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 MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

When Plaintiffs Landscape Consultants of Texas, Inc. (Landscape Consultants) and Metropolitan Landscape Management, Inc. (Metropolitan) initiated this lawsuit challenging Defendant City of Houston's Minority, Woman, and Small Business Enterprise (MWSBE) program, Plaintiffs claimed that Houston had no compelling interest in operating a race-based public contracting program and that, even if it had, the MWSBE program was not narrowly tailored to achieve that interest. Dkt.1 ¶¶ 47–55. Over a year later, Houston admits what Plaintiffs initially alleged: the MWSBE program does not remedy specific, identified instances of racial discrimination that violate the Constitution or a statute, and its racial classifications are unmoored from any evidence of discrimination against the preferred groups. Plaintiffs have moved for summary judgment on these grounds, Dkt. 68, and their motion should be granted.

Houston, however, contends that it is entitled to summary judgment as a matter of law. Houston relies almost entirely on a new disparity study with significant problems. Foremost is that Houston withheld this disparity study from Plaintiffs throughout discovery, despite Houston's continuing obligation to produce responsive documents under Fed. R. Civ. P. 26(e)(1). Houston's professional and ethical breach is the subject of Plaintiffs' accompanying Motion to Strike and for Sanctions. Regardless, the disparity study is only a draft; it has not been adopted by

the Houston city council and the MWSBE program has not been amended to reflect the study's findings. Speculating on what Houston might do in the future based on a disparity study it hasn't adopted says nothing about the constitutionality of the program it actually has.

Plaintiffs don't challenge some speculative future Houston program; they challenge Houston's current MWSBE program. Rather than defend its MWSBE program, Houston asks this Court to judge a MWSBE program that does not exist. Rather than offer evidence of a compelling interest and narrow tailoring to justify the MWSBE program's use of racial preferences, Houston offers a city official's musings on what might happen if the city council adopts the new disparity study. And because it cannot defend its current, racially discriminatory MWSBE program, Houston tries yet again to challenge Plaintiffs' standing, despite no supporting evidence.

Houston's speculation, obfuscation, and misconduct cannot hide what is readily apparent: Houston operates a public contracting program that discriminates against bidders due to race, in violation of Plaintiffs' right to equal protection of the laws. Houston's motion for summary judgment should be denied.

STATEMENT OF FACTS

Houston's motion misstates several key facts. First, Houston's MWSBE program does not "remedy active and passive discrimination," Dkt. 71 at 8, because

it has no evidence that such discrimination exists. The MWSBE program is based on the findings of a 2006 disparity study.[1] Dkt. 71, Hoyrd Decl. ¶ 8. This 18-year-old study is too old and stale to support Houston's race-based contracting program—a fact Houston officials openly admit[2] and Houston does not seriously dispute. Dkt. 71 at 31.

Houston also claims that a new, unadopted draft disparity study (MGT Study) justifies the current MWSBE program. However, in addition to the procedural and ethical issues raised in Plaintiffs' accompanying Motion to Strike and for Sanctions, this is logistically impossible. First, the draft MGT Study is dated May 7, 2024, while Houston's current MWSBE program was adopted nearly a decade before in 2013. Dkt. 71 at 8; Hoyrd Decl. Ex. E. Second, the Houston city council has not voted to adopt the draft MGT Study (and is not "expected to" for two more months), making it no more final or official than the 2020 Colette Holt & Associates disparity study

[1] Houston's motion also references a 2012 disparity study that was limited to the construction industry. Dkt. 71 at 11; Hoyrd Decl. ¶ 8. It has nothing to do with the landscaping preferences at issue in this case.

[2] *See* Houston Television, Houston City Council Consolidated Session Meeting (Jan. 17, 2024), https://houstontx.new.swagit.com/videos/295029 at 39:29 (City Attorney Arturo Michel: "You have to have a disparity study to show what the issue is. They get stale over time. Ours is now stale."), 39:43 (Mayor John Whitmire: "We probably need to review the process to emphasize how important it is. It seems to me like some of the valuations are pretty subjective. I heard the other day that one prime [contractor] had gone through 31 possible [MWBE] subs and the issue wasn't resolved and the firm was rejected, so it just seems to me like we need to review our process, support it, and be prepared to go to court with our strongest case.").

that Houston scrapped and is withholding from public view. *Id*. at Hoyrd Decl. ¶ 19; *see* Dkt. 68 at 2–3. Finally, Houston has not revised its MWSBE Ordinance to reflect the MGT Study's findings—the MWSBE program currently in effect is based on the 2006 disparity study. Dkt. 71, Hoyrd Decl. ¶ 19. In other words, the MGT Study has no bearing whatsoever on the MWSBE program that Plaintiffs challenge in this lawsuit.

And while Houston describes the MWSBE program's Good Faith Efforts policy as flexible and permissible, the reality is anything but. Dkt. 71 at 9–10. Bidders who cannot secure an agreement with a minority subcontractor to satisfy a contract goal must submit both a "Record of Good Faith Efforts" and a request for deviation, which Houston may or may not grant. Dkt. 71, Hoyrd Decl. Ex. 3. While Houston downplays the work involved in demonstrating Good Faith Efforts as merely "showing its efforts to obtain bids from minority- or women-owned businesses," in reality bidders must take 16 distinct and time-consuming actions to demonstrate Good Faith Efforts with no guarantee that Houston will grant a waiver. *Id*. If a successful bidder fails to meet the MWSBE goal post-award, a list of 13 additional actions determines whether Houston will excuse the failure or sanction the company. *Id*. Houston Code § 15-85(a) authorizes the Office of Business Opportunity director to suspend noncompliant contractors for up to five years.

