

Strict Scrutiny in Race-Based Government Contracts: As-Applied Challenges Require More Than a Narrow Tailoring Analysis

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I. Introduction	418
II. Background	422
A. SAFETEA-LU	422
1. A Federal Transportation Affirmative Action Statute	422
2. Constitutional Authority of SAFETEA-LU	424
B. The Equal Protection Strict Scrutiny Standard for Affirmative Action Programs in Government Contracting	425
1. State Affirmative Action Programs: The <i>Croson</i> Standard	425
2. Federal Affirmative Action Programs: The <i>Adarand III</i> Standard	427
III. Circuit Split: Is a State’s DBE Program Subject to an As-Applied Challenge?	428
A. Eighth Circuit: Allowing an As-Applied Challenge	429
B. Ninth Circuit: A Similar Eighth Circuit Approach	431
C. Seventh Circuit: No As-Applied Challenges Allowed	432
IV. Analysis	433
A. A State DBE Program Cannot be Insulated from Strict Scrutiny Analysis	434

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B. Narrow Tailoring Alone is Insufficient to Meet Strict Scrutiny	436
C. The Ninth Circuit had Proper Application, But a Flawed Explanation	438
D. The Supreme Court Should Apply Strict Scrutiny as Articulated in <i>Croson</i> and <i>Adarand III</i>	439
1. A State Must Exhibit its Own Compelling Interest	440
2. Narrow Tailoring is More Than an Analysis of Compliance with SAFETEA-LU Regulations	441
V. Conclusion	444

I. INTRODUCTION

“[W]e are just one race here. It is American.”¹ Justice Scalia’s concurrence in *Adarand v. Peña* (*Adarand III*)² supported the view that equal protection under the Constitution requires that all people are treated equal, without regard to race. Justice Harlan first articulated this view over 100 years ago, in his 1896 dissent in *Plessy v. Ferguson*.³ With his famous words “[o]ur Constitution is colorblind, and neither knows nor tolerates classes among citizens,” Justice Harlan’s view was forward-looking at the time, but still resonates today.⁴

Recently, state and local governments have implemented affirmative action programs in the employment context.⁵ One type of affirmative action program is race-based, with the goal of ensuring equality so that our nation’s racially biased history does not repeat.⁶ But,

¹ *Adarand Constructors, Inc. v. Peña* (*Adarand III*), 515 U.S. 200, 239 (1995) (Scalia, J., concurring).

² 515 U.S. 200 (1995).

³ 163 U.S. 537 (1896).

⁴ *Id.* at 559 (Harlan, J., dissenting).

⁵ See e.g. *H.B. Rowe Co. v. Tippett*, 615 F.3d 233 (4th Cir. 2010); *N. Contracting Inc., v. Illinois*, 473 F.3d 715, 720 (7th Cir. 2007); *Jana-Rock Constr. v. New York*, 438 F.3d 195 (2d Cir. 2006); *W. States Paving Co. v. Wash. DOT*, 407 F.3d 983, 995 (9th Cir. 2005); *Sherbrooke Turf, Inc. v. Minn. DOT*, 345 F.3d 964, 972 (8th Cir. 2003); *Adarand Constructors, Inc. v. Slater* (*Adarand IV*), 228 F.3d 1147, 1182 (10th Cir. 2000); *Tenn. Asphalt Co. v. Farris*, 942 F.2d 969 (6th Cir. 1991); *Geod Corp. v. N.J. Transit Corp.*, 678 F. Supp. 2d 276 (D.N.J. 2009).

⁶ See *Local 28 of Sheet Metal Workers’ Int’l Ass’n v. EEOC*, 478 U.S. 421, 474 (1986) (“The purpose of affirmative action is not to make identified victims whole, but rather to dismantle prior patterns of employment discrimination and to prevent discrimination in the future.”)

the Supreme Court has shown concern that these programs have gone too far and that there are ways to ensure equal opportunity for all without taking race into consideration.⁷ Therefore, to achieve true equality, the Court requires that race-based affirmative action programs, “imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.”⁸ In other words, federal, state, and local governments must only implement racial classifications if supported by a compelling reason, such as eliminating purposeful discrimination, and must design their programs specifically to address that reason.⁹

The review of government affirmative action programs has been a source of controversy for several decades.¹⁰ In *Richmond v. Croson*,¹¹ the Supreme Court required that a reviewing court apply strict scrutiny to state affirmative action programs.¹² The Court then expanded its *Croson* analysis in *Adarand III*, where the Court held that a reviewing court must analyze any federal or state race-based affirmative action program under strict scrutiny.¹³

In 1982, the federal government implemented an affirmative action program for minority-owned businesses.¹⁴ Congress reauthorized the program several times, most recently as the Transportation Equity Act for the 21st Century (TEA-21) in 1998 and as the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU or “the Act”) in 2005.¹⁵ The Act requires state and local

⁷ See *id.* at 476 n.48; see also *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989) (“There is no evidence in this record that the Richmond City Council has considered any alternatives to a race-based quota.”)

⁸ *Adarand III*, 515 U.S. at 227.

⁹ See *id.*

¹⁰ The confusion started in 1978, in *Regents of University of California v. Bakke*, where Justice Powell applied strict scrutiny, but only Justice White joined him in this part of the opinion. 438 U.S. 265, 291 (1978). Next, in *Fullilove v. Klutznick*, six Justices affirmed the set aside program, but could not agree on the level of scrutiny to be applied. 448 U.S. 448, 483, 495, 518 (1980). Three justices argued for strict scrutiny and three concurring justices argued for intermediate scrutiny. Then, in *Wygant v. Jackson Board of Education*, the plurality employed strict scrutiny. 476 U.S. 267, 279–80 (1986). In *Richmond v. Croson*, a majority confirmed a strict scrutiny standard of review, but only for state programs. 488 U.S. 469, 490–93 (1989). In *Metro Broadcasting v. FCC*, the Court applied intermediate scrutiny for benign federal racial classifications. 497 U.S. 547, 564–65 (1990).

¹¹ 488 U.S. 469 (1989).

¹² *Id.* at 490–93.

¹³ See *Adarand III*, 515 U.S. at 227.

¹⁴ See Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, 96 Stat. 2097 (1982) (codified in scattered sections of 23, 26 U.S.C.).

¹⁵ Transportation Equity Act for the 21st Century (TEA-21), Pub. L. No. 105-178, 112 Stat. 107 (1998) (codified in scattered sections of 16, 23, 49 U.S.C.); Safe,

recipients of federal transportation funds to operate affirmative action programs, specifically, Disadvantaged Business Enterprise (DBE) programs, mandating that each state spend ten percent of those funds with socially and economically disadvantaged individuals when contracting for transportation projects within the state.¹⁶ The purpose of SAFETEA-LU, according to the United States Department of Transportation (USDOT or DOT), is to “ensure nondiscrimination in the award and administration of DOT-assisted contracts,” “create a level playing field on which DBEs can compete fairly,” “help remove barriers to the participation of DBEs in DOT-assisted contracts,” and “provide appropriate flexibility to recipients of Federal financial assistance in establishing and providing opportunities for DBEs.”¹⁷

Four circuits have reviewed the constitutionality of TEA-21,¹⁸ but no circuit has reviewed the constitutionality of SAFETEA-LU.¹⁹ These circuits addressed subcontractor’s challenges under the Fourteenth Amendment that the state statutes implementing the federal requirements are either facially unconstitutional²⁰ or are unconstitutional as-applied²¹ to them.²² The Eighth, Ninth, and Tenth Circuits, agreed that TEA-21

Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Pub. L. No. 109-59, 119 Stat. 1144 (2005) (codified in scattered sections of 2, 5, 6, 15, 16, 19, 21, 23, 26, 31, 33, 42, 45, 49 U.S.C.).

¹⁶ 119 Stat. at 1156.

¹⁷ 49 C.F.R. § 26.1 (2011).

¹⁸ See *N. Contracting Inc., v. Illinois*, 473 F.3d 715, 720 (7th Cir. 2007); *W. States Paving Co. v. Wash. DOT*, 407 F.3d 983, 995 (9th Cir. 2005); *Sherbrooke Turf, Inc. v. Minn. DOT*, 345 F.3d 964, 972 (8th Cir. 2003); *Adarand Constructors, Inc. v. Slater (Adarand IV)*, 228 F.3d 1147, 1182 (10th Cir. 2000). For the purposes of this Comment, because the circuits reviewed the constitutionality of TEA-21, this previous name will be used when discussing the circuit cases, but otherwise this note will refer to the most recent act, SAFETEA-LU.

