

OVERSIGHT, ENFORCEMENT, AND EXTENSION IN
PUBLIC-INTEREST LITIGATION: AN EMPIRICAL
ANALYSIS OF COMPLIANCE WITH THE NINTH
CIRCUIT’S *WESTERN STATES PAVING V.*
WASHINGTON STATE DOT DECISION

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I. INTRODUCTION

For over a century, the words of Justice John Marshall Harlan's dissent in *Plessy v. Ferguson* have illuminated the minds of students, teachers, and public officials across the country and the world: "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens."¹ In view of this nation's history and the significant policy questions intertwined with public education, it is not hard to understand why the headline Fourteenth Amendment cases of the last decade have concerned the Equal Protection Clause's application to public law schools,² public undergraduate universities,³ and public grade schools.⁴

Public contract law, however, is less like the media's darling and more like the redheaded stepchild of law—so much so that even former Chief Justice Rehnquist has described the practice of public-contract procurement as "mundane,"⁵ and scholarly commentary has concurred with his assessment.⁶ Nevertheless, much like public education, the practice of public contracting is a vitally important piece of the U.S. economy and is a critical component of Equal Protection Clause jurisprudence. In fact, two of the Court's most influential Equal Protection Clause decisions—*City of Richmond v. J.A. Croson, Co.*⁷ and *Adarand Constructors, Inc. v. Peña*,⁸—arose from public contract procurement disputes. Thus, as a matter of both significant practical and philosophical importance for those committed to the principle of "Equal Protection under the law," developments in public-contracting law must not go overlooked, just as it

1. 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

2. See *Grutter v. Bollinger*, 539 U.S. 306 (2003).

3. See *Gratz v. Bollinger*, 539 U.S. 244 (2003).

4. See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).

5. See *United States v. Winstar Corp.*, 518 U.S. 839, 932 (1996) (Rehnquist, C.J., dissenting).

6. Michael H. LeRoy, *Presidential Regulation of Private Employment: Constitutionality of a Executive Order 12,954 Debarment of Contractors Who Hire Permanent Striker Replacements*, 37 B.C. L. REV. 229, 266 (1996).

7. 488 U.S. 469 (1989).

8. 515 U.S. 200 (1995).

must not go overlooked if a government agency secures a contract for the construction or improvement of a public building, road, airport, or implementation of airport concessions in violation of this principle.⁹

II. THE IMPORTANCE OF PUBLIC INTEREST LITIGATION IN SECURING “EQUAL PROTECTION UNDER THE LAW”

On the other hand, it is often forgotten that litigation is only one of many beneficial services that public-interest legal organizations provide to the public. Long before public-interest legal organizations file documents in court, they often seek public agency information through federal and state public records access laws in order to become fully informed of the background facts of a potential case. In actively seeking public documents, these organizations are able to determine whether or not federal and state agencies are actually following the law. This often underappreciated oversight function performed by public-interest legal organizations provides an invaluable service to society. A recent example that highlights the significant effect this oversight has had on such agencies in the area of public contracting may be seen through the results of the Sacramento, California-based Pacific Legal Foundation’s (PLF or Foundation) *Western States Paving* Project. To that end, this Article constitutes both an empirical analysis and a five-year retrospective of the Ninth Circuit’s *Western States*

9. Roger Clegg, *Unfinished Business: The Bush Administration and Racial Preferences*, 32 HARV. J.L. & PUB. POL’Y 971, 975 (2010) (“[P]rograms that discriminate on these bases are divisive and unfair, and any system that [awards] contracts to anyone other than the lowest qualified bidder will cost the government and its taxpayers money.”); Ralph W. Kasarda & Robert Luther III, *Why Courts Must Subject Municipalities to Constitutional Tort Liability Under § 1983 When Unconstitutional Race- and Sex-Based Preference Statutes Deprive an Otherwise Lowest Qualified Bidder of a Public Contract*, 19 GEO. MASON U. C.R. L.J. 371, 404 (2009). Kasarda & I argue:

Where a public entity wrongfully denies the award of a contract to the lowest responsible bidder due to an underlying unconstitutional statute that gave preferential treatment to another bidder because of the race and sex of his subcontractors, equity requires that the wrongdoing party make the wronged party whole by paying not only bidding, preparation, and overhead costs, but also lost profits. In addition to making the aggrieved party whole, requiring public entities to pay these frequently substantial sums for their unconstitutional conduct will deter such misconduct in the future.

Kasarda & Luther, *supra*, at 404.

