I. LEGAL ANALYSIS – HISTORICAL OVERVIEW

A. Introduction

The City of Gainesville, Florida (hereafter "Gainesville" or the "City") has engaged Griffin & Strong, P.C. ("GSPC") to conduct this Disparity Study (hereafter "Study") addressing the City's procurement policies, procedures, and overall purchasing environment. This is the first disparity study conducted for the City.

To provide background and context the Legal Analysis provided by GSPC for this Study will first present the important historical background guiding the development of disparity studies generally, which effectively began in the United States Supreme Court more than thirty years ago and has been carried forward to the present time by federal and state courts faced with legal challenges to Minority and Women Owned Business Enterprise (M/WBE) programs and policies.

Because the parameters of the current study of Gainesville's procurement policies and practices, and the various qualitative and quantitative methodologies employed therein are the product of developing case law and decades of practical experience, GSPC will then provide a more comprehensive discussion of the key judicial decisions inviting increased use (and development) of disparity studies, and a deeper look into the legal considerations and related evidentiary requirements for sustaining inclusion programs in the face of a challenge on constitutional grounds. This analysis will be provided in an appendix (Appendix 1 to the Study).

In each of these analyses GSPC specifically includes discussion of important decisions from the United States Court of Appeals for the Eleventh Circuit, as these decisions highlight the legal foundation under which a challenge to any of the City's program elements or policies would be analyzed.

Lastly, upon completion of the Study, GSPC will provide the City with proposed findings and recommendations regarding procurement policies and procedures, with reference to legal considerations that may support or otherwise be implicated by a particular recommendation, including one that includes race-conscious or gender-conscious policies or remedies. This underscores the importance of the following historical overview and the subsequent expanded legal analysis for full consideration by the City.

B. Historical Development of the Relevant Law Regarding DBE and M/WBE Programs

The outgrowth of disparity studies was in large measure a response to constitutionally-based legal challenges made against federal, state, and local minority business enterprise programs enacted to remedy past or present discrimination (whether real or perceived). Such studies were effectively invited by the United States Supreme Court in rendering its seminal decision in City of Richmond v. J. A. Croson Company, 488 U.S. 469; 109 S. Ct. 706; 102 L. Ed. 2d 854 (1989), and subsequent judicial decisions have drawn a direct line between Croson and the utilization of disparity studies. See, for example, Adarand Constructors, Inc. v. Slater (Adarand III), 228 F.3d 1147, 1172-73 (10th Cir. 2000) ("Following the Supreme Court's decision in Croson, numerous state and local governments have undertaken statistical studies to assess the disparity, if any, between availability and utilization of minority-owned businesses in government contracting.").

Disparity studies have therefore become an important tool for governmental entities in deciding whether to enact minority business programs or legislation, and in justifying existing programs or legislation in the face of constitutional challenge. To better understand the proper parameters of such programs, one must understand their judicial origin.

1. The Supreme Court's Decision in City of Richmond v. Croson

To fully appreciate the usefulness of disparity studies for development and defense of minority business programs, an overview of the Croson decision is helpful.

Laws that, on their face, favor one class of citizens over another, may run afoul of the Equal Protection Clause of the Fourteenth Amendment. DBE/MBE/WBE programs and legislation are among the types of laws invoking such concerns. Depending on the nature of the differentiation (e.g., based on race, ethnicity, gender), courts evaluating the constitutionality of such programs will apply a particular level of judicial scrutiny. As explained at greater length below, race-based programs are evaluated under a "strict scrutiny" standard, and gender-based programs may be subject to strict scrutiny or under a less-rigorous "intermediate scrutiny" standard, depending on the federal circuit within which the entity sits. Since there is an unclear difference between strict and intermediate scrutiny, GSPC treats them both with the highest level of review.

In its Croson decision, the Supreme Court ruled that the City of Richmond's Minority Business Enterprise (hereinafter "MBE") program failed to satisfy the requirements of "strict scrutiny." "Strict scrutiny" review involves two co-equal considerations: First, the need to demonstrate a compelling governmental interest; Second, implementation of a program or method narrowly tailored to achieve/remedy the compelling interest. In Croson, the Supreme Court concluded that the City of Richmond failed to show that its minority set-aside program was "necessary" to remedy the effects of discrimination in the marketplace.

In fact, the Court found that the City of Richmond had not established the necessary factual predicate to infer discrimination in contracting had occurred in the first place. The Court reasoned that a mere statistical disparity between the overall minority population in Richmond (50% African-American) and awards of prime contracts to minority-owned firms (0.67% to African-American firms) was an irrelevant statistical comparison and insufficient to raise an inference of discrimination.

Addressing the disparity evidence that Richmond proffered to justify its MBE program, the Court emphasized the need to distinguish between "societal discrimination," which it found to be an inappropriate and inadequate basis for social classification, and the type of identified discrimination that can support and define the scope of race-based relief.

Specifically, the Court opined that a generalized assertion of past discrimination in an entire industry provided no guidance in determining the present scope of the injury a race-conscious program seeks to remedy, and emphasized that "there was no direct evidence of race discrimination on the part of the City in

letting contracts or any evidence that the City's prime contractors had discriminated against minority-owned subcontractors."[1]

Accordingly, the Court concluded there was no prima facie case of a constitutional or statutory violation by anyone in the construction industry that might justify the MBE program. Justice O'Connor nonetheless provided some guidance on the type of evidence that might indicate a proper statistical comparison:

> [W]here 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 by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise. [Croson, 488 U.S. at 509]

Stated otherwise, the statistical comparison should be between the percentage of M/WBEs in the marketplace qualified to do contracting work (including prime contractors and subcontractors), and the percentage of total government contract awards (and/or contractual dollars paid) to minority firms. The relevant question among lower federal courts has been which tools or methods are best for such analysis; a matter addressed in the detailed discussion of statistical comparison provided below.

Additionally, the Court in Croson stated that identified anecdotal accounts of past discrimination also could provide a basis for establishing a compelling interest for local governments to enact race-conscious remedies. However, conclusory claims of discrimination by City officials, alone, would not suffice, nor would an amorphous claim of societal discrimination, simple legislative assurances of good intention, or congressional findings of discrimination in the national economy. In order to uphold a race- or ethnicity-based program, the Court held, there must be a determination that a strong basis in evidence exists to support the conclusion that the remedial use of race is necessary.

