Compelling Interest for Race- and Gender-Conscious Federal Contracting Programs: An Update to the May 23, 1996 Review of Barriers for Minority- and Women-Owned Businesses

I. Introduction

Barriers to access to capital for minority- and women-owned small businesses must be viewed in the broader context in which these firms conduct business. As detailed below, race and gender discrimination — of which discrimination in access to capital is just one example — remain a significant obstacle for minority and women entrepreneurs, and federal programs continue to have a critical role in addressing it.

In *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200 (1995) (*Adarand III*), the Supreme Court held that federal race-conscious classifications "are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Id.* at 227. In *United States* v. *Virginia*, 518 U.S. 515 (1996), the Court made clear that gender-conscious classifications must be substantially related to an important governmental objective.

Following *Adarand*, the government recognized that, in order to establish a compelling interest to support its race-conscious procurement programs, it must show with specificity how race discrimination and its effects diminished contracting opportunities for minorities. In 1996, the Department of Justice summarized and published in the Federal Register[1] an extensive body of evidence — including Congressional reports and hearings, academic research, state and local government disparity studies and testimony — which identified discriminatory practices affecting racial minorities that act as barriers to their participation in federal contracting. This evidence helped explain the compelling interest behind Congress's adoption of race-conscious contracting programs, such as the Small Business Administration's 8(a) program and the Department of Transportation's Disadvantaged Business Enterprise (DBE) program. A year later, this same document was presented to Congress and entered into the Congressional record.[2]

Since *Adarand*, a number of federal courts have cited that document when holding that Congress had a compelling interest justifying its race-conscious procurement programs.[3]

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[1] *The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey*, 61 Fed. Reg. 26,050 (May 23, 1996). This report summarized more than 50 documents and 30 congressional hearings between 1980 and 1996.

[2] *Unconstitutional Set-Asides: ISTEA's Race-Based Set-Asides After* Adarand*: Hearing Before the Subcomm. on the Constitution, Federalism, and Property Rights of the S. Comm. on the Judiciary*, 105th Cong. 27-80 (1997). See also 144 Cong. Rec. S1493 (daily ed. Mar. 6, 1998) (statement of Sen. Lieberman).

[3] *Western States Paving Co.* v. *Washington State Dep't of Transp.*, 407 F.3d 983, 991-993 (9th Cir. 2005) (quoting *Adarand III*, 515 U.S. at 223); *Adarand Constructors, Inc.* v. *Slater* (*Adarand VII*), 228 F.3d 1147, 1167-1176 (10th Cir. 2000), cert. dismissed, 534 U.S. 103 (2001); *id.* at 1176 ("[W]e conclude that the evidence cited by the government and its amici, particularly that contained in *The Compelling Interest*, 61 Fed. Reg. 26,050, more than satisfies the

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Specifically, these courts recognized that the vast body of evidence before Congress, much of which was summarized in the Department of Justice's 1996 memorandum, provided a "strong basis in evidence for [Congress's] conclusion that [race-conscious] remedial action was necessary."[4]

Since 1996, a significant body of new data has been generated that bears directly on the inquiry of whether race- and gender-conscious[5] procurement and business development programs remain necessary. This includes: Congressional hearings and reports that address the barriers faced by minority- and women-owned businesses; government-produced and government-sponsored reports on the characteristics and dynamics of minority- and women-owned small businesses; academic literature by social scientists, economists, and other academic researchers that focuses on the manner in which various forms of discrimination act together to restrict business opportunities for minorities and women; and disparity studies commissioned by state and local governments to determine whether there is evidence of racial discrimination in their contracting markets. Much of this evidence is already before Congress; additional evidence is discussed in this statement and submitted along with it.[6]

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government's burden of production regarding the compelling interest for a race-conscious remedy."); see also *Sherbrooke Turf, Inc.* v. *Minnesota Dep't of Transp.*, 345 F.3d 964, 970 (8th Cir. 2003). In 2008, the Court of Appeals for the Federal Circuit invalidated the contracting program authorized under 10 U.S.C. § 2323, holding that the evidence before Congress was not sufficiently current to provide the compelling interest necessary to support the program. *Rothe Dev. Corp. v. U.S. Dep't of Def.*, 545 F.3d 1023 (Fed. Cir. 2008). This memorandum responds to that decision, demonstrating that Congress does currently have ample evidence to demonstrate that race-conscious contracting programs are narrowly tailored to serve a compelling government interest and that gender-conscious programs are substantially related to an important governmental objective.

[4] *Adarand VII*, 228 F.3d at 1174-1175 (holding that "the government has met its initial burden of presenting a 'strong basis in evidence' sufficient to support its articulated, constitutionally valid, compelling interest"); see also *The Department of Transportation's Disadvantaged Business Enterprise Program: Hearing Before the H. Comm. on Transp. and Infrastructure*, 111th Cong. 204 (2009) (Opening Statement of the Hon. James L. Oberstar, Chairman and Rep. from Minnesota) ("Since *Adarand*, every federal court that has reviewed the DOT's DBE program has found it to be constitutional.").

[5] Although gender-conscious remedial programs were not the focus of the 1996 memorandum, which addressed the impact of the *Adarand III* decision and therefore dealt with the race-conscious provisions at issue in that decision, the present memorandum addresses both kinds of programs. See 15 U.S.C. 637(m)(2) (giving agencies the authority to "restrict competition for any contract for the procurement of goods or services by the Federal Government to benefit small business concerns owned and controlled by women" under certain circumstances).

[6] Between 2006 and the end of 2009, Congress conducted thirty-six separate hearings concerning public procurement and minority- and women-owned business enterprises. See

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This memorandum summarizes a sample of the extensive body of evidence generated since 1996 and builds on the evidence already before Congress at that time. That evidence clearly shows that discriminatory barriers continue to impede the ability of minority- and women-owned businesses to compete with other firms on a fair and equal footing in government contracting markets. Indeed, significant discrimination, in arenas such as access to capital and employment, limits the formation of these businesses in the first instance.[7]

As in 1996, these barriers "are real and concrete, and reflect ongoing patterns and practices of exclusion, as well as the tangible, lingering effects of prior discriminatory conduct."[8] The evidence discussed below confirms that many of the barriers identified more than a decade ago remain just as significant today. The government has a compelling interest in race- and gender-conscious federal procurement programs where necessary to ensure that it does not "perpetuat[e] the effects of racial discrimination in its own distribution of federal funds" and thereby become a "'passive participant' in a system" of racial or gender exclusion.[9] *Adarand Constrs, Inc.* v. *Slater*, 228 F.3d 1147 (10th Cir. 2000).

II.

Discriminatory Barriers to Contracting Opportunities for Minority- and Women-Owned Businesses

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Appendix A for a list of Congressional hearings addressing this subject. Appendix B contains a list of academic studies and reports cited herein. Appendix C contains a list of recent disparity studies conducted by state and local governments.

[7] For these reasons, some metrics that have been used to measure discrimination in government procurement programs – such as bidders' lists or lists of registered contractors – likely understate the true continuing effects of discrimination.

[8] 61 Fed. Reg. at 26,051.

[9] The Supreme Court has recognized and approved the government's compelling interest in avoiding becoming a "passive participant" in marketplace discrimination. As the Supreme Court stated in *City of Richmond* v. *Croson Co.*, 488 U.S. 469, 492 (1989), for example:

> [I]f the city could show that it had essentially become a "passive participant" in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.

Difficulties exist for any person interested in developing and sustaining a business that can compete for government contracts. First, a would-be business owner generally needs both experience and financial resources to create a viable enterprise. The practical experience needed to succeed in the government contracting market is often gained through prior employment in the targeted field, an informal apprenticeship in a family-run business, or membership in a professional trade union. The needed financial resources may come from personal wealth, commercial business loans, venture capital, or personal loans. And once a business is formed, access to working capital remains critical to both sustain and grow the business. Equally important is access to fair contracting opportunities, which means fair treatment by prime contractors and private sector customers, business networks, financial institutions, suppliers and bonding providers.

These are significant barriers, and they pose potential barriers to business formation and success for all businesses, regardless of the race or gender of their owners. But the evidence sampled in this memorandum shows that these barriers are substantially more difficult for businesses owned by minorities and women to overcome because of the widespread and systematic impact of race and gender discrimination that still exists in the economy generally and in the government contracting market specifically. The evidence shows that these barriers – whether the result of intentional discrimination or other activity that nonetheless perpetuates discrimination — often: (1) prevent minorities and women from forming businesses by denying them needed access to both experience and capital;[10] and (2) deprive minority- and women-owned businesses of fair access to contracting opportunities because of ongoing discrimination by prime contractors, business networks, financial institutions, suppliers, and bonding providers.

These types of disadvantages are in many ways precisely what the federal programs — like the U.S. Small Business Administration's 8(a) and Women Owned Small Business programs and the Department of Transportation's Disadvantaged Business Enterprise program — are designed to address. Each of these programs is designed to eliminate discriminatory barriers and help the development of small disadvantaged firms to enable them to gain a foothold in federal procurement contracting. In this way, the firms first gain access to relatively small contracting opportunities, which can then lead to success in larger federal contracts and the economy as a whole.

A. *Statistical Evidence Demonstrates the Existence of Discrimination.*

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[10] *Business Start-Up Hurdles in Underserved Communities: Access to Venture Capital and Entrepreneurship Training: Hearing Before the S. Comm. on Small Business and Entrepreneurship*, 110th Cong. 1 (2008) (statement of the Hon. John F. Kerry, Chairman and Sen. from Massachusetts) (explaining that the disparity between minority- and women-owned businesses on the one hand, and non-minority-owned businesses on the other, is "not due to any lack of motivation or determination on behalf of minorities and women," but is instead "due to the tremendous hurdles women and minorities must face each day to gain fair and adequate access to venture capital, credit and business and technical training").

1. *There Are General Disparities Between Minority- And Women-Owned Businesses Relative To Their Non-Minority, Male-Owned Counterparts.*

A primary objective of programs that consider race or gender as a factor in government contracting is to encourage and support the formation and development of minority- and women-owned businesses. This effort is a means to help remedy the effects of discrimination that have inhibited such business formation and success.[11] The most recent government statistics on minority- and women-owned businesses illustrate the disproportionately small share of the market these businesses currently occupy. For example, using data from the *2002 Survey of Business Owners*,[12] the U.S. Small Business Administration's Office of Advocacy prepared a report in 2007 entitled *Minorities in Business: A Demographic Review of Minority Business Ownership*.[13] The report analyzed information on minorities in the work force and minority-owned businesses, including statistics about the minority population, their labor force participation, age, education, occupation, work schedules, average personal and household income, business ownership, and business dynamics. The report focused on the growth of minority-owned businesses over recent years in relation to the growth of the minority populations in America during the same time period. Additionally, it analyzed revenue created by minority businesses in comparison to that created by non-minority-owned businesses. The report showed:

- Minorities (defined in the study as either Hispanic, Black, American Indian or Alaska Native, Asian, Native Hawaiian or other Pacific Islander) made up roughly 32% of the population, but owned only approximately 18% of firms.[14]

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[11] *Minority Entrepreneurship: Assessing the Effectiveness of SBA's Programs for the Minority Business Community: Hearing Before the S. Comm. on Small Business and Entrepreneurship*, 110th Cong. 2 (2007) (statement of the Hon. John F. Kerry, Chairman and Sen. from Massachusetts) ("These programs to help minority and disadvantaged firms access Federal contracts are needed to help these firms break into the Federal market."); see also *id.* at 1-2 ("[W]hile the numbers of minority-owned businesses hold promise for the future, and obviously that growth is important, it is clear that much more needs to be done to encourage and strengthen the minority business community and to guarantee the opportunities within it. The potential for small business growth and entrepreneurship has simply not been fully tapped and barriers continue to exist for many minority business owners.").

[12] Census Bureau, *2002 Survey of Business Owners, Advance Report on Characteristics of Employer Business Owners: 2002*, available at http://www.census.gov/econ/census02/sbo/intro.htm (last visited April 29, 2010). This survey provides economic and demographic characteristics for the owners of businesses with paid employees operating in the United States and is the first survey requesting information about business owners since the 1992 Characteristics of Business Owners (CBO) survey.

[13] Ying Lowrey, *Minorities in Business: A Demographic Review of Minority Business Ownership*, 298 U.S. Small Business Administration (2007).

[14] *Id.* at 1, 3.

- Blacks constituted 11.8% of the total U.S. population, but owned only 5.0% of all firms, and accounted for less than 1% of total receipts.[15]

- Hispanics constituted 13.5% of the total population, but owned only 6.55% of all firms, and accounted for only 2.48% of total receipts.[16]

- More than half of Black-owned businesses had less than $10,000 in business receipts in 2002, compared with one-third of White-owned firms.[17]

- On average, a non-minority-owned employer firm (*i.e.*, a firm with one or more employees) had more than $1.6 million, while a Black-owned employer firm had just $696,158 in sales.[18]

- On average, for every dollar that a White-owned firm made, Pacific Islander-owned firms made about 59 cents, Hispanic-, Native American-, and Asian-owned businesses made about 56 cents, and Black-owned businesses made 43 cents.[19]

- Minority women owned 29% of Black employer firms and 47% of Black non-employer firms; non-minority women owned 17% of White employer firms and 31% of White non-employer firms.[20]

A 2006 report produced by the Minority Business Development Agency also finds that, while minority-owned businesses grew in number at a fast pace between 1997 and 2002, their growth in gross receipts and paid employment lagged behind the growth in number of firms.[21] In fact, the report finds that the gap between the share of gross receipts generated by minority businesses and the share of the minority population slightly widened during that period.[22] This disparity "underscores the opportunity gap that still exists in the U.S. economy."[23]

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[15] *Id.* at 1.

[16] *Ibid.* Similarly, while Asian-owned firms accounted for 4.8% of all nonfarm businesses in the United States, these firms accounted for only 2.0% of nonfarm business employment and a scant 1.4% of their receipts. Census Bureau, *Survey of Business Owners – Asian-Owned Firms: 2002: Summary of Findings*, available at http://www.census.gov/econ/sbo/02/asiansof_all.html (last visited April 29, 2010).

[17] Ying Lowrey, *Minorities in Business: A Demographic Review of Minority Business Ownership*, 298 U.S. Small Business Administration 8 (2007).

[18] *Id.* at 7.

[19] *Id.* at 2.

[20] *Id.* at 4.

[21] U.S. Department of Commerce, Minority Business Development Agency, *The State of Minority Business Enterprises, An Overview of the 2002 Survey of Business Owners* (2006).

[22] *Id.* at 12.

[23] *The Minority Business Development Agency: Enhancing the Prospects for Success:*

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Additional data from the Census Bureau's *2002 Survey of Business Owners* show that women-owned businesses account for just a fraction of the receipts of all non-farm businesses in the United States. For example, in 2002, there were 6.5 million women-owned firms in the United States, which accounted for 28.2% of all non-farm business in the United States but just 4.2% of their receipts.[24] Only 1.8% of women-owned firms had receipts of more than $1 million, and less than 0.1% had more than 500 employees.[25]

Government reports also show that minority-owned firms experience a higher failure rate than that of non-minority owned firms. For example, data based on the 1997 Survey of Minority-Owned Business Enterprises (SMOBE) show that, between 1997 and 2001, the survival rate for non-minority-owned employer establishments was 72.6%.[26] The survival rate of all minority-owned employer establishments was about 4 percentage points lower.[27] The survival rates for specific minority-owned employer establishments were as follows:

- Asian and Pacific Islander-owned employer establishments: 72.1%.[28]

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Hearing Before the H. Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce, 111th Cong. (2009) (statement of David A. Hinson, National Director, Minority Business Development Agency) (testifying on the disparities between the minority population and the gross receipts generated by minority-owned businesses).

[24] Census Bureau, *Survey of Business Owners - Women-Owned Firms: 2002*, available at http://www.census.gov/econ/sbo/02/womensof.html (last visited April 29, 2010).

[25] Elaine Reardon, Nancy Nicosia and Nancy Y. Moore, *The Utilization of Women-Owned Small Businesses in Federal Contracting*, Kauffman-RAND Institute for Entrepreneurship Public Policy 14, 17 (2007). A report issued by the House Small Business Committee Democratic Staff shows that the federal government's failure to meet its own procurement goals of 5% contracting to women-owned businesses represented a cost of *$6 billion* in lost contracting opportunities for women-owned businesses in FY 2003. House Small Business Committee Democratic Staff, *Scorecard V: Dramatic Gains in the Federal Marketplace Fail to Result in Small Business Contracts* (2004) (noting that only 2.89% of contracts awarded throughout the entire federal government in FY 2003 went to women-owned businesses). For FY 2004, the estimated loss was *$5.5 billion*. *Id.* at 12. Contracts awarded to women-owned small businesses throughout the entire federal government in FY 2004 amounted to 3.03%; by 2008, that amount had increased very little, to 3.39%. Small Business Administration, *FY 2004 Official Goaling Report*; Small Business Administration, *Fiscal Year 2004: Small Business Prime Contract Goaling Achievements* (both documents available at http://www.sba.gov/aboutsba/sbaprograms/goals/index.html (last visited April 29, 2010)).

