IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

AEROSPACE SOLUTIONS, LLC,

Plaintiff,

v.

GLENN A. HEGAR, JR., in his official capacity as Texas Comptroller of Public Accounts,

Defendants.

Civil Action No. 1:24-cv-1383

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS

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INTRODUCTION

Plaintiff Aerospace Solutions (Aerospace) challenges Texas' Historically Underutilized Business (HUB) program—a state-run contracting scheme that imposes unconstitutional racial preferences. Though couched in the language of opportunity, the program imposes real, unlawful burdens on businesses like Aerospace, forcing them to either surrender substantial portions of state contracts to HUB-certified subcontractors—defined in relevant part by race—or navigate an onerous, discretionary process to justify keeping the work in-house.

Texas insists this is all voluntary. But both the law and the facts tell another story. The HUB program penalizes non-HUBs through a regime of economic coercion, subjective compliance hurdles, and unequal treatment. It chills participation by design—and that is exactly what happened here. Aerospace was ready and able to bid, but the race-based barriers built into the program deterred it from competing on fair terms.

The State now tries to sidestep accountability by arguing that Aerospace lacks standing because it didn't formally submit a bid. That argument runs headlong into binding precedent. *Ne. Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 666 (1993). So does its claim that § 1981 offers no protection unless a contract is ultimately denied. *Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 476 (2006). Neither the Constitution nor federal civil rights law requires a plaintiff to subject itself to discriminatory government behavior to assert a claim.

Aerospace has alleged exactly the kind of injury these laws were enacted to prevent. For the reasons set forth below, the State's motion should be denied.

STATEMENT OF FACTS

A. The HUB Statutory and Regulatory Scheme

Texas Government Code Chapter 2161 mandates that state agencies implement contracting practices designed to increase participation by Historically Underutilized Businesses (HUBs). The goal of this program is to "promote full and equal business opportunities for all businesses in an effort to remedy disparity in state procurement and contracting in accordance with the HUB utilization goals specified in the State of Texas Disparity Study." 34 Tex. Admin. Code § 20.281. The most recent disparity study was published well over a decade ago. Complaint, Doc. 1 ¶ 13.

Texas sets statewide HUB utilization goals that apply to all state contracts. The statewide HUB quotas are: 11.2% for heavy construction other than building contracts; 21.1% for all building construction, including general contractors and operative builders contracts; 32.9% for all special trade construction contracts; 23.7% for all professional services contracts; 26.0% for all other services contracts; and 21.1% for all commodities contracts. 34 Tex. Admin. Code § 20.284(b). State agencies must establish HUB utilization goals for each procurement category, with the statewide HUB utilization goals as the "starting point" for establishing agency-specific goals. *Id.* § 20.284(c).

The HUB classification is inherently race-conscious. To qualify, a business must be owned, operated, and controlled by "economically disadvantaged persons." *See* Tex. Gov't Code § 2161.001(2). But the statute does not require any showing of actual economic disadvantage. Instead, it presumes disadvantage based solely on race, ethnicity, or gender—thereby granting contracting preferences to members of certain minority groups by definition. *Id.* § 2161.001(3). The HUB program does not require HUB applicants to attest to suffering any identified instance of racial discrimination. Doc. 1 ¶¶ 16, 20.

Under 34 Tex. Admin. Code § 20.285, agencies demand the submission of a HUB Subcontracting Plan (HSP) for contracts of $100,000 or more when subcontracting is probable—as determined by the agency itself. The HSP must either (1) meet the state's numeric HUB utilization goals using HUB subcontractors, (2) document good faith efforts to do so, or (3) provide a detailed explanation of how the contractor intends to self-perform by fulfilling the HUB utilization goals with its own employees—an option only possible for contractors that are certified HUBs. *Id.* Bids that do not include a HUB subcontracting plan *must be* rejected. Tex. Gov't Code § 2161.252; 34 Tex. Admin. Code § 20.285(b)(3).