ARGUMENT

I. Plaintiffs Have Article III Standing

A. Plaintiffs suffered an injury in fact

Houston does not challenge the second and third prongs of Article III standing, focusing only on Plaintiffs' "injury in fact." Dkt. 71 at 16–18, 20–21; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). To establish standing, a party challenging a race-based set-aside program like Houston's "need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so …." *N.E. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993). The "'injury in fact' is the inability to compete on an equal footing in the bidding process, not the loss of a contract." *Id.*; *see also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995); *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 702, 719 (2007). This Court already held that Plaintiffs satisfied the injury in fact requirement in the initial stages of this case, and Houston makes no showing to contradict that holding at summary judgment.

Instead, Houston contends that its MWSBE program—which is facially discriminatory—does not treat Plaintiffs differently. Dkt. 71 at 16–18, 21–22. Houston cites no cases in support of this argument. Instead, Houston claims that Landscape Consultants has not suffered an injury in fact because Houston's

MWSBE program "does not exclude Landscape or anyone else from the opportunity to compete for City contracts." *Id*. at 16.

The standard for whether a discriminatory policy prevents Plaintiffs from competing on an equal footing is not whether Plaintiffs are completely excluded from bidding on Houston contracts, it is whether "a discriminatory policy prevents them from [bidding] on an equal basis." *Id*. at 14 (quoting *N.E. Fla.*, 508 U.S. at 666); *W.H. Scott Const. Co. v. City of Jackson*, 199 F.3d 206, 212 (5th Cir. 1999). In *Scott*, for example, the plaintiff company was not excluded from bidding on City of Jackson contracts—in fact, it won six city contracts while the challenged MWBE program was in place—yet the company was still at a competitive disadvantage due to the program's racial preferences. 199 F.3d at 212–14; *see also N.E. Fla.*, 508 U.S. at 666 ("The 'injury in fact' … is the denial of equal treatment resulting from the imposition of [a] barrier, not the ultimate inability to obtain the benefit.").

Next, Houston argues that Landscape Consultants is not injured because (according to the Office of Business Opportunity director) it will not be penalized if it fails to meet its current contract's MWSBE goals.[3] Dkt. 71 at 16–17. Again, the standard for whether a discriminatory policy prevents Plaintiffs from competing on

[3] And as Landscape Consultant's corporate representative testified, the company has already received multiple notices from Houston regarding failure to meet MWSBE goal milestones on its current contract with the city. Ex. A, Thompson Dep. Tr. 50:12–52:8.

an equal footing is not whether Plaintiffs are subject to mandatory penalties (or any penalties at all) for failure to meet an MWSBE goal in an existing contract. Dkt. 71 at 16–17. In *Scott*, the court rejected the city's argument that the plaintiff company was not disadvantaged by the MWSBE program because the city often awarded contracts to bidders who did not meet a contract's MWSBE goal. 199 F.3d at 213. The Fifth Circuit further held that "the inconsistency with which the obligation is enforced is irrelevant, because it has not negated the existence of the obligation." *Id*. Likewise, just because Houston's Office of Business Opportunity director says that her department won't penalize Landscape Consultants for failing to meet a contract's MWSBE goal, the obligation to comply still exists and it places Plaintiffs at a competitive disadvantage due to race.

Houston contends that minority prime contractors can only fulfill 50% of a MWSBE goal themselves and must subcontract out the remaining 50% to minority subcontractors. Dkt. 71 at 17. Houston argues this makes MWSBE contractors and Plaintiffs equal because nonminority prime contractors and minority prime contractors are both required to subcontract out part of an MWSBE goal. *Id*. Simple math undercuts Houston's argument—per Houston's policy, minority contractors keep 50% of the value of the MWSBE goal and give away 50% to a minority subcontractor, while Plaintiffs keep 0% and give away 100% to a minority

subcontractor. It's hard to imagine a better example of competing on "unequal footing" than the impact of this policy.

Further, Houston's claim that Metropolitan lacks an injury in fact because it hasn't bid on a Houston contract is a red herring. As Plaintiffs' corporate representative Gerald Thompson testified, Landscape Consultants and Metropolitan share the same employees. Ex. A, Thompson Dep. Tr. 25:2–7. The companies were acquired at the same time and were not merged because of customer brand awareness and loyalty; much like Hardees and Carl's Jr., some customers (like Houston) were familiar with the Landscape Consultants name and some (like Midtown) with the Metropolitan name. *Id*. at 14:22–15:1, 16:1–22, 38:9–39:1. That brand strategy solidified over time; when asked if Midtown sought out Landscape Consultants to bid on a recent Midtown contract, Mr. Thompson testified that he doesn't think "Midtown knows who Landscape is in that sense." *Id*. at 115:13–16. But marketing decisions do not defeat standing; Metropolitan is able and ready (as proven by its employees currently performing a Houston contract under the Landscape Consultants name) to bid on Houston contracts but for Houston's discriminatory MWSBE policy. *See Scott*, 199 F.3d at 213; *N.E. Fla.*, 508 U.S. at 666. In any event, in a case with multiple plaintiffs, "[i]f at least one plaintiff has standing, the suit may proceed." *Biden v. Nebraska*, 600 U.S. 482, 490 (2023); *see also Texas v. United States*, 50 F.4th 498, 512 (5th Cir. 2022).

B. Plaintiffs challenge the entire MWSBE program

Houston wrongly contends that Landscape Consultants' standing should be cabined to "other services" contracts. Dkt. 71 at 18–19. Houston's argument makes little sense; it presents no evidence that its MWSBE Ordinance is severable or that it administers its MWSBE policy differently for "other services" contracts as opposed to professional services, construction, or goods contracts. Further, Plaintiffs seek relief from the MWSBE program's racial classifications. Dkt. 1 ¶¶ 47–55. These racial classifications determine which business owners are eligible to become certified as a minority business enterprise and enjoy a racial preference when bidding on Houston public contracts. Houston Code § 15-82. The administrative category Houston places landscaping companies in for purposes of bidding is irrelevant in this challenge to Houston's use of racial classifications in its MWSBE program.

