U.S. COMMISSION ON CIVIL RIGHTS

EDITED

BRIEFING

REGULATORY AND OTHER BARRIERS TO ENTREPRENEURSHIP THAT IMPEDE BUSINESS START-UPS

FRIDAY, FEBRUARY 8, 2013

The Commission convened in Suite 1150 at 1331 Pennsylvania Avenue, Northwest, Washington, D.C. at 9:30 a.m., Martin R. Castro, Chairman, presiding.

PRESENT:

MARTIN R. CASTRO, Chairman

ABIGAIL THERNSTROM, Vice Chair

ROBERTA ACHTENBERG, Commissioner

TODD GAZIANO, Commissioner

GAIL L. HERIOT, Commissioner

PETER N. KIRSANOW, Commissioner

DAVID Kladney, Commissioner

MICHAEL YAKI, Commissioner (via telephone)

VANESSA EISEMANN, Parliamentarian
STAFF PRESENT:

PAMELA DUNSTON, Chief, ASCD

ALFREDA GREENE

JENNIFER CRON HEPLER

LENORE OSTROWSKY, Acting Chief, PAU

ELOISE PLATER

EILEEN RUDERT

MICHELE YORKMAN

COMMISSIONER ASSISTANTS PRESENT:

NICHOLAS COLTEN

ALEC DEULL

TIM FAY

JOHN MARTIN

CARISSA MULDER

MARLENE SALLO

ALISON SOMIN
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I. INTRODUCTORY REMARKS BY CHAIRMAN

CHAIRMAN CASTRO: Good morning, everyone. The meeting will come to order. My name is Marty Castro. I am Chair of the U.S. Commission on Civil Rights. And I wish to thank everyone for being here and welcome you to our briefing, "Regulatory and Other Barriers to Entrepreneurship that Impede Business Start-Ups." It is now 9:34 a.m. on February 8th, 2013.

The purpose of this briefing is to examine the regulatory and financial contracting, legal and other barriers that negatively impact smaller, less experienced business enterprises. I want to acknowledge that this is a briefing that was brought to our attention and supported in a bipartisan manner by our Vice Chair. I know this is an issue that she has been interested in for quite a while. So we are pleased to be able to have the hearing today.

In my perspective, you know, according
to the U.S. Department of Commerce, when we are looking at minority businesses, in particular, they have been and continue to be key drivers of our economy, generating over $1 trillion of economic impact for our economy. In order, I think to continue to bolster our economic recovery, it is very important that we look at the challenges and opportunities that face our small and disadvantaged, especially minority, businesses and determine what works and what doesn't, what can continue to empower them, and what may, in fact, be a hindrance.

So today I know we are going to hear from a group of very distinguished panelists about your perspective on those issues and how the diverse array of regulations may or may not impact small businesses.

So during this briefing, each of you is going to have ten minutes to speak. After all of the panelists have made their presentations, the Commissioners will then have an opportunity to ask you questions based on your presentations.
What we are going to do is, as much as possible, try to maximize the opportunity for interaction between the Commissioners and each of you. So I am going to try to enforce that ten-minute time frame as best as possible. You are going to see here a series of warning lights, just like traffic lights. So when you see it is green, you go ahead. When it turns yellow, just like we do when we are driving, we're speeding up to try to finish. And when it hits red, I ask you to stop so that we can then move on to the next panelist and ultimately get to our Commissioners.

Commissioners are going to, as always, be very considerate of the panelists. They are going to try to keep their questions concise, but they may have some follow-up questions. And I will be recognizing the Commissioners who speak. And they will be allowed to do some follow-up. But I also want to make sure that all Commissioners have had an opportunity to speak and ask questions. So I may at times shift to other Commissioners.

So, with those bits of housekeeping out
of the way, I want to proceed with the briefing. So, first of all, I am going to introduce each of the panelists. Then I am going to swear you in.

Our first panelist is Alex Cristofaro, Office Director of the Regulatory Policy and Management Division. That's ORPM within the Office of Policy, Economics, and Innovation at the U.S. Environmental Protection Agency.

Our second panelist is Harry Alford, President and CEO of the National Black Chamber of Commerce.

Our third panelist is Timothy Sandefur, Principal Attorney at the Pacific Legal Foundation.

Our fourth panelist is Omar Duque, President and CEO of the Illinois Hispanic Chamber of Commerce.

And our fifth panelist is George LaNoue, Professor of political science and Professor of public policy at the University of Maryland Baltimore County and the University of Maryland Graduate School in Baltimore.

I will now ask each of the panelists to
swear or affirm that the information that you are about to provide is true and accurate to the best of your knowledge and belief. Do you so affirm or swear?

(Whereupon, there was a chorus of "I do.")

CHAIRMAN CASTRO: Thank you.

Please proceed.

II. PANEL DISCUSSION

GOVERNMENT, SCHOLARS AND ADVOCACY GROUPS PANEL

MR. CRISTOFARO: Thank you, Mr. Chairman.

Being from the federal government --

CHAIRMAN CASTRO: Let me just say, too, if you could speak into that gray box there, it's voice-activated. So in order for us to hear you, you have got to speak up.

MR. CRISTOFARO: Okay. Thank you, Mr. Chairman. Coming from the Environmental Protection Agency, I am so used to talking and giving briefings using PowerPoint. I am going to PowerPoint presentation. Thank you.
I was asked to provide some information on how EPA considers small business impacts as it regulates. And, moving to the first slide, we were actually required to consider small business impacts by a statute, an environmental statute, or, actually, not -- we are required to consider small business impacts under a statute that was passed by the Congress. And, specifically, in 1980, the Congress passed the Regulatory Flexibility Act. It was amended in 1996. And it imposes the requirements on the Environmental Protection Agency to consider small business impacts as it proceeds with fulfilling its statutory mandates.

MS. DUNSTON: I'm going to switch this mike. Excuse me. Sorry.

VICE CHAIR THERNSTROM: Something's got to be done about this.

MS. DUNSTON: I'm working on it.

MR. CRISTOFARO: Okay. Thank you.

VICE CHAIR THERNSTROM: Thank you.

MR. CRISTOFARO: So, anyway, EPA is required to consider small impacts procedurally for
fulfilling our statutory mandates to protect the environment. And in 1996, the Regulatory Flexibility Act was amended. And, specifically, whenever we issue a rule that has a -- and we use this term all the time. It's called SEISNOSE, which is a Significant Economic Impact on a Substantial Number of Small Entities. Whenever we think one of our rules is going to impose a SEISNOSE, we are required to undertake a certain process for doing -- which results in our trying to consider, as best we can, how to accommodate the needs of small business as we go forward.

Now, we actually are required to undertake this process if we cannot certify no SEISNOSE. That means that whenever we suspect that there might be a significant impact, we go through this process that I was about to describe.

Now, we consider SEISNOSE on a case-by-case basis. We define it - we don't have, really, a precise definition.

Generally, we look at costs that we're imposing as a percentage of revenues and, in
addition to the number of firms regulated.

We encounter situations all the time where we might have a regulation that affects an industry. The industry might have only five firms in the industry. And then we might have an impact on one of those firms that could be large.

And then the question is, well, is that a significant impact? Because one could argue that it's one-fifth of the industry or one could argue that it's only one firm in a very large economy. So everything that we do is done on kind of a case-by-case basis, looking at the specifics of the situation.

Next slide, please. So what I will tell you this morning is what is this process? What is a small business advocacy review panel? How does this kind of input fit into our overall rulemaking process?

We actually go and we solicit input from small businesses. We call them a small entities because our rules affect not just business but also small governments. And so we use a
broader term. And then I will tell you what we do with the recommendations that we do get from this panel.

Next slide, please. Okay. So what is this panel? So let's suppose that we think, the EPA thinks that it has a regulation that is going to have a significant impact on small entities. We will then form a panel, which consists of the EPA, the Office of Management and Budget in the Small Business Administration. And this panel is charged with preparing a report which will advise the administrator of the EPA on a number of issues concerning small business.

Next slide, please. And the issues are actually laid out for us in the statute. And we are to share. The EPA is to share with this panel all the information that we have prepared. If we have a draft rule that we will share with the panel, we will. We are charged with collecting advice and recommendations from small businesses on specific issues. And these are listed here.

Have we truly captured the small
entities to which the rule, the proposed rule, will apply? What are the compliance requirements? We are to solicit information on what small businesses think, compliance assistance, what compliance assistance might be needed. We are charged with looking at whether other federal rules overlap or conflict with the regulation that we are proposing.

And then it is really the fourth item that is of most interest, which is are there ways that we can achieve our statutory or our environmental objectives while that could minimize the impact on small entities? So we specifically go out and we solicit from small businesses ideas in that regard.

Next slide, please. So, as I mentioned, we have this government panel, but the government panel is charged with soliciting small business input. So we actually go out and invite participation from small entities to participate in this process. And the way we do that is we use the Web to solicit small entity participation. We mine our contacts and trade associations and
professional associations to find people that we think represent small businesses that may be affected by our rules. And we invite them to participate in the process.

Once we identify a group of small entities, we have a couple of meetings with them. The first is to give them an overview of what the process requirements are and what their role in the process is. We give them a lot of background material on our regulations, what we are thinking about.

And then we have a second meeting with them, which, actually, I chair. And that meeting is basically spent discussing regulatory alternatives and anything that the small entities want to discuss.

So we invite small entities to submit comments to the panel. And we ensure that all of their comments are attached to an appendix. So we have a transparent process to see what everybody is thinking about our regulations.

Now, to be honest, I would have to say
that the EPA is very difficult to be green. Okay? And it's very difficult to satisfy everybody. Some people believe that we don't provide enough information. If we get very specific about what we are thinking, then we might be way down the line in terms of already have -- we will be criticized for basically presenting the panel with a cake that is already three-quarters baked. And if we come in too early and just solicit ideas, sometimes we are criticized for not really sharing our specific thinking on specific alternatives with the panel. So there is always a little bit of we always have to weigh at what point and what kind of information we share and at what period of time and where in the decision process we get this or we solicit this information.

Next slide, please. Once we have this, once we go through this process, the EPA, the OMB, and the SBA prepare a panel report. And that report is submitted to the EPA administrator with the goal of submitting it at a time when senior management decision-making can consider the
alternatives. Once the rule is proposed, we place the report in a rulemaking docket.

I have to tell you that while we are required to go through this process and while the administrator is required to consider these recommendations, there is nothing in the statute that binds the administrator to the panel's recommendations.

And while the process requirements are judicially reviewable, as I just mentioned, the administrator still retains the discretion to accord whatever weight she wants to the actual recommendations.

I would say that so far, I don't recall the actual number of panels that we have held. I think it is probably around 30 or 40. And so far I could say that the EPA has never lost a case with respect to complying with SBREFA requirements.

So that concludes my presentation.

Thank you.

