No. 11-16228

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ASSOCIATED GENERAL CONTRACTORS OF AMERICA,
SAN DIEGO CHAPER, INC., a nonprofit California corporation,

Plaintiff - Appellant,

v.

CALIFORNIA DEPARTMENT OF TRANSPORTATION;
WILL KEMPTON, individually and in his official capacity as Director
of the California Department of Transportation; OLIVIA FONSECA,

Defendants - Appellees,

and

COALITION FOR ECONOMIC EQUITY; NATIONAL ASSOCIATION
FOR THE ADVANCEMENT OF COLORED PEOPLE, San Diego Chapter,

Intervenor-Defendants - Appellees.

On Appeal from the United States District Court
for the Eastern District of California
Honorable John A. Mendez, District Judge

APPELLANT'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

This statement is made pursuant to Federal Rule of Appellate Procedure 26.1. Plaintiff-Appellant Associated General Contractors of America, San Diego Chapter, Inc. (AGC San Diego), is the San Diego Chapter of Associated General Contractors of California, Inc. AGC San Diego is a nonprofit California corporation, with headquarters in San Diego, California. AGC San Diego is not a subsidiary or affiliate of a publicly owned corporation. AGC San Diego is not a publicly held corporation, trade association, or other entity having a direct financial interest in the outcome of this litigation. There is no parent corporation or any publicly held corporation that owns 10% or more of stock in AGC San Diego.

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INTRODUCTION

Plaintiff-Appellant Associated General Contractors of America, San Diego Chapter, Inc. (AGC San Diego), appeals the adverse ruling of the district court, which granted summary judgment in favor of Defendant-Appellee California Department of Transportation (Caltrans) and against AGC San Diego. Caltrans has injected race, sex, and ethnicity into its public contracting decisions by requiring a certain percentage of dollars on federal and state funded transportation projects be awarded to African American, Native American, Asian Pacific, and women-owned firms or demonstrate "good faith efforts" to do so. If the prime contractor fails to document strict compliance with either of these two options, the prime contractor is punished by having his or her bid rejected as nonresponsive, even if it is the lowest bid. 49 C.F.R. § 26.53.

Caltrans' use of race and sex to grant preferences to some groups while encouraging discrimination against others is incompatible with the Equal Protection Clause, which mandates that "[no] State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Because the Equal Protection Clause "protect[s] *persons*," not groups, it follows that "all governmental action based on race—a *group* classification long recognized as 'in most circumstances irrelevant and therefore prohibited,'—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the

laws has not been infringed." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) (citations omitted). Accordingly, the core purpose of the Equal Protection Clause is to eliminate governmentally sanctioned racial distinctions. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989). Thus, all racial classifications imposed by the state and its agencies must be reviewed under strict scrutiny. Such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests. *Adarand*, 515 U.S. at 227. Decisions by the United States Supreme Court repeatedly confirm that all racial classifications are subject to the "strictest of judicial scrutiny," regardless of the allegedly benign motives and good intentions of the government. Yet, here, the lower court failed to properly examine Caltrans' discriminatory program under the exacting requirements of strict scrutiny.

In finding Caltrans' racial preferences constitutional, the district court failed to follow this Court's guidance in *Western States Paving Co., Inc. v. Washington State Dep't of Transp.*, 407 F.3d 983 (9th Cir. 2005). In *Western States*, this Court reemphasized that all racial classifications must be reviewed under strict scrutiny when it invalidated the race-conscious component of Washington's Disadvantaged Business Enterprise (DBE) program, even though the state had complied with the federal regulations. *Id.* at 991, 997. To apportion federal funds on the basis of race, a race-conscious DBE program can be constitutionally applied only in those states

where the effects of discrimination are present. *Id.* at 996. Specifically, a state must show the presence of discrimination in its transportation contracting industry, *id.* at 997-98, and that the application of the program is limited to those minority groups that have actually suffered discrimination, *id.* at 998. Moreover, this showing must survive "strict scrutiny's exacting requirements." *Western States*, 407 F.3d at 990-91.

In contrast here, the district court failed to examine the evidence in this case under heightened scrutiny as this Court commands. An examination of Caltrans' evidence under strict scrutiny discloses that Caltrans' DBE program is not narrowly tailored to remedy identified discrimination in the California transportation construction and engineering industry. Caltrans has a disparity study, but no evidence or findings of constitutional or statutory violations of discrimination. Two years after its disparity study, Caltrans told AGC San Diego that it did not believe that its officials or prime contractors engaged in discrimination. Excerpts of Record (ER) at 79, 80, 95-96; 160-161. Thus, Caltrans cannot identify discrimination with the particularity demanded by the Constitution to justify its race-conscious program. *Croson*, 488 U.S. at 500, 504 (demanding discrimination be identified with specificity); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (demanding particularized findings of discrimination).

Caltrans sets race-conscious contract goals as a percentage of the entire amount of a contract, even if the majority of the contract amount is funded by state funds.

Yet, the DBE utilization goals of the federal program apply only to federal funds. 49 C.F.R. § 26.45. Clearly, Caltrans has no compelling interest in allocating state funds on the basis of race, because the federal regulations do not require Caltrans to set race-conscious goals on state funds, and the California Constitution prohibits Caltrans from doing so. Cal. Const. art. I, § 31(a), (e).

Caltrans relies entirely on its disparity study to support its discriminatory program. Even if Caltrans' disparity study provides an inference of discrimination, and it does not, its program is not narrowly tailored. Caltrans applies the same race- and sex-conscious remedial measures to both construction and engineering subcontracts, even though its disparity study shows disparities for each type of contract and for each group. This means that racial preferences are granted to some groups who are not substantially underutilized. Caltrans' DBE program is also overinclusive with respect to individual firms. Contrary to the guidance set out in *Western States*, 407 F.3d at 1002, Caltrans grants preferences to DBE firms even if they only suffered societal discrimination, or discrimination in another state—even though such discrimination does not provide a factual predicate for remedial race-conscious remedies.

Caltrans' evidence simply does not satisfy the demanding requirements of strict scrutiny. Its DBE program treats businesses owned by nonpreferred groups differently solely because of their skin color or sex. Such blatant discrimination by

Caltrans violates the Equal Protection Clause. This Court has never approved such a standardless warrant for racial discrimination in public contracting under the exacting requirements of strict scrutiny. It should not do so now because it is clear that Caltrans lacks the necessary evidence to support its discrimination in the California transportation construction and engineering industry.

Accordingly, this Court should reverse the ruling of the district court that granted summary judgment in favor of Caltrans, and direct said court to enter summary judgment in favor of AGC San Diego under its claims under the Fourteenth Amendment.

STATEMENT OF JURISDICTION

Subject matter jurisdiction for this action arises under 28 U.S.C. § 1331, which confers federal jurisdiction on matters arising under the laws of the United States. Appellate jurisdiction arises under 28 U.S.C. § 1291, which grants the United States Court of Appeals jurisdiction over appeals from final decisions of the district courts. The district court's Order Granting Defendants' and Intervenors' Motions for Summary Judgment and Denying Plaintiff's Motion for Summary Judgment (Order) was filed on April 19, 2011. ER at 1. The district court entered judgment against Plaintiff on April 20, 2011. ER at 3. Plaintiff filed a timely appeal on May 13, 2011. ER at 65.

ISSUES PRESENTED

1. Whether the district court erred as a matter of law when it held that Caltrans had produced a strong basis in evidence sufficient to satisfy strict scrutiny.

2. Whether the district court erred as a matter of law in determining that Caltrans' race-based preference program was narrowly tailored to discrimination in the California transportation construction and engineering industry.

3. Whether the district court erred as a matter of law by failing to examine under strict scrutiny Caltrans' allocation of state funds based upon race.

STATEMENT OF THE CASE

Plaintiff-Appellant AGC San Diego appeals from the district court's Order, ER at 1, and final judgment, ER at 3, dated April 19, 2011 and April 20, 2011 respectively. AGC San Diego filed its Complaint on June 11, 2009, against the California Department of Transportation (Caltrans); Will Kempton, individually, and in his official capacity as Director of Caltrans; and Olivia Fonseca, individually, and in her official capacity as Deputy Director of Caltrans. Docket No. 1. AGC San Diego alleged that the DBE program, which requires that a certain percentage of contracts on federally funded transportation projects be awarded on the basis of race- and sex-based preferences, is unlawful and unenforceable because it violates the Fourteenth Amendment to the United States Constitution, the plain language of 42 U.S.C. §§ 1981, 1983, Title VI of the Civil Rights Act of 1964, as amended,

42 U.S.C. § 2000d, and Article I, section 31, of the California Constitution. AGC San Diego later filed its First Amended Complaint dismissing its state law claim. Docket No. 41.

Defendants Caltrans, Will Kempton, and Olivia Fonseca filed their joint Answer on July 7, 2009. Docket No. 5. Will Kempton resigned as Director of Caltrans on July 31, 2009, and was replaced by Randell H. Iwasaki.[1] Mr. Iwasaki resigned on April 15, 2010, and was replaced by Cindy McKim. On December 22, 2009, the court granted the motion to intervene by Defendant-Intervenors Coalition for Economic Equity and National Association for the Advancement of Colored People, San Diego Chapter (collectively, Intervenors). Docket No. 24. Intervenors filed their Answer on January 12, 2010. Docket No. 25.

All parties filed motions for summary judgment on January 26, 2011, and all oppositions and replies were filed by March 16, 2011. Docket Nos. 44-95. The district court issued a verbal ruling following oral argument on March 23, 2011, and did not file a written decision. Transcript, ER at 45, 61. The court granted summary judgment in favor of Caltrans and Intervenors, and against AGC San Diego. The court's signed order was filed on April 19, 2011, ER at 1, and judgment against AGC

[1] The parties filed a Stipulation of Dismissal as to Will Kempton in his personal capacity, which was approved by the district court on December 18, 2009. Docket No. 23.

San Diego was entered on April 20, 2011. ER at 3. AGC San Diego timely appealed on May 13, 2011. ER at 65.