B. Plaintiff Aerospace Solutions

Aerospace provides staffing services to the aerospace and transportation industries, and would like to expand into public sector contracting by competing for Texas state contracts. Doc. 1 ¶¶ 31-32. Yet despite identifying state contracts it is qualified, willing, and able to bid on, the HUB program's significant HUB utilization

goal—like the 26% HUB utilization goal attached to a 2023 Texas Department of Transportation contract—subjects Aerospace to unconstitutional criteria. Aerospace is not a HUB; thus, it is unable to compete on an equal footing due to the race of its owners. *Id* ¶¶ 38-39.

STANDARD OF REVIEW

When evaluating a motion to dismiss under Rule 12(b)(1), this Court must construe the complaint broadly and liberally and will accept as true all well-pleaded factual allegations. *Gaubert v. United States*, 885 F.2d 1284, 1285 (5th Cir. 1989). To establish standing at the pleading stage, a plaintiff need only allege facts that, if true, would establish an injury that is concrete, particularized, and either actual or imminent. The court must not demand evidentiary proof of injury at this early stage. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992); *Cruz v. Abbott*, 849 F.3d 594, 598 (5th Cir. 2017).

Under Rule 12(b)(6), the Court must determine whether the plaintiff has stated a claim upon which relief may be granted. A complaint should not be dismissed if it contains "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). The Court must accept all well-pleaded factual allegations as true and view them in the light most favorable to the plaintiff. *Id.* Dismissal is not appropriate merely because the plaintiff's ultimate likelihood of success appears uncertain. At this stage, the question is whether Aerospace's allegations—taken as true—plausibly suggest a legal entitlement to relief under the Constitution and § 1981. They clearly do.

ARGUMENT

I. This Court Has Jurisdiction over Aerospace's Equal Protection Claim

Aerospace has Article III standing to bring its equal protection claim against the State. To establish standing, a plaintiff must demonstrate: (1) a concrete and particularized injury in fact; (2) a causal connection between the defendant's actions and plaintiffs' injury; and, (3) a likelihood that the injury would be redressed by a favorable ruling. *Lujan*, 504 U.S. at 560. Based on a fundamentally incorrect interpretation of the HUB program's statute and regulations, Defendant has contested all three elements. Def. Mot. to Dismiss, Doc. 18 at 17. However, Aerospace's Complaint meets the standard to establish standing.

Aerospace alleges that it is ready, willing, and able to compete for state contracts, but that it faces an unfair and unconstitutional disadvantage on the basis of race. Doc. 1 ¶¶ 46-47, 56. This injures Aerospace because the challenged HUB program burdens its ability to compete for contracts for which it is ready and able to compete. *Id.* That injury is directly traceable to Defendant, who is tasked with enforcing the challenged statute and regulations. *Id.* ¶ 3. A favorable decision would redress Aerospace's alleged injury because it would allow Aerospace to compete for state contracts without being subject to unconstitutional criteria. Thus, Aerospace has standing to bring its claims.

A. Plaintiff Has Alleged an Injury in Fact

In an equal protection challenge to a race-conscious contracting scheme like Texas' HUB program, the injury is not losing a contract—the injury is being denied

the chance to compete on equal terms. As the Supreme Court made clear in *Northeastern Florida Chapter of Associated General Contractors v. City of Jacksonville*, "[t]he 'injury in fact'… is the denial of equal treatment resulting from the imposition of [a] barrier, not the ultimate inability to obtain the benefit." 508 U.S. at 666. A plaintiff need not show it would have won the contract, only that the rules rigged the game before it began. That principle applies with full force here. Aerospace was ready and able to bid on a specific TxDOT contract, but the HUB program forced it into an unfair choice: subcontract a quarter of the work to race- and gender-qualified firms, or risk rejection for failing to meet the State's goals. *See* Doc. 1 ¶¶ 38-45. That kind of coercive structure, on its face, inflicts Article III injury. *See Davis v. FEC*, 554 U.S. 724, 734 (2008) (statute causes injury when it forces a person to forgo a benefit enjoyed by another party).

