

A MODEL BRIEF TO CHALLENGE A DISCRIMINATORY PUBLIC CONTRACTING PROGRAM

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Pacific Legal Foundation (PLF) and the Center for Equal Opportunity (CEO) offer this model brief to prime contractors and subcontractors (and their attorneys) who have been discriminated against in their ability to secure public contracts because of race-based government “affirmative action” programs.

The government’s use of race is fundamentally incompatible with the Equal Protection Clause, which mandates that “[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. Because the Equal Protection Clause “protect[s] *persons*, not *groups*,” it follows that “all governmental action based on race—a *group* classification long recognized as ‘in most circumstances irrelevant and therefore prohibited,’—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed.” *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (citation omitted). This principle also applies to the equal protection component of the Fifth Amendment’s Due Process Clause. *Id.* at 253. Thus, all racial classifications imposed by federal, state, or local governments must be reviewed under strict scrutiny. Such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests. *Id.* at 227.¹

There have been many, many successful challenges to state and local contracting preference programs. Most recently in *Rothe Development Corp. v. United States Department of Defense*, 545 F.3d 1023 (F. Cir. 2008), a challenge to a federal race and ethnicity preference program, was likewise successful. The contracting program required the U.S. Department of Defense, the U.S. Coast Guard, the U.S. Air Force, and the National Aeronautic and Space Administration to ensure that five percent of all contract dollars were awarded to individuals or businesses designated as “disadvantaged.” Blacks, Asians, Hispanics, and Native Americans were automatically presumed to be disadvantaged.²

As Chief Justice Roberts aptly wrote, “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 748 (2007). Government can be vigilant against contract discrimination by requiring the wide publication of bidding opportunities and ensuring that the whole contract process is transparent and open. That is the best way to end contracting discrimination—not by more discrimination against a new set of victims.

This model brief is the culmination of years of effort and experience in the realm of equal protection. PLF and CEO encourage you to draw on it to fight your own legal battle against discrimination and preferences in public contracting. The law is in your favor—you have only to assert your rights.

The model brief here outlines the most important arguments to include when challenging a public contracting program that discriminates or grants preferences on the basis of race and ethnicity. The

brief is interspersed throughout with notes and instructions to help you tailor the arguments to your particular situation. Wherever you see *instructions in italics*, read them for guidance on how to particularize the argument in that section. Whenever you see [CAPSLOCK TEXT IN BRACKETS], you should replace the bracketed generic language with the terms particular to your dispute.

In general, remember that the brief is of necessity often couched in general terms. It is up to you to tailor it to your own situation—but much of the work has already been done. PLF and CEO encourage you to stand up against government discrimination and preferences by asserting your rights in court.

Attorneys, of course, are reminded to consult the Rules of Court to ensure that all required sections of the brief are included, and that the brief is compliant with the Rules in all ways.

VALUABLE LINKS

- Amicus curiae brief submitted in *Rothe Development Corp. v. United States Department of Defense*.
<http://community.pacificlegal.org/Document.Doc?id=236>
- Letter from Roger Clegg to the California Department of Transportation (Sept. 13, 2007).
<http://www.ceousa.org/content/view/510/86/>
- Letter from Sharon L. Browne to the California Department of Transportation (July 17, 2008).
<http://community.pacificlegal.org/Document.Doc?id=143>
- U.S. Commission on Civil Rights, *Disparity Studies as Evidence of Discrimination in Federal Contracting: Briefing Report, May 2006* (testimony of Roger Clegg, George LaNoue, and others).
<http://www.usccr.gov/pubs/DisparityStudies5-2006.pdf>
- George R. La Noue, *A New Era in Federal Preference Programs? Rothe Development Corporation v. U.S. Department of Defense and Department of the Air Force*, 10 Engage 13 (2009).
http://www.fed-soc.org/doclib/20090216_LaNoueEngage101.pdf
- U.S. Equal Employment Opportunity Commission, *Race-Based Charges FY 1997—FY 2009*.
<http://www.eeoc.gov/eeoc/statistics/enforcement/race.cfm>
- U.S. Commission on Civil Rights, *Federal Procurement After Adarand* (Sept. 2005).
http://www.usccr.gov/pubs/080505_fedprocadarand.pdf
- Justin Marion, *How Costly Is Affirmative Action? Government Contracting and California's Proposition 209*, University of California, Santa Cruz (2007).
http://people.ucsc.edu/~marion/Papers/Prop209_oct2007_revision.pdf
- Eryn Hadley, Note, *Did the Sky Really Fall? Ten Years After California's Proposition 209*, 20 BYU J. Pub. L. 103, 120 (2005) (concluding that California's Proposition 209, which bans all racial and sex preferences in the public sector, "has not adversely affected the public employment or labor market position of women and minorities").

- For a good discussion of the deficiencies of disparity studies, see various articles by Professor George R. La Noue, including: *Setting Goals in the Federal Disadvantaged Business Enterprise Programs*, 17 Geo. Mason U. Civ. Rts. L.J. 423 (2007); *Standards for the Second Generation of Croson-Inspired Disparity Studies*, 26 Urb. Law 485 (1994); *Who Counts?: Determining the Availability of Minority Businesses for Public Contracting After Croson*, 21 Harv. J.L. & Pub. Pol'y 793, 832 (1998); and *The Impact of Croson on Equal Protection Law and Policy*, 61 Alb. L. Rev. 1, 12-13 (1997).

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ARGUMENT

I

RACIAL CLASSIFICATIONS ARE PRESUMPTIVELY UNCONSTITUTIONAL UNDER THE EQUAL PROTECTION CLAUSE AND MUST BE SUBJECTED TO THE STRICTEST JUDICIAL SCRUTINY

[*This section can be shortened based upon the knowledge and experience of the court.*]

Decisions of the United States Supreme Court have made clear that distinctions between persons based solely upon their ancestry “are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.” *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 214 (1995) (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). All racial classifications by government are “inherently suspect,” *id.* at 223, and “presumptively invalid.” *Shaw v. Reno*, 509 U.S. 630, 643-44 (1993). Accordingly, the core purpose of the Equal Protection Clause is to eliminate governmentally sanctioned racial distinctions. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989).

