No. 14-1493

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DUNNET BAY CONSTRUCTION COMPANY, an Illinois corporation,

Plaintiff - Appellant,

v.

GARY HANNIG, in his official capacity as Secretary of Transportation for the Illinois Department of Transportation, et al.,

Defendants - Appellees.

On Appeal from the United States District Court
for the Central District of Illinois
Honorable Richard Mills, District Judge

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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Identity and Interest of Amicus Curiae

Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Appellant Dunnet Bay Construction Company. All parties consent to the filing of this brief.[1]

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF is submitting this brief because it believes its public policy perspective and litigation experience in the area of racial preferences in public contracting will provide an additional viewpoint with respect to the issues presented.

PLF has extensive experience briefing legal issues that arise when the government classifies individuals on the basis of race. Of particular relevance to this case, PLF participated as amicus curiae in the two seminal United States Supreme Court cases on racial preferences in public contracting: *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). PLF also participated as amicus curiae in *Rothe Dev. Corp. v. Dep't of Def.*, 545 F.3d 1023, 1026 (Fed. Cir. 2008), where the court invalidated a federal race-conscious contracting program.

PLF believes that America's fundamental constitutional principles regarding race are based on individual rights, not group rights. Therefore, to the extent that any benefits or burdens created by the government are based on group identity,

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[1] Under Fed. R. App. P. 29(c), Amicus states no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae or its counsel made a monetary contribution to its preparation or submission.

those benefits and burdens must be subject to the strictest possible scrutiny, whether the government actor is at the federal, state, or local level. The Supreme Court commands that "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny." *Adarand*, 515 U.S. at 224. The court below denied the owners of Dunnet Bay that right. Amicus PLF urges this Court to reverse the order of the U.S. District Court for the Central District of Illinois and hold that (1) Appellant has standing to challenge the Illinois Disadvantaged Business Enterprise program, (2) the Illinois Department of Transportation exceeded the authority granted to it by federal regulations, and (3) the Illinois program violates the Equal Protection Clause of the Fourteenth Amendment.

INTRODUCTION

The Illinois Department of Transportation (IDOT) injects race, sex, and ethnicity into its public contracting decisions by requiring a percentage of dollars for federal and state funded transportation projects be awarded to African American, Hispanic American, Native American, Asian American, and women-owned firms or demonstrate "good faith efforts" to do so. *See Dunnet Bay Constr. Co. v. Hannig*, No. 10-3051, 2014 WL 552213, at *2-4 (C.D. Ill. Feb. 12, 2014) (describing IDOT's race- and sex-conscious Disadvantaged Business Enterprise (DBE) program). IDOT punishes a general contractor who fails to document strict compliance with either of these two options by rejecting his or her bid as nonresponsive, even if it is the lowest bid. 49 C.F.R. § 26.53.

Bowing to political pressure, IDOT attempted to maximize the participation of minority-owned firms for construction work on the Eisenhower Expressway so the state could boast that the work was completed by subcontractors who closely reflected the racial demographics of the area. *See Dunnet Bay Constr.*, 2014 WL 552213, at *12 (describing statements by the governor's Director of Diversity Enhancement). To ensure success, IDOT eliminated contracts worth millions of dollars that were to be offered to small businesses of all races, and replaced them with race-conscious DBE participation goals on specific contracts. By doing so, IDOT exceeded the authority granted by the DBE regulations and violated equal protection principles that require states to use race-conscious measures as a last resort. *See* 49 C.F.R. § 26.51(a) (Recipients of federal aid "must meet the maximum feasible portion of [their] overall goal by using race-neutral means of facilitating DBE participation."); *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420 (2013) (The government has the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice.). IDOT never implemented its race-neutral small business contracting program before it was replaced with race-conscious measures.