¹⁹ The Fourth Circuit reviewed a North Carolina statute that mirrors the SAFETEA-LU statute in *H.B. Rowe Co. v. Tippett*, 615 F.3d 233 (4th Cir. 2010), but has not explicitly reviewed the constitutionality of the federal SAFETEA-LU statute.

²⁰ A successful facial challenge requires the plaintiff show the law is unconstitutional in every application. *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1190 (2008).

²¹ In an as-applied challenge, a successful plaintiff need only show that the statute is unconstitutional as-applied specifically to that plaintiff. Richard A. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1327 (2000).

²² See *N. Contracting Inc.*, 473 F.3d at 720; *W. States Paving Co.*, 407 F.3d at 995; *Sherbrooke Turf, Inc.*, 345 F.3d at 972; *Adarand IV*, 228 F.3d at 1182.

was facially constitutional.²³ The Supreme Court, however, has not decided the facial constitutionality of TEA-21 or SAFETEA-LU.²⁴

Three circuits reviewed as-applied constitutional challenges and utilized the reasoning in *Croson* and *Adarand III* to TEA-21, resulting in a circuit split.²⁵ The Eighth and Ninth Circuits permit as-applied challenges, requiring a state to demonstrate that it narrowly tailored its program.²⁶ In contrast, the Seventh Circuit held that a state is not susceptible to an as-applied challenge because the state is an agent of the federal government and is not susceptible to challenge outside of the state exceeding its federal authority implementing the program.²⁷

This Comment shows that a state's DBE program for federally-funded state projects must be subject to strict scrutiny as articulated in *Croson* and *Adarand III*.²⁸ States should not be immune to Fourteenth Amendment as-applied challenges, despite compliance with the federal statute and regulations for DBE programs established pursuant to SAFETEA-LU. Part II describes SAFETEA-LU and the constitutional authority of the Act. This part also defines the strict scrutiny standard as articulated by *Croson* and *Adarand III*. Part III discusses the current circuit split between the Seventh, Eighth, and Ninth Circuits. Part IV analyzes the approaches of the Circuits and argues how the Supreme Court should resolve the split. This Comment concludes that a state DBE program, pursuant to SAFETEA-LU, is not immune from constitutional attack, but rather must be subject to strict scrutiny analysis in line with *Croson* and *Adarand III*, identifying its own compelling interest and narrowly tailoring its DBE program to achieve that interest.

²³ See *W. States Paving Co.*, 407 F.3d at 995; *Sherbrooke Turf, Inc.*, 345 F.3d at 972; *Adarand IV*, 228 F.3d at 1182.

²⁴ Only Gross Seed and Sherbrooke Turf petitioned for a writ of certiorari to the Supreme Court from the Eighth Circuit, but it was denied. *Gross Seed Co. v. DOT*, 541 U.S. 1041 (2004); *Sherbrooke Turf, Inc. v. Minn. DOT*, 541 U.S. 1041 (2004).

²⁵ See *infra* Part III.

²⁶ See *Sherbrooke Turf, Inc.*, 345 F.3d at 971 (“[A] valid race-based program must be narrowly tailored, and to be narrowly tailored, a national program must be limited to those parts of the country where its race-based measures are demonstrably needed. To the extent the federal government delegates this tailoring function, a State’s implementation becomes critically relevant to a reviewing court’s strict scrutiny. Thus, we leave this question of state implementation to our narrow tailoring analysis.”); *W. States Paving Co.*, 407 F.3d at 997–98 (“We also agree with the Eighth Circuit that it is necessary to undertake an as-applied inquiry into whether Washington’s DBE program is narrowly tailored Whether Washington’s DBE program is narrowly tailored to further Congress’s remedial objective depends upon the presence or absence of discrimination in the State’s transportation contracting industry.”).

²⁷ *N. Contracting Inc.*, 473 F.3d at 721 (“Our holding . . . that a state is insulated from this sort of constitutional attack, absent a showing that the state exceeded its federal authority, remains applicable.”).

²⁸ See *infra* Part IV.

II. BACKGROUND

A. SAFETEA-LU

1. A Federal Transportation Affirmative Action Statute

SAFETEA-LU requires that at least ten percent of the money made available by the Secretary of Transportation for its programs “shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals.”²⁹ USDOT specified regulations for participation by disadvantaged business enterprises in USDOT transportation financial assistance programs.³⁰ The regulations require each recipient³¹ of federal transportation funds to implement a DBE program that complies with SAFETEA-LU.³²

To qualify as a DBE, a firm must be owned and controlled by a majority of individuals who are “socially and economically disadvantaged.”³³ The federal government presumes certain ethnic groups to be socially and economically disadvantaged, including Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, as well as women.³⁴ The state can rebut this presumption if the firm owner’s personal net worth exceeds \$1.32 million.³⁵ Furthermore, individuals not presumed socially and economically disadvantaged can apply for DBE certification, and the state must determine on a case-by-case basis if the individual qualifies.³⁶ The state makes the determination based on a number of factors set forth in the regulations, but generally determines whether an individual is socially disadvantaged if he has “been subjected to racial or ethnic prejudice or cultural bias within American society. . . .”³⁷ Moreover, the state determines whether an individual is economically disadvantaged if he is a “socially disadvantaged individual[] whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged.”³⁸

²⁹ TEA-21 § 1101(b)(1) (1998).

³⁰ See 49 C.F.R. § 26 (2011).

³¹ In the context of this note, recipients of federal transportation funds will be referred to generally as the “state.”

³² 49 C.F.R. § 26.21(a).

³³ *Id.* § 26.5 (definition of DBE).

³⁴ *Id.* § 26.21(a)(1).

³⁵ *Id.* § 26.67(b).

³⁶ *Id.* § 26.67(d).

³⁷ *Id.* § 26 app. E.

³⁸ 49 C.F.R. § 26 app. E.

The regulations specify that the ten percent DBE utilization requirement established by the SAFETEA-LU statute is merely an “aspirational goal at the national level.”³⁹ The statutory goal “does not authorize or require recipients to set overall or contract goals at the 10 percent level, or any other particular level.”⁴⁰ Rather, each recipient is required to set an overall DBE participation goal.⁴¹ The overall goal must allow participation by all certified DBEs and the state must not break down the goal into race, gender, or other categorical groups.⁴²

The regulations promulgate a two-step process for determining the relative availability of DBEs in order to set an overall goal.⁴³ The first step is to determine a base figure for the relative availability of DBEs, of which the regulations list proposed approaches, including using DBE Directories and Census Bureau Data, bidders’ lists, or conducting a disparity study.⁴⁴ Second, the recipient must determine if it is necessary to adjust the base goal.⁴⁵ The adjustment is based on a number of factors, including the “capacity of DBEs to perform work” such that the final goal reflects the percentage of funds that the state will allocate to DBEs in the forthcoming fiscal year.⁴⁶

After determining its final goal, the state must project the portions of the overall goal that it expects to meet through race-neutral and race-conscious measures,⁴⁷ meeting the maximum feasible portion of its goal by using race-neutral measures.⁴⁸ The regulations list several race-neutral means, including the use of a defined bidding process, providing assistance in overcoming inability to obtain bonding or financing, and assisting DBEs to develop their capability to conduct business electronically.⁴⁹ Once the state has determined its goal and its measures to achieve its goal, the state must send its methodology and evidence used to arrive at its overall goal to USDOT by August 1 of the preceding year.⁵⁰ The goal is in place for the upcoming year and the state regularly monitors its programs to ensure compliance with the overall goal.⁵¹

³⁹ *Id.* § 26.41(b).

⁴⁰ *Id.* § 26.41(c).

⁴¹ *Id.* § 26.45.

⁴² *Id.* § 26.45(h).

⁴³ *Id.* § 26.45(c), (d).

⁴⁴ *See* 49 C.F.R. § 26.45(c).

⁴⁵ *Id.* § 26.45(d).

⁴⁶ *Id.* § 26.45(d), (e).

⁴⁷ *Id.* § 26.45(f)(3).

⁴⁸ *Id.* § 26.51(a).

⁴⁹ *Id.* § 26.51(b).

⁵⁰ 49 C.F.R. § 26.45(f)(1)(i).

⁵¹ *Id.* § 26.37.