Where the government proposes to ensure participation of “some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected . . . as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids.” *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978).

All governmental action based on explicit racial classifications are subject to strict scrutiny to ensure that the personal right to equal protection has not been infringed. *Adarand*, 515 U.S. at 227. Thus, before resorting to a race-conscious measure, the government must “identify [the] discrimination [to be remedied], public or private, with some specificity,” and must have a “strong basis in evidence” upon which “to conclude that remedial action [is] necessary.” *Croson*, 488 U.S.

at 500. And even where there is a compelling interest supported by a strong basis in evidence, the program must be narrowly tailored to further that interest. *Id.* at 506; *Adarand*, 515 U.S. at 238-39. Moreover, the Supreme Court does not single out hard quotas and set-asides for strict scrutiny. The Court refers generally to *any* racial classification, and *any* racially defined goal or target.

[A]ll 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.

Adarand, 515 U.S. at 227.

The strict scrutiny standard of review applies regardless of whether a law is “benign” or “remedial,” *Adarand*, 515 U.S. at 226, regardless of the race of those burdened or benefited by a particular classification, *Croson*, 488 U.S. at 494, and regardless of whether the law may be said to benefit and burden the races equally. *Shaw*, 509 U.S. at 651. Simply put, it makes no difference whether the program has hard quotas, soft quotas, goals or timetables. “Any one of these techniques induces an employer to hire with an eye toward meeting the numerical target.” *Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 354 (D.C. Cir. 1998). It will result in “individuals being granted a preference because of their race.” *Id.* at 351. As the Ninth Circuit Court of Appeals stated in *Bras v. Cal. Pub. Utilities Comm’n*, 59 F.3d 869, 874 (9th Cir. 1995), *cert. denied*, 516 U.S. 1084 (1996), “[w]e look to the economic realities of the program rather than the label attached to it,” to determine whether it grants a preference based on race. A constitutional injury occurs whenever the government treats a person differently because of his or her race. *Adarand*, 515 U.S. at 211, 229-30.

When a governmental scheme uses a racial classification, the action is not entitled to the presumption of constitutionality which normally accompanies governmental acts. *Croson*, 488 U.S. at 500. “A governmental actor cannot render race a legitimate proxy for a particular condition

merely by declaring that the condition exists,” and “blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis.” *Id.* at 500-01.

A racial classification is presumptively invalid, and the burden is on the government to demonstrate extraordinary justification. *Shaw*, 509 U.S. at 643-44. In order to justify a racial classification, the government ““must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is “necessary . . . to the accomplishment” of its purpose or the safeguarding of its interest.” It requires governmental specificity and precision, *Croson*, 488 U.S. at 504, and demands a strong basis in evidence that race-based remedial action is necessary. *Shaw v. Hunt*, 517 U.S. 899, 909 (1996). Absent a prior determination of necessity, supported by convincing evidence, the governmental entity will be unable to narrowly tailor the remedy, and a reviewing court will be unable to determine whether the race-based action is justified. *Croson*, 488 U.S. at 510.

The Equal Protection Clause prohibits any difference in treatment based on race in public contracting—its purpose is to *stop* discrimination. The enactment of a racially discriminatory program merely as a part of the political process to better the condition of one racial group is not permitted. *Croson*, 488 U.S. at 495-96. Here, the [Government’s Program] classifies on the basis of race to provide certain minorities with special benefits not available to others. As discussed below, the Government has failed to meet its burden of bringing forth substantial evidence to prove its race-based discriminatory program is necessary to further a compelling governmental interest. And even if a compelling interest is found, [Government] has failed to narrowly tailor its race-conscious program to further that interest.

II

THE GOVERNMENT HAS FAILED TO MEET THE HEAVY BURDEN OF SHOWING THAT ITS DISCRIMINATORY CONTRACTING PROGRAM SERVES A COMPELLING GOVERNMENT INTEREST

Remedying the present effects of identified past illegal discrimination is the only compelling interest that can justify the use of racial classifications in public contracting programs. *Adarand*, 515 U.S. at 237; *Croson*, 488 U.S. at 505. It is well settled that

[w]hile the States and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination, they must identify that discrimination, public or private, *with some specificity before they may use race-conscious relief.*

Croson, 488 U.S. at 504 (emphasis added).

Simply stating the purpose for the use of racial classifications does not demonstrate the existence of a compelling interest. “[T]he 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.” *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986) (plurality opinion) (emphasis added). Further, “[f]indings of societal discrimination will not suffice, the findings must concern prior discrimination by the government unit involved.” *Croson*, 488 U.S. at 485. Specific findings ensure that racial classifications are not merely unthinking discrimination or a form of racial politics. *Croson*, 488 U.S. at 493.

Without specific findings it is impossible to determine whether the remedy is “tailored to the violation, rather than the violation’s being a pretext for the remedy,” *People Who Care v. Rockford Bd. of Educ., Sch. Dist. No. 205*, 111 F.3d 528, 534 (7th Cir. 1997), whether the geographic scope of the remedy benefits only victims of discrimination, whether the remedy lasts no longer than necessary, and whether race-neutral alternatives have been properly considered. Indeed, without

specific findings of discrimination, it is impossible to make any assessment at all of whether a race-based remedy is narrowly tailored. *Croson*, 488 U.S. at 507; *Wygant*, 476 U.S. at 275-76; *Contractors Ass’n of E. Pa., Inc. v. City of Phila.*, 91 F.3d 586, 599 (3rd Cir. 1996).