Scott does not support Houston's argument. The decision in *Scott* focused on Jackson's construction program because the plaintiff challenged a special racial quota applicable only to construction contracts. 199 F.3d at 209–11. Typically, courts evaluate race-based programs as a whole regardless of which administrative category a plaintiff falls into. For example, in *Ultima Servs. Corp. v. U.S. Dep't of Agriculture*, a professional services plaintiff's challenge was not limited—the federal court enjoined the entire Small Business Administration Section 8(a) program. 683 F.Supp.3d 745 (E.D. Tenn. July 19, 2023). Likewise, the construction

company plaintiff in *Northeastern Florida* was not limited to challenging only the portion of Jacksonville's MBE program that regulated construction contracts. 508 U.S. at 666. Constricting Plaintiffs' challenge to the specific contracts on which they bid, Dkt. 71 at 19–20, requires Plaintiffs to show that they lost contracts because of the MWSBE policy. The Fifth Circuit has explicitly held such a showing is not required to demonstrate standing in equal protection challenges to affirmative action policies, and it should not be required of Plaintiffs in this case. *Scott*, 199 F.3d at 213 (citing *N.E. Fla.*, 508 U.S. at 666).

II. Houston's MWSBE Program Fails Strict Scrutiny

In its Motion for Summary Judgment, Houston does not even attempt to defend its current MWSBE Ordinance and program. Instead, it relies entirely on the unadopted, *draft* MGT Study that plays no role in the creation or administration of the program that Plaintiffs challenge. Dkt. 71 at 25–38. For the reasons stated in Plaintiffs' accompanying Motion to Strike, this Court should not consider the MGT Study. With the irrelevant MGT Study stripped away, it is clear Houston's MWSBE program does not survive strict scrutiny and must be declared unconstitutional and enjoined.

A. Houston has no evidence of a compelling interest

To survive the "daunting two-step examination" of strict scrutiny, Houston must first prove that its MWSBE program remediates "specific, identified instances of past discrimination that violated the Constitution or a statute." *Students for Fair*

Admissions v. President and Fellows of Harvard Coll., 600 U.S. 181, 206–07 (2023) (*SFFA*). This compelling interest standard was first formulated over 35 years ago in *Croson* and reemphasized by the Supreme Court just last year in *SFFA*. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500 (1989). Houston's motion for summary judgment ignores it completely. Dkt. 71 at 22–32.

Instead, Houston claims a compelling interest in "remedying the effect of past and present racial discrimination in City contracting." Dkt. 71 at 23. This is insufficient; programs that rest on a "generalized assertion that there has been past discrimination in an entire industry" cannot justify race-based preferences. *Croson*, 488 U.S. at 498; *see also Shaw v. Hunt*, 517 U.S. 899, 909–10 (1996); *Parents Involved*, 551 U.S. at 732; *Vitolo v. Guzman*, 999 F.3d 353, 361 (6th Cir. 2021). Houston presents no evidence of "specific, identified instances of past discrimination that violated the Constitution or a statute." *SFFA*, 600 U.S. at 207. Nor can it, because Houston has already admitted that it is not aware of any racial discrimination within its MWSBE program. Ex. B, nos. 2, 4–5, 22. With no evidence of discrimination to remedy, Houston has no compelling interest in operating a race-conscious public contracting program.

B. Houston has no evidence of narrow tailoring

A race-conscious program should be the remedy of last resort. *Walker v. City of Mesquite*, 169 F.3d 973, 982–83 (5th Cir. 1999). Houston's race-conscious

MWSBE program is a remedy of first resort. Houston provides no evidence that its race-neutral "Hire Houston First" program or vague "numerous education and outreach programs" were considered prior to embarking on the race-conscious MWSBE program nearly 40 years ago. Dkt. 71 at 34–38. It's unknown whether "Hire Houston First" and the "numerous education and outreach programs" even predate Houston's race-conscious contracting program. What *is* known is that for a race-based program to survive narrow tailoring analysis, the government must show "serious, good faith consideration of workable race-neutral alternatives." *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); *Croson*, 488 U.S. at 407. Houston does not even attempt such a showing, and that is fatal to the program's constitutionality. *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 312 (2013) (courts must strike down race-based programs unless they are "satisfied that no workable race-neutral alternative" would achieve the compelling interest).

The rest of Houston's narrow tailoring argument relies on the unadopted, draft MGT Study that is unrelated to the MWSBE program Plaintiffs challenge in this lawsuit. Dkt. 71 at 34–38. For example, Houston claims "MBE participation goals under the City's program are tailored to statistical evidence of underutilization of MBEs by procurement category," citing to declarations from the Office of Business Opportunity director and a consultant on the MGT Study. Dkt. 71 at 35–36. But the current program's MBE participation goals are not based on the unadopted, draft

MGT study that Houston never disclosed. They are based on a stale 2006 disparity study that Houston makes no attempt at arguing is properly tailored.

Houston next asks this Court to agree that the current MWSBE program—which preferences minority-owned firms—"does not negatively affect non-minority firms" because at some future date the city may potentially implement a race-neutral method of fulfilling contract goals. Dkt. 71 at 36. Whatever changes Houston may or may not make to its MWSBE program in the future have zero impact on the constitutionality of the race-based MWSBE program in effect today. Houston's MWSBE program provides a benefit to MWSBE bidders that is not available to Plaintiffs and other non-MWSBE bidders, solely because of race. No individualized showing of racial discrimination is necessary, because Houston assumes all individuals from the same racial groups are the same. Ex. B, no. 12. This is the very definition of racial stereotyping and is "contrary … to the core purpose of the Equal Protection Clause." *SFFA*, 600 U.S. at 221 (citation omitted).