CHAIRMAN CASTRO: Thank you, Mr. Cristofaro.
Before I proceed to Mr. Alford, I would like to make a motion. One of our panelists, Marc Law, could not be here today because of illness. So I would like to make a motion that his statement be included in the record in lieu of his actual testimony before us. Do I have a second?

VICE CHAIR THERNSTROM: Second.

CHAIRMAN CASTRO: All those in favor say aye.

(Whereupon, there was a chorus of "Ayes.")

CHAIRMAN CASTRO: Any opposed?

(No response.)

CHAIRMAN CASTRO: Any abstentions?

(No response.)

CHAIRMAN CASTRO: Thank you. Mr. Alford, please proceed.

MR. ALFORD: Thank you, Mr. Chair, panel. Thank you for inviting me to come and speak.

Project labor agreements, one of the items I am discussing. A project labor agreement
is between an owner of a specific construction project and applicable labor unions. It is an agreement that union rules must be followed from the beginning to the end of the project. In essence, it becomes very cumbersome for a non-union shop to participate.

For instance, union wages must be paid to the non-union shop, plus the union-level medical benefits and pension plan, even though the money will never be credited to the non-union shop employees. Also, the non-union shops must pay union dues. Consequently, a project labor agreement pretty much blocks the use of non-union shops and their employees.

PLAs are mainly used on local, state, and federal projects as private corporations find them wasteful and too expensive. Ninety-eight percent of black and Hispanic construction companies are non-union shops. Thus, a project labor agreement greatly limits the opportunities for black and Hispanic firms whenever they are used. The possibility of black and Hispanic labor...
is greatly suppressed also.

There was a serious matter over the use of project labor agreements when the Woodrow Wilson Bridge was about to be rebuilt. Maryland's Governor Glendenning demanded the use of PLA while Virginia's Governor Gilmore insisted on no usage.

Through research, we compared the utilization of black firms and employment on highway construction work for the States of Virginia and Maryland. Maryland had a statewide PLA on this highway program while Virginia's was a right-to-work program. Virginia's utilization of black firms and employees was greater than Maryland by a ratio of three to one. That caught the attention of President George W. Bush. And he ordered no PLA on the bridge project. From there, he eventually banned all PLAs on federally funded projects as they "discriminated against women, minorities, and small business," quote, unquote.

Right after his inauguration, President Barack Obama issued his first executive order, February 9th, 2009. E.O. 13-502 ordered all majority
federally funded projects to operate under a project labor agreement. This was a major blow to women and minority-owned businesses and employees. Diversity is negatively affected.

If the U.S. Civil Rights Commission would do an audit on Executive Order 11-248, they would find that discrimination exists. The U.S. Department of Labor hides this by reporting racial employment by unit as a total number. They do not report exclusively on construction units by craft. If they did, it would uncover a disgrace. The NAACP has been trying to get these numbers beginning in 1987 but has failed.

Small business, which is 98 percent of black construction firms, happens to be best developed in a right-to-work environment. This has a direct impact on jobs and sustainability of such firms.

Okay. I'm going to speak off the cuff now. Section 3 of the HUD Act, that was implemented in 1968 by then HUD Secretary George Romney in response to the WATS riot of Los Angeles
in 1965. It was further strengthened in 1992 by then Secretary Jack Kemp after the Rodney King riots. It is also known as the Equal Opportunity Act for Low and Very Low Income Persons. It says “If there is HUD funding in a project or program, 30 percent of all new jobs are to go to residents of public housing or people living under the poverty level. Ten percent of all of those contracts are to be set aside by companies who hire these Section 3 residents. Those companies are known as Section 3 companies.”

It is a beautiful piece of work, race-neutral, and lifting people from poverty into the workforce and out of public housing and out of poverty. But, for some reason, it has never been implemented. It has never been enforced. We have been watching this since 1993.

Over 6,000 grantees received HUD money. None of them implement Section 3, even though it is a requirement. At most, we may find three or four in the nation, but that would be short-term because unions will run off the Housing Authority president
or change the board of a Housing Authority so they won't have this Section 3. Six thousand grantees are supposed to submit annual reports. We denied it three years ago.

I met with the National Black Chamber of Commerce with the U.S. Chamber of Commerce and found that 96 percent of the grantees weren't even filling out annual reports. We threatened to sue HUD. Today, about 80 percent will fill out the annual reports. Still, they won't implement the program.

As an example, Chicago Housing Authority, they did a review, a three-year review, on Chicago Housing Authority. They received a billion dollars in HUD monies. Not one job or one contract went to Section 3. And the last time I checked, there is plenty of poverty in the City of Chicago.

This is an outrage. And what is needed from a legal opinion we obtained is that the Legislature should make it allowable for HUD residents, Section 3 residents, to sue for
noncompliance of Section 3. Right now they laugh.

Example: City of Jacksonville. We found it in noncompliance in 1993. HUD found it in noncompliance in 1993. Today, 2013, they're still in noncompliance. They will not get in noncompliance. Now, what HUD can do is refuse to fund, give further funding to an entity in noncompliance. They have never done that once. That is a pain in my side. And I will fight it probably to the grave. We have been through three administrations, six administrations, three presidents, and still no compliance of Section 3.

The last thing I want to talk about: EPA. I had never heard of these sessions that EPA is to be outreaching with small businesses. The National Black Chamber of Commerce is the largest black business association in the world. We have 140 chapters throughout this nation. And I haven't heard of one business being asked for a response to some of the activity that goes on with EPA.

They are notching up. They are unchained with this new administration rules and
regulations. They have got probably 6,000 rules this year alone, most of which will negatively affect small business.

When cap and trade was in the legislature in 2009, we did a study that showed that cap and trade will negatively impact 65 percent of the black population in the United States economically. That was the beginning of the end for cap and trade. It went away. But now it is coming back piece by piece, rule by rule, and using many unconventional means, such as sue and settle, where an environmental group will sue the EPA and quickly the EPA will come to settle with that group, going along with every allegation or claim that they make. That is legislating through the courts, illegally I think it would be.

So those three items, the EPA, Section 3 of the HUD Act, project labor agreements, are probably three of the biggest items that hurt and negatively affect small business, particularly my constituency. And I pray and plead for your attention and perhaps assistance in the matter.
Thank you.

MR. SANDEFUR: Thank you very much, Commissioners. I am honored to be here today.

I would like to talk about, mostly about, a state-oriented problem. I regard economic liberty as the leading neglected civil right in America. And when you look at American history, I think American history, the history of civil rights in this country, is largely the history of entrepreneurship. And the history of entrepreneurship is largely the history of racial minorities and immigrants. And nobody I think has articulated this better than one of my heroes: Frederick Douglass.

In his autobiography, Douglass talked about how when he escaped from slavery to Rochester, New York, he said he was walking down the street when he had first arrived. And he saw -- back then they used to deliver coal from a wagon. They would put a pile of coal in front of your house. And you had to shovel it down the coal chute into your basement.
And Douglass said he was walking down the street. And he saw a pile of coal. And he decided to knock on the door and ask the woman inside if he might shovel the coal down her coal chute for her for some money. And she said, "Yes."

And he said quote, "I was not long in accomplishing the job when the dear lady put into my hand two silver half-dollars. To understand the emotion which swelled my heart as I clasped to this money, realizing that I had no master who could take it from me, that it was mine, that my hands were my own and could earn more of the precious coin, one must have been in some sense himself a slave." I think Douglass well-articulates a sense of empowerment and individual liberty that comes with the right to own a business and operate that business without being told no by somebody else.

Unfortunately, barriers to entrepreneurship, particularly at the state and local levels, infest this country, depriving a lot of hard-working people of the opportunity to pursue what everybody regards as the American dream. I
will talk in particular about two, which I go into more in depth in the written submission that I have given you. And that is occupational licensing and certificate of public convenience and necessity laws.

Occupational licensing is the idea that you can require somebody to obtain education and training prior to going into practice, like a bar license for me, for example, or for a medical license for a doctor. The Supreme Court first reviewed the constitutionality of these laws in 1884 in Dent v. West Virginia, when the Supreme Court said that medical licensing was okay, but any kind of licensing requirement had to be related to the business and couldn't just be arbitrary and impose burdens on people going into business that were designed to exclude them as competitors. Unfortunately, that aspect of the Dent case has not been enforced, certainly not in recent years.

Occupational licensing laws require extensive, time-consuming, and very expensive training and educational training requirements.
For example, many occupational licensing rules say you must have a college degree even to take the examination.

A lot of these are time-consuming, something that a lot of poor people, a lot of people who are immigrants or members of racial minorities cannot reasonably obtain. The examinations are often administered in inconvenient places and at inconvenient times, requiring people to travel long distances and stay overnight in hotel rooms to take examinations. Some of these examinations last for more than a full day. And the problem is that these licensing laws are used to exclude entrepreneurs and to benefit established politically well-connected insiders.

Probably the most heinous example is the Louisiana law requiring a license and a training regimen to become a florist. Now, to be a florist requires no particular educational requirement, you would think, but no. According to Louisiana, you have to have a training regimen. You have to take an examination, which, again, is
administered rarely and in inconvenient places. And until recently, you were graded not only on whether you could identify flowers but on the beauty and effects of your floral design, wholly subjective requirements. That part was only eliminated from the law last year, I believe. Nevertheless, this legal requirement remains on the books.

Now, floristry is not an industry that rich white guys go into. And these licensing laws are used to protect established florists from entrepreneurs who need this protection for economic liberty. They are precisely the people who might use floristry as an opportunity to obtain the kind of economic security and freedom that they could not obtain without it because they lack the kind of educational or the kind of family fortune background that might otherwise secure them.

Another good example is the interior designer law in Florida and in other states that requires you to have a college degree to be an interior designer. That is, if you want to take
money from somebody in exchange for telling them how to hang their drapes or something, where to place the tables in their house for the most beautiful effect, you have to have a college degree and take an examination and get the state's permission to do that. It is shameful, and it is particularly true about inner city residents, immigrants, members of minority groups that they do not live in the ownership society. They live in the permission society, where they have to get government bureaucrat permission to go into business to do practically anything.

Another example is a case I won not long ago in the Ninth Circuit Court of Appeals challenging California's law regulating pest control workers. My client installed spikes on buildings to keep birds from landing on them. You know these things? Nixalite they call it, right? Well, in California, you had to get a Branch 2 structural pest control operator's license to do this. And that required two years of training learning how to handle, use, and store pesticides,
even though my client never used pesticides. You then had to take a 200-question multiple choice exam, testing your knowledge of insect life, even though my client never dealt with insects. He only put spikes on buildings to keep birds away.

And it gets even worse because the law only applied to pigeons. If you wanted to put the same spikes on the same building to keep seagulls or starlings away, you didn't need any license at all.

Now, in deposition, the state's expert witness testified under oath about his law. And I said to him, "Now, this law requires you to get two years of training to put spikes on a building to keep pigeons away?"