The Fifth Circuit agrees. In *W.H. Scott Construction Co. v. City of Jackson*, the court held that a contractor challenging a minority set-aside policy need not prove lost business—only that it was forced to compete under unequal terms. 199 F.3d 206, 214 n.6 (5th Cir. 1999) ("[T]he [government policies] make it more difficult for members of one group to obtain a benefit than it is for members of another.") (citing *Jacksonville*). Similarly, in *Energy Management Corp. v. City of Shreveport*, 397 F.3d 297, 301-02 (5th Cir. 2005), the court upheld standing where a city policy deterred the plaintiff from seeking permits, even though none had yet been denied.

Aerospace alleges precisely that kind of injury. It has described in detail the policy barrier that deterred it before and the economic disadvantage it faces as a non-

HUB entity today. That is more than enough. As *Gratz v. Bollinger* reaffirmed, a plaintiff suffers a cognizable injury when a race-based policy dissuades participation, even if they never formally apply. 539 U.S. 244, 262 (2003). The only requirement is that the plaintiff be "able and ready" to bid but is blocked by discriminatory rules. *W.H. Scott*, 199 F.3d at 212. That is exactly what Aerospace has pleaded.

The State claims that Aerospace has provided only a "blanket statement" that Aerospace is qualified, willing, and able to bid on state contracts with no allegations to suggest Aerospace could actually bid on, win, and fulfill state contracts. Def. Mot. to Dismiss, Doc. 18 at 20. That's simply wrong. As alleged, Aerospace brings deep experience in staffing engineering, technical, and production roles in the private sector. Doc. 1 ¶ 31. Its Vice President for Public Sector—who handles bid submissions for affiliated companies—stands ready to do the same for Aerospace. *Id.* ¶ 36. Those affiliated companies have already secured public contracts. *Id.* ¶¶ 33-34. Aerospace has made clear it wants to bring its private-sector expertise to state contracting. *Id.* ¶ 32. Taken as true—as they must be at this stage—these facts easily show Aerospace is qualified, willing, and able to compete in a fair and constitutional system. Aerospace also specifically alleged that it refrained from bidding on a past TxDOT contract due to the HUB goals—which would have required it to subcontract approximately 26% of the value to HUBs. Doc. 1 ¶¶ 38-41. These allegations support Aerospace's contention that it is willing and able to bid on and perform public contracts.

B. Aerospace's Well-Pleaded Injury Is Traceable to Defendant and Redressable by a Favorable Ruling

Defendant also argues that Aerospace cannot show traceability or redressability, asserting that the harm complained of is too attenuated from the challenged regulation and that any deterrence from bidding was Aerospace's own choice. Def. Mot. to Dismiss, Doc. 18 at 19-20. This argument fails both factually and legally. Standing requires that the alleged injury only be traceable to the challenged conduct of the defendant—not to a third party or independent intervening cause. This is a less stringent analysis than "proximate causation" in other legal contexts—rather, a plaintiff need only show that the asserted injury is "fairly traceable to the defendant's conduct." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 n.6 (2014); *Bennett v. Spear*, 520 U.S. 154, 168 (1997) (A plaintiff need not show that "the defendant's actions are the very last step in the chain of causation.").

Aerospace easily clears this low bar. It has specifically alleged that the HUB Program's racial classification regime is what deterred it from submitting a bid. Doc. 1 ¶¶ 39-42. Aerospace does not complain of general market conditions or business strategy; it points directly to the State's imposition of subcontracting goals with race- and gender-based eligibility criteria, enforced through a bureaucratic system that treats non-HUBs as presumptively deficient unless they surrender contract value or justify why they won't. *Id.* That is textbook traceability.

