Transit Cooperative Research Program
Sponsored by the Federal Transit Administration

LEGAL RESEARCH DIGEST

June 1997--Number 7

Subject Areas: IA Planning and Administration and IC Transportation Law

The Impact of Civil Rights Litigation Under Title VI and Related Laws on Transit Decision Making

This report was prepared under TCRP Project J-5, "Legal Aspects of Transit and Intermodal Transportation Programs," for which the Transportation Research Board is the agency coordinating the research. The report was prepared by Sandra Van De Walle. James B. McDaniel, TRB Counsel for Legal Research Projects, was the principal investigator and content editor.

THE PROBLEM AND ITS SOLUTION

The nation's transit agencies need to have access to a program that can provide authoritatively researched, specific, limited-scope studies of legal issues and problems having national significance and application to their businesses. The TCRP Project J5 is designed to provide insight into the operating practices and legal elements of specific problems in transportation agencies.

The intermodal approach to surface transportation requires a partnership between transit and other transportation modes. To make the partnership work well, attorneys for each mode need to be familiar with the legal framework and processes of the other modes. Research studies in areas of common concern will be needed to determine what adaptations are necessary to carry on successful intermodal programs.

Transit attorneys have noted that they particularly need information in several areas of transportation law, including

- Environmental standards and requirements;
- Construction and procurement contract procedures and administration;
- Civil rights and labor standards; and
- Tort liability, risk management, and system safety.

In other areas of the law, transit programs may involve legal problems and issues that are not shared with other modes; as, for example, compliance with transit-equipment and operations guidelines, FTA financing initiatives, private sector programs, and labor or environmental standards relating to transit operations. Emphasis is placed on research of current importance and applicability to transit and intermodal operations and programs.

APPLICATIONS

Transit agencies must comply with a variety of civil rights requirements. Recent litigation and Federal grant requirements, resulting from court decisions, have brought to the forefront the extent of potential exposure that transit agencies open themselves up to as they make operational decisions about the level, cost determination, or initiation of services in their communities. They must also deal with these concerns when considering contracting practices and procedures.

This research identifies and analyzes civil rights legislation that impacts mass transportation operations in contracting and providing transit services, and the process that the courts and federal agencies use to determine the appropriateness of the operational and programmatic decisions made by operators.

This report is intended to provide guidance and should be useful to transit attorneys, administrators, planners, administrative officers, contracting officials, board members, and others interested in either affirmative action or equality in the provision of transit services.

TRANSPORTATION RESEARCH BOARD
NATIONAL RESEARCH COUNCIL

CONTENTS

I. INTRODUCTION 3

II. AFFIRMATIVE ACTION PROGRAMS FOR DBES 3

A. Adarand-U.S. Department of Justice 3

B. DBE Program-Subcontractor Compensation Clause 5

C. *Fullilove to Croson to Adarand--1980* to 1995 6

D. Post-Adarand Decisions-1995 and 1996 8

E. Executive Actions and Findings of Discrimination 11

F. Defending Constitutional Challenges to DBE Programs and Suits for Damages 14

III. OBLIGATION TO PROVIDE EQUALITY OF SERVICE TO MINORITY AND NONMINORITY PASSENGERS 16

A. Department of Transportation Regulations-"Non-Discrimination in Federally-Assisted Programs of the Department of Transportation-Effectuation of Title VI of the Civil Rights Act of 1964"[185] 16

B. Procedures for Determining Whether Grantees Comply with Obligation Not To Discriminate 17

C. Equality in the Provision of Transit Services-Class Actions 17

IV. CONCLUSION 20

A. Affirmative Action Programs for DBEs 20

B. Equality of Service 21

ENDNOTES 22

The Impact of Civil Rights Litigation Under Title VI and Related Laws on Transit Decision Making

By Sandra Van de Walle
New York, New York

I. INTRODUCTION

The United States Department of Transportation (DOT) plays a major role in the development of minority- and women-owned firms through direct procurements and by grant obligations assumed by transit grantees.[1] The DOT also plays a major role in ensuring equality in the provision of transit service to minority and nonminority passengers by means of the obligations assumed by its grant recipients.[2]

Section II of this article discusses the affirmative action obligations to small business firms owned and operated by individuals who have been found to be socially and economically disadvantaged (disadvantaged business enterprises, herein called DBEs) assumed under DOT grants to operators of rail and bus systems. There is a rebuttable presumption that individuals in the following groups are socially and economically disadvantaged: women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, and Asian-Indian Americans.[3] In addition, individuals who are not members of one of the aforementioned groups may be determined, on a case-by-case basis, to be socially and economically disadvantaged.[4] Section II will also discuss the impact that the recent decision of the United States Supreme Court in *Adarand Constructors, Inc. v. Pena*[5] has on affirmative action programs for DBEs developed and implemented by transit grantees.

Section III of this article discusses the issues surrounding the provision of rail and bus services to minority and nonminority passengers, including recent litigation that has called into question whether such services are being provided in accordance with the DOT grants, applicable regulations and legislation, and the United States Constitution.

There are more than 450 recipients of DOT transit grants who operate rail and/or bus systems.[6] These systems are found throughout the United States and range from individual bus systems in small localities to combined rail and bus systems operated by public agencies with several subsidiaries, such as in New York City. A common factor is that as a condition of receiving a DOT grant, each of these transit grantees agrees to be governed in the administration of the project to which the grant applies by applicable federal laws, regulations, policies, and related administrative practices.[7] With respect to civil rights, the transit grantees are required to comply both with current DOT regulations on the participation of DBEs in DOT-assisted programs and with DOT regulations respecting nondiscrimination in federally assisted programs and effectuation of Title VI of the Civil Rights Act of 1964.[8]

The regulations applicable to DBEs seek to eliminate discrimination and its effects and require affirmative action "to ensure nondiscriminatory results and practices in the future, and to involve minority business enterprises fully in contracts and programs funded by the Department."[9] The regulations relating to equality in the provision of transit service bar actions that discriminate against minorities and require "affirmative action to remove or overcome the effects of the prior discriminating practice or usage" or to ensure that persons are not excluded from benefits on the basis of race, color, or national origin. [10]

Although there has been very little litigation relating to the obligation of transit grantees to provide equality of services to minority and nonminority passengers, there has been a significant amount of litigation relating to the obligation of transit grantees to develop and maintain programs to facilitate the participation by DBEs. Although the recent Supreme Court decision in *Adarand* did not specifically address the obligations of transit grantees with respect to DBEs, the broadness of its holding left no doubt that it would ultimately affect such obligations. In addition, the response to *Adarand* by the President of the United States, the Department of Justice, and the DOT confirm that this concern is not unfounded.[11] This article discusses these two developing areas of the law and will be useful to attorneys and transit administrators in making decisions on the development and implementation of DBE programs and on the provision of equal transit service to minority and nonminority passengers. Moreover, this article will also be of assistance in devising strategies to avoid litigation and in defending any litigation that may ensue.

II. AFFIRMATIVE ACTION PROGRAMS FOR DBES

A. *Adarand*--U.S. Department of Justice

In order to assess the responsibilities of, and risks to, a transit grantee in connection with DBE programs in context, it is necessary to first address the recent decision in *Adarand*, in which the Supreme Court extended strict judicial scrutiny to federal affirmative action programs that use racial or ethnic criteria as a basis for decision making. Strict judicial scrutiny involves the application of a two-pronged test: the governmental entity using race or ethnic criteria as a basis for decision making must demonstrate that such usage is (a) narrowly tailored to serve (b) a compelling governmental interest. Prior to its decision in *Adarand*, the Supreme Court in *City of Richmond v. J. A. Croson Co.*[12] held that strict judicial scrutiny applied to state and local affirmative action programs that use racial or ethnic criteria as a basis for decision making. It is now clear that strict judicial scrutiny is applicable to all levels of government-federal, state, and local. What is not clear is how strict judicial scrutiny will be applied in a federal context. *Adarand* is the latest pronouncement by the Supreme Court on the standard by which the constitutionality of programs aimed at ensuring participation by minority-owned firms is to be judged.

In 1989, the Central Federal Lands Highway Division, which is part of DOT, awarded a prime contract for highway construction to Mountain Gravel & Construction Co. The contract provided that Mountain Gravel would receive additional compensation if it hired subcontractors certified as small businesses controlled by "socially and economically disadvantaged individuals."[13] Mountain Gravel awarded a subcontract for guardrail work to a firm so certified, Gonzales Construction Co., notwithstanding that Adarand, a noncertified subcontractor, had submitted a lower bid. As a result, Mountain Gravel became entitled to a bonus of approximately $10,000. Adarand, the petitioner, filed suit claiming that the race-based presumptions used in this subcontractor additional compensation clause "violates the equal protection component of the Fifth Amendment's Due Process Clause."[14] The subcontractor clause stated that "[t]he contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans and other minorities, or any other individual found to be disadvantaged by the (Small Business) Administration pursuant to section 8(a) of the Small Business Act."[15] The

United States District Court granted summary judgment in favor of the federal government, holding that the clause providing for additional compensation was related to achieving the government's important objective of remedying discrimination.[16]

On appeal, the district court's ruling was affirmed by the United States Court of Appeals for the Tenth Circuit.[17] The Tenth Circuit's decision was based on its interpretation that the Supreme Court decision in *Fullilove v. Klutznzck*[18] adopted "a lenient standard, resembling intermediate scrutiny,"[19] in assessing the constitutionality of federal race-based action authorized by Congress. The Tenth Circuit also relied on the later decision of the Supreme Court in *Metro Broadcasting, Inc. u. FCC,*[20] which stated with respect to its earlier holding in *Croson* that strict judicial scrutiny is only applicable to race-conscious classifications of state and local government and that "... much of the language and reasoning in *Croson* reaffirmed the lesson of *Fullilove* that race-conscious classifications adopted by Congress to address racial and ethnic discrimination are subject to a different standard than such classifications prescribed by state and local governments."[21]

In *Adarand,* the Supreme Court recognized that its decision to apply essentially the same standard of review to race-conscious classifications adopted by Congress as it applied to state and local government "alters the playing field in some important respects." For this reason, it remanded the case to the lower courts for further consideration in light of the principles announced in *Adarand.*[22] The Tenth Circuit, following *Metro Broadcasting* and *Fullilove,* analyzed the case by applying a judicial standard of intermediate scrutiny rather than the strict judicial scrutiny now mandated by the Supreme Court. Thus, while the Tenth Circuit found the challenged statutes and regulations to be narrowly tailored to achieve a "significant governmental purpose of providing subcontracting opportunities for small disadvantaged business enterprises," it did not decide whether the interests served by the subcontractor compensation clauses were compelling.[23]

The Supreme Court in *Adarand* also found that the Tenth Circuit addressed the question of narrow tailoring in terms of intermediate scrutiny rather than strict scrutiny. In *Adarand,* the Supreme Court enunciated broad principles as to the meaning of narrow tailoring in terms of strict scrutiny, stating that it wished "to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'"[24] The Court stated:

> The question whether any of the ways in which the Government uses subcontractor compensation clauses can survive strict scrutiny, and any relevant distinctions [with respect to definitions of which socially disadvantaged individuals qualify as economically disadvantaged] such as these may have to that question, should be addressed in the first instance by the lower courts.[25]

Although *Adarand* involved direct federal procurement, the Supreme Court made it clear that its rationale applied to all federal programs, including federally assisted contracts let by transit grantees, stating, "We hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests."[26] If any doubt lingered, the Court also stated that "[t]o the extent that *Metro Broadcasting* is inconsistent with that holding, it is overruled."[27]

The Supreme Court in *Adarand* provided limited guidance as to the meaning of narrowly tailored in a strict scrutiny context. Two factors that clearly emerged, however, are the following:

1. Did the governmental entity give any consideration to the use of race-neutral means to increase minority participation in governmental contracting?

2. Is the program limited in time so that it will not last longer than the discriminatory effects it is designed to eliminate?

Additional guidance as to how "narrowly tailored" would be applied can be garnered both from *Croson* and from the lower court decisions discussed in this article. To provide guidance as to the application of narrow tailoring in connection with direct federal procurement, the United States Department of Justice (Justice Department) reviewed and analyzed numerous court decisions. As a result of such analysis, six factors were set forth by the Justice Department as giving context to the narrow-tailoring prong of strict scrutiny. In addition to the above two factors, the following were included:

3. The scope of the program and whether it is flexible.

4. Whether race is relied upon as the sole factor in eligibility, or whether it is used as one factor in the eligibility determination.

5. Whether any numerical target is reasonably related to the number of qualified minorities in the applicable pool.

6. The extent of the burden imposed on nonbeneficiaries of the program.

Moreover, the Justice Department expressed the view that all six of these factors are not "relevant in every circumstance and courts generally consider a strong showing with respect to most of the factors to be sufficient."[28]

The other prong of strict scrutiny is the need to serve a compelling government interest. In *Adarand,* the Supreme Court recognized that the "unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." The Supreme Court, after noting that "[a]s recently as 1987, every Justice on this court agreed that the Alabama Department of Public Safety's 'pervasive, systematic, and obstinate discriminatory conduct' justified a narrowly tailored race-based remedy," stated that when "race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test."[29] Ultimately, the presence of a compelling interest becomes a matter of evidence. With respect to procurement, the threshold question becomes: Can the government show with some degree of specificity how the practice and lingering effects of racial discrimination have diminished contracting opportunities for members of racial minority groups? In the case of federal procurement and federally assisted procurement, a determination is required as to whether the action of Congress authorizing affirmative action programs is entitled to deference from the courts. If so, a further question arises as to the extent of such deference given the express constitutional power of Congress under Section 5 of the Fourteenth Amendment, which provides, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[30]

Section 1 of the Fourteenth Amendment, one of the articles Congress is empowered to enforce, provides:

> No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[31]

These issues were discussed by Justice Stevens in his dissenting opinion in *Adarand,* in which Justice Ginsburg concurred. This dissent asserts that the

institutional competence of Congress and its constitutional authority to overcome historic racial subjugation gave it more power than the States to identify and redress racial discrimination.[32] Justice Stevens expressed the view that the majority was now granting Congress and the States equal deference and rejecting prior precedents in *Metro Broadcasting* and *Fullilove.* These issues were explicitly left open in the plurality opinion written by Justice O'Connor, which stated that "[w]e need not, and do not, address these differences today."[33] In addition, Justice O'Connor, after noting that various members of the Supreme Court have taken different views of the authority of Congress to deal with racial discrimination and the extent to which the courts should defer to the exercise of that authority, states that, "Justice Stevens' suggestion that any Member of this Court has repudiated in this case his or her previously expressed views on the subject, *post*, at 2123-2125, 2127 is incorrect."[34]

Although the issue of the deference courts should give to the determinations of Congress remains open, with respect to direct federal contracts, the Justice Department has taken "as a constitutionally justified premise that affirmative action in federal procurement is necessary, and that the federal government has a compelling interest to act on that basis in the award of federal contracts."[35] From a review of the preliminary survey of evidence that the Justice Department relied upon to establish this compelling interest, it appears that such evidence, when supplemented with other evidence related to federally assisted contracts, will show a similar constitutionally justified premise that a compelling interest exists in the federal government to establish affirmative action programs for DBEs in federally assisted procurement programs.[36]

Assuming a compelling interest exists in the federal government to establish affirmative action programs for DBEs in federally assisted procurement programs of transit grantees, narrow tailoring must be applied to the DBE programs developed and implemented by transit grantees under their grant obligations. These DBE programs are summarized below and are compared with the subcontractor compensation provision, which was at issue in *Adarand.*