He said, "That's right."

And I said, "And no training at all to put the same spikes on the same building to keep seagulls away?"

He said, "Yes. That's right."

I said, "Would you call this irrational?"
He said, "Yes, I would."

The government's lawyer said, "Um, can we take a break?"

(Laughter.)

MR. SANDEFUR: We went before the District Court. And we said, "Your Honor, this law is positively irrational. The state's own witness testified that it was irrational." And we lost in the trial court because the constitutional law is so tilted against business owners and entrepreneurs in this country.

Fortunately, we won on appeal. And the Ninth Circuit of Appeals said government cannot use its licensing laws simply to protect established businesses against fair competition from entrepreneurs. Unfortunately, that creates a circuit split because the Tenth Circuit Court of Appeals has ruled that government can use licensing laws for no other purpose than to protect established businesses against fair competition.

Occupational licensing laws ought to be related to a person's fitness and ability to
practice the profession. That is what the Supreme Court has said. And, yet, the Court refuses to actually enforce this requirement in almost every case, including the Louisiana florist case. In that case, the District Court upheld the constitutionality of that law.

Now, the other kinds of laws that are problems are certificate of public necessity and convenience requirements or certificate of need requirements. These are not licenses that test your knowledge or skill. These are requirements that force entrepreneurs to go in front of a bureaucratic body and prove to them that there is a public need for a new business of that sort.

For example, in Missouri, I recently sued the State of Missouri over their certificate of necessity requirement for moving companies. My client wanted to start a moving company, but in order to get a license to run a moving company in Missouri, you first have to basically get permission from all of the existing moving companies.
The state as soon as you apply for a license notifies all the existing moving companies and allows them to object for no other reason than that you would compete with them. And when they object, you have to go to an agency and prove to them that there needs to be a new moving company.

How do you prove such a thing? That's the right answer. Nobody knows. There is nothing in the statute that says. And you are required to hire a lawyer to attend an administrative hearing if your company is incorporated.

These are time and expense requirements that most minority entrepreneurs definitely cannot afford. I am glad to say Missouri repealed that law, thanks to our lawsuit, but other laws remain on the books, including Nevada and Kentucky, which I am currently suing.

Public choice theory explains that these kinds of licensing laws are exploited by insiders to prohibit politically less well-connected and less wealthy entrepreneurs and outsiders. And that means that these kinds of
licensing requirements fall hardest on members of
racial minorities.

And, sadly, thanks to the rational
basis test that courts use in assessing the
constitutionality of these requirements, it is
virtually impossible to win legal challenges in
court unless you have a great lawyer like me.

What this country needs is new civil
rights legislation that protects economic liberty.
I would suggest something modeled on the Religious
Freedom Restoration Act that forces states and
cities to justify their inhibitions on economic
freedom by some sort of compelling public interest,
not based on protecting established companies
against legitimate competition.

Thank you.

CHAIRMAN CASTRO: Thank you.

MR. DUQUE: Good morning. My name is
Omar Duque, and I am the President and CEO of the
Illinois Hispanic Chamber of Commerce.

I am pleased to be here this morning to
talk about both real and perceived barriers to
business growth.

The Illinois Hispanic Chamber of Commerce represents the interests of Hispanic-owned businesses in the greater Chicago area and throughout Illinois. Our membership ranges from Illinois' largest Hispanic-owned businesses with revenues of close to $1 billion to very small micro enterprises. By and large, however, the great majority of our time and resources go to working with and helping small businesses.

Now, the Small Business Administration defines a small business as one that is independently owned and operated, is organized for profit, and is not dominant in its field. The great majority of the businesses that we work with have annual revenues of between half a million and $20 million.

For the purposes of this briefing this morning, we took a very broad approach to the issue of regulation, rather than looking at any specific regulations that have been addressed here. And we went out, and we talked to our members. And we
surveyed Hispanic-owned businesses to get their perspective on the effect that regulation has on their business.

Because of the nature of our work, we are very concerned with the issues that hinder a business' ability to grow. As such, we do not view government regulations as a direct barrier to the growth of the businesses that we represent and work with on a daily basis.

We do, however, recognize that there are very real, serious secondary effects some regulations have on businesses. And I will spend a little bit of time talking about how overregulation in the financial industry has hurt businesses' ability to access traditional financing.

A 2011 survey of small businesses conducted by McClatchey and the Chicago Tribune suggests small business owners are not concerned with regulations and do not think they are stifling their growth.

On September 8th, 2011, the Chicago Tribune reported on a study by writing that none of
the business owners complained, that none of the
business owners that they service complained about
regulation in their own industries. And some
seemed to welcome it. Some pointed to the lack of
regulation and mortgage lending as a principal
cause of the financial crisis that brought about
The Great Recession of 2007 to 2009 and its
aftermath.

In December of 2011, the Illinois
Hispanic Chamber of Commerce conducted its own
study of businesses. More than 125 businesses were
surveyed. And we asked, what was the biggest
barrier to their success? Only nine percent of
businesses that we surveyed said that regulations
were the biggest barriers to their success.

Business owners were asked to name
their biggest barriers. And here is what they
said. Fifty-one percent of businesses surveyed
said accessing financial resources was their
biggest concern. Forty-two percent said finding
customers. Thirty-four percent said competition
from big business. Twenty-six percent said lack of
access to business development and technical assistance resources. Twenty-three percent said taxes. Twenty percent said insurance. Eighteen percent said labor costs. Sixteen percent said inflation. Nine percent said regulation. Four percent listed other. And one percent cited language as their biggest barrier to success.

For the purposes of my testimony here today, we again surveyed 35 business owners in January of this year. This time we asked business owners to rank from 1 to 3 the same concerns listed in our 2011 survey. And only 2 of the 35 businesses cited regulations as a concern, both ranking regulations as their number three concern.

Next, we asked businesses if regulations were of any concern at all to their business. And 66 percent of the businesses we surveyed said that regulations were of no concern to their business. Interestingly, only a few of the 34 percent of businesses who said they were concerned with regulations were actually able to point to real business regulations hindering their
growth.

Seventy percent of businesses we surveyed said they disagreed that business regulations were one of the principal issues hurting small businesses today. In fact, 60 percent of the businesses we surveyed said they saw business regulation as a tool to help level the playing field with larger businesses that they compete with.

And, similar to the McClatchey-Tribune study, 95 percent of businesses we surveyed said they thought that lack of regulation in mortgage lending was a major contributing factor that caused The Great Recession of 2007 to 2009.

Now, we are not naive to the fact that often regulations that on the surface do not appear to directly impact a business can have very serious secondary effects. I specifically want to spend a little bit of time this morning talking about how regulations in the financial industry continue to have an impact on small businesses' ability to obtain much needed capital. It is a tricky topic.
When the mortgage crisis crippled our economy, federal regulators enacted extra strict regulations that brought mortgage lending to a complete halt. Small community banks, many who were over-leveraged in secondary mortgage securities, as was just about everybody else, were deemed too risky and were forced to close. Their assets sold to large mega banks.

This was a very real issue for the great majority of small businesses that we work with because most of them had longstanding business relationships with small community banks. When these banks went away, so did the capital that many of these businesses relied on.

New lending regulations along with the terrible economy forced many businesses to close. And for those that survived, many are still struggling to recover.

I want to highlight one specific example we saw in 2009 because it speaks to the absurdity of the lending parameters we were seeing at that time. One business that we worked with had
a relationship with a small community bank. That business had a $500,000 cash deposit with that bank and also a $500,000 line of credit.

After the bank was sold to a large multinational bank, the new bank came in and told the businesses that they were calling their line of credit, giving them 90 days to pay the full balance, at which time it was close to the full limit of a half a million dollars. The business offered to pay the balance out of the $500,000 cash deposit they had with them but asked to continue to keep the line of credit open and active because they needed it for capital for everyday operational expenses.

The bank told them that they could only keep the line of credit open if the business made a new $500,000 deposit to secure the line of credit again. If it doesn't make sense to you, you are right. It simply doesn't make sense. If businesses had that kind of cash, they wouldn't need the line of credit to begin with. Even the bankers that we were working with said that they
couldn't understand why they couldn't get the deal done.

In my capacity as CEO of the Illinois Hispanic Chamber of Commerce, I meet with bank executives all the time. All of them tell me the same thing, that they're lending, that they have money, and that they're looking for deals. But ask a couple of questions, and they will soon let up. They say their hands are tied, that regulators are looking over their shoulder, and if the deal doesn't fit neatly in a prescribed box, they can't do it.

I opened my remarks today by saying that government regulations are not barriers to small business growth. And I recognize it sounds like I'm saying that regulations indeed are hindering a business' ability to grow. Yes and no. Clearly, some regulations have very serious secondary effects; in this case, regulations that impact small business lending.

Specifically, let's look at what happened and what we can learn from this in other
industries. Prior to the mortgage crisis, the financial industry lacked real common sense and practical regulations. The lack of effective oversight was a contributing factor to the economic crash that nearly collapsed our entire economy.

As a result of the crash, regulations were put in place to stabilize and revive the economy. Have they gone too far? Yes. Do financial regulations that speak to lending need to be loosened? Yes. But are regulations, per se, bad for business? No.

My point is that if there have been more effective regulations in place, then our financial crisis might never have happened, and it might have been averted. If there had been good, practical regulations, the strict, some might say draconian measures enacted to right wrongs might never have been needed.

Too often business groups label government regulations as the primary evil preventing business growth in our nation. We don't think so. In fact, our studies suggest our
businesses welcome regulations because they say it helps create a standard set of rules that everyone must comply with.

Interestingly enough, entrepreneurs from across the world find the American markets so attractive because of our defined regulations and our rule of law.

As a business community, we must not fear regulations. Business owners thrive on predictability. If we develop a set of rules, enforce them equally and fairly across the board, businesses will thrive.

Thank you for the opportunity to be here this morning.

CHAIRMAN CASTRO: Professor LaNoue?

DR. LANOUÉ: Good morning. As I listen to the testimony of my colleagues, it seems to me that one of the common themes is that sometimes regulations have illegitimate purposes or unintended consequences. And the answer to the question that I posed in my testimony, are federal disadvantaged, transportation disadvantaged
programs remedied for or a cause of discrimination
against smaller or start-up businesses or, in other
words, do they create barriers or erase barriers,
the answer is they may be both, but we don't really
know.

And I think whatever our differing
views about the meaning and implementation of the
constitutional and statutory civil rights
provisions, I hope that we might all agree that it
is not defensible to know so little about the
implementation and effects of a program as large
and durable as the transportation DBE programs.
For fiscal 2013 and 2014, we are talking about $110
billion dollars.

In 2006, I had the privilege of
testifying before this body on the subject of
disparity studies as evidence of discrimination in
federal contracting. I am currently serving as
Vice Chair of the Maryland State Civil Rights
Advisory Commission, but, of course, I am not
speaking for them here.