In *Concrete Works of Colorado, Inc. v. City & County of Denver*, 36 F.3d 1513, 1520 (10th Cir. 1994), the Tenth Circuit acknowledged that generalized findings of nationwide discrimination do not support the use of racial classifications in any particular market, and that national statistics do not demonstrate discrimination in any particular region. Likewise, the Ninth Circuit in *Western States Paving Co. v. Washington State Dep’t of Transp.*, recognized that Washington must have evidence of actual present effects of discrimination in the state’s transportation contract industry. Otherwise, a DBE Program “provides an unconstitutional windfall to minority contractors solely on the basis of their race or sex.” *Western States*, 407 F.3d 983, 997-98 (9th Cir. 2005). The extrapolation of discrimination from one jurisdiction to another is not permitted. *Croson*, 488 U.S. at 505. In *Rothe Dev. Corp. v. Dep’t of Def.*, the Federal Circuit recognized:

It may be reasonable to assume that there are some demographic and industrial similarities between many of the larger cities and counties across the country. And we still think that Congress need not amass evidence of discrimination in all fifty states to meet its burden. But we would be hesitant to conclude even from methodologically unimpeachable disparity studies of one state, two counties, and three cities that there is a nation-wide pattern or practice of discrimination in public and private contracting.

545 F.3d 1023, 1046 (Fed. Cir. 2008).

Here, [GOVERNMENT ACTOR]’s race-based public contracting program fails to withstand strict scrutiny because the government is unable to meet its heavy burden of proof and demonstrate a compelling government interest based on a “strong basis in evidence” for past discrimination.

[Below are arguments that may be added based upon the facts of your case in order to demonstrate the particular failings of the evidence offered by the government. Because this model brief does not adopt the facts of any specific case, it must confine itself to more general arguments. However, your

finished brief should be fact-specific. If necessary, you should add further subsections detailing each particular problem with the disparity studies used in your case.]

A. The Government’s Reliance on Disparity Studies to Show Past Illegal Discrimination Fails

[Note: the government will almost certainly use disparity studies, which include anecdotal evidence, to argue that there is a past history of racial discrimination. The following sections argue that most disparity studies and anecdotal evidence in general do not prove past discrimination, and leave room for you to argue that the particular studies and anecdotes provided in your case are lacking in evidentiary value.]

[GOVERNMENT] has failed to demonstrate a compelling governmental interest justifying the race-conscious Program because the factual predicate supporting the Program does not establish the type of identified past discrimination in the Government’s construction industry that would authorize race-based relief. The Government relies solely on disparity studies in an attempt to prove discrimination in the construction industry; yet, disparity studies *as such* cannot prove discrimination. Moreover, mere racial disparities are not even evidence of discrimination when relevant nonracial factors have been controlled for.

The Court warned in *Maryland Troopers Ass’n v. Evans*, 993 F.2d 1072, 1077 (4th Cir. 1993), that “[i]nferring past discrimination from statistics alone assumes the most dubious of conclusions: that the true measure of racial equality is always to be found in numeric proportionality.” *See also* George R. La Noue, *Who Counts?: Determining the Availability of Minority Businesses for Public Contracting After Croson*, 21 Harv. J.L. & Pub. Pol’y 793, 832 (1998) (“Claims of statistical underutilization abound, but examples of discrimination regarding particular contracts are virtually non-existent.”).

“Where there is 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 by the locality or the locality’s prime contractors, an inference of discriminatory

exclusion could arise.” *Croson*, 488 U.S. at 509. However, statistical disparities are not proof of discrimination. To begin with, such disparities are merely an effect, and do not in and of themselves speak to their cause. A disparity study, at best, creates only an inference of discrimination—it does not establish intentional acts. Discrimination must be proven by actual evidence where the statistical study has factored out, “to the extent practicable, nontrivial, non-race-based disparities in order to permit an inference” of race discrimination. *Podberesky v. Kirwan*, 38 F.3d 147, 160 (4th Cir. 1994). See also, Derek M. Alphan, *Proving Discrimination After Croson and Adarand: “If It Walks Like a Duck,”* 37 U.S.F. L. Rev. 887, 968 (2003) (“[n]on-utilization of [minority firm] does not equate to discrimination”).

Here, the Government’s reliance on a disparity study fails to show a compelling state interest.

[Add your analysis of the disparity study.]

1. Racial Disparities Here Can Be Explained by a Plethora of Non-Discriminatory Factors

The most common explanation for a statistical disparity is the study’s failure to correctly assess the *availability* of minority-owned businesses. La Noue, *Who Counts?*, *supra*, at 798-99 (“Availability analysis is the Achilles’ heel of *Croson* disparity studies.”) (citation and internal quotation marks omitted). Available minority-owned businesses are those that are “qualified, . . . willing and able” to engage in public contracting. *Croson*, 488 U.S. at 509. Most studies completely ignore qualifications, such as bonding, licensing, experience, or other objective nondiscriminatory requirements. George R. La Noue, *Standards for the Second Generation of Croson-Inspired Disparity Studies*, 26 Urb. Law 485, 497 (1994). “Frequently there are substantial differences in the qualifications of [minority-owned] firms and [non-minority-owned] firms,” making the omission of this essential factor responsible for disparities. *Id.* As one expert on disparity studies has explained:

[I]t may be that the companies owned by a particular racial group in a particular market do not have the specific expertise or capability of doing the actual work sought. And, even if they are, there may not be a problem if these companies are for nondiscriminatory reasons not submitting bids in the first place . . . [E]ven if it is shown that a particular group bids on contracts in a particular market and fails to receive the contracts in its proportion, this does not mean that discrimination has occurred: The explanation may be simply that the bids submitted by the minority company were not the best bids, because they were too high or failed to meet other objective qualifications.

U.S. Commission on Civil Rights, *Disparity Studies as Evidence of Discrimination in Federal Contracting: Briefing Report, May 2006* at 73 (testimony of Roger Clegg).³

Another likely explanation for disparities is that minority-owned firms tend to be both younger and smaller than others in the market. They do more subcontracting work because they have less capacity to perform as prime contractors. Docia Rudley & Donna Hubbard, *What a Difference a Decade Makes: Judicial Response to State and Local Minority Business Set-Asides Ten Years After City of Richmond v. J.A. Croson*, 25 S. Ill. U. L.J. 39, 92 (2000) (“In case after case, courts have zeroed in on the argument that [minority] firms tend to be younger and smaller and thus have less capacity to perform the work required by the larger contracts.”). As Professor La Noue has observed:

One would have to believe that more discrimination took place by public bureaucracies who control the low-bid process where penalties for violations are severe and where there is scrutiny by the legislators and executives who have approved [minority preference] programs, than in the private sector where most prime-subcontractor relationships are not very visible and regulated. Or one could believe that this outcome reflects the relative differences in the size and qualifications of [minority- and non-minority-owned businesses].