Paving v. Washington State Department of Transportation decision.¹⁰

III. THE WESTERN STATES PAVING DECISION

In the May 2005 case of *Western States Paving Co. v. Washington State Department of Transportation*, the U.S. Court of Appeals for the Ninth Circuit considered whether the Transportation Equity Act for the 21st Century (“TEA-21”) violated the Fifth or Fourteenth Amendments of the United States Constitution, either on its face or as applied by the state of Washington’s Department of Transportation (Washington DOT) when it awarded race- and sex-based preferences to local public contractors.¹¹ The case arose when the owner of Western States Paving Company, a white male contractor, submitted a subcontract bid on a state contract that imposed a 14% minority utilization requirement.¹² Western States Paving’s bid was not selected “even though its bid was \$100,000 less than that of the minority-owned firm that was selected [and] the prime contractor explicitly identified the contract’s minority utilization requirement as the reason that it rejected Western States’ bid.”¹³ Western States Paving filed suit against the United States, the U.S. Department of Transportation, the State of Washington, the City of Vancouver, and Clark County.¹⁴

After failing to prevail at the district court level, Western States Paving appealed to the Ninth Circuit. The Ninth Circuit acknowledged that under the rule from *Adarand Constructors, Inc v. Pena*, the strict-scrutiny standard of review must be applied to all race-based legislation.¹⁵ And while the court upheld the facial constitutionality of TEA-21, it determined that the local Disadvantaged Business Enterprise (DBE) program was unconstitutional “as applied” insofar as state and local agencies that wished to accept

10. 407 F.3d 983 (9th Cir. 2005), *cert denied*, 546 U.S. 1170 (2006).

11. 407 F.3d at 987.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 990 (“[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.”) (quoting *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995)).

federal money for local race- and sex-based preference programs were unable to produce evidence of past—or current effects of—race or sex discrimination in the regional labor market, in accordance with the Court’s instructions from *Adarand*.¹⁶

Specifically, in consideration of the as-applied challenge, Washington State contended that its application of TEA-21 need not independently satisfy strict scrutiny but rather it was merely obligated to comply with federal statutes and regulations.¹⁷ The court countered, agreeing with the Eight Circuit in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*,¹⁸ that “[t]o the extent the federal government delegates [the] tailoring function, a State’s implementation becomes critically relevant to a reviewing court’s strict scrutiny.”¹⁹ As part of its as-applied analysis, the court began by observing that TEA-21 is a narrowly tailored remedial measure only if its application is limited to “those States in which the effects of discrimination are actually present[]” and “those minority groups that have actually suffered discrimination.”²⁰ Because Washington DOT was unable to produce evidence of past—or current effects of—race or sex discrimination in the regional labor market, relying instead on the disparity between participation in affirmative action and race-neutral contracts which the court admonished for not reflecting “the performance capacity of DBEs in a race-neutral market[]”—the court concluded that Washington State’s application of

16. *Id.* at 1002. The court stated,

The record is therefore devoid of any evidence suggesting that minorities currently suffer—or have ever suffered—discrimination in the Washington transportation contracting industry. We must therefore conclude that Washington’s application of TEA-21 conflicts with the guarantees of equal protection because the State’s DBE program is not narrowly tailored to further Congress’s remedial objective.

Id.

17. *Id.* at 996; Compare Ross R. Fulton, Comment, “Our Federal System”: States’ Susceptibility to Challenge When Applying Federal Affirmative Action Law, 74 U. CHI. L. REV. 687 (arguing that federalism requires local governments to make local findings of discrimination to comply with the federal DBE/MBE program regulations).

18. 345 F.3d 964 (8th Cir. 2003).

19. *Western States Paving*, 407 F.3d at 996–97 (quoting *Sherbrooke*, 345 F.3d at 971).

20. *Id.* at 998.

TEA-21 did not fulfill the obligations imposed by the Fourteenth Amendment.²¹ It also declined to give great weight to the disparity between the nominal DBE availability and proportion of contracts awarded to DBE's because "[t]his oversimplified statistical evidence is entitled to little weight . . . [when] it does not account for factors that may affect the relative capacity of DBEs to undertake contracting work."²² The court ultimately struck down Washington DOT's implementation of the TEA-21 program because its actions were not "narrowly tailored."²³

Thus, after the Ninth Circuit's decision in *Western States Paving*, a state or local entity that accepts federal funds may not pursue a federally mandated DBE goal by granting race- or sex-based preferences, unless the entity can produce evidence of past or current effects of race or sex discrimination in the regional labor market.²⁴ In effect, this means that after *Western States Paving* public agencies in the Ninth Circuit are forbidden from spending federal funds on state and local race-based preference schemes simply because Congress has recognized generally that discrimination has occurred in the nation's history.