I have consulted with a number of
governments about contracting program design and
evaluation and served as trial expert in more than
20 cases regarding constitutionality of such
programs. I am currently the plaintiff's expert in
a case, Hispanic Chamber of Commerce v. the City of
Milwaukee.

The Disadvantaged Business Enterprise
program was created in 1989. And in its first
incarnation, it set ten percent goals on all
federal contracting and transportation awards.
After the Supreme Court's decision in Adarand v.
Pena, the program was changed to require state and
local recipients to set those based on their market
prices. There are 1,425 recipients of
transportation. And I have spent some time
examining how these goals are set.

The federal government's own
examination of the program has been very limited.
In 1997, GAO did a study. And it came up with the
answer. We don't have our facts to really
understand this.

Nineteen ninety-eight, Commerce did a
study. And it found that in 19 to 27 geographic 3-digit SIC code comparisons, there was not under-utilization among minority businesses.

Your organization in 2005 came to the conclusion that federal agencies did not engage in program evaluation, outcome measurements, empirical research, and data collection, and periodic review of DBE programs and have largely failed to consider the alternatives that the Constitution required. But the bottom line is we really don't know a lot about how these programs work.

There are two reasons for reexamining this subject now. One is the Ninth Circuit decision in Western States v. the Washington State Department of Transportation, which essentially found that states must make their own findings of discrimination in their local marketplaces in order to use race-conscious measures. The Department of Justice concurred with that and did not appeal that decision. So you have the states in that area now conducting these kinds of studies.

The other source of information that
has been previously not considered is that each one of the federal recipients submits a report called the Uniform Reports of DBE Awards and Commitments. So that we actually do have data on what is going on in these local governments.

And I have spent some time analyzing that and published an article on a two airports. And that is figure 1, 2, and 3 on pages 8 to 9 in the reports. It is a detail that I would be happy to discuss. And recently I have done research on all 50 state highway departments. And here is the bottom line. The bottom line is that given the goals that states or other recipients set, DBEs are under-utilized in the award of prime contracts, but greatly over-utilized in the award of subcontracts.

There is a certain paradox here because the award of prime contracts is almost always by sealed low bid. It is a race-neutral process. And the federal government regards it as such. The award of subcontracts, however, is subjective. It is based on relationships that firms have with subcontractors and on their subjective evaluations
of the quality and characteristics of those firms. And here we find uniformly massive over-utilization of DBEs.

Now, some people might say, "Well, that is a wash. DBEs are under-utilized as primes and over-utilized as subs. So what?" But civil rights belong to individuals. And if we have a situation where the current structures, the current arrangements create over-utilization in the subjective part of the process and under-utilization in the objective central part of the process, I don't think we can simply regard that as a wash.

Now, why does this phenomenon occur? It occurs -- and I have got a Law Review article about this, and everything is in the bibliography. It occurs because there are great problems in the way the goals are set in the first place.

The Supreme Court said in the Croson decision that you should compare businesses that are comparably qualified, willing, and able to determine whether race or gender might be the
factor that creates differences in their utilization.

States and other recipients too often simply do head counts. You can find one airport that actually uses Yellow Pages. And so the goal setting may be flawed from the beginning.

The second thing is that when the specific contracts are set, there are two problems. One is that many recipients ignore non-DBE availability. So the goals are set strictly on DBE availability. And then that leads to over-utilization.

The second problem is the goals are set on the total amount of a contract, not just on the subcontracting portion. And if you do that, then you force prime contractors to over-utilize DBE subs to meet the goals.

Now, this can actually create handicaps for all new and small businesses but sometimes for specifically for minority and women-owned businesses. Let me give you an example. The definition of economic disadvantage would be a
DBE -- you have to be both socially and economically disadvantaged currently -- is that the owner can be considered economically disadvantaged if the owner has a net worth of less than $1.32 million minus the value of the owner's principal residence and the value of the business.

When the Department of Census in 2010 asked the same questions and created a national average, it was $46,000 dollars. So if you are defining economic disadvantage as people who have a net worth of 1.32 minus the exclusions, you are creating an artificial definition of who is actually economically disadvantaged.

Furthermore, the worth of the business can be $22.31 million dollars. In some lines of business, that may not be a huge amount, but when you're talking about guardrail installers or other kinds of businesses, that is a huge amount.

Furthermore, there are no limits on the amount of time that a DBE can be in a program or the number of contracts that a firm can win.
federal regulations suggest that recipients do what are called over-concentration studies. That is, looking if the particular configuration of businesses means that DBEs, the use of DBEs, runs everybody else out of the area. The only state that has done that is Rhode Island.

So what I am suggesting, then, is that this Commission revisit its earlier findings and the responses it got from the federal agencies, which were largely not very revealing, and try to get more information about how these programs really work and try to engage in what a narrowly tailored DBE program would really look like for the benefit of non-DBEs and for the benefit of smaller, start-up DBEs that are really being crowded out of the program by the large, well-established DBEs that are getting most of the benefits.

Thank you.

SPEAKERS' REMARKS AND QUESTIONS FROM COMMISSIONERS

CHAIRMAN CASTRO: Thank you.

At this point Commissioners will have an opportunity to ask questions. I would ask them
to identify by raising their hand or Commissioner Yaki identify on the phone if you would like to ask any questions. Commissioner Gaziano, Kirsanow? Commissioner Gaziano, please proceed.

COMMISSIONER GAZIANO: Thank you.

CHAIRMAN CASTRO: And then Commissioner Kirsanow will come after you.

COMMISSIONER GAZIANO: Thank you all.

And I think if the Chairman allows a second round after everyone else has, I may address some other witnesses, but I think my initial question I'd like to ask Messrs. Duque and Sandefur since at least the question I ask is implicated by both of your testimony.

In part, I want to ask Mr. Duque a little bit about the methodology or the meaning, I suppose, of the survey that these people in existing businesses were asked about whether regulations hindered their growth.

I'm kind of dubious to begin with how regulation was understood by them or whether they are even aware of some of the sea of regulation
that they may or may not be complying with that may -- but, putting that aside, I think one more fundamental question that Mr. Sandefur has written about/talked about is the barriers to entry that certain special regulations, the occupational licenses, the medallions, and the like, if you're going to survey those in an existing business with an occupational license, a medallion, -- and those are extreme examples of barriers to entry, but there are lots of other sort of lesser barriers to entry. But if you are interviewing the people in an existing business, they're the advantaged ones. The licensing regime, the need to get the medallion is a great boon to that. And I wouldn't be surprised if they say, "Yes, those are great things to keep out new entrants."

So I suppose I would like both of your comments, but wouldn't you expect if you're just surveying existing businesses, that they would not be objecting to barriers to entry to bring in new competitors?

MR. DUQUE: Sure. No. Thank you.
So, first, to speak to the methodology, I just want to be clear. This is something that we conducted internally in our office. We tried to get as large of a sample as possible and ask a broad range of questions.

In the strict meaning of an actual study, I don't know that it would necessarily qualify as a scientifically based study. We did it internally. We are confident with the results. We are confident in the feedback that we got. And the results speak to the attitudes of our members and of the businesses that we surveyed. And when we looked at other surveys similar to the ones that we did that were scientifically conducted, like the one that I mentioned that we conducted by McClatchey in partnership with the Chicago Tribune. Many of the answers were similar in nature, the responses that we got were similar in nature.

As to the fact that we were surveying existing businesses and compared to Mr. Sandefur's testimony, yes, I would agree that there probably is a bias with somebody who is already in business.
And I want to address also — you know, we were looking at this from a -- if the businesses aren't able to identify what regulations are, what specific regulations, then I think that that is also indicative of their feeling. I mean, if you feel that there is a regulation that is very, very, very much affecting your business, you are going to illustrate that. And when we asked them, when we asked the businesses to name a regulation, only a few could. This just tells me it is not top of mind for these businesses.

Do I agree? I think there is also a difference between regulations that have an impact and just silly laws. And I think that, you know, some of the licensing, occupational licensing, issues that Mr. Sandefur brought up, I mean, of course, we would be against that. And, of course, we are against that. Those just seem to be absolutely ridiculous. And they are barriers. And those need to be dealt with.

Does that mean necessarily, though,
that all regulations are bad or that we disagree with licensing to begin with? No. Absolutely not.

I hope that that addresses your question.

COMMISSIONER GAZIANO: Thank you.

Just to follow up, Mr. Sandefur, first of all, is it possible that you could provide the detail on your study?

MR. DUQUE: I'm happy to provide the detail of the study, including all of the other questions. I'm happy to submit that.

COMMISSIONER GAZIANO: In my sort of day job experience, a lot of regulated entities don't know they're regulated until the prosecution begins. Anyway --

MR. SANDEFUR: I would agree with what was said before. I suspect that respondents to a survey like that would probably not think of, would not immediately think of, a licensing requirement as a regulation because when you think of regulation, you typically think of something you have to deal with on a daily basis when you are
running a business.

But there is also the problem that a lot of these licensing requirements are kind of absurdly disguised as public safety requirements. The most heinous example of that is the Nevada certificate of need requirement for moving companies that I am currently challenging, which is the most anti-competitive law in the nation, I believe. In order to get a license to run a moving company in Nevada, everybody has to go through a hearing. Most states, you only have to go through a hearing if an existing company doesn't want you to get a license. But in Nevada, everybody who applies for a license to run a moving company is required to go to a hearing where you have to prove all sorts of often very complicated things. You have to provide scale maps of the routes you're going to drive as a mover, for example. You have to provide detailed financial information.

But the statute breaks it down into several sections. And over and over again, you have to prove you wouldn't compete with existing
moving companies. You have to prove that you wouldn't be a threat to the existing moving over and over. And you also have to prove that you would be in compliance with the policy announced in this other statute. You look that up. It says it's the policy of the state to discourage competition on the moving industry. And maybe that is why there are only 40 licensed moving companies in the entire State of Nevada today.

So the problem with asking questions to existing companies is not only that the insiders like the exclusion but also the propaganda value of wrapping these exclusionary rules in something that looks like a public safety measure. And nobody challenges a public safety measure. Everybody is fine with public safety requirements. The problem is that people think of public safety when often these laws have little or nothing to do with public safety.

And, finally, there is the problem that it really is kind of unfair to eliminate the barrier to entry after somebody else has already
gone through all of the unfair time and expense of having to get that license, right? When we were suing in Missouri, for instance, I got a couple of nasty emails from existing moving companies in Missouri. And they were like, "You know, we don't like this law either, but we had to go through the time and expense of getting this license. How is it right that your client should be able to sue and get the licensing abolished?" to which my answer is it's not fair, but who is responsible for that unfairness? The State of Missouri for adopting this unjust and unconstitutional licensing requirement.

And it is not all that cheap to sue the state and go through. Fortunately, our clients don't have to pay for lawyers because we do it for free. But most people don't have the wherewithal to challenge the constitutionality of these requirements.