B. DBE Program-Subcontractor Compensation Clause

A transit grantee who lets a federally assisted contract must implement a DBE affirmative action program[37] and submit an overall goal for this program to the appropriate Federal Transportation Administrator for approval.[38] DBEs are small business firms that are at least 51 percent owned by one or more socially and economically disadvantaged individuals.[39] A "small business concern" for DBE purposes has the same meaning as under the Small Business Act, except that under Section 1003(b)(2)(A) of the Intermodal Surface Transportation and Efficiency Act of 1991, it does not include a firm "which has average annual gross receipts over the preceding 3 fiscal years in excess of $15,370,00. as adjusted by the Secretary for inflation."[40] The regulations require that the firm be controlled by one or more of the disadvantaged individuals.[41] There is a rebuttable presumption that individuals in the following groups are socially and economically disadvantaged; women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans and Asian-Indian Americans.[42] On a case-by-case basis, individuals who are not members of these groups may be determined by the Small Business Administration to be socially and economically disadvantaged.[43]

A goal of at least 10 percent DBE participation in DOT's highway, mass transit, and airport financial assistance programs is required.[44] A lesser goal will only be approved if information provided by the transit grant recipient demonstrates to the Administrator that the recipient is making all appropriate efforts to increase DBE participation to 10 percent and, notwithstanding such efforts, the lesser goal is reasonable.[45] The regulations are silent on the subject of higher goals, but some transit recipients do adopt higher goals. For example, in January 1996, the New York Metropolitan Transit Authority adopted a goal of 20 percent.[46]

In addition to establishing an overall goal, the recipient must establish specific contract goals based on the known availability of qualified DBEs.[47] Goals need not be established for every contract.[48] However, each contract that contains a goal must provide for the submission of detailed information concerning the extent and nature of the proposed DBE participation prior to the contract award.[49]

If the apparent successful competitor does not meet the contract goal, the recipient must decide if "good faith efforts"[50] to meet the goal were utilized and may only make the award if it determines that the efforts were those that "a competitor actively and aggressively seeking to meet the goals would make."[51] The key to whether the program is narrowly tailored may be in the meaning of "good faith efforts." Although DOT has not defined this term, the regulations contain a list, which is neither exhaustive nor exclusive, that illustrates the type of action a contractor is expected to take to demonstrate that "good faith efforts" were utilized.[52] The regulations do treat the issue of DBE qualifications. They caution the contractor that, in determining whether the contractor negotiated in good faith with DBEs, recipients may consider whether the contractor rejected DBEs "as unqualified without sound reason based on a thorough investigation of their capabilities."[53] The DOT has also issued a Notice of Proposed Rule Making (NPRM),[54] proposing that compliance with DBE requirements always be a matter of responsiveness and that extra costs involved with finding and using DBEs not be an adequate reason for failing to meet a goal. This would address any concern of contractors that their bids would be deemed nonresponsive if they fail to meet the DBE goal, even though the goal could only be met by paying a premium to a DBE subcontractor. Unfortunately, the revisions and clarifications proposed in this NPRM have not yet been issued.

It is appropriate, however, to note that, unlike *Adarand*, where the contractor received a bonus for awarding a subcontract to a DBE at a higher price, there is no bonus paid to, or other financial advantage gained by, a contractor who awards a subcontract to a DBE at a higher price. If the contractor is awarded the contract, the contractor would be entitled to receive the same compensation whether or not he meets the DBE goal. Moreover, if the contractor establishes that he does not have DBE participation because such participation could only be obtained at a higher price, particularly if the higher price could not be attributed to the effects of discrimination, he is arguably entitled to the contract award.[55] Whether as a practical matter a contractor would wish to risk losing the contract on which it had bid by taking this position or would deem it advisable to ensure DBE participation by paying a higher price to the DBE subcontractor than a non-DBE competitor is a separate issue.

The DBE program that DOT requires of transit recipients is developed in large part by the recipient, subject to the criteria set forth by DOT and, in certain respects, to DOT approval. Thus, it is the recipient that establishes overall goals, which are then submitted to DOT[56] for approval,[57] together with the methodology used in establishing the goals;[58] it is the recipient that reviews its proposed contracts to identify those that have the greatest potential for DBE subcontracting;[59] and it is the recipient that determines which specific prime contract has subcontracting possibilities and establishes a contract goal,[60] which the proposer must meet or demonstrate it could not meet despite its "good faith efforts."[61] Because

the DBE program is developed and administered by the transit grant recipient, it is essential that the recipient be familiar with the court decisions bearing on what constitutes a compelling government interest, how the courts have viewed specific race-based programs, and whether such programs have been found to be narrowly tailored to serve a compelling government interest. These cases can be divided into two categories: *Fullilove* to *Croson* to *Adarand;* and the cases following *Adarand.*

C. Fullilove to *Croson* to *Adarand*--1980 to 1995

The 15-year period from *Fullilove* to *Adarand* saw a dramatic increase in the number of minority- and women-owned firms participating in federal, state, and local procurement. The increase in participation of these firms was not uniform because many state and local jurisdictions halted or suspended their race-based programs after the 1989 Supreme Court decision in *Croson.*[62] *Croson* applied strict judicial scrutiny to the City of Richmond race-based program and found that Richmond failed to demonstrate that its program was narrowly tailored to serve a compelling government interest, rendering the program unconstitutional.

In response to *Croson,* New York was among the jurisdictions suspending affirmative action programs. Accordingly, in a letter dated August 10, 1990, the Office of the Attorney General in New York advised the United States District Court Judge hearing *Harrison and Burrowes Bridge Constructors, Inc. v. Cuomo,*[63] that notwithstanding recently promulgated regulations mandating goals for minority-and women-owned firms, "the States will not enforce mandatory goals for M/WBE [minority-/women-owned business enterprise] participation when awarding state funded contracts until such time as...there exists a factual predicate adequate under applicable law to support the implementation of a group-specific program."[64] Many attorneys at the time were of the view that specific findings of discrimination were not required to support federally mandated racial preference programs, and such programs were continued in New York during the period that state programs were suspended.

Now that the Supreme Court has extended the strict judicial scrutiny standard to federal affirmative action programs it is essential that transit grantees become aware of the importance strict scrutiny will have on DBE programs. This article therefore addresses the *post-Croson* cases involving state and local programs to ascertain the applicability of the principles enunciated in these cases to DBE programs developed by transit grant recipients. Although the DBE program may also serve a compelling interest of the transit grantee, since the program is mandated by the DOT, the principal compelling government interest to be served is that of the United States.

On the other hand, since the DBE program is developed by the transit recipients, subject to the criteria and approval of DOT, it appears to be the responsibility of the recipient to ensure that the program is narrowly tailored to serve the compelling interest of the United States government to increase the participation of DBEs in federally assisted procurement. This approach is consistent with that taken by the Justice Department with respect to federal contracts since, as noted above, it "takes as a constitutionally justified premise that affirmative action in federal procurement is necessary, and that the federal government has a compelling interest to act on that basis in the award of federal contracts."[65] Following this conclusion, the Justice Department set forth the structure it developed for the federal departments and agencies to follow in determining how to achieve the remedial goals Congress has established. This structure was designed to ensure compliance with the constitutional standards established in *Adarand* and, in particular, with the requirements respecting narrow tailoring. Therefore, the following analysis focuses on narrow tailoring.

The Supreme Court in the *Croson* decision first applied strict scrutiny to a race-conscious measure of local government to remedy the effects of past discrimination. This decision is therefore the starting point for determining whether a program is narrowly tailored. The Supreme Court rejected the "findings" relied on by the lower courts to sustain the minority-owned business enterprise (MBE) program of the City of Richmond and emphasized that "proper findings" of past discrimination would be necessary to define the scope of the injury to the individuals discriminated against and to permit this injury to be addressed by a narrowly tailored remedy. Findings serve the purpose of both (a) ascertaining whether there is a problem sufficient to provide a compelling interest in the government to remedy and (b) permitting the remedy to be constructed in a manner that will correct the identified problem. In view of the legislative history of the evidence available to Congress when it enacted race-based classifications and the additional evidence gathered by state and local governments since *Croson,* it is reasonable to conclude that additional findings are not required to establish that the federal government has a compelling interest to mandate race classifications in the form of DBE programs.

Additional findings, however, appear to be required to satisfy the narrowly tailored prong of a strict scrutiny analysis. These findings might be quite limited, depending on the particular facts. For example, in *Croson* the Supreme Court observed that the City of Richmond apparently had not considered any race-neutral means to increase minority business participation in city contracting by overcoming the barriers to minority participation (such as lack of capital or inability to meet bonding requirements). The Court stated that this was one of the two observations it was making in support of its conclusion that "it is almost impossible to assess whether the Richmond Plan is narrowly tailored to remedy prior discrimination since it is not linked to identified discrimination in any way."[66] A transit grantee who has utilized race-neutral measures, such as eliminating or waiving bonding requirements or providing for biweekly payments or advances, and still has not achieved appreciable minority participation could point to these measures to demonstrate that race-conscious remedies were required. If race-neutral measures have not been utilized, the transit grantee should adopt them when it promulgates its DBE program or amend its existing DBE program to include them. This is consistent with DOT regulations that envision that the transit grantees' DBE program will contain certain components that are either race-neutral or almost so in the sense that no preference in the form of a contract award is created. These include arranging the bid dates, quantities, specifications, and delivery schedules to facilitate DBE participation and providing assistance to DBEs in overcoming barriers to obtaining bonding, financing, or technical assistance.[67]

In a *post-Croson* decision, the district court in *Coral Construction Co. v. King County* upheld most of the elements of the M/WBE program in King County, Washington. The district court took note of the county's training sessions for small businesses, finding that the county "considered race-neutral alternatives, and adopted some of them, but still found evidence of ongoing effects of past discrimination."[68] In its affirmance, the Ninth Circuit stated that while "strict scrutiny requires serious good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every possible such alternative."[69]

Subsequently, in *Concrete General, Inc. v. Washington Suburban Sanitary Comm'n.,* a district court in Maryland applying a similar approach to a different

set of facts struck down a minority set-aside plan established by the Washington Suburban Sanitary Commission. The court faulted the agency for not considering the use of race-neutral means to increase participation by minority-owned businesses in city contracting before resorting to the more drastic alternative of enacting a minority business set-aside.[70]

The Supreme Court observed in *Croson,* with respect to the "almost impossible" nature of assessing whether the Richmond Plan was narrowly tailored, that the 30 percent quota could not be tailored to any goal except racial balancing since it rested on the unrealistic assumption that minorities would "choose a particular trade in lockstep proportion to their representation in the local population."[71] The Supreme Court held that the numerical figure used in a racial preference must bear a relationship to the pool of qualified minorities. Since transit grantees establish their own overall DBE goals, subject to DOT approval, if this goal is above the 10 percent mandated by Congress for highway, mass transit, and airport financial assistance programs, the transit grantee cannot point to statutory authority to justify it.[72] If it is 10 percent or below, arguably it is validated by the evidence before Congress when it enacted numerous race-based classifications and by additional evidence that subsequently became available.

Transit grantees also establish contract-by-contract goals that are not mandated by statute. DOT has the right, but not the obligation, to approve contract goals prior to solicitation.[73] It would appear from *Croson* that the transit grantee should have evidence of the DBEs available to perform the subcontract work for which a contract goal is established and that this contract goal should bear a relationship to the pool of qualified DBEs.

This conclusion is supported by the decision of the Supreme Court in *H.K. Porter Co. v. Metropolitan Dade County,* which remanded to the Eleventh Circuit for further consideration in light of *Croson* an affirmative action program requiring 5 percent participation by minority business in construction of an electrified third rail to be used in the federally assisted construction of a transit system.[74] The plaintiff commenced the action in order to have the denial of the award of a contract to the plaintiff declared arbitrary and capricious. The plaintiff argued, among other things, that the 5 percent MBE goal is not narrowly tailored and thus is unconstitutional as applied because "the goal was not based upon the study or investigation of the availability of qualified MBEs to participate in contract Y621."[75] Although the Eleventh Circuit was admittedly troubled by the lack of detailed studies regarding past discrimination against MBEs or investigations regarding the availability of MBEs qualified to participate in contract Y-621, after noting that federal courts had approved figures higher than 5 percent, the Eleventh Circuit held that the "use of a 5 percent MBE goal in contract Y-621 is not unconstitutional."[76] In effect, the Supreme Court remanded the decision because, among other things, the transit grantee did not have findings of discrimination. In *Adarand,* the Supreme Court specifically noted that it had previously indicated that *Croson* had at least some bearing on federal race-based action when it remanded *Porter*[77] In light of the foregoing, it appears advisable for transit grantees to have evidence regarding the available pool of DBEs for subcontracting opportunities when establishing a subcontracting goal for a particular contract.

Another purpose of findings is that, in the words of *Croson,* they "serve to assure all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself."[78] Since the DBE program must have a logical stopping point, it should be structured so that the program's goals and measurable results are periodically reviewed. When a transit grantee achieves success in eliminating any significant statistical disparity in the number of DBEs it uses and the number of DBEs that are available in a particular industry or segment of an industry, the prudent course would be to evaluate whether it should phase out race-based programs in that industry or segment within a reasonable time thereafter. This cannot be done unless the transit grantee obtains periodic findings on the number of qualified DBEs and the extent of any disparities between their participation in contracting opportunities and such participation by non-DBEs.

In the event the transit grantee maintains an affirmative action program for its nonfederally assisted procurement, it should obtain similar periodic findings for such procurement. The compiling of this data is necessary to ensure that the state and local program is narrowly tailored. Such data may also be useful in supporting the DBE program. If there is a disparity in the utilization of minorities and women in the state and local program, even though there is not a disparity in the DBE program, such data may be of assistance in supporting the DBE program. This arises from the fact that the federal government has the authority to ensure that equal opportunity is present in state and local government procurement. Consequently, a DBE program arguably could be deemed to be narrowly tailored if it is designed to eliminate disparities in an industry, or segment of an industry, in which the transit grantee purchases goods and services under both federally assisted contracts and state and local contracts, even though the disparities exist only in connection with the state and local contracts. Therefore, findings on disparities in the utilization of DBEs and minority- and women-owned firms by the transit grantee in all its procurements will be useful in determining when to terminate race-based programs. Such data may not be controlling; depending on the particular facts and future developments in the law, it may be possible to utilize disparities experienced by others in the region or nationally to support a DBE program. It is essential that the DOT make guidance available to transit grantees on the factors the transit grantee should take into account in narrowly tailoring its DBE program, particularly with respect to the logical stopping point.

The DBE program envisioned by DOT regulations is flexible in that it does not require the establishment of a single goal for all contracts, but instead requires transit grantees to establish contract-by-contract goals.[79] Similarly, the King County (City of Seattle) program upheld by the Ninth Circuit in *Coral* had flexible subcontracting goals individually determined on an ad hoc basis, according to the availability of M/WBEs.[80]

Croson noted with approval the congressional scheme upheld in *Fullilove,* which allowed for a waiver of the set-aside provision where an MBE's higher price was "not attributable to the present effects of prior discrimination."[81] The King County program incorporated this concept administratively since a preference was only extended to an M/WBE if its bid was within 5 percent of the lowest bid. Additionally, the King County program permitted a reduction in the amount of subcontractor goals if it was not feasible to meet higher levels, because qualified M/WBEs were not available or *M/WBE* price quotes were not competitive. Furthermore, in certain circumstances, all or portions of the program could be waived.[82]

The 5 percent price differential preference provided for in the King County program may be sufficiently small as to lead to the conclusion that it was "attributable to the present effects of prior discrimination."[83] On the other hand, if the MBE is wealthy, a 3 percent or 4 percent differential might not be attributable to past discrimination but simply represent a different estimate, which could occur in any situation where judgment is involved.