Additionally, each state must establish contract-specific goals to meet any portion of the overall goal that it cannot meet using race-neutral means.⁵² The state may only use contract-specific goals in those federally assisted contracts that have subcontracting possibilities.⁵³ Similar to the overall goal, the contract-specific goals “must not be subdivided into group-specific goals.”⁵⁴ Contract-specific goals must cumulatively result in meeting any portion of the overall goal the state projected having to use race-conscious means.⁵⁵ The state must also adjust its contract-specific goals in order to ensure that the state continually narrowly tailors its program.⁵⁶

2. Constitutional Authority of SAFETEA-LU

The constitutional basis for SAFETEA-LU stems from Congress’s Spending Power.⁵⁷ This Article I authority empowers Congress to “lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.”⁵⁸ “Incident to this power, Congress may attach conditions on the receipt of federal funds.”⁵⁹ The conditional receipt gives the recipient a choice to either accept the condition or forego the federal funding.⁶⁰ This “Spending Power allows Congress to achieve its policy goals indirectly, using federal funds to incentivize state action.”⁶¹ But, the Court has placed limits on the federal government’s authority to induce the state to act.⁶² For example, Congress must have a clear statement of its stipulation and must condition the receipt of funds unambiguously, “enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.”⁶³ Further, Congress must relate the conditions “to the federal interest in a particular national project or program.”⁶⁴

⁵² *Id.* § 26.51(d).

⁵³ *Id.* § 26.51(e)(1).

⁵⁴ *Id.* § 26.51(e)(4).

⁵⁵ *Id.* § 26.51(e)(2).

⁵⁶ 49 C.F.R. § 26.51(f).

⁵⁷ Ross R. Fulton, “*Our Federal System*”: *States’ Susceptibility to Challenge When Applying Federal Affirmative Action Law*, 74 U. CHI. L. REV. 687, 689 (2007).

⁵⁸ U.S. CONST. art. I, § 8, cl. 1.

⁵⁹ *South Dakota v. Dole*, 483 U.S. 203, 206 (1987).

⁶⁰ *Fulton*, *supra* note 57, at 690.

⁶¹ *Id.* at 688.

⁶² *Dole*, 483 U.S. at 207.

⁶³ *Id.* (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (alteration in original)).

⁶⁴ *Id.* (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion)).

B. The Equal Protection Strict Scrutiny Standard for Affirmative Action Programs in Government Contracting

Two Supreme Court cases are fundamental in determining the level of scrutiny a reviewing court should apply when determining the equal-protection constitutionality of a government-created affirmative action program: *Richmond v. Croson*⁶⁵ and *Adarand v. Peña (Adarand III)*.⁶⁶ *Croson* confirms that a reviewing court must apply strict scrutiny for state or local race-based programs.⁶⁷ *Adarand III* expanded *Croson* and requires strict scrutiny review for federal programs.⁶⁸

1. State Affirmative Action Programs: The *Croson* Standard

The Supreme Court held in *Richmond v. Croson* that state or local affirmative action programs are subject to strict scrutiny analysis.⁶⁹ In 1983, the city of Richmond adopted the Minority Business Utilization Plan (“the Plan”), which required prime contractors to subcontract at least thirty percent of the dollar amount of the contract with Minority Business Enterprises (MBEs).⁷⁰ Minorities included black, Spanish-speaking, Oriental, Indian, Eskimo, and Aleut persons.⁷¹ The Plan permitted waivers of the thirty percent set-aside requirement for exceptional situations when the prime contractor proved that it could not meet the requirements of the Plan.⁷² In September 1983, J.A. Croson Company (Croson), a prime contractor, challenged the constitutionality of the Plan after the city denied its waiver of the thirty percent set-aside requirement.⁷³

The Court held that the Plan was unconstitutional.⁷⁴ The Court began its analysis stating that a state or its local subdivision has authority to eradicate the effects of discrimination within its own jurisdiction, so long as it is exercised within the constraints of section one of the Fourteenth Amendment.⁷⁵ The Court determined that Richmond’s plan denied certain citizens the opportunity to compete for public contracts

⁶⁵ 488 U.S. 469 (1989).

⁶⁶ 515 U.S. 200 (1995).

⁶⁷ *Croson*, 488 U.S. at 490–93.

⁶⁸ *Adarand III*, 515 U.S. at 227..

⁶⁹ *Croson*, 488 U.S. at 493–96.

⁷⁰ *Id.* at 477.

⁷¹ *Id.* at 478.

⁷² *Id.*

⁷³ *Id.* at 483.

⁷⁴ *Id.* at 511.

⁷⁵ *Croson*, 488 U.S. at 491–93 (“No State shall . . . deny to *any* person within its jurisdiction the equal protection of the laws.”).

based solely upon their race.⁷⁶ The Court applied strict scrutiny to Richmond's plan.⁷⁷

In the compelling interest analysis, the Court concluded that Richmond made a generalized statement that there had been past discrimination in the contracting industry.⁷⁸ Specifically, Richmond could not tie the thirty percent quota to any specific injury suffered by anyone.⁷⁹ Additionally, none of the city's findings, "singly or together, provide the city of Richmond with a 'strong basis in evidence for its conclusion that remedial action was necessary.'"⁸⁰ The Court further explained that states and their subdivisions cannot consider national findings that there has been societal discrimination in a host of fields, but rather must identify specific discrimination within their own jurisdiction before employing race-conscious relief.⁸¹ The Court stated that the inclusion of specific groups of which there was no evidence of discrimination suggested that the Richmond's purpose was not in fact to remedy past discrimination, but rather a haphazard plan.⁸²

The Court had difficulty assessing whether Richmond narrowly tailored the Plan because the city failed to identify specific discrimination.⁸³ The Court explained that in order to use race-based measures, the city should have first determined whether alternative race-neutral measures could be successful to increase minority-owned business participation.⁸⁴ The Court also stated that there was no apparent reason for a thirty percent quota when the city considered bids on a case-by-case basis.⁸⁵ The Court concluded that Richmond likely used the quota for administrative convenience.⁸⁶

Croson further articulated the measures that could be sufficient to survive strict scrutiny analysis. First, the Court stated that an inference of discrimination could arise by the showing of a "statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of contractors actually engaged by the locality or the locality's prime contractors."⁸⁷ Thus, in an

⁷⁶ *Id.* at 493.

⁷⁷ *Id.* at 493–95.

⁷⁸ *Id.* at 498.

⁷⁹ *Id.* at 499.

⁸⁰ *Id.* at 500 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion)).

⁸¹ *Croson*, 488 U.S. at 504.

⁸² *Id.* at 506.

⁸³ *Id.* at 507.

⁸⁴ *See id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 508.

⁸⁷ *Croson*, 488 U.S. at 509.

extreme case, a narrowly tailored racial preference might be necessary.⁸⁸ Second, the Court stated that when there are “racially motivated refusals to employ minority contractors,” the city would be justified in providing appropriate relief to the victim of discrimination.⁸⁹ Statistical evidence of a pattern of individual discriminatory acts may support a local government’s determination that broader remedial relief is necessary.⁹⁰ Third, the Court acknowledged that the city could employ a variety of race-neutral measures to increase the opportunities for small contractors of every race.⁹¹

2. Federal Affirmative Action Programs: The *Adarand III* Standard

In addition to holding that strict scrutiny applied to local and state governmental actors, the Supreme Court also held that strict scrutiny applied to federal governmental actors in *Adarand III*.⁹² In 1989, Adarand Constructors (Adarand) submitted the lowest bid to the general contractor, Mountain Gravel & Construction Company (Mountain Gravel), for the guardrail subcontract on a USDOT project.⁹³ USDOT was subject to the Surface Transportation and Uniform Relocation Assistance Act of 1987, which required it to spend at least ten percent of its funds with socially and economically disadvantaged businesses, as defined by the Small Business Act (SBA).⁹⁴ The SBA presumed social and economic disadvantage for certain minority groups, such as Black, Hispanic, Asian Pacific, Subcontinent Asian, and Native Americans.⁹⁵ The USDOT contract stated that Mountain Gravel would receive a monetary bonus for giving subcontracts to businesses owned by socially or economically disadvantaged individuals.⁹⁶ Adarand was not certified as such a business and was denied the contract in favor of a business owned by a socially or economically disadvantaged individual.⁹⁷ Adarand brought suit alleging that the SBA presumption of social or economic ownership discriminates based on race and violates equal protection as guaranteed by the Fifth Amendment.⁹⁸

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² 515 U.S. 200, 227 (1995).

⁹³ *Id.* at 205.

⁹⁴ *Id.* at 208.

⁹⁵ *Id.*

⁹⁶ *Id.* at 205, 209.

⁹⁷ *Id.* at 205.

⁹⁸ *Adarand III*, 515 U.S. at 205–06.