Redressability likewise poses no barrier. Aerospace seeks declaratory and injunctive relief that would eliminate the race-based elements of the HUB Program and restore neutral access to public contracts. If granted, that relief would remove

the precise disincentives that chilled Aerospace's participation in the past TxDOT contract. The Fifth Circuit has repeatedly held that a plaintiff seeking to remove an unconstitutional barrier to participation in a government program satisfies the redressability requirement. *See Tex. Democratic Party v. Abbott*, 978 F.3d 168, 178 (5th Cir. 2020) (relief is redressable when a favorable decision will relieve a discrete injury to the plaintiff caused at least *in part* by the challenged provision). Defendant's claim that Aerospace's choice not to bid severs the causal chain is flatly contradicted by binding precedent. In *Jacksonville*, 508 U.S. at 666, the Supreme Court made clear: standing exists even when a plaintiff is *deterred* by a discriminatory barrier—because the injury lies in being forced to compete on unequal terms. *Gratz v. Bollinger*, 539 U.S. at 262, reaffirmed the same principle: a plaintiff need not formally apply to suffer harm from a race-based hurdle. That is precisely what Aerospace alleges: it was qualified and interested in the contract, but the race-based criteria embedded in the HUB Program made participation unequal and economically irrational. Doc. 1 ¶¶ 39-42.

II. Plaintiff Has Standing Under 42 U.S.C. § 1981

Defendant argues that Aerospace's § 1981 claim fails because it was not "actually prevented" from contracting and merely alleges deterrence. Doc. 18 at 16-17. Aerospace is not required to have an existing contractual relationship with the state to bring a § 1981 claim, as Texas contends. Doc. 18 at 16 ("To be clear, Aerospace does not allege that it has ever bid on a contract with a Texas state agency."). The Supreme Court has confirmed that § 1981 protects the right to "make and enforce"

contracts—including the opportunity to compete for contracts on equal terms. *Domino's Pizza*, 546 U.S. at 476 (a prospective contractual relationship "need not already exist, because § 1981 protects the would-be contractor along with those who already have made contracts"). The Fifth Circuit has similarly held that § 1981 reaches discriminatory interference with pre-contract formation conduct that impedes fair competition for a prospective opportunity. *Body by Cook, Inc. v. State Farm Mutual Auto. Ins.*, 869 F.3d 381, 387-88 (5th Cir. 2017) ("[B]ecause [plaintiff] does not allege an existing contract, it must plead facts that plausibly demonstrate that [defendant's] discrimination concerned a prospective contract.").

Aerospace's § 1981 claim is not speculative, as Texas contends. Doc. 18 at 16. It is not speculative that Aerospace is qualified, willing, and able to bid on state contracts—Aerospace makes this exact allegation in its Complaint. Doc. 1 ¶¶ 38-45. It is not speculative that the HUB program discriminates against Aerospace in every state contract it will bid on—Aerospace alleges that per state law, bids that do not include a HUB subcontracting plan must be rejected, and that Aerospace must subcontract with a HUB to prevent its bids from being rejected. *Id.* ¶¶ 24, 40. It is not a "'mere possibility' that the HUB Program 'would interfere' with Aerospace's right to contract in the future," Doc. 18 at 16, it is an absolute certainty. Aerospace identified a contract that it would have bid on, but for the HUB program's racial discrimination. Doc. 1 ¶¶ 39-40. The HUB program's racial classifications mean Aerospace will be racially discriminated against in every future contract it wants to bid for with the State, simply because of the race of its owners. Texas cites no

authority requiring Aerospace to engage in futile actions to plead a § 1981 claim, and this Court should not impose that requirement on Aerospace.

The cases cited by Texas do not require otherwise. To start, they each apply only in the retail context, a far cry from public contracting. *Morris v. Dillard Department Stores, Inc.*, was brought by a customer detained by a department store for shoplifting. 277 F.3d 743, 752 (5th Cir. 2001). Likewise, *Arguello v. Conoco, Inc.*, 330 F.3d 355 (5th Cir. 2003), concerned discrimination during a private retail interaction, not a public procurement scheme that embeds racial classifications into eligibility rules. In *Arguello,* the Fifth Circuit emphasized that "[t]he law in this circuit for § 1981 claims in the *retail* context is established by *Morris*." *Id.* at 358 (emphasis in original). In *Morris* itself, the Court specifically noted that there are particular challenges in the retail context not present in other types of claims like the one asserted published Illinois district court case is equally unhelpful. Doc. 18 at 17. Buried in a string citation of retail lawsuits in *Morris*, the Fifth Circuit quotes *Henderson v. Jewel Food Stores, Inc.*, as holding that

> "a § 1981 claim must allege that the plaintiff was actually prevented, and not merely deterred, from making a purchase or receiving service after attempting to do so," and finding a plaintiff's allegation sufficient to sustain a § 1981 claim where the "plaintiff was midstream in the process of making a contract for [a] goods purchase" at a cashier at the time an officer arrested him.