CHAIRMAN CASTRO: If you win, maybe Commissioner Kladney can open a moving company.

COMMISSIONER KLADNEY: Yes.
(Laughter.)

COMMISSIONER KLADNEY: I'm thinking so fondly of that.

CHAIRMAN CASTRO: Commissioner Kirsanow?

COMMISSIONER KIRSANOW: Again I want to thank the panelists for doing a great job. I wish we had more media coverage here because I think this is an extraordinarily important topic. You know, it should be carried by C-SPAN.

We have got an unemployment rate among grads of 13.8 percent, minority participation rate of 58 percent. More than 15 percent of working-age black men in urban areas have no jobs. When I say, "no jobs," that includes being self-employed. We have got an atrocious unemployment rate in the Hispanic community of 9 percent plus. So, you know, this is something of immediate import.

Commissioner Gaziano actually asked my question about existing businesses and those who are trying to gain access into a particular market or an existing business trying to gain access to a
new market. So I am going to kind of pivot and ask maybe Mr. Alford a question going to Mr. Cristofaro's point about the Regulatory Flexibility Act and the analysis that goes through that.

I have done a fair amount of litigation with respect to the Regulatory Flexibility Act and the Administrative Procedures Act, not with respect to the EPA but other federal agencies. And, unfortunately, -- and I do that portion at least for mammoth enterprises.

My understanding is that at the initial stage, the agency head has wide discretion to certify whether or not there is a SEISNOSE, correct?

MR. CRISTOFARO: The definition of SEISNOSE is not specified in the statute. So there is discretion.

COMMISSIONER KIRSANOW: Right.

MR. CRISTOFARO: And so whether one describes it as wide or not, there has to be a rational basis for the determination.

COMMISSIONER KIRSANOW: And in my
experience, it is very burdensome, even for a gigantic enterprise, to go through the litigation process to determine whether or not through the volume of paperwork and analyses and experts, to make the determination that, in fact, there is no burden or there is not a substantial burden on a small business, partly daunting enterprise.

Mr. Alford, how many of your members have got the resources to challenge the federal government when there is a discrete regulation that may have an impact on you that you think they didn't go through the proper process to get implemented?

MR. ALFORD: Maybe five percent.

COMMISSIONER KIRSANOW: How many of your members have the ability to weather a blizzard of regulations? Not just one, but when your enterprise is subject to thousands of regulations coming at you or at least hundreds at the same time, what do they do?

MR. ALFORD: They shrink. They lay off. They retract. Many go out of business, sir.
COMMISSIONER KIRSANOW: I know a little bit about project labor agreements. Who generally in your experience accesses or which companies get access to those project labor agreements?

MR. ALFORD: Large, usually large, construction companies with a high tradition of family-owned businesses, multi-generational businesses.

COMMISSIONER KIRSANOW: For a long time, correct?

MR. ALFORD: Three or four generations, sir.

COMMISSIONER KIRSANOW: Right. And will you be surprised if they might be politically connected?

MR. ALFORD: Let's say Turner Construction, a former German company; Fluor; Bechtel. You're talking about companies over 100 years old.

COMMISSIONER KIRSANOW: How many of your members are that politically connected?

MR. ALFORD: They are not connected at
the federal level at all, maybe at the local level with state representatives, maybe with the mayor, but they're not to the point of being outspent by larger corporations.

COMMISSIONER KIRSANOW: How many of your members are unionized?

MR. ALFORD: Two percent.

COMMISSIONER KIRSANOW: How many of your members could sustain unionization in your estimation?

MR. ALFORD: I'll give you an example, please: Buffalo, electrical firm. They were forced by the powers that be to join a union. This small outfit had about 15 employees, had his wife and daughter and himself. They became unionized. They had to give their 15 employees to the union shops, to the electrical shop. They never got work. He followed and followed. They never got work. They had to go find other business. That's the game that is played.

COMMISSIONER KIRSANOW: One final question. How often do you go out to dinner with
Senator Barbara Boxer?

(Laughter.)

MR. ALFORD: My wife told me there is this group that is called Left Right and you're supposed to get the most opposite person you can to have lunch with and to write papers with. And my wife suggested that I ask Senator Boxer.

COMMISSIONER KIRSANOW: Thank you, Mr. Chairman.

CHAIRMAN CASTRO: Thank you.

Commissioner Achtenberg? And then Commissioner Kladney.

COMMISSIONER ACHTENBERG: Thank you, Mr. Chairman.

Mr. Duque, in my experience, I used to be policy director for a Chamber of Commerce myself. And my experience pretty much is consistent with what you described were the impressions of your business members. And it is that regulatory compliance. While they are aware of it, it doesn't rise too high on their list in terms of critical concerns. What is of greater
concern is typically access-to-capital issues and the like.

So my own experience is pretty consistent, which doesn't mean -- as has been I think well-pointed-out, that doesn't mean that every business is necessarily aware of every regulatory regime under which they comply but where it is not obvious to them that that is the case or what have you. I mean, I am willing to grant that, but my own -- I just wanted to offer that my own experience was pretty consistent with the observations of your members.

I also wanted to observe that I am a director of a small community bank. And we are able to provide working capital through the various SBA programs to emerging businesses in our area on a pretty fair and affordable basis. We have found ways of really assisting growing businesses to comply with the particular requirements of the SBA lending programs and really been able to offer substantial
assistance to those businesses.

I am wondering what your experience and the experience of your members has been with the various SBA lending programs and what observations you have for things that might improve on that critical issue of access to capital for small but growing businesses.

MR. DUQUE: Sure. Thank you.

So many of our members, like I said in the testimony, traditionally have had relationships with small community banks. And it really has been a relationship in the strict sense of the term.

COMMISSIONER ACHTENBERG: It is a relationship business.

MR. DUQUE: Right. So, you know, you walk in. The president of the bank or your banker has intimate knowledge of your business because they are in the community. And they make decisions based on the strength of your financials, based on the strength of your request, but also based on that relationship and knowing that business and knowing the history of that business.
Banking in many ways and lending is about risk and is about taking that risk. And that is how people make money. That is how banks make money.

You make a value judgment on what that risk is. Many community banks for a long time I think did very well and judged these risks very well and were able to make money. And small businesses were able to benefit. Many of our members, many minority and Hispanic-owned businesses, were able to benefit. As we saw those banks, many of those banks, go away, that really just dried up.

Our businesses do really well in SBA. And I think SBA has some great programs for small businesses. And we are beginning to see a lot of those opportunities come back.

But even the small community banks that are still around, they -- I mean, I talk to them. And they say that they feel that opportunities are beginning to open up again, that they can begin to take more risks. But for too long, you know, they
felt that federal regulations guiding lending were really restricting them from being able to make what might be deemed a risky loan.

    You know, as to specific examples, I think that, you know, the greater impact, the greater reach of SBA opportunities for the small business community I think would be great, but then also on the technical assistance side, which is what we do, is educating businesses as to what they need to do to prepare themselves.

    So a lot of times, the barrier as to these businesses just does not have the resources or know how to put together their financials or understand their financials or put together a loan package to come forward. And so that is a great amount of the work that we do, is helping these businesses prepare for that, because many of them just -- either they have never done it or they have never had to. And so I think that is an issue.

    COMMISSIONER ACHTENBERG: Could I just ask one follow-up question, Mr. Chairman?

    CHAIRMAN CASTRO: Sure.
COMMISSIONER ACHTENBERG: How many of your members are women-owned businesses?

MR. DUQUE: I would say probably about 35 to 40 percent, but, again, that's not scientific because I can't remember the last time we looked at that.

COMMISSIONER ACHTENBERG: Let me just say I'm disappointed that we don't have any representation for women-owned businesses, which is the fastest growing sector of small business in the country. But thank you very much.

MR. DUQUE: Thank you.

COMMISSIONER ACHTENBERG: Thank you, Mr. Chairman.

CHAIRMAN CASTRO: Commissioner Kladney, please proceed.

COMMISSIONER KLADEY: Mr. Sandefur, thank you for speaking so kindly of my home state.

MR. SANDEFUR: Well, you gave us Mark Twain. So it makes up the difference.

COMMISSIONER KLADEY: I guess I am going to ask my question first, but I am going to
follow with a statement. And then maybe you can answer.

I empathize with your position. I guess what I am looking at is, how do you discern good from bad regulation in start-up kind of situations? I was involved in an ancillary manner in a case in the '80s where a doctor had gone and bought an MRI in Nevada. He spent $2 million. He built a building around the MRI. And as he was getting ready to go into business, one of the hospitals went to the medical board and said, "He needs a certificate of need." He fought that case I think for six years. He wound up going bankrupt. And the Supreme Court finally said, "Yes, you can do it," which is a very similar case to what you filed.

So, you know, when you talk about trash falling, the taxis, and things like that, how do you discern a good regulation from bad regulation?

One of my concerns is -- and people on the panel know it -- I am concerned about every one of these regulatory bodies says if you have a
felony, you can't get a license; if you have this, you can't do this; if you have that, you can't do this. So I need some direction in this regard.

Obviously you are more toward we don't need any regulation. I am toward, well, we need some regulation. I mean, if I am going to have a taxi, I think I want to know what I am being charged when I get in the cab, something like that.

MR. SANDEFUR: Yes. No, I do not favor no regulation. I think regulations ought to be publicly oriented. That is, they should relate to public safety and health and preventing against fraud, things like that.

The problem with the certificate of necessity laws, at least when applied to non-monopolistic, non-public utility industries, or with these occupational licensing abuses that are talked about is that they don't relate to the public in this way.

My primary reform if I were the emperor of the world and I could make one reform to these kinds of laws, the first thing I would do would be,
first of all, to remove the application and certificate of necessity laws to any non-monopolistic, non-public utility industry. They have no business being there. These laws were created in the 1880s to regulate railroads and, truly by historical accident, have been applied to things like moving companies.

Taxicabs are slightly different, although there I think also they should be abolished, but when it comes to moving companies and so forth on the theory I am not making this up, one of the defenses that was put forward in the Oregon case where we sued that state -- they also repealed their law thanks to our lawsuit -- in that case, one of the theories put forward was that these laws were necessary to prevent the roads from becoming degraded by too many moving trucks driving on the asphalt.

Now, we laugh at that, but that can pass muster in a court of law because of the rationale basis test. And when you ask a question of how do we determine, I think the broader
question you have to answer first is, how do we go about finding out how to determine whether these laws are legitimate?

And the problem we have in the legal community is that, thanks to precedents dating back 70 years, courts apply basically no scrutiny to laws that inhibit people's economic liberties.

COMMISSIONER KLADNEY: They're presumed.