La Noue, *Standards, supra*, at 519.

[INSERT THE FOLLOWING PARAGRAPHS IF THERE IS LOCAL EVIDENCE OF RACIAL POLITICS IN THE ENACTMENT OF THE PROGRAM AT ISSUE]

Further, as the Supreme Court recognized in *Croson*, elected city councils are not insulated from the temptation of “racial politics.” “Racial politics” is not only helping one’s own race, it uses race to curry votes.⁴ In *Croson*, the Court invalidated an elected local city council’s voluntary race-based preference program fearing that it was adopted for the purpose of “racial politics.” The *Croson* Court demanded that any government entity seeking to classify by race must point to specific identified instances of past or present discrimination.

[I]f there is no duty to attempt either to measure the recovery by the wrong or to distribute that recovery within the injured class in an evenhanded way, our history will adequately support a legislative preference for almost any ethnic, religious, or racial group with the political strength to negotiate “a piece of the action” for its members.

Croson, 488 U.S. at 510-11. Race-based decisions made by political groups in the political process are suspect. *Id.* at 496. *Croson* held:

Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are “benign” or “remedial” and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, 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. The test also ensures that the means chosen “fit” this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.

Id. at 493. Given these political realities, disparity studies like the ones relied on by the Government deserve no deference—particularly where, as here, constitutional rights are at stake.

[Add your analysis.]

[INSERT THE FOLLOWING PARAGRAPH IF THE DISPARITY STUDY INDICATES UNDERUTILIZATION OF MINORITY-OWNED FIRMS]

Another explanation of statistical disparities—at least with respect to state or local government contracting—is the tendency of minority-owned firms to work on federal as opposed

to state or local contracts. One sophisticated Louisiana disparity study applying regression analysis made that precise finding. La Noue, *Standards, supra*, at 520. This would explain the “underutilization” of minority-owned firms identified in the government’s studies, all of which centered strictly on state and local contracts.

[INSERT THE FOLLOWING PARAGRAPH IF THE DISPARITY STUDY WAS CREATED AFTER THE DBE PROGRAM WAS ENACTED]

Finally, some disparity studies are commissioned to provide post-enactment support for the decision to implement racial preferences, often as insurance against litigation. Such post-enactment evidence is unpersuasive. *Hunt*, 517 U.S. at 909-10 (rejecting the use of post-enactment evidence of discrimination to justify racial gerrymandering of voting districts). In *Eng’g Contractors Ass’n of South Florida, Inc. v. Metropolitan Dade Co.*, 122 F.3d 895, 926, 929 (11th Cir. 1997), Eleventh Circuit found post-enactment statistics and anecdotal evidence insufficient to justify a race-based DBE program where there was a neutral explanation for the proven statistical disparity. George R. La Noue, *The Impact of Croson on Equal Protection Law and Policy*, 61 Alb. L. Rev. 1, 12-13 (1997).

2. The Government’s Disparity Study Is Stale and Fails to Properly Measure Ability or Capacity in Calculating Disparity Ratios

The Government’s reliance on its disparity study suffers the same fatal flaws identified by other courts. It is stale and fails to measure properly the ability or capacity of MBE and non-MBE firms in calculating disparity ratios. In *Rothe*, the Federal Circuit declared the U.S. Dep’t. of Defense race-preferential program, 10 U.S.C. § 2323, unconstitutional on its face. 545 F.3d at 1026. In making its decision, the court considered the validity of numerous disparity studies used to create a predicate for federal post-*Adarand* preferential procurement. The court created two important principles to be used in strict scrutiny review.

First, the *Rothe* court required that the data used in disparity studies not be stale. While the court did not create a hard and fast rule on staleness, the court found that a ten-year-old federal report was obsolete. The court said that disparity studies should rely on the most recently available data. Recognized expert Professor George La Noue, in a commentary on the *Rothe* case, notes that “the United States Commission on Civil Rights suggested a five-year rule for determining whether statistical data were relevant to analyzing the existence of discrimination in a fast changing economy.” George R. La Noue, *A New Era in Federal Preference Programs? Rothe Development Corporation v. U.S. Department of Defense and Department of the Air Force*, 10 Engage 13, 16 (2009).⁵ [add your facts to show regarding staleness.]

Second, the *Rothe* court faulted the six disparity studies it reviewed for failing properly to measure the ability or capacity of minority and non-minority firms in calculating disparity ratios. The court found that it was not enough to establish a threshold of being able to bid on one contract because that failed to account for “the relative capacities of business to bid for more than one contract at a time.” *Rothe*, 545 F.3d at 1044. Professor La Noue commented on the case: “The Circuit was particularly concerned that the studies failed to measure firm capacity correctly. This is an endemic problem in disparity studies.” La Noue, *A New Era*, *supra*, at 16. [add facts regarding your disparity study.]

Rothe is not new law. In *Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 736 (6th Cir. 2000), the Sixth Circuit struck down Ohio’s Minority Business Enterprise Act, finding that statistical differences did not alone show discrimination because they did not account for the relative size of the firms, either in terms of their ability to do particular work or in terms of the number of tasks they have the resources to complete.

Similarly, in *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 426 (D.C. Cir. 1992), the court held that a statistical disparity could not establish discrimination because of other factors, such as the size and ability of minority firms to take on larger projects, whether minority firms were already engaged on other projects, whether minority firms were choosing to bid on other more lucrative contracts outside the geographic area, the firms' lack of expertise, or the firms' noncompetitive bids. *Id.* at 426.