[26] Ying Lowrey, *Dynamics of Minority-Owned Employer Establishments, 1997-2001*, 251 U.S. Small Business Administration 10 (2005).

[27] *Ibid.*

[28] *Ibid.* Note, however, that Asian-American firms exhibited a slightly higher rate of contraction than non-minority owned firms (23% in comparison to 21%). *Ibid.* Also, a study of
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- Hispanic-owned employer establishments: 68.6%.[29]
- American-Indian and Alaska Native-owned employer establishments: 67.0%.[30]
- African-American-owned employer establishments: 61.0%.[31]

Black-owned employer establishments also had the lowest expansion rate (26%) of all minority business groups.[32] Moreover, Black-owned firms and, to a lesser extent, Latino-owned firms, had lower sales, hired fewer employees, and had smaller payrolls than White- owned firms.[33]

A number of Congressional hearings have addressed disparities in business formation and success between minority-and women-owned businesses, on the one hand, and businesses owned by their non-minority, male counterparts,[34] on the other, as well as the specific barriers that minority- and women-owned businesses continue to face.[35] The evidence presented at these

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the survival rate of Asian American firms in SBA's 8(a) program has shown that it is not statistically different from the business survival rates of other MBEs in the program. See Asian American Justice Center, *Equal Access: Unlocking Government Doors for Asian Americans: Public Contracting Laws and Policies* 28 (2008).

[29] Ying Lowrey, *Dynamics of Minority-Owned Employer Establishments, 1997-2001*, 251 U.S. Small Business Administration 10 (2005).

[30] *Ibid.*

[31] *Ibid.*

[32] *Id.* at 20.

[33] Robert W. Fairlie, *Minority Entrepreneurship*, The Small Business Economy, produced under contract with the SBA, Office of Advocacy 74 (2005).

[34] See, *e.g.*, *Opportunities and Challenges for Women Entrepreneurs: Roundtable Before the S. Comm. on Small Business and Entrepreneurship*, 110th Cong. 3 (2008) (statement of the Hon. John F. Kerry, Chairman and Sen. from Massachusetts) (finding generally that "women-owned businesses still lag behind their male counterparts in important areas," and finding specifically that "[w]omen-owned firms have lower revenues and fewer employees than their male-owned counterparts"); *Expanding Opportunities for Women Entrepreneurs: The Future of Women's Small Business Programs: Hearing Before the S. Comm. on Small Business and Entrepreneurship*, 110th Cong. 2 (2007) (statement of the Hon. John F. Kerry, Chairman and Sen. from Massachusetts) (stating that "women owned small businesses still continue to have markedly lower revenue and fewer employees than firms, even comparable ones, owned by men"); *Access to Federal Contracts: How to Level the Playing Field: Field Hearing Before the S. Comm. on Small Business and Entrepreneurship*, 110th Cong. 4-8 (2007) (statement of the Hon. Benjamin L. Cardin, Sen. from Maryland).

[35] See, *e.g.*, *Minority Entrepreneurship: Assessing the Effectiveness of SBA's Programs*
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hearings shows that the disparities between the minority share of the business population and its share of business sales and receipts "are adverse, very large, and statistically significant."[36] Moreover, these disparities have been observed in all 50 states and the District of Columbia for all minority groups and for women.[37]

These studies and data of course provide a snapshot of firms at a particular period of time. But the data show that minority-and women-owned firms continue to have only limited success both in the larger economy and in the federal procurement market.

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for the Minority Business Community: Hearing Before the S. Comm. on Small Business and Entrepreneurship, 110th Cong. (2007); *Access to Federal Contracts: How to Level the Playing Field: Field Hearing Before the S. Comm. on Small Business and Entrepreneurship*, 110th Cong. (2007); *Expanding Opportunities for Women Entrepreneurs: The Future of Women's Small Business Programs: Hearing Before the S. Comm. on Small Business and Entrepreneurship*, 110th Cong. (2007); *How Information Policy Affects the Competitive Viability of Small and Disadvantaged Business in Federal Contracting: Hearing Before the Subcomm. on Information Policy, Census, and National Archives of the H. Comm. on Oversight and Government Reform*, 110th Cong. (2008); *Business Start-Up Hurdles in Underserved Communities: Access to Venture Capital and Entrepreneurship Training: Hearing Before the H. Subcomm. on Economic Development, Public Buildings, and Emergency Management Staff of the H. Comm. on Transp. and Infrastructure*, 110th Cong. (2008); *The Department of Transportation's Disadvantaged Business Enterprise Program: Hearing Before the H. Comm. on Transp. and Infrastructure*, 111th Cong. (2009).

[36] *How Information Policy Affects the Competitive Viability of Small and Disadvantaged Business in Federal Contracting: Hearing Before the Subcomm. on Information Policy, Census, and National Archives of the H. Comm. on Oversight and Government Reform*, 110th Cong. 19 (2008) (statement of Jon Wainwright, Vice President, NERA Economic Consulting); see also *Minority Entrepreneurship: Assessing the Effectiveness of SBA's Programs for the Minority Business Community: Hearing Before the S. Comm. on Small Business and Entrepreneurship*, 110th Cong. 26-34 (2007) (statement of Jon Wainwright, Vice President, NERA Economic Consulting).

[37] *How Information Policy Affects the Competitive Viability of Small and Disadvantaged Business in Federal Contracting: Hearing Before the Subcomm. on Information Policy, Census, and National Archives of the H. Comm. on Oversight and Government Reform*, 110th Cong. 25 (2008) (statement of Jon Wainwright, Vice President, NERA Economic Consulting); see also *The Department of Transportation's Disadvantaged Business Enterprise Program: Hearing Before the H. Comm. on Transp. and Infrastructure*, 111th Cong. 328 (2009) (statement of Jon Wainwright, Vice President, NERA Economic Consulting) (testifying that minority- and women-owned construction and construction-related professional service businesses earned on "average almost 25 percent lower than their non-minority male counterparts, again even when other attributes are held constant," and that the disparities are even larger for African American-, Native American-, and non-minority women-owned businesses).

2. *Discrimination Is A Basis For Identified Disparities Between Minority- And Women-Owned Businesses And Their Non-Minority, Male-Owned Counterparts.*

The findings outlined above are mirrored by the numerous studies commissioned by state and local governments that have identified stark and continuing disparities between the availability of minority- and women-owned businesses and the utilization of such businesses in state and local government procurement. The Supreme Court has held that such significant disparities can support an inference of "discriminatory exclusion."[38]

A list of approximately 70 recently conducted disparity studies is attached.[39] The studies show that "minority-owned businesses and women-owned businesses throughout the nation continue to face large disparities in almost every aspect of business enterprise activity that can be quantified"[40] in a pattern of discriminatory barriers that is repeated across the nation. Moreover, the findings confirm that the disparities "are symptoms of discrimination in the labor force that, in addition to its direct effect on workers, reduce[s] the future availability of [minority- and women-owned businesses] by stifling opportunities for minorities and women to progress through precisely those internal labor markets and occupational hierarchies that are most likely to lead to entrepreneurial opportunities."[41] The disparities identified in these state and local government studies "demonstrate the nexus between discrimination in the job market and reduced entrepreneurial opportunities for minorities and women."[42] Past hearings have identified similar disparities that exist in the federal contracting market.[43]

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[38] *Croson,* 488 U.S. at 509.

[39] See Appendix C for a complete listing of these studies. The studies document evidence from 25 states and the District of Columbia, including: Alaska, Arizona, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Kansas, Maryland, Massachusetts, Minnesota, Missouri, Nevada, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Tennessee, Texas, Virginia, Washington, and suburban Washington, D.C. Eighteen of these studies focus on disparities state-wide: Alaska, Arizona, California, Colorado, Idaho, Illinois, Kansas, Kentucky, Maryland, Minnesota, Missouri, Montana, Nevada, New Jersey, North Carolina, Oregon, Pennsylvania, and Virginia. See, *e.g.*, *The Department of Transportation's Disadvantaged Business Enterprise Program: Hearing Before the H. Comm. on Transp. and Infrastructure*, 111th Cong. (2009) (citing more than 20 disparity and utilization studies throughout); *Business Start-Up Hurdles in Underserved Communities: Access to Venture Capital and Entrepreneurship Training: Hearing Before the S. Comm. on Small Business and Entrepreneurship*, 110th Cong. (2008) (citing more than 12 different studies throughout).

[40] *The Department of Transportation's Disadvantaged Business Enterprise Program: Hearing Before the H. Comm. on Transp. and Infrastructure*, 111th Cong. 326 (2009) (statement of Jon Wainwright, Vice President, NERA Economic Consulting).

[41] National Economic Research Associates, Inc., *Race, Sex and Business Enterprise: Evidence from Memphis, Tennessee* 100 (2008).

[42] *Ibid.*

[43] *Expanding Opportunities for Women Entrepreneurs: The Future of Women's Small*

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Academic research using a variety of publicly available statistical data confirms that these disparities remain large and statistically significant even when minority- and women-owned businesses are compared with otherwise similar (with respect to characteristics such as industry, geography, etc.) male- and nonminority-owned firms.[44] In reaching these conclusions, researchers controlled for factors such as industry, geography, education, age, and labor market status — even though minority- and women-owned businesses face demonstrable barriers to achieving parity in these areas — thus demonstrating that the remaining disparities likely result in large part from discrimination. Recent independent research has also concluded that the gap that exists between minority business owners and their non-minority counterparts "has not in any way been caused by a lack of effort on the part of minority entrepreneurs," but rather results in part because "discriminatory conditions that previously existed were deep and pervasive and have not been fully reversed."[45] In addition, some disparities are likely to be greater than data

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Business Programs: Hearing Before the S. Comm. on Small Business and Entrepreneurship, 110th Cong. 2 (2007) (statement of the Hon. John F. Kerry, Chairman and Sen. from Massachusetts) (stating that firms owned by women "account for less than 3 percent of all Federal contracts even though they comprise 30 percent of all privately-held firms," and describing this as "an unacceptable ratio"); *Full Comm. Hearing to Consider Legislation Updating and Improving the SBA's Contracting Programs Before the H. Comm. on Small Business*, 110th Cong. 3 (2007) (statement of the Hon. Steve Chabot, Ranking Member and Rep. from Ohio) ("Despite the extra assistance from the SBA, small businesses owned by socially and economically disadvantaged individuals [and] women * * * do not receive their fair proportion of contracts to sell goods and services to the federal government."); *Federal Contracting: Removing Hurdles for Minority-Owned Small Businesses: Hearing Before the Subcomm. on Government Management, Organization, and Procurement of the House Comm. on Oversight and Government Reform*, 110th Cong. 3 (2007) (statement of the Hon. Edolphus Towns, Chairman and Rep. from New York) ("Although procurement provides the federal government with a potentially powerful tool for promoting minority opportunities and counteracting discrimination, there continues to be disparity in the allocation of government contracts to minority firms.").

[44] Congress heard the results of academic studies that were based on data taken from the 2002 Survey of Business Owners (SBO) and the Public Use Microdata Sample (PUMS), which are both produced by the Census Bureau; the Current Population Surveys (CPS), which is produced jointly by the Census Bureau and the Bureau of Labor Statistics; and the Survey of Small Business Finances (SSBF), which is produced by the Federal Reserve Board and the SBA. See *Minority Entrepreneurship: Assessing the Effectiveness of SBA's Programs for the Minority Business Community: Hearing Before the S. Comm. on Small Business and Entrepreneurship*, 110th Cong. 30-34 (2007) (statement of Jon Wainwright, Vice President, NERA Economic Consulting); see also *The Department of Transportation's Disadvantaged Business Enterprise Program: Hearing Before the H. Comm. on Transp. and Infrastructure*, 111th Cong. 328 (2009) (statement of Jon Wainwright, Vice President of NERA Economic Consulting).

[45] Boston Consulting Group, *The New Agenda for Minority Business Development* 14

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show; because the age and size of minority- and women-owned businesses may themselves have been limited by discrimination, current statistics likely understate the number and size of minority- and women-owned firms that might exist once the effects of discrimination no longer stifle their creation and expansion.[46]

Qualitative evidence from minority and women business owners gathered from surveys, interviews, and presented via Congressional testimony overwhelmingly support these findings.[47] For example, minorities and women business owners often report that they "encounter significant barriers to doing business in the public and private sector market[s], as both prime contractors and subcontractors," that are greater than those faced by their non-minority and non-female counterparts.[48] Minorities and women report that they "often suffer from stereotypes about their suspected lack of competence and are subject to higher performance standards than similar White men," and that they "encounter discrimination in obtaining loans and surety bonds; receiving price quotes from suppliers; working with trade unions; obtaining public and private sector prime contracts and subcontracts, and being paid promptly."[49] Indeed, Congress has repeatedly recognized that there is overwhelming evidence that shows that "considerable

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(2005).

[46] *How Information Policy Affects the Competitive Viability of Small and Disadvantaged Business in Federal Contracting: Hearing Before the Subcomm. on Information Policy, Census, and National Archives of the H. Comm. on Oversight and Government Reform*, 110th Cong. 66-67 & n.2 (2008) (Statement of Anthony W. Robinson, President, Minority Business Enterprise Legal Defense Fund). Congress also heard testimony that discriminatory barriers impede the ability to measure the actual business capacity of MBEs because "[m]any, if not all, 'capacity' indicators are themselves impacted by discrimination. Therefore, it is not good social science to limit availability measures by factors such as firm age, revenues, or numbers of employees." *The Department of Transportation's Disadvantaged Business Enterprise Program: Hearing Before the H. Comm. on Transp. and Infrastructure*, 111th Cong. 375 (2009) (statement of Jon Wainwright, Vice President, NERA Economic Consulting) "[F]ocusing on the 'capacity' of businesses in terms of employment, revenue, bonding limits, number of trucks, and so forth is simply wrong as a matter of economics because it can obscure the existence of discrimination. A truly 'effective' discriminatory system would lead to a finding of no 'capacity,' and under the 'capacity' approach, a finding of no discrimination." *Id.* at 376; see also *id.* at 10, 325 (*Rothe* court "made several serious errors in its economic reasoning, concluding, for example that factors such as firm size should be factored into study estimates of DBE availability"), 371 (proper statistical analysis "should not control for the variables affected by the behavior sought to be isolated").

[47] See, *e.g.*, *Minority Entrepreneurship: Assessing the Effectiveness of SBA's Programs for the Minority Business Community: Hearing Before the S. Comm. on Small Business and Entrepreneurship*, 110th Cong. 33-34 (2007) (statement of Jon Wainwright, Vice President, NERA Economic Consulting).

[48] *Ibid.*

[49] *Ibid.*

discrimination" exists throughout the federal contracting market that affects small minority- and women-owned businesses across the racial and ethnic spectrum.[50]

B. *Discrimination Affects the Formation and Development of Minority-And Women-Owned Businesses.*

The 1996 report prepared by the Department of Justice identified discrimination in two sectors of the national economy that accounted, at least in part, for diminished opportunities for minorities to form their own businesses: (1) discrimination by employers, which prevented minorities from acquiring necessary technical skills; and (2) discrimination by lenders, which prevented minorities from accessing much-needed capital to develop and sustain a business.[51] Discrimination in these same sectors of the economy persists and remains a significant barrier to the formation of viable businesses by minorities and women.