STATEMENT OF FACTS

A. The Disadvantaged Business Enterprise Program

Caltrans receives and administers federal funds from the United States Department of Transportation (USDOT) for highway construction under the SAFETEA-LU. SAFETEA-LU is the successor to the Transportation Equity Act for the Twenty First Century (TEA-21), Pub. L. No. 105-178, 112 Stat. 107 (1998), which established a DBE program.[2] SAFETEA-LU delegates to each state that accepts federal transportation funds the responsibility for implementing a DBE program that comports with SAFETEA-LU. The implementing regulations for this subcontractor preference program are found at Title 49 Code of Federal Regulations (49 C.F.R.) Part 26, §§ 26.1-26.109, as amended, June 16, 2003.[3]

A DBE is defined as a small business owned and controlled by one or more individuals who are socially and economically disadvantaged. 49 C.F.R. § 26.5. African Americans, Hispanic Americans, Native Americans, Asian Pacific

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[2] *See also* Hiring Incentives to Restore Employment (H.I.R.E.) Act, Pub. L. No. 111-147, 124 Stat. 71 (2010), and Continuing Appropriations and Surface Transportation Extensions Act 2011, Pub. L. No. 111-322, 124 Stat. 3518 (2010) (current extensions to SAFETEA-LU).

[3] A further discussion of the federal DBE regulations is contained in *Western States*, 407 F.3d at 988-91.

Americans, Subcontinent Asian Americans, and women are presumed to be socially and economically disadvantaged. 49 C.F.R. § 26.67(a). To show social disadvantage, individuals need only demonstrate that they have been "subjected to racial or ethnic prejudice or cultural bias within American society." 49 C.F.R. pt. 26, App. E.

Those eligible for the presumption of social disadvantage because of their status as minorities or women must submit a signed, notarized form claiming they are in fact disadvantaged. 49 C.F.R. § 26.67(a)(1). But applicants signing the form may be attesting to discrimination experienced outside of California, with no relation to the transportation construction industry. Deposition of Olivia Fonseca (Fonseca Dep.), ER at 168, 170-173. Having signed the certification, members of these groups are not required to prove they are socially disadvantaged. 49 C.F.R. § 26.61(c).

B. The 2007 Disparity Study Shows Inconsistent Statistical Results for Minority and Women Businesses Depending on the Category and Level of the Contract

Caltrans enforced race- and sex-conscious measures in its DBE program from 1999 through 2006. Defendants' Mem. 5:8, 13 n.4 (Docket No. 48).[4] Caltrans discontinued the race-conscious component of its DBE program in 2006, after

[4] In its unsuccessful attempt to find sufficient evidence of discrimination in 2006, Caltrans advertised public notice hearings in 70 publications, mailed notices to 3,300 certified DBEs and other interested groups, and held 23 hearings. Defendants' Mem. 6:19-24 (Docket No. 48).

Caltrans and the Federal Highway Administration (FHWA) concluded that Caltrans lacked "sufficient evidence to satisfy the strict scrutiny and the evidentiary standards set forth" in *Western States*. Caltrans May 1, 2006, letter to the Transportation Construction Community, ER at 109. In 2007, BBC Research & Consulting performed an "Availability and Disparity Study" (Disparity Study) for Caltrans analyzing potential DBE availability and state and local transportation contracts from 2002 to 2006. ER at 89-90, 137-138, 257, 404-942 (Disparity Study). The utilization analysis shows data for the two different categories of Caltrans transportation contracts: construction and engineering. Deposition of Will Kempton (Kempton Dep.), ER at 72-73; Caltrans 2010 DBE Program, ER at 232. In each of these two categories, the Disparity Study also shows data for two different levels of contracts: prime contracts awarded by the state and local governments, and subcontracts awarded by the prime contractors. ER at 77. The utilization of different racial groups differs depending on the category and level of the contracts. Deposition of Mark Berkman (Berkman Dep.), ER at 277. An examination of the Disparity Study reveals the following:

1. No Substantial Disparities for Subcontinent Asian Americans and White Women in Federally Assisted Prime Contracts

For federally assisted prime construction contracts awarded on a nondiscriminatory and race-neutral basis,[5] the Disparity Study reported no substantial disparities for Subcontinent Asian Americans and "white" women.[6] Disparity Study, ER at 472 (Figure VI-4). For federally assisted prime engineering contracts, the Disparity Study reported no substantial disparities for white women. Disparity Study, ER at 485 (Figure VIII-3).

2. No Substantial Disparities for Subcontinent Asian Americans and White Women in State-Funded Prime Contracts

From 2002 to 2006, Caltrans also awarded prime contracts funded entirely with state funds in a race-neutral manner. Kempton Dep., ER at 74, 77-79, 101-103. For state-funded prime construction contracts, the Disparity Study reported no substantial disparities for firms owned by Subcontinent Asian Americans. Disparity Study, ER

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[5] State law directs Caltrans to award prime construction contracts in a nondiscriminatory manner to the lowest responsible bidder. Cal. Pub. Cont. Code § 10180 ("On the day named in the public notice, the department shall publicly open the sealed bids and award the contracts to the lowest responsible bidders."); Kempton Dep., ER at 74, 77-79, 101-103; *see also* Cal. Const. art. I, § 31(a) (prohibiting discrimination or racial preferences in public contracting). Although the Disparity Study purports to reveal that disparities may exist even when contracts are awarded in a race-neutral manner, Caltrans cannot discriminate in the award of prime construction contracts without violating state law.

[6] The Disparity Study's statistics for Women-Owned Businesses is derived solely from firms owned by white women. Disparity Study, ER at 424.

at 472 (Figure VI-4). For state-funded prime engineering contracts, the Disparity Study reported no substantial disparities for firms owned by white women. Disparity Study, ER at 485 (Figure VIII-3).

3. No Substantial Disparities for Asian Pacific Americans, Subcontinent Asian Americans, Hispanic Americans, Native Americans and White Women in Subcontracts for Federally Assisted Projects

From 2002-April, 2006, Caltrans required the prime contractors awarded contracts to satisfy race-conscious DBE utilization goals by subcontracting with any certified DBEs that were either female or a member of any minority race, or make good faith efforts to do so. For federally assisted construction subcontracts, the Disparity Study reported no substantial disparities for Asian Pacific Americans, Subcontinent Asian Americans, Hispanic Americans, Native Americans, and white women. Disparity Study, ER at 463 (Figure V-4). For federally assisted engineering subcontracts, under the same race-conscious contracting scheme as above, the Disparity Study reported no substantial utilization disparities for Asian Pacific Americans, Subcontinent Asian Americans, and Hispanic Americans. Disparity Study, ER at 479 (Figure VII-3).

4. The Disparities on Construction Subcontracts Are Different Than the Disparities on Engineering Subcontracts

On state-funded construction projects from 2002 to 2006, where race-conscious contract goals were not utilized,[7] the Disparity Study reported no substantial disparities for Native Americans, Hispanic Americans, and Subcontinent Asian Americans. Disparity Study, ER at 463 (Figure V-4). For state-funded engineering subcontracts, the disparity study did not report significant disparities for firms owned by Asian Pacific Americans or white women. Disparity Study, ER at 479 (Figure VII-3).

5. No Identified Cause of Disparities

In its various Goal and Methodology reports, Caltrans identifies "barriers to the entry and expansion" of minority and women business firms in the transportation construction and engineering industries. Caltrans Amended Goal and Methodology FFY 2009 (2009 DBE Program), ER at 203-206; Caltrans Goal and Methodology FFY 2010 (2010 DBE Program), ER at 227-230. These include education, employment, advancement, business formation and ownership, rates of business closure, access to capital, business capital from home equity, business loans, bonding, insurance, bids of minority- and women-owned firms, and business earnings. *Id.* But

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[7] The California Constitution forbids all race- and sex-based classifications unless necessary to maintain eligibility for federal funding. Cal. Const. art. I, § 31(a), (e).

Caltrans does not know whether these variables are caused by discrimination. *See* Fonseca Dep., ER at 149-150 (no knowledge of discrimination by bonding or insurance companies). Even with these variables, Caltrans made no adjustment in its utilization goal to account for "evidence of discrimination against DBEs." *Western States*, 407 F.3d at 989 (citing 49 C.F.R. § 26.45(d)(1)); ER at 150; Defendants' Mem. 12:8-11 (Docket No. 48).

C. After the Disparity Study, Caltrans Stated That Its Officials, Local Agencies, and Prime Contractors Did *Not* Discriminate

1. No Discrimination by Caltrans

In 2009, Caltrans told AGC San Diego that it did not believe that Caltrans officials or the local governments who receive federal highway-related funding through Caltrans engaged in discrimination. Fonseca Dep., ER at 160-161; Kempton Dep., ER at 95-98; Declaration of Jim Ryan (Ryan Decl.), ER at 338, 364; *see* Fonseca Dep., ER at 156-157 (no knowledge of discrimination in the award of contracts); Kempton Dep., ER at 76, 82 (same); Fonseca Dep., ER at 156 (no knowledge of a Caltrans employee being disciplined for discriminating against minority-owned firms); Kempton Dep., ER at 75, 96 (same); Kempton Dep., ER at 75-76 (no determination or suspicion that Caltrans personnel awarded contracts on the basis of race); Fonseca Dep., ER at 156-157 (same). The district court made no

findings of discrimination by Caltrans. *See* Transcript, ER at 45-62 (no findings of discrimination).

2. No Discrimination by Prime Contractors

In depositions and in correspondence to AGC San Diego, Caltrans stated that it does not believe, and is not aware, that any segment of its prime contractors has engaged in discrimination on the basis of race or sex. Fonseca Dep., ER at 160-161; Kempton Dep., ER at 79-80, 95-96; Ryan Decl., ER at 338, 364. The district court believed the evidence showed "numerous instances of specific discrimination," but failed to make particularized findings of discrimination by any contractor. Transcript, ER at 57:23-24. The record contains no judicial or legislative findings of discrimination by any prime contractor.