The question of whether a wealthy individual should be presumed to be economically disadvantaged has been considered by the Wisconsin Department of

Transportation, a transit grantee. The department determined, in the case of two wealthy black athletes who applied for certification as DBEs, that the presumption that black individuals are economically disadvantaged was rebutted. Consequently, they were excluded from participation in the Department's DBE program on the grounds that they were not economically disadvantaged (see *Milwaukee County Pavers Assn. v. Fiedler*[84]*).* The inclusion of a minority-owned firm, which has the ability to effectively compete against nonminority firms, in an MBE program may render the MBE program overinclusive. See *Concrete General, Inc. v. Washington Suburban Sanitary Comm'n.,* in which the district court found an MBE program not to be narrowly tailored, in part because it had "no provision to 'graduate' from the program those contracting firms which had demonstrated the ability to effectively compete with non-MBEs in a competitive bidding process."[85]

Croson raised the issue as to whether race can be the sole determining factor in a contract award by indicating that programs are less problematic from an equal protection standpoint if they have a waiver provision that permits the treatment of candidates individually, "rather than making the color of an applicant's skin the sole relevant consideration."[86] The implication that race should not be the sole determining factor in contract awards also relates to the reluctance of the courts to impose too high a burden on nonparticipants in an affirmative action program. In *Fullilove,* a very small portion of the construction funds appropriated by Congress were reserved for minorities. In *Croson,* on the other hand, a 30 percent subcontracting requirement placed a high burden on nonminorities.

Transit grantees should be able to meet these requirements for narrow tailoring by structuring their contract goals to take into account, on a contract-by-contract basis, whether subcontracting opportunities are presented in trades where qualified DBEs are available and where there are findings that the DBEs are significantly underutilized. Similarly, in determining whether an apparent low bidder who does not meet the goals has exercised "good faith" and hence should be awarded the contract, the transit grantee should be cognizant of the narrow tailoring dictates and examine the available findings, as well as the specific efforts of the apparent low bidder.

By remanding the case to the lower court for a factual determination and application of the strict scrutiny standard, the Supreme Court in *Adarand* acknowledged that it wished the benefits of analysis by the lower courts before deciding the issue before it, to wit: "The question whether any of the ways in which the Government uses subcontractor compensation clauses can survive strict scrutiny..." [87]

As a consequence of the *Adarand* decision, the Supreme Court has raised, but deferred answering, issues of significance to transit grantees. This has created the present uncertainty and need for guidance on the constitutionally permissible limits of affirmative action programs. It may be some time before this guidance is available since the district court has not yet made its determinations in the remand of *Adarand.*

D. Post-*Adarand* Decisions--1995 and 1996

The subcontractor in *Adarand* was certified as socially and economically disadvantaged but the record did not disclose clearly whether the certification procedure utilized a race-neutral assessment of the subcontractor's disadvantaged status. The Supreme Court noted that such certification could have been obtained through three routes, only one of which, the Small Business Administration 8(a) program, clearly requires each participant to prove "economic disadvantage," i.e., individualized showings. [88]

The Supreme Court noted a distinction between the Small Business Administration 8(a) program and its 8(d) program, stating that the "regulations seem unclear as to whether 8(d) subcontractors must make individualized showings."[89] With respect to DOT regulations applicable to transit grantees, the Supreme Court stated that they "do not require certifying authorities to make such individualized inquiries."[90] The DOT regulations defining DBEs contain the same rebuttable presumption that individuals in the protected classes are economically disadvantaged as it does that they are socially disadvantaged. The Supreme Court recognized that race could have been used as a proxy to establish the minority contractor's economic disadvantage, as well as its social disadvantage, and this was one of the unresolved questions it wished the lower courts to address on remand. The raising of this question leaves open the possibility that, ultimately, only the 8(a) program will be found not to be race-based since individualized findings of economic disadvantage are clearly required.

This distinction between the 8(a) route to certification and the other two routes, 8(d) and DBE, was considered in *Dynalantic Corp. v. United States Dep't of Defense.*[91] Among other things, Dynalantic challenged the constitutionality of the Small Business Act and the implementing regulations relating to the 8(a) program, pursuant to which the United States restricted bids on the procurement at issue to 8(a) participants (i.e., firms found to be socially and economically disadvantaged). The plaintiff's motion for a preliminary injunction to restrain the defendants from limiting their solicitation of bids to 8(a) participants was denied on the grounds that the plaintiff did not demonstrate a strong likelihood of success on the merits or demonstrate that it would suffer irreparable harm. In a lengthy analytical opinion, the district court noted that it had raised the issue of standing, *sua sponte,* and therefore reserved ruling on the ultimate issue of dismissal until the parties had had an opportunity to address it. One of the insights to be gained from this opinion is not favorable to the certification procedure followed by transit grantees since the court concluded that the Supreme Court in *Adarand* believed it more likely that the 8(a) program route to certification would survive a strict scrutiny analysis than would the other two routes, including the DBE program, applicable to transit grantees.[92] In *Dynalantic,* the court indicated some of the issues left open by *Adarand* to be as follows:

1. The degree to which, if any, congressional findings are entitled to some heightened level of deference.

2. The relevant geographic and product markets that Congress must consider in fashioning a federal remedial program have not been established. By way of example, the court indicated in the subject case that it "may have to consider whether Congress must make findings specifically addressing discrimination in the military simulator industry or whether Congress may rely upon findings of discrimination in the defense contracting industry more generally."

3. With respect to the geographic market, it is unclear with the limited record developed whether Congress may rely upon evidence of discrimination in just a few states or whether Congress must demonstrate that there has been discrimination throughout the country.[93]

District courts in several other post-*Adarand* decisions have refused to grant preliminary injunctions. *Converse Constr. Co., Inc. v. Massachusetts Bay Transp. Auth'y.*[94] involved the seeking of a preliminary injunction on the opening of bids on state highway contracts funded, in part, by DOT and containing DBE provisions.

The plaintiff did not challenge the constitutionality of the federal program but instead argued that since there was state, as well as federal, money involved, the court should find the usage of state money unconstitutional and issue the requested preliminary injunction. The court found that "if the state agency at issue does what federal law requires, its conduct is constitutional, at least where, as here, the constitutionality of the federal program is not challenged."

In *C.S. McCrossan Construction Co., Inc. v. Cook,* the plaintiff brought a constitutional challenge against the Small Business Administration's 8(a) program, which limits participants to those firms that are certified to be socially and economically disadvantaged.[95] The facts in this case are very similar to the facts in *Dynalantic:* the plaintiff was neither socially nor economically disadvantaged, the plaintiff had not applied to participate in the 8(a) program, and the preliminary injunction requested by the plaintiff was denied. In *McCrossan,* however, the district court found "that under *Adarand* and *Jacksonville,* Plaintiff has established standing."[96] In contrast, the district court in *Dynalantic* specifically stated that the plaintiff had not demonstrated standing and that reliance on *Northeastern Florida Contractors v. Jacksonville*[97] is unavailing since, unlike the Jacksonville program, the "8(a) contracts are not awarded solely on the basis of race."[98] The court cited the Transcript of Preliminary Injunction Motion Hearing where the National Association for the Advancement of Colored People's Legal Defense and Educational Fund pointed out that the "8(a) program is not exclusive. It does not exclude anyone on the basis of race. The 8(a) program is not automatic. In other words, you're black; show up and you get a contract."[99]

Although the district court found the plaintiff in *McCrossan* had standing and that the plaintiff demonstrated it would suffer some injury, the district court held that the plaintiff did not demonstrate it would suffer irreparable injury if the preliminary injunction were not granted. Moreover, if the preliminary injunction were granted, the hardships to the defendants would be extensive since it would delay bidding on a vital missile development contract. Additionally, the court found that the plaintiff had not demonstrated a substantial likelihood of prevailing on the merits, while the defendants "have submitted significant evidence that the 8(a) program may survive strict scrutiny as articulated in *Adarand."*[100] Furthermore, if it were to grant the preliminary injunction, since the "8(a) program is an important federal remedial contracting measure," it would "frustrate important government policies" and "not be in the public interest."[101]

A post-*Adarand* preliminary injunction involving a transit grantee's DBE program was granted by a trial court in *Cornelius v. Los Angeles County Metropolitan Transportation Authority.*[102] In addition to granting an injunction in Los Angeles, the court granted plaintiff's motion for summary judgment, declaring that the Los Angeles DBE program, undertaken to comply with federal requirements under the Surface Transportation and Uniform Relocation Assistance Act of 1987, did not pass muster under the strict scrutiny analysis required by *Adarand.*[103] The deficiencies included the following:

1. A DBE goal of 29 percent, almost three times the federal minimum of 10 percent, and no showing that there was a compelling public interest for the program or that it was narrowly tailored.

2. A failure to identify a pattern of discrimination with some specificity.

3. No showing that the program is narrowly tailored to achieve its goals.

4. No basis for the 10 percent feature whereby a DBE can bid 10 percent higher on a contract and still win the contract.

5. In direct contrast to *McCrossan,* the Superior Court in Los Angeles included among the defects in the DBE program that the rebuttable presumption of disadvantage favors recipients based on their membership in a particular group and places the burden on others to rebut the presumption.[104]

This decision was subsequently reversed by the state appeals court[105] on the grounds that the lower court had improperly granted standing to an engineer employed by a contractor to sue the transit authority. The appeals court did not address the constitutional questions and noted that its decision to deny standing, either as an individual injured by the program or as a taxpayer, "does not necessarily result in the DBE program remaining unchallenged." The court observed that:

> Given the far reaching scope of MTA's construction activities, the pervasive nature of the construction industry, and the fact that *Adarand* now requires the government to show a compelling state interest to justify the challenged programs, there is no reason to believe that a party who fulfills the case law requirement of actual injury cannot come forward to challenge the DBE program. Consequently, we conclude that there is no need to expand the concept of statutory taxpayer standing beyond that already recognized by law. [106]

It is thus still open to another plaintiff to argue that the Los Angeles DBE program, undertaken to comply with federal requirements under the Surface Transportation and Uniform Relocation Assistance Act of 1987, does not pass muster under the strict scrutiny analysis required by *Adarand* based upon the same deficiencies found by the lower court in *Cornelius.*

The district court in Houston issued a post-*Adarand* preliminary injunction in *Houston Contractors Association v. Metropolitan Transit Authority of Harris County*[107] The preliminary injunction in favor of plaintiffs restraining the DBE program permits existing contracts with DBE provisions to remain in place but bars the defendant, Metropolitan Transit Authority (MTA), from receiving DBE reports and other data from its contractors. The injunction also bars the inclusion of race-based preferences in future contracts.

An interesting facet of the *Houston* decision is the inclusion of preferences based on gender, as well as on race, in the conduct enjoined. Most of the cases discussing DBE programs and similar programs relate to racial and ethnic classifications. The distinction between the levels of scrutiny applied to race and gender classifications was set forth by the Tenth Circuit in a pre-*Croson* decision holding a Michigan law establishing an affirmative action program for minority- and women-owned firms to be unconstitutional with respect to both groups *(Michigan Road Builders Assn., Inc. v. Milliken).*[108] Relying on United States Supreme Court precedent, the Tenth Circuit held that a race-based classification must be narrowly tailored to serve a compelling government interest.

In contrast, the Tenth Circuit held that a gender-based classification only need meet the judicial standard that it be substantially related to serve an important government interest.[109] The Tenth Circuit stated that although the Supreme Court had never expressly defined these terms, the review standard applicable to gender is regarded as a less stringent judicial standard of review and has been described as "mid-level review."[110]

Traditionally, gender distinctions have been subject to an intermediate level of scrutiny by the courts and not to the strict scrutiny standard held to be applicable in *Croson* and *Adarand* to racial classifications. Recently, the United States Supreme Court in its decision on the admission of women to Virginia Military Institute indicated that gender distinctions were subject to a heightened level of scrutiny, which is somewhat higher than intermediate but less than strict scrutiny.[111] Justice Ginsberg, writing for the majority, stated that it was not "equating gender classifications, for all purposes, to classifications based on race or national

origin."[112] In scrutinizing such classifications, the reviewing court must determine whether the proffered justification is "exceeding persuasive" and "[t]he burden of justification is demanding and it rests entirely on the State."[113]

Notwithstanding that programs for women-owned firms are not subject to strict scrutiny, as a practical matter most governmental entities have treated programs for women-owned firms in the same manner as programs for minority-owned firms. For example, when the Port Authority of New York and New Jersey (Port Authority) developed *Croson*-type findings of discrimination to support its programs for minorities, the policy decision was made to obtain such data for women-owned firms. Thereafter, when a revised program for minority- and women-owned firms was authorized by the Board of Commissioners of the Port Authority, the Board treated minority- and women-owned firms in an identical fashion, requiring a showing of a disproportionate award of contracts to women-owned firms in a particular classification before women-owned firms could be granted a preference with respect to such classification.[114]

Whether the DOT and other agencies of the United States will take a similar position with respect to DBE programs and other programs authorized by Congress for the benefit of women-owned firms, as well as minority-owned firms, is yet to be determined. The stated position of the Justice Department on this question is that:

> Congress has also adopted affirmative action measures in federal procurement, as well as in programs that fund the procurement activities of state and local governments, that are intended to assist women-owned businesses. At present, such measures are subject to intermediate scrutiny, not the *Adarand* strict scrutiny standard. Therefore, they have not been the focus of the post-*Adarand* review that the Justice Department is coordinating. However, some of the evidence collected by the Justice Department bears on the constitutional justification for affirmative action programs for women in government procurement.[115]

The United States District Court in *Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*[116] expressed uncertainty as to whether the United States Supreme Court intended the Virginia Military Institute decision to "signal a heightening in scrutiny of gender-based classifications"[117] and analyzed the WBE program before it under the traditional intermediate scrutiny analysis. After noting that if the WBE program failed this test it would also fail strict scrutiny, the court held the WBE program unconstitutional and in violation of the Equal Protection clause of the Fourteenth Amendment. Applying a strict scrutiny analysis to the MBE program before the court, the court held that it, too, was unconstitutional and in violation of the Equal Protection clause of the Fourteenth Amendment. The Court's holdings were premised on a finding that the statistical evidence presented in support of the WBE and MBE programs was not sufficient to meet the *Croson* standard. The court noted that the "costs associated with the imposition of race, ethnicity, and gender preferences are simply too high to sustain a patently discriminatory program on such weak evidence."[118] Accordingly, the court enjoined Metropolitan Dade County from using or requiring the use of race, ethnicity, or gender in deciding contract awards.

The *Houston Contractors Association* decision granting a preliminary injunction left open many issues that will not be determined until after a trial, including whether the plaintiffs have met the jurisdictional requirements for standing.[119] In the event this case reaches the Fifth Circuit, this court's recent decision in *Hopwood v. Texas*,[120] although involving race as a factor in law school admission rather than the utilization of race as a factor in contract awards, provides some insight into the thinking of the Fifth Circuit on a strict scrutiny analysis of racial classifications.

The University of Texas School of Law gave "substantial racial preferences in its admissions program ... [to] blacks and Mexican Americans, to the detriment of whites and non-preferred minorities."[121] The Fifth Circuit unanimously held that the School of Law did not present a compelling justification to elevate some races over others "even for the wholesome purpose of correcting perceived racial imbalance in the student body."[122] It remanded the case to the district court, instructing it that the School of Law may not use race as a factor in admissions and directing it to reconsider the issue of damages. This decision is of interest to transit grantees because of its reliance on *Croson* and *Adarand*, its rejection of diversity as a compelling state interest, and its analysis of the indicia of past discrimination required to justify a racial preference.