IV. WESTERN STATES PAVING'S ADMINISTRATIVE AND JUDICIAL PROGENY

In response to the Ninth Circuit's decision in *Western States Paving*, the United States Department of Transportation (USDOT) Federal Highway Administration Office of Civil Rights issued a memorandum entitled "Questions and Answers Concerning Response to Western States Paving v. Washington Department of Transportation."²⁵ This memorandum, approved by USDOT's general counsel, indicated that the *Western States Paving* decision to forbid the government's use of race- and

21. *Id.* at 1000.

22. *Id.*

23. *Id.* at 1002.

24. *Id.* at 1002–03.

25. Office of Civil Rights, *Questions and Answers Concerning Response to Western States Paving Company v. Washington State Department of Transportation*, U.S. DEPARTMENT OF TRANSPORTATION, http://www.fhwa.dot.gov/civilrights/Programs/dbe_faq.htm (last modified Nov. 4, 2010).

sex-conscious goals in the absence of past discrimination binds only entities within the Ninth Circuit.²⁶

Unfortunately, guidance such as the above-described policy has contributed to the creation of a quagmire of confusion as well as a conflict between the federal circuits because not all states within the circuits have followed the Ninth Circuit's guidance. While the decision of *Western States Paving* concluded that states may consider race-conscious methods to achieve DBE goals in the presence of evidence of past discrimination, USDOT's guidance here is problematic because it supports the premise that while government may not consider the race or sex of a contractor in the Ninth Circuit states unless evidence of past discrimination in the regional labor market can be identified, government may still consider the race or sex of a contractor in the Seventh Circuit states, even in the *absence* of evidence of past discrimination in the regional labor market. The latter scenario is evidenced in the Seventh Circuit case of *Northern Contracting, Inc., v. Illinois Department of Transportation*.²⁷

Although the court in *Northern Contracting* adhered to the first half of the *Western States Paving* court's analysis by recognizing that "[i]n the post-*Adarand* era, two other circuits have considered the question of whether a state may properly rely on the federal government's compelling interest in implementing a local DBE plan for highway construction, and both have concluded that a state may properly do so,"²⁸ it ignored the second half of the *Western States Paving* decision's holding by failing to recognize that even though a state may rely on the federal government's compelling interest, the state must subsequently produce evidence of past—or current effects of—race or sex discrimination in the regional labor market.²⁹ Furthermore, by relying only on a disparity study, the Seventh Circuit failed to require that evidence of past discrimination be produced at the local level to be considered narrowly tailored

26. *Id.*

27. 473 F.3d 715 (7th Cir. 2007).

28. *Id.* at 720.

29. See *supra* note 16 and accompanying text.

under *Western States Paving*.³⁰ Because disparity studies do not definitively establish evidence of past discrimination,³¹ the Seventh Circuit's decision in *Northern Contracting* marked the most recent chapter in the ongoing federal circuit split over the type of evidence necessary to permit race- and sex-based remedial methods to achieve DBE goals.³²

The confusion over the proper framework for evaluating these cases has trickled down from the federal circuit courts into the federal district courts.³³ Not surprisingly, a number of federal district courts outside of the Ninth and Seventh circuits have admitted uncertainty as to whether they should apply to the Ninth Circuit's framework from *Western States Paving* or should apply to the Seventh Circuit's framework from *Northern Contracting*.³⁴ For example, in

30. The Ninth Circuit stated,

As the United States correctly observed in its brief and during oral argument, it cannot be said that TEA-21 is a narrowly tailored remedial measure unless its application is limited to those States in which the effects of discrimination are actually present. *See* Dist. Ct. Oral Argument Tr. 48 ("The state would have to have evidence of past or current effects of discrimination to use race-conscious goals.")

Western States Paving Co. v. Wash. State Dep't of Transp., 407 F.3d 983, 998 (9th Cir. 2005).

31. *See* *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 12 P.3d 1068, 1087 (Cal. 2000) ("The City's disparity study, at best, creates only an inference of discrimination against MBE/WBE subcontractors by prime contractors; it does not establish intentional acts by the City."); Clegg, *supra* note 9, at 976 ("A disparity is not necessarily evidence of discrimination, however, let alone proof.")

32. *See* A. Benjamin Spencer, *Circuits Split Re Whether States Must Show Independent Compelling Interest in Defending Disadvantaged Business Enterprise Program*, SPLIT CIRCUITS BLOG (Jan. 16, 2007), http://splitcircuits.blogspot.com/2007_01_01_archive.html.