D. Caltrans Resumed Enforcing Race-Conscious Contract Goals in 2009

Based on the Disparity Study, Caltrans identified an overall DBE goal of 13.5%, which means Caltrans projects that 13.5% of federal aid dollars could go to DBEs. Fonseca Dep., ER at 142-143, 147-148, 230. On March 4, 2009, Caltrans announced that it received conditional approval from the FHWA to immediately implement its 2009 DBE Program, which provides for a 6.75% race-conscious utilization goal for businesses owned by African Americans, Asian Pacific

Americans, Native Americans, and women, but not for male Hispanic American or Subcontinent Asian American businesses. Fonseca Dep., ER at 209-210, 232-233.

Caltrans attempts to achieve its race-conscious goal by setting an Underutilized DBE (UDBE) goal on federally assisted transportation construction and engineering contracts. Fonseca Dep., ER at 128, 176, 261-263. Prime contractors can satisfy the race-conscious UDBE goals only by subcontracting with African American, Asian American, Native American, or women DBEs, but not with male white, Hispanic American, or Subcontinent Asian American DBEs—regardless of whether the specific subcontract is for construction or engineering. Fonseca Dep., ER at 151, 177, 203-206, 227-230.

E. Race-Conscious Contract Goals Are Applied to State Funds

Caltrans' overall DBE goal of 13.5% means that 13.5% of only federal aid dollars should go to DBEs. Fonseca Dep., ER 147-148. Some Caltrans' projects are funded by both federal and state funds. Kempton Dep., ER at 99; Fonseca Dep., ER at 259. For administrative convenience, when a race-conscious contract goal is set on a contract funded by both federal and state dollars, the contract goal is based on the total dollar value of the contract, not just the federally funded portion of the contract. Kempton Dep., ER at 99; Fonseca Dep., ER at 178; Deposition of Kris Kuhl (Kuhl Dep.), ER at 264-265. The federal regulations contain no requirement for

setting race-conscious goals on state funds. *See* 49 C.F.R. §§ 26.41-26.55 (regulations about goal setting contain no mention of state funds).

F. Standing of AGC San Diego

No party disputes the standing of AGC San Diego. AGC San Diego is a nonprofit California corporation, with headquarters in San Diego, California. Ryan Decl., ER at 330. AGC San Diego's members have submitted bids in the past, and they are ready, willing, and able and are continuing to submit bids for present and future contracts that are, or will be, subject to Caltrans' DBE Program. *Id.*, ER at 331, 333. Many of AGC San Diego's members are not members of the race and sex classes granted preferences by Caltrans' DBE Program, and their bids are not considered on the same equal basis as those members of race and sex classes preferred by this program. *Id.*, ER at 333. Caltrans' DBE programs, which grant preferences on the basis of race or sex, require members of AGC San Diego to use businesses owned by preferred racial groups and women-owned businesses as subcontractors rather than their own employees or other subcontractors of their own choosing, and forces them to discriminate against businesses not owned by women or minorities who are not of the preferred racial groups who may want to participate as subcontractors. *Id.*, ER at 333-334. These members of AGC San Diego are placed at a disadvantage in bidding on future federally funded Caltrans' projects. *Id.*, ER at 334.

G. Ruling of the District Court

The district court's ruling on the parties' motions for summary judgement is contained in the transcripts of the hearing on March 23, 2011. Transcripts, ER at 45-62. The district court held that the race-conscious component of the Caltrans DBE program is supported by a strong basis in evidence that gives rise to a compelling interest and that the program is narrowly tailored. Transcript, ER at 57. But the court made no particularized findings of discrimination by Caltrans, local agencies, or the prime contractors. *See* Transcript, ER at 22:14-18 (court doubting that Caltrans needed to show instances of discrimination by itself, prime contractors, or local governments). *See id.*, ER at 45-62 (no findings of discrimination identified with specificity). The district court stated that discrimination was proven by comparing the utilization of DBEs on contracts without racial preferences to the utilization of DBEs on contracts with racial preferences. Transcript, ER at 17:17-13:4, 19:7-23.

The court accepted that strict scrutiny was satisfied based on Caltrans' assurances. *See*, *e.g.*, Transcript, ER at 24:20-25:4 (assurances that a pattern of discrimination exists); *id.* at 26:2-8 (assurances that Caltrans simply abides by the federal regulations); *id.* at 21:21-23 (same); *id.* at 49:1-3 (accepting Caltrans' assurances as to what the federal regulations required); *id.* at 48:1-13 (accepting Caltrans' assurances as to what is in the disparity study). The court accepted societal discrimination as a factual predicate for the program, *id.* at 39:7-40:3; *see id.*, ER

at 12:18-21 (district court conceding Caltrans' statement of undisputed facts only consisted of three legal conclusions about discrimination in the entire industry). The court did not want to "penalize" Caltrans because it went through the trouble to get a disparity study, *id.* at 58:13-15, and it believed that just having a disparity study was more important than what the study actually showed. *See* Transcript, ER at 37:19-38:15 ("What more can a court require a public agency to do?").

The district court took Caltrans' assurances that there are disparities for female Hispanic and Subcontinent Asian women-owned firms, but never required Caltrans to identify them. Transcript, ER at 53:9-13. The Disparity Study states that it only reported on "white" female businesses. Disparity Study, ER at 424.

As for AGC San Diego's contention that Caltrans grants preferences to firms that have not suffered discrimination in the California transportation construction and engineering industry, the district court's only comment on this claim was that Caltrans certifies DBEs according to the regulations. Transcript, ER at 53:14-15.

The district court ignored AGC San Diego's claim that Caltrans violates the Equal Protection Clause by allocating state funds on the basis of race. *See* Transcript, ER at 45-62 (no ruling on whether Caltrans may set race-conscious goals on state funds).

SUMMARY OF ARGUMENT

By giving deference to Caltrans, and ignoring this Court's requirements in *Western States*, the district court erred in holding that Caltrans' discriminatory program is justified by SAFETEA-LU. The district court neglected this Court's mandate that the inquiry into whether a state has identified discrimination sufficient to justify its DBE race-conscious measures must be performed under "strict scrutiny's exacting requirements." *Id.* at 990-91.

Caltrans has no evidence of discrimination by employees of Caltrans. Because of state law, Caltrans must award construction prime contracts in a race-neutral manner to the lowest responsible bidder. Cal. Pub. Cont. Code § 10180; Kempton Dep., ER at 74, 77-79, 101-103. Although Caltrans has a 2007 disparity study, Caltrans "does not believe . . . any segment of its prime contractors have engaged in discrimination." Kempton Dep., ER at 79, 80, 95-96; Fonseca Dep., ER at 160-161. Thus, as a matter of law, Caltrans cannot demonstrate that its discriminatory contracting program is narrowly tailored to discrimination in California's transportation contracting industry. Even if Caltrans had evidence of discrimination, its race-conscious program still fails strict scrutiny because the program is not narrowly tailored according to requirements set forth by the Supreme Court and this Court. *Adarand*, 515 U.S. at 238-39; *Western States,* 407 F.3d at 998.

The Caltrans' DBE Program is fatally overinclusive. "[R]acial classifications are simply too pernicious to permit any but *the most exact connection* between justification and classification." *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (emphasis added). There are prime contracts, subcontracts, construction contracts, and engineering contracts. Kempton Dep., ER at 72-73, 77. Disparities for each type of contract are different per group and sex. Yet Caltrans forces prime contractors to apply the same race and sex preferences to both construction and engineering subcontracts. This means that Caltrans' remedial race-conscious measures provide preferences to some groups who are not substantially underutilized per the statistics. Pitting minority group against minority group, and dividing certain minority groups by sex, but not others, is the result of Caltrans' twin untenable assumptions that statistical disparities alone can prove discrimination, and that such disparities can be "remedied" by aggregate preferences, without regard to the details of each type of contract.

The Caltrans' DBE program is further overinclusive by providing a remedy for purported racial discrimination to persons who have never suffered discrimination in California. In *Western States* this Court faulted the form affidavits used by Washington to certify DBEs, because the forms allowed persons to be certified who only suffered societal discrimination, and not discrimination in the state's transportation contracting industry. *Western States*, 407 F.3d at 1002. Caltrans still

uses the same language on its form affidavits that this Court criticized, and thus certifies firms that have never suffered discrimination in California. Fonseca Dep., ER at 170-173.

Finally, under the guise of the federal DBE program, Caltrans is operating an impermissible state race-conscious program in violation of the Fourteenth Amendment. Caltrans concedes that it sets race-conscious contract goals as a percentage of the entire amount of a transportation construction contract, even if the majority of the contract amount is funded by state funds. The federal regulations do not require Caltrans to set race-conscious goals on state funds. The regulations specify that race-conscious goals are set to cumulatively result in meeting the overall DBE goal, 49 C.F.R. § 26.51(e)(2), which is expressed as a percentage of federal funds only. 49 C.F.R. § 26.45. By setting race-conscious goals on state funds, Caltrans is operating outside the boundaries of the federal regulations. Clearly, Caltrans must satisfy the compelling interest prong of strict scrutiny to justify that practice. But California has no such compelling interest because Article I, section 31, of the California Constitution prohibits the state from discriminating against, or granting preferences to, any person on the basis of race or sex in public contracting. Cal. Const. art. I, § 31(a), (e). The district court failed to rule on this Fourteenth Amendment violation.

ARGUMENT

I

STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment de novo. *Chale v. Allstate Life Ins. Co.*, 353 F.3d 742, 745 (9th Cir. 2003). Summary judgment is proper where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). In considering a motion for summary judgment, the court draws all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The central issue is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986).

Moreover, as discussed below, "[a]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Adarand*, 515 U.S. at 227 (1995). Before resorting to a race-conscious measure, the government must "identify [the] discrimination [to be remedied], public or private, with some specificity," and must have a "strong basis in evidence" upon

which to "conclu[de] that remedial action [is] necessary." *Croson*, 488 U.S. at 500, 504 (citation omitted). "The burden of justifying different treatment by ethnicity or sex is always on the government." *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 713 (9th Cir. 1997).