The unanimous decision in *Hopwood* was accompanied by a concurring opinion by Judge Wiener, which was primarily limited to his agreement that the remedy adopted by the law school was not narrowly tailored to achieve diversity.[123] Judge Wiener assumed for the purpose of the case, without deciding, that obtaining diversity in the law school is a compelling state interest. He did not read Supreme Court precedent "as having held squarely and unequivocally either that remedying effects of past discrimination is the only compelling state interest that can ever justify racial classification, or conversely that achieving diversity in the student body of a public graduate or professional school can never be a compelling governmental interest."[124] With respect to *Regents of University of California v. Bakke*,[125] in which Justice Powell first endorsed reliance on race as a legitimate means of achieving diversity in a student body, Judge Wiener expressed the view that "if *Bakke is* to be declared dead, the Supreme Court, not a three-judge panel of a circuit court, should make that pronouncement."[126] The opinion of the court differed, holding that "the use of ethnic diversity simply to achieve racial heterogeneity even as part of the consideration of a number of factors, is unconstitutional."[127] This conclusion was reached after an analysis of *Bakke*, *Croson*, *Metro Broadcasting*, *Adarand*, and other Supreme Court decisions.

Subsequently, in *Taxman v. Board of Education*,[128] the Third Circuit, sitting *en banc in* an employment context, decided nine to four that a school district violated Title VII when, faced with layoffs, the district used race as the sole reason to lay off an equally competent white teacher with identical seniority to the black teacher whom it elected to retain for reasons of diversity. Diversity as a compelling state interest justifying racial classifications has therefore been rejected by the Fifth and Third Circuits. Nevertheless, because Title VII and constitutional standards can differ, it is still open in the Third Circuit for litigants to assert that race-based classifications enacted to achieve diversity may pass constitutional muster.

However, there is little likelihood that a need for diversity would be found by the Third Circuit to be adequate to support a DBE program. In *Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia*,[129] decided in July, 1996, by the Third Circuit, the court affirmed the issuance of a permanent injunction against the implementation of a municipal affirmative action program that provided for a set-aside for blacks of 15 percent in prime contracts and subcontracts. The court noted that *"Croson* teaches that there must be a strong basis in evidence not only for a conclusion that there is, or has been, discrimination, but also for a conclusion that the particular remedy chosen is made necessary by the discrimination."[130] The court found the evidence before it inadequate to demonstrate a strong basis in evidence of discrimination by prime contractors in the selection of subcontractors or by contracting associations in admitting members. Additionally, the court

found that the municipality was "unable to provide an evidentiary basis from which to conclude that a 15% set-aside is necessary to remedy discrimination against black contractors in the market for prime contracts."[131]

Moreover, the Court found that the municipality's procurement procedures created barriers to black contractors, citing its prequalification and bonding requirements. It held that the failure of the city to address these barriers by race-neutral means or to adapt less intrusive remedies, such as training and financial assistance programs for "disadvantaged contractors of all races,"[132] constituted a failure to narrowly tailor its remedy for past or existing discrimination against black contractors. Accordingly, the Third Circuit, in an opinion by the Chief Judge, which was joined by 12 Circuit Judges, held that the city ordinance establishing a program setting aside contracts for black-owned construction firms violated the Equal Protection rights of the plaintiffs and enjoined its enforcement.

As noted by Justice Stevens in his dissenting opinion in *Adarand*, "[r]eliance on race as a legitimate means of achieving diversity was first endorsed by Justice Powell in *Regents of University of California v. Bakke."*[133] Subsequent Supreme Court decisions, including *Fullilove* and *Croson*, all dealt with remedial programs to alleviate the effects of past discrimination. It was not until its decision in *Metro Broadcasting* that the Supreme Court was faced with ruling on racial classifications adopted not to alleviate the effects of past discrimination but to ensure diversity. In this instance, the purpose was enhancing broadcast diversity. *In Adarand*, the Supreme Court stated:

> [A]ll racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests. To the extent that *Metro Broadcasting* is inconsistent with that holding, it is overruled.[134]

The application of strict scrutiny and rejection of the intermediate scrutiny standard applied in *Metro Broadcasting* followed a lengthy analysis by Justice O'Connor in which she rejected holding "benign" state and federal racial classifications to different standards and emphasized that the Fifth and Fourteenth Amendments protect persons, not groups. An argument that achieving diversity is a compelling government interest could still be successful in defending an affirmative action program in an educational context or possibly with respect to a police force. It is unlikely, however, that achieving diverse racial and ethnic sources from which to procure construction and supplies would be found to constitute a compelling government interest. It appears more likely that if confronted with such an argument, the courts will hold that racial classifications in procurement may only be justified by a compelling government interest to remedy the effects of past discrimination.

After rejecting diversity as a compelling government interest, *Hopwood* held that the only past discrimination which the School of Law could redress would be that of the law school itself and not "past discrimination in education, other than at the law school."[135] Recent past discrimination by the law school was not alleged. The first two reasons advanced by the law school for using race as a factor in admissions--namely, to achieve a diverse student body and to alleviate the law school's poor reputation in the minority community--were found either to be not remedial or to be the result of societal discrimination. The third reason advanced--to eliminate the present effects of past discrimination by other state actors--although remedial, did not relate to past discrimination by the law school. Accordingly, the Fifth Circuit found that the plaintiffs were scrutinized under an unconstitutional admissions system. By way of *dicta*, the Fifth Circuit indicated that even if the law school were ordered by the University as a part of the state's negotiations with the United States Department of Health, Education and Welfare's Office for Civil Rights (OCR) to adopt its race-based admissions program to "the extent that the OCR has required actions that conflict with the Constitution, the directives cannot stand."[136]

In arriving at its conclusion that only the past discrimination of the law school was relevant, the Fifth Circuit relied heavily on *Croson*, noting that the Supreme Court refused to accept indicia of past discrimination in anything but the Richmond construction industry. The Fifth Circuit analogized the contractor situation to that of higher education and rejected amorphous claims of past discrimination to "justify the use of an unyielding racial quota."[137] The Fifth Circuit recognized that Texas state actors discriminated against some minorities in the past in the public schools but disagreed with the conclusion of the lower court that the relevant governmental entity is the system of education within the state as a whole. In *Croson*, the Supreme Court stated "if the city could show that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry, ...we think it clear that the city could take affirmative steps to dismantle such a system."[138] The Fifth Circuit's requirement that the governmental entity be permitted to remedy only its own past discrimination appears unduly restrictive in light of the clear statement in *Croson* respecting the ability of a governmental unit to remedy identified discrimination in which it had been a "passive participant."

Since the *Hopwood* decision relies in large part on *Croson* and *Adarand*, it creates concern that the Fifth Circuit would uphold the striking down of the DBE program of the MTA in Houston absent identified past discrimination on the part of the MTA. This concern emphasizes the need for guidance on the limits of affirmative action. Unfortunately, an insufficient number of decisions have emerged from the lower courts to supplement the "minimal guidance in *Adarand."*[139] Moreover, while it has become axiomatic that something should be done about affirmative action, to date no political consensus has emerged.

E. Executive Actions and Findings of Discrimination

On March 7, 1996, President Clinton requested a review of federal affirmative action programs to answer the following questions:

- Descriptions. What kinds of federal programs and initiatives are now in place, and how are they designed?
- Performance. What is known about their effects--benefits and costs, direct and indirect, intended and unintended--both to the specified beneficiaries and to others? In short, how are they run? Do they work? Are they fair?[140]

In response to this request, in July 1995 the Senior Advisor to the President for Policy and Strategy, George Stephanopoulos, and the Special Counsel to the President, Christopher Edley, Jr., submitted a Report to the President on the Review of Federal Affirmative Action Programs (Report).[141] The Report contained only tentative and provisional conclusions and recommendations because *Adarand* was determined by the Supreme Court during its preparation.

The framework set forth in the Report for analyzing affirmative action was based on the premise that the goal of any affirmative action program must be to promote equal opportunity. Affirmative action measures "recognize that existing patterns of discrimination, disadvantage and exclusion may require race or gender conscious measures to achieve that equality of opportunity."[142] The primary

justification stated for the programs is the eradication of discrimination, but the Report recognized that promoting inclusion is another justification. Although the Report did not state that procurement programs should be limited to those that remedy discrimination, the list of examples of programs where inclusion, i.e., diversity, is an appropriate goal included colleges, police departments, the military, judicial benches, and policy-making agencies.[143]

In determining whether the programs are fair, the review team considered whether they were quotas, whether race-neutral options had been analyzed, whether the program was flexible and limited in duration, and whether it had an effect on nonbeneficiaries sufficiently small and diffuse so as not to burden their opportunities.[144]

The review team concluded that there has been undeniable progress in many areas but that "the evidence is overwhelming that the problems affirmative action seeks to address--widespread discrimination and exclusion and their ripple effects--continue to exist."[145]

The Report covered programs of the Department of Labor, the military, and federal civilian employment; and federal procurement efforts administered by the Department of Defense, the Department of Transportation, and the Small Business Administration and various other departments, including the Departments of Education, Health and Human Services, Treasury, and Agriculture, and the Federal Communications Commission. The only programs described in the Report that will be discussed in this article are those administered by the Department of Transportation and, to a lesser extent, those of the Small Business Administration.

The Report states that programs for minority business "were enacted as a response to specific executive and congressional findings that widespread discrimination, especially in access to financial credit, has been an impediment to the ability of minority owned businesses to have an equal chance at developing in our economy."[146] Notwithstanding such programs, the Report indicates that congressional studies conducted during the 1980s indicated that racial discrimination in federal contracting persisted. Other studies in the 1990s note substantial disparities between the income of minority-owned firms and white-owned firms and link these disparities to past and present discriminatory practices, especially in the provision of capital.

In its discussion of DOT programs, the only mention made in the Report of the DOT's DBE program is that certification of the firms status is determined by the grant recipient. This is contrasted to the procedure in the Department of Defense programs where the firms self-certify.[147]

In measuring the performance of the affirmative action efforts, the review team found them to be "very successful in expanding federal procurement from women and minority-owned firms."[148] A potential problem of interest to transit grantees highlighted by the Report is "a tendency for agencies to concentrate their minority contracting in certain fields--such as construction--where there are a significant number of existing minority firms."[149] The Report notes that this can create an imbalance in certain regions and fields and notes that the "government contractor community has pointed out that these types of unintended consequences have caused resentment."[150]

The Report discusses several reforms proposed by critics and commentators. The following are among those of potential applicability to transit grantees:

- Providing for firms certified by the DOT to be subject to "graduation" and business-mix requirements analogous to those provided for in the Small Business Administration Section 8(a) program. This program requires "graduation" after 9 years, and has phased requirements of non-8(a) and non-federal business mix designed to wean firms from sheltered competition and dependency on federal contracts.
- Expanding efforts more broadly for small, disadvantaged businesses (SDBs) so as to avoid the undesirable concentration of contracts with such firms in certain industries and regions. Construction contracts were cited as an example of such concentration, since in 10 states "more than 40 percent of all construction contracts awarded to small business were awarded to SDBs."
- Expanding the use of SDBs in subcontracting. Currently, only one-sixth of the $13 billion in federal contract dollars received by SDBs is through subcontracting.[151]

The Report notes that even where a statute seems to speak of a rigid numerical set-aside, elsewhere the agency head is given authority to waive or modify the numerical target. The Report concludes that the apparently rigid set-aside is therefore not actually a quota. By way of example, the Report states that when the Surface Transportation Assistance Act of 1982 and the Surface Transportation and Uniform Relocation Assistance Act of 1987 are read together, "these provisions amount to the usual kind of flexible goal, though with a pointed Congressional emphasis suggesting that the Secretary of Transportation would be expected to defend carefully a decision to set lesser ambitions."[152] Thus, the target of 10 percent DBE participation set by the Secretary of Transportation is considered to be a flexible goal.

The Report recommended that other agencies adopt the Small Business Administration rule on graduation or a similar measure so that "an opportunity to succeed at business [does not become] an effort to guarantee such success."[153] It also urged the formulation of a set of measures for when a given program has accomplished enough to be terminated. After noting that the agencies are examining the extent of continuing patterns of discrimination and exclusion in the industries in which they do business, it recommends utilization of these findings "to develop guidelines for measuring when minority and women entrepreneurs have achieved a full measure of equal opportunity to participate in the economic mainstream, making sunset of the programs appropriate."[154]

The review team, after noting the lack of readily available data, concluded "that moving from social and economic disadvantage to focus on economic disadvantage only would seriously undermine efforts to create entrepreneurship opportunities for minorities and women, given continuing patterns of exclusion and discrimination."[155]

In substance, the Report endorsed the existing affirmative action programs, expressed a need for their continuation, and proposed relatively modest changes to better ensure their integrity and to broaden their utilization in fields and regions where minority firms have not yet gained a foothold. The tentative nature of the recommendations was underscored by the fact that the Report was submitted to the President, together with a Memorandum on *Adarand* from Assistant Attorney General Walter Dellinger to General Counsels of various departments and agencies (Memorandum).[156] On July 19, 1995, the President asked each of the departments and agencies to develop the necessary information to evaluate whether their programs utilizing race or ethnicity in decision-making are narrowly tailored to serve a compelling interest under the *Adarand* standard.[157] The tentative response of the Justice Department applicable to direct federal procurement is contained in the Notice of Proposed Reforms to Affirmative Action in Federal

Procurement dated May 23, 1996 (Notice).[158] The difficulties inherent in reconciling the political, legal, and policy considerations are graphically illustrated by the fact that more than a year has transpired since the President's request, and as of January 1997, responses applicable to procurement by transit grantees were not available from the Justice Department or the Department of Transportation.

The Memorandum sets forth preliminary legal guidance on the implications of *Adarand*, stating that it "federalizes" the *Croson* strict scrutiny standard of review applicable to state and local government affirmative action measures. The Memorandum includes an important caveat, namely that in this area, "Congress may be entitled to some deference when it acts on the basis of race or ethnicity to remedy the effects of discrimination."[159] This conclusion is based, in part, on the citing by the Supreme Court in *Adarand* of the opinions of various justices in *Fullilove*, *Croson* and *Metro Broadcasting* concerning the authority that Section 5 of the Fourteenth Amendment confers upon Congress to deal with the problem of racial discrimination, and the extent to which courts should defer to Congress's exercise of that authority. Some of the opinions cited, notably Justice O'Connor's opinion in *Croson*, discuss the unique power of Congress to address problems of discrimination. The Memorandum, however, cautions against assuming that Congress need only assert there is a problem and states:

> The more probable construction of those opinions is that Congress must have some particularized evidence about the existence and effects of discrimination in the sectors and industries for which it prescribes racial or ethnic classifications...
>
> [This] does not mean that Congress must find discrimination in every jurisdiction or industry affected by such a measure (although it is unclear whether, as a matter of narrow tailoring, the scope of a classification should be narrowed to exclude regions and trades that have not been affected by the discrimination that is to be remedied.)[160]

This concern with narrow tailoring led the Assistant Attorney General to conclude that if, for example, lending discrimination against minorities is the problem, that it should be addressed directly and not "serve as a catch-all justification for racial and ethnic classifications benefitting minority-owned firms through the entire economy."[161]

The accompanying Report, however, emphasized that the lack of access to financial capital was a primary cause of the disparities between the number of minority firms and the dollar value of the business obtained by minority firms and the number of nonminority firms and the dollar value of business obtained by nonminority firms. This lack of access is attributable to (a) discriminatory lending practices of traditional sources of financial capital, such as commercial banks and (b) the effects of past and present discrimination in the labor markets, which created a ceiling on minority earning potential, thus limiting the amount of inherited income available for equity investments.[162] Subsequently, the Justice Department concluded that there is "a compelling interest in taking race-conscious remedial measures"[163] in direct federal procurement and stated that the evidence with respect to discriminatory barriers to minority contracting opportunities may be grouped into two categories: (a) evidence that discrimination precluded minorities from obtaining the requisite capital and experience, and (b) evidence of discriminatory barriers depriving minority firms of full and fair contracting opportunities.[164] Thus, the Justice Department has concluded that when combined with other discriminatory barriers, evidence of lack of access to capital forms a part of the evidence required to establish a compelling government interest.