The Court analyzed whether the Fifth Amendment provides the same protection as the Equal Protection Clause of the Fourteenth Amendment.⁹⁹ The Court relied on *Croson* and held that “all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny.”¹⁰⁰ The Court reasoned that the Fifth and Fourteenth Amendments protect persons, not groups and therefore, there is no distinction between racial discrimination cases brought under either amendment.¹⁰¹ The Constitution prohibits all government action based on race, a group classification, or requires the government to implement a program narrowly tailored to the government’s compelling interest to ensure that the government does not infringe upon the right to equal protection.¹⁰² The Court remanded the case to the lower court to apply strict scrutiny.¹⁰³

III. CIRCUIT SPLIT: IS A STATE’S DBE PROGRAM SUBJECT TO AN AS-APPLIED CHALLENGE?

Generally, the circuits agree that TEA-21, SAFETEA-LU’s predecessor, is facially constitutional and does not violate equal protection under the Fifth Amendment.¹⁰⁴ The circuits disagree, however, whether a state is subject to an as-applied equal protection challenge under the Fourteenth Amendment.¹⁰⁵ In the post-*Adarand III* era, there is a circuit split between the Seventh, Eighth, and Ninth

⁹⁹ *Id.* at 213.

¹⁰⁰ *Id.* at 227.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 237.

¹⁰⁴ See *W. States Paving Co. v. Wash. DOT*, 407 F.3d 983, 995 (9th Cir. 2005); *Sherbrooke Turf, Inc. v. Minn. DOT*, 345 F.3d 964, 972 (8th Cir. 2003); see also *Adarand Constructors, Inc. v. Slater (Adarand IV)*, 228 F.3d 1147, 1182 (10th Cir. 2000).

¹⁰⁵ Compare *N. Contracting Inc. v. Illinois*, 473 F.3d 715, 721 (7th Cir. 2007) (“Our holding in *Milwaukee County Pavers* that a state is insulated from this sort of constitutional attack, absent a showing that the state exceeded its federal authority, remains applicable.”), with *W. States Paving Co.*, 407 F.3d at 997–98 (“We also agree with the Eighth Circuit that it is necessary to undertake an as-applied inquiry into whether Washington’s DBE program is narrowly tailored Whether Washington’s DBE program is narrowly tailored to further Congress’s remedial objective depends upon the presence or absence of discrimination in the State’s transportation contracting industry.”), and *Sherbrooke Turf, Inc.*, 345 F.3d at 971 (“[A] valid race-based program must be narrowly tailored, and to be narrowly tailored, a national program must be limited to those parts of the country where its race-based measures are demonstrably needed. To the extent the federal government delegates this tailoring function, a State’s implementation becomes critically relevant to a reviewing court’s strict scrutiny. Thus, we leave this question of state implementation to our narrow tailoring analysis.”).

Circuits regarding as-applied challenges.¹⁰⁶ The Seventh Circuit held that a state is not susceptible to an as-applied challenge because the state is an agent of the federal government and is only subject to a challenge if the state exceeded its federal authority in implementing the program.¹⁰⁷ On the other hand, the Eighth and Ninth Circuits permitted as-applied equal protection challenges, requiring a state to demonstrate that it narrowly tailored its program to survive strict scrutiny.¹⁰⁸ These circuits agreed that a state's DBE program must be susceptible to as-applied challenges in order to ensure that the state applied TEA-21 in a constitutional manner.¹⁰⁹

A. Eighth Circuit: Allowing an As-Applied Challenge

The Eighth Circuit discussed its approach in *Sherbrooke Turf, Inc. v. Minnesota DOT*.¹¹⁰ The *Sherbrooke Turf* decision encompasses cases from the district courts of Nebraska and Minnesota.¹¹¹ In the Minnesota action, Sherbrooke Turf sued the Minnesota Department of Transportation (MnDOT) and its commissioner.¹¹² In the Nebraska action, Gross Seed Company (Gross Seed) sued the Nebraska

¹⁰⁶ Notably, two additional circuits have decided this question. The circuits include the Sixth Circuit in *Tennessee Asphalt Co. v. Farris*, 942 F.2d 969 (6th Cir. 1991) (challenging the 1982 version of the Act), and the Second Circuit in *Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo*, 981 F.2d 50 (2d Cir. 1992) (challenging a 1977 version of the Act). The Sixth Circuit has not revisited its position on this matter post-*Adarand III*. This distinction is noteworthy because these older decisions relied on the Seventh Circuit's decision in *Milwaukee County Pavers Association v. Fiedler*, 922 F.2d 419 (7th Cir. 1991), which based its authority on *Fullilove v. Klutznick*, 448 U.S. 448 (1980), the established Supreme Court case at the time. Since the *Milwaukee County Pavers* decision, *Adarand III* subsequently overturned *Fullilove*, applying a stricter standard of review for race-based classifications in government contracting. *Adarand III*, 515 U.S. at 236. "Very recently, the Second Circuit took a brief look at New York's DBE program post-*Adarand III*. In *Jana-Rock Construction v. New York*, 438 F.3d 195 (2d Cir. 2006), the court did not thoroughly review the program because the contractor was arguing solely that the state's definition of "Hispanic" was unconstitutional because it did not include those persons of Spanish or Portuguese origin. *Id.* at 200. The court equated this to an under-inclusiveness challenge and determined that a rational basis inquiry instead of a strict scrutiny review was appropriate. *Id.* The court reasoned that *Jana-Rock* did not demonstrate that the exclusion was motivated by a discriminatory purpose and did not challenge the overall constitutional authority of the state's affirmative action program. *Id.* Therefore, while the Sixth and Second Circuits positions might not have changed since the *Adarand III* decision, it is outside the scope of this note to hypothesize how these courts might review their decisions post-*Adarand III*.

¹⁰⁷ *N. Contracting Inc.*, 473 F.3d at 721; *Milwaukee Cnty. Pavers Ass'n*, 922 F.2d at 423.

¹⁰⁸ *See W. States Paving Co.*, 407 F.3d at 997; *Sherbrooke Turf, Inc.*, 345 F.3d at 971.

¹⁰⁹ *See W. States Paving Co.*, 407 F.3d at 998; *Sherbrooke Turf, Inc.*, 345 F.3d at 971.

¹¹⁰ 345 F.3d 964 (8th Cir. 2003).

¹¹¹ *Id.* at 967.

¹¹² *Id.*

Department of Roads (NDOR) and its director.¹¹³ The plaintiffs alleged each state's DBE program violated equal protection under the Fifth Amendment of the United States Constitution.¹¹⁴ Sherbrooke Turf and Gross Seed are white male-owned subcontractor companies that provide landscaping services for general contractors on federally assisted highway projects.¹¹⁵ Both MnDOT and NDOR are federally assisted state highway programs.¹¹⁶ Sherbrooke Turf and Gross Seed lost bids on highway projects in their respective states due to each state's DBE program.¹¹⁷

The Eighth Circuit allowed an as-applied challenge to a state's DBE program under TEA-21.¹¹⁸ In considering such a challenge, the Eighth Circuit required a state to have a narrowly tailored program subject to strict scrutiny, as ordered by *Adarand III*.¹¹⁹ The court reasoned that the national program in place is subject to strict scrutiny, requiring it to be limited only to those areas of the country where race-based measures are discernibly needed.¹²⁰ The Eighth Circuit allowed MnDOT and NDOR to adopt Congress's compelling interest for implementing TEA-21, and neither Minnesota nor Nebraska was required to demonstrate a compelling interest.¹²¹ Thus, the court only reviewed the narrow tailoring prong of strict scrutiny reasoning that the federal government delegated this prong to the states.¹²²

The court found that the MnDOT and NDOR programs were constitutional under the as-applied analysis.¹²³ Both states followed the federal regulations by conducting DBE availability and capability studies in the highway construction market, setting an annual goal, and identifying the portion of that goal that required use of race-conscious means.¹²⁴ USDOT approved both state programs in 2001.¹²⁵ In its case, Sherbrooke Turf attacked the reliability of the data MnDOT used in determining its annual goal, but the court concluded that Sherbrooke

¹¹³ *Id.*

¹¹⁴ *Id.* at 969.

¹¹⁵ *Gross Seed Co. v. Neb. Dep't of Rds.*, No. 4:00CV3073, 2002 U.S. Dist. LEXIS 27125, at *3 (D. Neb. May 6, 2002); *Sherbrooke Turf, Inc. v. Minn. DOT*, No. 00-CV-1026(JMR/RE), 2001 U.S. Dist. LEXIS 19565, at *2 (D. Minn. Nov. 14, 2001).

¹¹⁶ *Sherbrooke Turf, Inc.*, 345 F.3d at 967.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 971.

¹¹⁹ *Id.* at 969.

¹²⁰ *Id.* at 971.

¹²¹ *Id.* at 970–71.

¹²² *Sherbrooke Turf, Inc.*, 345 F.3d at 971.

¹²³ *Id.* at 973–74.