Morris, 277 F.3d at 752 (quoting *Henderson*, No. 1:96-CV-3666, 1996 WL 617165, at *3-4 (N.D. Ill. Oct. 23, 1996). These circumstances could not be more different than those alleged in Aerospace's Complaint.

Aerospace's claim is far from speculative. It alleges a concrete, ongoing barrier to specific contract opportunities and a credible threat of repeated harm in future procurements, as long as the HUB program remains in place. Doc. 1 ¶ 32. The Fifth Circuit has made clear that when a plaintiff identifies specific contracts it was prevented from pursuing due to race-based policies, § 1981 applies. *See Body by Cook*, 869 F.3d at 387. Aerospace's allegations—that the HUB program requires race-conscious subcontracting or a self-performance option available only to HUBs—plausibly state a claim under § 1981. Defendant's motion should be denied.

III. The HUB Program Violates Aerospace's Right to Equal Protection

A. Aerospace Properly Pleads a Prospective Equal Protection Claim

Government contracting programs that employ race-based classifications are subject to strict scrutiny. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989). To satisfy this "daunting two-step examination," a statute's racial discrimination must (1) further a compelling interest, (2) in a manner that is "'narrowly tailored'—meaning 'necessary'—to achieve that interest." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 206-07 (2023) (*SFFA*) (quoting *Fisher v. Univ. of Tex.*, 570 U.S. 297, 311-12 (2013)).

Texas has no compelling interest justifying the racially discriminatory HUB program. Under current Supreme Court precedent, only two interests are sufficiently compelling to permit the government to treat individuals differently based on race: (1) "remediating specific, identified instances of past discrimination that violated the Constitution or a statute," and (2) "avoiding imminent and serious risks to human safety in prisons." *SFFA*, 600 U.S. at 207. Aerospace alleges that the HUB program's

stated purpose to "promote full and equal business opportunities for all businesses in an effort to remedy disparity in state procurement and contracting in accordance with the HUB utilization goals specified in the State of Texas Disparity Study" does not satisfy the high bar for compelling interest and that Texas lacks a strong basis in evidence that the HUB program's race-based utilization goals are related to remedying the past or present effects of racial discrimination in any particular industry or in the state. Doc. 1 ¶¶ 12-13, 47-52.

The HUB program is also not narrowly tailored, as it must be to survive strict scrutiny. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). Aerospace alleges that the HUB program defines an "economically disadvantaged person" using broad racial categories and does not require HUB applicants to attest to suffering any identified instance of racial discrimination. Doc. 1 ¶¶ 16, 20; *see also J.A. Croson*, 488 U.S. at 506 ("gross overinclusiveness" of contracting program's racial preference "strongly impugns" its claim of remedial motivation and narrow tailoring); *Ultima Servs. Corp. v. U.S. Dep't of Agric.*, 683 F.Supp.3d 745, 772 (E.D. Tenn. 2023) (presumption of economic disadvantage applied to all members of a racial or ethnic group is overinclusive). Aerospace's equal protection claim is properly pleaded and should proceed.

B. Texas' Arguments Are Unpersuasive

Aerospace does not "misrepresent" the HUB statute and regulations, nor does it couch legal conclusions as factual allegations. Doc. 18 at 6-7. Instead, perhaps in an attempt to distract from the difficulty of defending a facially unconstitutional

public contracting program, Texas misinterprets the law in such a way as to make it almost unrecognizable. Essentially, Texas asks this Court to agree with two nonsensical positions: (1) that non-HUBs can fulfill HUB utilization goals; and (2) that the HUB program is essentially meaningless. This Court should decline on both counts and Texas' motion should be denied.