1. *Discrimination by Employers Results in a Lack of Human Capital.*

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[50] *How Information Policy Affects the Competitive Viability of Small and Disadvantaged Business in Federal Contracting: Hearing Before the Subcomm. on Information Policy, Census, and National Archives of the H. Comm. on Oversight and Government Reform*, 110th Cong. 1-2 (2008) (statement of the Hon. William Lacy Clay, Chairman and Rep. from Missouri) ("There has been a large body of evidence concerning discrimination. Court cases, legislative hearings, quantitative studies and anecdotal reports detail the considerable discrimination based on race and national origin that confronts minority contractors in all parts of the country and in virtually every industry. The discrimination is not limited to one particular minority group, instead, evidence shows businesses owned by African-Americans, Latinos, Asians, Pacific Islanders and Native Americans all must overcome discriminatory practices in order to grow and prosper."); see also *Opportunities and Challenges for Women Entrepreneurs: Roundtable Before the S. Comm. on Small Business and Entrepreneurship*, 110th Cong. 3 (2008) (statement of the Hon. John F. Kerry, Chairman and Sen. from Massachusetts) ("In reviewing the last 20 years, it is disturbing to see that the issues that were hindering women entrepreneurs from achieving their full potential 20 years ago are still barriers today."); see also *The Department of Transportation's Disadvantaged Business Enterprise Program: Hearing Before the H. Comm. on Transp. and Infrastructure*, 111th Cong. 204-205 (2009) (statement of the Hon. James L. Oberstar, Chairman and Rep. from Minnesota) ("The Committee has also received volumes of evidence, both empirical and anecdotal, about the discrimination that continues to impact minority and women business owners across this nation. This data demonstrates that it is difficult for small and disadvantaged businesses to compete — discrimination impacts minority and women owned businesses at many points in the contracting process, including obtaining credit, bonding, and insurance."); *The Department of Transportation's Disadvantaged Business Enterprise Program: Hearing Before the H. Comm. on Transp. and Infrastructure*, 111th Cong. 309 (2009) (statement of Joel Szabat, Acting Assistant Secretary, Transportation Policy, DOT) (noting that states and localities had reported to DOT that discrimination against women and minorities persists).

[51] *The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey*, 61 Fed. Reg. 26,050 (May 23, 1996).

Discrimination in the workplace may take many forms. It can be intentional and overt, as when employers purposefully treat employees and would-be employees differently based on their race or gender[52] or when others in the business community explicitly state their preference *not* to work with minorities and women.[53] It can involve explicit harassment by employers or co-workers that gives rise to a hostile work environment[54] or can take a more subtle, yet no less

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[52] See, *e.g.*, *EEOC* v. *Area Erectors, Inc.*, No. 1:07-cv-02339 (N.D. Ill. May 27, 2009) (construction company settling lawsuit for $630,000 where group of African-American employees were terminated because of their race); *EEOC* v. *Marjam Supply Co.*, No. 7:03-cv-5413 (S.D.N.Y. April 14, 2009) (building materials supplier settling lawsuit for $495,000 where African-American employees were subjected to differential discipline and termination); *EEOC* v. *Michigan Seamless Tube*, No. 2:05-cv-73719 (E.D. Mich. June 5, 2007) (steel tubing company settling lawsuit for $500,000 after refusing to hire a group of African Americans who were former employees of its predecessor company); *EEOC* v. *S & Z Tool & Die Co.*, No. 1:03-cv-2023 (N.D. Ohio Aug. 16, 2006) (metal manufacturing firm settling lawsuit for $850,000 where it refused to hire women and African-American applicants because of their gender and race, respectively); *EEOC* v. *Optical Cable Corp.*, No. 7:00-cv-00757 (W.D. Va. Feb. 20, 2002) (fiber-optic cable manufacturer settling lawsuit for $1 million after failing to hire African-American applicants for a ten year period, and assigning women to lower-paying positions than their similarly situated male counterparts); *EEOC* v. *Landis Plastics, Inc.*, No. 5:00-cv-01874 (N.D.N.Y. Dec. 8, 2000) (settling lawsuit for $782,000 after discriminating against women on the basis of gender in the assignment of jobs and in promotions).

[53] See, *e.g.*, *Minority Entrepreneurship: Assessing the Effectiveness of SBA's Programs for the Minority Business Community: Hearing Before the S. Comm. on Small Business and Entrepreneurship*, 110th Cong. 39 (2007) (statement of Anthony W. Robinson, President, Minority Business Enterprise Legal Defense and Educational Fund) (relating experience of an African-American business owner who was told by a potential business partner that he "[doesn't] like doing business with you people"); see also *Women in Business: Leveling the Playing Field: Roundtable Before the S. Comm. on Small Business and Entrepreneurship*, 110th Cong. 42 (2008) (statement of Kerstin Forrester, President, Stonebridge Precision Machining & Certified Welding) (testifying that when she first purchased her business, two former customers told her "outright that they would not do business with a woman," and that one engineer told her that "machining was nothing that a woman could understand").

[54] See, *e.g.*, *EEOC* v. *Brand Energy Solutions, LLC*, No. 2:08-cv-00305 (S.D. Tex. May 30, 2009) (construction contractor settling sexual harassment and retaliation lawsuit for $175,000 where female employee was forced to quit her job when company failed to take appropriate remedial action after she was subjected to repeated unwelcome physical contact, sexual advances and comments, and threatening behavior); *EEOC* v. *Ceisel Masonry, Inc.*, No. 06-cv-2075 (N.D. Ill. May 22, 2009) (construction company settling lawsuit for $500,000 where Hispanic employees were called racially derogatory terms by their supervisors and routinely exposed to racist graffiti); *EEOC* v. *Talbert Building Supply, Inc.*, No. 1:08-cv-00707 (M.D.N.C. May 26, 2009) (North Carolina lumber and hardware retailer settling race discrimination lawsuit for $80,000 where employee was subjected to explicit racial slurs as well as racial jokes and

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damaging, form.[55] It can result from practices that, although facially neutral, unjustifiably and disproportionately exclude groups of employees or applicants based on their race, national origin or sex.[56] Regardless of the form, race and gender discrimination in the workplace have a devastating effect on the ability of minorities and women to develop and sustain their own businesses. In particular, they result in a marked decrease in human capital — the experience necessary to create a viable new business in today's markets.

This historical discrimination in employment limited — and continues to limit — the advancement of minorities and women to higher level positions in the workforce, and thus their opportunity to gain the skills, experience, and business contacts necessary to develop a successful business model. Among other things, historical discrimination prevented many

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derogatory stereotypes about African Americans on an almost daily basis for two years); *EEOC* v. *Wheeler Construction, Inc.*, No. 2:07-cv-01829 (D. Ariz. March 5, 2009) (construction company settling lawsuit for $325,000 where Mexican employees were harassed based on their national origin).

[55] See, *e.g.*, CRA International for the San Mateo County Transit District and thePeninsula Corridor Joint Powers Board, *Measuring Minority- and Women-Owned Construction and Professional Service Firm Availability and Utilization* 95 (2008) (discussing study in which researchers sent fictitious resumes that included randomly assigned "white- and black-sounding" names to help-wanted ads in Boston and Chicago, and finding that resumes with "white-sounding" names received 50% more callbacks for interviews than did the resumes with "black-sounding" names); see also *Section 15: Race and Color Discrimination*, EEOC Compliance Manual, § 15-I (2006), available at http://www.eeoc.gov/policy/docs/race-color.html (last visited April 29, 2010) (citing a 2003 study in Milwaukee finding that Whites with a criminal record received job call-backs at a rate more than three times that of Blacks with the same criminal record, and even at a rate higher than Blacks *without* a criminal record; a 2003 study in California finding that temporary agencies preferred White applicants three to one over African American applicants; and a 2002 study in Boston and Chicago finding that résumés of persons with names common among Whites were 50 percent more likely to generate a request for an interview than equally impressive résumés of persons with names common among Blacks); cf. *Women in Business: Leveling the Playing Field: Roundtable Before the S. Comm. on Small Business and Entrepreneurship*, 110th Cong. 44 (2008) (statement of Sharon Green, President, Custom Copper and Slate, Ltd.) (testifying to her experience that decision making officials prefer talking to a man, not a woman, regarding construction projects).

[56] 42 U.S.C. Sec. 2000e-2(k)(1)(A) (prohibiting employment practices that have a disparate impact on the basis of race, color, religion, sex or national origin); see, *e.g.*, *Griggs* v. *Duke Power Co.*, 401 U.S. 432 (1971) (recognizing that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability"); *EEOC* v. *Dial Corp.*, 469 F.3d 735, 742-743 (8th Cir. 2006) (upholding district court's finding that a physical strength test had an unlawful disparate impact on female employees).

minorities and women from forming businesses and passing them on to their children; as a result, many would-be minority and female business owners of today never had the opportunity to work in a family-run business and thus gain skills to develop a successful business in today's markets.[57] Indeed, minority business owners state that they face an initial barrier stemming from a lack of familiarity about running a business.[58]

Academic research confirms that the lingering effects of discrimination can extend across generational lines. For example, one researcher found that black business owners face three different hurdles in comparison to their white counterparts: they are less likely to inherit businesses, and thus need to raise their own capital to start a business; they are less likely to be employed by family members who own small businesses, thus missing out on gaining first-hand business experience; and they are less likely to have family members who own small businesses, thus lacking ready access to business mentors.[59] Thus, not only are minorities statistically less likely to start a business due to historical and current patterns of lower self-employment, they are also less likely to have had the opportunity to learn the skills necessary to run a successful business.[60] As one researcher concluded, "the lack of prior work experience in family businesses among future black business owners, perhaps by restricting their acquisition of general and specific business human capital, limits the successfulness of their businesses relative to whites."[61] Women business owners have also reported fewer opportunities to learn the skills necessary to run successful businesses.[62]

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[57] *Business Start-Up Hurdles in Underserved Communities: Access to Venture Capital and Entrepreneurship Training: Hearing Before the S. Comm. on Small Business and Entrepreneurship*, 110th Cong. 3 (2008) (statement of Margaret Henningsen, Vice President, Legacy Bank) (explaining that many would-be minority entrepreneurs are first generation entrepreneurs who "do not have the benefit of family members handing down a business or providing them with the necessary training and coaching that is so crucial for business success").

[58] *Access to Federal Contracts: How to Level the Playing Field: Field Hearing Before the S. Comm. on Small Business and Entrepreneurship*, 110th Cong. 71 (2007) (statement of Wayne Frazier, Sr., President, Maryland-Washington Minority Contractors Association) (testifying that the majority of minority business owners do not have family members who have owned a business, and therefore have little if any understanding of how to run a business).

[59] Robert W. Fairlie and Alicia M. Robb, *Why are Black-Owned Businesses Less Successful Than White-Owned Businesses? The Role of Families, Inheritances, and Business Human Capital*, 25 Journal of Labor Economics 289, 295 (2007) (Table 2).

[60] Michael Hout and Harvey S. Rosen, *Self-Employment, Family Background and Race*, 35 Journal of Human Resources 670-692 (2000).

[61] Robert W. Fairlie and Alicia M. Robb, *Why are Black-Owned Businesses Less Successful Than White-Owned Businesses? The Role of Families, Inheritances, and Business Human Capital*, 25 Journal of Labor Economics 289, 308 (2007).

[62] For example, one researcher testified before Congress that, based on a national study by the Center for Women's Business Research, women business owners of fast-growth companies reported that, unlike their male counterparts, role models and mentors "[weren't] really available to them." *Women in Business: Leveling the Playing Field: Roundtable Before*

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Current discrimination in hiring and promotions by employers can also severely limit the opportunities for minorities and women to build the human capital necessary for future business success. In 2008, women comprised 46.5% of the U.S. labor force, yet held only 15.2% of US Fortune 500 directorships.[63] In addition, although women account for 51% of all workers in high-paying management, professional, and related occupations, of the top ten occupations of women workers, senior manager and middle manager did not make the list.[64] At a recent workshop on transition points in women's careers (*e.g.*, moving into more senior levels and assuming leadership roles) held by the National Academies Committee on Women in Science, Engineering, and Medicine (CWSEM), several women's professional societies referred to surveys and studies in which women identified their work environments as hostile.[65] Such conditions act as a barrier to advancement – or even continued employment – within a company.

Thus, minorities and women often lack equal access to the two central means of gaining the experience needed to operate a business. A history of discrimination in employment opportunities provided significantly fewer opportunities for minorities and women to develop businesses to pass on to their children or to teach their children business-development skills.[66] And the continued discrimination by employers and would-be business partners against minorities and women severely limits their development of those skills and their entry into the

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the S. Comm. on Small Business and Entrepreneurship, 110th Cong. 8 (2008) (statement of Teri Cavanagh, Principal, Teri Cavanagh and Associates).

[63] Ernst & Young, *2008 Catalyst Census of Women Board Directors of the Fortune 500*, at 1. *Quick Stats on Women Workers, 2008,* United States Department of Labor, available at http://www.dol.gov/wb/stats/main.htm (last visited, April 29, 2010). See also Siri Terjesen, Ruth Sealy and Val Singh, *Women Directors on Corporate Boards,* 17 Corporate Governance: An International Review 325, 320-337 (2009). In addition, in 2008, only 15.7 % of corporate officers of Fortune 500 companies were women. Ernst & Young, *2008 Catalyst Census of Women Corporate Officers and Top Earners of the Fortune 500*, at 1. A study controlling for organization and director characteristics found that women directors are less likely than men to be on the executive committee and more likely to be on the public affairs committee. See Craig A. Peterson and James Philpot, *Women's Roles on U.S. Fortune 500 Boards: Director Expertise and Committee Memberships*, 72(2) Journal of Business Ethics 177, 179 (2007).

[64] *Quick Stats on Women Workers, 2008,* United States Department of Labor, available at http://www.dol.gov/wb/stats/main.htm (last visited, April 29, 2010).

[65] *Opportunities and Challenges for Women Entrepreneurs: Roundtable Before the S. Comm. on Small Business and Entrepreneurship*, 110th Cong. 56 (2008) (statement of Cat Shrier, Ph.D., P.G. Watercat Consulting LLC).

[66] Robert W. Fairlie, *Minority Entrepreneurship,* The Small Business Economy, produced under contract with the SBA, Office of Advocacy 97 (2005) (identifying one of the major barriers to minority-owned business as relatively disadvantaged family business backgrounds which "appear to limit entry and success in small business").

business markets today.[67]

2. *Discrimination Limits Access To Capital.*

Access to financial capital is absolutely essential for business formation and development.[68] However, lack of access to capital is the most frequently cited obstacle among minority and women business owners to developing and growing their businesses.[69] A critical question, then, is the extent to which their lack of equal access to capital, which can prevent minority- and women-owned businesses from forming, developing, and succeeding in today's markets, is a result of discrimination in lending practices.[70]

Numerous studies that address the question have reached the same conclusion: minority and women small business owners routinely face discrimination in the lending market. Relying on data from the *National Survey of Small Business Finances* (SSBF), Jon Wainwright, Vice President, NERA Economic Consulting, found that "African-American-owned firms, Hispanic-owned firms, and to a lesser extent other minority-owned firms are substantially and statistically significantly more likely to be denied credit than are White-owned firms," even when controlling for firm size and credit history.[71] Other researchers have made similar findings.[72] One study

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[67] See, *e.g.*, *supra* notes 59-62.

[68] See, *e.g.*, *Opportunities and Challenges for Women Entrepreneurs: Roundtable Before the S. Comm. on Small Business and Entrepreneurship*, 110th Cong. 110 (2008) (report by the National Association of Women Business Owners Procurement Task Force, submitted by Gayle Waldron, President & Owner, The Management Edge, asserts that "[a]ccess to capital has been, and remains, a critical issue for emerging and growing businesses, particularly those owned by women and minorities").

[69] *How Information Policy Affects the Competitive Viability of Small and Disadvantaged Business in Federal Contracting: Hearing Before the Subcomm. on Information Policy, Census, and National Archives of the H. Comm. on Oversight and Government Reform*, 110th Cong. 20 (2008) (statement of Jon Wainwright, Vice President, NERA Economic Consulting); see also Robert W. Fairlie, *Minority Entrepreneurship*, The Small Business Economy, produced under contract with the SBA, Office of Advocacy 97 (2005) (identifying one of the major barriers to minority-owned businesses as relatively low asset levels, which limit business entry and lead to higher rates of business closure, lower sales and profits, and less employment).

[70] *Business Start-Up Hurdles in Underserved Communities: Access to Venture Capital and Entrepreneurship Training: Hearing Before the S. Comm. on Small Business and Entrepreneurship*, 110th Cong. 3 (2008) (statement of Jon Wainwright, Vice President, NERA Economic Consulting).

[71] *Id.* at 4.