MR. SANDEFUR: They're presumed constitutionally. And the court has said that we have to negative every conceivable rational basis for the law in order to get it struck down. Now, that is literally impossible. That means I have to not only prove a negative, but I have to imagine what reasons the legislature might have had in mind and prove that those aren't true. And then the judge can come up with his own justification for the law --

COMMISSIONER KLADNEY: Do me a favor.

MR. SANDEFUR: -- even if I do all of that.
COMMISSIONER Kladney: Right.

Let's short-circuit this. How do we go about trying -- if we were to make a recommendation, how would we make a recommendation as to -- you know, you referred to the states are doing this, --

Mr. Sandefur: That's right.

COMMISSIONER Kladney: -- you know, the states. Really, it's the businesses involved in the regulatory body.

Mr. Sandefur: No. It's the states that give them the power to block their own competition that is a problem.

COMMISSIONER Kladney: Right, right. I'm saying that the state -- the businesses pressure the regulatory body for these kinds of --

Mr. Sandefur: Often they do. You know, it's --

COMMISSIONER Kladney: But it is the state that authorizes --

Mr. Sandefur: That's right. And if you ask me a specific recommendation, I guess I would have two recommendations just to begin with.
The first one, as I mentioned, is to remove the ability of existing companies to exploit this power by saying existing companies if they do file an objection to a licensing application have to state a public justification.

In the Missouri case, we got every application since 2005 to the filing of the lawsuit. And there were 75 applications, about 150 objections that had been filed. Every single one of them said the only ground for objection was that it would cause competition. Not a single one of the objections filed stated a public justification.

So that's the first thing is, at the very least, licenses should be denied only where there is a public reason. And the second one is I think broader civil rights enforcement, possibly new civil rights legislation, modeled on the Religious Freedom Restoration Act that would require states and localities to meet a heightened standard in order to impose these kinds of restrictions on trade.

COMMISSIONER Kladney: One more
question, if I can, Mr. Chair. And I'll ask too many questions. It's my problem.

MR. SANDEFUR: It's a good habit.

COMMISSIONER KLADNEY: Contractors.

And this was a total surprise to me. A fellow, I hired him to be the lead guy on my house or whatever. And I encouraged him to go and get a contractor's license after we got done building the house.

He went down, studied, took the test, working guy like you were talking about and passed the test. And he was all excited. And then the contractor's board gave him a $20,000 limit. I mean, you can't build a garage for $20,000.

So is it the same kind of process that you recommended just now? I mean, do you understand what I am saying?

MR. SANDEFUR: Yes. I have never heard of such a regulation. That is heinous. But I would say that the legislation I have in mind would impose the same kind of restriction. It would be something that says -- the Religious Freedom
Restoration Act says if you impose a substantial burden on people free exercise, you have to prove that it's necessary in some public sense and that it is really tailored to accomplish that. And that is what these kinds of restrictions should be, should have to satisfy also. If it is a limit on what a person can build or whether they can build at all, it should have to satisfy heightened scrutiny.

COMMISSIONER KLADNEY: Thank you.

CHAIRMAN CASTRO: The Chair recognizes Vice Chair Thernstrom.

VICE CHAIR THERNSTROM: Well, I have a question both for Mr. LaNoue and also for Mr. Sandefur. Mr. Sandefur, I'm curious about kind of the political context here. I have never understood why. And maybe you can explain it to me.

I have never really understood why the only people -- why the drive for economic liberty has provoked so little interest in the civil rights community. And, really, the people
who are on board with you are almost all libertarians. Why is this such a small community?
This may be an off-the-wall question, but I have never known the answer to this.

MR. SANDEFUR: Wow. That kind of stumps me, too. You know, honestly, it is so under-covered by the media, for one thing, that the struggles of small businesses is something that is not really publicized the way that other kinds of civil rights issues are.

And so, you know, I remember when I first learned about these issues, when I was in law school -- or right before I went to law school, rather. And, you know, it struck me like a thundercloud. I had never heard of these kinds of restrictions. Most people had never heard of certificate of necessity requirements and things like that.

So I think part of it is that the media has failed to cover these problems. And I think because, you know, there are lots of different civil rights problems and barriers to
entrepreneurship. The rapid access to capital is a huge problem. And when you are talking about what seemed like more mundane issues, like getting a license to run a moving company, sometimes it's hard to get people really excited about that.

However, I like to emphasize the fact that, you know, these issues were central to the civil rights movement in the '60s. Martin Luther King's march was not just for civil rights but for jobs also. Thurgood Marshall wrote in some Law Review articles that he wrote when he was an attorney that these kinds of racially restrictive barriers to economic opportunity were a serious concern, but he didn't have the time and resources to focus on them. So he did schools instead.

So I think it is a shame. And if I could get everybody to care about this, I would.

VICE CHAIR THERNSTROM: I find little media attention to the cases that you bring.

MR. SANDEFUR: Fortunately, I think that is changing. I think that we have won a lot of these lawsuits and we're getting more attention
to the importance of constitutional protection for economic liberty.

Now, the reason why the liberal intellectual elite refuses to pay attention to this is because it threatens one of their sacred cows, which is the New Deal. The New Deal legislation so radically broke with constitutional protections for economic liberty that a lot of the Left sees any kind of effort to protect economic liberty as a threat to the New Deal. And perhaps they are right to be worried about that, but that is still not a justification for completely ignoring these issues and relegating them to this toothless rational basis test that says you have to negative every conceivable basis for the law.

I have a forthcoming Law Review article, in fact, where I explain how even the New Deal court didn't say that. The New Deal court itself said plaintiffs should have the opportunity to prove that these laws are unconstitutional. And they are not even being allowed that.

VICE CHAIR THERNSTROM: And, Mr.
LaNoue, I don't want you to violate client confidentiality, but can you describe the issue in the Hispanic Chamber of Commerce v. City of Milwaukee case?

DR. LANOUE: Yes. The case is publicly filed. And so I wouldn't be violating any confidentiality.

The City of Milwaukee did a disparity study. And the results were that it found that African American contractors and women-owned contractors were under-utilized. And it created a goals program that excluded Hispanic contractors. And so the Hispanic Chamber of Commerce and the Native American -- I've forgotten the exact name of the organization, but Native Americans have joined as plaintiffs.

And I can't describe the current state of discussions about it, but I have concluded that the disparity study is not valid and the Hispanic Chamber of Commerce and the Native Americans want to go back to a race-neutral program.

Milwaukee had a race-neutral program
that by any measure of small business and minority participation was enormously successful. And that is their goal.

I will follow up if you'd like, but we get close into privileged knowledge.

CHAIRMAN CASTRO: Can I ask a question? Then I'll go to Commissioner Heriot.

This is a hypothetical question. So, again, I don't want you to violate any attorney-client privilege if this is something that came up. Had the disparity study shown that Latinos were under-represented and they were included in this program, would the chamber you think still have challenged it and favored a race-neutral version?

DR. LANOUÉ: I really can't speculate on the motives and even the personnel in the Hispanic Chamber of Commerce in Milwaukee. My role as expert doesn't get into their internal views.

I was pleased to see -- and it would have been a condition for my participation -- that the outcome they wanted was race-neutral. If all

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they had wanted was to be added to the preferred
groups, I wouldn't have been expert because the
disparity study in my view is not a defensible
study.

CHAIRMAN CASTRO: And a follow-up to
the question that the Vice Chair asked Mr. Sandefur
about why this issue may not get as much traction
as one might expect. As I read your materials and
listened to some of the others as well, you clearly
are talking about a disparate impact theory here.
You are saying that these rules and these
regulations have an adverse impact on minority
firms and women firms, African American firms.

But that is -- I don't want to put
words in folks' mouths but an anathema to some of
my conservative colleagues when it comes to issues
of employment discrimination or bullying. They
want to see disparate treatment. So maybe that is
one of the reasons that this is not getting as much
traction as one might think because you are really
advocating a disparate treatment, even though you
are not saying it, a disparate impact perspective,
isn't it?

MR. SANDEFUR: Well, I think my answer to that would actually be to turn the tables and to say, why is it that the liberal community cares about disparate impact in everything except when it comes to government regulation.

VICE CHAIR THERNSTROM: Also, we are talking about something valued deeply; that is, economic liberty, deeply embedded in the U.S. Constitution and fundamental to the thought of the founders.

MR. SANDEFUR: That's right. In fact, if you look -- one of my favorite examples of that is when you look at the Summary Review of Rights of British America by Thomas Jefferson, which was the pamphlet that got him invited to write the Declaration of Independence, one of the things he complains about is the British regulation of the iron industry in the colonies. He complains that it was illegal under British law at that time to make things out of iron in the colonies.

You had to take the iron, ship it to
England, and have them make the things and then ship them back in order to protect the jobs of established iron mongers in Britain.

VICE CHAIR THERNSTROM: This shouldn't be a left-right issue. I have never understood why it is. Left should be --

MR. SANDEFUR: And, to be fair, a lot of our liberal colleagues have been allies with us in our fights for economic liberty and private property rights. For instance, in an eminent domain case I did in Michigan, the ACLU cosigned the brief that I wrote, which is, believe me, the first time that has ever happened at Pacific Legal Foundation. And a lot of the time, we find that we are on the same side with Chambers of Commerce and other organizations for racial minority business owners, precisely because they know — or women.

I have a case in Nebraska right now where my client is a female entrepreneur actually located in California. She runs a website that helps advertise homes for sale by owner. Nebraska says she is practicing real estate in Nebraska
without a license because her website includes homes for sale that are located in Nebraska.

So we find that we are often allied with these groups, but it has been a recent thing. And they are sometimes hesitant to get on board with us. And I hope that that is changing. And I have reason to believe that it is.

CHAIRMAN CASTRO: The Chair recognizes Commissioner Heriot and then Commissioner Achtenberg, then Commissioner Kirsanow. Commissioner Yaki, do you want to ask any questions? I can put you on the list. No? All right. Well, Commissioner Heriot?

COMMISSIONER HERIOT: I have just got some minor clarifications here. Mr. Cristofaro, at the end of your testimony, you said the EPA had never lost a case with respect to these panels. I just want to clarify. Were you talking about the same thing Commissioner Kirsanow was talking about, where someone actually sues the EPA and says you should have established such a panel in this case but did not?
MR. CRISTOFARO: We have not lost a case on any aspect of SBREFA or --

COMMISSIONER HERIOT: How many cases have you had where someone on the outside brings a lawsuit and their claim is that you have failed to establish such a panel when you should have?

MR. CRISTOFARO: That I don't know the answer to that question.

COMMISSIONER GAZIANO: And is your experience limited to EPA?

MR. CRISTOFARO: Yes. Actually, I should say that --

COMMISSIONER GAZIANO: SBREFA applies to many agencies?

MR. CRISTOFARO: No, it doesn't. SBREFA, these panel requirements only apply to EPA, OSHA, and the new Consumer Finance Corporation. Well, RFA applies to all agencies, but the amendments, the 1996 amendments, SBREFA amendments in this panel process, only applies to three agencies at this time.