33. *See, e.g.*, *GEOD Corp. v. N.J. Transit Corp.*, 678 F. Supp. 2d 276 (D.N.J. 2009) (denying the majority of both parties' cross-motions for summary judgment); *S. Fla. Chapter of the Associated Gen. Contractors v. Broward Cnty., Fla.*, 544 F.Supp. 2d 1336, 1341 (S.D. Fla. 2008) (choosing to adopt the analysis laid out by the Seventh Circuit in *Northern Contracting* and not the analysis laid out by the Ninth Circuit in *Western States Paving*).

34. In *GEOD Corp.*, the court stated,

Both Plaintiffs' and Defendants' arguments are based on an alleged Circuit split. Plaintiffs rely on *Western States Paving Co., Inc., v. Washington State Department of Transportation, et al.*, 407 F.3d 983 (9th Cir. 2005) for the proposition that an as-applied challenge to the constitutionality of a particular DBE program requires a demonstration by the recipient that the program is narrowly tailored. Conversely, Defendants rely primarily on *Northern Contracting Inc. v. State of Illinois, et al.*, 473 F.3d 715 (7th Cir. 2007) for the proposition that if a DBE program complies with TEA-21, it is narrowly tailored.

South Florida Chapter of the Associated General Contractors v. Broward County, Florida, the court issued an order on the specific issue of whether *Western States Paving* or *Northern Contracting* controlled the litigation unfolding in the Southern District of Florida.³⁵ The court in *South Florida* ultimately chose to adopt the rationale of the Seventh Circuit in *Northern Contracting* and not the rationale of the Ninth Circuit in *Western States Paving*.³⁶

The U.S. District Court for the District of New Jersey recently added fuel to the fire in the context of denying the parties' cross-motions for summary judgment in *GEOD Corp. v. New Jersey Transit Corp.* by selecting the third door and opining that a circuit split did not exist even though the litigants conceded this point.³⁷ In its opinion on the merits,

678 F.Supp. 2d at 282. In *South Florida*, the court stated:

The threshold legal issue presented in the Plaintiffs' Motion and Defendants' Response is, essentially, whether compliance with the federal regulations is all that is required of Defendant Broward County. The County contends that it is, relying on case law from the Seventh Circuit in support of its position. See *Northern Contracting v. Illinois*, 473 F.3d 715 (7th Cir. 2007). Plaintiffs disagree, and contend that the County must take additional steps beyond those explicitly provided for in the regulations to ensure the constitutionality of the program, as administered in the County. Plaintiffs rely on law from the Ninth Circuit in support of their position. See *Western States Paving Co. v. Washington State Dept. of Transp.*, 407 F.3d 983 (9th Cir. 2005). Because there is no case law on point in the Eleventh Circuit, the Court must consider each of these arguments and the case law in other circuits to determine the appropriate approach to take in the instant case.

544 F.Supp. 2d at 1338.

35. 544 F.Supp. 2d at 1338 ("Because there is no case law on point in the Eleventh Circuit, the Court must consider each of these arguments and the case law in other circuits to determine the appropriate approach to take in the instant case.").

36. *Id.* at 1341.

After much consideration of the relevant case law, and the arguments made by the parties, this Court agrees with the approach taken by the Seventh Circuit in *Milwaukee County* and *Northern Contracting*, and concludes that the appropriate factual inquiry in the instant case is whether or not Broward County has fully complied with the federal regulations in implementing its DBE program.

Id.

37. *GEOD Corp.*, 678 F.Supp. 2d at 282–83.

Although both parties assert a Circuit split, this Court views the various Circuits differing analyses as fact specific determinations which have lead to the parties distinguishing cases without any substantive difference in the application of law. Each case actually makes considerably the same analysis under different facts. The Third Circuit however, has not addressed this issue.

the court (having already decided that the “compelling interest” prong of strict scrutiny mandated under *Adarand* was met by the statute) limited its discussion to “whether NJ Transit’s DBE program is narrowly tailored . . . in accordance with ‘its grant of authority under federal law.’”³⁸ The court concluded that “following the *Northern Contracting, Inc. v. Illinois* line of cases, NJ Transit’s DBE program . . . [did] not exceed its federal authority.”³⁹

Of course, when one takes the wrong fork in the road, it should not come as a surprise when one arrives late to his or her destination, if he or she arrives at all. In view of the fact that the *GEOD* court had already decided that *Northern Contracting* controlled, its subsequent conclusions on this point are not particularly surprising because the standard announced in *Northern Contracting* is so deferential to the statute that it is questionable whether any aggrieved bidder may satisfy it.⁴⁰ It was surprising, however, that the court chose to opine that “even under the *Western States Paving Co., Inc. v. Washington State Department of Transportation* standard, the NJ Transit program remains constitutional.”⁴¹ As the court correctly noted, “[u]nder *Western States Paving*, a court must ‘undertake an as-applied inquiry into whether [the state’s] DBE program is narrowly tailored.’”⁴² After applying that standard, it concluded as it did because “NJ Transit did get complaints, i.e. anecdotal evidence, of the lack of opportunities for Asian firms.”⁴³

Here, the court’s analysis goes awry. Simply because Asian firms may have suffered discrimination in the past, and in this case, an Asian firm was awarded the contract sought by the white-male-owned contractor plaintiff, these two unrelated events do not justify the constitutionality of the DBE program on the whole nor has case law made any

Id.