i. Aerospace cannot satisfy HUB utilization goals without subcontracting

Texas' most egregious interpretive gymnastics are its contentions that "neither the [HUB] statute nor the associated rules require a respondent to fulfill any portion of the HUB utilization goals," and that "Aerospace was not required to subcontract with a HUB in order to keep its bid from being rejected." Doc. 18 at 9, 11. This is flatly incorrect. As Aerospace alleges in its Complaint, Tex. Gov't Code § 2161.252 and 34 Tex. Admin. Code § 20.285(b)(3) both clearly state that bids which do not include a HUB subcontracting plan must be rejected. Doc. 1 ¶ 24. If the threat of automatic rejection is not a "requirement" to fulfill a HUB utilization goal, it's difficult to imagine what is.

Texas also inexplicably contends that there is no requirement for a bidder "that intends to self-perform a contract to be a HUB or to be in any way associated with a HUB." Doc. 18 at 9. In other words, Texas asks this Court to agree that Aerospace (which is not a HUB) can itself fulfill a contract's HUB utilization goal (which, by definition, must be performed by a HUB)—even though (again) Aerospace is not a HUB. This makes no sense. What's more, if Aerospace *did* attempt to self-perform instead of subcontract with a HUB, it could be sanctioned for noncompliance with the

HUB subcontracting plan, including debarment from state contracts for up to five years. 34 Tex. Admin. Code § 20.285(h)(4).

Texas is also incorrect that "Plaintiff simply assumes certified HUBs are not subject to the same requirements as Aerospace" when complying with HUB subcontracting plans. Doc. 18 at 12. Aerospace does not assume this; it is state law. 34 Tex. Admin. Code § 20.285(d). It is immaterial that both HUBs and non-HUBs must submit a HUB subcontracting plan. Doc. 18 at 12-13. Submitting the HUB subcontracting plan is not the differential treatment Aerospace complains of; *fulfilling* the HUB subcontracting plan is. Doc. 1 ¶ 40. As discussed above, *supra* page 4, Aerospace is not a HUB and so cannot satisfy a HUB utilization goal without subcontracting with a certified HUB. A certified HUB competitor, however, may self-perform under state law. 34 Tex. Admin. Code § 20.285(d)(4). Texas cites no law or case to the contrary. Nor could it; the Fifth Circuit has already rejected Texas' argument that the ability to self-perform a minority contracting goal does not disadvantage nonminority contractors. In *W.H. Scott*, the court held that even absent express statutory language, it would be "nonsensical" to interpret a disadvantaged business enterprise (DBE) statute as precluding a DBE contractor from satisfying DBE participation goals by "keeping the requisite percentage of work for itself." 199 F.3d at 214-15. The court went on to recognize that if a DBE contractor self-performed, "it could satisfy the participation goal and avoid both a loss of profits to subcontractors and the time and expense of complying with the 'good faith'

requirements." *Id.* at 215. Non-DBE contractors "obviously do not have this option" placing them at a competitive disadvantage with DBE contractors. *Id.*

Aerospace cannot, as Texas contends, "submit its response and win the contract regardless of whether it is a HUB." Doc. 18 at 11. Under state law, it matters very much whether a bidder is a HUB; the only way for non-HUBs like Aerospace to win a contract is to subcontract with a HUB. Tex. Gov't Code § 2161.252; 34 Tex. Admin. Code § 20.285(b)(3) ("A state agency shall reject any response that does not include a completed and timely HUB subcontracting plan due to a material failure to comply with Government Code, §2161.252(b).").