The DOT and other departments and agencies are engaged in gathering particularized evidence of discrimination in connection with the evaluation of whether their programs are narrowly tailored to serve a compelling government interest. Among the questions that agencies with remedial programs are looking into with respect to existing evidence or findings of discrimination are the following:

- Is the evidence contained in a statute or legislative history or in agency findings?
- Is the evidence statistical or documentary or anecdotal? Does it identify the number of qualified minorities in the industry or seek to explain what the numbers would look like "but for" the exclusionary effects of discrimination?
- Are the findings national or regional?
- If reliance was placed on reports of others, who is the "author" of that information?
- Since the adoption of the program, have additional findings been assembled?[165]

Following this evaluation, the President has directed each department head to reform or eliminate any program that is not narrowly tailored to serve a compelling government interest.[166] In the meanwhile, with a few exceptions that are not applicable to DOT, the departments and agencies have been advised not to suspend any affirmative action program prior to such evaluation.[167]

Accordingly, the transit grantee must continue its present affirmative action program pending an evaluation by DOT of its programs and modification of its regulations and guidelines. Following such evaluation, transit grantees will be required to comply with the revised regulations and guidelines, if any, issued by DOT. Pending such modifications, and in all likelihood thereafter, the transit grantee will be presented with the issue of whether it should undertake seeking evidence of discrimination in its region or in connection with its contracts or rely only on such evidence as may be collected by the DOT. This is a matterthat can only be determined after weighing the practical, as well as legal, consequences. Collecting particularized evidence is an expensive and time-consuming task. This cost must be balanced against the likelihood of litigation and its anticipated financial and other impacts. Moreover, since the DBE programs are mandated by DOT, and DOT has an interest in their continuance, it is probable that in any litigation DOT would be named either a party or an intervenor.

Most transit grantees will probably elect not to develop findings solely for its federally funded contracts, particularly since there is no certainty that regional findings will be required by the courts or that, if required, they will not be developed by DOT. On the other hand, since incremental findings can be developed at a relatively small cost, transit grantees who maintain affirmative action programs in connection with their state or local funded contracts would be well advised to ensure that whatever findings they develop to meet the *Croson* standard are extended to the federally funded contracts. This could provide a factual predicate for the DBE program, which would supplement the factual and legal predicate provided by DOT. This procedure was followed by the MTA in New York. Following *Croson* but prior to *Adarand*, the MTA retained a consultant to undertake a disparity study to supplement findings of discrimination that were developed at the state and national levels. The study was completed *after Adarand* and included (a) documentation of widespread statistically significant underutilization of DBEs in the MTA's market; (b) an analysis of DBE subcontracting on MTA contracts; and (c) anecdotal evidence of perceived race and gender discrimination by DBEs competing for contracts and subcontracts in the MTA's market.[168] Based on this study and other factual data and legal advice, the MTA Board made a finding that race

and gender discrimination continue to exist in the MTA's market and that the MTA is justified in continuing to implement its New York program applicable to non-federally funded contracts and its DBE program required by DOT.[169]

Several circuits have ruled on whether findings developed after adoption of an affirmative action program meet the *Croson* standard. Such evidence has been held admissible, although some courts have required that there be some evidence of discrimination at the time of adoption of the affirmative action program. Thus, if a transit grantee elects not to develop findings and subsequently becomes involved in a litigation, it may not be precluded from developing findings in connection with the litigation. Additionally, since the litigation cost of defending a DBE program is generally reimbursable under the grant, the grantee need not utilize its funds for the development of findings, including whatever disparity studies may be necessary. This is not a completely satisfactory solution, since whatever grant funds are used for this purpose would reduce the federal funds available for direct transit purposes.

If litigation involving the DBE program of a transit grantee should ensue, it is likely that the plaintiff will request a preliminary injunction halting implementation of the DBE program pending a full hearing. If granted, and if confronted at the same time by a demand from DOT that it continue to include DBE provisions in its contracts, the transit grantee may be forced to consider suspending its construction program. A short-term solution that should be considered by transit grantees subject to conflicting requirements is to issue contracts on the critical path without DBE provisions but not suspend construction. If this is done based on a reasonable expectation that any deficiency in meeting overall DBE goals can be made up at a future date by including higher than usual DBE goals in subsequent contracts, it would not provide a basis for the imposition of sanctions by DOT.

F. Defending Constitutional Challenges to DBE Programs and Suits for Damages

The preceding three sections addressed some of the cases interpreting *Croson* and *Adarand*, the position of the Executive Branch of government, and findings of discrimination, and set forth some of the actions transit grantees could take to avoid or mitigate the impact of challenges to their DBE programs. In this section, the potential financial liability of employees and representatives of transit grantees named as defendants in suits for damages will be explored.

An extensive discussion of the potential for liability is found in two separate decisions of the United States District Court in New York rendered after *Croson* but prior to *Adarand*, to wit, *Harrison and Burrowes Bridge Constructors, Inc. v. Cuomo.* The first decision granted a preliminary injunction on enforcement of the state affirmative action program and dismissed the federal claims.[170] One year later, the second decision dismissed the state claims.[171]

In *Harrison and Burrowes*, the district court had before it challenges to the constitutionality of the enforcement by the New York State Department of Transportation (NYSDOT) of a DBE program funded, in part, by DOT and of an affirmative action program for minority- and women-owned firms, which was funded solely by state funds. The plaintiffs sought to have the state and federal programs declared unconstitutional and to have their enforcement enjoined. In addition, plaintiffs sought damages and attorneys' fees. In the first decision, the plaintiffs' claims based on the federally assisted DBE program were denied. A preliminary injunction, however, was issued with respect to the state program and the court reserved decision on the claims based on the state program. This decision was *pre-Adarand* and the court denied a preliminary injunction with respect to the federally assisted DBE program on the grounds that plaintiff had not shown a substantial likelihood of ultimately succeeding on the merits of its equal protection challenge to the federal program.

In its analysis, the district court relied on *Fullilove* and *Metro Broadcasting* and applied intermediate scrutiny, stating: "The application of this intermediate level of scrutiny, as opposed to strict scrutiny, is far more likely to result in the program being upheld against a constitutional challenge."[172]

The subsequent dismissal by the district court of plaintiffs' claims based on the federal program was not appealed. In view of its application of intermediate scrutiny to the federal program, it is likely that this decision would not be upheld today. Nevertheless, the two decisions in *Harrison and Burrowes* are instructive since their treatment of the state program and, to a lesser extent, the federal program on issues of standing, irreparable injury, and the distinction between an individual action and a class action in defining the scope of a preliminary injunction is informative to transit grantees. Moreover, their discussion of the immunity of public officials from suit provides an outline of possible defenses for employees of transit grantees in the event they are named defendants in litigation involving federally assisted DBE programs or affirmative action programs funded solely with state funds.

The district court in *Harrison and Burrowes*, citing decisions in the United States Supreme Court and the Second Circuit, stated the standard for issuance of a preliminary injunction and the factors that may operate to increase the burden on the plaintiff. The court indicated that the party seeking the preliminary injunction must show a risk of irreparable harm and either a likelihood of success on the merits or a balance of hardships, which favor the party seeking the preliminary injunction. Among the factors that will increase the burden on the party seeking such an injunction are where its granting will (a) change the status quo, or (b) provide the movant with virtually all of the relief sought, or (c) adversely impact on the public interest.

Although an irreparable injury is generally one for which a monetary award is not adequate, the district court, quoting the Second Circuit, noted that when a deprivation of a constitutional right is alleged, most courts do not require a further showing of irreparable injury.[173] The court held the plaintiff met this burden with respect to the federal and state programs since both elements were present--an alleged violation of its Fourteenth Amendment right to equal protection and little likelihood that the plaintiff would recover monetary compensation.

With respect to the federal program, plaintiff was not able to show a likelihood of success, in large part because of the application of intermediate scrutiny. Today, under strict judicial scrutiny, it would be easier for the plaintiff to show a likelihood of success. The defendant transit grantee should therefore be prepared to supplement its argument on the likelihood of success by arguing against the granting of a preliminary injunction on the grounds that to do so (a) would delay award of a contract on the critical path of a construction program; (b) would adversely affect an important public interest, namely, including DBEs among the firms participating in federally funded construction; and (c) would result in serious financial impact on one or more DBEs. The third argument would be persuasive if the facts demonstrate that one or more DBEs could go out of business as a result of losses during the period a preliminary injunction is in effect and that they would not have an opportunity to recoup such losses even though a permanent injunction may never be granted.

The district court in *Harrison and Burrowes* applied strict scrutiny to the state program and found there was a likelihood of success to the plaintiff on the merits

as to its equal protection challenge. The plaintiff had not brought a class action and indicated it would be satisfied with narrow relief. Thus, the court issued a preliminary injunction, which "applies to the defendants' enforcement of the state programs as against the plaintiff and only to the extent that plaintiff bids on state-funded transportation projects."[174] The court intentionally narrowed the relief "to protect the public interest involved in this major state program."[175] Transit grantees confronted with demands for preliminary injunctions may find that if they cannot be successful in defeating the granting of the injunction, they may be able to convince a court to follow the example of the district court in *Harrison and Burrowes* and narrowly tailor the preliminary injunction to reduce the adverse impact on the public interest while affording relief to the individual plaintiff.

The plaintiffs in *Harrison and Burrowes* brought their action under 42 U.S.C. Section 1983. The basic purpose of Section 1983 is to provide compensation for injuries caused by a deprivation of constitutional rights--in this instance, equal protection under the Fourteenth Amendment. Initially, the action was brought against the Governor of the State of New York and the Commissioner of NYSDOT in their official capacities. Subsequently, the complaint was amended to add claims against the Commissioner of NYSDOT and three employees of NYSDOT in their individual capacities.[176] Relying on United States Supreme Court precedent, the District Court held that compensation under Section 1983 is not available against the Governor and the Commissioner of NYSDOT in their official capacities because (quoting the Supreme Court), "neither a State nor its officials acting in their official capacities are 'persons' under §1983."[177]

The district court then addressed whether the defendants named in their individual capacities were potentially liable for a monetary award. Citing the Supreme Court decision in *Kentucky v. Graham*, the district court held that where a Section 1983 plaintiff seeks a monetary award from a state official that can be executed only against the official's personal assets, the Eleventh Amendment is no bar. The district court noted that the Second Circuit held that Eleventh Amendment immunity does not protect the state official from personal liability even though the official is "merely carrying out a policy of the State."[178] The court recognized the existence of defenses to individual liability and held that since, in most instances, an official who complies with an unconstitutional state law will be protected from personal liability, the fact that there is personal liability does not negate that the injury constitutes irreparable harm for the purpose of granting a preliminary injunction.

Over a year later, the district court issued its second decision in *Harrison and Burrowes.* In the later decision, the court denied the plaintiffs' motion to enjoin enforcement of the state program and granted the defendants' cross motion to dismiss the damage claims against the individual defendants on the ground of qualified immunity. This later opinion reflects the current law in the Second Circuit and is particularly instructive on the question of personal liability of employees and representatives of transit grantees who implement a law that is ultimately declared unconstitutional. Although the law at issue involved state legislation, the analysis is equally applicable to congressional legislation, and arguably, to regulations of a federal agency such as DOT, which a transit grantee is contractually bound to implement. The district court in *Harrison and Burrowes,* relying on United States Supreme Court decisions and those in the Second Circuit, held that state officials sued in their individual capacities were entitled to qualified immunity from damages and from suit. The lengthy exposition on the doctrine of qualified immunity contained in the opinion is of interest to transit grantees since, unlike the many opinions dealing with qualified immunity involving prison officials, sheriffs, prosecutors, and other government officials, the *Harrison and Burrowes* opinion deals with qualified immunity of employees of a state transportation agency who seek to implement an affirmative action program to encourage utilization of minority- and women-owned firms in highway construction. Although the program at issue was a state program to which strict judicial scrutiny applied, the rationale of the court is equally applicable to a federally assisted DBE program subject to strict judicial scrutiny.

a. Harrison and Burrowes *Doctrine on Qualified Immunity*

The defense of qualified immunity shields government officials from personal liability for civil damages and from suits insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Relying on several Second Circuit decisions, the district court in *Harrison and Burrowes* indicated that this defense has evolved into one of objective reasonableness designed to permit resolution of insubstantial claims on summary judgment.[179] The Second Circuit precedent identified three situations in which qualified immunity will apply in a Section 1983 case. It is the third situation that requires an examination of the particular facts before the court, which was of interest to the district court and which is of interest to transit grantees. Specifically, it is the situation where the contours of the plaintiff's federal rights and the official's permissible actions are not clearly delineated. In such an instance, the defendant may enjoy qualified immunity if it was objectively reasonable for him to believe his acts did not violate those rights.

With respect to the state program, the plaintiff argued that the NYSDOT employees were put on notice by *Croson* that their conduct in enforcing the state program was subject to a strict judicial scrutiny standard but did not "enlighten the court on how the qualified immunity defense applies to government officials aware that they are operating under a 'strict scrutiny' standard."[180] The district court concluded that since *Croson* did not declare such programs unconstitutional *per se*, the program before it must be analyzed on a case-by-case basis under the *Croson* criteria to establish the contours of the plaintiffs' federal rights. Plaintiffs failed to do this, and the district court found that it could be persuasively argued that such contours were not sufficiently definite that it was objectively unreasonable for the defendant individuals to believe they were acting lawfully. The district court stated that its analysis of the applicability of qualified immunity in the case before it revolves around the effect and clarity of the *Croson* decision, which was recently described by the Eleventh Circuit[181] as follows:

> ...neither did *Croson* provide a set of standards of guidelines describing the kind of MBE plan that would pass constitutional muster. It simply provided a stringent burden of proof for proponents of MBE laws to meet-they must be able to show that there were actual instances of past discrimination, that the MBE plan is necessary to remedy the discrimination, and that the plan is narrowly tailored to meet that goal. *Cone Corp. v Hillsborough County*, 908 F.2d 908, 913 (11th Cir.), *cert. dented*, 111 S. Ct. 516 (1990).[182]

The district court then held that given the lack of clear direction to the individual defendants, both before and after *Croson*, that they were entitled to qualified immunity from damages and from suit.

If, as the district court found, a lack of clarity existed with respect to the contours of federally protected rights in connection with state programs after *Croson*, it is indisputable that there is an even greater lack of clarity of the contours of the

federally protected rights in connection with federally assisted DBE programs after *Adarand. Adarand* extended the strict judicial scrutiny standard of *Croson* to federally funded programs, leaving open to the lower courts the responsibility to define the type of race classification program, if any, that would pass constitutional muster, which, as the Eleventh Circuit noted, was left undefined in *Croson.* In addition, *Adarand* left open numerous other questions relating to the deference due Congress and the nature of the specific findings that may be required. Currently, it appears that the doctrine of qualified immunity shelters from personal liability employees of transit grantees who seek to enforce DBE programs in accordance with DOT regulations, pursuant to legislation enacted by Congress.

In the event that subsequent court decisions so clearly delineate the contours of the federally protected rights of non-DBE firms to equal protection that it is not objectively reasonable for state employees to implement such programs, then they would no longer be entitled to qualified immunity. In an educational context, this was recognized by the Fifth Circuit in *Hopwood,* in which the racial classifications utilized by the law school for admissions were struck down.[183] In response to the plaintiffs' demand for punitive damages under Section 1983, the Fifth Circuit stated:

> The court did determine, however, that the law school had always acted in good faith. This is a difficult area of the law, in which the law school erred with the best of intentions. As a result, the plaintiffs have not met the Federal standard for punitive damages as stated in *Smith v. Wade,* 461 U.S. 30, 56; 103 S. Ct. 1625, 1640 (1983). Thus, we agree with the district court that punitive damages are not warranted. We note, however, that if the law school continues to operate a disguised or overt racial classification system in the future, its actions could be subject to actual and punitive damages.[184]

Accordingly, employees of transit grantees are cautioned that, when the contours of the federally protected rights of non-DBE firms become clear, if their actions violate such rights, qualified immunity may not be available.