[72] See, *e.g.*, David G. Blanchflower, Phillip B. Levine, and David J. Zimmerman, *Discrimination in the Small-Business Credit Market*, 85(4) Review of Economics and Statistics 930, 942 (2003) (finding that "loan denial rates are significantly higher for black-owned firms that for white-owned firms even after taking into account differences in an extensive array of measures of creditworthiness and other characteristics"); Lloyd Blanchard, Bo Zhao, and John

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concluded that personal wealth plays an important role in predicting loan turndown rates, but that even *after* controlling for personal wealth, large differences in loan turndowns between African-American-, Hispanic-, and Asian-owned small businesses relative to those of whites remain.[73] Minority business owners who *do* receive loans often are required to pay higher interest rates on their loans than are charged to comparable white business owners.[74]

Indeed, the U.S. Small Business Administration recently concluded that the restrictions minorities face in gaining access to credit are "consistent with prejudicial discrimination against African-American and Hispanic firm owners."[75] The same has been found for women-owned firms.[76] Given their personal experience, or that of their colleagues, in being denied credit for

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Yinger, *Do Credit Market Barriers Exists for Minority and Women Entrepreneurs?* 14 Center for Policy Research, Maxwell School, Syracuse University, Working Paper No. 74 (2005) (finding that African-American- and Hispanic-owned firms face a higher probability of loan denial than that of white-owned firms even when controlling for a number of relevant variables); Myron Quon, *Discrimination Against Asian American Business Enterprises: The Continuing Need for Affirmative Action in Public Contracting*, Asian American Policy Review 41, 43, 46 (2008) (mentioning a study showing that Asian-American owned firms are denied loans at a rate 50% higher than white-owned companies and pay higher interest rates than comparable white-owned firms); Susan Coleman, *Access to Debt Capital for Women and Minority Owned Small Firms: Does Educational Attainment Have an Impact,* 9(2) Journal of Developmental Entrepreneurship 127, 132-133 (2004) (finding that firms owned by African-American, Hispanic, and Asian men were significantly more likely to be denied their most recent loan requests than white men); Jonathan Taylor, *Income and Wealth Transfer Effects of Discrimination in Small Business Lending*, 32(3/4) Review of Black Political Economy 87, 88-90 (2005) (finding evidence that African-American business owners face a higher probability of loan denial).

[73] Ken Cavalluzzo & John Wolken, *Small Business Loan Turndowns, Personal Wealth, and Discrimination*, 78(6) Journal of Business 2153, 2170 (2005).

[74] *Business Start-Up Hurdles in Underserved Communities: Access to Venture Capital and Entrepreneurship Training: Hearing Before the S. Comm. on Small Business and Entrepreneurship*, 110th Cong. 4 (2008) (statement of Jon Wainwright, Vice President, NERA Economic Consulting); see also *ibid.(*Testimony of Margaret Henningsen, Founder Legacy Bank)(discussing her bank's successful business serving minority entrepreneurs who had been denied loans by larger financial institutions); see also David G. Blanchflower, Phillip B. Levine, and David J. Zimmerman, *Discrimination in the Small-Business Credit Market*, 85(4) Review of Economics and Statistics 930, 941 (2003) ("Even among a sample of firms with no past credit problems, black-owned firms pay significantly higher interest rates.").

[75] Karlyn Mitchell & Douglas K. Pearce, *Availability of Financing to Small Firms Using the Survey of Small Business Finances*, 257 U.S. Small Business Administration 46 (2005).

[76] *Business Start-Up Hurdles in Underserved Communities: Access to Venture Capital and Entrepreneurship Training: Hearing Before the S. Comm. on Small Business and Entrepreneurship*, 110th Cong. 4 (2008) (statement of Jon Wainwright, Vice President, NERA Economic Consulting).

perceived discriminatory reasons, many minority and women business owners expect to be turned down and simply do not apply for financing.[77]

In addition to the academic and government-commissioned studies discussed above, numerous disparity studies conducted by state and local governments have also concluded that minorities and women face discrimination in the lending market. For example, one study found that African-American-, Hispanic-, and female-owned businesses reported loan denial rates of 47%, 39%, and 26%, respectively, in contrast to 21% for non-minority male-owned firms, even after controlling for creditworthiness and other related variables.[78] A disparity study conducted for San Mateo County, using data from the 1998 and 2003 Survey of Small Business Finances (SSBF), concluded that loan denial rates are much higher for similarly situated minority firms than for non-minority firms — both at the national level and for the Pacific region.[79] At the national level, African-American- and Hispanic-owned firms that did receive loans received much smaller amounts than non-minority-owned firms.[80] Moreover, the minority-owned firms receiving loans paid higher interest rates than did non-minority-owned firms.[81]

There is also evidence that minority- and women-owned businesses are less likely to secure outside investment revenue. The results from a 2001 study prepared for the U.S. Small Business Administration show that women-led firms received just 4.1% of all venture capital investments in 1998.[82] This suggests that women may be left behind in the asset creation process, limiting their opportunities to develop and grow their businesses. The study also states that "[m]inority women seeking capital may have greater barriers than white women or minority men."[83] One possible cause for the disparity between the access to outside capital of male-owned and female-owned firms is the "gender dominance" in the venture capital industry[84] and

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[77] *Opportunities and Challenges for Women Entrepreneurs: Roundtable Before the S. Comm. on Small Business and Entrepreneurship*, 110th Cong. 14 (2008) (statement of the Center for Women's Business Research). The Center concluded that the "expectation of being turned down is especially prevalent among women business owners of color." *Ibid.*; see also David G. Blanchflower, Phillip B. Levine, and David J. Zimmerman, *Discrimination in the Small-Business Credit Market*, 85(4) Review of Economics and Statistics 930, 942 (2003) (finding that concerns about being turned down due to prejudice or discrimination prevent more African-American-owned firms from applying for loans).

[78] Griffin & Strong, P.C., *City of Atlanta Disparity Study: Executive Summary* 7 (2006).

[79] CRA International, *Measuring Minority- and Women-Owned Construction and Professional Service Firm Availability and Utilization* 82 (2008).

[80] *Id.* at 85.

[81] *Ibid.*

[82] Candida G. Brush et al., *An Investigation of Women-Led Firms and Venture Capital Investment* 14 (2001).

[83] *Id.* at 16.

[84] *Women in Business: Leveling the Playing Field: Roundtable Before the S. Comm. on Small Business and Entrepreneurship*, 110th Cong. 10-11 (2008) (statement of Laila Partridge, CEO, Cover4me) (explaining that women are not well-represented in venture capital firms and

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the perception among many women and minorities that venture capitalists focus on pre-existing relationships or networks to which women and minorities do not have access.[85]

Without access to traditional sources of financing, minority- and women-owned businesses are often forced to forgo opportunities or rely on higher cost capital to support their businesses.[86] For example, a survey conducted by Women Impacting Public Policy showed that 66% of the respondents, women-owned businesses, relied on bank financing that was backed by home equity loans and 49% used credit card financing.[87] Another 36% received their funding from family and friends.[88] And while some business owners may be able to rely on personal wealth to fund and support their businesses, research shows that the lower median net worth of African-American households compared to white households (*e.g.*, $6,166 v. $67,000 in 2005, based largely on the net worth of homes owned by the households) translates into lower levels of start-up capital among African-American business owners than among white business owners.[89]

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therefore they lack an opportunity to develop relationships with firms looking to invest in small businesses); see *id.* at 10 ("Having spent 10 years in venture capital and working with larger firms, you * * * never see women in those firms."); see also *Expanding Opportunities for Women Entrepreneurs: The Future of Women's Small Business Programs: Hearing Before the S. Comm. on Small Business and Entrepreneurship*, 110th Cong. 114 (2007) (statement of Ann Marie Ameida, President and CEO, Association of Women's Business Centers) (explaining that "the majority of venture capital deals are made through referrals via a fairly closed system of networks" to which women business owners do not have access).

[85] *Business Start-Up Hurdles in Underserved Communities: Access to Venture Capital and Entrepreneurship Training: Hearing Before the S. Comm. on Small Business and Entrepreneurship*, 110th Cong. 4 (2008) (statement of Donald T. Wilson, President and CEO, Association of Small Business Development Centers); see also *Women in Business: Leveling the Playing Field: Roundtable Before the S. Comm. on Small Business and Entrepreneurship*, 110th Cong. 11 (2008) (statement of Laila Partridge, CEO, Cover4me) (explaining that the people who funded her business were people who knew her, had worked with her, and who understood what she could do).

[86] *Business Start-Up Hurdles in Underserved Communities: Access to Venture Capital and Entrepreneurship Training: Hearing Before the S. Comm. on Small Business and Entrepreneurship*, 110th Cong. 1 (2008) (statement of Don O'Bannon, Chairman, Airport Minority Advisory Council (AMAC)).

[87] *Opportunities and Challenges for Women Entrepreneurs on the 20th Anniversary of the Women's Business Ownership Act: Roundtable Before the S. Comm. on Small Business and Entrepreneurship*, 110th Cong. 31-32 (2008) (statement of Ann Sullivan, Women Impacting Public Policy).

[88] *Ibid.*

[89] Robert W. Fairlie and Alicia M. Robb, *Why are Black-Owned Businesses Less Successful Than White-Owned Businesses? The Role of Families, Inheritances, and Business Human Capital*, 25 Journal of Labor Economics 289, 309-311 (2007).

These findings are borne out in a 2008 report published by the Minority Business Development Agency, which examined many of the challenges faced by minority-owned businesses that contribute to their lower survival rates when compared to non-minority businesses.[90] The report found that "a greater proportion of minority businesses operating in 2002 used more expensive sources of capital, such as credit cards, to start or acquire the business, compared to non-minority businesses. Minority firms were also less likely to use bank loans to start, acquire, expand or finance capital expansions of the business compared to non-minority firms."[91] Differences in capital usage between minority firms and non-minority firms still existed when data were segregated for firms with gross receipts of $500,000 or more.[92] The findings suggest minority-owned firms may be faced with a larger financial burden when starting and expanding their businesses because credit cards often carry higher costs compared to business loans that generally have more favorable terms.[93]

Finally, Congressional hearings provide specific examples of how lending discrimination plays out in the real world. Testimony from minority and women business owners has provided egregious examples of racial and gender discrimination by lenders. For example, one minority contractor with solid financial data was denied a loan only to have one of his white employees take the same financial data to the same loan officer, receive a loan, and be told that he was "the kind of businessman [the bank was] looking for."[94] After that experience, the contractor never went into a bank without a white employee accompanying him. Other testimony revealed that some women business owners are repeatedly asked to have a man co-sign their business loan applications, even when the men are not affiliated with the business and have lower credit scores or lower personal incomes than the women seeking the loans.[95] According to one witness, after a female applicant in that situation explained to the loan officer that her husband had no involvement with her company or the construction industry and that he had a lower credit score than the applicant, the loan officer nonetheless stated that the bank would be "a lot more

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[90] U.S. Department of Commerce, Minority Business Development Agency, *Characteristics of Minority Businesses and Entrepreneurs, An Analysis of the 2002 Survey of Business Owners* (2008).

[91] *Id.* at 54.

[92] *Id.* at 26-27.

[93] *Id.* at 54.

[94] *The Department of Transportation's Disadvantaged Business Enterprise Program: Hearing Before the H. Comm. on Transp. and Infrastructure*, 111th Cong. 311 (2009) (statement of Joel Szabat, Acting Assistant Secretary, Transportation Policy, DOT).

[95] *The Department of Transportation's Disadvantaged Business Enterprise Program: Hearing Before the H. Comm. on Transp. and Infrastructure*, 111th Cong. 299 (2009) (statement of Joann Payne, President, Women First National Legislative Committee); see also *Opportunities and Challenges for Women Entrepreneurs: Roundtable Before the S. Comm. on Small Business and Entrepreneurship*, 110th Cong. 25 (2008) (statement of Margot Dorfman, CEO, U.S. Women's Chamber of Commerce) (relaying experience of woman business owner who was told she would need her husband to co-sign her loan application because the lender did not believe that the applicant had a higher salary than her husband).

comfortable with a man's name on the application."[96]

C. *Discrimination Limits Access To Contracting Markets.*

Even when women and minorities are able to form and develop businesses, they often continue to experience discrimination that impedes their ability to compete equally for government contracts.[97] This discrimination takes many forms, including discrimination by prime contractors, exclusion from business networks, and discrimination by bonding companies and suppliers.[98]

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[96] *The Department of Transportation's Disadvantaged Business Enterprise Program: Hearing Before the H. Comm. on Transp. and Infrastructure*, 111th Cong. 299 (2009) (statement of Joann Payne, President, Women First National Legislative Committee).

[97] *The Department of Transportation's Disadvantaged Business Enterprise Program: Hearing Before the H. Comm. on Transp. and Infrastructure*, 111th Cong. 309 (2009) (statement of Joel Szabat, Acting Assistant Secretary, Transportation Policy, DOT) ("The Department believes strongly that, while substantial progress has been made, discrimination and its effects continue to exist today and to distort contracting opportunities for DBEs."); *Opportunities and Challenges for Women Entrepreneurs: Roundtable Before the S. Comm. on Small Business and Entrepreneurship*, 110th Cong. 8 (2008) (statement of Virginia Littlejohn, Co-Founder and CEO, Quantum Leaps, Inc.) ("Access to federal procurement remains a huge area of underachievement, and is one of the biggest structural impediments to the economic advancement of women owned businesses in the US.").

[98] See *Minority Entrepreneurship: Assessing the Effectiveness of SBA's Programs for the Minority Business Community: Hearing Before the S. Comm. on Small Business and Entrepreneurship*, 110th Cong. 27 (2007) (statement of Jon Wainwright, Vice President, NERA Economic Consulting) (discussing findings from thousands of surveys and interviews that show that, throughout the country, and within both the public and private sector marketplaces, minorities report similar instances of negative stereotyping regarding their qualifications, double standards about their performance, and discrimination by bonding companies and suppliers); *How Information Policy Affects the Competitive Viability of Small and Disadvantaged Business in Federal Contracting: Hearing Before the Subcomm. on Information Policy, Census, and National Archives of the H. Comm. on Oversight and Government Reform*, 110th Cong. 28 (2008) (statement of Jon Wainwright, Vice President, NERA Economic Consulting) (concluding that "minorities and women reported that they still encounter significant barriers to doing business in the public and private sector market places, as both prime contractors and subcontractors" and "continued operation of federal, state, and local efforts to ensure equal access to the public contracting process is essential to the competitive viability of minority-owned and women-owned business enterprises."); *The Department of Transportation's Disadvantaged Business Enterprise Program: Hearing Before the H. Comm. on Transp. and Infrastructure*, 111th Cong. 223 (2009) (statement of Julie Cunningham, President and CEO, Conference of Minority Transportation Officials) (testifying that "discrimination is still a serious problem" and citing "use of antiquated 'old boy networks,' exclusion of DBEs from business opportunities, discrimination in credit lending, bonding and insurance, attempts to induce DBEs

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1. *Discrimination By Prime Contractors Creates Obstacles.*

Discrimination by prime contractors poses a very significant and continuing obstacle to contracting for minority- and women-owned businesses. In the past, evidence before Congress has shown that "minority-owned firms are seldom or never invited to bid on projects that do not contain affirmative action requirements."[99] This remains true today for both minority- and women-owned firms.[100] A recent study that included surveys and interviews of hundreds of Disadvantaged Business Enterprises (DBEs) found general agreement among them "that without the use of affirmative remedies such as the USDOT DBE Program, minorities and women would receive few if any opportunities [— either as prime contractors or as subcontractors[101] —] on government contracts."[102] That study's author testified before Congress that, through his research, he has repeatedly found that contractors who use minority- and women-owned businesses on projects with goals "rarely use [those businesses] — or even solicit them — in the absence of such goals."[103]

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to act fraudulently as 'fronts' and discriminatory application of procurement and contracting rules"); see also *id.* at 328 (statement of Jon Wainwright, Vice President, NERA Economic Consulting).

[99] 61 Fed. Reg. at 26,058.

[100] *How Information Policy Affects the Competitive Viability of Small and Disadvantaged Business in Federal Contracting: Hearing Before the Subcomm. on Information Policy, Census, and National Archives of the H. Comm. on Oversight and Government Reform*, 110th Cong. 86 (2008) (statement of Anthony Brown, Chair, Government Affairs Committee of the AMAC, Senior Associate Partner, MGT of America) ("I can say in the many offices that I have held in airports, it has been very frustrating when you have contracts that are of a particular size and you will come in contact with very qualified, very capable minority business owners who have been limited in their abilities and their business's ability to grow, not due to their vision, not due to their hard work, not due to their ability, but simply due to the fact that no one will give them the opportunity to do the work because of what their racial or ethnic background is or their sex.").

[101] *The Department of Transportation's Disadvantaged Business Enterprise Program: Hearing Before the H. Comm. on Transp. and Infrastructure*, 111th Cong. 331 (2009) (statement of Jon Wainwright, Vice President, NERA Economic Consulting) ("In general, minorities and women reported that they still encounter significant barriers to doing business in the public and private sector market places, as both prime contractors and subcontractors.").