Houston incorrectly claims that it has "not attempted to include minority groups for which there is no evidence of past or present discrimination or to exclude other similarly situated groups." Dkt. 71 at 38. To the contrary, Houston's MWSBE program gives racial preferences to companies owned by "minority person[s]" as follows:

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.

Houston admits that this definition of "minority persons" is not based on specific data from the Houston metropolitan area. Ex. B, no. 10. Houston also admits it has not identified any prime contract awards based on intentional discrimination against MWSBE bidders in the last five years, nor has it disciplined any employee or City official for discriminating in the award of public contracts during that period. Ex. B, nos. 1–2. Houston has not identified any specific constitutional or statutory violations related to its public contracting or procurement process or awards during that period either. Ex. B, no. 20. Houston admits that it does not require evidence that an applicant to the MWSBE program has experienced previous discrimination when determining whether to grant preferential MWSBE status. Ex. B, no. 14.

Without evidence of racial discrimination towards members of any racial or ethnic group, it's impossible to credit Houston's claim that it "has provided evidence of discrimination for each of the minority groups addressed by the program." Dkt. 71 at 38.

Instead, Houston's MWSBE program is grossly under- and over-inclusive. Houston does not distinguish between recent immigrants and those whose families have been citizens for generations. Ex. B, no. 13. Moreover, the MWSBE program preferences an individual from Pakistan but excludes his Afghan neighbor. *Id*.; Houston Code § 15-82. It prefers the business owner from Nauru despite no evidence of racial discrimination against Nauruans in Houston public contracting. Yet it excludes a Palestinian immigrant who could prove that she lost a bid because of a Houston official's prejudice against Middle Eastern individuals. *Id*. Without "clear evidence tracing one-for-one" each of Houston's preferred racial groups to "concrete discrimination in this context," Houston's racial presumptions are not narrowly tailored. *Nuziard v. Minority Business Development Agency*, 721 F.Supp.3d 431, 491 (N.D. Tex. Mar. 5, 2024).

Finally, Houston incorrectly claims that the MWSBE program is "limited in duration and has a logical endpoint." Dkt. 71 at 36. While it is true that city ordinance requires Houston to review its MWSBE program every five years and the program should continue "only until its purposes and objectives are achieved," Houston has

disregarded that ordinance for twenty years. Houston Code § 15-81(b). More than ten years passed between the 2006 comprehensive disparity study and the next comprehensive disparity study completed in 2020. Dkt. 68 at 1–2. Houston waited another three years after burying the 2020 disparity study before it commissioned a replacement. *Id*. at 3. The MGT Study, which Houston first claimed would be adopted in May 2024, has still not been voted on by the city council. Dkt. 41-1, Hoyrd Aff. ¶ 5; Dkt. 71, Hoyrd Decl. ¶ 19. Meanwhile, Plaintiffs continue to be subjected to Houston's race-based public contracting program that is based on no compelling interest, is not narrowly tailored, and violates their right to equal protection as guaranteed by the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, Houston's motion for summary judgment should be denied and Plaintiffs' motion for summary judgment, Dkt. 68, should be granted.

DATED: December 20, 2024.

Respectfully submitted,

s/ Erin E. Wilcox

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CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2024, I served this document via the Court's electronic filing system to Defendants' counsel of record as follows:

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EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Gerald Thompson
November 06, 2024

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

ORAL VIDEOTAPED DEPOSITION OF

GERALD THOMPSON

November 6, 2024

ORAL VIDEOTAPED DEPOSITION OF GERALD THOMPSON, produced as a witness at the instance of the Defendants and duly sworn, was taken in the above-styled and numbered cause on the 6th day of November, 2024, from 10:00 a.m. to 1:33 p.m., before Dawn McAfee, Certified Shorthand Reporter in and for the State of Texas, reported by computerized stenotype machine at the offices of Husch Blackwell LLP, 600 Travis Street, Suite 2350, Houston, Texas 77002, pursuant to the Federal Rules of Civil Procedure and the provisions stated on the record or attached hereto.

U.S. LEGAL SUPPORT, INC
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Gerald Thompson
November 06, 2024

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EXHIBITS

Gerald Thompson
November 06, 2024

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THE VIDEOGRAPHER: This is beginning of File Number 1 in the deposition of Gerald Thompson. The time is 10:27, and we're on the record. Would the court reporter please swear the witness?

GERALD THOMPSON,

having been first duly sworn, testified as follows:

EXAMINATION

BY MR. STEPHENS:

Q. Sir, can you state and spell your name for our record, please.

A. Gerald Raymond Thompson. G-E-R-A-L-D, Raymond, R-A-Y-M-O-N-D, Thompson, T-H-O-M-P-S-O-N.

Q. All right. And I'll call you Mr. Thompson. My name is Ben Stephens. I'm a lawyer representing the City of Houston. Can you -- can you tell me, in your own words, what this lawsuit is about?

A. Well, quite frankly, the lawsuit is about discrimination against my companies from being able to fully and capably use our employees to perform contracts in the -- for the City of Houston. And because we are white owners with 95 percent Hispanic employees, it just seems very strange that we would have to do that. So, my main -- my main concern is to protect my employees, not someone else's employees, for payroll and things like that.

Gerald Thompson
November 06, 2024

U.S. LEGAL SUPPORT, INC
713-653-7100

Q. Tell me -- tell me when and how Landscape was started. I think you said you purchased it from someone. Can you tell me more about that?

A. Yes. When I was ready to leave my last employer, I decided that I would go out on my own and stake my own case. And I had a lot of experience managing people, and so I started looking to buy a business. And that, Landscape Consultants of Texas, was the business that I thought fit well with what I could afford and what I wanted to do going forward.