Regarding the second prong of the strict scrutiny test, the Croson Court ruled that Richmond's MBE program was not narrowly tailored to redress the effects of discrimination. First, the Court held that Richmond's MBE program was not remedial in nature because it provided preferential treatment to minorities such as Eskimos and Aleuts, groups for which there was no evidence of discrimination in Richmond. Thus, the scope of the City's program was too broad.

Second, the Court ruled that the 30% goal for MBE participation in the Richmond program was a rigid quota not related to identified discrimination. Specifically, the Court criticized the City for its lack of inquiry into whether a particular minority business, seeking racial preferences, had suffered from the effects of past discrimination.

Third, the Court expressed disappointment that the City failed to consider race-neutral alternatives to remedy the under-representation of minorities in contract awards. Finally, the Court highlighted the fact that the City's MBE program contained no sunset provisions for a periodic review process intended to assess the continued need for the program.[2]

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[1] Croson, 488 U.S. at 480.
[2] Croson, 488 U.S. at 500.

Subsequent to the decision in Croson, the Supreme Court and the federal Circuit Courts of Appeal have provided additional guidance regarding the considerations, measurements, information, and features surrounding race and gender based programs which will assist in protecting programs from constitutional challenge under a strict scrutiny analysis. These recommendations have in many respects provided a roadmap of sorts for disparity studies and are therefore discussed in greater detail below.

2. The Supreme Court's Decision in Adarand v. Pena and Subsequent Circuit Court Proceedings

Six years after its decision in Croson, the Supreme Court was again confronted with an Equal Protection challenge to a minority business program, in Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (Adarand II). This time, however, a DBE program enacted by the federal government was at issue, thus implicating the Fifth Amendment rather than the Fourteenth Amendment analysis required for the local program in Croson.

Reversing the decision of the Tenth Circuit, the Supreme Court ruled that federal programs are not reviewed for constitutionality under a more lenient standard (as had been indicated in some prior Supreme Court opinions); strict scrutiny is likewise to be applied to such programs.[3] Because the district court and the Tenth Circuit had not applied the proper standard of review, the Supreme Court remanded the case back to the district court to apply strict scrutiny to the program, consistent with Croson.[4]

On remand, the district court (D. Colo.) essentially ruled that no program can meet the strict scrutiny standard --- i.e., it is "fatal in fact." The Tenth Circuit disagreed, upholding the federal program even under a strict scrutiny standard, finding a compelling state interest, and the required narrow tailoring to achieve such compelling interest.[5]

Consistent with Croson and subsequent opinions, the Tenth Circuit described its task regarding the compelling state interest as follows:

> [O]ur inquiry necessarily consists of four parts: First, we must determine whether the government's articulated goal in enacting the race-based measures at issue in this case is appropriately considered a "compelling interest" under the governing case law; if so, we must then set forth the standards under which to evaluate the government's evidence of compelling interest; third, we must decide whether the evidence presented by the government is sufficiently strong to meet its initial burden of demonstrating the compelling interest it has articulated; and finally, we must examine whether the challenging party has met its ultimate burden of rebutting the government's evidence such that the granting of summary judgment to either party is proper. We begin, as we must, with an inquiry into the meaning of "compelling interest." [Adarand III, 228 F.3d at 1164]

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[3] Id. at 222-26.
[4] Id.
[5] Adarand Constructors, Inc. v. Slater, 228 F.3d 1147 (10th Cir. 2000) (Adarand III).

If satisfied that the compelling state interest prong had been met, the court then needed to determine whether the federal DBE program was narrowly tailored, as required under Croson (and strict scrutiny jurisprudence generally).[6]

The court first found that the government's proffered interest – "remedying the effects of racial discrimination and opening up federal contracting opportunities to members of previously excluded minority groups" – met the standard.[7]

As for the "strong basis in evidence" that remedial action was necessary, the court in Adarand III found that the government established that minority contractors faced significant discriminatory *barriers to entry* into the disbursement programs, such as a classic "old boy" network of contractors, denial of access to capital, and denial of or difficulty in obtaining union membership to assist in access.[8] The government also demonstrated, the court found, that existing minority contractors faced *barriers to competition*, owing to various methods of "discrimination by prime contractors, private sector customers, business networks, suppliers, and bonding companies[.]"[9]

In support of its position, the government produced statistical and anecdotal evidence, both direct and circumstantial, taken from local disparity studies which demonstrated underutilization of minority subcontractors (described in more detail below), and the effect on utilization rates when affirmative action programs or efforts were discontinued for one reason or another.[10]

The Adarand III court went on to discuss at length its reasoning that the government had adequately demonstrated that its program was narrowly tailored to achieve the required compelling interest .[11] In sum, the Court found that the government satisfactorily met the following important factors: "the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties."[12]

The case was therefore returned to the district court for further proceedings "consistent with this opinion."[13]

3. The Eleventh Circuit's Decision in Engineering Contractors v. Metropolitan Dade

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[6] Id. at 1176-77.
[7] Id. at 1164-65 ("[W]e readily conclude that the federal government has a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds and in remedying the effects of past discrimination in the government contracting markets created by its disbursements.").
[8] 228 F.3d at 1168-69.
[9] Id. at 1170-72.
[10] Id. at 1174-75.
[11] 228 F.3d at 1176-1187.
[12] Id. at 1177. These remedial concepts are covered in greater detail below.
[13] Id.

Having the benefit of the Supreme Court's reasoning in Croson and Adarand, the Eleventh Circuit addressed the constitutionality of state or local M/WBE programs providing for race-, ethnicity-, and gender-conscious measures for public contracts in Engineering Contractors Assoc. of South Florida, Inc. v. Metropolitan Dade County, 122 F.3d 895 (1997).[14]

Applying the strict scrutiny standard required by Croson and Adarand to the race-based and ethnicity-based provisions, the district court ruled that Metropolitan Dade failed to provide a "strong basis in evidence" to justify the measures and the provisions were also not narrowly tailored to remedy past or present discrimination. Applying an intermediate scrutiny standard to the gender-based provision, the district court also found "insufficient probative evidence" to support that measure.[15] The Court of Appeals ultimately affirmed after extensive discussion of the evidence, finding that the district court's findings of fact were not clearly erroneous.[16]

With respect to the statistical analysis relied upon by Metropolitan Dade, which included disparity indices, use of standard deviations, and regression analysis, the Eleventh Circuit shared the conclusion of the district court that the statistical disparities for minorities and for women revealed in the data were better explained by correlation to firm size than by discrimination.[17]

The court also rejected the "narrow tailoring" efforts by Metropolitan Dade, finding that the County appeared to institute race-conscious remedies without any serious consideration of possible race-neutral options, which is antithetical to the requirement for a narrowly tailored remedial program.[18]

As noted, decisions by the Eleventh Circuit (like Engineering Contractors) are particularly important when addressing/evaluating any M/WBE program implementation and administration that the City may undertake pursuant to, or after completion of, this Study.