¹²⁴ *Id.*

¹²⁵ *Id.*

Turf failed to show that better data was available for Minnesota's use.¹²⁶ Instead, the court noted that even though MnDOT could not meet its overall goal with race-neutral measures, MnDOT adjusted its goals as the year progressed as required by the regulations.¹²⁷ Further, the court identified that NDOR apportioned its contracting to race-neutral decisions and set an overall goal in compliance with the national program.¹²⁸ The Eighth Circuit found both the MnDOT and NDOR programs constitutional as-applied to Sherbrooke Turf and Gross Seed.¹²⁹

B. Ninth Circuit: A Similar Eighth Circuit Approach

In *Western States Paving Co. v. Washington DOT*,¹³⁰ the Ninth Circuit heard a challenge from a white male-owned asphalt and paving subcontractor.¹³¹ Western States Paving Company (Western States) sued the Washington State Department of Transportation (WSDOT), the City of Vancouver, and Clark County, alleging that Washington's DBE program violated equal protection under the Fifth and Fourteenth Amendments of the United States Constitution.¹³² WSDOT receives federal funding for its transportation projects.¹³³ Western States lost contracts to minority subcontractors despite presenting lower bids.¹³⁴

The Ninth Circuit allowed an as-applied challenge to the state's DBE program under TEA-21.¹³⁵ In *Western States Paving*, the Ninth Circuit determined that it must follow the *Croson/Adarand III* standard, applying strict scrutiny to Washington's DBE program.¹³⁶ The Ninth Circuit agreed with the Eighth Circuit, allowing WSDOT to adopt Congress's compelling interest.¹³⁷ The Ninth Circuit focused on the narrow tailoring prong to determine if Washington's DBE program could overcome the as-applied challenge.¹³⁸ In order for WSDOT's program to qualify as a narrowly tailored program, the court required evidence of past discrimination in the state's transportation contracting industry and

¹²⁶ *Id.* at 973.

¹²⁷ *Id.*

¹²⁸ *Sherbrooke Turf, Inc.*, 345 F.3d at 974.

¹²⁹ *Id.*

¹³⁰ 407 F.3d 983 (9th Cir. 2005).

¹³¹ *Id.* at 987.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 998.

¹³⁶ *W. States Paving Co.*, 407 F.3d at 990–91.

¹³⁷ *Id.* at 997.

¹³⁸ *Id.*

specifically required the program to be “limited to those minority groups that have actually suffered discrimination.”¹³⁹

The court found that “Washington’s DBE program closely tracks the sample DBE program developed by the USDOT.”¹⁴⁰ But the court did not find “any evidence suggesting that minorities currently suffer—or have ever suffered—discrimination in the Washington transportation contracting industry.”¹⁴¹ Thus, the court concluded that “Washington’s application of TEA-21 conflicts with the guarantees of equal protection”¹⁴²

C. Seventh Circuit: No As-Applied Challenges Allowed

The Seventh Circuit differed in its approach to an as-applied challenge to a state’s DBE program in disagreement with the Eighth and Ninth Circuits in *Northern Contracting, Inc. v. Illinois*.¹⁴³ Northern Contracting, Inc. (NCI) is a guardrail and fence subcontractor for Illinois highway construction projects.¹⁴⁴ NCI is not a certified disadvantaged business enterprise.¹⁴⁵ The Illinois Department of Transportation (IDOT) received federal funding from USDOT for its projects and implemented a DBE program.¹⁴⁶ NCI filed an action for declaratory and injunctive relief against IDOT, its Secretary and Bureau Chief of the Bureau of Small Business Enterprises, and USDOT, alleging Illinois’s DBE program violated the equal protection provision under the Fifth and Fourteenth Amendments.¹⁴⁷

The Seventh Circuit did not allow an as-applied challenge to the state’s DBE program implemented under TEA-21.¹⁴⁸ The court agreed with the Ninth and Eighth Circuits allowing a state to rely on Congress’s compelling interest in implementing a DBE program.¹⁴⁹ The court, however, differed from the Ninth and Eighth Circuits in its reasoning, limiting its inquiry to whether IDOT complied with TEA-21.¹⁵⁰ The Seventh Circuit did not employ a narrow tailoring inquiry.¹⁵¹ Rather, the

¹³⁹ *Id.* at 998.

¹⁴⁰ *Id.* at 999.

¹⁴¹ *Id.* at 1002.

¹⁴² *W. States Paving Co.*, 407 F.3d at 1002.

¹⁴³ 473 F.3d 715 (7th Cir. 2007).

¹⁴⁴ *Id.* at 717–18.

¹⁴⁵ *N. Contracting Inc. v. Illinois*, No. 00 C 4515, 2004 U.S. Dist. LEXIS 3226 at *7 (N.D. Ill. Mar. 3, 2004).

¹⁴⁶ *N. Contracting Inc.*, 473 F.3d at 717–18.

¹⁴⁷ *Id.* at 717, 719.

¹⁴⁸ *Id.* at 722.

¹⁴⁹ *Id.* at 720–21.

¹⁵⁰ *Id.* at 722.

¹⁵¹ *Id.* at 722 n.5.

court reaffirmed its pre-*Adarand III* holding in *Milwaukee County Pavers v. Fiedler*¹⁵² that a state insulates itself from constitutional attack, absent a showing that the state exceeded its federal authority.¹⁵³ Therefore, the court determined that a challenge to a state's implementation of a federally mandated program must be limited to the question of "whether the [state] complied with the federal program regulations."¹⁵⁴

IV. ANALYSIS

The Supreme Court should resolve this circuit split by requiring a state to demonstrate its own compelling interest and implement a narrowly tailored program in order to survive a strict scrutiny analysis, remaining true to the Constitution and eliminating race-based programs in violation of equal protection. States should not be immune to Fourteenth Amendment as-applied challenges, despite compliance with the federal statute and regulations for DBE programs established pursuant to SAFETEA-LU. None of the circuit opinions adequately account for the strict scrutiny standard as articulated in *Croson* and *Adarand III* for appellate review of government race-based affirmative action programs. The Seventh Circuit's position that a state can be immune from constitutional attack¹⁵⁵ violates principles of state sovereignty and undermines the *Croson* and *Adarand III* decisions, which is to ensure equal protection at every governmental level.¹⁵⁶ Additionally, the Eighth and Ninth Circuit approaches advocate for strict scrutiny but fail to apply the *Croson/Adarand III* standard.¹⁵⁷ These

¹⁵² 922 F.2d 419 (7th Cir. 1991)

¹⁵³ *N. Contracting Inc.*, 473 F.3d at 721; see also *Milwaukee Cnty. Pavers*, 922 F.2d at 423 ("Insofar as the state is merely complying with federal law it is acting as the agent of the federal government and is no more subject to being enjoined on equal protection grounds than the federal civil servants who drafted the regulations If the state does exactly what the statute expects it to do, and the statute is conceded for purposes of the litigation to be constitutional, we do not see how the state can be thought to have violated the Constitution.").

¹⁵⁴ *N. Contracting Inc.*, 473 F.3d at 721–22.

¹⁵⁵ *Id.* at 722.

¹⁵⁶ See *Adarand Constructors, Inc. v. Pena (Adarand III)*, 515 U.S. 200, 227 (1995) (requiring race-based programs enacted by every government to be "narrowly tailored measures that further compelling governmental interests"); *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 504–05 (1989) (requiring identification of specific past discrimination in furtherance of the state government's compelling interest before a narrow tailoring analysis can be performed). The Court entertained an equal protection Fourteenth Amendment challenge in *Croson* and an equal protection Fifth Amendment challenge in *Adarand III*, but the Court held that there is no distinction between claims brought under either of the two Amendments. *Adarand III*, 515 U.S. at 213–14.