In *Western States*, 407 F.3d 983, the Ninth Circuit struck down a state discriminatory public contracting program. The court held that where the government fails to prove discrimination, then the "DBE program does not serve a remedial purpose; it instead provides an unconstitutional windfall to minority contractors solely on the basis of race and sex." *Id.* at 998. The court rejected statistical disparity evidence that was proffered in support of the program, stating that the statistical evidence was "oversimplified" and "entitled to little weight" because it did not account for factors that may affect the relative capacity of disadvantaged business enterprises to undertake contracting work, such as their size, experience, or concentration in certain geographic areas of the state, rendering them unavailable for a disproportionate amount of work. *Id.* at 1000. Likewise, the court in *Coral Constr. Co. v. King County*, 941 F.2d 910, 919 (9th Cir. 1991), concluded that "[s]tatistical evidence often does not fully account for the complex factors and motivations guiding employment decisions, many of which may be entirely race-neutral."⁶

[Add your facts.]

B. The Government's Anecdotal Evidence Fails to Establish Past Discrimination

The Government supplements its disparity study[IES] with anecdotal evidence. But anecdotal evidence "rarely, if ever" can "show a systemic pattern of discrimination necessary for the adoption of an affirmative action plan." *Coral Constr.*, 941 F.2d at 919. It is based on unsworn

statements of discrimination, is generally unreliable, and thus “should be treated cautiously.” Teresa Lee Brown, *Deceived by Disparity Studies: Why the Tenth Circuit Failed to Apply Croson’s Strict Scrutiny Standard in Concrete Works of Colorado*, 81 Denv. U. L. Rev. 573, 594 (2004) (quoting La Noue, *Standards, supra*, at 525) (internal quotation marks omitted). Primarily this is because of the inherent “difficulty in verifying that it is remembered, perceived, or reported accurately.” *Id.*

The unreliability of anecdotal claims is borne out by some telling statistics from the United States Equal Employment Opportunity Commission (EEOC), which is charged with investigating and prosecuting alleged violations of federal anti-discrimination laws under Title VII. In its investigation of just over 33,500 claims of racial discrimination made in 2009, the EEOC found “reasonable cause” to believe that race-based discrimination had actually occurred in a mere 3.9% of those claims. U.S. Equal Employment Opportunity Commission, *Race-Based Charges FY 1997—FY 2009*.⁷ The average for the period between 1997 and 2006 was only 4.5%. *Id.*

It is no accident that so many claims turn out to be utterly baseless. Anecdotal evidence is not examined for accuracy, nor are the witnesses cross-examined. For instance, in one study,

the researchers worked from a list of 200 certified MBEs, but only 78 were ever found No attempt was made to verify any of the incidents reported. Under cross-examination at the trial on the disparity study he managed, Dr. Andrew Brimmer had to concede that he had no way of knowing whether any of the stories his researchers heard were true.

La Noue, *Standards, supra*, at 526-27.

To determine whether an instance of discrimination alleged in an anecdote has actually occurred is “complex and requires a knowledge of the perspectives of both parties involved in an incident as well as knowledge about how comparably placed persons of other races, ethnicities, and genders have been treated” by the same party in similar circumstances. *Eng’g Contractors Ass’n of S. Fla.*, 943 F. Supp. at 1579. To end the inquiry with the person providing the anecdote is to ignore

all of this complexity, and ensure that no true understanding of the incident will ever be reached. Indeed, it is perfectly possible that the incident recounted never occurred at all.

Also, there is the problem of “interviewer bias” or “response bias.” *Id.* “When the respondent is made aware of the political purpose of questions or when questions are worded in such a way as to suggest the answers the inquirer wishes to receive,” the interviewee will give the interviewer the answers he or she seems to be looking for. *Id.*

Further, anecdotes may be completely anomalous. They may well reflect no pattern of discrimination at all, and certainly none that would justify a government-sponsored racial preference program. U.S. Commission on Civil Rights, *Disparity Studies, supra*, at 72 (Clegg Testimony) (testifying that anecdotal statements must be weighed for their “typicality and how many contracting decisions are made (so that there is a clear pattern of consistent discrimination.)”).⁸ Anecdotes may leave unanswered the most relevant question: Whether the alleged discrimination resulted in the actual loss of a contract. *Id.* at 73 (“[T]here must be a link shown between the discrimination against a particular group and the denial of contracting opportunities to members of that group.”). Or, anecdotes may be motivated by the knowledge that the continuing use of racial preferences favoring the witnesses is dependent upon “their ability to create a record of discrimination,” so that “the incentive to engage in memory contrivance, consciously or unconsciously, is substantial.” La Noue, *Standards, supra*, at 524. To say the least, these factors make reliance on anecdotal allegations—particularly when drawn from unvetted, anonymous questionnaires—an imprudent choice.

[Detail the evidentiary flaws with the anecdotal evidence provided by the government in your case.]

III

THE GOVERNMENT’S RACIALLY DISCRIMINATORY PROGRAM IS NOT NARROWLY TAILORED TO FURTHER A COMPELLING GOVERNMENT INTEREST

Even where there is a compelling interest supported by a strong basis in evidence, the program must be narrowly tailored to further that interest. Only the most exact connection between justification and classification will suffice. *Adarand*, 515 U.S. at 236. A narrow tailoring analysis commonly involves consideration of six factors: (1) the necessity of relief; (2) the efficacy of alternative, race-neutral remedies; (3) the flexibility of relief, including the availability of waiver provisions; (4) the relationship of the stated numerical goals to the relevant market; (5) the impact of relief on the rights of third parties; and (6) the overinclusiveness or underinclusiveness of the racial classification. *Adarand*, 515 U.S. at 238-39; *Croson*, 488 U.S. at 506; *United States v. Paradise*, 480 U.S. 149, 171 (1987) (plurality opinion); *Rothe*, 545 F.3d at 1036.

Here, the Government’s lack of narrow tailoring of its race-based program is fatal.

While all of the above-listed elements of narrow tailoring are important, the most fundamental is the consideration of means other than racial preferences to stop any still-existing discrimination, and it is discussed first, in subpart A below. Even if [Government] has shown the existence of ongoing discrimination, it is clear that in 2010 “the way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 748 (2007). It is simply implausible that racial discrimination in [your location] today remains so intractable that there is no way to end it except by overlaying it with a racially preferential program. The contracting and subcontracting process is particularly amenable to requirements of greater transparency and advanced publication to ensure that contracting opportunities are open to all regardless of race.