38. *GEOD Corp. v. N.J. Transit Corp.*, No. 2:04-cv-2425 (SDW), 2010 U.S. Dist. LEXIS 111909, at *27 (D.N.J., Oct. 19, 2010) (quoting *Northern Contracting, Inc. v. Ill. Dep’t of Transp.*, 473 F.3d 715, 722 (7th Cir. 2007)); see also Fulton, *supra* note 18.

39. *GEOD Corp.*, 2010 U.S. Dist. LEXIS 111909, at *36.

40. *N. Contracting, Inc.*, 473 F.3d at 722.

41. *GEOD Corp.*, 2010 U.S. Dist. LEXIS 111909, at *36.

42. *Id.* at *37 (quoting *W. States Paving Co. v. Wash. State Dep’t of Transp.*, 407 F.3d 983, 997 (9th Cir. 2005)).

43. *Id.* at *38.

special distinction when the party awarded the contract sought by the plaintiff happens to have been a member of a class of individuals that has been found to have suffered discrimination.⁴⁴ This faux “relationship” does not satisfy the narrow tailoring required by the Ninth Circuit in *Western States Paving*. Quite to the contrary, these unrelated events, or “coincidences” for lack of a better word, in no way speak to the constitutionality of the DBE program on the whole and certainly do not justify the court’s failure to engage GEOD’s argument that NJ Transit’s “DBE program is constitutionally defective because it is not ‘narrowly tailored’ because it includes in the category of DBE’s to which a percentage of subcontracts must be awarded racial or ethnic groups as to which it has no evidence of past discrimination.”⁴⁵

Taken as a whole, these rulings are difficult to reconcile and reveal uncertainty in the judiciary’s determinations of whether to sustain constitutional challenges to race-preference programs when evidence of past discrimination in the local labor market cannot be produced by the governmental entity. That said, few would argue that the government should treat citizens differently simply because they reside in the Seventh or Ninth Circuits—even in the presence of evidence of past discrimination within the local labor market. If such a distinction between Illinois and Washington State citizens is said to exist, there is little doubt that “the central tenet of the Equal Protection Clause teeters on the brink of incoherence.”⁴⁶

V. PACIFIC LEGAL FOUNDATION’S WESTERN STATES PAVING PROJECT

A. Objectives

The Foundation takes the position that “[g]overnment cannot make us equal; it can only recognize, respect, and

44. The court’s conclusion also presumes that “anecdotal” evidence of discrimination is sufficient enough to satisfy the second prong of *Western States Paving*. *Id.* This question is also unresolved around the circuits.

45. *GEOD Corp.*, 2010 U.S. Dist. LEXIS 111909, at *37.

46. *Coal. for Econ. Equity v. Wilson*, 110 F.3d 1431, 1439 (9th Cir. 1997), *cert. denied*, 522 U.S. 963 (1997).

protect us as equal before the law.”⁴⁷ Members of the Foundation’s legal staff also believe in “the basic principle that the Fifth and Fourteenth Amendments to the Constitution protect *persons*, not groups.”⁴⁸ Therefore, to the extent that any benefits or burdens created by government are based on group identity, those benefits and burdens must be subject to the strictest possible scrutiny—whether the actor be at the federal, state, or local level.

Although PLF’s ultimate goal aims to abolish all government programs that grant preferential treatment to individuals on the basis of their race or sex, the specific goals for the *Western States Paving* Project can be divided into oversight, enforcement, and extension.

The Ninth Circuit decision in *Western States Paving* provides an excellent opportunity to enforce the clarified standard for agencies in the Ninth Circuit, particularly in view of the fact that USDOT has directed these agencies to administer race-neutral programs in the absence of evidence of past discrimination of the type described by the court.

B. Methodology

At the beginning of 2006, PLF began canvassing state departments of transportation (DOT) and public airport agencies throughout the Ninth Circuit to determine the degree of compliance with the Ninth Circuit’s opinion in *Western States Paving*.