II

CALTRANS FAILED TO PRODUCE A STRONG BASIS IN EVIDENCE OF PAST OR PRESENT DISCRIMINATION SUFFICIENT TO SATISFY STRICT SCRUTINY

A. Racial Classifications Are Presumptively Unconstitutional Under the Equal Protection Clause and Must Be Subjected to the Strictest Judicial Scrutiny

Caltrans' DBE Program creates classifications based on race and sex and distributes benefits and creates burdens according to those classifications. Transcript, ER at 47:10-14 (district court ruling); Fonseca Dep., ER at 166-167; Caltrans 209 DBE Program, ER at 209-210; Caltrans 2010 DBE Program, ER at 232-233. Therefore, the Caltrans DBE program, like any governmental action based on race, must be subjected to "detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed." *Adarand*, 515 U.S. at 227.

The Equal Protection Clause mandates that, "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Decisions of the United States Supreme Court have made clear that

distinctions between persons based solely upon their ancestry "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Adarand*, 515 U.S. at 214 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). The core purpose of the Equal Protection Clause is to eliminate governmentally sanctioned racial distinctions. *Croson*, 488 U.S. at 495. Where the government proposes to ensure participation of "some specified percentage of a particular group merely because of its race," such a preferential purpose must be rejected as facially invalid. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (plurality opinion). Accordingly, all racial classifications by government are "inherently suspect," *Adarand*, 515 U.S. at 223 (citation omitted), and "presumptively invalid." *Shaw v. Reno*, 509 U.S. 630, 643-44 (1993). "A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979).

Before resorting to a race-conscious measure, the government must "identify [the] discrimination [to be remedied], public or private, with some specificity," and must have a "strong basis in evidence" upon which to "conclu[de] that remedial action [is] necessary." *Croson*, 488 U.S. at 504, 500 (citation omitted). All sex-based classifications must be supported by an "exceedingly persuasive justification" and

substantially related to the achievement of that underlying objective. *United States v. Virginia*, 518 U.S. 515, 524 (1996) (citation omitted).[8]

The government's use of racial classifications is not entitled to the presumption of constitutionality that normally accompanies governmental acts. *Croson*, 488 U.S. at 500. "[B]lind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis." *Id.* at 501. The burden is on the government to demonstrate "extraordinary justification." *Reno*, 509 U.S. at 644. The government "must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest." *Bakke*, 438 U.S. at 305 (plurality opinion) (citations omitted). It requires governmental specificity and precision, *Croson*, 488 U.S. at 504, and demands a strong basis in evidence that race-based remedial action is necessary. *Shaw v. Hunt*, 517 U.S. 899, 909 (1996). Absent a prior determination of specific necessity, supported by convincing evidence, the government will be unable to narrowly tailor the remedy, and a reviewing court will be unable to determine whether the race-based action is justified. *Croson*, 488 U.S. at 510.

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[8] Because SAFETEA-LU does not treat racial minorities and women differently, the terms "minority" and "race" will refer to minorities and women. *See Western States*, 407 F.3d at 987 n.1 (using "minority" to refer to both minorities and women).

B. Caltrans Failed to Produce a Strong Basis in Evidence of Past or Present Discrimination, Because There Are No Findings of Any Constitutional or Statutory Violations in the Record

Caltrans failed to establish a strong basis in the evidence sufficient to justify its race-based DBE program, because there are no judicial or legislative "particularized findings" of discrimination by Caltrans, local agencies, or prime contractors. Kempton Dep., ER at 75-76, 82, 95-98; Fonseca Dep., ER at 156-157, 160-161.

The district court claims to have based its ruling below on this Court's decision in *Western States*. *See* Transcript, ER at 52:6-8 (the issue is whether "Caltrans complied with the Ninth Circuit's guidance in *Western States*"). The court, however, failed to follow this Court's guidance. In *Western States*, a contractor challenged the federal DBE program on its face, and as applied to the State of Washington. 407 F.3d at 987. The United States Department of Transportation (USDOT) had approved Washington's DBE program, just like it has approved the Caltrans program here. *Id.* at 1000. Although this Court found that the federal DBE program passed strict scrutiny, it invalidated Washington's program even though "the State complied with the federal program's requirements." *Id.* at 997.

The federal DBE program's "race-conscious measures can be constitutionally applied only in those States where the effects of discrimination are present." *Id.* at 996. A state must show (1) "the presence . . . of discrimination in [its]

transportation contracting industry," *id.* at 997-98, and (2) that the "application [of the remedial program] is limited to those minority groups that have actually suffered discrimination," *id.* at 998. However this Court did not intend for this test to be used as a "standard" to replace strict scrutiny, as the district court believed. Transcript, ER at 24:20-25:3; *see id.* at 22:14-18 (court doubting that Caltrans needed to show instances of discrimination by itself, prime contractors, or local governments). In finding Washington's DBE program unconstitutional, this Court held the state's evidence had to be subjected to rigorous judicial examination. *See id.*; 407 F.3d at 990-91 (requiring state to satisfy "strict scrutiny's exacting requirements").

Because Washington failed to proffer any probative evidence of discrimination in *Western States*, this Court was not required to articulate the standard for how precisely states must "show the presence of discrimination" in their "transportation contracting industry." It is clear, however, that "generalized assertions about discrimination in an entire industry cannot be used to justify race-conscious remedial measures." *Id.* at 1002 (citing *Croson*, 488 U.S. at 498). Caltrans must show "identified discrimination" with specificity. *Croson*, 488 U.S. at 499, 500, 505, 507, 509. "While the States and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination, they must identify that discrimination, public or private, with some specificity before they may use race conscious relief." *Id.* at 504. Moreover, the

identified discrimination must show a "pattern[] of deliberate exclusion," or race-conscious remedial action cannot be implemented. *Id.* at 509.

Croson rejected the City of Richmond's evidentiary showing because it failed to "approach[] a prima facie case of a constitutional or statutory violation." 488 U.S. at 500; *see Bakke*, 438 U.S. at 307 (for the governmental interest in remedying past discrimination to be triggered "judicial, legislative, or administrative findings of constitutional or statutory violations" must be made); *Wygant*, 476 U.S. at 276 (warning that "[i]n the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future"). The district court rejected the requirement to make any particularized findings, and ignored the failure of Caltrans to present evidence "approaching a prima facie case" of discrimination by its officials, local governments, or the prime contractors. *See* Transcript, ER at 45-62 (no findings of discrimination identified with specificity).

C. Caltrans' Statistical Studies Fail to Provide a Strong Basis in the Evidence Sufficient to Identify Illegal Discrimination

Under strict scrutiny, to show a "compelling interest" in the enactment of a racial classification, Caltrans must first "identify that discrimination, public or private, with some specificity before [it] may use race-conscious relief." *Croson*, 488 U.S. at 504. The district court ruled the Caltrans DBE Program is "supported by a

strong basis in evidence that gives rise to a compelling interest." Transcript, ER at 57:9-17. Rigorous examination of the Disparity Study reveals that Caltrans sets race-based goals on subcontracts without an appropriate statistical finding or the identification of any actual discrimination.

The Disparity Study contains four chapters showing different minority groups with different utilization percentages depending on the type and purpose of the contract. Disparity Study, Sections V-VIII, ER at 457-480. The Supreme Court holds that, in the right circumstance, an inference of discrimination might arise when there is a "significant statistical disparity" between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged. *Croson*, 488 U.S. at 509. Otherwise, underutilization statistics are not an inference of discrimination. But the district court never made any inquiry into which statistical tables represent comparisons between *qualified*, *willing*, and *able* contractors and the total number of contractors. Indeed, the district court never made any inquiry into what *makes* a contractor qualified, willing, and able.

Although the district court ruled that the Disparity Study is comprehensive and accounted for several factors, Transcript, ER at 60:10-11, the court never analyzed possible nondiscriminatory causes for the reported differences in utilization among various groups, such as bonding and insurance practices. Caltrans confessed to having no knowledge that bonding or insurance companies have discriminated

against minority- and women-owned businesses. Fonseca Dep., ER at 149-150; Kempton Dep., ER at 101. Indeed, there were no questions in the BBC availability survey specifically asking whether firms were licensed, bonded, or insured. Disparity Study (survey questions), ER at 524-542.

In its various Goal and Methodology reports to FHWA, Caltrans identified "barriers to the entry and expansion" of minority and women business firms in the transportation construction and engineering industries. Caltrans 2009 DBE Program, ER at 203-206; Caltrans 2010 DBE Program Goal, ER at 227-230. These included education, employment, advancement, business formation and ownership, rates of business closure, access to capital, business capital from home equity, business loans, bonding, insurance, bids of minority/women-owned firms, and business earnings. *Id.* Disparities in these factors do not provide the factual predicate for Caltrans' race-conscious remedial measures. *See Croson*, 488 U.S. at 498-99 (Court rejecting similar factors for being indicators of societal discrimination).

Further evidence that Caltrans cannot identify discrimination is the fact Caltrans made no step two adjustment when determining its annual DBE goal. The SAFETEA-LU regulations delineate a two-step process that a state must follow to set a DBE utilization goal that reflects its "determination of the level of DBE participation [that] would [be] expect[ed] absent the effects of discrimination." 49 C.F.R. § 26.45(b). In establishing this goal, a state's first step is to calculate a

base figure, which is the relative availability of DBEs in its local transportation contracting industry. 49 C.F.R. § 26.45(c).

Under step two, a state must examine all available evidence in its jurisdiction to determine if the base figure should be adjusted upward or downward. 49 C.F.R. § 26.45(d). According to 49 C.F.R. § 26.45(d)(1), the many types of evidence to be considered when adjusting the base figure include evidence from disparity studies, and the current capacity of DBEs to perform work (as measured by the volume of work DBEs have performed in recent years). A state may also consider statistical disparities in the bonding and financing industries relative to DBEs, as well as the present effects of past discrimination. 49 C.F.R. § 26.45(d)(2)-(3). Caltrans analyzed the factors listed above, but made no step-two adjustment during its goal setting to account for offsets to identified discrimination.

Caltrans' admission that it does not believe that either its officials or prime contractors discriminated, together with its failure to make any step two adjustment, suggests either that the disparities shown in the Disparity Study are not caused by discrimination; the disparities are caused by discrimination which Caltrans failed to identify with specificity; or the disparities are caused by societal discrimination. Caltrans' race-conscious measures cannot be supported under any of these conditions.