Q. Okay. What attracted you in particular and, if anything, to the landscaping business? Or is it primarily a coincidence of those -- you know, I can afford it and I'm interested in doing it?

A. Well, it's just like when you go out and buy a house, right? So there's so many houses on the market at the time, and you need to buy one of them. So, that one seemed to fit, out of all the ones that were available, at the time.

Q. What year did you purchase Landscape?

A. 2006.

Q. Okay. Did you purchase Metropolitan at the same time, or how did that come about?

A. They came together.

Q. Okay. Oh, from the same seller?

A. Yes.

Q. Tell me what Landscape Consultants does.

A. Well, we're a full-service landscape maintenance, landscape installation, irrigation installation and repair business. Pretty much anything -- any kind of softscape kind of landscaping.

Q. What does softscape landscaping mean?

A. We're just the general -- the other side of that would be the hardscape. We don't do the fountains. We don't make fountains. We don't do pavers, you know. We can subcontract for that, but we typically don't bid on those kinds of projects.

Q. So, generally, fair to say, you're sort of working with dirt and plants, and things that go with dirt and plants. And the paving and fountains and decorations, essentially, that's a -- sort of a different thing?

A. Right.

Q. Okay.

A. Yes.

Q. Is Metropolitan's business similar?

A. Yes.

Q. What, if anything, are the differences between those two businesses?

A. Very little.

Gerald Thompson
November 06, 2024

U.S. LEGAL SUPPORT, INC
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Q. Okay.

A. They each have separate EINs. And the reason why they did that, was that when the original seller purchased Metropolitan Landscape Management, he bought it to expand his business through an acquisition. And it just made sense to keep the brand loyalty, at the time, between the two companies.

Q. Did you inherit any contracts that Landscape and Metropolitan had when you purchased the two companies?

A. Yes.

Q. And tell me, generally, about those contracts.

A. That was a long time ago.

Q. Yeah. To the extent you can remember.

A. There were multiple contracts. It was a -- it was a thriving landscaping business. So, it had multiple contracts throughout the Houston and county area, metropolitan area, probably within a 50-mile radius. City of Sugar Land, City of Rosenberg. I think they were doing the Midtown Management District at the time. Just multiple different clients. I can't remember them all. That was quite a while ago.

Q. Generally, I understand that the vast majority of your current business is government contracts. Is it fair to say that that was the case when you purchased

A. They're all -- it's our workforce, yes.
Q. Okay. Are -- are your employees shared between Landscape and Metropolitan?
A. Yeah, basically. Yeah, I mean, it's all pretty much one. Like I said, the only difference was a branding position back in 2006 when we purchased the company.
Q. Okay. What led you to maintain the separation between the two companies? If the difference was primarily with branding, why didn't you combine them?
A. I thought about doing that many times. It's -- it's a -- kind of an administrative nightmare. In a lot of sense, closing one, and consolidation like that, would be tricky.

At one time, Metropolitan Landscape was HUB certified through Texas, and we'd grown the business too large to -- to requalify for that, so that was part of the reason. But since then, it's just kind of been the way it's been.

Q. Okay. Can you describe for me the structure of Landscape's business? I mean, how does it -- do you have landscaping crews? Supervisors who are under sort of a general manager? What's that structure look like?
A. Sure. As far as the operational side of it, we have a general manager. And then we have an operations

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is the one we use to bid on Houston contracts as opposed to Sugar Land contracts"?

A. Correct.

Q. Okay. And nothing unique about Metropolitan's business that leads you to say, "Well, with Metropolitan, we're only bidding on Management District work or on West U work"?

A. No, not really.

Q. Okay. Functionally, they do the same thing. They could bid on the same contracts. You just make a -- kind of a game time election as to which -- which company you're going to use to bid on which contract?

A. No, not necessarily. You know, I mean, if we had a reputation -- if we had a contract under Metropolitan -- you're starting to spur my memory now. But if we had a contract under Metropolitan that was very successful and we lost it because of low bid, if it comes out for bid again, they know us. They know our quality of service. That we would probably bid that again under Metropolitan.

Q. So they know the Metropolitan name. You've had a contract with -- I'm just using this as a hypothetical. But you've had a Metropolitan contract with Sugar Land before. If you wanted another Sugar Land contract, you would bid with Metropolitan again.

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A. Right. But in that case, it's Landscape.
Q. Got it. Got it. Your current contract with the City of Houston, what is it for?
A. We provide services for multiple locations around the city. Different buildings, police -- police buildings, just general services contract for all the different locations that they have.
Q. Okay. So it's a goods and services contract?
A. I don't know. Is that what they call it? I don't know what they actually call it. It's a general services contract --
Q. You see yourself --
A. -- for those facilities.
Q. Sure. You see yourself as providing services to the City of Houston?
A. Yes.
Q. Okay. Would you characterize it as a construction contract?
A. Landscaping contract.
Q. Okay.
A. I mean that's -- that's the name of the contract, I think, is landscaping services. I don't know the exact name of it. I would have to go look. But -- so that's -- that's typically what we bid on, are landscaping-type contracts.

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A. No.

Q. How -- how do you go about determining which subcontractor you would use? I mean, let's use a concrete example. Let's use your current contract with the City of Houston.

A. Uh-huh.

Q. I think you put a company called X Scapes (sic) Environmental on your bid.

A. Right. Correct.

Q. How did you find X Scapes?

A. Through the -- through the list.

Q. Okay. So, walk me through the process of, you looked at the list and then you were awarded a contract. What happens in between finding them on the list and awarding the contract with X Scapes?