C. Conclusion

The Croson decision, handed down thirty years ago, continues to cast a long shadow over M/WBE and DBE programs and legislation. Significant refinement by the Supreme Court and the federal Circuit Courts of

[14] The program at issue in Engineering Contractors had been upheld by the Eleventh Circuit applying pre-Croson Supreme Court precedent. 122 F.3d at 901.
[15] Id. at 902.
[16] Id. at 924, 929.
[17] Id. at 918 ("Based on the foregoing, the district court concluded that the demonstrated disparities were better explained by firm size than by discrimination. In the district court's view, the few unexplained disparities that remained after regressing for firm size did not provide a strong basis in evidence of discrimination for [Black Business Enterprises] and [Hispanic Business Enterprises], and did not sufficiently demonstrate the existence of discrimination against WBEs in the relevant economic sector. We do not consider that view of the evidence to be an implausible one in light of the entire record, which is to say we do not find it to be clearly erroneous.").
[18] Id. at 927 ("If a race-neutral remedy is sufficient to cure a race-based problem, then a race-conscious remedy can never be narrowly tailored to that problem. . . . Here, the County has clearly failed to give serious and good-faith consideration to the use of race and ethnicity-neutral measures to increase BBE and HBE participation in the County construction market.").

Appeal transpired in its wake, though, addressing the acceptable and proper methodologies for achieving the legal standards established by Croson.

In fact, the Court in Kossman recently included in its opinion a lengthy legal overview of what it dubbed "Croson's Continuing Significance." In this section of its decision, the court opined about why a statistical analysis like that presented by the City of Houston was necessary and proper under the Equal Protection scheme established by Croson and refined by its (continuing) progeny.[19] In many respects, this opinion provides a roadmap for success in implementing and defending a DBE or M/WBE program under the current state of the law, with appropriate attribution and reference to Croson. It is in this legal environment that any M/WBE program element or policy implemented by the City will be evaluated, including in the face of any legal/constitutional challenge.

[19] Id. at pp. 34-49, and 53-62.

II. APPENDIX 1 -- EXPANDED LEGAL ANALYSIS

A. Expanded Legal Analysis

Having provided a historical overview of the significance and initial development of disparity studies, the following underscores the legal benefit to such studies should an M/WBE program or initiative be challenged in a court of law. There are several important legal standards and considerations which arise when a constitutional challenge to an M/WBE program is initiated, and each is addressed in turn.

Following this discussion, GSPC provides in this analysis an overview of some of the key aspects of its own Study methodology for gathering and analyzing statistical and anecdotal evidence (which provides the "factual predicate" for any remedial program/policy), and discussion of the underlying legal basis for these methodological features.

1. Equal Protection and Levels of Judicial Scrutiny

The Fourteenth Amendment provides that "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws". U.S. Const. amend. XIV, § 1. Courts determine the appropriate standard of equal protection review by "[f]irst. . . [determining] whether a state or local government has developed the program, or whether Congress has authorized the program's creation", then by examining the protected classes embodied in the statute. S. J. Groves & Sons Company v. Fulton County et al, 920 F.2d 752, 767 (11th Cir. 1991).

When a program or ordinance provides race-based policies or remedies, equal protection considerations are triggered, and the court will apply what is referred to as "strict scrutiny" in evaluating its constitutional legitimacy. When gender-based, the program (or policy) will be reviewed under the less-stringent "intermediate scrutiny" standard, as detailed below.

a) Racial Classifications

"We have held that all racial classifications imposed by government must be analyzed by a reviewing court under strict scrutiny." Grutter v. Bollinger, 539 U.S. 306, 326 (2003).[20] The Eleventh Circuit previously explained its view of the rationale for this level of judicial review:

> Because the [Black Business Enterprise] and [Hispanic Business Enterprise] programs create preferences based on race and ethnicity, the relevant constitutional standard applicable to those programs is the strict scrutiny test articulated in City of Richmond v. J.A. Croson Co., 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989). That test requires a "searching judicial inquiry" into the justification for the preference, because without that kind of close analysis "there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." Id. at 493, 109 S.Ct. at 721. Accordingly, strict scrutiny is designed both to "'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool"

[20] See also Adarand II, 515 U.S. at 212 (same); Fisher v. Univ. of Tex., 570 U.S. 297, 310 (2013) (reaffirming Grutter and the application of strict scrutiny when reviewing government programs that include racial classifications or categories).

> and to "ensure[ ] that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." Id.
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> Under strict scrutiny, an affirmative action program must be based upon a "compelling governmental interest" and must be "narrowly tailored" to achieve that interest. E.g., Ensley Branch, 31 F.3d at 1564 (citations omitted). As we have observed: In practice, the interest that is alleged in support of racial preferences is almost always the same--remedying past or present discrimination. That interest is widely accepted as compelling. As a result, the true test of an affirmative action program is usually not the nature of the government's interest, but rather the adequacy of the evidence of discrimination offered to show that interest. Id. at 1565 (citations and internal quotation marks omitted). [Engineering Contractors, 122 F.3d at 906][21]

Thus, under strict scrutiny, a racial or ethnic classification must (1) serve a compelling state interest and (2) be narrowly tailored to achieve that interest.[22] However, "[r]emedying past or present discrimination is widely accepted as a compelling governmental interest, so the critical question here is not the nature of the County's interest but the sufficiency of the evidence of discrimination and the narrow tailoring of the remedy." Hershell Gill Consulting Engineers v. Miami-Dade Cty, 333 F. Supp. 2d 1305, 1316 (S.D. Fla. 2004). These concepts are covered in greater depth below.

b) Gender Classifications

Though still unsettled in some federal circuits, it appears in the Eleventh Circuit that programs with gender-based classifications are evaluated for constitutionality under a more relaxed level of scrutiny than race-based ones, i.e., intermediate scrutiny:

> There is a long line of directly applicable Supreme Court precedents applying traditional intermediate scrutiny to gender classifications. More specifically, the Supreme Court held in Mississippi University for Women v. Hogan, 458 U.S. 718, 724, 102 S.Ct. 3331, 3335, 73 L.Ed.2d 1090 (1982), that intermediate scrutiny was the appropriate test to apply to a gender-based classification favoring women, which is the same type of classification created by the County's WBE program. Instead of overruling Mississippi University for Women, the VMI Court cited that case as "immediately in point" and the "closest guide" for the VMI decision itself. VMI, --- U.S. at ----, ----, 116 S.Ct. at 2275, 2271. The Supreme Court is not in the practice of overruling its own precedents by citing them with approval, and we decline to hold that the Court did so in the VMI case. Unless and until the Supreme Court tells us otherwise, intermediate scrutiny remains the applicable constitutional standard in gender discrimination cases, and a gender preference may be upheld so long as it is substantially related to an important governmental objective. [Engineering Contractors, 122 F.3d at 907-908]

In light of the above, any gender-based classification component in the Gainesville program would be analyzed under a level of judicial scrutiny which would be easier for the City to meet than that which would be applied to any race-based component.

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[21] See also Reynolds v. Alabama D.O.T., 996 F. Supp. 1118, 1127 (M.D. Ala. 1998) (citing Croson).
[22] Id., at 906.

2. Government as Active or Passive Participant in Discrimination

The Supreme Court has uniformly held that general societal discrimination is insufficient to justify the use of race-based measures to satisfy a compelling governmental interest.[23] Rather, there must be some showing of prior discrimination by the governmental actor involved, either as an "active" or "passive" participant.[24] The upshot of this dual-faceted (active/passive) evaluation of the enacting governmental entity is that, even if the entity did not directly discriminate, it can take corrective action.[25]

Subsequent lower court rulings have provided more guidance on passive participation by local governments. In Concrete Works of Colorado, Inc. v. City of Denver, 36 F.3d 1513 (10th Cir. 1994), the Tenth Circuit held that it was sufficient for the local government to demonstrate that it engaged in passive participation in discrimination rather than showing that it actively participated in the discrimination:

> Neither Croson nor its progeny clearly state whether private discrimination that is in no way funded with public tax dollars can, by itself, provide the requisite strong basis in evidence necessary to justify a municipality's affirmative action program. Although we do not read Croson as requiring the municipality to identify an exact linkage between its award of public contracts and private discrimination, such evidence would at least enhance the municipality's factual predicate for a race/gender-conscious program. [Concrete Works, 36 F.3d at 1529]

Thus, the desire for a government entity to prevent the infusion of public funds into a discriminatory industry is enough to satisfy the requirement.

The next question, however, is whether a public entity has the requisite factual support for its program in order to satisfy the particularized showing of discrimination required by Croson. This factual support can be developed from anecdotal and statistical evidence, as discussed hereafter.

3. Burdens of Production/Proof

As noted above, the Croson court struck down the City of Richmond's minority set-aside program because the City failed to provide an adequate evidentiary showing of past and present discrimination as was its initial burden.[26] Since the Fourteenth Amendment only allows race-conscious programs that narrowly seek to remedy particularized discrimination, the Court held that state and local governments "must identify that discrimination . . . with some specificity before they may use race-conscious relief." The Court's

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[23] Adarand II, 515 U.S. at 227; Croson, 488 U.S. at 496-97.
[24] Croson, 488 U.S. at 498.
[25] Engineering Contractors, 122 F.3d at 907 ("[I]f the County could show that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry, the Supreme Court has made it clear that the [County] could take affirmative steps to dismantle such a system."); Croson, 488 U.S. at 492 ("Thus, if the city could show that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system.").
[26] Croson, 488 U.S. at 498-506.

rationale for judging the sufficiency of the City's factual predicate for affirmative action legislation was whether there existed a "strong basis in evidence for its [government's] conclusion that remedial action was necessary."[27]

The initial burden of production on the state or local governmental entity is to demonstrate a "strong basis in evidence" that its race- and gender-conscious contract program is aimed at remedying identified past or present discrimination. Merely stating a "benign" or "remedial" purpose does not constitute a "strong basis in evidence" that the remedial plan is necessary, nor does it establish a prima facie case of discrimination. Thus, the local government must identify the discrimination it seeks to redress and produce particularized findings of discrimination.[28]

A governmental entity may, for example, establish an inference of discrimination by using empirical evidence that proves a significant statistical disparity between the number of qualified M/WBEs and the number of M/WBE contractors actually awarded a contract by the governmental entity, or M/WBEs brought in as subcontractors by prime contractors to which a contract is awarded. The courts maintain that the quantum of evidence required for the governmental entity is to be determined on a case-by-case basis, and in the context and breadth of the M/WBE program it purports to advance.[29] If the governmental body is able to do this, then the burden shifts to the challenging party to rebut the showing.[30]

Once the governmental entity has shown acceptable proof of a compelling interest in remedying past discrimination and illustrated that its plan is narrowly tailored to achieve this goal, the party challenging the affirmative action plan bears the ultimate burden of proving that the plan is unconstitutional. Sherbrooke Turf, Inc. v. Minnesota D.O.T., 345 F.3d 964, 971 (8th Cir. 2003) ("Sherbrooke and Gross Seed have the ultimate burden of establishing that the DBE program is not narrowly tailored."); Geyer Signal, Inc. v. Minnesota D.O.T., 2014 WL 1309092, *26 (D. Minn. 2014) ("The party challenging the constitutionality of the DBE program bears the burden of demonstrating that the government's evidence did not support an inference of prior discrimination.").[31]

4. "Compelling Public Interest" Considerations

Although imposing a substantial burden, strict scrutiny is not automatically "fatal in fact." Adarand, 515 U.S. at 237, 115 S.Ct. 2097. After all, "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." Id.; Alexander, 95 F.3d at 315. In so acting, a governmental entity must demonstrate it had a compelling interest in "remedying the effects of past or present racial discrimination." Shaw v. Hunt, 517 U.S. 899, 909, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996).

Thus, to justify a race-conscious measure, a state must "identify that discrimination, public or private, with some specificity," Croson, 488 U.S. at 504, 109 S.Ct. 706, and must have a " 'strong basis in evidence for its conclusion that remedial action [is] necessary,' " id. at

[27] Croson, 488 U.S. at 500 (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277, 106 S.Ct. 1842, 1849 (1986)).
[28] Croson, 488 U.S. at 500-01.
[29] See Concrete Works, 36 F.3d 1513 (10th Cir. 1994).
[30] Id.
[31] Citing Adarand III, 228 F.3d at 1166.