III. OBLIGATION TO PROVIDE EQUALITY OF SERVICE TO MINORITY AND NONMINORITY PASSENGERS

A. Department of Transportation Regulations--"Non-Discrimination in Federally-Assisted Programs of the Department of Transportation--Effectuation of Title VI of the Civil Rights Act of 1964"[185]

Title VI of the Civil Rights Act of 1964 provides, "No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[186]

Transit grants obligate the transit grantee to comply with Title VI and with the regulations promulgated by DOT to effectuate Title VI.[187] These regulations, which are applicable to any program receiving DOT financial assistance, restate the provisions of Title VI and also enumerate specific discriminatory actions that are prohibited on the grounds of race, color, or national origin. The prohibited actions include denying a person any services, financial aid, or other benefit offered to another person or providing a different service, financial aid, or benefit if the reason is therefore based on race, color, or national origin. The regulations provide that the transit grantee "in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program...may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting persons to discrimination because of their race, color, or national origin."[188]

The regulations set forth examples of how the prohibited discrimination applies to DOT programs. Among the examples is the following, "No person or group of persons shall be discriminated against with regard to the routing, scheduling or quality of service of transportation service as a part of the project on the basis of race, color or national origin...."[189]

Although the regulations are primarily directed at discrimination, provision is made for the consideration of race, color, or national origin to remove or overcome the effects of any prior discriminatory practice or usage. More important, they provide that, "Even in the absence of prior discriminatory practice or usage, a recipient...is expected to take affirmative action to assure that no person is excluded from participation in or denied the benefits of the program or activity on the grounds of race, color, or national origin."[190]

The transit grantee is barred from selecting a site or location of a facility if the effect when made of such selection would be to exclude individuals or deny them benefits on the grounds of race, color, or national origin.[19l]

These DOT regulations address the "effects" of action and thus, by their terms, incorporate a disparate impact standard. A divided Supreme Court in *Guardians Association v. Civil Service Commission*[192] held that even though Title VI itself did not proscribe unintentional discrimination, the regulators charged with enforcing Title VI had the discretion to enforce it by forbidding unintentional, as well as intentional, discrimination. The Supreme Court ruled that the language of Title VI is ambiguous and therefore is subject to the construction that federal agencies may bar disparate impact discrimination of the type first recognized by the Supreme Court under Title VII in *Griggs v. Duke Power Co.*[193] Thus, actions having an unjustifiable impact on minorities may be redressed through agency regulations designed to implement Title VI. In a dissenting opinion, Justice Marshall expressly pointed out that this interpretation by the federal agencies had been in effect for almost two decades and that Congress had rebuffed all efforts to overturn the Title VI disparate impact regulations. Among the regulations cited by Justice Marshall in a footnote were those of the DOT.[194]

In a subsequent unanimous opinion in *Alexander v. Choate,* the Supreme Court in its discussion of *Guardians* stated that in enacting Title VI, Congress, "...delegated to the agencies in the first instance the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and were readily enough remediable, to warrant altering the practices of the federal grantees that had produced those impacts."[195]

Thus, it appears clear that the DOT has the authority to enact regulations requiring transit grantees to take affirmative action to ensure that the grantees' activities do not have an unjustified disparate impact on minorities, thereby excluding them from the benefits of federally assisted programs without an appropriate justification.

B. Procedures for Determining Whether Grantees Comply with Obligation Not To Discriminate

Transit grantees are required to keep such records as are necessary to ensure compliance with their nondiscrimination obligations. This includes racial and ethnic data showing the extent to which members of minority groups are beneficiaries of programs receiving DOT financial assistance.[196]

DOT reviews the practices of transit grantees to determine whether they are in compliance with their nondiscrimination obligations.[197] Provision is made in the regulations for the filing of complaints with DOT by any person or any specific

class of persons who believe that they have been the subject of discrimination.[198] If following an investigation of the practices of the transit grantee, the circumstances under which the alleged discrimination occurred, and other relevant factors, the investigator is of the view that the grantee is in noncompliance, the grantee will be notified and efforts will be taken to resolve the matter informally.[199] If the complaint is not informally resolved, compliance "may be effected by the suspension or termination of or refusal to grant or to continue Federal financial assistance or by any other means authorized by law."[200]

A considerable number of procedural safeguards must be complied with before an order to suspend, terminate, or refuse federal assistance becomes effective. These include an opportunity for a hearing at which the applicant or recipient may be represented by counsel.[201] After a decision by the hearing officer, the applicant or recipient may file with the Secretary of Transportation his exceptions to this initial decision and his reasons.[202] In addition, the Secretary may, on his own motion, review the decision.[203] An opportunity is provided for the filing of briefs and written statements with the Secretary and a written copy of the Secretary's final decision is sent to the applicant or recipient and to the complainant, if any.[204] Moreover, an order to suspend, terminate, or refuse federal assistance is not effective until 30 days after the Secretary of Transportation files a written report with the appropriate House and Senate committee.[205]

In order to ensure that the Secretary is personally aware of the imposition of sanctions, the regulations provide:

> Approval by Secretary. Any final decision by an official of the Department, other than the Secretary personally, which provides for the suspension or termination of, or the refusal to grant or continue Federal financial assistance, or the imposition of any other sanction available under this part or the Act, shall promptly be transmitted to the Secretary personally, who may approve such decision, may vacate it, or remit or mitigate any sanction imposed.[206]

The regulations provide for the restoration of full eligibility to receive federal assistance if the grantee satisfies the terms and conditions of the order against it or brings itself into compliance and provides reasonable assurance that it will fully comply with the regulations.[207]

Several administrative hearings have been instituted involving alleged noncompliance on the part of transit applicants or recipients, but none of the hearings has resulted in a suspension, termination, or refusal of financial assistance according to the Office of General Counsel at the DOT. A partial explanation for the failure to impose sanctions is the relative scarcity of instances where complaints of noncompliance are instituted. Another explanation is that settlement is encouraged.[208] Moreover, since attorneys' fees may not be recovered in an administrative proceeding, but may be recovered in a civil litigation, there is little incentive for a plaintiff's attorney to bring an administrative proceeding without also filing a "protective civil complaint" so that the attorney may claim that the time spent in the administrative hearing was necessary to advance the civil action. This view was expressed in *North Carolina Department of Transportation v. Crest Street Community Council, Inc.* by Justice Brennan in a dissent in which Justice Marshall and Justice Blackman joined.[209]

In the *Crest Street* case, the petitioners filed an administrative complaint with DOT in which they contended that a proposed highway extension under a DOT-assisted contract violated Title VI, and pursuant to DOT regulations, they requested an investigation. After DOT made a preliminary judgment of a violation of Title VI and of Section 21.5(b)(3) of DOT regulations, DOT urged the parties to begin negotiations, which ultimately led to a settlement providing for the petitioners' rerouting of the extension. The petitioners sought attorney fees in an independent action in the United States District Court for the Middle District of North Carolina.[210] The holding of the district court that fee awards are not authorized for administrative hearings was ultimately affirmed by the Supreme Court when it reversed the decision of the Fourth Circuit allowing such fees.[211] The majority, in an opinion written by Justice O'Connor, based its decision on the plain language and legislative history of the Civil Rights Attorneys Fees Awards Act of 1976 and expressed the view that its holding would encourage "potential civil rights defendants to resolve disputes expeditiously, rather than risk the attorney's fees liability connected to civil rights litigation."[212]

A further explanation for the failure to impose sanctions is that since it is not clear that seeking an administrative determination is a condition precedent to the institution of litigation alleging a violation of Title VI and DOT regulations, plaintiffs have instituted litigation before a decision is issued in the administrative proceeding. Although, to date, the occasion has not arisen to review termination, suspension, or dental of benefits orders of DOT, it is clear that such action, i.e., taken pursuant to Section 602 of the Civil Rights Act of 1964, is subject to judicial review as provided in Section 603 of the Act.[213] Only a single complaint involving noncompliance has been identified that is currently the subject of an administrative proceeding and is not also the subject of a litigation.[214] The complaint in *Georgia Legal Service Program v. City of Macon* was filed in June 1994 on behalf of African-American and disabled residents of Macon, Georgia, and alleges disparate provision of transportation services in the city of Macon and in Bibb County, Georgia. The complaint alleges that a violation of Title VI and the implementing DOT regulations arises from an overfunding of the road network, which is used primarily by nonminorities, and an underfunding of the public bus transportation system, which is used primarily by African-Americans lacking cars. This deployment of public transportation funds is alleged to discriminate against African-American residents, who make up the majority of residents without cars. The complaint also asserts that the city, the County, the Planning and Zoning Commission, and the Georgia DOT have no persuasive justification for their discriminatory acts and omissions. In addition, the complainant alleges that while the defendants have accelerated the planning of roads, streets, and highways, they have failed to invigorate or accelerate other transportation planning involving public transit. This conduct is alleged to constitute a failure to comply with federal transportation law as reflected in the Intermodal Surface Transportation Efficiency Act of 1991. The complaint is not limited to Title VI and its implementing regulations since the complaint includes disabled residents who allege violations of the Americans with Disabilities Act.

The petitioners requested that the office of the DOT Assistant Secretary for Civil Rights investigate this complaint based on the involvement of intermodal transportation policies and practices.[215] In May 1995, after a review of the allegations in the complaint, the complaint was accepted by DOT's Director, Departmental Office of Civil Rights, "for investigation under Title VI of the Civil Rights Act of 1964."[216] The investigation is ongoing.

C. Equality in the Provision of Transit Services--Class Actions

Before addressing litigation that raises the issue of equality in the provision of transit service or alleges discrimination in the provision of public transportation,

it is necessary to consider the type of conduct Title VI and the implementing DOT regulations seek to restrain.

To illustrate the application of the nondiscrimination provisions, DOT regulations include:

> No person or group of persons shall be discriminated against with regard to the routing, scheduling or quality of service of transportation service furnished as a part of the project on the basis of race, color, or national origin. Frequency of service, age and quality of vehicles assigned to routes, quality of stations serving different routes, and location of routes may not be determined on the basis of race, color or national origin.[217]

In a research report (Research Report) sponsored by DOT, equity in the provision of transit service is described as "providing equal levels of service to minority and non-minority residents of the urbanized area. Levels of service, in turn, are defined in terms of capital allocation and accessibility."[218] The Research Report listed some indices of discrimination that could be monitored for disparate treatment. These include assigning older or inferior equipment to minority areas; distributing more benches and other amenities to nonminority areas; scheduling practices that provide a lesser level of service to minority areas; routing practices that require more transfers by minority passengers; and fare structures, particularly transfer charges, which cause "minority-group riders consistently to bear a higher average fare burden than non-minority group riders."[219] The Research Report indicates that a discriminatory fare structure is generally related to the routing practice mentioned, i.e., transfers.

It is noteworthy that this Research Report, prepared in 1977, mentions "fare structure" since the examples contained in the DOT regulations, although stated to be illustrative "without being exhaustive," do not specifically mention the fare structure. The Research Report recognizes that sometimes there is a trade-off required between equity and efficiency: Namely, that the remedy for apparent discrimination, in a situation where the funding of the transit system results from delicate political compromises, may be attainable only at the peril of a loss of financial support and hence of service or improved service for all parties.[220]

The issues that are at the forefront of the discrimination complaints in Georgia, New York, and Los Angeles revolve around capital allocation and fare structure and appear to involve political compromises. These issues present themselves in a complex fashion since the conduct complained of involves alleged favoring of one means of transportation over another, rather than the favoring of nonminority passengers in the provision of the same mode of transportation. Thus, it is alleged to be discrimination to favor the construction of roads and highways over the provision of public bus transportation (Georgia), to require primarily minority passengers to pay a higher share of the cost of operating the mass transit system than the share primarily nonminority passengers pay toward the operation of the commuter rail system (New York), and to increase the fares and eliminate the passes of bus riders who are predominantly minority and poor while allocating funds to construct a rail line designed to eventually serve a predominantly white and relatively wealthy commuter ridership (Los Angeles).

In *New York Urban League, Inc. v. State of New York*,[221] the Second Circuit reversed the granting by the district court[222] of a preliminary injunction barring the MTA from imposing a fare increase on the mass transit system and remanded the case to the district court for further proceedings. These proceedings have not yet been concluded. The reversal was based on a determination by the Second Circuit that the district court's conclusion that the plaintiffs are likely to succeed on the merits is based upon insufficient evidence.

The underlying complaint alleged that the predominantly minority users of mass transportation, compared with the predominantly white riders of the commuter lines, bear a disproportionately high share of the cost of operating the system they use. Plaintiffs contended that the disparity in the share of costs borne by the two groups of passengers violates DOT regulations promulgated under Title VI, including Section 21.5(b)(2), which provides:

> A recipient in determining the type of services, financial aid, or other benefits, or facilities which will be provided under any such program ... may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting persons to discrimination because of their race, color, or national origin ...[223]

Since the reversal and remand were based on insufficient findings by the district court, the Second Circuit did not rule on many of the threshold legal issues raised, including:

1. Whether the DOT regulations, which target a recipient's decisions as to the types of services, financial aid, or other benefits it will provide, cover an allocation of subsidies;

2. Whether subsidies to two different transportation systems are a proper subject for comparison under the regulations; and 3. Whether the State of New York, although not a direct recipient of funds designated for the MTA, is nonetheless a proper defendant under the regulations.[224]

The Second Circuit's opinion is instructive since it states that even if the record supported a *prima facie* showing of disparate impact, the record did not support "the second prong of the analysis-whether the defendants have shown a substantial legitimate justification for the challenged conduct."[225] Since the focus of the complaint is the total allocation of subsidies to the mass transit system and the commuter line, the Second Circuit stated the district court should have considered and analyzed "whether the defendants had shown a substantial legitimate justification for this allocation."[226] Defendants persuasively argued that the district court failed to address several factors relating to the larger policy initiative of subsidizing commuter rail transportation as a means to discourage suburban residents from driving into the city, thereby indirectly benefiting minority riders of the city mass transit system. The benefits, while indirect, nevertheless may have an overall positive impact on minority riders of the city mass transit system, and include the following:

1. It minimizes congestion and pollution.
2. It encourages business to locate in the city.
3. It provides additional fare-paying passengers for the mass transit system.

Thus, the Second Circuit signaled that the foregoing factors may justify a disproportionate allocation of monies to the commuter lines.

The Second Circuit concluded by stating that a preliminary injunction barring a fare increase was an inappropriate remedy since the theory of the complaint is that mass transit users receive a comparatively disproportionate subsidy rather than that mass transit users pay too high a fare. As the Second Circuit noted, an increase in subsidies would not necessarily result in a lower fare since management might elect to use a subsidy increase for other purposes, such as increased services. Furthermore, the Second Circuit stated that a remedy for any disparity might include reducing the commuter subsidy rather than increasing the mass transit subsidy.