[102] *Ibid.*; see also *Minority Entrepreneurship: Assessing the Effectiveness of SBA's Programs for the Minority Business Community: Hearing Before the S. Comm. on Small Business and Entrepreneurship*, 110th Cong. 27 (2007) (statement of Jon Wainwright, Vice President, NERA Economic Consulting).

[103] *The Department of Transportation's Disadvantaged Business Enterprise Program: Hearing Before the H. Comm. on Transp. and Infrastructure*, 111th Cong. 331 (2009) (statement of Jon Wainwright, Vice President, NERA Economic Consulting)

The discriminatory attitudes of some prime contractors towards minority- or women-owned firms are demonstrated by prime contractors who cynically use minority- or women-owned firms to get lower prices from non-minority subcontractors, or even to win the prime contract itself, with no intention of ever actually using the minority- or women-owned firms. In "bid shopping," a prime contractor solicits a bid for subcontract work from minority- or women-owned firms in order to qualify for a contract goal, but then, rather than using the minority-or women-owned business, shares those bids with non-minority subcontractors so the non-minority businesses can submit a lower bid.[104] In Pima County, Arizona, for example, 19% of Caucasian women business owners and 25% of Hispanic business owners experienced pressure to lower quotes on a bid because of bid shopping by prime contractors.[105]

Another questionable practice is the "bait and switch," in which a contractor commits to using a minority- or woman-owned business to win a contract that contains race- or gender-conscious goals for subcontractors, but then never actually gives the minority- or woman-owned firm the promised work. For example, after receiving a complaint from a DBE owner who alleged that a large prime contractor had used the DBE to secure a contract without generating work for the DBE, the DOT investigated and learned that the prime contractor had falsely represented to the DOT that it had met its DBE requirements.[106] Another time a DBE alleged that it had been included on the prime's original contract but was replaced by a non-DBE contractor *after* the contract had been awarded to the prime.[107] A number of state and local

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[104] For example, one witness testified before Congress that a Hispanic construction subcontractor was informed by a large majority owned prime contractor that they would use him on a job to fulfill a contract goal, but they in fact "shopped" his bid to a much larger majority subcontractor and removed the minority subcontract from the contract. *How Information Policy Affects the Competitive Viability of Small and Disadvantaged Business in Federal Contracting: Hearing Before the Subcomm. on Information Policy, Census, and National Archives of the H. Comm. on Oversight and Government Reform*, 110th Cong. 60 (2008) (statement of Anthony Brown, Chair, Government Affairs Committee of the AMAC, Senior Associate Partner, MGT of America). The subcontractor also reported that, based on his 25 years of experience in the industry, he feels "there is significant racial animus against Hispanic owned companies." *Ibid.* See also *Minority Entrepreneurship: Assessing the Effectiveness of SBA's Programs for the Minority Business Community: Hearing Before the S. Comm. on Small Business and Entrepreneurship*, 110th Cong. 43 (2007) (letter from Rita Baslock, President, Max Electric, Inc.).

[105] D. Wilson Consulting Group, *A Comprehensive Study of the Pima County MWBE Program* 9-11 (2008).

[106] *The Department of Transportation's Disadvantaged Business Enterprise Program: Hearing Before the H. Comm. on Transp. and Infrastructure*, 111th Cong. 313 (2009) (statement of Joel Szabat, Acting Assistant Secretary, Transportation Policy, DOT).

[107] *Ibid.* See also *Expanding Opportunities for Women Entrepreneurs: The Future of Women's Small Business Programs: Hearing Before the S. Comm. on Small Business and Entrepreneurship*, 110th Cong. 57 (2007) (statement of Wendi Goldsmith, President,

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disparity studies have concluded that this practice is a major problem facing minority- and women-owned businesses.[108]

The prevalence of discrimination comes starkly into focus in jurisdictions that recently have discontinued race-conscious programs. For example, Congress heard testimony that less than a year after Michigan discontinued its affirmative action contracting program, the percentage of state-funded highway construction projects performed by DBEs *fell to zero*, even though their participation in the federal program was 13%.[109] Other states also experienced dramatic decreases in the participation of minority- and women-owned businesses when race- and gender-conscious remedies were abandoned.[110] Indeed, research shows that the disparity in

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Bioengineering Group) ("In many cases, small firms are recruited onto teams to help win work as called for in contract solicitations. We appear in the proposals, often at great expense to the small and minority and women-owned businesses due to the work related to researching and compiling proposal materials, only to never actually receive work under the contract. I cringe to recount how many times that happened to my firm and to tally how much money, namely hundreds of thousands of dollars my firm involuntarily contributed in order to help other firms win and perform work, while we received none or sometimes a token amount."); see also *Access to Federal Contracts: How to Level the Playing Field: Field Hearing Before the S. Comm. on Small Business and Entrepreneurship*, 110th Cong. 172 (2007) (statement of Women Impacting Public Policy (WIPP)) (explaining that prime contractors often list women-owned business on their bid, but then revert to using "the same old subcontractors they have used in other bids" after winning the contract).

[108] See, *e.g.*, CRA International for the San Mateo County Transit District and the Peninsula Corridor Joint Powers Board, *Measuring Minority- and Women-Owned Construction and Professional Service Firm Availability and Utilization* 139 (2008) (finding that, in many cases, minority- and women-owned businesses were considered by prime contractors bidding for government jobs merely "for cosmetic purposes related to compliance with suggested or required good faith efforts"); Mason Tillman Associates, Ltd., *State of New Jersey Construction Services Disparity Study, 2000-2002* at 2-34 (2005) ("Many [minority and women business owners] reported that prime contractors have purposely used tactics to circumvent the [DOT DBE program's 'good faith effort'] requirements. For example, some prime contractors will seek to obtain [minority- and women-owned] business names and certification numbers without intending to use them on their projects."). One DBE in New Jersey explained that majority-contractors frequently get a minority business to bid on a project just "so they can say they [have] a minority bid" but do not actually consider subcontracting with the minority-owned firm. *Id.* at 2-36.

[109] *The Department of Transportation's Disadvantaged Business Enterprise Programs: Hearing Before the H. Comm. on Transp. and Infrastructure*, 111th Cong. 301 (2009) (statement of Joann Payne, President, Women First National Legislative Committee).

[110] In Idaho, for example, the rate of minority- and women-owned business participation remained steady at just above 6% from 2004 through 2006 under a goal-based program. When Idaho switched to a race-neutral program in 2007, their participation rate dropped to below 4%.
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contracting between minority- and majority-owned businesses is "markedly greater in jurisdictions where there [is] no goals program in place."[111] Joann Payne, President of Women First National Legislative Committee, told Congress that based on "history and present DBE participation percentages on state funded projects," absent race- and gender-conscious remedies, "participation [in government contracting] of women and minority owned businesses will drop nationally to approximately 2[%]."[112]

Academic studies have also found that the presence of race- and gender-conscious programs significantly improves minority- and women-owned businesses' ability to develop and participate in government contracting. For example, one study found that the gap between white and minority self employment rates narrowed during the 1980s "when affirmative action programs were implemented by many public sector jurisdictions."[113] The same study found that the gap began to widen again when the number of race-conscious contracting programs was reduced after the Supreme Court's decision in *Croson*,[114] and then narrowed again after 2000 once courts began to declare race-conscious contracting programs constitutional.[115] Another study found similarly that when race-conscious "programs are removed or replaced with race-neutral programs the utilization of minorities and women in public construction declines rapidly."[116] That study concluded that affirmative action programs appear to work but have not

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Ibid. The same thing happened in California: DBE participation in federally funded contracts was 9% between 2002 and April 2006, but dropped to less than 5% in May 2006 after the state discontinued setting DBE goals. *Ibid.* The participation rate for women-owned businesses was just 0.1%. *Ibid.*

[111] *Minority Entrepreneurship: Assessing the Effectiveness of SBA's Programs for the Minority Business Community: Hearing Before the S. Comm. on Small Business and Entrepreneurship*, 110th Cong. 3 (2007) (statement of Anthony W. Robinson, President, Minority Business Enterprise Legal Defense and Educational Fund).

[112] *The Department of Transportation's Disadvantaged Business Enterprise Program: Hearing Before the H. Comm. on Transp. and Infrastructure*, 111th Cong. 302 (2009) (statement of Joann Payne, President, Women First National Legislative Committee).

[113] David G. Blanchflower, *Minority Self-Employment in the United States and the Impact of Affirmative Action Programs*, National Bureau of Economic Research, Working Paper 13972, at 17 (2008).

[114] *City of Richmond* v. *J.A. Croson, Co.*, 488 U.S. 469, 492 (1989) (holding that the City of Richmond had failed to demonstrate a compelling interest to justify its race-conscious contracting program).

[115] David G. Blanchflower, *Minority Self-Employment in the United States and the Impact of Affirmative Action Programs*, National Bureau of Economic Research, Working Paper 13972, at 17 (2008).

[116] David G. Blanchflower and Jon Wainright, *An Analysis of the Impact of Affirmative Action Programs on Self-Employment in the Construction Industry*,National Bureau of Economic Research, Working Paper 11793, at 24 (2008) ("The evidence we have available to us suggests that very rapidly after the race and gender conscious programs were removed the utilization of
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yet achieved their objectives "because they have not been allowed to work by non-minority contractors and by the courts."[117]

Congress has also heard testimony reporting a general "unwillingness [by prime contractors] to use minorities and women on jobs where there is no [minority- or women-owned business contracting] goal" even though "[t]here are a significant number of minority/women small business contractors who have the capability and proven experience to perform."[118] One witness testified that many prime contractors maintain a "mentality of exclusion" with respect to subcontractors, and explained that contractors exhibiting this mentality believe that "minority- and women-owned businesses don't belong at the table."[119]

DOT's recent experience in administering its DBE program provides further evidence of the lasting effects of discrimination in contracting and the continuing need for race- and gender-conscious programs to address those effects. DOT's program requires states to use the "best evidence available to estimate the DBE participation they could expect to obtain if there were a nondiscriminatory level playing field."[120] This "evidence-based estimate" then becomes the state's goal for DBE participation.[121] States are required to "achieve as much as possible of that annual goal through * * * 'race-neutral' means," including "[o]utreach, technical and bonding

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firms owned by women and minorities collapsed."); see also Insight Center for Community Economic Development, *The Impact of State Affirmative Procurement Policies on Minority- and Women- Owned Businesses in Five States, Best Practices, Imperfections, and Challenges in State Inclusive Business Programs* iv (2007) (concluding that "when affirmative procurement policies end or are interrupted, MBEs and WBEs do not grow as fast as similar businesses in other states" and that these "slower business growth rates are not usually made up later, indicating the importance of the consistent presence of affirmative procurement programs").

[117] *Ibid.*

[118] *Minority Entrepreneurship: Assessing the Effectiveness of SBA's Programs for the Minority Business Community: Hearing Before the S. Comm. on Small Business and Entrepreneurship*, 110th Cong. 43 (2007) (letter from Rita Baslock, President Max Electric, Inc.).

[119] *How Information Policy Affects Competitive Viability in Minority Contracting: Hearing Before the Subcomm. on Information Policy, Census, and National Archives of the H. Comm. on Oversight and Government Reform*, 110th Cong. 85 (2008) (statement of Anthony Brown, Chair, Government Affairs Committee of the AMAC, Senior Associate Partner, MGT of America).

[120] *The Department of Transportation's Disadvantaged Business Enterprise Program: Hearing Before the H. Comm. on Transp. and Infrastructure*, 111th Cong. 308 (2009) (statement of Joel Szabat, Acting Assistant Secretary, Transportation Policy, DOT); see also 49 C.F.R. 26.

[121] *The Department of Transportation's Disadvantaged Business Enterprise Program: Hearing Before the H. Comm. on Transp. and Infrastructure*, 111th Cong. 308 (2009) (statement of Joel Szabat, Acting Assistant Secretary, Transportation Policy, DOT).

assistance, unbundling of contracts, and small business programs."[122]

What DOT found is that, between 2004 and 2008, states that received federal transportation dollars had to resort to race-conscious measures to meet their DBE participation goals 81% of the time.[123] The magnitude of this finding was not lost on DOT officials: "This means that, eight out of ten times, [DOT funding] recipients, if denied the availability of race-conscious goals, would have left unremedied the effects of discrimination on small, disadvantaged business."[124] Perhaps even more revealing is that "in 69 percent of these cases, the race-conscious component of the goal was needed to make up the majority of the entire overall goal."[125] These facts led DOT to conclude that "in the absence of race-conscious goals, the gap between a level playing field and the reality facing DBEs trying to find work with [DOT funding] recipients would have been significantly larger."[126]

That conclusion was proven in jurisdictions that have suspended the use of race-conscious measures. These jurisdictions have experienced declines in DBE participation and have not been able to meet their participation goals. For example, Congress heard testimony that after jurisdictions discontinued the use of race-conscious measures, following the Ninth Circuit's decision in *Western States Paving Co.*,[127] the results were striking. Arizona's DOT set overall goals of 9.1% in 2007 and 9.9% in 2008, but only achieved 3.8% and 3.1%, respectively; California's DOT set goals of 10.5%, 10.5% and 13.5% for 2006-2008, but was only able to achieve 8.2%, 6.6% and 4.6% participation by DBEs during those years; Sound Transit in

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[122] *Ibid.*

[123] *Id.* at 309.

[124] *Ibid.*

[125] *Ibid.*

[126] *Ibid*; see also *The Department of Transportation's Disadvantaged Business Enterprise Program: Hearing Before the H. Comm. on Transp. and Infrastructure*, 111th Cong. 292 (2009) (statement of Don O'Bannon, Chairman, Airport Minority Advisory Council) ("One study found that DBE participation dropped to virtually zero on federally-assisted contracts during a time when the program was enjoined. Researchers stated that 'it appears that the mere fact of adopting a DBE program — whether or not goals are being set on any given contract — increases DBE participation.'").

[127] *Western States Paving Co., Inc.* v. *United States and Washington State Dep't of Transp.*, 407 F.3d 983 (9th Cir. 2005). In *Western States Paving Co.*, the court concluded that DOT's race-conscious contracting program — the Transportation Equity Act for the 21st Century — is constitutional on its face. The evidence before Congress established a compelling interest for the program, *id.* at 991-993, and — because race-conscious measures are used only when race-neutral means prove ineffective, and are employed in a flexible manner for a limited duration — the program is narrowly tailored, *id.* at 993-996. But the court determined that the program was unconstitutional as applied in Washington state because – the court concluded – the State failed to proffer "evidence of discrimination within its own contracting market and * * * thus failed to meet its burden of demonstrating that its DBE program is narrowly tailored." *Id.* at 1003.

Washington state set goals of 15% in 2007 and 13% in 2008, but only achieved 8.6% and 6.8% participation; Portland's airport set goals of 7.3% and 4% for the years 2007 and 2008, but only achieved 2% and 1.1% participation in those years.[128] From the reduction in the use of DBE programs following the *Western States Paving Co.* decision, DOT concluded that without the ability to use race conscious measures, states that are DOT funding recipients cannot, in many cases, "ensure [that] their Federally-assisted contracting programs provide nondiscriminatory access to business opportunities on a level playing field, as defined by their overall goals."[129] One DBE contractor "told State officials, since 'there's no DBE participation goal, our phones have stopped ringing . . . we don't get calls any more.'"[130]

These data — which reveal the significant downturn in contracts and dollars won by minority- and women-owned firms when race- and gender-conscious programs are eliminated — demonstrate more than just that these programs present opportunities. They establish that without such programs, minority- and women-owned firms are left with significantly less business than they actually can perform. When race- and gender-conscious programs are in place, minority- and women-owned firms secure, and perform, many more contracts than they secure without such programs. This certainly demonstrates that the amount of business these firms can handle is not defined by their success when these programs are not in place; rather, their capacity to perform work outstrips what they are hired to do in the absence of goals and in any event expands as contracts become available to them.

The evidence before Congress also contains many examples of blatant and egregious discrimination against minorities and women:

- One Alaskan-Native construction specialty contractor was regularly told by a prime contractor that he was only hired because he is a minority.[131] The prime contractor also

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[128] *The Department of Transportation's Disadvantaged Business Enterprise Program: Hearing Before the H. Comm. on Transp. and Infrastructure*, 111th Cong. 310 (2009) (statement of Joel Szabat, Acting Assistant Secretary, Transportation Policy, DOT). See also *id.* at 31 (statement of Joann Payne, President, Women First National Legislative Committee) (noting that in Idaho, the rate of minority- and women-owned business participation remained steady at just above 6% from 2004 through 2006 but dropped to below 4% in 2007 and that DBE participation in federally funded contracts was 9% between 2002 and April 2006, but dropped to less than 5% in May 2006).