> 500, 109 S.Ct. 706 (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (plurality opinion)); see also Podberesky v. Kirwan, 38 F.3d 147, 153 (4th Cir.1994). As courts have noted, "there is no 'precise mathematical formula to assess the quantum of evidence that rises to the Croson 'strong basis in evidence' benchmark." Rothe Dev. Corp. v. Dep't of Def., 545 F.3d 1023, 1049 (Fed.Cir.2008) (Rothe II) (quoting W.H. Scott Constr. Co. v. City of Jackson, 199 F.3d 206, 218 n. 11 (5th Cir.1999)). [H.B. Rowe Company, Incorporated v. W. Lyndo Tippett, 615 F.3d 233, 241 (4th Cir. 2010)]

This compelling interest must be proven by particularized findings of discrimination. The strict scrutiny test ensures that the means used to address the compelling goal of remedying discrimination "fit" so closely that there is little likelihood that the motive for the racial classification is illegitimate racial prejudice or stereotype.

The relevant case law establishes that the compelling state interests of remedying past discrimination and of avoiding discrimination in the context of governmental procurement programs are well-accepted, and not controversial at this point. See W.H. Scott Const. Co. v. City of Jackson, 199 F.3d 206, 217 (5th Cir. 1999) ("Combatting racial discrimination is a compelling government interest.").[32]

5. Statistical Data and Anecdotal Evidence Combine to Establish Compelling Interest

The types of evidence routinely presented to show the existence of a compelling interest include statistical and anecdotal evidence.[33] Where gross statistical disparities exist, they alone may constitute prima facie proof of a pattern or practice of discrimination. Anecdotal evidence, such as testimony from minority or female business owners, is most useful as a *supplement* to strong statistical evidence, as it cannot carry the burden for the entity by itself. See infra.

For example, the Croson majority implicitly endorsed the value of personal accounts of discrimination, but Croson and subsequent decisions also make clear that selective anecdotal evidence about M/WBE experiences *alone* would not provide an ample basis in evidence to demonstrate public or private discrimination in a municipality's construction industry.[34]

Thus, personal accounts of actual discrimination or the effects of discriminatory practices are admissible and effective, and anecdotal evidence of a governmental entity's institutional practices that provoke

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[32] See also Croson, 488 U.S. at 492 ("It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evils of private prejudice."); Adarand II, 515 U.S. at 237 ("The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.").

[33] Croson, 488 U.S. at 501.

[34] Croson, 488 U.S. at 480 (noting as a weakness in the City's case that the Richmond City Council heard "no direct evidence of race-conscious discrimination on the part of the city in letting contracts or any evidence that the City's prime contractors had discriminated against minority-owned subcontractors"); See also Coral Construction Co. v. King County, 941 F.2d 910, 919 (9th Cir. 1991)("While anecdotal evidence may suffice to prove individual claims of discrimination, rarely, if ever, can such evidence show a systematic pattern of discrimination necessary for the adoption of an affirmative action plan.").

discriminatory market conditions is particularly probative. In order to carry the day, however, such evidence must be supplemented with strong statistical proof:

> As we explained in Ensley Branch, "[c]ertain aspects of this inquiry are well established." 31 F.3d at 1565. A "strong basis in evidence" cannot rest on "an amorphous claim of societal discrimination, on simple legislative assurances of good intention, or on congressional findings of discrimination in the national economy." Id. (citing and applying Croson) (internal quotation marks omitted). However, a governmental entity can "justify affirmative action by demonstrating 'gross statistical disparities' between the proportion of minorities hired . . . and the proportion of minorities willing and able to do the work." Id. (citations omitted). "Anecdotal evidence may also be used to document discrimination, especially if buttressed by relevant statistical evidence." Id. [Engineering Contractors, 122 F.3d at 906-907][35]

Of note, several courts have rejected assertions by plaintiffs attacking programs that anecdotal evidence must be verified to be considered as part of a governmental entity's evidentiary proffer.[36]

a) Statistical Data Generally

In Croson, the court explained that an inference of discrimination may be made with empirical evidence that demonstrates "a significant statistical disparity between the number of qualified minority contractors . . . and the number of such contractors actually engaged by the locality or the locality's prime contractors."[37] A predicate to governmental action is a demonstration that gross statistical disparities exist between the proportion of M/WBEs awarded government contracts and the proportion of M/WBEs in the local industry "willing and able to do the work," in order to justify its use of race-conscious contract measures.[38] In other words, a disparity study is intended to evaluate whether there is a statistically-significant disconnect – i.e., disparity – between the availability of and utilization of women- or minority-owned firms in public contracting.

In order to adequately assess statistical evidence, there must be information identifying the basic qualifications of minority (or women) contractors "willing and able to do the job" and a court must

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[35] See also id. at 925 (citing Cone Corp. v. Hillsborough, 908 F.2d at 916); Hershell, 333 F. Supp. 2d at 1316 ("A strong basis in evidence cannot rest on a mere claim of societal discrimination or on simple legislative assurances of good intentions.")

[36] Associated General Contractors of America, San Diego Chapter v. California D.O.T., 713 F.3d 1187, 1196-1197 (9th Cir. 2013) ("AGC contends that the anecdotal evidence has little or no probative value in identifying discrimination because it is not verified. AGC cites to no controlling authority for a verification requirement. Both the Fourth and Tenth Circuits have rejected the need to verify anecdotal evidence."), citing H.B. Rowe, 615 F.3d at 249; Concrete Works, 321 F.3d at 989. See also Kossman Contracting Co. v. City of Houston, Case No. H-14-1203, at 58 (S.D. Texas 2016) ("Plaintiff criticizes the anecdotal evidence with which NERA supplemented its statistical analysis as not having been verified and investigated. Anecdotes are not the sole or even primary evidence of discrimination in this case. . . . One reason anecdotal evidence is valuable supplemental evidence is that it reaches what statistics cannot: a witness' narrative of an incident told from the witness' perspective and including the witness' perceptions.") (quotations and citations omitted).

[37] Croson, 488 U.S. at 509.