When IDOT establishes a DBE participation goal for a particular contract, as it did here, general contractors must engage in "good faith efforts" to hire subcontractors of the favored races, and ignore subcontractors of the nonfavored races. *See* 49 C.F.R. pt. 26 app. A (guidance concerning good faith efforts). In other words, the more "good faith efforts" a general contractor exhibits, the more he must discriminate on the basis of race. Dunnet Bay regularly bids for IDOT highway

construction contracts, and is certified by IDOT to bid on future contracts. When Dunnet Bay submitted the lowest responsible bid for a construction project on the Eisenhower Expressway, IDOT rejected the bid because Dunnet Bay failed to document the required level of DBE participation. IDOT accused Dunnet Bay of not engaging in sufficient good faith efforts—discriminatory conduct—to meet the race-conscious hiring goals. *Dunnet Bay Constr.*, 2014 WL 552213, at *9.

Dunnet Bay challenged IDOT's implementation of the DBE program as exceeding its authority granted under the Federal DBE regulations and violating the Fourteenth Amendment's guarantee of equal protection. The district court dismissed Dunnet Bay's equal protection claims, finding that Dunnet Bay did not have standing because it did not suffer an injury in fact. *Id.* at *30. This holding conflicts with those of other circuits that have found that a contractor who is forced to discriminate on the basis of race, and to compete in a discriminatory contracting environment, suffers an injury in fact. *See Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 660, 664-66 (1993) ("injury in fact" is the inability to compete on an equal footing in the bidding process); *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 707-08 (9th Cir. 1997) (general contractor has standing to challenge a law that forces the contractor to discriminate on the basis of race). This Court should also find that IDOT exceeded its authority under the Federal DBE regulations by implementing race-conscious DBE contract goals as the first and only effort to increase DBE participation, thereby violating the Equal Protection Clause of the Fourteenth Amendment.

ARGUMENT

I

A General Contractor Who Bids for Construction Contracts Regulated by IDOT's Discriminatory DBE Program Has Standing to Challenge That Program

Dunnet Bay originally submitted the lowest bid for Contract No. 60I57, *Dunnet Bay Constr.*, 2014 WL 552213, at *6, but IDOT rejected the bid because Dunnet Bay failed to attain the race-conscious 22% DBE hiring goal. *Id.* at *9. In other words, Dunnet Bay failed to grant enough racial preferences to ensure that it would hire the proper number of subcontractors of preferred races. Dunnet Bay brought an equal protection claim against IDOT challenging the constitutionality of such a program. But the district court held that Dunnet Bay lacked standing and dismissed the complaint.[2] *Id.* at *29. The court erred. Dunnet Bay suffered two distinct forms of injury sufficient to establish standing and raise an equal protection claim. First, Dunnet Bay suffered injury by being induced by IDOT's DBE program to discriminate against subcontractors on the basis of race. Second, Dunnet Bay suffered injury when it was denied the ability to compete on an equal basis in the bidding process.

[2] To invoke a federal court's jurisdiction, a claimant must establish standing by showing: (1) it suffered an injury in fact, (2) a causal connection between the injury and the challenged conduct, and (3) a favorable decision is likely to remedy the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The district court considered only the injury-in-fact element of standing. *Dunnet Bay Constr.*, 2014 WL 552213, at *29-30.

A. Dunnet Bay Suffers Harm Every Time It Is Pressured by IDOT to Discriminate Against Subcontractors on the Basis of Race

This Court has never addressed the issue whether a person suffers constitutional harm when forced by the government to engage in racial discrimination. But other circuits hold that a general contractor suffers a particularized injury when the government encourages him to discriminate against subcontractors on the basis of race. *Monterey Mechanical*, 125 F.3d at 707-08.

In *Monterey Mechanical*, a California statute—similar to IDOT's DBE program here—required a general contractor who received a public contract to assign a percentage of the work to subcontracting businesses owned by racial minorities and women. *Id.* at 704. Alternatively, the statute provided that the general contractor could demonstrate a "good faith" effort to achieve the required goal. *Id.* The plaintiff-contractor did not qualify as a minority- or women-owned business. *Id.* Although the plaintiff was the lowest bidder on a particular construction project, he was denied the contract because he neither achieved the statutory percentage, nor did he make a good faith effort to do so. *Id.* Like the district court below, the district court in *Monterey Mechanical* reasoned that "if the government does not discriminate against A, but requires that A discriminate against B, B has standing but A does not." *Id.* at 706. The Ninth Circuit rejected that reasoning. *Id.* at 706-07.