Moreover, if a non-HUB like Aerospace could satisfy a contract's HUB utilization goal, the HUB program would be self-defeating. It would be impossible for the HUB program to achieve its stated purpose of "encourage[ing] the use of historically underutilized businesses (HUBs) by state agencies" or to "remedy disparity in state procurement and contracting in accordance with the HUB utilization goals specified in the State of Texas Disparity Study." 34 Tex. Admin. Code § 20.281. Even setting aside the obvious logical absurdities of Texas' argument, it is well-established that "[a] construction of a statute leading to unjust or absurd consequences should be avoided." *Ecee, Inc. v. Fed. Energy Regulatory Comm'n*, 611 F.2d 554, 564 (5th Cir. 1980) (quoting *Quinn v. Butz*, 510 F.2d 743, 753 (D.C. Cir. 1975)); *see also Almendarez v. Barrett-Fisher Co.*, 762 F.2d 1275, 1278 (5th Cir. 1985) (literal statutory construction is inappropriate if it would produce a result in conflict with the legislative purpose clearly manifested in an entire statute); *Forsyth v. Barr*,

19 F.3d 1527, 1544 (5th Cir. 1994) (refusing to read statute in a manner that "compels an absurd result"). The HUB program was intended to embed racial preferences into Texas' state contracting program, and Defendant's contrary interpretation must be disregarded.

ii. The HUB Program imposes substantive burdens on bidders

Texas next attempts to brush off the entire HUB program by arguing that its goals are aspirational, with state law requiring the comptroller to merely "encourage" state agencies to "make a good faith effort"[1] to contract with HUBs. Doc. 18 at 7-8. The existence of the HUB program itself, which in fiscal year 2023 alone resulted in $3.75 billion dollars in state contracts awarded to HUBs, speaks to more than just encouragement. Doc. 1 ¶ 4 & n.2. Nor do state agencies have discretion in determining whether to participate in the HUB program; HUB regulations mandate that for every potential contract with an expected value of over $100K, the agency "shall" determine whether subcontracting opportunities are probable under the contract and if so, the agency "shall" require a HUB subcontracting plan with each bid response or else be rejected. 34 Tex. Admin. Code § 20.285(a), (b)(1). The HUB program mandates agency staffing; every state agency with a biennial budget exceeding $10 million is required to designate a staff member to serve as the agency's HUB coordinator. Tex. Gov't Code § 2161.062(e). Also arguing against Texas' aspirational argument is the strict

[1] "Good faith effort" is a term of art in public contracting; it does not mean simply trying one's best. Failure to demonstrate requisite good faith efforts almost always results in sanctions. In Texas state contracting, a contractor that fails to demonstrate sufficient good faith efforts to comply with a HUB subcontracting plan may be barred from further contracting opportunities. Tex. Gov't Code § 2161.253.

oversight of this program by the state legislature; twice yearly, the comptroller "shall" prepare and submit a report including the total dollar amount of payments made by each state agency, the total number of HUBs paid by each state agency, and the total number of contracts awarded to HUBs by each state agency. 34 Tex. Admin. Code § 20.287(e)-(f). The report "shall" categorize each HUB by "sex, race, and ethnicity," as well as how it qualifies for HUB certification. Tex. Gov't Code § 2161.125. State law also requires "random periodic monitoring of state agency compliance" with the HUB program by the comptroller and state auditor. *Id.* § 2161.123(d). Agencies have a financial incentive to comply with the HUB program requirements—annual appropriations requests must include a detailed report of agency compliance. *Id.* § 2161.127. Far from the voluntary, discretionary opportunity described by Defendant, the HUB program is a multi-billion-dollar driver of Texas' economy maintained by a mandatory bureaucratic framework.

iii. Discovery is necessary

At minimum, there is a live factual dispute regarding how the comptroller and state agencies interpret and enforce the HUB program. Even if the government's interpretation of the HUB program's statute and regulations is correct, Aerospace has alleged that state agencies discriminate in state contracts involving HUBs. Doc. 1 ¶¶ 5, 52-54. Thus, discovery is necessary. Aerospace plausibly alleges that agencies applying the HUB program treat businesses differently based on the race of its owners. Doc. 1 ¶ 47. Texas contends that the HUB program treats HUB and non-HUB businesses the same. Doc. 18 at 9-12. Dismissal at this stage, before discovery

related to these factual questions, would be premature. The Court should deny the state's motion.

CONCLUSION

For the reasons set forth above, this Court should deny Defendant's motion in its entirety.

DATED: April 16, 2025.

Respectfully submitted,

/s/ Erin E. Wilcox
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CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2025, I served this document to all counsel of record via the Court's electronic filing system.

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