless it has received approval from the Director of the Office of Business Opportunity for a deviation there from, the contractor shall be required to submit to the Office of Business Opportunity reports of its efforts under this article in such form or manner as shall be prescribed by the OBO Director."

Ex. A. The email goes on to threaten:

> Be advised that, pursuant to Section 15-86 of the Code, a pattern of non-compliance with the City's MWSDBE program and a failure to make good faith efforts to meet the MWSDBE goal are grounds for suspension from engaging in any contract with the City for a period up to 5 years.

Id.

Legally, repackaging and relabeling one discriminatory MWSBE Program with another does nothing to change the future injury suffered by Plaintiffs. *See N.E. Fla.*, 508 U.S. at 666. The revised ordinance's racial classifications and racial preferences continue to prevent Plaintiffs from competing for contracts on an equal footing. Prior to the revised ordinance's adoption, Plaintiffs were placed at a disadvantage when bidding on contracts because of their race. After the revised

ordinance was adopted that is still true—the only difference is that the burden has grown *worse*. Dkt. 105-1, Ex. A at 3 of 19.

II. Voluntary Cessation Does Not Deprive This Court of Jurisdiction

The Supreme Court has twice rejected Houston's mootness argument, first in *City of Mesquite*, 455 U.S. 283, where the Court called it "well settled" that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Id.* at 289. Though the City of Mesquite repealed the challenged language while the case was pending, a live controversy remained because defendant's "repeal of the objectionable language would not preclude it from reenacting precisely the same provision[.]" *Id.*

The Supreme Court also condemned Houston's "repeal-and-replace" strategy in *Northeastern Florida*, a case with facts strikingly similar to this one. 508 U.S. 656. Like Houston, Jacksonville repealed its "Minority Business Enterprise" ordinance at an advanced stage of litigation—three weeks after the Supreme Court granted certiorari—and immediately replaced it with a new "African-American and Women's Business Enterprise Participation" ordinance. *Id*. at 660-61. Like Houston, the new Jacksonville ordinance differed only slightly from the previous ordinance while retaining its racial preferences. *Id*. at 661. And like Houston, Jacksonville filed a motion to dismiss the case as moot, claiming there was no longer a live controversy with respect the constitutionality of the repealed ordinance. *Id*.

The Supreme Court denied Jacksonville's motion to dismiss in a memorandum opinion. *Ne. Fla. Chapter of the Assoc. Gen. Contractors of Am., v. City of Jacksonville*, 506 U.S. 1031 (1992) (mem.). Jacksonville then reasserted its mootness claim in a Supreme Court merits brief, and the Supreme Court once again shot it down. *Ne. Fla.*, 508 U.S. at 661-62. Referring to its decision in *City of Mesquite* as "controlling," the Court explained that the case against Jacksonville was even stronger because it had not just repealed a challenged ordinance, it had replaced it with another ordinance that continued the unlawful conduct. *Id*. at 662 ("There is no mere risk that Jacksonville will repeat its allegedly wrongful conduct; it has already done so."). Like Jacksonville, there is no question that Houston will repeat the racial preferences Plaintiffs challenge; it has already done so by retaining every racial preference from the previous ordinance *despite* adopting a disparity study that found no disparities existed for certain racial groups. Dkt. 102-2, Ex. B at 2 of 9.

It is irrelevant that, like in Houston, the new Jacksonville ordinance was not an exact copy of the previous ordinance:

> *City of Mesquite* does not stand for the proposition that it is only the possibility that the selfsame statute will be enacted that prevents a case from being moot; if that were the rule, a defendant could moot a case by repealing the challenged statute and replacing it with one that differs only in some insignificant respect. *The gravamen of petitioner's complaint is that its members are disadvantaged in their efforts to obtain city contracts. The new ordinance may disadvantage them to a lesser degree than the old one, but insofar as it accords preferential treatment to black- and female-owned contractors—and, in particular,*

> *insofar as its "Sheltered Market Plan" is a "set aside" by another name—it disadvantages them in the same fundamental way*.

Ne. Fla., 508 U.S. at 662 (emphasis added). Under binding Supreme Court precedent, this Court retains jurisdiction to, at long last, give Plaintiffs their day in court. Houston's motion should be denied.

III. Houston's Arguments Are Unavailing

Despite being directly and irrefutably on point, Houston's motion to dismiss does not address *City of Mesquite* at all and mentions *Northeastern Florida* only in passing. Dkt. 105 at 15. Instead, Houston relies on out-of-circuit and easily distinguishable cases that do nothing to overcome the "'well settled' rule that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" *Ne. Fla.*, 508 U.S. at 662 (quoting *City of Mesquite*, 455 U.S. at 289).