Many of the issues raised in the New York litigation, but not decided by the Second Circuit, are also present in the Los Angeles litigation. In *Labor/Community*

Strategy Center v. Los Angeles County Metropolitan Transportation Authority,[227] plaintiffs sought a preliminary injunction enjoining the MTA from implementing bus fare hikes and eliminating the use of bus passes. The Los Angeles plaintiffs sought to permanently enjoin the MTA from operating an allegedly "discriminatory two tier, separate and unequal system of public transportation--one for poor minority bus riders and another designed to serve predominantly white and relatively wealthy rail riders."[228] Plaintiffs alleged a violation of the Fourteenth Amendment to the United States Constitution, which guarantees the equal protection of the laws; the Civil Rights Act of 1866, which guarantees minority persons the same right to make and enforce contracts as white persons and prohibits depriving individuals of the equal protection of the laws; and Title VI of the Civil Rights Act of 1964 and the implementing DOT regulations, which prohibit the defendant from using federal funds in a discriminatory manner. The plaintiffs allege both an unjustified adverse impact of MTA's policies and practices on the bus-riding minority poor and the intentionally discriminatory nature of MTA's policies and practices. Among the actions alleged to be discriminatory are the spending of 70.9 percent of MTA's total resources on commuter rail projects, although 94 percent of the MTA patrons are bus riders; refusing to provide service to minority communities or to connect them to other areas; providing inferior bus service; imposing arbitrary transfers in minority communities; and making changes in rapid rail plans on racially motivated grounds.

Judge Hatter of the U.S. District Court in the Central District of California granted a preliminary injunction to maintain the status quo, holding that any harm to the defendants resulting from being enjoined "pales in comparison to the harm to plaintiffs if the fare changes are implemented."[229] The district court found that plaintiffs had presented "more than sufficient evidence to meet their burden of preliminarily showing that MTA's actions have adversely impacted minorities; that MTA's actions were not justified by business necessity; and that the MTA has rejected less discriminatory alternatives."[230] In addition, the district court found that the plaintiffs had raised serious questions going to the merits of their disparate impact claim and their intentional discrimination claim, and that the MTA had not come forward with sufficient evidence to rebut the plaintiffs' initial evidentiary showing or to demonstrate that the fare increases and pass elimination were required by business necessity.

On January 25, 1995, the parties entered into a stipulation modifying the order granting the preliminary injunction with respect to the fare structure and waiving any right to appeal such order. With the agreed to modified fare structure in place pending trial, the litigation continued[23l] until October 1996, when Judge Hatter approved a Consent Decree containing a settlement that has been estimated by an attorney for the plaintiffs to cost in the hundreds of millions of dollars. The settlement provides for additional bus service and continuation of the sale of the monthly bus pass, as well as a commitment by the MTA to provide additional security on the bus system. The Consent Decree establishes specific criteria to reduce the crowding on buses, including target maximum passenger load factors and dates by which these targets must be met. Although the Consent Decree states that the MTA "will have discretion in determining how the targets will be met," the MTA must consult with the Joint Working Group (JWG) in formulating and implementing its plan. The JWG is provided for in the Consent Decree and is composed of an equal number of representatives of the MTA and the plaintiffs' class. In addition to working on reducing overcrowding, the JWG is charged with fostering cooperation in the implementation of the Consent Decree. Moreover, the Consent Decree provides that:

- MTA shall work with the JWG in the development and implementation of bus service improvement plans and on fare adjustment issues.
- MTA shall engage in ridership surveys, and shall seek the participation and concurrence of the JWG in developing the methodology and procedures for such surveys.

Disputes under the Consent Decree in which the JWG has a role are initially addressed by the JWG. If the JWG cannot resolve the dispute, or does not have a role in the disputed function, the dispute is referred to the attorneys for the parties. If they do not resolve the dispute, provision is made for resolution by a Special Master whose decision is reviewable by the district court.

The district court has jurisdiction over the litigation to monitor compliance with the Consent Decree for 10 years unless at the end of 7 years, based upon specific showings of compliance with the Consent Decree and a service plan that will continue adherence for 5 years to the principles and objectives of the Consent Decree, the district court grants a motion by the MTA to terminate the Consent Decree.

The most important features of the Consent Decree may ultimately turn out to be the provisions for the JWG and the Special Master. The provisions with respect to the JWG provide a mechanism to ensure that the needs of the plaintiffs are taken into account in developing and implementing plans for transit service. The appointment of a Special Master to resolve disputes not resolved by the JWG should facilitate timely decisions and reduce the need for adversarial court proceedings.

Many of the issues in the current litigation in New York and Los Angeles are similar to those present in *Committee For a Better North Philadelphia v. Southeastern Pennsylvania Transportation Authority* [232] (SEPTA), which granted summary judgment to the defendants. This was affirmed, without opinion, by the Third Circuit in 1991. The defendant, SEPTA, operates a transit system that serves primarily minority riders in Philadelphia and a rail system that travels to the suburbs and has a primarily nonminority ridership. SEPTA is the recipient of subsidies from various state and federal agencies, including DOT. These subsidies are received for the entire SEPTA system, and the Board of SEPTA determines the manner in which the subsidies will be used. Plaintiffs alleged that the allocation of subsidies favors the commuter rail system's primarily nonminority riders at the expense of the primarily minority transit riders and that this has a discriminatory impact on the minority community of Philadelphia, in violation of Title VI. For the purpose of its motion to dismiss the complaint, SEPTA conceded that the transit fares would be lower if SEPTA allocated its subsidies based on a proportion determined from passenger fare revenues rather than operating deficits. The district court concluded that this "cross-subsidization" caused the transit riders to "pay through their fares a higher percentage of the division's operating expenses than do the riders of Regional Rail."[233] This raised an inference of discrimination, which the district court found SEPTA overcame by showing that its conduct was based upon legitimate, nondiscriminatory reasons. The justification accepted by the district court for the use of cross-subsidization is the necessity "to accomplish the goal of stabilizing Regional Rail fares, maintaining service to the area, luring back Regional Rail ridership, and keeping a balanced budget in all of its divisions."[234] The plaintiffs were unable to show that there were other devices available to accomplish this goal without having a similar undesirable impact. Accordingly, the summary judgment motion of SEPTA was granted.

The district court, in its discussion of the three means of eliminating cross-subsidization, dismissed the option of raising higher subsidy dollars for the entire system on the ground that it was outside the control of SEPTA and lies with Congress and the Pennsylvania legislature. The district court dismissed the remaining two options--increasing fares and decreasing service on Regional Rail--as a matter within the business judgment of SEPTA, stating it "is not this court's function to second guess the business judgment of SEPTA or otherwise dictate what business goals such an entity should pursue."[235]

In its disparate impact analysis and discussion with respect to a legitimate business justification, the district court in *SEPTA* relied on Supreme Court precedent in *Wards Cove Packing Co., Inc. v. Antonio*[236] and also cited two earlier lower court disparate impact decisions. The subsequent enactment by Congress of the Civil Rights Act of 1991,[237] amending Title VII in response to *Wards Cove*, may require a different analysis by the courts of alleged violations of Title VI than the analysis applied by the district court in *SEPTA.* This issue is in contention in the New York litigation and was in contention in the Los Angeles litigation.

In Los Angeles, the plaintiffs assert that (a) *"SEPTA's* rejection of the business necessity standard in favor of a legitimate purpose test" is at odds with Ninth Circuit precedent, and (b) *SEPTA's* legitimate purpose test is based on *Wards Cove*, which was overruled by the Civil Rights Act of 1991.[238] The defendants in the Los Angeles litigation, on the other hand, note that the two lower court disparate impact decisions relied on by the district court as precedent for the legitimate purpose test preceded *Wards Cove* and therefore were not overruled by the Civil Rights Act of 1991.[239]

In the New York litigation, the finding of the district court in *SEPTA* that the objective of SEPTA in increasing Regional Rail ridership represented a legitimate business judgment has been relied upon by the defendant.[240] The plaintiffs in the New York litigation have relied upon the *SEPTA* decision to support their assertion that DOT regulations apply to the allocation of transit subsidies, noting that the district court in *SEPTA* never questioned such applicability.[241] MTA, the defendant in the New York litigation, asserts that due to its lack of authority to control its subsidies, it is not properly a defendant in a Title VI claim relating to determinations on financial aid.[242]

The foregoing illustrates some of the many arguments surrounding complaints of inequality in the provision of transit services. Guidance to transit grantees must await pronouncements by the Circuit Courts, and perhaps ultimately by the Supreme Court, on issues as basic as whether Title VI implementing regulations apply to transit subsidies, and whether the legitimate business purpose or business necessity purpose is the appropriate standard to apply in justifying disparate impacts under DOT's Title VI implementing regulations. In the meanwhile, it is incumbent on transit grantees to carefully monitor litigation relating to alleged discrimination in the provision of transit services.

IV. CONCLUSION

A. Affirmative Action Programs for DBEs

It is essential that DOT promptly complete its evaluation of whether its present DBE program will withstand strict scrutiny and comply with the demand of the President that "any program that does not meet the constitutional standard must be reformed or eliminated." Until this is done, transit grantees continue to be placed in the untenable position of being at risk of having to defend a DBE program that DOT may ultimately conclude does not meet constitutional standards.

Transit grantees should look to DOT to provide assistance in defending constitutional challenges to the DBE program. As a result of their current extensive review of the legal and factual issues surrounding DBE programs, the DOT and the Justice Department possess the unique expertise required to defend constitutional challenges to such programs. Thus, they can bring to bear insights and experience that are not possessed by the majority of transit grantees and that could only be obtained with the expenditure of considerable time and money.

It is anticipated that even if DOT concludes that the DBE program contemplated by the current regulations passes constitutional muster, the agency will still issue revised regulations clarifying aspects of the program that are ambiguous. For example, the question of whether a contractor is exercising good faith if he fails to retain a qualified DBE subcontractor solely because the DBE is more expensive than its non-DBE competitor requires clarification. If DOT determines that good faith requires paying a financial premium to obtain the services of a DBE subcontractor, guidelines are required to define the extent of the premium required. This is necessary because there is a point at which a premium is too high to be attributable to discrimination or exclusion and to require its payment would be subject to constitutional challenge.

Transit grantees need not wait for further guidance from the DOT to increase their outreach and technical assistance to DBEs. It is clear that race-neutral initiatives such as expanding mailing lists, eliminating or reducing bonding requirements, and making instruction available in estimating, computer skills, and other disciplines will not only pass strict scrutiny but are essential to narrow tailoring.

Transit grantees should prepare for future challenges by setting up a data collection system that will make readily available the information required to defend DBE programs. This would include maintaining a list of the potential DBE subcontractors and a compilation of the bids received on each contract containing a DBE goal, indicating the bidders who agreed to meet the goal and those who did not. Data should also be kept on the number of bids received directly from DBEs by the transit grantee, together with the reasons why such bids were accepted or rejected.

Accurate records of the DBE participation achieved at the construction site should be kept by the transit grantee. Such information will be of value in ascertaining the actual DBE participation and may be of use in determining whether to make future awards to a contractor who has a pattern of not achieving the agreed to DBE goal.

The staff of the transit grantee should possess the technical skills and experience required to ensure literal compliance with DOT regulations and to collect and evaluate the data needed to ensure that the DBE program, as implemented by the transit grantee, passes constitutional muster under the strict scrutiny standard.

It is essential that the transit grantee administer the DBE program in strict accordance with the regulations. For example, a qualified low bidder who does not meet the DBE goal should be given every opportunity to demonstrate that he utilized good faith efforts, as defined in the regulations, and nevertheless could not meet the goal. This bidder should be awarded the contract if he makes such a demonstration, since any other action would be subject to challenge on the ground that the DBE program, as enforced, is an inflexible quota.

In the event an analysis of subcontracting opportunities and available DBE subcontractors indicates a DBE goal may not be achieved, the transit grantee should not include a goal in the contract and should advise DOT as to its reasons

herefor. The sanctions, if any, that DOT may impose on a transit grantee relate to ts failure to meet the overall goal. Therefore, such notification should assist the transit grantee in resisting the imposition of sanctions in the event it cannot make ?? for the "lost" DBE participation by achieving high DBE participation under other contracts. If the transit grantee includes a DBE goal in a particular contract, notwithstanding an analysis which indicates the contract does not contain subcontracting opportunities or that there are no DBE subcontractors available to perform subcontracts in the required trades, the transit grantee's program becomes vulnerable to a constitutional challenge that it failed to narrowly tailor its contract DBE goal. It thus appears that, on balance, the transit grantee should be cautious about including DBE goals in contracts without adequate factual justification, particularly in regions or industry areas where, based on prior litigation or statements of contractor representatives and others, it is reasonable to anticipate challenges to the DBE program.

B. Equality of Service

Transit grantees should be aware that there is an increasing likelihood that proposed increases or changes in their fare structure or in their routes will subject them to litigation if such changes are perceived to have an unjustified adverse impact on minorities. Transit grantees should continue to seek guidance from the DOT and to monitor the litigations relating to equality of service. As the courts determine the as yet unresolved issues surrounding equality of service, the transit grantee should extrapolate guidelines as to permissible and impermissible conduct from the courts' determinations, which the transit grantee can then apply to its factual situation.

ENDNOTES

[1]Pub. L. No. 95-507 and Pub. L. No. 100656 require DOT, like all other federal agencies and departments, to establish and monitor its goals for small and disadvantaged businesses (SDBs) participation in its direct procurement. SDBs do not include women-owned firms. However, the Federal Procurement Streamlining Act of 1994 established a 5 percent goal for women-owned business enterprises (WBEs).

49 C.F.R. pt. 23 (1995) contains the regulations governing implementation of the obligations of transit grantees respecting programs authorized by various statutes to provide contracting opportunities for small business concerns owned and controlled by socially and economically disadvantaged individuals in DOT's highway, mass transit, and airport financial assistance programs.

[2] 49 C.F.R. pt. 21 (1995) contains the regulations governing implementation of the obligations of transit grantees under Title VI of the Civil Rights Act of 1964.

[3] 49 C.F.R. § 23.62 (1995).

[4] *Id*.

[5] 115 S. Ct. 2097 (1995).

[6] FEDERAL TRANSIT ADMINISTRATION, TRANSIT PROFILES FOR THE 1994 TRANSIT DATABASE REPORT YEAR (1995).

[7] FEDERAL TRANSIT ADMINISTRATION, DEPARTMENT OF TRANSPORTATION, Form FTA(3), MASTER AGREEMENT (1996).

[8] MASTER AGREEMENT § 22c, DISADVANTAGED BUSINESS ENTERPRISE and § 22a, TITLE VI OF THE CIVIL RIGHTS ACT OF 1964.

[9] DEFINITIONS, AFFIRMATIVE ACTION, 49 C.F.R. § 23.5 (1995).

[10] DISCRIMINATION PROHIBITED (a), (b)(1), (2), (5), and (7),.49 C.F.R. § 21.5 (1995).

[11] Memorandum from President Clinton to Heads of Executive Departments and Agencies dated July 19, 1995. Notice of Proposed Reforms to Affirmative Action in Federal Procurement, 61 Fed. Reg. 26042 (Dep't Justice May 23, 1996). Currently, DOT staff is conducting an evaluation of DBE and SDB programs for the President.

[12] 488 U.S. 469 (1989).

[13] 115 S. Ct. 2102.

[14] *Id.* at 2101.

[15] *Id.* at 2102.

[16] 790 F. Supp. 240 (D. Colo. 1992), *aff'd,* 16 F.3d 1537.

[17] 16 F.3d 1537 (10th Cir. 1994).

[18] 448 U.S. 448 (1990).

[19] 16 F.3d 1537, 1544.

[20] 497 U.S. 547 (1990).

[21] 16 F.3d at 1545 (quoting Metro Broadcasting, Inc. v. FCC), 497 U.S. 547, 565 (1990).

[22] 115 S. Ct. 2118.

[23] 16 F.3d 1547.

[24] 115 S. Ct. 2117.

[25] *Id.* at 2118.

[26] *Id.* at 2113.

[27] *Id*.

[28] 61 Fed. Reg. 26042.

[29] 115 S. Ct. 2117.