States must identify discrimination with specificity before they may use race-conscious relief. *Croson*, 488 U.S. at 504. "Claims of general societal

discrimination," or "generalized assertions about discrimination in an entire industry" cannot justify race-conscious remedial measures. *Western States*, 407 F.3d at 1002 (citing *Croson*, 488 U.S. at 498; *Hunt*, 517 U.S. at 909-10; *Wygant*, 476 U.S. at 276 (plurality op. of Powell, J.)). However, such assertions were accepted by the district court as an adequate basis for Caltrans' discriminatory program. *See* Transcript, ER at 12:18-21 (district court conceding the state's statement of undisputed facts were merely three legal conclusions about discrimination in the entire industry).

The district court never issued a written decision specifically identifying how the Disparity Study's findings justify Caltrans' race-conscious measures. The court believed that just *having* a disparity study was important, and not what the disparity study *showed*. After mentioning that Caltrans had a disparity study with an anecdotal section, the court asked during oral argument, "What more can a court require a public agency to do?"[9] Transcript, ER at 37:19-38:15. The court asked the wrong question. The question is not what evidence does a public agency have, the question is what does that evidence show? *Id.*, ER at 38:12-14. Here, the Disparity Study reveals that minority groups have different utilization percentages depending on the category and level of the contract. Disparity Study, Sections V-VIII, ER at 457-480.

[9] The district court did not want to "penalize" Caltrans, because Caltrans had a disparity study. Transcript, ER at 58:13-15.

The district court believed that race discrimination was shown by comparing DBE utilization on state funded contracts to utilization on federally assisted contracts, or the differences in DBE utilization before and after race-conscious measures went into effect. Transcript, ER at 17:17-13:4, 19:7-23. This Court rejected the same faulty reasoning when it invalidated Washington's race-conscious program in *Western States*. "The disparity between the proportion of DBE performance on contracts that include affirmative action components and on those without such provisions does not provide any evidence of discrimination against DBEs." *Western States*, 407 F.3d at 1000. Similarly, comparisons of utilization statistics from the Caltrans' race-conscious and race-neutral programs do not justify the continued use of race-conscious measures as the district court mistakenly held. Transcript, ER at 58:16-22.

D. The Unverified Anecdotal Information Fails to Identify Specific Acts of Discrimination

The unverified anecdotal evidence from the disparity study is not evidence of specific acts of intentional discrimination, as the district court erroneously ruled. Transcript, ER at 57:18-24. Anecdotal evidence "rarely, if ever" can "show a systemic pattern of discrimination necessary for adoption of an affirmative action plan." *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991). "Indeed, anecdotal evidence may even be less probative than statistical evidence in

the context of proving discriminatory patterns or practices." *Id.* At best, anecdotal evidence amounts to unsubstantiated and subjective perceptions, and is "of little probative value in establishing identified discrimination." *Croson*, 488 U.S. at 500. Caltrans dismissed its own anecdotal evidence in 2006 because it was not verified. Caltrans' May 1, 2006, letter to the Transportation Construction Community, ER at 109. Yet here, the district court never inquired whether the anecdotal information supporting Caltrans' DBE program was or could be verified. Without corroboration, no court could distinguish between allegations that represent objective assessments of a situation, and those that contain "heartfelt, but erroneous, interpretations of events and circumstances." *Eng'g Contractors Ass'n of S. Fla., Inc. v. Metro. Dade County*, 943 F. Supp. 1546, 1584 (S.D. Fla. 1996). Whether discrimination has occurred is often a complex question that requires a knowledge of the perspectives of both parties involved in an incident as well as knowledge about how comparably placed persons of other races have been treated. *Id.* at 1579. Persons providing anecdotes rarely have such information, *id.*, as the district court apparently assumed here.

The district court accepted Caltrans' unverified anecdotal evidence as proof of discrimination even though Caltrans' own expert, Mark Berkman, did not. Berkman Dep., ER at 269. He testified that public hearings are "not a controlled environment of any sort," and that there is a problem with "selection bias" because people may be

motivated to speak because they have "an axe to grind in one direction or the other" resulting in "conflicting responses." *Id.* Nevertheless, the court ignored the reservations of Caltrans' expert and accepted the anecdotes as probative evidence of actual discrimination.

Even if the paraphrased summaries from Appendix I of the Disparity Study were from verified statements, they are not claims of discrimination but are conflicting descriptions of problems with the Caltrans' DBE program. There are complaints concerning the difficulty of obtaining DBE certification, but also comments saying the process is easy. Disparity Study, ER at 788, 790, 793. There are accusations of business fronts and fraudulent DBEs. But these are problems that exist because of the DBE program, and are not justification for race-conscious measures.

Interviewees mentioned difficulty due to slow payments, not just for DBEs, but for all small firms. *Id.*, ER at 876-881. The study contains other examples where DBEs are negatively affected because of their smaller size, not because of race. A frequent concern was that Caltrans contracts were too big for DBEs, but DBEs are required to be small by the regulations. *Id.* at 796, 799. Bonding is another problem for all small firms. *Id.* at 798, 889. But Caltrans denied having knowledge that bonding companies have discriminated against minority firms. Fonseca Dep., ER at 149-150; Kempton Dep., ER at 101.

Similarly, financing is a problem for DBEs, but firm owners remarked that is "characteristic to small businesses" and had nothing to do with the owner's race. Disparity Study, ER at 892. There was a statement that Caltrans' insurance requirements were overly stringent. *Id.*, ER at 871, 895. But the amount of insurance required could be a problem for both small firms and DBEs based primarily on size. Caltrans has no knowledge that insurance companies are discriminating. Fonseca Dep., ER at 150.

Interviewees said there was a "Good Ole Boy" network, but this did not seem to be driven by race. A male Asian firm owner said "probably 20% of the DBEs 'gobble up' 80% of the work because of their standing relationships." Disparity Study, ER at 817. There is a kind of "Good Ole Boy" network that benefits DBEs. A minority trade association representative explained that "[p]eople tend to use people they are comfortable with," so a DBE prime contractor would tend to hire a DBE subcontractor. *Id.*, ER at 898.

Three years after the 2007 Disparity Study was completed, officials testified that Caltrans did not believe that any of its officials, the local governments, or any of its prime contractors have engaged in discrimination. Kempton Dep., ER at 75-76, 82, 95-98 (no particularized findings of discrimination); Fonseca Dep., ER at 156-157, 160-161 (same). Caltrans does not know whether the "barriers to the entry and expansion" of minority and women business firms in the transportation construction

and engineering industries are caused by discrimination. *See* Fonseca Dep., ER at 149-150 (no knowledge of whether bonding or insurance companies discriminated). Thus, even if Caltrans verified the study's anecdotal information, that process did not enable Caltrans to identify discrimination. Yet the district court had no trouble doing so.

Intervenors introduced anecdotal evidence from 13 declarations. Docket No. 88. Like the anecdotal summaries in the Disparity Study, these declarations failed to identify any specific discriminatory behavior by a Caltrans' employee or prime contractor that lead to a willing, qualified, and able minority- or woman-owned business being deprived of a contract. No anecdote identified any incident with specificity and the declarants acknowledged that they did not file formal complaints or have any incidents investigated.[10] Rather they testified in general terms about perceived bias in the industry,[11] and that prime contractors rely on long-term business

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[10] If a prime contractor or a bank discriminated against a minority-owned firm, one of the first steps in eradicating the discrimination would be to determine who was doing the discrimination and then take action against the discrimination. *Croson* instructs: "[T]he city could act to dismantle the closed business system by taking appropriate measures against those who discriminate on the basis of race or other illegitimate criteria." 488 U.S. at 509.

[11] Docket No. 88, Attachment #1 (Au Decl. ¶ 8), Attachment #4 (Hou Decl. ¶ 4), Attachment #7 (Liem Decl. ¶ 6), Attachment #12 (Smith Decl. ¶ 7), Attachment #9 (Ortiz Decl. ¶ 11), Attachment #8 (Montgomery Decl. ¶ 6), Attachment #11 (Singh Decl. ¶ 6), Attachment #13 (Turner Decl. ¶ 7).

relationships that they have developed.[12] They also admit that as small, emerging businesses, they have a difficult time surviving in this business climate without preferences.[13] The district court leaped to the conclusion that these individual perceptions were tantamount to discrimination. Transcript, ER at 61:11-13.

Contrary to the district court's ruling, the declarations fail to show the necessary degree of specificity required by *Croson* and do not form a strong basis in evidence of discrimination. Instead, the declarations merely suggest that the construction industry is built upon relationships and past experiences. Thus, it is difficult for new entrants to break in and gain a foothold within the network of established firms. But this is not evidence of a pattern or practice of racial discrimination. As recognized in *Coral Constr*., 941 F.2d at 919, anecdotal evidence is most useful as a supplement to strong statistical evidence and it "rarely, if ever, can . . . show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan."

The district court resorted to a less stringent form of judicial scrutiny than the Supreme Court demands. The government is not entitled to deference when a court

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[12] Docket No. 88, Attachment #2 (Au Decl. ¶ 15), Attachment #7 (Liem Decl. ¶ 4), Attachment #8 (Montgomery Decl. ¶ 4).

[13] Docket No. 88, Attachment #3 (Haygood Decl. ¶ 10), Attachment #4 (Hou Decl. ¶ 6), Attachment #6 (Kawamoto Decl. ¶ 7), Attachment #11 (Singh Decl. ¶ 10), Attachment #13 (Turner Decl. ¶ 6), Attachment #14 (Warner Decl. ¶¶ 3, 9), Attachment #15 (Wilder Decl. ¶ 6).

conducts strict scrutiny. *Croson*, 488 U.S. at 500-01. But the district court decided that strict scrutiny was satisfied because Caltrans said it was. *See*, *e.g.*, Transcript, ER at 24:20-25:4 (assurances that a pattern of discrimination exists); *id.* at 26:2-8 (assurances that Caltrans simply abides by the federal regulations); *id.* at 21:21-23 (same). The district court gave improper deference to Caltrans.