[38] Ensley Branch N.A.A.C.P. v. Seibels, 31 F.3d 1548, 1565 (11th Cir. 1994).

determine, based upon these qualifications, the relevant statistical pool with which to make the appropriate statistical comparisons.[39]

b) Availability

The attempted methods of calculating M/WBE (or DBE) availability have varied from case to case. In Contractors Association of Eastern Pennsylvania v. City of Philadelphia, 6 F.3d 990 (3rd Cir. 1993), the Third Circuit stated that available and qualified minority-owned businesses comprise the "relevant statistical pool" for purposes of determining availability. The Court permitted availability to be based on the metropolitan statistical area (MSA) and local list of the Office of Minority Opportunity for non-M/WBEs, which itself was based on U.S. Census data.

In Associated General Contractors v. City of Columbus,[40] the City's consultants collected data on the number of M/WBE firms in the Columbus MSA in order to calculate the percentage of available M/WBE firms. Three sources were considered to determine the number of M/WBEs "ready, willing and able" to perform construction work for the city. However, the Court found that none of the measures of availability purported to measure the number of M/WBEs who were qualified and willing to bid as a prime contractor on City construction projects because neither the City Auditor Vendor Payment History file, Subcontractor Participation Reports, or Contract Document Database of the City were attentive to which firms were able to be responsible or provide either a bid bond or performance bond. The Court wrote, "[t]here is no basis in the evidence for an inference that qualified M/WBE firms exist in the same proportions as they do in relation to all construction firms in the market."[41]

In H.B. Rowe, availability was calculated using a vendor list that included: "1) subcontractors approved by the Department to perform subcontract work on state-funded projects, (2) subcontractors that performed such work during the study period, and (3) contractors qualified to perform prime construction work on state-funded contracts."[42]

Similarly, in Associated General Contractors v. California D.O.T., the court noted with approval that in the course of conducting its disparity study for Caltrans "[t]he research firm gathered extensive data to calculate disadvantaged business availability in the California transportation contracting industry"[,] and used

[39] See e.g., Associated General Contractors v. California D.O.T., 713 F.3d at 1197-1199; see also Engineering Contractors, 122 F.3d at 911 (relevant data may include "post-enactment" evidence, i.e., evidence based on data related to years following the County's initial enactment of the [] program").
[40] Associated General Contractors of America v. City of Columbus, 936 F. Supp. 1363 (1996), reversed on related grounds, 172 F.3d 411 (6th Cir. 1999).
[41] Associated General Contractors, 936 F. Supp. at 1389. The Court also questioned why the City did not simply use the records it already maintains "of all firms which have submitted bids on prime contracts" since it represents "a ready source of information regarding the identity of the firms which are qualified to provide contracting services as prime contractors." Id.
[42] 615 F.3d at 244.

"public records, interviews and assessments as to whether a firm could be considered available for Caltrans contracts[.]"[43]

A common question in collecting and applying availability data is whether prime contractor and subcontractor data needs to be evaluated separately; the trend is to accept combined data.

> NCI's argument is that IDOT essentially abused its discretion under this regulation by failing to separate prime contractor availability from subcontractor availability. However, NCI has not identified any aspect of the regulations that requires such separation. Indeed, as the district court observed, the regulations require the local goal to be focused on overall DBE participation in the recipient's DOT-assisted contracts. See 49 C.F.R. § 26.45(a)(1). It would make little sense to separate prime contractor and subcontractor availability as suggested by NCI when DBEs will also compete for prime contracts and any success will be reflected in the recipient's calculation of success in meeting the overall goal. [Northern Contracting, Inc. v. Illinois DOT, 473 F.3d at 723][44]

Also, although not used in the present Study, several courts have accepted the use of a "custom census" methodology for calculating availability. For example, in Northern Contracting, after identifying the relevant geographic market and product market (transportation construction) the analyst "surveyed Dun & Bradstreet's *Marketplace*, which is a comprehensive database of American businesses that identifies which businesses are minority or women-owned. Wainwright supplemented this survey with IDOT's list of DBEs in Illinois.").[45] In Kossman, for example, the consulting analyst "relied on data acquired from Dun & Bradstreet's Hoovers subsidiary on the total number of businesses in the defined market area. . . . Because the Dun & Bradstreet data did not adequately identify all MWBEs, NERA collected information on MWBEs in Texas and surrounding states through lists from public and private entities, as well as prior NERA studies, and culled records for MWBEs within the [City's] defined market area."[46]

c) Utilization

Utilization is a natural corollary to availability, in terms of statistical calculation. Different courts have applied utilization rates to different base measures, including percentage-based analyses regarding contract awards and dollars paid.

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[43] 713 F.3d at 1191-92. Cf. Engineering Contractors, 122 F.3d 895 (when special qualifications are necessary to undertake a particular task, the relevant statistical pool must include only those minority-owned firms qualified to provide the requested services).

[44] See Associated General Contractors v. California D.O.T., 713 F.3d at 1199 (citing Northern Contracting); Kossman, at 58 ("Separately considering prime contractors and subcontractors is not only unnecessary but may be misleading. The anecdotal evidence indicates that construction firms had served, on different contracts, as both."). See also H.B.Rowe, 615 F.3d at 245 (court accepted combined data based on experts' explanation that prime contractors are also qualified to do subcontracting work, and often do).

[45] 473 F.3d at 718.

[46] Id. at 5. See also Midwest Fence Corp. v. U.S. D.O.T., 840 F.3d 932, 950 (7th Cir. 2016) (discussing and approving custom census method).

For example, in H.B. Rowe, the state demonstrated statistical disparity using subcontracting dollars won by minority subcontractors.[47] In Associated General Contractors v. California D.O.T., the State's disparity study consultants calculated the percentage of contracting dollars that were paid to DBE firms.[48] This is referred to as the rate of utilization. From this point, one could determine if a disparity exists and, if so, to what extent.

In Cone Corp. v. Hillsborough County, 908 F.3d 908 (11th Cir. 1990), the following utilization statistics were developed and presented to justify an MBE program:

> The County documented the disparity between the percentage of MBE contractors in the area and the percentage of contracts awarded to those MBE contractors. Hillsborough County determined that the percentage of County construction dollars going to MBE contractors compared to the total percentage of County construction dollars spent. . . . The data extracted from the studies indicates that while ten percent of the businesses and twelve percent of the contractors in the County were minorities, only 7.89% of the County purchase orders, 1.22% of the County purchase dollars, 6.3% of the awarded bids, and 6.5% of the awarded dollars went to minorities. The statistical disparities between the total percentage of minorities involved in construction and the work going to minorities, therefore, varied from approximately four to ten percent, with a glaring 10.78% disparity between the percentage of minority contractors in the County and the percentage of County construction dollars awarded to minorities. Such a disparity clearly constitutes a prima facie case of discrimination indicating that the racial classifications in the County plan were necessary. [Id. at 915-16]

d) Disparity Indices

Once the statistical data has been collected and preliminarily assessed, further analysis must be done to evaluate whether any disparity identified is statistically significant. Reviewing courts have approved the use of disparity indices and standard deviations for this purpose, and GSPC will be utilizing them in the present Study.