Alaska v. U.S. Dep't of Agric., 17 F.4th 1224 (D.C. Cir. 2021), is inapplicable. This out-of-circuit case, which Houston relies on repeatedly, has no application here. That case involved a fully repealed rule. *Id.* at 1226. The D.C. Circuit's opinion focused on whether the repeal was sufficiently permanent as to moot the case or whether the federal rule could be reinstated. *Id*. at 1226-29. Here, Houston's racial preferences remain fully operative. No repeal, no reinstatement—just ongoing discrimination. There is no question whether these unconstitutional policies might be reinstated in the future. They never left.

Houston asks this Court to believe that "no reasonable expectation remains that it will return to [its] old ways." Dkt. 105 at 8 (citing *Fed. Bureau of Investigation v. Fikre*, 601 U.S. 234, 241 (2024)). But Houston already has returned to its old ways—exactly as Jacksonville did, by passing a new ordinance that "disadvantages [plaintiffs] in the same fundamental way." *Ne. Fla.*, 508 U.S. at 662. Enough is enough. Houston's motion should be denied.

CONCLUSION

For the foregoing reasons, Defendant City of Houston's Motion to Dismiss should be denied.

Dated: June 13, 2025.

Respectfully submitted,

s/ Erin E. Wilcox

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CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2025, I served this document via the Court's electronic filing system to all counsel of record.

s/ *Erin E. Wilcox*
Erin E. Wilcox
Pacific Legal Foundation

Exhibit A

[redacted]

On Thursday, May 8, 2025 at 02:29:03 PM CDT, City of Houston <houston@mwdbe.com> wrote:

Jeremy Thompson
LANDSCAPE CONSULTANTS OF TEXAS
3439 W BENDERS LANDING BLVD SPRING, TX 77386

RE: MWSDBE Goal for Contract: Grounds Maintenance and Landscaping Services for Various Departments;S78-L29576
Contract Number: 4600016671

Dear Jeremy Thompson:

Our records indicate that your firm is not in compliance with the MWSDBE provisions for the above-referenced contract, on which your firm functions as the Prime contractor. This contract has a total MWSDBE participation goal of **11.00%**. Per your firm's most recent online contract audit summary, which you may view 24/7 via the B2GNow Public Contract Search Portal at https://houston.mwdbe.com/, your firm's current MWSDBE participation is at **0.00%**. Please note that Primes on construction contracts are required to make good faith efforts to meet or exceed the individual MBE, WBE, and SBE (if applicable) contract goals.

Section 15-85 of the City of Houston's Code of Ordinances (the "Code) states: "After execution of a contract or receipt of a purchase order, the contractor shall comply with the submitted plan, unless it has received approval from the Director of the Office of Business Opportunity for a deviation there from, the contractor shall be required to submit to the Office of Business Opportunity reports of its efforts under this article in such form or manner as shall be prescribed by the OBO Director." **As indicated in your contract documents, and pursuant to the City's Good Faith Efforts Policy (https://www.houstontx.gov/obo/docsandforms/goodfaithefforts.pdf), your firm is required to make good faith efforts to meet or exceed the MWSDBE contract goal(s).**

Please submit a written response, no later than 14 days after receipt of this notice, detailing the reason why your firm is not meeting the MWSDBE goal(s) and the actions your firm plans to take to achieve the contract's MWSDBE participation goal(s). You may also schedule a meeting to discuss your "Good Faith Efforts" to achieve the goal if you believe you will not be able to meet the goal by the time the project ends. Your firm must also submit an updated

MWSDBE Utilization schedule to show your current and projected contract spend for each of your approved MWSDBE's, if applicable. This schedule can be found on the OBO website at: https://www.houstontx.gov/obo/contract_compliance.html.

If you do not respond to this notice within the designated timeframe, your firm will be deemed non-compliant. A final good faith efforts review will be conducted at the end of your contract term and a MWSDBE performance rating will be rendered. Be advised that, pursuant to Section 15-86 of the Code, a pattern of non-compliance with the City's MWSDBE program and a failure to make good faith efforts to meet the MWSDBE goal are grounds for suspension from engaging in any contract with the City for a period up to 5 years.

We look forward to hearing from you soon. If you have any questions, or need additional information, contact the Office of Business Opportunity's Contract Compliance Division at: roger@hilldaypr.com or 832-393-0609.

Sincerely,

OBO Contract Compliance Division
obocontractcompliance@houstontx.gov

This message was sent to: "Jeremy Thompson"
Sent on: 5/8/2025 2:29:01 PM
System ReferenceID: 272312552