E. Caltrans Failed to Show Evidence of Discrimination Against All Women

1. The Disparity Study Lacks a Strong Basis in Evidence to Support Caltrans' Preferences for Firms Owned by Hispanic American or Subcontinent Asian American

The Disparity Study provides no statistical inferences of discrimination against Hispanic and Subcontinent Asian women. Transcript, ER at 58:23-59:4. Caltrans concedes the Disparity Study did not identify Hispanic Americans or Subcontinent Asian Americans—that would include male and female—as being underutilized, Fonseca Dep., ER at 144-146. But Caltrans chooses to exclude firms owned by Hispanic and Subcontinent Asian American men from its race-conscious DBE program, but not women. Transcript, ER at 47:11-16, Fonseca Dep., ER at 209-210, 232-233.

The disparity study clearly states that minority women are grouped together with minority men for purposes of both the availability and the utilization analysis. Disparity Study, ER at 424 (Figure II-5). Consequently, the Disparity Study does not

show separate statistics for male and female minorities. *See* Keen Dep., ER at 258-259 (no separate statistics for male or female Hispanics); Fonseca Dep., ER at 144-146 (same); Kempton Dep., ER at 93-94 (not recalling ever seeing disparity ratios for specific female minority groups). Whenever the Disparity Study reported on the availability and utilization of Women Business Enterprises (WBE), that term only includes white women-owned firms. Disparity Study, ER at 424 ("Note that statistics for WBEs refers to white women-owned firms, as discussed in Figure II-5.").

Caltrans initially removed all Hispanic and Subcontinent Asian Americans, male and female, from the groups granted race-conscious preferences in the Caltrans DBE program. Fonseca Dep., ER at 144-146. Later, however, the women—but not the men—in the two groups were reinstated. Letter from USDOT to Caltrans, August 7, 2008, ER at 399. But the Disparity Study clearly states that statistics and ratios about women are limited to white women. Disparity Study, ER at 424. Therefore, the Disparity Study provides no way to determine whether there are substantial disparities specifically for male Hispanics or for female Hispanics. Consequently, Caltrans has no basis for providing preferences for either group. The same is true for Subcontinent Asian Americans.

2. Caltrans Never Identified Any Statistical Disparities Showing Women-Owned Firms of All Races as It Was Required to Do Under Strict Scrutiny

Caltrans argued in the court below that, "taken together, both the disparity statistics for different races and the disparity statistics for white women, there is sufficient evidence to conclude that all women are significantly disadvantaged." Transcript, ER at 53:4-8. This argument is erroneous, and contradicted by the manner in which Caltrans grants preferences to certain minority groups while excluding others. The one statistical table that Caltrans relies upon for its conclusion that specific groups are substantially underutilized, and thus deserving of a preference, comes from Figure IV-9 on page 13, Section IV, of the Disparity Study. ER at 447. Figure IV-9 shows that when the dollars from all the categories and levels of contracts are combined, the disparity for all minority- and women-owned firms is 59%. Since Caltrans is apparently relying upon this statistical disparity to grant preferences to all women-owned firms (Caltrans has never identified any statistical analysis of women by race), then Caltrans should also rely on this disparity to grant preferences to all minority-owned firms. But Caltrans does not grant preferences to all minority groups. That is because Figure IV-9 does not show substantial disparities for Hispanic or Subcontinent Asian Americans.

As discussed above, for purposes of both availability and utilization analysis, the terms Hispanic Americans and Subcontinent Asian Americans include both male-

and female-owned firms within those groups. Disparity Study, ER at 424 (Figure II-5). As a result, the Disparity Study simply provides no means to identify whether the male- or female-owned firms within Hispanic and Subcontinent Asian American groups are substantially underutilized.

The district court held that the "disparity study calculated a disparity rate for white women-owned businesses and a disparity rate for all women-owned businesses, white and minority, and finding similar disparity across the board, arrived at one disparity number for all women-owned businesses." Transcript, ER at 53:9-13. Nowhere in the record is this "one disparity number" identified. Caltrans has never indicated where in the Disparity Study there is one utilization statistic for all white and minority women-owned businesses. There is none, because, as the Disparity Study states for purposes of the utilization analysis, "WBE refers to white women-owned firms" only. Disparity Study, ER at 424. Of the more than 120 pages of tables in Appendix E of the Disparity Study comparing minority- and women-owned utilization with that of white male-owned firms, not one table addresses Hispanic and Subcontinent Asian women-owned firms. Keen Dep., ER at 258-259. The district court never asked Caltrans to identify the specific statistical evidence of discrimination pertaining to Hispanic and Subcontinent women-owned firms.

III

THE GOVERNMENT'S RACE-BASED PREFERENCE PROGRAM IS NOT NARROWLY TAILORED TO REMEDY IDENTIFIED DISCRIMINATION "IN THE CONTRACTING INDUSTRY"

A. Caltrans' "One Size Fits All" Race-Conscious Program Is Not Narrowly Tailored to Address the Different Disparity Ratios Caltrans Claims Exist on Construction and Engineering Subcontracts

Even if the Caltrans' Disparity Study can withstand heightened scrutiny, the Caltrans DBE Program is not narrowly tailored to remedy the discrimination that Caltrans claims the study identifies. *See Western States*, 407 F.3d at 990 (state must satisfy strict scrutiny's exacting requirements).

In those rare cases where the state's use of race may further a compelling interest, the Supreme Court has emphasized that the means chosen must "work the least harm possible," *Bakke*, 438 U.S. at 308 (op. of Powell, J.), and be narrowly tailored to fit the interest "with greater precision than any alternative means." *Grutter v. Bollinger*, 539 U.S. 306, 379 (2003) (Rehnquist, C.J., dissenting) (citation omitted). The Court recently reaffirmed in *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007), that "'racial classifications are simply too pernicious to permit any but the most *exact* connection between justification and classification.'" (quoting *Gratz*, 539 U.S. at 270 (emphasis added)).

This Court holds that when a state's DBE program must resort to race-conscious remedies to break up identified patterns of deliberate exclusion of minorities, "a remedial program is only narrowly tailored if its application is limited to those minority groups that have actually suffered discrimination." *Western States*, 407 F.3d at 998. Each of the principal minority groups benefitted by a state's DBE program must have suffered discrimination within the state. Otherwise, "the DBE program provides minorities who have not encountered discriminatory barriers with an unconstitutional competitive advantage" over nonminorities and any minority groups that have suffered discrimination. *Id.* at 999; *see also Monterey Mech.*, 125 F.3d at 704, 714 (invalidating a California statute with overinclusive racial classifications).

1. Caltrans' Race-Conscious Remedy Is Not an Exact Fit With the Inconsistent Racial Disparities Caltrans Claims to Have Identified on Construction and Engineering Subcontracts

Caltrans sets race- and sex-conscious goals on both federally assisted construction and engineering subcontracts. Fonseca Dep., ER at 128, 176; Kuhl Dep., ER at 261-262. Preferences are given to African Americans, Asian Pacific Americans, Native Americans, and women regardless of whether the contract is for construction or engineering. But according to Caltrans' Disparity Study, racial groups who may be substantially underutilized on construction subcontracts are not substantially underutilized on engineering subcontracts, and vice versa:

- Construction Subcontracts. The Disparity Study showed no substantial disparities on state funded transportation construction subcontracts for Native Americans, Hispanic Americans, or Subcontinent Asian Americans. Disparity Study, ER at 463. But Native Americans are entitled to preferences on construction subcontracts, while Hispanic Americans and Subcontinent Asian Americans are not. Caltrans 2010 DBE Program, ER at 233.

- Engineering Subcontracts. The Disparity Study showed no substantial disparities on state funded transportation engineering subcontracts for Asian Pacific Americans or white women. Disparity Study, ER at 479. But both Asian Pacific Americans and white women are entitled to preferences on engineering subcontracts. SUMF Nos. 22-24. There are substantial disparities for both Hispanic Americans and Subcontinent Asian Americans, but they do not receive preferences. Caltrans 2010 DBE Program, ER at 233.

An inference of discrimination only arises when there is a "significant statistical disparity" between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged. *Croson*, 488 U.S. at 509. The Disparity Study's statistics do not create an "inference of discrimination" against Native Americans on construction subcontracts or against Asian Pacific Americans or white women on engineering subcontracts. However those groups are granted preferences by Caltrans' race- conscious measures. Thus, Caltrans' race-conscious remedy does not provide an "exact connection between justification and classification," as required for narrow tailoring. *Parents Involved*, 551 U.S. at 720 (citation omitted).

2. Caltrans' Mismatched Remedy Cannot Be Justified

The district court failed to address this lack of narrow tailoring in its ruling. At oral argument, Caltrans did not argue whether the disparities identified in the awards of subcontracts do or do not create an inference of discrimination, only that: (1) nothing in the federal regulations requires Caltrans to consider prime contracts and subcontracts separately; and (2) the issue was already addressed in *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715 (7th Cir. 2007). Transcript, ER at 35:1-16. The district court's reliance on any of these reasons is reversible error.

a. Under *Western States*, a State Must Do More Than Merely Comply With the Federal Regulations

Under *Western States*, a state's blind adherence to the federal regulations does not render its DBE program constitutional. In *Western States*, there was no dispute that Washington's program complied with both the federal statute and regulations. 407 F.3d at 995-96. Yet this Court still invalidated that program because it was not narrowly tailored to discrimination within the state. *Id.* at 997 ("[T]he district court erred when it upheld Washington's DBE program simply because the State complied with the federal program's requirements.") Thus, Caltrans' claim that it need not ensure that its program is narrowly tailored simply because the federal regulations do not address a specific issue raised by Caltrans' Disparity Study is without merit, and the district court's deference to Caltrans is error.

Moreover, the federal DBE program has been held to be narrowly tailored, in part, because of its "substantial flexibility" in allowing a state to "obtain waivers or exemptions from any requirement." *Sherbrooke Turf, Inc. v. Minnesota Dep't of Transp.*, 345 F.3d 964, 972 (8th Cir. 2003). The federal regulations allow recipients of federal aid to apply for an exemption from "any provision" in the DBE regulations. 49 C.F.R. § 26.15(a). The regulations specifically state that federal aid recipients may apply for a waiver regarding the contract goal requirements "for the purpose of authorizing you to operate a DBE program that achieves the objectives of [the DBE program]."[14] 49 C.F.R. § 26.15(b). An objective of the DBE program is to ensure that it is narrowly tailored in accordance with applicable law. 49 C.F.R. § 26.1(c). Thus, Caltrans' claim that the federal regulations do not allow it to narrowly tailor its program to the different categories of subcontracts is patently false. On the contrary, to accomplish the objectives of the DBE program, and comply with equal protection principles, Caltrans is required to narrowly tailor its program.