[129] *Id.* at 310 (statement of Joel Szabat, Acting Assistant Secretary, Transportation Policy, DOT).

[130] *Ibid.* A DOT official relayed additional stories of DBE contractors following the *Western States Paving Co.* decision: one DBE contractor reported a 50% drop in calls following the decision; and a woman business owner reported that "where there are no goals, I can tell you that the fax machines stop . . . the next day I got no faxes, the phone didn't ring, asking for my bid. I used to get maybe 20 faxes a day . . . now I might get three a week." *Ibid.*

[131] *The Department of Transportation's Disadvantaged Business Enterprise Program: Hearing Before the H. Comm. on Transp. and Infrastructure*, 111th Cong. 292-293 (2009)

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explicitly expressed his view that "minority businesses [are] not qualified."[132] At this same job site, the Alaskan Native's "company's equipment was regularly turned on during the night, causing the batteries to die and the project to be delayed. No non-minority contractors experienced this problem."[133]

- A Hispanic contractor was told by a general contractor that he "did not want any Mexicans on the job."[134] On other job sites, that same Hispanic contractor "has been called 'Wetback,' 'brown like s**t,' 'dumb Mexican,''little Mexican,' [and] 'my little Mexican friend.'"[135]

- A DBE owner in Delaware had a disagreement with one of her prime contractors, who insisted on speaking with her male foreman whenever he called her office.[136] Despite the male foreman's insistence that the prime needed to speak with his female boss, the prime called the boss's home — *and left a message for her husband*, who was not involved in the project.[137] In the message to the husband, the prime explained that he wanted to resolve the issue through a meeting but that "we don't have to have your wife

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(statement of Don O'Bannon, Chairman, Airport Minority Advisory Council).

[132] *Ibid.*

[133] *Ibid.*

[134] *Ibid.*

[135] *Ibid.*; see also *The Department of Transportation's Disadvantaged Business Enterprise Program: Hearing Before the H. Comm. on Transp. and Infrastructure*, 111th Cong. 311 (2009) (statement of Joel Szabat, Acting Assistant Secretary, Transportation Policy, DOT) (relaying incident where a Hispanic contractor "was not allowed to provide a proposal on a private contract because of ethnicity").

Congress has heard many other reports of direct discrimination by prime contractors against minorities. One minority contractor reported not being given a seat at the table for a presentation to a general contractor during which the general contractor "joked and laughed about the fact that he believed he had a way of 'getting around' the DBE ordinance." *The Department of Transportation's Disadvantaged Business Enterprise Program: Hearing Before the H. Comm. on Transp. and Infrastructure*, 111th Cong. 294 (2009) (statement of Don O'Bannon, Chairman, Airport Minority Advisory Council). An African-American contractor reported that he encounters people who assume he does not understand fairly simple work-related matters because of his race. *Id.* at 293. Another minority contractor reported encountering the attitude, among other contractors, that "minorities are better-suited to be janitors or plumbers than architects." *Id.* at 294. That contractor also reported "that his firm gets less credit than non-minority owned firms when projects are successful, and disproportionate criticism when projects are not successful." *Ibid.*

[136] *The Department of Transportation's Disadvantaged Business Enterprise Program: Hearing Before the H. Comm. on Transp. and Infrastructure*, 111th Cong. 299 (2009) (statement of Joann Payne, President, Women First National Legislative Committee).

[137] *Id.* at 299-300.

involved."[138] When the prime finally met with the female owner of the company, the first thing he said to her was "I am sorry this has taken so long but I don't like dealing with women."[139]

Similar evidence of discrimination by prime contractors against minorities and women is recounted in local disparity studies. For example, when a female contractor attempted to collect money she was owed on a subcontract from the prime contractor, the prime contractor refused to pay her, saying "no woman [should] make that kind of money."[140]

Another particularly egregious example of discrimination by a prime contractor occurred

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[138] *Id.* at 300.

[139] *Ibid.* Another woman told of an instance "when a project's resident engineer [would not] speak to [her] on the job site but direct[ed] all his comments to the (male) foreman standing two feet to [her] left." *Id.* at 299. Similarly, another woman reported getting calls asking for the man in charge; the caller simply hung up after finding out that the person in charge was a woman. *The Department of Transportation's Disadvantaged Business Enterprise Program: Hearing Before the H. Comm. on Transp. and Infrastructure*, 111th Cong. 214 (2009) (statement of Katherine M. Cloonen, President and Owner, JK Steel Erectors, Inc.). Cloonen also reported that when she was starting out, she was not taken seriously and was sent the worst workers from the union. *Ibid.* Other women complained that they frequently encounter people who assume that they are "fronts" for the man who really owns the business. *The Department of Transportation's Disadvantaged Business Enterprise Program: Hearing Before the H. Comm. on Transp. and Infrastructure*, 111th Cong. 293, 299 (2009) (statement of Joann Payne, President, Women First National Legislative Committee & statement of Don O'Bannon, Chairman of the Airport Minority Advisory Council).

[140] Mason Tillman Associates, Ltd., *State of New Jersey Construction Services Disparity Study, 2000-2002*, Vol. 1 at 2-11 (2005); see also BBC Research & Consulting for the Washington Suburban Sanitary Commission, *WSSC 2005 Disparity Study – Summary and Recommendations*, § 3 at 17 (2005) (African-American business owner in the Washington, D.C., area reported that he lost work when a client learned of his race; officials in charge of the project indicated that they loved his company's proposal but then used a white-owned company instead after learning that his firm was minority-owned); MGT of America, Inc., *The City of Phoenix Minority-, Women-Owned and Small Business Enterprise Program Update Study* 6-22 (2005) (minority contractor reported that "[t]here have been incidents where I've been on the job site and the General [Prime Contractor] won't talk to me, they will go to the white foreman and talk to the foreman"); Washington Suburban Sanitary Commission by BBC Research & Consulting, *WSSC 2005 Disparity Study – Summary and Recommendations*, § 4 at 21 (2005) (Hispanic owner of a construction firm recounting experience where three white men at an industry conference pointed to his friend, an African-American man, and started making racist comments and using racial slurs); University of Minnesota Disparity Study Research Team, *Analysis of Essex County Procurement and Contracting: Final Report* 91 (2005) (recounting racially and gender motivated harassment experienced by minorities and women at job sites).

on a government contract in Iraq. Worldwide Network Services (WWNS), an African-American-owned firm, was awarded a subcontract to perform communications work on two security-related contracts for DynCorp International.[141] DynCorp was initially satisfied with WWNS's work and rated it as "exceptional" and "very good."[142] But in 2005, DynCorp began discriminating against and exhibiting racial animus toward WWNS in a number of ways, including: excluding WWNS from planning meetings, failing to respond to WWNS's requests for information and assistance, refusing to provide WWNS employees with security badges they needed in order to perform their work, and refusing to make or process payments on WWNS's invoices.[143] These actions "effectively put WWNS * * * out of business."[144] The jury found that DynCorp's conduct was motivated by racial animus. DynCorp's IT manager referred to WWNS as "kaffirs," a derogatory term for black South Africans, and also made many other derogatory comments.[145]

2. *Discrimination By Business Networks Limits Opportunities.*

As the Department of Justice explained in 1996, access to informal business networks is essential to survival in contracting because these networks "serve as conduits of information about upcoming job opportunities and facilitate access to the decisionmakers."[146] These same networks and contacts "can help a business find the best price on supplies, facilitate a quick loan, foster a relationship with a prime contractor, or yield information about an upcoming contract for which the firm can prepare — all of which serve to make the firm more competitive."[147]

Race- and gender-conscious contracting programs have helped some women and minorities break into these networks. Indeed, a DOT official recently testified before Congress that "possibly the most important function" the DBE program has performed over the last 30 years "is to address the lack of access by minority and women contractors to these crucial

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[141] *Worldwide Network Services, LLC* v. *DynCorp International, LLC*, No. 1:07-cv-627, Doc. 459 at 6 (E.D.V.A. Sept. 22, 2008).

[142] *Id.* at 6-7.

[143] *Id.* at 7-8.

[144] *Id.* at 8.

[145] *Id.* at 7.

[146] 61 Fed. Reg. at 26,059. See also *Expanding Opportunities for Women Entrepreneurs: The Future of Women's Small Business Programs: Hearing Before the S. Comm. on Small Business and Entrepreneurship*, 110th Cong. 57 (2007) (statement of Wendi Goldsmith, President, Bioengineering Group) ("It is virtually impossible to win work through a competitive process without a level of comfort that comes through personal relationships, * * * long-term relationships — going to school together, working together or what have you.").

[147] 61 Fed. Reg. at 26,059; see also *Expanding Opportunities for Women Entrepreneurs: The Future of Women's Small Business Programs: Hearing Before the S. Comm. on Small Business and Entrepreneurship*, 110th Cong. 57 (2007) (statement of Wendi Goldsmith, President, Bioengineering Group) (discussing the importance of networks).

informal networks."[148] The official explained that the program requires prime contractors, who may not normally socialize with minority or female contractors, to make an effort to involve minority- and women-owned firms as subcontractors.[149] This, the official explained, "is a very beneficial way of introducing prime contractors to DBEs and, hopefully, beginning to create business relationships that will lead to opportunities for DBEs to get the work they need to succeed."[150]

But progress for minorities and women attempting to break into established business networks has been slow, and more work needs to be done.[151] Opening business networks to minority- and women-owned businesses "doesn't happen by accident and * * * doesn't happen without help."[152] DOT still considers lack of access to business networks and to the information those networks provide to be "[o]ne of the most important barriers to participation [in contracting]" that minorities and women face.[153]

Many minorities and women still find themselves excluded from informal business networks today. Congress has heard a significant amount of testimony about the continued prevalence of "old boys' networks" and the difficulty minority and women business owners face in attempting to break into these networks.[154] Likewise, many state and local disparity studies

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[148] *The Department of Transportation's Disadvantaged Business Enterprise Program: Hearing Before the H. Comm. on Transp. and Infrastructure*, 111th Cong. 312 (2009) (statement of Joel Szabat, Acting Assistant Secretary, Transportation Policy, DOT).

[149] *Ibid.*

[150] *Ibid.*

[151] Anthony Brown, Chair of the Government Affairs Committee of the AMAC, testified about the importance of "help[ing] majority firms move beyond their established networks to give previously excluded businesses the opportunity to prove themselves." *How Information Policy Affects the Competitive Viability of Small and Disadvantaged Business in Federal Contracting: Hearing Before the Subcomm. on Information Policy, Census, and National Archives of the H. Comm. on Oversight and Government Reform*, 110th Cong. 58-59 (2008) (statement of Anthony Brown, Chair, Government Affairs Committee of the AMAC, Senior Associate Partner, MGT of America). But Brown said effecting this change is "hard" because of "[t]he mentality of exclusion can exist in contractors and public contracting officials." *Id.* at 55.

[152] *Id.* at 59.

[153] *The Department of Transportation's Disadvantaged Business Enterprise Program: Hearing Before the H. Comm. on Transp. and Infrastructure*, 111th Cong. 311 (2009) (statement of Joel Szabat, Acting Assistant Secretary, Transportation Policy, DOT).

[154] *Opportunities and Challenges for Women Entrepreneurs: Roundtable Before the S. Comm. on Small Business and Entrepreneurship*, 110th Cong. 15 (2008) (statement of the Center for Women's Business Research) ("Acceptance into industry networks is often difficult, especially for women of color. Even when they join the meetings, they are not welcomed nor are they part of the activities."); *id.* at 18 (statement of Lisa Dolan, President, Securit) ("[B]eing in a male-dominated field in security, I am usually the only woman at the table and not taken seriously."); *Minority Entrepreneurship: Assessing the Effectiveness of SBA's Programs for the*

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reveal that minorities and women still face barriers to participation in business networks.[155]

When minority- and women-owned businesses are excluded from business networks, they are cut off from information and decision-makers and, as a result, are placed at a serious disadvantage. As one minority business owner told Congress: "One of the major problems that we face is the overall inability to have access to decision makers as we are unable to gain access to their many formal and informal networking activities." [156] A DOT official relayed to

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Minority Business Community: Hearing Before the S. Comm. on Small Business and Entrepreneurship, 110th Cong. 43 (2007) (letter from Rita Baslock, President, Max Electric, Inc.) ("MBEs experience difficulty breaking into old-boy networks of general contractors. Because of the monetary and time consumption of the construction business for small businesses, many small minority and women subcontractors do not have the social connections, money, or time to effectively network in the old boy system."); *Women in Business: Leveling the Playing Field: Roundtable Before the S. Comm. on Small Business and Entrepreneurship*, 110th Cong. 43 (2008) (statement of Kerstin Forrester, President and Owner, Stonebridge Precision Machining & Certified Welding) ("There is still very much an 'old boys' network in place."); *The Department of Transportation's Disadvantaged Business Enterprise Program: Hearing Before the H. Comm. on Transp. and Infrastructure*, 111th Cong. 208 (2009) (statement of Gilbert Aranza, CEO, Stars Concessions, Ltd.) ("I wish I could report that the Good Ol' Boy Network no longer exists, but I am afraid that I run up against it all the time."); *id.* at 312 (statement of Joel Szabat, Acting Assistant Secretary, Transportation Policy, DOT) (quoting one business owner as stating, "An Idaho Hispanic contractor described the network there as 'white guys that have been running around with the same white guys that have controlled the money * * * for [many] years.'"). See also Michael Bonds, *Looking Beyond the Numbers, The Struggles of Black Businesses to Survive: A Qualitative Approach*, 37 Journal of Black Studies 581, 595 (2007) (concluding that "racism seems to play a major role in limiting African American business opportunities"); *id.* at 598 ("Black business owners expressed their frustration with their inability to break in to the old boys' network, being denied business loans, having to constantly prove themselves to White business owners, or being held to a higher performance standard than Caucasian firms.").

[155] For example, a New Jersey disparity study found that both "new and established minority and women business owners report difficulties breaking into the contracting network." Mason Tillman Assocs., *State of New Jersey Construction Services Disparity Study, 2000-2002,* Vol. 1 at 2-25 (2005). That study also found that some minority- and women-owned businesses that "have been in been in operation for more than 20 years * * * are still excluded from job opportunities because they are not included in the social and business networks with those in positions of power in their respective fields." *Ibid.* Another study reported that many female and some minority business owners interviewed "were especially vocal about the 'good ole boy' system." CRA International for the San Mateo County Transit District and the Peninsula Corridor Joint Powers Board, *Measuring Minority- and Woman-Owned Construction and Professional Service Firm Availability and Utilization* 140 (2008).

[156] *Minority Entrepreneurship: Assessing the Effectiveness of SBA's Programs for the*
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Congress minority and women business owners' concern about lack of access to important information: "There's still very much an old boy network . . . and if you're not an old boy, you're not in that network [and] there's a lot of information you don't get."[157]

In some places, minorities are still excluded from the social clubs that are a primary site for business networking.[158] More commonly, exclusion of minorities and women may be the result of non-minority contractors being comfortable with existing homogeneous networks, rather than overt discrimination.[159] That is one reason why programs that require majority-owned businesses to reach outside of their comfortable networks are so essential. If a contractor has a positive experience with a minority- or women-owned business, that may, over time, open the door to a continuing business relationship. That is precisely what has happened for Katherine M. Cloonen, the president and owner of JK Steel Erectors, Inc., who told Congress that the DBE

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Minority Business Community: Hearing Before the S. Comm. on Small Business and Entrepreneurship, 110th Cong. 46 (2007) (letter from Bobby E. Henderson, President, Anlab Environmental).

[157] *The Department of Transportation's Disadvantaged Business Enterprise Program: Hearing Before the H. Comm. on Transp. and Infrastructure*, 111th Cong. 311 (2009) (statement of Joel Szabat, Acting Assistant Secretary, Transportation Policy, DOT); *ibid.* (relating comment from a DBE firm owner, who noted that the "number one thing [that] puts DBEs at a disadvantage is lack of access to decision makers, who maybe . . . go out to drinks every once in a while . . . or see each other on the golf course"); *id.* at 311-312 (relating comment from a trade association representative, who stated: "Lots of things get done with back slapping and who knows who and if you're not in that group you might as well not come to the party."); see also MGT of America, *Broward County Small Disadvantaged Business Enterprise (SDBE) Study* 6-97 (2001) (quoting a business owner explaining that white owners enjoy certain advantages because "[t]hey play golf together and their kids go to the same schools").