A. The Government Failed to Make Use of Available Race-Neutral Methods to Combat Discrimination

Here, the Government claims that without a race-based discriminatory program, it will not be able to ensure nondiscrimination against minority contractors competing for public contracting opportunities. [CITE TO GOVERNMENT ACTION ADOPTING THE PROGRAM] Yet despite the clear requirements that Government must examine race-neutral methods to combat discrimination, there is no evidence in the record that [GOVERNMENT ACTOR] examined, much less rejected, race-neutral alternatives.

Case law makes clear that the use of any racial classification must be necessary rather than convenient, and the availability of nonracial alternatives—or the failure of Government to consider such alternatives—will be fatal to the classification. *Croson*, 488 U.S. at 507. As the Fourth Circuit recognized in *Hayes v. North State Law Enforcement Officers Ass’n*, 10 F.3d 207, 217 (4th Cir. 1993), “The essence of the ‘narrowly tailored’ inquiry is the notion that explicitly racial preferences . . . must be only a ‘last resort’ option.”⁹

A number of courts and experts have recognized that race-neutral alternatives exist. *Croson*, 488 U.S. at 507 (“Many of the barriers to minority participation in the construction industry . . . appear to be race neutral.”); *Contractors Ass’n of E. Pa.*, 91 F.3d at 608-09 (striking down race-based public contracting program for failure to consider race-neutral alternatives); George R. La Noue, *Setting Goals in the Federal Disadvantaged Business Enterprise Programs*, 17 Geo. Mason U. Civ. Rts. L.J. 423, 468-73 (2007) (describing race-neutral alternatives). In a report entitled “Federal Procurement After *Adarand*,” the United States Civil Rights Commission identified five “race-neutral contracting strategies”:

- Strictly enforce nondiscrimination laws in all facets of federal public contracting,

- Increase knowledge about opportunities to contract with the federal government,
- Provide education or technical assistance to impart business skills, knowledge of federal procurement, and strategies to win federal contracts,
- Provide financial aid or adjustments to offset the difficulties struggling firms encounter, and
- Expand contracting opportunities and promote business development in underutilized geographic regions.

U.S. Commission on Civil Rights, *Federal Procurement After Adarand*, at 31 (Sept. 2005);¹⁰ *see also* U.S. Commission on Civil Rights, *Disparity Studies*, *supra*, at 72 (Clegg Testimony) (advocating the elimination of “unrealistic or irrational” bidding requirements, greater bid publication and solicitation efforts, and enforcement of existing anti-discrimination laws). These race-neutral alternatives apply equally to state and local contracting and subcontracting programs.

In short, at every step of the contracting process there are better tailored remedies than racial preferences. If companies are being excluded from bidding because of unrealistic or irrational bonding or bundling requirements, then those requirements should be changed for *all* companies, regardless of the race of the owner. If companies who could be submitting bids are not doing so, then the publication and other procedures used in soliciting bids should be opened up—but again, to *all* potential bidders, regardless of race. Even in the extreme case where it can be shown that contracts have been denied to the lowest qualified bidder because of that bidder’s race, sanctions and safeguards against the repetition of such behavior can often be implemented so as to protect *all* bidders, regardless of race.

B. The Government Failed to Narrowly Tailor Its Racially Discriminatory Program Because There Is a Poor Relationship Between the Stated Goals and the Percentage of Qualified MBEs in the Relevant Labor Market, the Program Is Overinclusive of the Racial Classifications, Failed to Consider the MBE Program’s Burden on Innocent Third Parties, and the Termination Date is Illusional

In addition to determining whether race-neutral alternatives were considered first and found insufficient, the narrow tailoring analysis requires consideration of the necessity of relief, flexibility of relief, the relationship of the stated numerical goals to the relevant market, the impact on third parties, and the over/under inclusiveness of the racial classifications. *Adarand*, 515 U.S. at 238-39; *Croson*, 488 U.S. at 506; *Paradise*, 480 U.S. at 171 (plurality opinion). This detailed examination ensures “that the means chosen fit th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.” *Croson*, 488 U.S. at 493.

Here, the Government’s scant narrow tailoring analysis is fatal. Government’s discriminatory program insulates preferred racial groups from competition with other contractors solely on the basis of a group identification.

[A finished brief should analyze and discuss each of the factors in turn, in relation to the facts of the particular case.]

IV

**STATE IMPLEMENTATION OF A FEDERAL PROGRAM
DOES NOT SHIELD THE STATE FROM BEING
INDIVIDUALLY SUBJECTED TO STRICT SCRUTINY**

[This section should be included in your brief if you are challenging a Federal program as it has been applied to a State actor. States may try to shield themselves from strict scrutiny by arguing that they are simply complying with Federally mandated requirements. However, two circuit courts to date have held that this is not permissible – State actors need not show a new compelling interest (independent from that shown by Congress) for a remedial program, but they do have to show that their application of the Federal program is narrowly tailored within the State and the industry.]

Here, [STATE GOVERNMENT] argues that it should not be subjected to strict scrutiny because it is merely complying with [NAME OF FEDERAL PROGRAM]. However, two circuit courts have already found that states are not free to hide behind the federal government in order to shield themselves from strict scrutiny.

In *Western States*, a white-owned asphalt and paving contractor based in Washington State challenged the federal Transportation Equity Act (TEA) on its face, and as applied to the State of Washington. 407 F.3d at 987. Although the Ninth Circuit found that the federal program passed strict scrutiny, it noted that it was “necessary to undertake an as-applied inquiry into whether Washington’s DBE program is narrowly tailored,” *Id.* at 997, and that it could not uphold a state program “simply because the State complied with the federal program’s requirements.” *Id.* In finding Washington’s program invalid, the Ninth Circuit said “race-conscious measures can be constitutionally applied only in those States where the effects of discrimination are present.” *Id.* at 996. The court required the State to show: (1) “the presence . . . of discrimination in [its] transportation contracting industry,” *Id.* at 997-98 and (2) that the “application [of the remedial program] is limited to those minority groups that have actually suffered discrimination.” *Id.* at 998.