¹⁵⁷ See *W. States Paving Co. v. Wash. DOT*, 407 F.3d 983, 997–98 (9th Cir. 2005); *Sherbrooke Turf, Inc. v. Minn. DOT*, 345 F.3d 964, 971 (8th Cir. 2003).

circuits do not complete a thorough strict scrutiny analysis, but rather allow a state to adopt Congress's compelling interest.¹⁵⁸

A. A State DBE Program Cannot be Insulated from Strict Scrutiny Analysis

The Seventh Circuit's position that a state is an agent of the federal government and thus, is not subject to a strict scrutiny analysis is incorrect and violates state sovereignty. The Seventh Circuit insulated IDOT from constitutional attack because IDOT was "acting as an instrument of federal policy."¹⁵⁹ Agency is defined as the "fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act."¹⁶⁰ The cornerstone of the principles of agency is that the principle has the *right to control* the actions of the agent.¹⁶¹

In this context, the Seventh Circuit implies that the federal government, as the principal, enacted the TEA-21 program, and the state, as the agent, acted on behalf of the federal government, and is subject to the control of the federal government. This proposition, however, violates the principles of state sovereignty set forth by the Supreme Court in *New York v. United States*¹⁶² and *Printz v. United States*.¹⁶³ In those cases, the Supreme Court explicitly acknowledged that the states are not agents of the federal government, but rather the states are sovereign actors.¹⁶⁴ The Court affirmed its decision in *South Dakota v. Dole*¹⁶⁵ while acknowledging that Congress could place conditions on the receipt of federal funds to incentivize state action.¹⁶⁶ But, the principle form *New York* remained that the "residents of the State retain the ultimate decision as to whether or not the State will comply [S]tate governments remain responsive to the local electorate's preferences; state officials remain accountable to the people."¹⁶⁷

¹⁵⁸ *W. States Paving Co.*, 407 F.3d at 997; *Sherbrooke Turf Inc.*, 345 F.3d at 971.

¹⁵⁹ *N. Contracting Inc.*, 473 F.3d at 722.

¹⁶⁰ RESTATEMENT (THIRD) OF AGENCY § 1.01(2006).

¹⁶¹ *Id.* § 1.01 cmt. c ("The person represented has a right to control the actions of the agent . . . the principal has the right throughout the duration of the relationship to control the agent's acts.").

¹⁶² 505 U.S. 144, 162 (1992).

¹⁶³ 521 U.S. 898, 918 (1997).

¹⁶⁴ *Printz*, 521 U.S. at 919–20; *New York*, 505 U.S. at 188.

¹⁶⁵ 483 U.S. 203 (1987).

¹⁶⁶ *Id.* at 206.

¹⁶⁷ *New York*, 505 U.S. at 168.

The SAFETEA-LU regulations place a condition on the receipt of funds from USDOT, incentivizing the states to employ a DBE program.¹⁶⁸ If the state were a true agent of the federal government, however, Congress could instead require the states to perform on its behalf. But, this is the very principle that *New York* and *Printz* expressly prohibit.¹⁶⁹ Thus, the Seventh Circuit's conclusion that the state is insulated from constitutional attack as an agent of the federal government is in direct contradiction of the principles of state sovereignty.

Moreover, this approach effectively undermines the purpose of equal protection under the Constitution. Applying the Seventh Circuit's agency principle, the court would not allow a third party subject to a state's program to challenge the program's constitutionality. This approach is improper because each individual impacted by a government entity through a race-based program can challenge the program, as the Supreme Court has stated that "equal protection [is] a personal right."¹⁷⁰ The fundamental purpose of equal protection is to ensure that government respects the individual right "to be treated with equal dignity and respect" such that the government does not use race, a group classification, as the sole criterion in decision-making.¹⁷¹ This requires the government to treat all people as equal Americans, without regard to race.¹⁷² Instead of continuing to rely on *Milwaukee County Pavers*, the Seventh Circuit's pre-*Adarand III* decision, the court should have revisited its position in light of *Adarand III*.¹⁷³ Thus, there is no

¹⁶⁸ 49 C.F.R. § 26.21 (2011).

¹⁶⁹ See *Printz*, 521 U.S. at 925 ("[T]he Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs." (citations omitted)); *New York*, 505 U.S. at 161 ("Congress may not simply commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." (internal quotation marks omitted) (citations omitted)); *New York*, 505 U.S. at 162 ("We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.").

¹⁷⁰ *Adarand Constructors, Inc. v. Peña (Adarand III)*, 515 U.S. 200, 235 (1995).

¹⁷¹ See *Richmond v. J. A. Croson Co.*, 488 U.S. 469, 493 (1989).

¹⁷² See *Adarand III*, 515 U.S. at 213–18.

¹⁷³ This issue is exemplified in a recent Illinois District Court case which denied a motion for a temporary restraining order prohibiting IDOT from entering into contract for repair work. *Dunnet Bay Const. Co. v. Hannig*, No. 10-3051, 2010 U.S. Dist. Lexis 29102 (C.D. Ill. Mar. 26, 2010). The district court did not revisit the Seventh Circuit's position in light of *Adarand III*, but rather referenced *Northern Contracting* as precedent. *Id.* at *2–3. The court acknowledged that IDOT's bid process was determined in accordance with federal SAFETEA-LU regulations and followed procedures as approved in *Northern Contracting*. *Id.* at *2–3. *Dunnet Bay* argued that IDOT modified its program by no longer allowing waivers, thereby turning the DBE goal into a rigid quota, but the court did not look further because it found that *Dunnet Bay* did not satisfy the elements for a temporary restraining order. *Id.* at *10–14.

authority for the Seventh Circuit's holding based on agency principles. Instead, the Seventh Circuit should have applied strict scrutiny in compliance with *Adarand III*.

B. Narrow Tailoring Alone is Insufficient to Meet Strict Scrutiny

The Eighth Circuit erred when it allowed Minnesota and Nebraska to merely rely on Congress's compelling interest and limited the applied review to a narrowly tailored analysis. In *Sherbrooke Turf*, the Eighth Circuit analyzed a facial attack on a federal highway program, concluding that Congress conducted studies finding that there was widespread intentional discrimination in the contracting industry.¹⁷⁴ This widespread discrimination is akin to general societal discrimination, which is impermissible under *Croson*.¹⁷⁵

In the context of government contracting, the Supreme Court has acknowledged only one compelling interest—the need to remedy past, specific discrimination.¹⁷⁶ This compelling interest specifically allows the government to use a race-conscious remedy when it is necessary to correct its own unlawful racial classification.¹⁷⁷ For example, if a state department compensates black employees at twenty percent less than it compensates their white counterparts solely because of race, the state may correct this past, specific discrimination by raising the salaries of all black employees.¹⁷⁸

¹⁷⁴ *Sherbrooke Turf, Inc. v. Minn. DOT*, 345 F.3d 964, 970–71 (8th Cir. 2003).

¹⁷⁵ *Croson*, 488 U.S. at 505.

¹⁷⁶ *Id.* at 504. The Court acknowledged a compelling interest in enhancing overall diversity, but this has been limited to the education context. *See, e.g.*, *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 314 (1978) (opinion of Powell, J.); *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (“[W]e endorse Justice Powell’s view that student body diversity is a compelling state interest that can justify the use of race in university admissions.”). But, this interest is not relevant here. Government contracting is not concerned with selecting a broadly diverse selection of individual applicants from a larger pool in order to achieve an “atmosphere which is most conducive to speculation, experiment and creation.” *Bakke*, 438 U.S. at 312 (internal citations omitted). These education cases are principled on “safeguarding academic freedom which is of transcendent value to all of us . . . [and] is therefore a special concern of the First Amendment.” *Id.* (internal citations omitted). Furthermore, the Court has struck down several other interests because they were not sufficiently compelling. *See, e.g.*, *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275 (1986) (“The role model theory allows the Board to engage in discriminatory hiring and layoff practices long past the point required by any legitimate remedial purpose.”); *Bakke*, 438 U.S. at 310 (“Petitioner identifies, as another purpose of its program, improving the delivery of health-care services to communities currently underserved . . . [b]ut there is virtually no evidence in the record indicating that petitioner’s special admissions program is either needed or geared to promote that goal.”).

¹⁷⁷ *Croson*, 488 U.S. at 524 (Scalia, J., concurring).

¹⁷⁸ *Id.* at 524.

But, if the government's only goal is to remedy a long history of general racism, the Court will not find a compelling purpose and the government's program will not survive strict scrutiny analysis.¹⁷⁹ Specifically, the Court has stated its concern that including racial groups in DBE programs that have never suffered from specific discrimination in the past suggests that the real purpose of the program was not to remedy past discrimination.¹⁸⁰ It is even not enough for the government to allege a compelling interest to remedy past, specific discrimination if the government bases its evidence only on statistical disparities and possible inferences that racial discrimination caused the disparities.¹⁸¹ In order to remedy the effects of discrimination in government contracting, the government must show "a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged."¹⁸² Therefore, to comply with the principles set forth in *Croson*, Minnesota and Nebraska should be required to demonstrate a compelling interest, identifying specific groups that have been subject to past discrimination and narrowly tailor its program to remedy those effects of past discrimination.