One way to demonstrate the underutilization of M/WBEs (or DBEs) in a particular area is to employ a statistical device known as the "disparity index."[49] The use of such an index was explained, and cited approvingly, in H.B. Rowe, 615 F.3d at 243-44. In that case, after noting the increasing use of disparity indices, the court explained that the State (through a consulting firm) calculated a disparity index for each relevant racial or gender group covered by the DBE program, and further, conducted a standard deviation

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[47] 615 F.3d at 241, 250-51 ("[A] state may meet its burden by relying on 'a significant statistical disparity' between the availability of qualified, willing, and able minority subcontractors and the utilization of such subcontractors by the governmental entity or its prime contractors."), citing Croson, 488 U.S. at 509, 109 S.Ct. 706.

[48] 713 F.3d at 1191-1193. In Kossman v. City of Houston, NERA used both "award amounts" and "paid amounts" to determine utilization. Id. at 3, n. 10. The court, in approving the statistical proffer, looked only at the award amounts to "simplify matters." Id.

[49] See Engineering Contractors, 122 F.3d at 914 ("The utility of disparity indices or similar measures to examine the utilization of minorities or women in a particular industry has been recognized by a number of federal circuit courts.").

analysis on each of those indices using t-tests.[50] The resulting calculations "demonstrated marked underutilization of [] African American and Native American subcontractors," according to the court.[51]

The utility of disparity indices or similar measures to examine the utilization of minorities or women in a particular industry has been recognized by a number of federal circuit courts.[52] Specifically, courts have used these disparity indices to apply the "strong basis in evidence" standard in Croson. As noted, the disparity index in H.B. Rowe was 0.46 for African Americans and was 0.48 for Native Americans.[53] Based on a disparity index of 0.22, the Ninth Circuit upheld the denial of a preliminary injunction to a challenger of the City of San Francisco's MBE plan based upon an equal protection claim.[54] Similarly, the Third Circuit held that a disparity of 0.04 was "probative of discrimination in City contracting in the Philadelphia construction industry."[55]

e) Standard Deviations

The number calculated via the disparity index (established above) is then tested for its validity through the application of a standard deviation analysis. Standard deviation analysis measures the probability that a result is a random deviation from the predicted result (the more standard deviations, the lower the probability the result is a random one). Social scientists consider a finding of two standard deviations significant, meaning that there is about one chance in 20 that the explanation for the deviation could be random, so the deviation must be accounted for by some factor.

As noted above, standard deviations were applied by the State of North Carolina in the statistical analysis utilized to defend its M/WBE program in H.B. Rowe.[56] The Fourth Circuit described the significance of the findings as follows:

> For African Americans, the t-value of 3.99 fell outside of two standard deviations from the mean and, therefore, was statistically significant at a 95% confidence level. In other words, there was at least a 95% probability that prime contractors' underutilization of African American subcontractors was not the result of mere chance. For Native American subcontractors, the t-value of 1.41 was significant at a confidence level of approximately 85 percent. [Id. at 245]

Similarly, the Eleventh Circuit has directed that "'where the difference between the expected value and the observed number is greater than two or three standard deviations', then the hypothesis that [employees]

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[50] Id. at 244. The disparity index is calculated by dividing the percentage of available M/WBE participation (amount of contract dollars) by the percentage of M/WBEs in the relevant population of local firms. A disparity index of one (1.0) demonstrates full M/WBE participation, whereas the closer the index is to zero, the greater the underutilization. Some courts multiply the disparity index by 100, thereby creating a scale between 0 and 100, with 100 representing full utilization. Engineering Contractors, 122 F.3d at 914.
[51] Id.
[52] See Associated General Contractors v. California D.O.T., 713 F.3d at 1191, citing H.B. Rowe; Concrete Works, 36 F.3d at 1523 n. 10 (10th Cir.1994) (employing disparity index); Contractors Ass'n, 6 F.3d at 1005 (3d Cir.1993) (employing disparity index).
[53] Id. at 245.
[54] AGC v. Coal. for Economic Equity, 950 F.2d 1401, 1414 (9th Cir. 1991).
[55] Contractors Ass'n., 6 F.3d at 1005.
[56] 615 F.3d at 244-45.

were hired without regard to race would be suspect." Peightal v. Metropolitan Dade County, 26 F.3d 1545, 1556 (11th Cir. 1994) (quoting Castaneda v. Partida, 430 U.S. 482, 497 n.17, 97 S.Ct. 1272, 1281 n.17, (1977)).

f) Regression Analyses

In conducting its statistical analysis of Gainesville's purchasing, GSPC will also be employing a regression analysis, which essentially seeks to control for numerous factors *other than discrimination*, e.g., firm size, experience level, which may be causing or contributing to any disparity identified. This aspect of the GSPC methodology likewise has the support of several courts as a current "best practice" for disparity studies.