The Ninth Circuit held that plaintiff contractor established standing regardless of whether it actually competed against minority contractors, because the law required contractors to discriminate against subcontractors based on the subcontractors' race. *Id.* at 707. The court explained that "[a] 'law compelling

persons to discriminate against other persons because of race' is a 'palpable violation of the Fourteenth Amendment,' regardless of whether the persons required to discriminate would have acted the same way regardless of the law." *Id.* at 708 (quoting *Peterson v. City of Greenville, N.C.*, 373 U.S. 244, 248 (1963)); *see Norwood v. Harrison*, 413 U.S. 455, 465 (1973) ("Racial discrimination in state-operated schools is barred by the Constitution and [i]t is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.") (citation and internal quotations omitted). Thus, even if a general contractor suffers no discrimination itself, it is harmed by a law requiring it to discriminate, or try to discriminate, against others on the basis of ethnicity or sex. *Id.*

Other circuit courts relied on *Monterey Mechanical* to reach the same conclusion. *Safeco Ins. Co. of Am. v. City of White House, Tenn.*, 191 F.3d 675, 689 (6th Cir. 1999) (holding that a general contractor has standing when it is required to discriminate against nonminority subcontractors, even if minority and nonminority general contractors face the same requirement); *see also Lutheran Church-Mo. Synod v. FCC*, 141 F.3d 344, 350 (D.C. Cir. 1998) ("forced discrimination may itself be an injury").

IDOT's DBE program similarly harms contractors by requiring them to discriminate against subcontractors on the basis of race. *See* 49 C.F.R. § 26.53 (when a state establishes a race-conscious DBE contract goal, only contractors who meet the goal, or make good faith efforts to meet it, can be awarded the contract). To be considered for IDOT's public contracts, Dunnet Bay had to discriminate

against subcontractors on the basis of race. This is a particularized injury for purposes of establishing standing.

Contractors also suffer an additional injury—the risk of liability for discrimination. *Monterey Mech. Co.*, 125 F.3d at 708 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 148 (1970)). Indeed, subcontractors have sued general contractors for discriminating against them based on race, even when the general contractor was acting pursuant to a government imposed affirmative action plan. *Id.* at 707 (citing *Bras v. Cal. Pub. Utils. Comm'n*, 59 F.3d 869 (9th Cir. 1995), as an example of such a suit). *See also Lutheran Church-Mo. Synod*, 141 F.3d at 350 ("if the rules do force [an employer] to discriminate, they expose it to risk of liability," which might establish injury in fact for standing purposes).

B. A General Contractor Suffers an Injury in Fact When It Submits a Bid Under a Program That Imposes a Race-Based Competitive Disadvantage

A contractor establishes standing by "demonstrat[ing] that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis." *Ne. Fla. Chapter of Associated Gen. Contractors of Am.*, 508 U.S. at 666. Neither the district court, nor the defendants, dispute that Dunnet Bay is able and ready to bid on IDOT highway construction contracts.[3] The district court held that Dunnet Bay did not suffer injury for a different reason: because IDOT's

[3] The district court did not question whether Dunnet Bay was able and ready to bid. *See Dunnet Bay Constr.*, 2014 WL 552213, at *30. The fact that Dunnet Bay satisfies this standing requirement is beyond dispute. Dunnet Bay twice underwent the bidding process on the contract that led to this lawsuit. *Id.* at *6, 11-12; *see Concrete Works of Colorado, Inc. v. City & County of Denver*, 36 F.3d 1513, 1518 (10th Cir. 1994) (a contractor who has submitted bids for past contracts is "able and ready" to bid).

DBE program did not prevent Dunnet Bay from bidding on an equal basis with other contractors. *See Dunnet Bay Constr.*, 2014 WL 552213, at *29 (the denial of Dunnet Bay's bid was not based on the race of its owners).

The district court assumed that if a hypothetical DBE competed for Contract No. 60I57, IDOT's DBE program would have afforded that DBE a competitive advantage over Dunnet Bay. *Id.* at 30. A DBE contractor can count its own workforce towards the DBE participation goal, and it would not have to subcontract work on the Eisenhower project to other DBEs, unlike nonminority-owned general contracting firms. *Id.* But the court claimed that these facts were not present in this case. *Id.* The court is mistaken.