COMMISSIONER HERIOT: What kind of
cases were you talking about?

MR. CRISTOFARO: We have cases -- first off, I would have to say that small businesses are typically -- it is the case that, you know, a small business is not going to sue EPA. It is the case that, though, that their association would sue EPA. And most small businesses are in associations. And those associations do bring litigation on a rather regular basis.

But there were cases, such as the American Truckers Association case in I think 1998 or so, where we were sued because it was alleged that we didn't follow the Regulatory Flexibility Act because we were establishing a standard for ambient air. And we didn't.

We decided that because it was a standard for ambient air, although there might be implications for small businesses coming down the road because eventually the nation will have to attain that standard, small businesses were not subject to that particular action. And we won that case. It was a Supreme Court case, actually.
So these cases are brought in different venues. I'm actually not an attorney. So I am not involved in defending the agency. I am involved in issuing regulations.

COMMISSIONER HERIOT: You also said that there is no requirement that the recommendations of these panels be followed.

MR. CRISTOFARO: Correct.

COMMISSIONER HERIOT: And I think you gave like 30 as the number that --

MR. CRISTOFARO: Roughly, yes.

COMMISSIONER HERIOT: -- you have had over the years?

MR. CRISTOFARO: Yes.

COMMISSIONER HERIOT: How many of those have the administrator not --

MR. CRISTOFARO: Sometimes the recommendations are -- that is difficult. I mean, I don't know. I mean, we do not keep a record and say that, you know, this was followed by the administrator or there were 16 recommendations on this panel and 14 of them were followed and 2 were
not. We just do not do that.

I would say that there have been many cases where we have tailored our regulations to -- typically what we tend to do is we tailor the size requirements. So we would say that -- you know, we are interested in controlling pollution and protecting public health and the environment.

So if we can achieve those objectives, typically there might be thousands of sources contributing to an environmental problem. And by focusing on the larger sources, sometimes we sort of have like an 80/20 rule. If you can get 80 percent of the benefits by focusing on the 20 percent of the top leaders, then maybe that's the desirable thing to do. So we generally kind of defy that logic in this panel process.

We often give special -- to the extent that we are authorized by Congress, if we can give extensions in terms of compliance times, we will try to do that in certain cases. We have had some rules that have hardship provisions in them.

And we also have a requirement to
develop compliance assistance tools. So in certain cases, we will go out of our way to undertake outreach to do compliance assistance.

CHAIRMAN CASTRO: The Chair recognizes -- one more follow-up? Okay.

COMMISSIONER HERIOT: I just have a little question for Mr. Sandefur.

CHAIRMAN CASTRO: All right. Go ahead.

COMMISSIONER HERIOT: And that is that you mentioned that you are in a position sometimes of having to prove multiple negatives. Do courts ever apply the same logic in McDonnell Douglas v. Green and say, "Okay. The city needs to come forward with their reasoning?" and you just have to hit that one back? I mean, that is a limited solution to that problem because, you know, you have got cases like -- what was it? -- St. Mary's Honor Center, which indicates that if some other reason comes up during litigation, you're going to have to hit that one back, too. Do they ever apply that kind of logic?

MR. SANDEFUR: Well, keep in mind
that in the cases that we are talking about, when it comes to businesses, it is only constitutional law that applies. There is no statutory basis. And so the courts then apply the ordinary rational basis test. And there is uncertainty in the case law as to whether that requires the government to provide a justification for the law.

Veitch Communications is the notorious case that says --

COMMISSIONER HERIOT: It doesn't say anything about the -- this is just the judicial gloss. So you might as well have a judicial gloss of that sort on the Constitution.

MR. SANDEFUR: I agree with that. And the Veitch Communications case says no, the government -- in fact, it says facts are irrelevant in these cases, but most cases have not gone that far. Mostly the Supreme Court has said there has to be some fit between an identifiable government interest and the law that is at issue.

But, of course, whenever I sue these states over these laws, they immediately quote all
the Veitch Communications language and even get -- this is a horrible thing -- even get dismissals of rational basis challenges prior to discovery, which is not justified by the Federal Rules of Civil Procedure, but they get it all the time because of this errant language in some Supreme Court cases that suggests that rational basis means as long as the judge can close his eyes and imagine something right with the statute, it is constitutional.

So the bottom line answer is it is not really clear. And the Supreme Court really needs to clarify whether rational basis means a really rational basis or whether it means anything goes, rubber-stamp for the government, which is what a lot of the cases do say.

COMMISSIONER HERIOT: In response to Chairman Castro, I assumed that you would take the same position on all of this if there were no racial aspect to it, that this is simply a question of entrepreneurialship and not just disparate impact.
MR. SANDEFUR: That's right.

COMMISSIONER HERIOT: That is an interesting angle.

MR. SANDEFUR: That's right. The disparate impact is caused by the fact that any time the government has the authority to grant or withhold economic favors from one group and give all of those favors to another group, the people who are going to benefit from that are the most politically adept and the most well-financed, not the most morally deserving. And that fact is true across the board, throughout the regulatory welfare state.

No matter how well-intentioned your government redistribution program is, it is going to fall into the hands of those with the best lobbyists, not into the hands of those who deserve it most.

CHAIRMAN CASTRO: The Chair recognizes Commissioner Achtenberg. Then it will be Commissioner Kirsanow and Commissioner Gaziano.

COMMISSIONER ACHTENBERG: Welcome to
the political system. Mr. Alford?

MR. ALFORD: Yes, ma'am?

COMMISSIONER ACHTENBERG: I wanted to talk a little bit about the Section 3 issues that you raised. I find myself to have a good bit of sympathy for some of the issues that you raised with regard to the enforcement of Section 3, although I believe you slightly overstate the case in that I once had responsibility for the enforcement of Section 3. And I like to think within the bounds of the law, which only required best efforts, unfortunately, as you and I both know, I tried to make Section 3 worth its salt.

So I do have some sympathy for the notion that if there were to be an individual right of action, that that would beef up Section 3 substantially. And I'm thinking.

Are there other ways in which if HUD were so inclined, they might be able to make Section 3 real for the residents who live surrounding public housing who were meant to benefit from some of the financial investment that
HUD makes in not only public housing but assisted housing of various kinds?

MR. ALFORD: Section 3 is so simple. You have landscaping. You have painting. You have janitorial services. You have day care centers. You have accounting done, data processing. Teach the tenants to do it and hire them. And then when they are employed, place them in regular jobs out in the community.

Willie Brown had probably the best Section 3 program in the country. And a week after he turned out of his office, they shut everything down, shut it down. Smoot Construction, one of our larger construction companies, had a model program in Columbus, Ohio. And then Secretary of HUD Cisneros came out at Smoot's request. And he showed what he was doing with single parent ladies, mothers, putting them in the construction business, putting them in the landscaping business, bought computers to teach them how to do accounting for the Housing Authority. They shut that down. Cisneros never even talked about it. It's
conspiratorial, really.

And what one guy in the Housing Authority in New Orleans told me years ago, "You want us to shrink. You want us to get these people working and out of public housing. Well, what about my job?"

And I replied, "I don't think you should have a job doing this. It shouldn't exist" if America is free and we are running a free enterprise.

So it is very simple. It is the simplest way to go. And it is a tragedy.

I hope I answered your question.

COMMISSIONER ACHTENBERG: I mean, again, the best efforts requirement I always found was a little modest, but if there were a more robust requirement, that would be helpful, a) and b) if there were to be an individual right of action, as you were recommending, I think that would be of significant help as well.

 Anyone charged with enforcement of Section 3 would be helped substantially by the
crowd at the door, at the courthouse door, you know, trying to get in. So I don't disagree with your assessment that an individual right of action would be very helpful in strengthening the hand of the person inside of HUD who has the responsibility for trying to make Section 3 really work. So I do agree with that.

I don't necessarily agree with your characterization of the activities of Secretary Cisneros. I would have been his Fair Housing Assistant Secretary at that time. And I completely disagree with your characterization of my activities with regard to the enforcement of Section 3. But, nonetheless, I think you brought on a good point with regard to the individual right of action.

MR. ALFORD: Nothing personal intended.

COMMISSIONER ACHTENBERG: No, no.

And nothing personal intended --

MR. ALFORD: We had a Section 3 specialist. The Chamber hired one to go to cities and to teach Section 3 and to show people how to
implement Section 3. One day, Secretary Cisneros offered a $130,000 job to my specialist, an intern at Harvard University, and took him away from me because he was doing his job well.

COMMISSIONER ACHTENBERG: Well, I can understand your concern.

Thank you, Mr. Chairman.

CHAIRMAN CASTRO: The Chair recognizes Commissioner Kirsanow.

COMMISSIONER KIRSANOW: I had one more for Mr. Sandefur and one for Professor LaNoue.

Mr. Sandefur, this might be outside your area of expertise. It certainly is outside of mine. I spent I think a decade one semester in antitrust law. But if you have a certificate of need, a number of -- have you dealt with nursing homes', for example, certificates of need?

MR. SANDEFUR: Not nursing homes, no.

COMMISSIONER KIRSANOW: Okay. With nursing homes, for example, it is the same dynamic where you have a number of nursing homes in an area will sometimes challenge a new nursing home's
desire to expand, have more bed space. Could that conceivably be either Section 1 or Section 2, Sherman Act violation if they band together like that and assert that that particular nursing home really doesn't need to expand?

MR. SANDEFUR: There have been efforts to use the Sherman Act against certificate of necessity regimes. In fact, the Federal Trade Commission sponsored an effort to use the Sherman Act against moving industry cartels under certificate of necessity laws. Unfortunately, of course, the state action doctrine bars a lot of that, which is the completely made-up idea that government should be immune from the Sherman Act, which I see no basis for in the statute itself.

And I would also advocate its immediate abolition and allow the Sherman Act to be used against that entity, which is most likely to create coercive and exclusive monopolies in favor of politically well-connected people. And that is the government. Obviously that is going nowhere.

So there have been efforts to use it.
And it hasn't really been an effective tool.

COMMISSIONER KIRSANOW: Okay.

Thank you.

And, Professor LaNoue, you have been expert witness across the country. So I am wondering if what I observe anecdotally might be something that is more broadly applied. And that is, where you have a DBE in a particular locality, very often you have got a single entity that maybe early on in the DBE process, 20, 30, 40 years ago, or simply right after Richmond v. Croson became the go-to DBE for that political subdivision. And from then on, it seems to be that they are the one and no other DBEs seem to be able to develop and flourish as a result.

Do you see that happening in your practice?

DR. LANOUE: I have seen it happening. And it also I think goes to Chairman Castro's question. It is easy to take a position and say, "I align myself with DBEs" or "I align myself with non-DBEs possibly hurt by these programs," but when
you examine them more carefully, within the DBE community, there are differences between large DBEs that are well-established that virtually get all of the work. And there are differences in various specialties so that in some specialties, DBEs are almost always going to get all the work and various specialties will get very little because you can fulfill the goals that way. And there are differences among various groups, which are advantaged or disadvantaged because, after all, a prime contractor can have a prejudice against a particular minority group or women, never employ them but still meet the goals.