Furthermore, the Eighth Circuit failed to adequately address its reasons for allowing a state to adopt Congress's compelling interest. The court argued that the "[c]ompelling government interest looks at a statute or governmental program on its face. When the program is federal, the inquiry is (at least usually) national in scope."¹⁸³ The Eighth Circuit cited no authority for its conclusion,¹⁸⁴ likely because it is contrary to *Croson* and *Adarand III*.¹⁸⁵

¹⁷⁹ See *id.* at 505–06 ("To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for 'remedial relief' for every disadvantaged group We think such a result would be contrary to both the letter and spirit of a constitutional provision whose central command is equality."); *Wygant*, 476 U.S. at 274 ("This Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination.").

¹⁸⁰ *Croson*, 488 U.S. at 506.

¹⁸¹ *Concrete Works of Colo., Inc. v. Denver*, 540 U.S. 1027, 1031 (2003) (Scalia, J., dissenting).

¹⁸² *Croson*, 488 U.S. at 509.

¹⁸³ *Sherbrooke Turf, Inc. v. Minn. DOT*, 345 F.3d 964, 970 (8th Cir. 2003).

¹⁸⁴ *Id.*

¹⁸⁵ *Adarand Constructors, Inc. v. Pena (Adarand III)*, 515 U.S. 200, 227 (1995); *Croson*, 488 U.S. at 504.

C. The Ninth Circuit had Proper Application, But a Flawed Explanation

The Ninth Circuit's language limited itself to a narrow tailoring analysis of Washington's DBE program, but also articulated a compelling interest, sufficient to meet the strict scrutiny analysis requirement of *Croson* and *Adarand III*. Specifically, the Ninth Circuit's narrow tailoring analysis required evidence of past discrimination in order to survive constitutional attack.¹⁸⁶ The court stated that Washington need not set forth a compelling interest for its DBE program independent of that identified by the federal government.¹⁸⁷ But in its review, the Ninth Circuit required Washington to show that there was a *need* to apply a compelling interest in the state.¹⁸⁸

The Ninth Circuit required a showing of past discrimination in order to survive constitutional attack.¹⁸⁹ The court stated that narrow tailoring "depends upon the presence or absence of discrimination in the State's transportation contracting industry."¹⁹⁰ The court further stated, "[i]f no such discrimination is present in Washington, then the State's DBE program does not serve a remedial purpose; it instead provides an unconstitutional windfall to minority contractors solely on the basis of their race"¹⁹¹ This articulation of narrow tailoring was actually a compelling interest illustration. The compelling interest inquiry is an examination of the rationale for the state or entity to enact its program—in other words, "assuring that the legislative body is pursuing a goal important enough"¹⁹² Thus, the Ninth Circuit conflated the narrow tailoring and compelling interest requirements of strict scrutiny.

Despite the Ninth Circuit's confusing language, the result was sound. In its analysis, the court reviewed the Washington program and determined that WSDOT did not have a compelling interest for implementing its program because Washington failed to offer sufficient evidence of past discrimination in the transportation contracting industry.¹⁹³ This meant Washington did not narrowly tailor its program and thus, was unconstitutional.¹⁹⁴ While the court used narrow tailoring language to find that the program was not constitutional, its actual holding was based on the fact that the state had no compelling interest to

¹⁸⁶ *W. States Paving Co. v. Wash. DOT*, 407 F.3d 983, 997–98 (9th Cir. 2005).

¹⁸⁷ *Id.* at 997.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 997–98.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Croson*, 488 U.S. at 493.

¹⁹³ *W. States Paving Co.*, 407 F.3d at 1002.

¹⁹⁴ *Id.*

implement its program because there was no evidence of past discrimination.¹⁹⁵

D. The Supreme Court Should Apply Strict Scrutiny as Articulated in Croson and Adarand III

The Supreme Court has not addressed the issue of whether a party can bring an as-applied constitutional challenge of a state's DBE program implemented pursuant to SAFETEA-LU. If the case were to come before the Supreme Court, it should allow these challenges. The Court should comply with its precedential *Croson/Adarand III* strict scrutiny approach. Strict scrutiny is necessary to ensure governments treat all persons equally as required by the Fifth and Fourteenth Amendments of the United States Constitution.¹⁹⁶ In the words of Justice Scalia, "[w]hen we depart from this American principle we play with fire."¹⁹⁷

The Court requires strict scrutiny because it is skeptical of affirmative action programs and the stigmatic harm that arises when the government creates classifications based on race.¹⁹⁸ Race-based programs may reinforce stereotypes, aggravating the premise that certain racial groups are unable to achieve success without assistance, based on information that has no connection to individual merit.¹⁹⁹ Furthermore, the Court is concerned that it is inequitable to force an innocent person to bear the burden of redressing a wrong that he or she did not commit.²⁰⁰ Those individuals who think that racial preferences "even the score" do not further the goal of equality, but rather hinder the view of one

¹⁹⁵ *Id.*

¹⁹⁶ The Equal Protection Clause of the Fourteenth Amendment applies to state action only. U.S. CONST. amend. XIV, § 1. Equal protection claims based on federal action are derived from the Fifth Amendment of the United States Constitution which provides, in pertinent part, that "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ." U.S. CONST. amend. V. Even though the Fifth Amendment "is not as explicit a guarantee of equal treatment as the Fourteenth Amendment," the Supreme Court held that there is no distinction between claims brought under either of the two Amendments. *Adarand Constructors, Inc. v. Peña (Adarand III)*, 515 U.S. 200, 213–14 (1995).

¹⁹⁷ *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 527 (1989) (Scalia, J., dissenting).

¹⁹⁸ *Adarand III*, 515 U.S. at 223. Justice O'Connor noted that the "Court's cases through *Croson* had established three general propositions with respect to governmental racial classification," one of which was skepticism. *Id.* She noted that the Court is skeptical of governmental racial classifications and thus, "[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination." *Id.* (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273 (1986)); *see also Croson*, 488 U.S. at 493.

¹⁹⁹ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 298 (1978) (opinion of Powell, J.).

²⁰⁰ *Id.*

American race because this ideal reinforces injustice in our society.²⁰¹ For example, evening the score allows the government to compensate for its discrimination against a black man by discriminating against a white man the next time, but this process only creates perpetual discrimination, which still violates the principles of equal protection.²⁰² Thus, unless a government reserves racial classifications for remedying a specific past wrong, the classifications may promote notions of racial inferiority and lead to a government of racial hostility.²⁰³

But affirmative action programs are not per se unconstitutional.²⁰⁴ Rather, “[t]he unacceptable vice is simply selecting or rejecting [persons] on the basis of their race.”²⁰⁵ Affirmative action programs can be successful when the government creates a program aimed at assisting the disadvantaged generally, because this type of program does not violate the Constitution.²⁰⁶ A race-neutral program does not take race into consideration and thus, does not violate equal protection.²⁰⁷ On the other hand, when the government creates a race-conscious affirmative action program, our equal protection jurisprudence requires reviewing courts to analyze those racial classifications under strict scrutiny.²⁰⁸ The Supreme Court’s concern is that if strict scrutiny is not applied, the court has “no way of determining . . . what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.”²⁰⁹ The “purpose of strict scrutiny is to ‘smoke out’ illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool.”²¹⁰

1. A State Must Exhibit its Own Compelling Interest

Strict scrutiny requires an analysis to determine if the actor implemented its program narrowly to further compelling governmental

²⁰¹ *Croson*, 488 U.S. at 528 (Scalia, J., concurring) (The problem is that it was not “blacks, or Jews, or Irish who were discriminated against, but that it was individual men and women, created equal, who were discriminated against . . .”).

²⁰² *See id.*

²⁰³ *Bakke*, 438 U.S. at 298.

²⁰⁴ *See, e.g., Grutter v. Bollinger*, 539 U.S. at 343 (2003). The University of Michigan Law School’s educational diversity program, which took race into consideration for admission decisions, survived strict scrutiny because the school reviewed each applicant as an individual, taking various factors into consideration, not just race, in order to achieve its goal of attaining a diverse student body. *Id.*

²⁰⁵ Antonin Scalia, *The Disease as Cure*, 1979 WASH. U. L.Q. 147, 156 (1979).

²⁰⁶ *Croson*, 488 U.S. at 528 (1989) (Scalia, J., concurring).

²⁰⁷ *Id.*

²⁰⁸ *See Grutter*, 539 U.S. at 331; *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003); *Adarand Constructors, Inc. v. Peña (Adarand III)*, 515 U.S. 200, 227 (1995).

²⁰⁹ *Croson*, 488 U.S. at 493.

²¹⁰ *Id.*

interests.²¹¹ The court must first analyze the state's asserted compelling interest before determining whether the state narrowly tailored its program and complied with SAFETEA-LU and its regulations.²¹² Absent evidence of this past discrimination for remediation, the resulting program is per se unconstitutional.²¹³ A state must exhibit its own compelling interest and cannot rely on a federal compelling interest.