In order to determine each state DOT’s compliance with its constitutional obligations, PLF asked four standard questions.⁴⁹ The first request asked that the DOT supply a copy of its DBE goals; the second request asked for copies of the supporting documents the DOT supplied to the USDOT to support its DBE goals; and the third request asked for a copy of the DOT’s current DBE program as approved and implemented.⁵⁰ A final question asked whether the DOT

47. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring).

48. *Id.* at 227 (majority opinion).

49. Letter from Russell C. Brooks, Managing Attorney, Pac. Legal Found., to Jackie Johnson, Equal Opportunity Dep’t, Phx. Sky Harbor International Airport (Mar. 10, 2006) (on file with author).

50. *Id.*

possessed a disparity study related to the DBE program in place.⁵¹

In order to determine each airport agency's compliance with its constitutional obligations, PLF asked three standard questions. The first question was "whether the agency is administering or will administer projects with federal transit funding that requires a DBE program."⁵² The second was "whether the agency used or intends to use race and sex-conscious means to fulfill required DBE goals."⁵³ The third question was "whether the Airports' DBE goal was supported by a disparity study, if the entity intended on using race and sex-conscious means."⁵⁴

When PLF became aware that an agency failed to act in compliance with the holding of *Western States Paving*, the Foundation sent the entity a cease and desist letter to remind the entity's administrator of its constitutional obligations.

C. Results

Despite the Ninth Circuit's clear prohibition against the establishment of race-conscious DBE contracting goals independent of adequate evidence of past discrimination, some public agencies within the Ninth Circuit continued to implement these unconstitutional methods. In February 2006, PLF sent public records act (PRA) requests to the nine state DOTs and the sixty-six public airports within the Ninth Circuit.⁵⁵ PLF sent a follow-up mailing to twenty-two of these public airports in August 2007 to obtain information from the airports that did not respond to the 2006 mailing. A particular highlight of the project from PLF's perspective is

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. Although the *Western States Paving* decision does not explicitly apply to the Federal Aviation Administration (FAA) or Federal Transit Administration (FTA) goals, the underlying reasoning remains consistent because, pursuant to 49 C.F.R. Part 26, state entities are obligated to provide the federal department with a DBE goal in order to obtain federal funding. See generally George LaNoue, *Setting Goals in the Federal Disadvantaged Business Enterprise Programs*, 17 GEO. MASON U. C.R. L.J. 423 (2007).

the fact that two DOTs⁵⁶ and eight airports,⁵⁷ which had illegally set race and sex-conscious DBE goals for 2006, subsequently adopted race-neutral DBE goals in 2007 after receiving PLF cease and desist letters.

1. Departments of Transportation

In March 2006, ten months after the decision in *Western States Paving*, the California DOT (Caltrans) website stated that it had still not decided whether or not to pursue solely race-neutral methods to achieve its DBE goals, despite its lack of a disparity study or evidence of past discrimination in the local public contracting industry. Based on this information, PLF sent Caltrans a cease and desist letter on March 20, 2006, insisting that Caltrans cease implementing race-conscious goals in accordance with the decision in *Western States Paving*. The receipt of PLF's cease and desist letter caused Caltrans to adopt race-neutral DBE goals for the 2006–2007 year. On June 29, 2007, Caltrans released the findings of a disparity study it had contracted for with BBC Consulting, and in August 2007, Caltrans submitted its 2007–2008 DBE goals to USDOT. Again, these goals included the statement that Caltrans intended to achieve a 13.5% DBE goal in equal proportions of race-conscious and race-neutral goals.

Subsequently, the Washington DOT adopted an 18.77% DBE goal for the 2006–2007 year. Of this 18.77% goal, the Washington DOT intended to achieve 4.07% of this goal through race-neutral methods and 14.7% through race-conscious methods. The Washington DOT's disparity study was completed on October 20, 2005.

In 2007, Caltrans and the Washington DOT continued to maintain race-conscious goals. Both entities also possessed disparity studies. The Montana DOT failed to respond to PLF's public records act requests. The other six DOTs

56. Departments of Transportation that went "race-neutral" after receiving PLF cease and desist letters consist of the Arizona Department of Transportation and California Department of Transportation.