On the first round of bidding, Dunnet Bay competed against a joint venture between Albin Carlson and Areatha Construction.[4] *Dunnet Bay Constr.*, 2014 WL 552213, at *9. Areatha Construction is a certified DBE.[5] With Areatha Construction's participation, that joint venture was able to project a DBE participation level of 40 percent, much higher than Dunnet Bay's projected DBE participation. *See id.* A DBE general contractor can satisfy DBE subcontractor goals with its *own work force*. 49 C.F.R. § 26.53(i). The DBE program allows minority- and women-owned firms, but not Dunnet Bay, to avoid the costs associated with the

[4] A joint venture is an association of a DBE firm and one or more other firms to carry out a single, for-profit business enterprise, for which the parties combine their property, capital, efforts, skills, and knowledge, and in which the DBE is responsible for a distinct, clearly defined portion of the work of the contract. 49 C.F.R. § 26.5.

[5] IDOT, et al., *Illinois Unified Certification Program* 31 (updated May 23, 2014), *available at* http://www.dot.state.il.us/ucp/UCP%20Directory%20By%20Name.pdf (last visited June 3, 2014).

"good faith" requirement and to keep all of a contract's profits for themselves. When determining whether Dunnet Bay made good faith efforts to achieve the DBE subcontracting goals for Contract No. 60I57, IDOT could "take into account the performance of other bidders"—including the joint venture with Areatha Construction—in meeting the goal. *See* 49 C.F.R. pt. 26 app. A(V) (when the apparent successful bidder fails to meet the contract goal, but others meet it, agencies may question whether the apparent successful bidder acted in good faith). Both the Ninth and Tenth Circuits hold that these "extra requirements impose[] costs and burdens on non-minority firms" that preclude them from competing with minority- and women-owned firms on an equal basis. *Monterey Mech.*, 125 F.3d at 707 (citing *Concrete Works*, 36 F.3d at 1518-19). An injury results not only when the bidder actually loses a bid, but every time the company places a bid. *Id.* Thus, contrary to the district court's understanding of the facts, Dunnet Bay was at a competitive disadvantage because it competed against a favored DBE.

When the government erects a barrier that makes it more difficult for members of one group of contractors to obtain a benefit than it is for members of another group of contractors, a member of the former group seeking to challenge the barrier need not show that he would have obtained the benefit but for the barrier in order to establish standing. *Ne. Fla.*, 508 U.S. at 666. The injury in fact is the denial of equal treatment resulting from "the imposition of the barrier, not the ultimate inability to obtain the benefit." *Id.* In other words, a contractor has standing to challenge IDOT's DBE program merely by establishing that (1) he is able and ready to bid, and (2) IDOT's contracting scheme is discriminatory. *Id.* Other U.S. circuit

courts hold that general contractors have standing to challenge laws like the DBE program at issue here, regardless of the other bidders' race. *See*, *e.g.*, *W.H. Scott Constr. Co., Inc. v. City of Jackson, Miss.*, 199 F.3d 206, 213-15 (5th Cir. 1999); *Contractors Ass'n of E. Pa., Inc. v. City of Philadelphia*, 6 F.3d 990, 995-96 (3d Cir. 1993); *Monterey Mechanical*, 125 F.3d at 707 (The injury is "bidding in a discriminatory context . . . caused by the challenged statute.").

Dunnet Bay has standing to challenge the DBE program because Dunnet Bay was able and ready to bid, and the DBE program prevented it from doing so on an equal basis. This is true whether or not Dunnet Bay actually competed against a DBE contractor.[6] If this Court does not overturn the rule of standing set out by the lower court, it will create an intercircuit split of authority regarding a general contractor's standing to challenge a race-based public contracting program.