A. That would be a better question for -- for the general manager. But my understanding of it is that we have -- we get it -- we get the bid -- we see the bid. It asks for a certain goal. It says you have to have a certified city contractor, subcontractor, minority contractor.

We go out and we get the list that they have available at that time, that's certified by the City. And we -- again, we only have, like, five to seven days to accomplish this, and reach out to the

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first one that responds, because they're all the same to me. I don't know any of them, all right.

And so this person, X Scape, decided to sign on the contract, or -- or sign the commitment with us. So we submit that to the City. And then we get the contract, and we start performing the services. Everything is being accomplished and completed as needed. No -- no service complaints.

We send an email to X Scape and say, "Hey, can you do these five locations for us this week? Give me a price." Okay. Nothing. Okay. So then we go about our business. Couple of months later -- oh, we get a -- we get a notice from the City, "Hey, you're not in compliance." So we send another email, "Hey, will you give us a price for those five locations?" Nothing.

A couple of weeks go by, "You're out of compliance. You've got to meet this goal." So we -- and this is the only one we can use. I mean, we can't say, "Hey, we've got other -- " and we have done that. We have other minority subcontractors that we use. They're just not certified by the City. So we try to submit those. "Can we use them?" "No, you have to use X Scape."

So this just goes on and on, and after a while it gets pretty tiring. And you just -- how many

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times -- how many times do you have to make a good faith effort? Is it one? Is it ten? I mean, is it a hundred? I mean, we have a business to run. We don't have time to play games. We have to get this done. We're under contract.

Q. So at some point, do you just go ahead and do the work?

A. We have to. It's our contract.

Q. Do you get paid for doing that work?

A. Yes.

Q. Okay.

MS. WILCOX: So we've been going about, I think, a little over an hour. Would you guys like to take a break?

MR. STEPHENS: I was about to say, we've been going an hour. We can take a ten-minute break if you want a break.

THE WITNESS: Sure, that's fine.

THE VIDEOGRAPHER: 11:30, we're off the record.

(Break taken.)

THE VIDEOGRAPHER: This is the beginning of File Number 2 to the deposition of Gerald Thompson. The time is 11:45. We're on the record.

Q. (By Mr. Stephens) Welcome back, sir. Are you

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where Metropolitan lost a bid for doing work for Midtown, was because of the points that were added to a minority or woman-owned business, other than 2022 that we're talking about here?

A. I'm not sure when this was implemented. It doesn't seem like it was the entire time, but part of the time. I don't know if it was the last couple of times or all along. I don't remember, you know.

Q. Okay. So Metropolitan would be ready, willing and able to begin work for Midtown on the Field Services Project now, if asked?

A. Yes.

Q. Okay. Was Landscape ever asked to do that contract?

A. I don't think Midtown knows who Landscape is in that sense.

Q. Okay.

A. They know us as Metropolitan Landscape.

Q. So any work that y'all would do for -- for Midtown, Metropolitan would do? You wouldn't have Landscape do that work, correct?

A. Yeah. I think there's some confusion there. Midtown and -- or Metropolitan and Landscape are one in the same.

MS. WILCOX: Counsel, we've been going

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

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

ORAL DEPOSITION OF GERALD THOMPSON

November 6, 2024

I, Dawn McAfee, Certified Shorthand Reporter in and for the State of Texas, do hereby certify to the following:

That the witness, GERALD THOMPSON, was duly sworn by the officer and that the transcript of the oral deposition is a true record of the testimony given by the witness;

I further certify that pursuant to FRCP Rule 30(e)(1) that the signature of the deponent:

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November 06, 2024

__X__ was requested by the deponent or a party before the completion of the deposition and is to be returned within 30 days from the date of receipt of the Signature Page contains any changes and the reasons therefor;

__ was not requested by the deponent or a party before the completion of the deposition.

I further certify that I am neither counsel for, related to, nor employed by any of the parties or attorneys to the action in which this proceeding was taken. Further, I am not a relative or employee of any attorney of record in this cause, nor am I financially or otherwise interested in the outcome of the action.

Subscribed and sworn to on this _____ day of _____, _____.

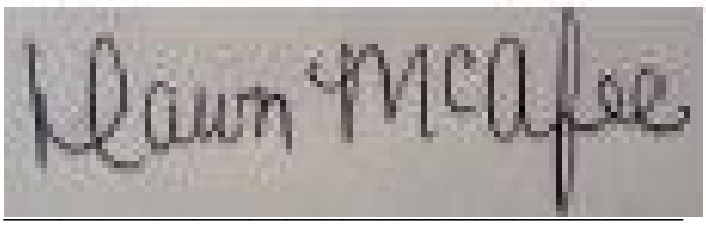

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EXHIBIT B

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

CITY OF HOUSTON'S
RESPONSES TO PLAINTIFFS' REQUESTS FOR ADMISSION

TO: Plaintiffs Landscape Consultants of Texas, Inc. and Metropolitan Landscape Management, Inc., by and through their counsel of record.

Defendant City of Houston, Texas ("Defendant" or "the City") submits this as its Responses to Plaintiffs' Requests for Admission.

-signatures follow-

Respectfully submitted,

By: */s/ Ben Stephens*
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ATTORNEYS FOR THE CITY OF HOUSTON

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of May, 2024, a true and correct copy of Defendant City of Houston, Texas' Responses to Plaintiffs' Request for Admission was served on counsel of record by email.

/s/ Ben Stephens
Ben Stephens

REQUESTS FOR ADMISSION

REQUEST FOR ADMISSION NO. 1:

Admit that the City has not disciplined, terminated, or otherwise sanctioned any employee or official for discrimination in the award of public contracts from January 1, 2019, to present.

OBJECTIONS:

This request concerns matters and seeks information not relevant to the claims and defenses of the parties, not proportional to the needs of the case, and is overbroad.