57. Airports that went "race-neutral" after receiving PLF cease and desist letters consist of the Juneau International Airport (AK), San Diego Regional Airport (CA), Santa Barbara Municipal Airport (CA), Humboldt County Regional Airport (CA), Stockton Metro Airport (CA), Redding Municipal Airport (CA), San Francisco International Airport (CA), and Great Falls International Airport (MT).

within the Ninth Circuit adopted race-neutral DBE goals for the 2006–2007 fiscal year.⁵⁸ For two years subsequent to these initial PRA requests, “Caltrans was unsuccessful in getting federal permission to reinstate race-based quotas. But the federal government now has complied. In letters on February 25, 2009, and April 2, 2009, the U.S. Department of Transportation (Federal Highway Administration) approved ‘race conscious means’ in ‘implementation of [Caltrans’] FY 2009 Disadvantage[d] Business Enterprise (DBE) Program.’”⁵⁹ In response to Caltrans’ repeated violations of Article I, § 31(a) of the California Constitution, which states that “[t]he State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting,” PLF filed suit on June 11, 2009, to vindicate the rights of aggrieved bidders.⁶⁰ While Article I, §31(e) of the California Constitution does provide an exemption for using race when it is required to maintain federal funding, PLF maintains that the use of race is not necessary to maintain federal funding in this instance, and thus, the state agency’s actions are in violation of the California Constitution.⁶¹

2. Public Airport Agencies

Of the sixty-six public airport agencies contacted by PLF in February 2006, forty-seven had adhered to their constitutionally mandated obligations and stopped setting race- and sex-conscious DBE goals as of November 2007,⁶²

58. The entities that adopted race-neutral DBE goals for 2006–2007 were the Alaska DOT, Arizona DOT, Hawaii DOT, Idaho DOT, Nevada DOT, and Oregon DOT.

59. *Caltran’s Quotas are Unconstitutional*, PACIFIC LEGAL FOUNDATION, <http://community.pacificlegal.org/Page.aspx?pid=922> (last visited Oct. 29, 2010).

60. Complaint for Declaratory and Injunctive Relief at 9, *Associated Gen. Contractors of Am., San Diego Chapter, Inc., v. California Dep’t of Transp.*, No. 09-01622, 2009 WL 5206722 (E.D. Cal. June 11, 2009).

61. See generally Stephen R. McCutcheon, Jr. & Travis J. Lindsey, *The Last Refuge of Official Discrimination: The Federal Funding Exception to California’s Proposition 209*, 44 SANTA CLARA L. REV. 457 (2004).

62. Eleven public airports have failed to respond to both sets of our requests and will require additional follow-up, while one airport, Friedman Memorial Airport in Idaho, has told us that we could visit to review the documents but that they were not obligated under the law to send them to us in the mail. Additionally,

while one airport was clearly in violation of *Western States Paving*.⁶³

The City of Phoenix's Sky Harbor International Airport presented an interesting question as to whether it was in violation of *Western States Paving*. Sky Harbor International Airport responded to PLF's request for public records on October 2, 2007. The responses submitted indicated that the airport planned to achieve its 2006–2007 DBE goals by implementing race-conscious methods.⁶⁴ Specifically, the Airport set an overall DBE goal of 12.93% to be achieved through both 4.79% race-neutral methods and 8.14% race-conscious methods.⁶⁵ The City of Phoenix also intended to achieve race-conscious goals to meet DBE goals in its airport concession, department of transportation, and light rail contracts.⁶⁶ However, unlike the Monterey Peninsula Airport, the City of Phoenix had conducted a disparity study.⁶⁷ Finally, PLF attorneys sought clarification concerning the programs being implemented by two airports.

VI. THE AFTERMATH AND THE FRONTIER

Ultimately, PLF intends to extend the requirement that governmental agencies not pursue race- or sex-conscious efforts to meet federally mandated DBE goals to all state and local agencies that accept federal funds and then to all federal agencies. However, with respect to the immediate

three entities—Lake Havasu City Airport (AZ), Page Municipal Airport (AZ), and William Fairchild International Airport/Port of Port Angeles (WA)—have indicated that they did not plan to implement any projects in 2007 and therefore have no need to set DBE goals to obtain federal funding.

63. The airport in violation of the holding in *Western States Paving* was Monterey Peninsula Airport (CA). Monterey Peninsula Airport's "Overall Goal and Methodology for 2006–2007" form, obtained by PLF on October 9, 2007, indicated that the airport had established a 1% overall DBE goal for 2006–2007. The airport intended to achieve this goal through 0.75% race-neutral methods and through 0.25% race-conscious methods. A letter from the airport's manager, dated September 27, 2007, indicated that the airport did not possess a disparity study.

64. Letter from Carole Coles Henry, Dir., City of Phx. Equal Rights Dep't, to Lisa Wormington, Ariz. Civil Rights Adm'r, Ariz. Dep't of Transp. (July 28, 2006) (on file with author).