II

IDOT Exceeded Its Authority Under the Federal DBE Regulations and Its DBE Program Is Unconstitutional

IDOT violated DBE regulations that require federal aid recipients to maximize DBE participation through race-neutral measures by demanding race-conscious contracting instead of enforcing its race-neutral Small Business Initiative projects. 49 C.F.R. § 26.51(a). Furthermore, by resorting to race-conscious DBE goals before

[6] Because Dunnet Bay suffered injury in fact under IDOT's DBE program, Dunnet Bay also satisfies the causation and redressability elements of standing. *See Ne. Fla.*, 508 U.S. at 666 n.5; *W.H. Scott*, 199 F.3d at 215 n.8 ("The Supreme Court explained that causation and redressability were collapsed into its definition of injury in fact." (citing *Ne. Fla.*, 508 U.S. at 666 n.5)); *Concrete Works*, 36 F.3d at 1519 (citing *Ne. Fla.*, 508 U.S. at 663). Accordingly, this brief does not discuss causation and redressability.

exhausting reasonable race-neutral measures, IDOT's program fails the narrow tailoring prong of strict scrutiny and is unconstitutional.

A. IDOT Exceeded Its Authority Under the Federal DBE Regulations

In this Circuit, a state implementing the Federal DBE program is insulated from constitutional attack absent a showing that the state exceeded its federal authority.[7] *N. Contracting, Inc. v. Illinois*, 473 F.3d 715, 721 (7th Cir. 2007). IDOT exceeded the federal authority granted to it under the DBE regulations by choosing to maximize DBE participation through race-conscious, rather than race-neutral, means. *Dunnet Bay Constr.*, 2014 WL 552213, at *14.

Federal regulations require states to narrowly tailor their DBE programs by ensuring they obtain the greatest DBE participation possible through race-neutral measures. *See* 49 C.F.R. § 26.51(a) (Recipients of federal aid "must meet the maximum feasible portion of [their] overall goal by using race-neutral means of facilitating DBE participation."). The federal regulations provide that race-neutral measures include, but are not limited to:

> Arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate participation by DBEs and other small businesses and *by making contracts more accessible to small businesses.*

49 C.F.R. § 26.51(b)(1) (emphasis added). IDOT's Small Business Initiative contracts are race-neutral measures per these regulations, because the purport to

[7] *But see Western States Paving Co., Inc. v. Washington State Dep't of Transp.*, 407 F.3d 983, 996 n.7 (9th Cir. 2005) (invalidating Washington's DBE program under strict scrutiny even though there was no dispute that Washington complied with the federal requirements).

make more transportation construction contracts accessible to small businesses owned by individuals of any race, including DBEs. *Dunnet Bay Constr.*, 2014 WL 552213, at *14.

IDOT admitted that it could maximize Contract No. 60I57's race-conscious DBE goal by eliminating the race-neutral Small Business Initiative contracts for the Eisenhower Project. *Dunnet Bay Constr.*, 2014 WL 552213, at *14. IDOT originally reserved $7 million from the four main Eisenhower contracts to create race-neutral small business contracts, but abandoned them in favor of race-conscious DBE contract goals. *Id.* In certain circumstances, the federal regulations allow recipients of federal aid to *supplement* race-neutral measures with race-conscious DBE contract goals, but not to *replace* them as IDOT did here. States may use race-conscious contract goals only to meet the portion of the overall DBE goal that they are unable to achieve by race-neutral means. 49 C.F.R. § 26.51(d); *see Western States Paving*, 407 F.3d at 993 ("Only when race-neutral efforts prove inadequate do the regulations authorize a State to resort to race-conscious measures to achieve the remainder of its DBE utilization goal.").

Here, to appease the governor, IDOT simply abolished race-neutral measures and replaced them with race-conscious ones. *See Dunnet Bay Constr.*, 2014 WL 552213, at *12 (email indicating governor instructed IDOT to "max[] . . . minority participation numbers" on Eisenhower project). IDOT exceeded the authority granted to it under federal law.