[158] Chuck Covington, CEO of People's Transit, told Congress that in Michigan, where he does business, the Eagles Club is a primary hub for networking. *The Department of Transportation's Disadvantaged Business Enterprise Program: Hearing Before the H. Comm. on Transp. and Infrastructure*, 111th Cong. 5 (2009). This club has an unwritten rule excluding African Americans. *Ibid.* Covington said the club's rule "sickens" him, "[b]ut the fact that it impacts my ability to conduct business is reprehensible." *Ibid.* Summarizing the problem, Covington said, "If people do business with the people they are comfortable with, and if I am denied opportunities to sit down and get to know people — based on nothing more than my race — it automatically puts me and my business at a disadvantage." *Ibid.*

[159] *Minority Entrepreneurship: Assessing the Effectiveness of SBA's Programs for the Minority Business Community: Hearing Before the S. Comm. on Small Business and Entrepreneurship*, 110th Cong. 15 (2007) (statement of Professor Candida Brush, Paul T. Babson chair-professor of entrepreneurship, Babson College) ("[W]e know from what is called the theory of homophily that people like to do business with people who are like themselves. So if you have this very homogeneous group, if you happen to be different in some way, it is going to be hard for you to get over that barrier.").

program has allowed her to slowly break into business networks.[160]

3. *Discrimination In Bonding And By Suppliers Burdens Disadvantaged Firms.*

Many contracts, both public and private, require bidders to secure a surety bond. Accordingly, success in contracting depends not only upon a firm's ability to do the work at a good price, but also on the firm's ability to obtain quality services from bonding companies. Any discrimination that exists in the bonding market makes fulfilling this requirement much more difficult for minority- and women-owned firms.[161]

A surety bond is required "[b]efore any contract of more than $100,000 is awarded for the construction, alteration, or repair of any public building or public work of the Federal Government."[162] As the Department of Justice explained in 1996,[163] our country's history of discrimination often lands minority- and women-owned businesses in a vicious cycle: they cannot get bonding because they lack experience, yet they cannot get experience because they lack bonding.[164] A 2006 report of the National Association of Women Business Owners

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[160] *The Department of Transportation's Disadvantaged Business Enterprise Program: Hearing Before the H. Comm. on Transp. and Infrastructure*, 111th Cong. 213-214 (2009) (statement of Katherine M. Cloonen).

[161] See, *e.g.*, *The Department of Transportation's Disadvantaged Business Enterprise Programs: Hearing Before the H. Comm. on Transp. and Infrastructure*, 111th Cong. 2 (2009) (statement of the Hon. James L. Oberstar, Chairman and Rep. from Minnesota) ("This data demonstrates that it is difficult for small and disadvantaged businesses to compete – discrimination impacts minority and women owned businesses at many points in the contracting process, including obtaining credit, *bonding*, and insurance.") (emphasis added).

[162] 40 U.S.C. 3131.

[163] 61 Fed. Reg. at 26,060.

[164] See, *e.g.*, *Access to Federal Contracts: How to Level the Playing Field Before the S. Comm. on Small Business and Entrepreneurship*, 110th Cong. 132 (2007) (statement of Randy McRae) ("[B]onding has been a cruel Catch-22 for [DBEs]. These struggling firms either can't afford a bond or can't persuade bonding companies to guarantee their performance. But without a bond, they can't bid on many jobs in the public or private sector, limiting their growth."); *id.* at 48 (statement of Wayne Frazier, Sr., President, Maryland-Washington Minority Contractors Association) ("Small businesses dealing with the Federal Government cannot get surety bonding. Again, no financing, no bonding, no contract, no award, no way to compete."); *The Department of Transportation's Disadvantaged Business Enterprise Program: Hearing Before the H. Comm. on Transp. and Infrastructure*, 111th Cong. 311 (2009) (statement of Joel Szabat, Acting Assistant Secretary, Transportation Policy, DOT) (relating comment from a female contractor in California who stated that "minorities and women have a much harder time getting capital, getting bonding, getting insurance … in bonding … women are still asked to have their husbands sign at the bank"); see also Washington Suburban Sanitary Commission by BBC Research & Consulting, *WSSC 2005 Disparity Study – Summary and Recommendations*, § 4 at 19-20 (2005)

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Procurement Task Force, which was submitted to Congress, concludes that "[b]onding requirements and other financial tests can impose an insurmountable barrier to [women-owned small businesses] seeking federal contracts."[165] Where prime contractors set the bonding requirement at an unnecessarily high level, moreover, it effectively excludes a greater percentage of minority- and women-owned businesses because those businesses are more commonly unable to secure the necessary levels of bonding due to the variety of discriminatory barriers that have been discussed thus far.[166]

Moreover, their inability to secure bonding prevents minority- and women-owned businesses from growing their companies to the point where they can take on the role of prime contractor. One congressional witness explained: "You have to have proof that you are capable and have the capacity to deliver to large scale-projects if, in fact, you want to be a prime. As a result of the inability to be bonded, you end up being a subcontractor, which limits your growth opportunities."[167]

State and local disparity studies also identify bonding requirements as a major obstacle to success for minority- and women-owned businesses. For example, one study found that "[o]btaining sufficient bonding (or bonding at all) is frequently cited as a major barrier" to

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(minority business owner reported that MBE firms get charged a higher rate for the same bonding as compared to white competitors).

[165] *Opportunities and Challenges for Women Entrepreneurs on the 20th Anniversary of the Women's Business Ownership Act: Roundtable Before the S. Comm. on Small Business and Entrepreneurship*, 110th Cong. 67 (2008) (report of the NAWBO Procurement Task Force, February 2006).

[166] *How Information Policy Affects Competitive Viability in Minority Contracting Before the Subcomm. on Information Policy, Census, and National Archives of the H. Comm. on Oversight and Government Reform*, 110th Cong. 92 (2008) (statement of Anthony Brown, Chair, Government Affairs Committee of the AMAC, Senior Associate Partner, MGT of America); *The Department of Transportation's Disadvantaged Business Enterprise Programs: Hearing Before the H. Comm. on Transportation and Infrastructure*, 111th Cong. 311 (2009) (statement of Joel Szabat, Acting Assistant Secretary, Transportation Policy, DOT) ("Several California [DBE] contractors mentioned that prime contractors often imposed higher bonding or insurance requirements than the state required, blocking them from participation.").

[167] *Women in Business: Leveling the Playing Field: Roundtable Before the S. Comm. on Small Business and Entrepreneurship*, 110th Cong. 26 (2008) (statement of Eydie Silva, Executive Director, State Office of Minority and Women Business Assistance); see also Kevin O'Brien, Ph.D., Bernard Goitein, Ph.D., and Camden Bucey, *Disparity Study for the City of Peoria* 32, 36 (2004) (concluding that lack of access to bonding was a factor that helped to explain why, from 1992-2001, no African-American-owned business in Peoria was able to obtain a contract as a prime contractor in any of the City's 136 contracting projects; and there was only one project where a women-owned business was the prime contractor).

contracting for minority- and women-owned businesses.[168] Specifically, that study concluded that "[m]inority firms often have difficulty obtaining bonding because they lack the experience bonding companies require."[169]

Discrimination by suppliers is also still a problem. If a supplier charges minority- or women-owned businesses a higher price than it charges a majority-owned business, then the minority- and women-owned firms will have to include the higher price of supplies in their bid. This in turn limits the minority- and women-owned businesses' ability to compete.[170] The problem has a significant effect on minority- and women-owned businesses. For example, a disparity study in Memphis, Tennessee, found that 21.6% of the minority- and women-owned businesses surveyed stated that they had experienced at least one instance of discrimination by a supplier in the last five years.[171] Another study found that women-owned businesses reported "that they were often given a higher price for materials than their male-owned counterparts, and they believe that the higher prices were related to their gender."[172]

Congress has also heard testimony about supplier discrimination. One egregious example occurred in Michigan: An African-American employee of a minority-owned business obtained a quote of $613 per tire for 16 new tires.[173] The minority business owner discovered that a white business associate had paid only $400 per tire.[174] He then called the supplier and "put on a white voice" and was quoted $400.[175] Congress also heard about an African-American mechanical contractor who solicited a quote for equipment from his non-minority-owned supplier which he then included in his bid.[176] He then received a fax from the supplier that was intended for his

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[168] Pennsylvania Advisory Comm. to the U.S. Comm'n on Civil Rights, *Barriers Facing Minority- and Women-Owned Bus. in Pa.* 18 (2002) .

[169] *Id.* at 19.

[170] See National Economic Research Associates, Inc., *Race, Sex, and Business Enterprise: Evidence from Memphis, Tennessee* 103 (2008) (concluding that "discrimination by commercial customers and suppliers against [minority- and women-owned businesses] operates to increase input prices and lower output prices for" those businesses).

[171] *Id.* at 259.

[172] CRA International for the San Mateo County Transit District and the Peninsula Corridor Joint Powers Board, *Measuring Minority- and Woman-Owned Construction and Professional Service Firm Availability and Utilization* 139 (2008).

[173] *The Department of Transportation's Disadvantaged Business Enterprise Programs: Hearing Before the H. Comm. on Transp. and Infrastructure*, 111th Cong. 217 (2009) (statement of Chuck Covington, CEO, People's Transit).

[174] *Ibid.*

[175] *Ibid.*

[176] *Minority Entrepreneurship: Assessing the Effectiveness of SBA's Programs for the Minority Business Community: Hearing Before the S. Comm. on Small Business and Entrepreneurship*, 110th Cong. 39 (2007) (statement of Anthony W. Robinson, President, Minority Business Enterprise Legal Defense and Educational Fund).

non-minority-owned competitor, quoting the competitor a lower quote.[177] When the minority business owner requested the lower price quote provided to his competitor, the supplier responded that it reserved the right to provide better pricing to their better customers.[178] Obviously — as a minority business owner testified — "no businessperson, no matter how talented, can succeed if they are paying a race-based mark-up on supplies."[179]

III.

Conclusion

The discussion above surveys only a portion of the evidence that demonstrates that the race- and gender-based barriers facing minority-and women-owned firms still exist. While some progress has been made, the U.S. Small Business Administration's 8(a) and Women-Owned Small Business programs, the DOT's Disadvantaged Business Enterprise program, and similar programs are still critical to prevent the federal government from becoming a "passive participant" in a system infected by race and gender discrimination. The government's obligation to ensure that tax money is spent fairly and equally requires these programs.

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[177] *Ibid.*

[178] *Ibid.* See also Mason Tillman Assocs., *State of New Jersey Construction Services Disparity Study, 2000-2002*, Vol. 1 at 2-7 (2005) (African-American business owner reported that one supplier demanded that she pay up front or pay a certain amount of money down before checking her business's credit rating; the supplier openly stated that the reason for this requirement was that his business was minority-owned and the supplier claimed to have "had prior experience with a minority vender that had not paid them").

[179] *The Department of Transportation's Disadvantaged Business Enterprise Programs: Hearing Before the H. Comm. on Transp. and Infrastructure*, 111th Cong. 218 (2009) (statement of Chuck Covington, CEO, People's Transit).

Appendix A

Congressional Hearings Between 2006 and 2010
Addressing Public Procurement and Minority- and Women-Owned Business Enterprises

- *Assessing Access: Obstacles and Opportunities for Minority Small Business Owners in Today's Capital Markets, Hearing Before the S. Comm. on Small Business and Entrepreneurship*, 111th Cong. (2010)

- *Infrastructure Investment: Ensuring an Effective Economic Recovery Program: Hearing Before the H. Comm. on Transportation and Infrastructure*, 111th Cong. (2009)

- *The Federal Aviation Administration Reauthorization Act of 2009: Hearing Before the H. Subcomm. on Aviation of the H. Comm. on Transportation and Infrastructure*, 111th Cong. (2009)

- *Full Committee Hearing on the State of the SBA's Entrepreneurial Development Programs and Their Role in Promoting an Economic Recovery: Hearing Before the H. Comm. on Small Business*, 111th Cong. (2009)

- *Full Committee Hearing on Oversight of the Small Business Administration and its Programs: Hearing Before the H. Comm. on Small Business*, 111th Cong. (2009)

- *The Department of Transportation's Disadvantaged Business Enterprise Programs: Hearing Before the H. Comm. on Transportation and Infrastructure*, 111th Cong. (2009)

- *The Role of Small Business in Recovery Act Contracting: Hearing Before the S. Comm. on Small Business and Entrepreneurship*, 111th Cong. (2009)

- *Trends Affecting Minority Broadcast Ownership: Hearing Before the H. Judiciary Comm.*, 111th Cong. (2009)

- *Roundtable on Healthcare Reform: Small Business Concerns and Priorities: Hearing Before the S. Comm. on Small Business and Entrepreneurship*, 111th Cong. (2009)

- *Doing Business with the Government: The Record and Goals for Small, Minority and Disadvantaged Businesses: Hearing Before the H. Comm. On Transportation and Infrastructure*, 111th Cong. (2009)

- *Minority Entrepreneurship: Evaluating Small Business Resources and Programs: Hearing Before the S. Comm. on Small Business and Entrepreneurship*, 111th Cong. (2009)

- *The Minority Business Development Agency: Enhancing the Prospects for Success: Hearing Before the H. Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce*, 111th Cong. (2009)

- *Full Committee Hearing on SBA's Progress in Implementing the Women's Procurement Program: Hearing Before the H. Comm. on Small Business*, 110th Cong. (2008)

- *Holding the Small Business Administration Accountable: Women's Contracting and Lender Oversight: Hearing Before the S. Comm. on Small Business and Entrepreneurship*, 110th Cong. (2008)

- *Diversity in the Financial Services Sector: Hearing Before the H. Subcomm. on Oversight and Investigations of the H. Comm. on Financial Services*, 110th Cong. (2008)

- *Military Base Realignment: Contracting Opportunities for Impacted Communities: Hearing Before the H. Subcomm. on Government Management, Organization, and Procurement of the H. Comm. on Oversight and Government Reform*, 110th Cong. (2008)

- *Community Reinvestment Act: Thirty Years of Accomplishments, But Challenges Remain: Hearing Before the H. Comm. on Financial Services*, 110th Cong. (2008)

- *Doing Business with the Government: The Record and Goals for Small, Minority, and Disadvantaged Businesses: Hearing Before the H. Subcomm. on Economic Development, Public Buildings, and Emergency Management of the H. Comm. on Transportation and Infrastructure*, 110th Cong. (2008)

- *Subcommittee Hearing on Oversight of the Entrepreneurial Development Programs Implemented by the Small Business Administration and National Veterans Business Development Corporation: Hearing Before the H. Subcomm. on Rural and Urban Entrepreneurship of the H. Comm. on Small Business*, 110th Cong. (2008)

- *Women in Business: Leveling the Playing Field: Roundtable Before the S. Comm. on Small Business and Entrepreneurship*, 110th Cong. (2008)

- *Subcommittee Hearing on Minority and Hispanic Participation in the Federal Workforce and the Impact on the Small Business Community: Hearing Before the H. Subcomm. on Regulations, Health Care, and Trade of the H. Comm. on Small Business*, 110th Cong. (2008)

- *Opportunities and Challenges for Women Entrepreneurs on the 20th Anniversary of the Women's Business Ownership Act: Hearing Before the S. Comm. on Small Business and Entrepreneurship*, 110th Cong. (2008)

- *Business Start-Up Hurdles in Underserved Communities: Access to Venture Capital and Entrepreneurship Training: Hearing Before the S. Comm. on Small Business and Entrepreneurship*, 110th Cong. (2008)

- *How Information Policy Affects Competitive Viability of Small and Disadvantaged Business in Federal Contracting: Hearing Before the H. Subcomm. on Information Policy, Census, and National Archives of the H. Comm. on Oversight and Government Reform*, 110th Cong. (2008)

- *Full Committee Field Hearing on Participation of Small Business in Hurricane Katrina Recovery Contracts: Hearing Before the H. Comm. on Small Business*, 110th Cong. (2007)

- *Minority Entrepreneurship: Assessing the Effectiveness of SBA's Programs for the Minority Business Community: Hearing Before the S. Comm. on Small Business and Entrepreneurship*, 110th Cong. (2007)

- *Full Committee Hearing on the Small Business Administration's Microloan Program: Hearing Before the H. Comm. on Small Business*, 110th Cong. (2007)

- *Increasing Government Accountability and Ensuring Fairness in Small Business Contracting: Hearing Before the S. Comm. on Small Business & Entrepreneurship*, 110th Cong. (2007)

- *Diversifying Native Economies: Oversight Hearing Before the H. Comm. on Natural Resources*, 110th Cong. (2007)

- *Expanding Opportunities for Women Entrepreneurs: The Future of Women's Small Business Programs: Hearing Before the S. Comm. on Small Business and Entrepreneurship*, 110th Cong. (2007)

