



UNITED STATES COMMISSION ON CIVIL RIGHTS

624 NINTH STREET, NW, WASHINGTON, DC 20425

www.usccr.gov

August 4, 2008

President George W. Bush
The White House
1600 Pennsylvania Avenue
Washington, DC 20500

Dear President Bush:

On July 28, 2008, we—a majority of the Commissioners on the U.S. Commission on Civil Rights—voted to bring to your attention a conflict within your administration that is undermining enforcement of equal treatment in public transportation contracting. Public contracting is an issue of considerable interest to the Commission and was the subject of our September 2005 report “Federal Procurement After *Adarand*.”

After the Supreme Court decided *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), the Department of Transportation (DOT) reformed its Disadvantaged Business Enterprise (DBE) program to require state and local recipients of federal transportation funds to set individual DBE goals according to their expected level of DBE participation absent discrimination. See 49 C.F.R. § 26.45(b). In a 2005 challenge to the federal DBE program in *Western States Paving Inc. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005), the U.S. Department of Justice (DOJ) and the DOT in a joint brief vigorously defended the Congressional assertion of a compelling interest in the DBE program and its accompanying regulations, while also arguing that Washington State had not met its obligation to determine if discrimination in the local highway contracting industry existed before resorting to the use of racial preferences. The Ninth Circuit agreed with the Administration’s argument that a compelling interest existed and that narrow tailoring required a local finding of discrimination. The Court declared:

Whether Washington’s DBE program is narrowly tailored to further Congress’s remedial objective depends upon the presence or absence of discrimination in the State’s transportation contracting industry. If no such discrimination is present in Washington, then the State’s DBE program does not serve a remedial purpose; it instead provides an unconstitutional windfall to minority contractors solely on the basis of their race or sex.

Western States, 407 F.3d at 997-98. Moreover, the court held that even where there was a finding of discrimination, narrow tailoring requires any remedial program to be limited to only those minority groups who have actually suffered the discrimination. *Western States*, 407 F.3d at 998. The *Western States* decision was not appealed and it has had an enormous impact on federal funding recipients in the Ninth Circuit jurisdictions—leading to a great increase in race neutral efforts to achieve DBE participation.

After the decision, however, the DOT issued guidance—flatly inconsistent with the joint brief it filed with DOJ in *Western States*—that advised recipients outside of the Ninth Circuit that they need make no finding of discrimination before setting race conscious DBE goals.

Consequently, there is confusion in the courts and among state and local DOT funding recipients about the Administration's position on this critical issue. In courts where the federal government has not appeared as a party to clarify its position, challenges to state DBE programs that have not made local findings of discrimination have been rejected. See, e.g. *Northern Contracting, Inc. v. Illinois*, 473 F.3d 715 (7th Cir. 2007). But the courts that have rejected these as-applied challenges to the constitutionality of the state's actions have not done so due to the presence or absence of localized findings of discrimination. The basis for their rejection is instead the argument that when the state's actions are consistent with the requirements of a federal program, the state is merely an instrument of the federal government. *Northern Contracting*, 473 F.3d at 722.

In a most recent example—a February 6, 2008 federal district court decision—the United States District Court for the Southern District of Florida in *South Florida Chapter of the Associated General Contractors v. Broward County, Florida*, 544 F.Supp.2d 1336 (S.D. Fla. 2008) denied plaintiffs' challenge to the constitutionality of the county's actions as "simply an impermissible collateral attack on the constitutionality of the [DBE] statute and implementing regulations" (to which plaintiffs had not mounted an as-applied challenge). *Id.* at 1341. But the inconsistency between DOT's guidance and its position in the *Western States* litigation did not escape the court's notice:

The United States appears not to be of one mind on this issue, however. The United States Department of Transportation has in its analysis posted on its Web site, implicitly instructed states and localities outside of the Ninth Circuit to ignore the *Western States* decision which would tend to indicate that this agency may not concur with the "opinion of the United States" as represented in *Western States*."

South Florida Contractors, 544 F.Supp.2d at 1338, n.3.

Both the Eighth and Ninth Circuits have held that "to be narrowly tailored, a *national* program must be limited to those parts of the country where race-based measures are demonstrably needed. To the extent the federal government delegates this tailoring function, a State's implementation becomes critically relevant to a reviewing court's strict scrutiny." *Western States*, 407 F.3d at 996-97 (citing *Sherbrooke Turf, Inc. v. Minnesota Dept. of Transp.*, 345 F.3d 964, 971 (8th Cir. 2003) (emphasis in the original)).

Because the federal government cannot intervene in every case, uniform guidance governing every circuit is imperative. In our view, the rule of *Western States* is unequivocal: narrow tailoring requires a localized finding of discrimination if the federal DBE program, which

has been delegated for implementation to the states, is to survive constitutional analysis under strict scrutiny. As such, the DOT cannot have it both ways. Sound public policy requires that it apply the same standard to all its DBE grantees, regardless of whether or not they are located in the Ninth Circuit. That uniform standard should require local evidence that race conscious goals are necessary to achieve expected local DBE participation. Without local evidence of discrimination, the DBE goal setting process amounts to nothing more than the use of racial preferences to achieve proportional racial or ethnic representation in violation of the Constitution.

We are not aware of any legal impediment to applying the *Western States* precedent on a national basis. Doing so would advance the Administration's policy of equal treatment and the use of race neutral alternatives to increase diverse participation. By requiring local findings of discrimination, recipients may identify problems, while avoiding using race preferences where they are not necessary.

We urge your attention to this issue so that the Administration will speak clearly and consistently on this vital civil rights issue. Specifically, we urge that the DOT inform its DBE program participants that the position taken by it and the U.S. Department of Justice in the *Western States* litigation regarding the necessity of local findings of discrimination is Administration policy nationwide.

Respectfully,



GERALD A. REYNOLDS
Chairman



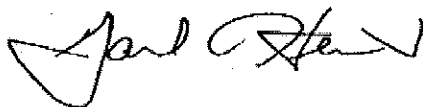
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cc: The Honorable Michael Mukasey, Attorney General, U.S. Department of Justice
The Honorable Mary E. Peters, Secretary, U.S. Department of Transportation

Letter to President Bush
Page 4

The Honorable Jim Nussle, Director, Office of Management and Budget
The Honorable Karl Zinsmeister, Assistant to the President, White House Domestic
Policy Council