B. IDOT's DBE Program Is Not Narrowly Tailored To Further a Compelling Government Interest

The district court failed to make a "careful judicial inquiry" into whether IDOT could achieve sufficient DBE participation without resorting to racial preferences. *See Fisher*, 133 S. Ct. at 2420 (explaining that narrow tailoring requires the government to verify that it is "necessary" for the government to use race to further a compelling interest). As a government program employing racial classifications, and operating outside of the boundaries of the federal regulations, IDOT's DBE program is subject to strict judicial scrutiny. *N. Contracting*, 473 F.3d at 720. The program must be narrowly tailored to serve a compelling governmental interest. *Id.*

The most fundamental element of narrow tailoring is the consideration of race neutral means to prevent or remedy any remaining discrimination.[8] In *Fisher*, the Supreme Court reiterated that, even if government establishes that its implementation of racial preferences is justified by a compelling interest, there still must be a further judicial determination that the race-conscious measures "meet[] strict scrutiny in [their] implementation." 133 S. Ct. at 2419-20; *see Croson*, 488 U.S. at 507 (set-aside plan not narrowly tailored where there was no consideration of race-neutral means); *Rothe*, 545 F.3d at 1036 ("[E]ven where there is a

[8] Narrow tailoring analysis commonly involves consideration of six factors: (1) the necessity of relief; (2) the efficacy of alternative, race-neutral remedies; (3) the flexibility of relief, including the availability of waiver provisions; (4) the relationship of the stated numerical goals to the relevant market; (5) the impact of relief on the rights of third parties; and (6) the overinclusiveness or underinclusiveness of the racial classification. *Adarand*, 515 U.S. at 238-39; *Croson*, 488 U.S. at 506; *United States v. Paradise*, 480 U.S. 149, 171 (1987) (plurality opinion).

compelling interest supported by a strong basis in evidence," the court must consider "the efficacy of alternative, race-neutral remedies.").

Courts have clarified that while "'narrow tailoring does not require exhaustion of every conceivable race-neutral alternative,'" it "'require[s] serious, good faith consideration of workable race-neutral alternatives.'" *Western States*, 407 F.3d at 993 (quoting *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003)). The government may not consider race if a nonracial approach could promote the substantial interest about as well, and at tolerable administrative expense, as racial preferences. *Fisher*, 133 S. Ct. at 2420 (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986)). Moreover, *Fisher* is clear that government has the burden to make this showing. *Fisher*, 133 S. Ct. at 2420 (emphasis added) (strict scrutiny imposes on the government "the *ultimate burden* of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice").

IDOT must also prove that it was "necessary" to replace the race-neutral Small Business Initiative contracts with race-conscious DBE contract goals. *See Fisher*, 133 S. Ct. at 2420 (courts must verify that racial classifications are "necessary"). But IDOT eliminated these contracts before they had even been tried and evaluated. IDOT cannot prove that workable, race-neutral measures failed to remedy the effects of identified discrimination, because it never attempted any race-neutral measure before imposing race-conscious DBE goals. *See Fisher*, 133 S. Ct. at 2420 (the government must prove that available, workable race-neutral alternatives do not suffice); *Parents Involved in Cmty. Schools v. Seattle Sch. Dist.*

No. 1, 551 U.S. 701, 798 (2007) (Kennedy, J., concurring) ("[M]easures other than differential treatment based on racial typing of individuals first must be exhausted.").

IDOT's DBE program cannot be found constitutional until the court is satisfied—through a searching examination—that no workable race-neutral alternatives can remedy the identified, past discrimination. "The essence of the 'narrowly tailored' inquiry is the notion that explicit racial preferences . . . must be only a 'last resort' option." *Hayes v. N. State Law Enforcement Officers Ass'n*, 10 F.3d 207, 217 (4th Cir. 1993). For IDOT, race-conscious measures are the first and only option. Therefore, IDOT's implementation of the DBE program fails to satisfy strict scrutiny, and is thus unconstitutional. *Fisher*, 133 S. Ct. at 2419-20.

CONCLUSION

For these reasons, Amicus Curiae Pacific Legal Foundation respectfully requests that this Court reverse the decision of the district court, and hold that Appellant Dunnet Bay Construction Company has standing to challenge the Illinois Disadvantaged Business Enterprise program, that such program is not in compliance with federal regulations, and that it violates the Equal Protection Clause of the Fourteenth Amendment.

DATED: June 9, 2014.

Respectfully submitted,

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s/ Ralph W. Kasarda
RALPH W. KASARDA

Attorney for Amicus Curiae
Pacific Legal Foundation

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