- *Federal Contracting: Removing Hurdles for Minority-Owned Small Businesses: Hearing Before the H. Subcomm. on Government Management, Organization, and Procurement of the H. Comm. on Oversight and Government Reform*, 110th Cong. (2007)

- *Full Committee Hearing to Consider Legislation Updating and Improving the SBA's Contracting Programs: Hearing Before the H. Comm. on Small Business*, 110th Cong. (2007)

- *Mortgage Lending Discrimination: Field Hearing Before the H. Comm. on Financial Services*, 110th Cong. (2007)

- *Access to Federal Contracts: How to Level the Playing Field: Field Hearing Before the S. Comm. on Small Business and Entrepreneurship*, 110th Cong. (2007)

- *Preserving and Expanding Minority Banks: Hearing Before the H. Subcomm. on Oversight and Investigations of the H. Comm. on Financial Services*, 110th Cong. (2007)

- *Reauthorization of Small Business Administration Financing and Entrepreneurial Development Programs: Hearing Before the S. Comm. on Small Business and Entrepreneurship*, 109th Cong. (2006)

- *Northern Lights and Procurement Plights: The Effect of the ANC Program on Federal Procurement and Alaska Native Corporation: Joint Hearing Before the H. Comm. on Government Reform and the H. Comm. on Small Business*, 109th Cong. (2006)

- *Diversity: The GAO Perspective: Hearing Before the H. Subcomm. on Oversight and Investigations of the H. Comm. on Financial Services*, 109th Cong. (2006)

- *Strengthening Participation of Small Businesses in Federal Contracting and Innovation Research Programs: Hearing Before the S. Comm. on Small Business and Entrepreneurship*, 109th Cong. (2006)

Appendix B

Studies and Reports

- Frances Amatucci, *Women Entrepreneurs Securing Business Angel Financing: Tales from the Field*, Venture Capital (2004)

- Ana Aparicio, *Hispanic-Owned Business Enterprises in the Construction Industry of Greater Chicago: Responses and Personal Perspectives*, for the City of Chicago M/WBE Program (2009)

- Ana Aparicio, *Women-Owned Business Enterprises in the Construction Industry of Greater Chicago: Responses and Personal Perspectives*, for the City of Chicago M/WBE Program (2009)

- Asian American Justice Center, *Equal Access: Unlocking Government Doors for Asian Americans: Public Contracting Laws and Policies* (2008)

- S. Ann Becker and Donn Miller-Kermani, *Women-Owned Small Businesses in the Federal Procurement Market*, Journal of Contract Management 131 (2008)

- Dana Bible, Kathy Hill, *Discrimination: Women in Business,* Journal of Organizational Culture, Communications and Conflict, Volume 11, No. 1 (2007)

- Lloyd Blanchard, Bo Zhao, and John Yinger, *Do Credit Market Barriers Exists for Minority and Women Entrepreneurs?*, Center for Policy Research, Maxwell School, Syracuse University, Working Paper No. 74 (2005)

- David. G. Blanchflower and Jon Wainwright, *An Analysis of the Impact of Affirmative Action Programs on Self-Employment in the Construction Industry*, National Bureau of Economic Research, Working Paper 11793 (2008)

- David G. Blanchflower, Phillip B. Levine, and David J. Zimmerman, *Discrimination in the Small-Business Credit Market*, 85(4) Review of Economics and Statistics 930 (2003)

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- Susan Coleman, *Is There a Liquidity Crisis For Small, Black-Owned Firms*, Journal of Developmental Entrepreneurship (2005)

- Ernst & Young, *2008 Catalyst Census of Women Corporate Officers and Top Earners of the Fortune 500*, available at http://www.catalyst.org/file/241/08_census_cote_jan.pdf (last visited, April 29, 2010)

- Robert W. Fairlie and Alicia M. Robb, *Minority Business Development Agency Disparities in Capital Access between Minority and Non-Minority-Owned Businesses: The Troubling Reality of Capital Limitations Faced by MBEs*, Prepared for the U.S. Department of Commerce (2010)

- Robert W. Fairlie and Alicia M. Robb, *Why are Black-Owned Businesses Less Successful Than White-Owned Businesses? The Role of Families, Inheritances, and Business Human Capital*, 25 Journal of Labor Economics 289 (2007)

- Robert W. Fairlie, *Minority Entrepreneurship*, The Small Business Economy, produced under contract with the SBA, Office of Advocacy (2005)

- Cedric Herring, *Barriers to the Utilization of Targeted Program Contractors: Results from Interviews of African American Contractors*, for the City of Chicago M/WBE Program (2009)

- Michael Hout and Harvey Rosen, *Self-Employment, Family Background, and Race*, 35 Journal of Human Resources 671(2000)

- Insight Center for Community Economic Development, *The Impact of State Affirmative Procurement Policies on Minority- and Women- Owned Businesses in Five States, Best Practices, Imperfections, and Challenges in State Inclusive Business Programs* (2007)

- Yvonne M. Lau, *Profiles on Asian Americans in Construction -A Study for the City of Chicago M/WBE Sunset Project*, for the City of Chicago M/WBE Program (2009)

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Appendix C

A Sample of State and Local Government Disparity Studies

Alabama

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Alaska

- *Alaska Disadvantaged Business Enterprise Study – Availability and Disparity*, Prepared by D. Wilson Consulting Group, LLC for the Alaska Department of Transportation and Public Facilities (2008)

Arizona

- *A Comprehensive Study of the Pima County MWBE Program*, Prepared by D. Wilson Consulting Group, LLC for the Pima County Procurement Department (2008)

- *A Comprehensive Disparity Study of the City of Tucson MWBE Program*, Prepared by D. Wilson Consulting Group, LLC for the Pima County Procurement Department (2008)

- *Availability Analysis and Disparity Study for the Arizona Department of Transportation: Final Report*, Prepared by MGT of America for the Arizona Department of Transportation (2009)

- *The City of Phoenix Minority-, Women-Owned, and Small Business Enterprise Program Update Study*, Prepared by MGT of America, Inc. for the City of Phoenix (2005)

California

- *San Francisco Bay Area Rapid Transit District, Availability and Utilization Study*, Final Report, Prepared by Mason Tillman Assoc. for the San Francisco Bay Area Rapid Transit District (2009)

- *Statistical Disparities in Minority and Female Business Formation and Earnings In and Surrounding San Francisco, California*, Prepared by NERA Economic Consulting for the City of San Francisco, CA (2003)

- *Availability and Disparity Study for the California Department of Transportation*, Prepared by BBC Research & Consulting for the California Department of Transportation (2007)

- *Measuring Minority- and Woman-Owned Construction and Professional Service Firm Availability and Utilization*, Prepared by CRA International for the San Mateo County Transit District and the Peninsula Corridor Joint Powers Board (April 14, 2008)

- *Measuring Minority- and Woman-Owned Construction and Professional Service Firm Availability and Utilization*, Prepared by CRA International for the Santa Clara Valley Transportation Authority (December 14, 2007)

- *Alameda County Availability Study*, Prepared by Mason Tillman Associates, Ltd. for the County of Alameda (October 2004)

Colorado

- *Colorado Department of Transportation Statewide Transportation Disparity Study*, Prepared by D. Wilson Consulting Group, LLC for the Colorado Department of Transportation (2009)

- *Race, Sex, and Business Enterprise: Evidence from Denver, Colorado*, Prepared by NERA Economic Consulting for the City and County of Denver, Colorado (2006)

- *Colorado Department of Transportation Disparity Study Update*, Prepared by MGT of America for the Colorado Department of Transportation (2001)

Connecticut

- *The City of Bridgeport Disparity Study Regarding Minority Participation in Contracting*, presented by Mason Tillman Associates, Ltd. for the City of Bridgeport Connecticut (August 2005)

Florida

- *Statistical Disparities in Minority and Female Business Formation and Earnings In and Surrounding Jacksonville, Florida,* Prepared by NERA Economic Consulting for the City of Jacksonville, FL (2003)

- *Multi-Jurisdictional Disparity Study Consultant Services: Hillsborough County Aviation Authority and City of Tampa*, Prepared by Mason Tillman Associates, Ltd. for the Hillsborough County Aviation Authority Office and City of Tampa, Florida (April 2006)

- *Broward County Small Disadvantaged Business Enterprise (SDBE) Study*, Prepared by MGT of America for the Broward County Board of Commissioners (2001)

Georgia

- *Race, Sex, and Business Enterprise: Evidence from Augusta, Georgia*, Prepared by NERA Economic Consulting for August-Richmond County Georgia (2009)

- *Consortium Disparity Study Update*, Prepared by BBC Research & Consulting for the City of Albany, Georgia; Dougherty County, Georgia; Dougherty County School System; Albany Water, Gas & Light Commission; and Albany Tomorrow, Inc. (2008)

- *City of Atlanta Disparity Study*, Prepared by Griffin and Strong for the City of Atlanta (2006)

- *Georgia Department of Transportation Disparity Study*, Prepared by Boston Research Group for the State of Georgia (2005)

Idaho

- *A Study to Determine DBE Availability and Analyze Disparity in the Transportation Contracting Industry in Idaho*, Prepared by BBC Research & Consulting for the Idaho Transportation Department (2007)

Illinois

- *Disadvantaged Business Enterprise Availability Study*, Prepared by NERA Economic Consulting, for the Illinois Department of Transportation (2004)

- *Report on the City of Chicago's MWBE Program*, Prepared by David Blanchflower, Ph.D., for the City of Chicago M/WBE Program (2009)

- *Disadvantaged Business Enterprise Study*, Prepared by NERA Economic Consulting, for the Northeast Illinois Regional Commuter Railroad Corporation D/B/A Metra (2000)

- *Disparity Study for the City of Peoria*, Prepared by Kevin O'Brien, Ph.D., for the City of Peoria (2004)

- *Race, Sex, and Business Enterprise: Evidence from the State of Illinois and the Chicago Metropolitan Area*, Prepared by NERA Economic Consulting for the Illinois State Toll Highway Authority (2004)

Iowa

- *City of Davenport Disparity Study Regarding Minority and Women Participation in Contracting*, Prepared by Mason Tillman Associates, Ltd. for the Davenport, Iowa (2009)

Kansas

- *Kansas Department of Transportation Availability and Goal Setting Study*, Prepared by MGT of America for the Kansas Department of Transportation (2001)

Kentucky

- *Disparity Study for the Commonwealth of Kentucky*, Prepared by Griffin and Strong for the Commonwealth of Kentucky (2000)

Maryland

- *Race, Sex, and Business Enterprise: Evidence from the City of Baltimore*, Prepared by NERA Economic Consulting for the City of Baltimore, MD (2007)

- *Disadvantaged Business Enterprise Availability Studies Prepared for the Maryland Department of Transportation, State Highway Administration, Maryland Transit Administration, Maryland Aviation Administration*, Prepared by NERA Economic Consulting for the Maryland Department of Transportation (2006)

- *The Prince George's County Government: Disparity Study Final Report*, Prepared by D.J. Miller & Associates, Inc. for the Prince George's County Government (2006)

- *Race, Sex and Business Enterprise: Evidence from the State of Maryland*, Prepared by NERA Economic Consulting for the Maryland Department of Transportation (2006)

Massachusetts

- *Race, Sex and Business Enterprise: Evidence from the Commonwealth of Massachusetts*, Vol. I, Prepared by NERA Economic Consulting for the Massachusetts Housing Finance Agency (2006)

Minnesota

- *A Disparity Study for the City of Saint Paul and the Saint Paul Housing and Redevelopment Authority, Saint Paul, Minnesota*, Prepared by MGT of America for the City of Saint Paul and the Redevelopment Authority of Saint Paul (2008)

- *Race, Sex and Business Enterprise: Evidence from the State of Minnesota*, Prepared by NERA Economic Consulting for the Minnesota State Department of Transportation (2005)

Missouri

- *Race, Sex, and Business Enterprise: Evidence from the St Louis Metropolitan Statistical Area 1979-2004*, Prepared by NERA Economic Consulting for the Bi-State Development Agency (2005)

- *Disadvantaged Business Enterprise Availability Study, for the Missouri Department of Transportation*, Prepared by NERA Economic Consulting for the Missouri State Department of Transportation (2004)

Montana

- *Disparity Study for the Montana Department of Transportation: Final Report*, Prepared by D. Wilson Consulting Group, LLC for the Montana Department of Transportation (2009)

Nevada

- *Availability and Disparity Study for the Nevada Department of Transportation*, Prepared by BBC Research & Consulting for the Nevada Department of Transportation (2007)

New Jersey

- *State of New Jersey Construction Services: Disparity Study 2003-2004*, Prepared by Mason Tillman Associates, Ltd. for the New Jersey Disparity Study Commission (2006)

- *State of New Jersey Construction Services: Disparity Study 2000-2002*, Prepared by Mason Tillman Associates, Ltd. for the New Jersey Disparity Study Commission (2005)

- *State of New Jersey Disparity Study of Procurement in Professional Services, other Services, and Goods and Commodities*, Prepared by Mason Tillman Associates, Ltd. for the New Jersey Department of State (2005)

- *Analysis of Essex County Procurement and Contracting: Final Report*, Prepared by the University of Minnesota Disparity Study Research Team for the County of Essex Disparity Study Commission (2005)

New York

The State of Minority- and Women-Owned Business Enterprises: Evidence from New York, Prepared by NERA Economic Consulting for the New York State Department of Economic Development (2010)

- *The City of New York Disparity Study*, presented by Mason Tillman Associates, Ltd. for the City of New York (2005)

North Carolina

- *North Carolina Department of Transportation Second Generation Disparity Study*, Prepared by MGT of America, Inc. for the State of North Carolina (2004)

- *Measuring Business Opportunity: A Disparity Study of NCDOT's State and Federal Programs*, Prepared by Equant for the North Carolina Department of Transportation (July 27, 2009)

Ohio

- *State of Ohio Predicate Study, Final Report*, Prepared by D.J. Miller and Assoc. for the State of Ohio (2001)

- *A Second-Generation Disparity Study*, Prepared by MGT of America, Inc. for the City of Dayton, Ohio (2008)

Oregon

- *Disadvantaged Business Enterprise Disparity Study*, Prepared by MGT of America, Inc. for the Oregon Department of Transportation (2007)

Pennsylvania

- *Minority Business Shares of Prime Contracts Approved by the Board of Pittsburgh Public Schools, January-September 2005*, Prepared by the University of Pittsburgh Center on Race and Social Problems (June 2006)

- *Commonwealth of Pennsylvania Department of General Services: Disparity Study in Building Construction and Building Design*, Prepared by Mason Tillman Associates, Ltd. for the Commonwealth of Pennsylvania Department of General Services (August 2007)

- *City of Philadelphia Fiscal Year 2006 Annual Disparity Study*, Prepared by Econosult Corporation for the City of Philadelphia Department of Finance (May 30, 2007)

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South Carolina

- *A Business Underutilization Causation Analysis Study for the City of Columbia*, Prepared by MGT of America, Inc. for the State of South Carolina (2006)

Tennessee

- *Race, Sex, and Business Enterprise: Evidence from Memphis, Tennessee*, Prepared by NERA Economic Consulting for the Memphis-Shelby County Airport Authority (December 18, 2008)

- *State of Tennessee Department of Transportation*, Prepared by Mason Tillman Associates, Ltd. for the Tennessee Department of Transportation (December 11, 2007)

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Texas

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- *City of Dallas Availability and Disparity Study*, Prepared by Mason Tillman Assoc., Ltd. (2002)

- *Quantitative Analysis of the Availability of Minority- and Women-Owned Businesses and their Utilization by the Corpus Christi Regional Transportation Authority*, Prepared by Jim Lee, Ph.D., for the Corpus Christi Regional Transportation Authority (November 2007)

- *Race, Sex, and Business Enterprise: Evidence from the City of Austin*, Prepared by NERA Economic Consulting for the City of Austin, TX (May, 2008)

- *San Antonio Regional Business Disparity Causation Analysis Study*, Prepared by MGT of America for the City of San Antonio, Texas (April 6, 2009)

Utah

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Virginia

- A *Procurement Disparity Study of the Commonwealth of Virginia,* Prepared by MGT of America, Inc. for the Commonwealth of Virginia (2004)

Washington

- *Race, Sex and Business Enterprise: Evidence from the State of Washington*, Prepared by NERA Economic Consulting for the Washington State Department of Transportation (2005)

Washington, D.C.

- *Washington Suburban Sanitary Commission 2005 Disparity Study: Summary and Recommendations*, Prepared by BBC Research & Consulting for the Washington Suburban Sanitary Commission (2005)

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