65. *Id.*

66. *Id.*

67. CITY OF PHOENIX, MINORITY-, WOMEN-OWNED, AND SMALL BUSINESS ENTERPRISE PROGRAM UPDATE STUDY (2005), available at <http://phoenix.gov/EOD/mgtes.pdf>.

implications of this study, two factors must be considered prior to the commencement of litigation.

The first is the unfortunate reality that USDOT's guidelines fail to provide a constitutionally adequate enforcement mechanism for the implementation of federal DBE programs. The second consideration follows from the contrasts between Washington State's DBE program and the DBE programs approved by the state of Illinois in the Seventh Circuit decision of *Northern Contracting* and the states of Minnesota and Nebraska in the Eighth Circuit decision of *Sherbrooke Turf*. Whereas Washington State did not rely on any evidence of past or present discrimination prior to establishing race- and sex-conscious goals, Illinois, Minnesota, and Nebraska relied on "statistical analyses of the availability and capacity of DBEs in their local markets"⁶⁸ prior to setting race- and sex-conscious goals. While disparity studies are one of many tools that may be consulted in the attempt to pinpoint specific evidence of past discrimination, disparity studies alone do not definitively demonstrate localized evidence of past discrimination.⁶⁹ And *Western States Paving* makes clear that where racially discriminatory measures are used to remedy the effects of past or present discrimination, the measure *must* be predicated on actual evidence of the effects of past discrimination.⁷⁰

68. *Western States Paving Co., Inc. v. Wash. State Dep't of Transp.*, 407 F.3d 983, 997 (9th Cir. 2005).

69. See Spencer, *supra* note 32.

70. In *Western States Paving*, the Ninth Circuit stated,

As the United States correctly observed in its brief and during oral argument, it cannot be said that TEA-21 is a narrowly tailored remedial measure unless its application is limited to those States in which the effects of discrimination are actually present. See Dist. Ct. Oral Argument Tr. 48 ("The state would have to have evidence of past or current effects of discrimination to use race-conscious goals.").

407 F.3d at 998. The court continued,

The record is therefore devoid of any evidence suggesting that minorities currently suffer or have ever suffered— discrimination in the Washington transportation contracting industry. We must therefore conclude that Washington's application of TEA-21 conflicts with the guarantees of equal protection because the State's DBE program is not narrowly tailored to further Congress's remedial objective.

Id. at 1002.

VII. CONCLUSION

Undoubtedly, the decision in *Western States Paving* stands as a prominent victory in the war against government imposition of race- and sex-based preferences. However, the true measure of victory attributable to *Western States Paving* only begins with the court's decision. As this Article has described, obtaining a favorable judicial decision is often only the first step in realizing a public-interest legal organization's strategic goals. For a public-interest legal organization, a true victory can only be claimed when a judicial decree requires decision makers to change the way they effectuate public policy. This scenario reflects the type of victory achieved by Pacific Legal Foundation's *Western States Paving* Project.

While the *Western States Paving* Project highlights PLF's interest in federal court challenges to end race- and sex-based preferences in public contracting, PLF has been equally active in direct representation challenges to race- and sex-based preference programs in California state courts.⁷¹

Admittedly, the best course of action would be for all federal legislation to reflect the view of the U.S. Supreme Court's recent statement that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."⁷² Indeed, "[i]t is very unlikely that, in 2009, [or today] the only way to end race discrimination in contracting is through race discrimination in contracting."⁷³ Unfortunately, "[w]ith President Obama's term nearing its half-way point, the record is inconclusive as to the impact that his election has had on the enforcement of anti-discrimination laws."⁷⁴ Consequently, "what is needed now

71. This past July, in *Connerly v. Schwarzenegger*, Case No. 2010-80000412 (July 2, 2010), available at <http://plf.typepad.com/plf/2010/07/victory-in-connerly-v-schwarzenegger.doc>, the Superior Court of California struck down four provisions of California's State Public Contract Code "to the extent that they contain[ed] provisions requiring state agencies to apply minority business enterprise and women business enterprise participation goals in awarding state contracts." *Id.*

72. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007).

73. Clegg, *supra* note 9, at 975.

74. Joel W. Friedman, *The Impact of the Obama Presidency on Civil Rights Enforcement in the United States* (Tulane Public Law Research Paper No. 10-03, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1691023.

is not much different from what was needed when the Bush Administration began . . . namely, a decision holding that, although remedying discrimination (the only governmental interest advanced for preferences in contracting) is a compelling interest, it is now basically impossible for the use of preferences to be narrowly tailored.”⁷⁵ Until that case materializes, it is clear that the decision in *Western States Paving*—and the Foundation’s oversight and enforcement—have brought federal law one step closer to the end of all government-sanctioned race- and sex-based preference programs.

75. Clegg, *supra* note 9.