In regards to SAFETEA-LU, the federal government bases its compelling interest for implementing SAFETEA-LU on a Congressional report identifying widespread intentional discrimination in the contracting industry.²¹⁴ Because the federal government found widespread discrimination and not discrimination in each individual state, each state or other local recipient of federal funds must "possess evidence that their own spending practices are exacerbating a pattern of prior discrimination" in order to take remedial action.²¹⁵ Each state "must identify that discrimination, public or private, with some specificity before they may use race conscious relief."²¹⁶ Therefore, in accordance with *Adarand III* and *Croson*, a state or other recipient of SAFETEA-LU federal funds must identify its own pattern of discrimination before implementing a race-conscious DBE program.

2. Narrow Tailoring is More Than an Analysis of Compliance with SAFETEA-LU Regulations

If a state or local government can justify a compelling interest for its race-based program, the next step is to determine if the state narrowly tailored its program to achieve those compelling interests.²¹⁷ "The purpose of the narrow tailoring requirement is to ensure that the means chosen 'fit' the compelling goal *so closely* that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype."²¹⁸ A court's analysis of narrow tailoring includes the review of a number of factors: "the necessity for the relief

²¹¹ *Adarand III*, 515 U.S. at 227.

²¹² *Cf. Croson*, 488 U.S. at 507 ("[I]t 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.").

²¹³ *Adarand III*, 515 U.S. at 511.

²¹⁴ *Sherbrooke Turf, Inc. v. Minn. DOT*, 345 F.3d 964, 970–71 (8th Cir. 2003).

²¹⁵ *Croson*, 488 U.S. at 504; accord Major Patricia C. Bradley, *ARTICLE: Affirmative Action or Passive Participation in Perpetuating Discrimination? The Future of Race-Based Preferences in Government Contracting*, 2008 ARMY LAW 24, 38 (2008) (noting that the holdings of *W. States Paving* and *Shaw v. Hunt*, 517 U.S. 899, 910 (1996) require the states to conduct their own separate studies to demonstrate a compelling interest).

²¹⁶ *Croson*, 488 U.S. at 504.

²¹⁷ *Adarand III*, 515 U.S. at 227 (1995).

²¹⁸ *Croson*, 488 U.S. at 493 (emphasis added).

and the efficacy of alternative remedies; the flexibility and duration of relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties.”²¹⁹ The first factor requires analysis of race-neutral alternatives.²²⁰ The second factor requires the program to be appropriately limited such that it “will not last longer than the discriminatory effects it is designed to eliminate.”²²¹ The Supreme Court should apply these factors in order to determine if the state narrowly tailored its DBE program.

Justice Scalia has made persuasive arguments for a narrow tailoring analysis. Justice Scalia sets forth the notion of one American race, which is consistent with the Court’s overall equal protection principles. He argued that the only way a state can act by race to ameliorate the effects of past discrimination is to eliminate a state’s system of unlawful race discrimination.²²² Thus, if in the past, a state had a program that did differentiate based on race, the state may adopt a race-conscious remedy in order to correct this unlawful discrimination.²²³ But, once that problem is fixed and the state has established a racially diverse workforce, the government may no longer use a race-conscious remedy and must discontinue its race-based program.²²⁴

Employing these principles in the context of government contracting, if there is evidence of unlawful discrimination, the states can develop a program, like the SAFETEA-LU disadvantaged business enterprise program, to correct the unlawful discrimination.²²⁵ After a state identifies a compelling interest for implementing a race-conscious DBE program, the state must narrowly tailor that program to ensure the program only remedies discrimination of those racial and ethnic groups that have been discriminated against in the past.²²⁶ Once the state has remedied this discrimination, the state must discontinue its race-conscious program.²²⁷

²¹⁹ *United States v. Paradise*, 480 U.S. 149, 171 (1987).

²²⁰ *See Adarand III*, 515 U.S. at 237–38 (“To remedy prior discrimination, narrow tailoring requires consideration of the use of race-neutral means to increase minority business participation in contracting.”); *see also Croson*, 488 U.S. at 507 (“[T]here does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting.”).

²²¹ *Adarand III*, 515 U.S. at 237–38 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 513 (1980) (Powell, J., concurring)).

²²² *Croson*, 488 U.S. at 524 (Scalia, J. concurring).

²²³ *Id.*

²²⁴ *Id.* at 525.

²²⁵ *Id.* at 524.

²²⁶ *Adarand III*, 515 U.S. at 227.

²²⁷ *Croson*, 488 U.S. at 524 (Scalia, J. concurring).

Each of the aforementioned circuits included in its narrow tailoring analysis a determination of whether the state's DBE program complied with SAFETEA-LU (as TEA-21) and the related USDOT regulations.²²⁸ But this is not enough. The SAFETEA-LU regulations provide sufficient flexibility to recipients, which must be monitored to ensure equal protection rights are not violated.²²⁹ For example, while SAFETEA-LU encourages states to set aside ten percent of federal funds for economically and socially disadvantaged individuals, the regulations specify that this ten percent amount is merely "aspirational" in nature.²³⁰ Furthermore, in determining the overall base figure for the relative availability of DBEs, the regulations offer several options, but do not limit the goal setting to one of the numerated options.²³¹ As a result of this flexibility, a recipient may choose a method, albeit prescribed by the regulation, that may not be narrowly tailored to achieve its compelling interest. In other words, in merely complying with the federal regulations, states may apply a facially constitutional law in an unconstitutional manner.

For example, if a court were to review a state's program only to determine if it complied with the regulations, the Washington DBE program in *Western States Paving* would have survived constitutional challenge. USDOT approved the WSDOT program, finding it complied with the regulations.²³² The court acknowledged that Washington's DBE program closely tracked the program developed by the USDOT.²³³ If the Ninth Circuit stopped here, acknowledging that WSDOT complied with the regulations, WSDOT's program would have survived constitutional attack. But, the court took its analysis one step further, finding that Washington did not evidence past discrimination in its transportation contracting industry, thereby finding WSDOT's program unconstitutional.²³⁴ Without determining if a state narrowly tailored its program to remedy past discrimination, the overall goal of equal protection would be frustrated. Thus, a court's narrow tailoring analysis should be more than a mere examination to determine if the state complied with the federal regulations. The court should further determine if the state employed race-neutral measures where possible and limited its program in time such that the program only lasts long

²²⁸ See *supra* Parts III.A, B, C.

²²⁹ See, e.g. 49 C.F.R. § 26.51(b) (2011).

²³⁰ *Id.* § 26.41(b).

²³¹ *Id.* § 26.45(c).

²³² *W. States Paving Co. v. Wash. DOT*, 407 F.3d 983, 1000 (9th Cir. 2005).

²³³ *Id.* at 999.

²³⁴ *Id.* at 1002.

enough to remedy continuing effects of discrimination.²³⁵ This is the only way a government program can narrowly tailor an affirmative action program to survive strict scrutiny.

V. CONCLUSION

A party alleging a state's unconstitutional application of a DBE program pursuant to SAFETEA-LU regulations is met with a different approach depending on if the party brings suit in the Seventh, Eighth, or Ninth Circuit. The Eighth and Ninth Circuits allow as-applied challenges to a state's DBE program and focus their inquiry on the narrow tailoring aspect of strict scrutiny. The Seventh Circuit precludes an as-applied challenge, and instead limits its review to whether the state complied with the federal regulations. None of these approaches are constitutionally sound.

The Supreme Court should clarify the *Croson/Adarand III* standard as required for state-implemented DBE programs based on federal regulation. A state DBE program, pursuant to SAFETEA-LU, is not immune from constitutional attack, but rather must be subject to strict scrutiny analysis in line with *Croson* and *Adarand III*. To comply with this strict standard articulated by the Supreme Court, a state or other government recipient of SAFETEA-LU federal funds must exhibit a compelling interest, separate from that of Congress, by identifying its own pattern of discrimination before implementing a race-based program. Additionally, the narrow tailoring aspect of strict scrutiny can include a review of the state's compliance with the SAFETEA-LU regulations, but the analysis should not end here. The court should also review to ensure the method chosen by the state corresponds to its compelling goal so narrowly that there is little or no possibility that the motive for the classification was based on factors of race. This requires the use of race-neutral alternatives and a program that is limited in time such that it will only remain in effect to remedy the continual effects of past racial discrimination. This is the only way to ensure that federal, state, and local governments treat all persons as American, the only race acknowledged by the United States Constitution.

²³⁵ *Concrete Works of Colo., Inc. v. Denver*, 540 U.S. 1027, 1031 (2003) (Scalia, J. dissenting); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 528 (1989) (Scalia, J., concurring).