RESPONSE:

Subject to and without waiving the foregoing, admit.

REQUEST FOR ADMISSION NO. 2:

Admit that the City has identified no prime contract awards based on intentional discrimination against M/WBE bidders from January 1, 2019, to present.

OBJECTIONS:

This request concerns matters and seeks information not relevant to the claims and defenses of the parties, not proportional to the needs of the case, and is overbroad.

RESPONSE:

Subject to and without waiving the foregoing, admit.

REQUEST FOR ADMISSION NO. 3:

Admit that the City has specific procurement policies that forbid discrimination in awarding public contracts.

RESPONSE: Admit.

REQUEST FOR ADMISSION NO. 4:

Admit that the City has identified no instances of a prime contractor discriminating against M/WBE subcontractors on a City contract from January 1, 2019, to present.

OBJECTIONS:

This request concerns matters and seeks information not relevant to the claims and defenses of the parties, not proportional to the needs of the case, and is overbroad. Additionally, the terms "instances" and "discriminating" are vague, overbroad, and ambiguous.

RESPONSE:

Subject to and without waiving the foregoing, the City lacks sufficient information to admit or deny this request.

REQUEST FOR ADMISSION NO. 5:

Admit that the City has not debarred or sanctioned a public contractor for discrimination against M/WBE subcontractors from January 1, 2019, to present.

OBJECTIONS:

This request concerns matters and seeks information not relevant to the claims and defenses of the parties, not proportional to the needs of the case, and overbroad. Additionally, the terms "debarred" and "sanctioned" are vague, overbroad, and ambiguous.

RESPONSE:

Subject to and without waiving the foregoing, the City admits that no public contractor has been debarred.

REQUEST FOR ADMISSION NO. 6:

Admit that the City has not adopted any study, report, or research that identifies specific instances of discrimination in procurement or public contracting from January 1, 2019, to present.

RESPONSE:

Subject to and without waiving the foregoing, the City admits it has not adopted any study, report, or research that identifies specific instances of discrimination in procurement or public contracting from January 1, 2019, to present. The City denies, however, that such a finding is necessary in evaluating the constitutionality of its MWBE program.

REQUEST FOR ADMISSION NO. 7:

Admit that from January 1, 2019, to present, the City has awarded the majority of its public construction contract dollars to the lowest responsive and responsible bidder through a competitive procurement process.

OBJECTIONS:

This request concerns matters and seeks information not relevant to the claims and defenses of the parties, not proportional to the needs of the case, and is overbroad. Furthermore, the City objects that the competitive procurement process is not always based on a "lowest responsive and responsible bidder" standard, and bidders may or may not be awarded a contract for any number of reasons. Accordingly, this request is confusingly phrased and is not capable of being answered as written.

RESPONSE:

Subject to and without waiving the foregoing, the City is unable to admit or deny this request as written.

REQUEST FOR ADMISSION NO. 8:

Admit that since at least January 1, 2019, to present, City contracts valued at $50,000.00 or more must be approved by the Houston City Council.

RESPONSE:

Admit.

REQUEST FOR ADMISSION NO. 9:

Admit that the definition of "minority person" in Houston Code §15-82 is based on the federal definition of "socially disadvantaged individuals" as used by federal agencies such as the U.S. Small Business Administration (13 C.F.R. 124.103(b)(1)) or U.S. Department of Transportation (49 C.F.R. 26.67(a)(1)).

OBJECTIONS:

The City objects that this request seeks admission of a legal conclusion.

RESPONSE:

Subject to the foregoing objection, this request cannot be admitted or denied.

REQUEST FOR ADMISSION NO. 10:

Admit that the definition of "minority person" in Houston Code §15-82 is not based on specific data from the Houston metropolitan area.

RESPONSE:

Admit.

REQUEST FOR ADMISSION NO. 11:

Admit that Houston Code §15-82 includes persons who originate from five continents and dozens of countries.

OBJECTIONS:

This request concerns matters and seeks information not relevant to the claims and defenses of the parties, not proportional to the needs of the case, and is overbroad.

RESPONSE:

This request is not capable of being admitted or denied with certainty, and accordingly is denied.

REQUEST FOR ADMISSION NO. 12:

Admit that the City cannot identify for each of the countries encompassed or listed in Houston Code § 15-82 individuals who have suffered discrimination by the City of Houston in its procurement process or awards since January 1, 2019.

OBJECTIONS:

This request concerns matters and seeks information not relevant to the claims and defenses of the parties, and not proportional to the needs of the case, and is overbroad.

RESPONSE:

Subject to and without waiving the foregoing, the City admits it has not identified for each of the countries encompassed or listed in Houston Code § 15-82 individuals who have suffered discrimination by the City of Houston in its procurement process or awards since January 1, 2019. The City denies, however, that such a finding is necessary in evaluating the constitutionality of its programs.

REQUEST FOR ADMISSION NO. 13:

Admit that for purposes of MBE certification through the City of Houston, it is irrelevant whether an applicant is owned by a recent immigrant to the United States or an individual who has been a United States citizen for decades.

RESPONSE:

Admit.

REQUEST FOR ADMISSION NO. 14:

Admit that when determining whether to certify a M/WBE applicant, the City does not require evidence that an applicant has experienced previous discrimination.

RESPONSE:

Admit.

REQUEST FOR ADMISSION NO. 15:

Admit that the MWSBE program disadvantages non-M/WBE certified firms that the City has never found to have engaged in discriminatory business practices.

RESPONSE:

Deny.

REQUEST FOR ADMISSION NO. 16:

Admit that businesses interested in bidding on contracts offered by the City must take specific actions to compete for those contracts.

RESPONSE:

Admit.

REQUEST FOR ADMISSION NO. 17:

Admit that City contracts are not awarded based on a random selection drawn from all businesses in any particular geographic area.