Indeed, the regulations seem to be written precisely to address the narrow tailoring issue with respect to subcontracting that the Caltrans disparity study

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[14] Caltrans had to request such a waiver to make its race-conscious subcontract goals available only to certain minority groups while excluding others. ER at 399. That 49 C.F.R. § 26.45(h) specifically prohibits agencies from limiting preferences to only some minority groups did not deter Caltrans from requesting the waiver. In contrast, there is no federal regulation prohibiting Caltrans from narrowly tailoring its remedy to the different subcontracts.

presents. The regulations state that waivers are to be given for "different or innovative means" as long as "conditions in [the local] jurisdiction are appropriate for implementing the proposal"; the "proposal would prevent discrimination against any individual or group"; and "is consistent with applicable law." 49 C.F.R. § 26.15(b)(2). Here, Caltrans' own study reveals that providing the same preferences to the groups chosen by Caltrans on every type of contract is not a narrowly tailored remedy to address the disparities identified on construction and engineering subcontracts. Clearly, Caltrans' Disparity Study on statistical disparities does not evidence a pattern of deliberate exclusion by nonminority contractors; but even if they do, the blanket remedy chosen by Caltrans in response to the different disparities is not narrowly tailored according to constitutional requirements of strict scrutiny.

b. Reliance on *Northern Contracting* Is Misplaced, Because the Seventh Circuit Never Addressed the Utilization Issue Presented by the Caltrans' Disparity Study

Contrary to Caltrans' claims at oral argument below, the Seventh Circuit, in *Northern Contracting*, did not confront, or even address, the lack of narrow tailoring issue presented here by the Caltrans' Disparity Study. In *Northern Contracting*, a subcontractor sued the State of Illinois alleging that its DBE program was unconstitutional. One of the subcontractor's arguments was that when Illinois determined its overall DBE goal, it should have adjusted the base figure to local market conditions by separating prime contractor availability from subcontractor

availability. *Northern Contracting*, 473 F.3d at 722-23. The Seventh Circuit rejected this argument, because DBEs compete for both prime contracts and subcontracts. *Id.*

The availability issue from *Northern Contracting* has nothing to do with the utilization issue presented by Caltrans' Disparity Study. *Northern Contracting* concerned the interpretation of availability data to calculate the overall DBE goal under 49 C.F.R. § 26.45. Here, the issue is whether the utilization data implies intentional discrimination, and whether Caltrans' race-conscious subcontracting goals under 49 C.F.R. § 26.51 are narrowly tailored to remedy the identified discrimination. In *Northern Contracting*, the issue was how to count DBEs. Since the state did not make a distinction between DBEs that bid for subcontracts and DBEs that bid for prime contracts, the court had to determine whether the regulations required the state to compile the availability data separately for subcontractors and prime contractors. But here, the Disparity Study already reports contracting data by prime contract and subcontract, and by construction and engineering fields. Disparity Study, Sections V-VIII. ER at 457-480. In *Croson*, the Supreme Court criticized the City of Richmond for not having subcontracting data, since the City assumed white prime contractors will not hire minority firms. 488 U.S. at 502. Here, by contrast, the subcontracting data is available, but the district court deferred to Caltrans and *ignored* it.

3. Caltrans' Overinclusive DBE Program Is Attempting to Remedy Societal Discrimination

This Court recognized in *Western States* that societal discrimination provides no basis for a race-conscious remedy. 407 F.3d at 1002. Caltrans' discriminatory DBE program does not remedy past and present discrimination to break up a pattern of deliberate exclusion, but is trying to remedy societal discrimination.

In *Croson*, the City of Richmond argued that it was attempting to remedy various forms of past discrimination such as the exclusion of African Americans from skilled construction trade unions and training programs, deficiencies in working capital, inability to meet bonding requirements, unfamiliarity with bidding procedures, and disability caused by an inadequate track record. *Croson*, 488 U.S. at 498-99. This past discrimination, the City argued, prevented minorities "from following the traditional path from laborer to entrepreneur." *Id.* The Court rejected this argument because "it is sheer speculation how many minority firms there would be in Richmond absent past societal discrimination." *Id.* at 499. The Court cautioned that "defining these sorts of injuries as 'identified discrimination' would give local governments license to create a patchwork of racial preferences." *Id.* But that is exactly what the Disparity Study does.

The district court stated that Caltrans could show discrimination by "[statistical] studies and anecdotal evidence." Transcript, ER at 20:21-27. Were

Caltrans to truly narrowly tailor its race-conscious program to address the Disparity Study's underutilization statistics that both the district court and Caltrans claim are indicators of discrimination, its DBE program would consist of a "patchwork of racial preferences." Already Caltrans' jumbled race-conscious program awards preferences to some groups, while excluding others. Extending racial preferences to account for the substantial disparities shown in the Disparity Study's subcontracting data would turn the program into an ever more intricate patchwork of preferences, indicative of an impermissible attempt to remedy societal discrimination as described in *Croson*. This is because the Disparity Study's statistics simply do not support an inference of a pattern of "deliberate exclusion."

B. The Caltrans Program Is Overinclusive Because It Certifies DBEs to Receive Preferences Without Evidence They Have Suffered Discrimination in California

The Caltrans' DBE program is not narrowly tailored, because Caltrans grants preferences to minority firms who may never have been victims of discrimination in California. Fonseca Dep. ER at 168, 170-173. In *Croson*, the Supreme Court criticized governments for not inquiring into whether particular minority firms seeking a racial preference had suffered from the effects of past discrimination by the government or prime contractors. *Croson*, 488 U.S. at 508. But that is exactly what Caltrans does. The district court's only comment on this issue was that Caltrans

certifies DBEs according to the regulations, thereby improperly deferring to the government once again. Transcript, ER at 53:14-15.

In *Western States*, this Court criticized the affidavits that potential DBEs must sign in order to become certified and eligible for a state's race-conscious remedial measures. *Western States*, 407 F.3d at 1002. By signing the form, potential applicants certify that they are persons "who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities." 49 C.F.R. § 26.67(a); Participation by Disadvantaged Business Enterprises in Department of Transportation Programs, 64 Fed. Reg. 5096 (Feb. 2, 1999). Washington argued in *Western States* that the signed affidavits created evidence of discrimination within the state. The Ninth Circuit rejected that claim, holding that the unverified attestations "do not provide any evidence of discrimination within Washington's transportation contracting industry." *Western States*, 407 F.3d at 1002. Caltrans uses the same language in its certification affidavit found to be inadequate in *Western States*. Affidavit, ER at 314-315. Thus, Caltrans fails to certify that DBEs who are eligible for preferences under the Caltrans DBE program have suffered discrimination within California. Fonseca Dep., ER at 170-173.

Caltrans "must identify discrimination" within the state before it may use race-conscious relief. *Croson*, 488 U.S. at 504; *Western States*, 407 F.3d at 999.

Otherwise, "the DBE program provides minorities who have not encountered discriminatory barriers with an unconstitutional competitive advantage" over nonminorities and any minority groups that have suffered discrimination. *Western States*, 407 F.3d at 999; *see also Monterey Mech.*, 125 F.3d at 704, 714 (invalidating a California statute with overinclusive racial classifications).

Additionally, each minority contractor receiving the preference must have suffered discrimination within the state, or the program makes "the color of an applicant's skin the sole relevant consideration" rather than treating "all candidates individually." *Croson*, 488 U.S. at 508; *see Bakke*, 438 U.S. at 307 (op. of Powell, J.) ("Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.").

Even prior to *Croson* and *Adarand*, where the Supreme Court clarified that all government racial classifications must be reviewed by courts under strict judicial scrutiny, individual justices expressed concern about the manner in which individual minority firms were certified to be socially disadvantaged and hence eligible for government racial preferences. In *Fullilove v. Klutznick*, six justices upheld a federal program that set aside 10% of federal funds for minority contractors. 448 U.S. 448, 453-54 (1980). Articulating notions of narrow tailoring that would eventually become the prevailing view, dissenting justices questioned not only the congressional

decision about which minority groups were eligible for the 10% set-aside, but also which particular firms were to be eligible for those contracts.

Justice Stewart argued that, "[i]n today's society, it constitutes far too gross of an oversimplification to assume that every single [minority firm] potentially interested in construction contracting currently suffers from the effects of past or present racial discrimination." 448 U.S. at 530 (Stewart, J., dissenting). Justice Stevens argued that it was highly unlikely that those minority firms that had been victims of discrimination were at all representative of the entire class of firms to which the federal program granted a racial preference. *Id.* at 541 (Stevens, J., dissenting). Thus, he doubted whether the program could be considered a narrowly tailored remedial measure.

In *Croson*, where the Court clarified that the standard for review of state imposed racial classifications is strict scrutiny, the concern for narrowly tailoring the beneficiaries of a remedial race-based contracting program extended from dissenting justices to a Court majority.

The *Croson* majority indicated that government was required to conduct an individualized consideration of those minority firms receiving a racial preference. The Court faulted the City of Richmond's race-conscious remedy for "focus[ing] solely on the availability of MBE's; [with] no inquiry into whether or not the particular MBE seeking a racial preference ha[d] suffered from the effects of past

discrimination by the city or prime contractors." *Croson*, 488 U.S. at 508. Moreover, a state's failure to investigate whether minority firms receiving racial preferences have in fact been victims of racial discrimination by the government or prime contractors cannot be excused by bureaucratic inconvenience. "[T]he interest in avoiding the bureaucratic effort necessary to tailor remedial relief to those *who truly have suffered the effects of prior discrimination* cannot justify a rigid line drawn on the basis of a suspect classification." *Id.* (citing *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (plurality opinion)) (emphasis added).