So what I am saying is that we just don't have enough information. The federal government I think has been woefully unwilling to actually analyze these programs.

When we made a request for the uniform reports that every recipient submits for the 50-state highway programs to the federal government, FOIA requests, they weren't able to comply. We had to go to each state to get them.
Now, that suggests to me that they don't ever analyze them. They don't take them seriously. This is a document that takes a while to compile. And it has really very detailed data about what is going on.

So my hope would be this Commission would say that the government needs to do more analysis of the consequences of these programs, who benefits, who doesn't, and probably needs to strengthen the over-concentration requirement that is now only a suggestion and, as I have said, only Rhode Island has ever done it. They did find massive over-concentration.

And when you do that, then you will add to leveling the playing field and not just create DBEs and non-DBEs fairly but treat specialists and firms and groups within the DBE community more full than I think is now the case.

COMMISSIONER KIRSANOW: There was a flurry of fraud cases immediately after Richmond v. Croson where you had certain DBEs acting as front groups for majority-owned companies. Has that
diminished?

DR. LANOUE: I don't know the answer, but I do know that there was a very substantial one brought in New York City where the owner accused of this actually committed suicide.

COMMISSIONER KIRSANOW: Mr. Alford, you were shaking your head.

MR. ALFORD: Yes. Fronting, as it is called, is flourishing today as it ever has been. And that was, the company, the case you're talking about, he was a vice president of a San Francisco group. In fact, Dianne Feinstein's husband owns that construction company, is the CEO. But no. Fronting is very big.

And also may I say DBE refers to small business. So when you are talking about prime contracting, you are not referring to DBEs. That is just a regular business. We have had successful DBEs get kicked out of the program because they were successful.

And I believe the standard today is maybe $35 million a year on the average of 3 years.
You exceed $35 million a year, you are grown up. You are out of the program.

COMMISSIONER KIRSANOW: Thank you.

MR. DUQUE: The issue of fronting and fronts, unfortunately, this is still happening. And it is still a very common thing. We see many cases in Chicago.

I want to believe that businesses are educated and aware of how severe of an action that this is. And I want to believe that there are less people willing to go about this way because there have been so many high-profile cases. And I want to believe and I do believe that there is more enforcement in these areas.

So fronting hurts all of us. It hurts us because it gets to the credibility. It hurts the credibility of the program.

As to DBEs and prime contracts and subcontracts, there are a couple of things. One of the things that we see specifically in Illinois that we have been fighting against and that I think that we have made some progress on is
to reach the goals, a lot of times what they do is there is an active suppression of a business' ability to grow, whether this is done on behalf of the actual transportation departments or on some of the large companies. Actually, I believe it's the prime contractors.

You have a 20 percent goal. You will spread that 20 percent goal among 10 companies. And those 10 companies get such a small percentage of the work. Those companies, they are getting a small percentage of the work. But in my opinion, these companies should have a larger opportunity so that they can grow, so that they can get the expertise, so that they can participate as a prime contractor, maybe smaller jobs.

So if a company can do on the transportation side maybe a $5 million job or a $10 million job and be in the driver's seat and run that contract and get the experience of putting together and running the entire group, in our opinion, that is the goal. And so the more of that that you have, if you graduate, that is a good
thing because you have grown and you have used the program effectively.

You are still at a disadvantage against some of these larger companies, like Turner and Bechtel and others. And we would argue that there is still also a need for programming beyond the graduation point. And some areas are doing it. The city of Chicago is doing something related to small business that is race-neutral. But I think we want to see these companies participate more in the prime level of these DBEs.

MR. ALFORD: City of Chicago. We took on United Airlines that was doing a billion-dollar project in Indianapolis. And they were going to use fronting. They admittedly said that they were going to use fronting. And we took them on and won that. It changed Indianapolis around.

Today -- that was maybe 20 years ago. Today there are more black construction dollars being earned in Indianapolis than Chicago, a city six times its size, because it's the real deal: Indianapolis. And the majority of the numbers
coming out of Chicago are fake.

How can a city with a 25 percent minority goal after Mayor Daly -- you go back to old man Daly, 25 percent. But, yet, they can't have a construction company the size of construction companies in Columbus, Ohio or Indianapolis. It doesn't make sense. It's useless, their program.

CHAIRMAN CASTRO: Commissioner Gaziano?

COMMISSIONER GAZIANO: Thank you. And there will be a question at the end of this for Mr. Sandefur, but I am going to respond --

(Laughter.)

CHAIRMAN CASTRO: Duly noted. Duly warned.

COMMISSIONER GAZIANO: First, a little bit on the Chairman's challenge that we conservatives have expressed concern about improper uses of disparate impact explain ourselves as to why we should care about this type of disparate impact.

First, though, I would note that in
your exchange with Commissioner Heriot, we ought to all concern ourselves with the denial of a civil right. If it didn't have a disparate impact, it just might not be within our jurisdiction.

Now, as to our jurisdiction and why we ought to care about this disparate impact, there is a difference between when a disparate impact occurs out in the real world, such as employers who want to conduct background checks or have a high school diploma, whether the federal government or any government, for that matter, has the constitutional power to force them to eliminate a disparate impact. But we always should care, in this Commission and elsewhere, if the government creates the disparate impact, particularly if the government creates a pernicious disparate impact. And it is very much within our jurisdiction to study, comment, recommend ways to eliminate government-caused pernicious disparate impacts. So I am 100 percent consistent, never inconsistent in anything in my --

(Laughter.)
COMMISSIONER GAZIANO: The record is now clear on that.

My final question, then, is, with regard to some of the occupational license, medallion regimes, particularly the project labor agreements that Mr. Alford talked about, it is certainly my understanding -- and if either of you two know -- that the origin of some of them was not benign but was -- Davis-Bacon, for example, was founded in intentional racism. And it only masqueraded as some other public regarding.

So I am not sure how common the racist origin of some of these licensing regimes are, but they were by established people many, many years ago. And the established groups many, many years ago tended not to be the minorities.

Are you aware of other examples of this sort of intentionally racist origin of some of these occupational licensing?

MR. SANDEFUR: Yes. I would say that the history of occupational licensing is rife with such abuses. Occupational licensing really took
off in this country in the 25 years or so after the Civil War. And one of the primary purposes of them was to exclude primarily the freed slaves but, really, any other racial group.

I am from California. We never had slavery in California. The closest thing we had to slavery was the treatment of the Chinese immigrants in California. And when you read, which is, by the way, very hard to do because it is hard to get these records, but when you get the records of the California Constitutional Convention of 1878 to '79, which generated the constitution we still operate under in California, it is 3 volumes of the most disgusting racist tirades that you will ever read.

And one of the primary purposes of the convention was to devise occupational licensing and other restrictions under the guise of public safety to exclude the Chinese laborers from any business. They just barely avoided writing a constitution that would have prohibited any corporation from hiring a Chinese person on pain of forfeiture of
assets. Instead, they adopted occupational licensing regimes.

In my written submission, I talk about Yick Wo v. Hopkins, which is the most notorious Supreme Court case on the abuse of occupational licensing laws for racist reasons.

Unfortunately, most lawyers today are not taught that this is an occupational licensing case. This is a case about economic liberty. They're taught that it is about racism. And it is.

But if you take a step back, what happened with San Francisco passed the licensing law for laundries, which were almost all run by the Chinese, that, for one thing, imposed very restrictive requirements on laundry facilities and, secondly, allowed officials unreviewable discretion at their will to grant or withhold licenses in order to exclude minorities.

And the history of this is rife. I would recommend that the Commission look at the work of Professor David Bernstein from George Mason University, who is the nation's leading expert on...
the abuse of licensing laws for racist purposes.

CHAIRMAN CASTRO: Well, that brings us to the conclusion of our panel. I want to thank each of the panelists for your contributions today. This was a very informative panel. We appreciate --

COMMISSIONER YAKI: Commissioner?
Commissioner? I have been waiting.


COMMISSIONER YAKI: Well, I'm just going to say I thank you all. Thank the panel for their remarks. I am glad that we closed down -- since I was a member, as was Commissioner Achtenberg, of the Board of Supervisors, whose forbearers were the ones who enacted the draconian, insane, and utterly racist law. We are proud to be descendants of that body but with a little more enlightenment.

The only comment I wanted to make about this is that I found this all very interesting, but
to me, what was lacking was a recognition of some of the areas where we need to be looking further. And I think that one of the things that -- I heard what was said about the contracting set-asides, what have you. Part of me believes that while this is a lack of effective government distortion of these laws that results in the disgruntlement by people in the contracting community, it seems to me, I don't blame them.

And I think that one of the biggest areas that we need to look at in the future on these sorts of issues is in the area of finance, where we saw in the - bailout and what have you, that most of the gigantic lion's share of the transactions are performed ostensibly to buy, sell, and otherwise deal with the assets of the companies who were desperately trying to keep from blowing up our economy in 2009-2010.

I think on that, that the ability of minority firms to participate at the trading level of options, swaps, and other things that essentially the U.S. taxpayer was funding was
almost nonexistent and why in Dodd-Frank, they put in the Office of Minority and Women Businesses and not just for various trade institutions within Treasury and other financial bodies but to also deal with the fact that Wall Street has continued to be an extremely exclusive and racially polarized community. And I hope that in the future, we can take a look at that.

But that was just my statement and also to say that, also to correct one thing that the last speaker said. In California, perhaps it wasn't the direct work of the California government per se, but I dare say that there are a fair number of indigenous people to California who were held in slavery, albeit it by the -- it was before Westerners came and took over California.

MR. SANDEE: Very fair point.

CHAIRMAN CASTRO: Thank you, Commissioner Yaki. I also want to thank Lenore Ostrowsky and Tim Fay from our staff for putting together today. And I want to thank Pam Dunston and her staff on the logistics of the event. We
appreciate all of your hard work.

Also, the record for this briefing report is going to remain open for the next 30 days. If panelists or members of the public would like to submit materials, they can either do it by mailing them to us at the U.S. Commission on Civil Rights, Office of the Staff Director, 1331 Pennsylvania Avenue, Northwest, Suite 1150, Washington, D.C. 20425 or via email to publiccomments@usccr.gov. Please be advised that all submissions to the Commission's public comments are part of the public record.

If you submit a comment, please indicate if any portion of your submission should be kept private. Unless otherwise specified, the content of submissions is a matter of public record.

It is now 11:33. And this portion of our meeting is adjourned. Thank you, everybody. And, Commissioners, we will take a five or ten-minute break. And then we will come back for our business meeting.
(Whereupon, the above-entitled matter was concluded at 11:33 a.m.)