RESPONSE:

Admit.

REQUEST FOR ADMISSION NO. 18:

Admit that from January 1, 2019, to present, City contracts have been awarded to businesses which are not located in the City of Houston, Harris County, or the Houston Metropolitan area.

RESPONSE:

Admit.

REQUEST FOR ADMISSION NO. 19:

Admit that from January 1, 2019, to present, at least one City contract has been awarded to stockholder-owned corporations which cannot be classified as M/WBEs or non-M/WBEs.

OBJECTIONS:

This request concerns matters and seeks information not relevant to the claims and defenses of the parties, and not proportional to the needs of the case.

RESPONSE:

The City lacks sufficient information to answer this request, and accordingly denies the request.

REQUEST FOR ADMISSION NO. 20:

Admit that the City has not identified any specific Constitutional or statutory violations related to its public contracting or procurement process or awards from January 1, 2019, to present.

RESPONSE:

Admit.

REQUEST FOR ADMISSION NO. 21:

Admit that the MWSBE Program does not remedy past, specific instances of discrimination that violate Constitutional or statutory requirements.

OBJECTIONS:

This request is vague and ambiguous. Strong evidence exists to evidence past racial and/or gender discrimination in public contracting.

RESPONSE:

This request cannot be admitted or denied as written.

REQUEST FOR ADMISSION NO. 22:

Admit that the City has not formally adopted the 2020 Harris County disparity study as the basis for a compelling interest of its MWSBE program.

RESPONSE:

Admit.

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' SUMMARY OF OPPOSITION TO DEFENDANT CITY OF HOUSTON'S MOTION FOR SUMMARY JUDGMENT

SUMMARY OF ARGUMENT

Defendant City of Houston is not entitled to summary judgment as a matter of law and its Motion for Summary Judgment should be dismissed.

I. Plaintiffs Have Article III Standing

Houston wrongly contends that Plaintiffs cannot establish the first prong of Article III standing, the injury in fact, because its MWSBE program does not disadvantage Plaintiffs. Dkt. 71 at 16–18, 20–22. Houston misunderstands the nature of Plaintiffs' injury; in an equal protection challenge to a race-based public contracting program, the "'injury in fact' is the inability to compete on an equal footing in the bidding process, not the loss of a contract." *N.E. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993); *see also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995); *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 702, 719 (2007). Houston's arguments to the contrary—for example, that Plaintiffs are not completely excluded from bidding, or that there is no mandatory penalty for failure to meeting MWSBE contract goals—do not change the fact that Houston's racially discriminatory MWSBE program prevents Plaintiffs from bidding on an equal basis. Dkt. 71 at 16–17. *That* is Plaintiffs' injury in fact, and it is sufficient for Article III standing. *N.E. Fla.*, 508 U.S. at 666; *W.H. Scott Const. Co. v. City of Jackson*, 199 F.3d 206, 212 (5th Cir. 1999).

Having established an injury in fact, Houston cannot limit Plaintiffs' standing to challenging only "other services" contracts, rather than the MWSBE program as a whole. Dkt. 71 at 18–19. Houston presents no evidence that the city ordinance on which the MWSBE program is based is severable or that it administers its MWSBE policy differently for "other services" contracts as opposed to professional services, construction, or goods contracts. Further, Plaintiffs seek relief from the MWSBE program's racial classifications. Dkt. 1 ¶¶ 47–55. These racial classifications determine which business owners are eligible to become certified as a minority business enterprise and enjoy a racial preference when bidding on Houston public contracts. Houston Code § 15-82. The administrative category Houston places landscaping companies in for purposes of bidding is irrelevant in this challenge to Houston's use of racial classifications in its MWSBE program.

II. Houston's MWSBE Program Fails Strict Scrutiny

Houston does not argue that its current MWSBE ordinance and program are constitutional. Instead, it relies entirely on an unadopted, draft disparity study that plays no role in the creation or administration of the program that Plaintiffs challenge. Dkt. 71 at 25–38. Plaintiffs' accompanying Motion to Strike explains why this Court should not consider this unadopted, draft study. Without it, Houston has no evidence of a compelling interest to support its race-based public contracting

program, and cannot show that the program is narrowly tailored to accomplish any compelling interest.

Houston presents no evidence of "specific, identified instances of past discrimination that violated the Constitution or a statute" because it admits that it is not aware of any racial discrimination within its MWSBE program. *Students for Fair Admissions v. President and Fellows of Harvard Coll.*, 600 U.S. 181, 207 (2023) (*SFFA*). With no evidence of discrimination to remedy, Houston has no compelling interest in operating a race-conscious public contracting program.

Houston's narrow tailoring arguments are equally unfounded. It makes no attempt to show any "serious, good faith consideration of workable race-neutral alternatives" to the MWSBE program, and relies largely on the unadopted, draft disparity study that should not be considered by this Court. *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003); Dkt. 71 at 34–38. Houston fails to prove that the MWSBE program Houston *currently* operates, and which Plaintiffs challenge, is narrowly tailored.

CONCLUSION

For the foregoing reasons, Houston's motion for summary judgment should be denied and Plaintiffs' motion for summary judgment, Dkt. 68, should be granted.

DATED: December 20, 2024.

Respectfully submitted,

s/ Erin E. Wilcox

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**Pro Hac Vice*

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2024, I served this document via the Court's electronic filing system to Defendants' counsel of record as follows:

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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 **[PROPOSED] ORDER**

This matter comes before the Court on Defendant City of Houston's Motion for Summary Judgment. For the reasons stated herein, it is hereby

ORDERED that Defendant City of Houston's Motion for Summary Judgment is DENIED.

Dated: _____

_____
Hon. David Hittner
UNITED STATES DISTRICT JUDGE