In *Adarand*, the Court again indicated that minority subcontractor compensation clause programs require individualized proof of "social or economic disadvantage." The Court was troubled that various federal affirmative action programs required recipients of the racial preference to make different kinds of showings to establish social and economic disadvantage. *See* 515 U.S. at 238 (highlighting discrepancies in the different and broad definitions of what is meant by "socially disadvantaged"). In light of these broad and varying definitions of social and economic disadvantage, the Court concluded that lower courts should examine whether the government's use of subcontractor compensation clauses "can survive strict scrutiny." *Id.* at 238-39. The district court made no such examination here, although the issue was clearly raised. Plaintiff's Mem. of Points and Authorities in Support of MSJ at 20 (Docket No. 44).

If the certification affidavits used by Caltrans cannot establish that a potential DBE has suffered discrimination within the California transportation industry, then the affidavits also fail to establish that any certified DBE in California is entitled to benefit from Caltrans' race-conscious measures. Merely attesting to being a victim of societal discrimination in some unknown place at some unknown time for some unknown reason is not a sufficient predicate for an individual race-conscious remedy. *Western States*, 407 F.3d at 1002 (citing *Croson*, 488 U.S. at 498).

C. Caltrans Failed to Make Use of Available Race-Neutral Methods to Combat Discrimination

The district court ruled that race-conscious measures of the Caltrans' DBE program were narrowly tailored. Transcript, ER at 57. But Caltrans has adopted racially discriminatory measures before endeavoring a "serious, good faith consideration of workable race-neutral alternatives." *Western States*, 407 F.3d at 993.

This Court has made clear that while "'[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative,' it does 'require serious, good faith consideration of workable race-neutral alternatives.'" *Grutter*, 539 U.S. at 339. "The essence of the 'narrowly tailored' inquiry is the notion that explicit

racial preferences . . . must be only a 'last resort' option."[15] *Hayes v. North State Law Enforcement Officers Ass'n*, 10 F.3d 207, 217 (4th Cir. 1993).

The Caltrans 2008 DBE program identified 45 race-neutral measures, the amended 2009 DBE program identified 70, and the 2010 DBE program identifies 150 race-neutral measures. ER at 120-123, 218-221, 240-251. Yet Caltrans continues to insist on implementing racial preferences before the effectiveness of these ever increasing race-neutral efforts have been evaluated. Caltrans could even have adopted race-neutral small business goals rather than goals based on race and sex. Fonseca Dep., ER at 152, 153, 154; Kempton Dep., ER at 107-108.

In *Croson*, the government entity was criticized for failing to enforce its nondiscrimination law before resorting to racial preferences. *Croson*, 488 U.S. at 502 n.3. Likewise, Caltrans has not enforced nondiscrimination laws in the transportation industry, because it is unaware of discrimination by its own employees, by prime contractors, by bonding companies, or by insurance companies. Fonseca Dep., ER at 149-150, 160-161; Kempton Dep., ER at 95-98, 101.

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[15] *See also Parents Involved*, 551 U.S. at 798 ("[M]easures other than differential treatment based on racial typing of individuals first must be exhausted."); *Rothe Dev. Corp. v. U.S. Dep't of Def.*, 545 F.3d 1023, 1036 (Fed. Cir. 2008) ("[E]ven where there is a compelling interest supported by a strong basis in evidence," the court must consider "the efficacy of alternative, race-neutral remedies.").

Caltrans could not have evaluated the effectiveness of its race-neutral measures in remedying the disparities that existed at a time before the ever-increasing race-neutral measures were even identified. Failure to properly consider race-neutral alternatives renders the entirety of Caltrans' DBE Program unconstitutional. *Western States*, 407 F.3d at 993.

IV

CALTRANS HAS NO COMPELLING INTEREST IN USING ITS DBE PROGRAM TO SET RACE-CONSCIOUS GOALS ON THE UTILIZATION OF STATE FUNDS

Caltrans enforces its DBE program in such as a way as to assign race-conscious contract goals to its use of state funds. Kempton Dep., ER at 99; Fonseca Dep., ER at 178; Kuhl Dep., ER at 264-265; Transcript, ER at 39:21-40. Even if the majority of funds for a federally assisted transportation project consisted of state funds, the race-conscious component of Caltrans' DBE program would apply to the total value of the project. No federal regulation requires states to set race-conscious DBE goals for its utilization of state funds. *See* 49 C.F.R. § 26.51(d) (omitting mention of any requirements to set goals on state funded portion of a federally assisted contract). Thus, Caltrans cannot rely on the federal DBE requirement as establishing a compelling interest to justify its allocation of state funds on the basis of race. The district court erred by failing to analyze the Caltrans' program under strict scrutiny

to determine if Caltrans' use of race-conscious goals on its awards of state funds is narrowly tailored to effectuate a compelling state interest. *Adarand*, 515 U.S. at 227.

A. The Federal Regulations Require States to Set DBE Goals on Their Awards of Federal Funds—Not State Funds

The federal DBE regulations state that a recipient of federal aid determines its overall DBE goal, which is expressed "as a percentage of all *Federal-aid* highway funds" the recipient "will expend in FHWA-assisted contracts in the forthcoming three fiscal years." 49 C.F.R. § 26.45(e)(1) (emphasis added). This Court even held in *Western States* that "[t]he final, adjusted figure [overall DBE goal] represents the proportion of *federal* transportation funding that a State must allocate to DBEs." 407 F.3d at 989 (emphasis added). Caltrans' 13.5% overall DBE goal is therefore a projection that 13.5% of "federal aid dollars" the state receives for transportation projects should go to DBEs, not 13.5% of federal *and* state dollars. Fonseca Dep., ER at 147-148.

To meet the overall DBE goal, agencies like Caltrans are expected to set race-neutral and race-conscious goals. 49 C.F.R. § 26.45(a), (d). Race-conscious contract goals "must" be set so that they will "cumulatively result in meeting any portion of [the] overall goal [the state does] not project being able to meet through the use of race-neutral means." 49 C.F.R. § 26.51(e)(2). In other words, the race-conscious contract goals are set so that the projected amount of federal funds will be

earned by DBEs. There is no federal authority mandating Caltrans to allocate state funds to DBEs on a racial basis.

B. Caltrans' Allocation of State Funds by Race Is Not Justified By Any State Compelling Interest

Caltrans' DBE program violates the Fourteenth Amendment because it has identified no compelling interest to justify its distribution of state funds on the basis of race. Article I, section 31, of the California Constitution prohibits the state from granting preferential treatment to, or discriminating against, any group or individual on the basis of race, color, ethnicity, sex, or national origin in the operation of public contracting. Cal. Const. art. I, § 31(a). A contracting scheme that requires preferential treatment on the basis of race or sex violates Article I, section 31. *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068, 1085 (Cal. 2000); *see Coal. for Econ. Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997) (upholding constitutionality of Article I, section 31). When a California agency may either use race-neutral or race-conscious measures to comply with a federal program, the agency is required to use race-neutral measures. *C&C Constr., Inc. v. Sacramento Mun. Util. Dist.*, 18 Cal. Rptr. 3d 715, 731 (Cal. Ct. App. 2004). Caltrans cannot claim that it is combining federal and state dollars just because that would make the program easier to implement. Matters of administrative convenience do not justify a violation

of the Equal Protection Clause. *Croson*, 488 U.S. at 508 (citing *Frontiero*, 411 U.S. at 690).

CONCLUSION

The race-conscious component of Caltrans' DBE program fails to satisfy the heavy burden of strict scrutiny and is therefore unconstitutional under the Fourteenth Amendment.

Appellant AGC San Diego respectfully requests that this Court reverse the ruling of the district court and direct the lower court to enter summary judgment in favor of Appellant's claims under the Fourteenth Amendment.

DATED: October 21, 2011.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Plaintiff - Appellant is aware of no related cases within the meaning of Circuit Rule 28-2.6.

FORM 8. CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(a)(7)(C) AND CIRCUIT RULE 32-1 FOR CASE NUMBER 11-15100

Form Must Be Signed By Attorney or Unrepresented Litigant *and attached to the back of each copy of the brief*

I certify that: **(check appropriate option(s))**

✓ 1. Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32.1, the attached opening/answering/reply/cross-appeal brief is

☑ Proportionately spaced, has a typeface of 14 points or more and contains 13,835 words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words; reply briefs must not exceed 7,000 words),

or is

❑ Monospaced, has 10.5 or fewer characters per inch and contains ______ words or ______ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 14,000 words or 1,300 lines of text; reply briefs must not exceed 7,000 words or 650 lines of text).

__ 2. The attached brief is **not** subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because

❑ This brief complies with Fed. R. App. P. 32(a)(1)-(7) and is a principal brief of no more than 30 pages or a reply brief of no more than 15 pages;

❑ This brief complies with a page or size-volume limitation established by separate court order dated ___________ and is

❑ Proportionally spaced, has a typeface of 14 points or more and contains ______ words,

or is

❑ Monospaced, has 10.5 or fewer characters per inch and contains ______ pages or _______ words or _______ lines of text.

__ 3. *Briefs in Capital Cases*

❑ This brief is being filed in a capital case pursuant to the type-volume limitations set forth at Circuit Rule 32-4 **and is**

❑ Proportionately spaced, has a typeface of 14 points or more and contains ______ words (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 21,000 words; reply briefs must not exceed 9,800 words)

or is

❑ Monospaced, has 10.5 or fewer characters per inch and contains ______ words or ______ lines of text (opening, answering, and the second and third briefs filed in cross-appeals must not exceed 75 pages or 1,950 lines of text; reply briefs must not exceed 35 pages or 910 lines of text).

__ 4. *Amicus Briefs*

❑ Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 7,000 words or less,

or is

❑ Monospaced, has 10.5 or fewer characters per inch and contains not more than either 7,000 words or 650 lines of text,

or is

❑ **Not** subject to the type-volume limitations because it is an amicus brief of no more than 15 pages and complies with Fed. R. App. P. 32(a)(1)(5).

DATED: October 21, 2011.

s/ Ralph W. Kasarda
RALPH W. KASARDA

CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

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