For example, after the Fourth Circuit in H.B. Rowe noted the statistical significance of certain quantitative analyses showing two standard deviations or a disparity ratio higher than .80, it addressed the value of a regression analysis as a further evaluative tool. Specifically, in discussing the disparity evidence offered by the State, the court favorably noted:

> To corroborate the disparity data, MGT conducted a regression analysis studying the influence of certain company and business characteristics - with a particular focus on owner race and gender - on a firm's gross revenues. MGT obtained the data from a telephone survey of firms that conducted or attempted to conduct business with the Department. The survey pool consisted of a random sample of 647 such firms; of this group, 627 participated in the survey.
>
> MGT used the firms' gross revenues as the dependent variable in the regression analysis to test the effect of other variables, including company age and number of full-time employees, and the owners' years of experience, level of education, race, ethnicity, and gender. The analysis revealed that minority and women ownership universally had a negative effect on revenue. African American ownership of a firm had the largest negative effect on that firm's gross revenue of all the independent variables included in the regression model. These findings led MGT to conclude that "for African Americans, in particular, the disparity in firm revenue was not due to capacity-related or managerial characteristics alone." [Id. at 245-46; 250]

In Kossman v. City of Houston, the key feature of the supporting study was an analysis addressing business formation, earnings, and capital markets.[57] Using both statistical and anecdotal evidence, the study ultimately concluded that "business discrimination against M/WBEs existed in the geographic and industry markets for [the City's] awarding of construction contracts":

> [W]e conclude that there is strong evidence of large, adverse, and frequently statistically significant disparities between minority and female participation in business enterprise activity in [Defendant's] relevant market area and the actual current availability of those businesses. **We further conclude that these disparities cannot be explained solely, or even primarily, by difference between M/WBE and non-M/WBE business populations in factors untainted by discrimination, and that these differences therefore give rise to a strong inference of the continued presence of discrimination in [Defendant's] market area.** There is also strong anecdotal evidence of continuing barriers to the full and fair participation of M/WBEs on [Defendant] contracts and subcontracts, despite the implementation of the M/W/SBE Program, and in the wider Houston construction economy. Remedial efforts remain necessary to ensure

[57] Id. at pp. 2-10.

> that Houston does not function as a passive participant in discrimination. [Kossman, at p. 11 (emphasis added)]

6. Requirement for a Narrowly-Tailored Remedy

Under the Croson framework, any race-conscious plan or remedy must also be narrowly tailored to ameliorate the effects of past discrimination on (and only on) the protected groups identified as significantly underutilized in the study. See Michigan Road Builders Ass'n v. Milliken, 834 F.2d 583, 589-90 (6th Cir. 1987). "Generally, while 'goals' are permissible, unyielding preferential 'quotas' will normally doom an affirmative action plan." Virdi v. DeKalb County School District, 135 Fed. Appx. 262 (2005).[58]

The Eleventh Circuit addressed the parameters of this requirement in Engineering Contractors:

> In this circuit, we have identified four factors that should be taken into account when evaluating whether a race- or ethnicity-conscious affirmative action program is narrowly tailored:
>
> In making this evaluation, we consider: (1) the necessity for the relief and the efficacy of alternative remedies; (2) the flexibility and duration of the relief, including the availability of waiver provisions; (3) the relationship of numerical goals to the relevant labor market; and (4) the impact of the relief on the rights of innocent third parties. The preceding four factors are not a mechanical formula for determining whether an affirmative action program is narrowly tailored, but they do provide a useful analytical structure. [122 F.3d at 927 (citation omitted)][59]

Similar guideposts are provided in several post-Croson cases addressing or evaluating efforts to meet the "narrowly tailored" prong – which we simply list for ease of reference:

- Relief is limited to minority groups for which there is identified discrimination;[60]
- Remedies are limited to redressing the discrimination within the boundaries of the enacting jurisdiction;
- The goals of the programs should be flexible and provide waiver provisions;
- Race and/or gender-neutral measures should be considered to the extent reasonably possible; and
- The program should include provisions or mechanisms for periodic review and sunset. [61]

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[58] See also Sherbrooke Turf, 345 F.3d at 972 (citing Croson, 488 U.S. at 496).

[59] See also Croson, 488 U.S. at 507-08. See also Sherbrooke Turf, 345 F.3d at 971-72 ("Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, but it does require serious, good faith consideration of workable race-neutral alternatives."); Adarand III, at 1177; Reynolds v. Alabama D.O.T., 996 F. Supp. at 1127.

[60] See Builders Assn' of Chicago v. County of Cook, 256 F.3d 642, 647 (7th Cir. 2001) (A group-based remedy must be justified by evidence of discrimination, and over-inclusion of uninjured groups can threaten the entire program.).

[61] Sherbrooke Turf, 345 F.3d at 971 ("In determining whether a race-conscious remedy is narrowly tailored, we look to factors such as the efficacy of alternative remedies, the flexibility and duration of the race-conscious remedy, the relationship of the numerical goals to the relevant labor market, and the impact of

Inherent in the above discussion is the notion that M/WBE programs and remedies must maintain flexibility with regard to local conditions in the public and private sectors. Courts have suggested project-by-project goal setting and waiver provisions as means of ensuring fairness to all vendors. Both of these were features of the program ultimately upheld by the Eleventh Circuit in Cone v. Hillsborough County:

> The GSC sets goals for each individual project based on the number of *qualified* MBE subcontractors available for each subcontractable area. If there are not at least three qualified MBE subcontractors available for the subcontractable area, no goal is set in that area. In areas where goals are set, no goal may ever exceed fifty percent MBE participation. At any time prior to advertisement of the project, the goals can be waived. A low bidder who does not meet the plan goals still can obtain a contract simply by demonstrating a good-faith effort to find MBE contractors. Even absent such good faith efforts, the contractor may still receive the contract if the next lowest bid is either $100,000 or fifteen percent higher than the non-responsive bidder. [908 F.2d at 917 (italics in original)]

Lastly, "review" or "sunset" provisions are strongly suggested components for an M/WBE program to guarantee that remedies do not out-live their intended remedial purpose. As an example, the Fourth Circuit had little problem rejecting a challenged college scholarship program because it had no "sunset" provision.[62] In H.B. Rowe, however, the Court specifically noted with approval the mandatory review and sunset provisions included in the North Carolina statute at issue in that case.[63]

B. **City**

the remedy on third parties."); see also Shuford v. Ala. State Bd. of Educ., 846 F. Supp. 1511, 1529 (M.D. Ala. 1994) ("[T]he parties considered race-neutral means, employed race-neutral means in the past without success, and yet still reimpose race-neutral requirements as the frontline and principal means of achieving the goals in the proposed decree; in this context, race-conscious relief is necessary and appropriate.").

[62] Podberesky v. Kirwin, 38 F.3d 147, 160 (4th Cir. 1994) ("The program thus could remain in force indefinitely based on arbitrary statistics unrelated to constitutionally permissible purposes.").

[63] 615 F.3d at 239.

III. TABLE OF CASES AND AUTHORITIES

Virdi v. DeKalb County School District, 135 Fed. Appx. 262 (2005)

W.H. Scott Const. Co. v. City of Jackson, 199 F.3d 206 (5th Cir. 1999)

Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986)

U.S. Const. art. III, § 2, cl. 1

U.S. Const. amend. XIV §1