The Ninth Circuit is not alone in this position—it followed the Eighth Circuit, which up to that point had been the “only other appellate court to have confronted an as-applied challenge to TEA-21.” *Id.* at 996. The Eighth Circuit ruled in *Sherbrooke Turf, Inc. v. Minnesota Dep’t of Transp.*, 345 F.3d 964, 971 (8th Cir. 2003), that in order for a race-based national program to be narrowly tailored, it “must be limited to those parts of the country where its race-based measures are demonstrably needed.” If the federal government “delegates this tailoring function,” then the state implementation “becomes critically relevant to a reviewing court’s strict scrutiny.” *Id.*

This Court should follow the Eighth and Ninth Circuits in rejecting [STATE GOVERNMENT]'s attempt to shield itself behind federal regulations.

V

[GOVERNMENT OFFICIALS] ARE NOT ENTITLED TO QUALIFIED IMMUNITY FOR VIOLATING PLAINTIFF'S CONSTITUTIONAL RIGHTS

[You may be able to hold the government officials responsible for the discriminatory program personally liable for the violation of your constitutional rights. Once you have established a constitutional violation, you must look to decisions in your jurisdiction to determine whether that right was clearly established at the time of the violation.]

[GOVERNMENT OFFICIALS] are not entitled to qualified immunity and should be held personally liable for Plaintiff's damages where the official violated a clear constitutional right by their conduct, and where a reasonable government official should have known that the conduct was a constitutional violation. *Hallstrom v. City of Garden City*, 991 F.2d 1473, 1482 (9th Cir. 1993).

Public officials are protected by "qualified immunity" when performing their duties within the scope of their employment as long as their conduct does not breach "clearly established statutory or constitutional rights of which a reasonable person would have known." *Sigman v. Town of Chapel Hill*, 161 F.3d 782, 786 (4th Cir. 1998) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "The reasonableness inquiry is an objective one, 'measured by reference to clearly established law.'" *Milstead v. Kibler*, 243 F.3d 157, 161 (4th Cir. 2001). In analyzing the reasonableness of the conduct and the clarity of the constitutional right, courts may expect officials to be aware of binding judicial precedent on the subject. *Hallstrom*, 991 F.2d at 1483 (no qualified immunity because "an official is charged with knowledge of controlling Supreme Court and Ninth Circuit precedent").

In *Wilson v. Layne*, 526 U.S. 603 (1999), the Supreme Court set forth the correct analytical sequence for determining whether qualified immunity should apply at all. Initially, a court must

“determine whether the plaintiff has alleged the deprivation of an actual constitutional right,” and if so, “proceed to determine whether that right was clearly established at the time of the alleged violation.” *Id.* at 609 (quoting *Conn v. Gabbert*, 526 U.S. 286, 290 (1999)).

Here, the Government [OFFICIALS] subjected Plaintiff to race discrimination. Specifically, the Government [OFFICIALS] violated Plaintiff’s rights guaranteed under the Equal Protection Clause, entitling Plaintiff to damages pursuant to 42 U.S.C. §§ 1981 and 1983.

The next step in the qualified immunity analysis is to determine whether that right was clearly established at the time of the alleged violation. *Wilson* 526 U.S. at 609. Here, the decisions in *Adarand*, 515 U.S. 200; *Shaw*, 509 U.S. 630; *Croson*, 488 U.S. 469; *Bakke*, 438 U.S. 265; *Rothe*, 545 F.3d 1023; and *Western States*, 407 F.3d 983, should have put all reasonable administrators of local affirmative action programs on notice that their programs would be subject to strict scrutiny.

In fact, several courts have held officials who voted to adopt a discriminatory program personally liable. *See, e.g., Alexander v. Estep*, 95 F.3d 312 (4th Cir. 1996) (no qualified immunity for county and fire department officials in a case challenging affirmative-action employment policy); *Alexander v. City of Milwaukee*, 474 F.3d 437 (7th Cir. 2007) (no qualified immunity for police and fire commissioners who engaged in discriminatory promotion practices); *Hershell Gill Consulting Eng’rs, Inc. v. Miami-Dade County*, 333 F. Supp. 2d 1305 (S.D. Fla. 2004) (commissioners were acting in an administrative rather than legislative capacity when they voted and therefore they were not entitled to qualified immunity); and *F. Buddie Contracting, Ltd. v. Cuyahoga Cmty. Coll. Dist.*, 31 F. Supp. 2d 571 (N.D. Ohio 1998) (Board members and individual community college officers were not entitled to qualified immunity in a case challenging the rejection of the low bid for a construction contract).

[OFFICIALS] defense of qualified immunity should be rejected under the sound reasoning articulated in *Harlow*: “Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action.” 457 U.S. at 819. Government officials who classify individuals on the basis of race have been warned that racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination. *Adarand*, 515 U.S. at 227. Because the conduct here so clearly violates [PLAINTIFF]’s constitutional rights, this Court should also reject a qualified immunity defense and hold individual [OFFICIALS] liable for Plaintiff’s damages.

CONCLUSION

[Your brief should include a brief conclusion that summarizes and completes the arguments ultimately included in the brief. A sample conclusion is provided here, but it should be tailored to the arguments ultimately included in the brief.]

[Government’s] racially discriminatory public contracting program treats individuals differently on the basis of race. This mandate of differential treatment is not supported by a compelling interest to remedy past discrimination. If the true purpose is the remedying of discrimination rather than racial politics, [Government] should have no objection to making specific findings of discrimination instead of relying on flimsy and discredited evidence found in its disparity stud[ies]. Without an adequate factual predicate for the use of race-based remedies, there can be only one purpose: racial politics.

Government’s reliance on statistical disparities and anecdotal claims of discrimination is insufficient to demonstrate a compelling government interest and is an indicator that race is being used for illegitimate purposes. To avoid allowing the unjustified and illegitimate use of racial classifications by Government, this Court should hold that [Government’s] race-based program fails

strict scrutiny, because it is not based on findings of past discrimination or narrowly tailored to remedy actual discrimination.

[Provide a short summary of Program's lack of narrow tailoring. The following paragraph is an example.]