[30] U.S. Const. amend. XIV, § 5.

[31] U.S. Const. amend. XIV, § 1.

[32] 115 S. Ct. 2123 (Stevens, J., dissenting).

[33] *Id.* at 2114.

[34] *Id*.

[35] 61 Fed. Reg. at 26042 (May 23, 1996).

[36] *Id.* at 26050-26063 contains an appendix setting forth the preliminary survey of evidence relied upon.

[37] 49 C.F.R. § 23.41 (1995).

[38] 49 C.F.R. § 23.45 (g) and § 23.66 (1995).

[39] 49 C.F.R. § 23.62 (1995).

[40] Pub. L. No. 102-240 (December 18, 1991), 105 Stat. 1919.

[41] 49 C.F.R. § 23.62 (1995).

[42] *Id*

[43] *Id.*

[44] 49 C.F.R. § 23.61 (1995).

[45] 49 C.F.R. § 23.66 (1995).

[46] Minutes of Metropolitan Transportation Authority meeting of January 24, 1996, at 3.

[47] 49 C.F.R. § 23.45 (g)(7) (1995).

[48] 49 C.F.R. § 23.45(g)(2)(ii) (1995). Requires goals only for prime contracts "with subcontracting possibilities."

[49] 49 C.F.R. § 23.45 (h)(1).

[50] 49 C.F.R. § 23.45 (h)(2).

[51] GUIDANCE CONCERNING GOOD FAITH EFFORTS, 49 C.F.R. App. A to § 23.45

[52] *Id*.

[53] GUIDANCE CONCERNING GOOD FAITH EFFORTS, at ¶ 7,49 C.F.R. App. A to § 23.45

[54] On December 9, 1992, the Department of Transportation issued a Notice of Proposed Rule Making (NPRM), which clarified certain regulatory provisions respecting DBEs and revised the DBE program to reflect DOT's experience in administering the program since 1980 (52 Fed. Reg. 58288). Although comments were received during the initial and extended comment period. the regulations have not yet been issued.

The NPRM includes an appendix listing matters recipients should consider in evaluating good faith efforts of contractors. One of these considerations is that the need to incur "reasonable" extra costs for finding and using DBEs is not an adequate reason for failing to meet a goal. However, DOT specifically sought comments on whether recipients should be required to quantify, in the bid documents, what a "reasonable" cost for DBE participation would be for the contract.

[55] In Croson, 488 U.S. 489, Justice O'Connor approves the seeking of a waiver of the MBE provision in Fullilove "where an MBE attempts to exploit the remedial aspects of the program by charging an unreasonable price, i.e., a price not attributable to the present effects of prior discrimination."

[56] C.F.R. § 23.45 (g)(i).

[57] 49 C.F.R. § 23.66.

[58] 49 C.F.R. § 23.45 (g)(3)(i).

[59] 49 C.F.R. § 23.45 (g)(l).

[60] 49 C.F.R. § 23.45 (g)(2)(ii) and 49 C.F.R. § 23.45 (g)(3)(i). Goals for specific contracts need not be submitted with the recipients DBE program but "may require approval by the Department prior to contract solicitation."

[61] 49 C.F.R. § 23.45 (h)(2).

[62] 61 Fed. Reg. 26062.

[63] 743 F. Supp. 977 (N.D.N.Y. 1990).

[64] Unpublished letter. Copy will be provided upon request.

[65] 61 Fed. Reg. 26042.

[66] 488 U.S. 507.

[67] 49 C.F.R. § 23.45 (c).

[68] 729 F. Supp. 734, 740 (W.D. Wash. 1989), *aff'd in part*, 941 F.2d 910 (9th Cir. 1991).

[69] 941 F.2d 923.

[70] 779 F. Supp. 370 (D. Md. 1991).

[71] 488 U.S. 507.

[72] The Second Circuit in Harrison and Burrowes, 981 F.2d 50 (2nd Cir. 1992) held that New York need not make independent findings of discrimination to support a DBE goal of 17 percent, stating that the language of the federal statute requiring not less than 10 percent DBE participation "clearly contemplates minority set-asides above that figure," at 57-58.

[73] 49 C.F.R. § 23.45 (g)(3)(i).

[74] 489 U.S. 1062 (1989).

[75] H.K. Porter Co. v. Metropolitan Dade County, 825 F.2d 324, at 332 (11th Cir. 1987), *vacated*, 489 U.S. 1062 (1989).

[76] *Id*.

[77] 115 S. Ct. 2110.

[78] 488 U.S. 510.

[79] 49 C.F.R. § 23.45 (g)(2)(ii).

[80] 941 F.2d 924.

[81] 488 U.S. 489.

[82] 941 F.2d 914.

[83] 488 U.S. 489.

[84] 922 F.2d 419 (7th Cir. 1991), *cert. denied,* 500 U.S. 954 (1991).

[85] 779 F. Supp. 370 at 381.

[86] 488 U.S. 508.

[87] 115 S. Ct. 2118.

[88] *Id.*

[89] *Id.*

[90] *Id*

[91] Civil Action No. 95-2301 (D.D.C. 1996).

[92] *Id.* at 20.

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

[94] 899 F. Supp. 753,761 (D. Mass. 1995).

[95] Civil Action No. 95-1345 H.B. (D.N.M. 1996).

[96] *Id* at 7.

[97] 508 U.S. 656 (1993). The Supreme Court held that to establish standing the aggrieved party need not allege that he would have obtained a benefit but for the barrier.
[98] Dynalantic at 18.
[99] *Id.*, fn. 8.
[100] McCrosson, at 9.
[101] *Id.*
[102] Superior Court of California, No. B.C. 101 913 (July 27, 1995) (WL 9822).
[103] *Id.*
[104] *Id.* at 3-5.
[105] Cornelius v. Los Angeles County Metro. Transit Auth., 57 Cal. Rptr. 2d 618 (1996).
[106] *Id.* at 629.
[107] Civil Action No. H-93-3651 U.S. (S.D. Texas 1996).
[108] 834 F.2d 583 (6th Cir. 1987).
[109] *Id.*, at 595.
[110] *Id.*
[111] 116 S. Ct. 2264 (1996).
[112] *Id.* at 2275.
[113] *Id.*
[114] Minutes of Board Meeting of Port Authority of New York and New Jersey Commissioners (June 10, 1993).
[115] 61 Fed. Reg. at 26051, fn. 6.
[116] F. Supp. (S.D. Fla. 1996) 1996 WL560171.
[117] *Id.* at 7.
[118] *Id.* at 38.
[119] Houston Contractors Association, Civil Action No. H-93-3651 U.S. (S.D. Texas, 1996).
[120] 78 F.3d 932 (5th Cir. 1996), *cert. denied*, (U.S. July 1, 1996) (No. 95-1773).
[121] *Id.* at 934.
[122] *Id.*
[123] *Id.* at 962 (Weiner, J., *concurring).*
[124] *Id.* at 964.
[125] 438 U.S. 265 (1978).
[126] 78 F.3d 963.
[127] *Id.*, at 945-946.
[128] ____F.3d_ (3rd Cir 1996), WL445267 (3rd Cir. NJ 1996).
[129] 91 F.3d 586, *rehearing denied* September 5, 1996.
[130] *Id.* at 605.
[131] *Id.* at 607.
[132] *Id.* at 608.
[133] *See* 115 S. Ct. 2127, citing Bakke, 438 U.S. 265, 311-319 (1978).
[134] *Id.* at 2113.
[135] 78 F.3d 932 at 954.
[136] *Id.* at 954, fn. 47.
[137] *Id.* at 950, quoting Croson at 499.
[138] 488 U.S. 492.
[139] 78 F.3d 932, 964-965 (Weiner, J. *concurring).*
[140] GEORGE STEPHANOPOULOS AND CHRISTOPHER EDLEY, JR, AFFIRMATIVE ACTION REVIEW, REPORT TO THE PRESIDENT (July 19, 1995), p. 1.
[141] *Id.* (unnumbered page).
[142] *Id.* at 3.
[143] *Id.* at 4.
[144] *Id.* at 4-5.
[145] *Id.* at 20.
[146] *Id.* at 55.
[147] *Id.* at 62.
[148] *Id.* at 63.
[149] *Id.* at 64.
[150] *Id.*
[151] *Id.* at 65-66.
[152] *Id.* at 70, fn. 89.
[153] *Id.* at 72.
[154] *Id.* at 74.
[155] *Id.* at 71.
[156] *Id.* Appendix B., Memorandum dated June 28, 1995.
[157] *Id.* Appendix A, Memorandum dated June 19, 1995 at 1-2.
[158] 61 Fed. Reg. 26042.
[159] Report, Appendix B, Memorandum dated June 28, 1995, p. 30.
[160] *Id* at 32.
[161] *Id.* at 33.
[162] Report at 58.
[163] 61 Fed. Reg. 26051 (May 23, 1996), but the Department noted that "their use must be limited."
[164] *Id.* at 26054.
[165] Report, Appendix B at 35-36.
[166] Appendix A at 1-2.
[167] Appendix B at 34.
[168] Minutes of Metropolitan Transportation Authority Meeting of January 24, 1996.
[169] *Id.*
[170] *Supra*, note 63.
[171] 1991 WL 197049 (N.D. N.Y.). Subsequently, the Second Circuit affirmed both decisions of the district court, stating that "it cannot be said that New York's program, even post-Croson, would have been regarded by a reasonable public official as clearly unconstitutional." 981 F.2d 50, 62 (2nd Cir. 1992).
[172] 743 F. Supp. 977 at 1004, fn. 24 (N.D. N.Y. 1990).
[173] *Id.* at 996.
[174] *Id.* at 1005.
[175] *Id.*
[176] *Id.* at 996.
[177] *Id.* fn. 21.
[178] *Id.*
[179] 1991 WL 197049, 9 (N.D. N.Y.).
[180] *Id.* at 10.
[181] *Id.*
[182] *Id.*
[183] 78 F.3d 932.
[184] *Id.* at 959.
[185] 49 C.F.R. Part 21.
[186] Pub. L. 88-352, Title VI, § 601 (July 2, 1964), 78 Stat. 252, 42 U.S.C.A. § 2000-d.
[187] FEDERAL TRANSIT ADMINISTRATION, DEPARTMENT OF TRANSPORTATION, 178 Form FTA MA(3), MASTER AGREEMENT (1996).
[188] 49 C.F.R. § 21.5 (b)(2).
[189] 49 C.F.R. Appendix C to Part 21, (a)(3)(iii).
[190] 49 C.F.R. § 21.5 (b)(7).
[191] 49 C.F.R. § 21.5 (b)(3).
[192] 463 U.S. 582, 103 *S.* Ct. 3221, 77 L. Ed.2d 866 (1983).
[193] 401 U.S. 424 (1971). Subsequently, the Civil Rights Act of 1991 codified the concepts of "business necessity" and'job related" enunciated in Griggs prior to Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989).
[194] 463 U.S. 619, 103 S. Ct. 3241, fn. 7 (1983).
[195] 469 U.S. 287, 293 (1985).
[196] 49 C.F.R. § 21.9 (b).
[197] 49 C.F.R. § 21.11 (a).
[198] 49 C.F.R. § 21.11 (b).
[199] 49 C.F.R. § 21.11 (c) and (d).
[200] 49 C.F.R. § 21.13 (a).
[201] 49 C.F.R. § 21.15 (a) and (c).
[202] 49 C.F.R. § 21.17 (a).
[203] *Id.*
[204] 49 C.F.R. § 21.17 (b).
[205] 49 C.F.R. §21.13 (c)(3) and (4).
[206] 49 C.F.R. § 21.17 (e).
[207] 49 C.F.R. § 21.17 (g)(3).
[208] 49 C.F.R. § 21.11 (d)(1).
[209] 479 U.S. 6 (1986).
[210] 598 F. Supp. 258 (1984), *rev'd*, 769 F.2d 1025 (4th Cir. 1985), *rev'd*, 479 U.S. 6 (1986).
[211] *Id.*
[212] 479 U.S. 6 at 15 (1986).
[213] 42 U.S.C. 2000 d-1, 42 U.S.C. 2000 d2.
[214] Georgia Legal Services Program. v. City of Macon--DOT #94-922 (Complaint dated June 14, 1994).
[215] Letter from NAACP Legal Defense and Educational Fund, Inc. (LDF) dated January 18, 1995.
[216] Letter from DOT dated May 3, 1995.
[217] 49 C.F.R Part 21, Appendix C.
[218] DAVID R. MILLER, U.S. DEP'T OF TRANSPORTATION, UT-50029, EQUITY OF TRANSIT SERVICE, Vol. II at 29.
[219] *Id.* at 5.
[220] *Id.*
[221] 71 F.3d 1031 (2nd Cir. 1995).
[222] New York Urban League v. Metropolitan Transportation Authority, 905 F. Supp. 1266 (S.D. N.Y. 1995).
[223] 49 C.F.R. § 21.5(b)(2).
[224] 71 F.3d 1031, 1037.
[225] *Id.* at 1038.
[226] *Id.* at 1039.
[227] Labor/Community Strategy Center. Case No. CV94-5936 TJH (MCX), September 21, 1994.
[228] Amended complaint, ¶ 5.
[229] Findings of Fact and Conclusions of Law re: Preliminary Injunction--Conclusions of Law, ¶ 4.
[230] *Id.* at ¶ 6.
[231] Labor/Community Strategy Center--Case No. CV94-5936 TJH (MCX)--Stipulation and Proposed Order re: Modification of Order Granting Preliminary Injunction.

[232] 1990 WL121177 (E. D. Pa.) (1990) *aff'd w/o op*. 935 F.2d 1280 (3rd Cir. 1991).
[233] *Id.* at 6, fn. 8.
[234] *Id.* at 3.
[235] *Id.* at 5.
[236] 490 U.S. 642 (1989).
[237] Pub. L. 102-166, Title I §105 (November 21, 1991), 105 Stat. 1074, 42 U.S.C. § 2000e-2 (k)(1)(A).
[238] Plaintiff's Contentions of Fact and Law dated November 20, 1995 at 1589, ¶ 463.
[239] Defendants memorandum of Contentions of Fact and Law dated November 17, 1995 at 44.
[240] Brief for Defendants--Appellants--MTA and E. Virgil Conway, Chairman of MTA, dated November 13, 1995 at 28.
[241] Reply Brief for Plaintiffs--Appellees dated November 20, 1995 at 13.
[242] Brief for Defendants--Appellants--MTA and E. Virgil Conway, Chairman of MTA, dated November 13, 1995 at 19.

ACKNOWLEDGMENTS

This study was performed under the overall guidance of TCRP Project Committee J-5. The Committee is chaired by RICHARD J. BACIGALUPO, N.E. Illinois Regional Transit Authority. Members are ARTHUR P. BERG, Port Authority of New York and New Jersey; RICHARD W. BOWER, California Department of Transportation; SHELLY R. BROWN, Federal Transit Administration--Region 10; DORVAL RONALD CARTER, JR., Federal Transit Administration--Region 5; PAUL STEPHEN DEMPSEY, University of Denver; DENNIS C. GARDNER, Ogletree, Deakins, Nash, Smoak & Stewart, Houston, Texas; EDWARD J. GILL, JR., Eckert, Seamans, Cherin & Mellott; BRIGID HYNES-CHERIN, SanFrancisco County Transportation Authority; CLARKJORDAN-HOLMES of Stewart, Joyner, Jordan-Holmes, Holmes, P.A.; and JEANETTE J. CLARK, Attorney. LORETTA H. GARRISON provided liaison with the Federal Transit Administration during the preparation of this study, and GWEN CHISHOLM SMITH represents the TCRP staff.

TRANSPORTATION RESEARCH BOARD
National Research Council
2101 Constitution Avenue, N.W.
Washington, DC 20418