Even if [Government] had proved a compelling interest in ending racial discrimination in its contracting programs, it has not and could not pass the narrow tailoring requirements of strict scrutiny. Most fundamentally, there is no demonstration that, in order to stop discrimination [Government] must adopt discriminatory preferences. Rather in 2010, “the way to stop discrimination on the basis of race is to stop discriminating on the basis of race.” *Parents Involved in Cmty. Schools*, 551 U.S. at 748.

But instead of using racial classifications as a “last resort,” there is no evidence that the Government examined, much less plausibly rejected, race-neutral alternatives or even considered the Program’s lack of flexibility or burden on innocent third parties. Nor can Government show that its “disparity study[ies]” finding mere “statistical disparity” is sufficiently particularized and specific to support its race-based program.

For the reasons set forth above, this Court should find the Program unconstitutional, and should find [INDIVIDUAL OFFICIALS] personally liable for their violation of [PLAINTIFF]’s constitutional rights.

* Sharon L. Browne is a principal attorney in Pacific Legal Foundation’s Individual Rights Practice Group. Roger Clegg is the President and General Counsel of Center for Equal Opportunity. This model brief would not have been possible without the assistance of Rebecca K. Girn, a recent graduate of the UCLA School of Law who clerked for Pacific Legal Foundation in fall of 2009. For more information on Pacific Legal Foundation, please visit www.pacificlegal.org. For more information on Center for Equal Opportunity, please visit www.ceousa.org.

¹ Gender preference programs are not addressed specifically in this brief because they are reviewed under immediate scrutiny. However, they should be included in any challenge. Gender

classifications are immediately suspect and require the government to demonstrate with “exceedingly persuasive” evidence that it is acting to achieve “important governmental objectives.” *United States v. Virginia*, 518 U.S. 515, 533 (1996). Intermediate scrutiny mandates that the government produce evidence of past discrimination against women. *Eng’g Contractors Ass’n of S. Fla., Inc. v. Metro Dade County*, 122 F. 3d 895, 910 (11th Cir. 1997).

² While the *Rothe* lawsuit challenged a Defense Department program, the Court of Appeals decision has much broader application. Applying strict scrutiny, the decision struck down the race-conscious program because Congress did not have a “strong basis in evidence” to conclude that the Defense Department was a passive participant in racial discrimination across the country, which required remedial race-based action. According to the court, the statistical and anecdotal evidence relied upon by Congress were flawed and failed to provide the evidentiary predicate for a compelling interest.

³ Available at <http://www.usccr.gov/pubs/DisparityStudies5-2006.pdf> (last visited on Nov. 4, 2009).

⁴ City officials openly have criticized their consultants for failing to come up with racial disparities to justify racial preferences. See, e.g., Jeffrey M. Hanson, Note, *Hanging By Yarns?: Deficiencies in Anecdotal Evidence Threaten the Survival of Race-Based Preference Programs for Public Contracting*, 88 Cornell L. Rev. 1433, 1445 n.88 (2003) (reporting the outrage of officials in Miami and Los Angeles with their commissioned studies that concluded there was no minority underutilization).

⁵ Available at http://www.fed-soc.org/doclib/20090216_LaNoueEngage101.pdf (last visited Nov. 5, 2009).

⁶ Since *Croson* held that racial classifications could only be justified in an “extreme case,” *Croson*, 499 U.S. at 509, numerous courts have rejected the use of statistical studies to prove discrimination. *Hershell Gill Consulting Eng’rs, Inc. v. Miami-Dade County*, 333 F. Supp. 2d 1305 (S.D. Fla. 2004) (the statistical evidence is unreliable and fails to establish the existence of discrimination); *L. Tarango Trucking v. County of Contra Costa*, 181 F. Supp. 2d 1017 (N.D. Cal. 2001) (no way to tell if MWBEs are underutilized because census data is flawed); *Builders Ass’n of Greater Chicago v. County of Cook*, 123 F. Supp. 2d 1087 (N.D. Ill. 2000) (statistics from private sector insufficient to show discrimination in public contracting), *aff’d*, 256 F.3d 642 (7th Cir. 2001); *Ass’n for Fairness in Bus. Inc. v. New Jersey*, 82 F. Supp. 2d 353, 361 (D.N.J. 2000) (commission’s report offers little support for the MWBE program); *Webster v. Fulton County, Georgia*, 51 F. Supp. 2d 1354, 1376 (N.D. Ga. 1999) (methods and statistics in the disparity study fail to provide a strong basis in evidence to justify preferences), *aff’d*, 218 F.3d 1276 (11th Cir. 2000); *Phillips & Jordan, Inc. v. Watts*, 13 F. Supp. 2d 1308, 1314 (N.D. Fla. 1998) (record establishing only ill-defined wrongs is not enough); *Eng’g Contractors Ass’n of S. Fla., Inc. v. Metro. Dade County*, 943 F. Supp. 1546 (S.D. Fla. 1996) (county’s statistical evidence is conflicting and unpersuasive), *aff’d*, 122 F.3d 895 (11th Cir. 1997); *Contractors Ass’n of E. Pa., Inc. v. City of Phila.*, 893 F. Supp. 419 (E.D. Pa. 1995), *aff’d*, 91 F.3d 586, 602 (3d Cir. 1996) (city unable to provide evidentiary basis for goals).

⁷ Available at <http://www.eeoc.gov/eeoc/statistics/enforcement/race.cfm> (last visited July 15, 2010).

⁸ Available at <http://www.usccr.gov/pubs/DisparityStudies5-2006.pdf> (last visited on Nov. 5, 2009).

⁹ See also, *Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 798 (2007) (“[M]easures other than differential treatment based on racial typing of individuals first must be exhausted.”); *Rothe*, 545 F.3d at 1036 (“even where there is a compelling interest supported by a strong basis in evidence,” the court must consider “the efficacy of alternative, race-neutral remedies”); *Western States*, 407 F.3d at 993 (“[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative,’ it does ‘require serious, good faith consideration of workable race-neutral alternatives.’”).

¹⁰ Available at http://www.usccr.gov/pubs/080505_fedprocadarand.pdf (last visited Nov. 5, 2009).