
# U.S. DOT Disadvantaged Business Enterprise Program | *Mid-America* and Its Implications

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# Overview of Presentation

- Background of U.S. DOT DBE program
- What is a DBE?
- What is an equal protection challenge?
- Overview of *Mid-America* and its status
- How did we end up here?…*Students for Fair Admissions v. President and Fellows of Harvard College* and *Ultima Service Corp. v. U.S. Department of Agriculture*
- Other current challenges
- What could this mean for the U.S. DOT DBE program?
- Implications for A/E firms and contracting strategies

# Background of the U.S. DOT DBE Program

- Congress enacted the first U.S. DOT DBE statutory provision in 1983
- Congress has regularly reauthorized the U.S. DOT DBE program, most recently in the Infrastructure Investment and Jobs Act
- The DBE program provides opportunity for DBEs to participate in state and local transportation projects by requiring that state and local transportation agencies receiving federal assistance establish annual DBE goals
- State and local transportation agencies certify the eligibility of firms to participate as DBEs in federally assisted projects
- Rules and guidelines set forth at 49 C.F.R. Part 26
  - New rule issued April 9, 2024
  - Technical corrections July 3, 2024

# What is a DBE?

- Under the U.S. DOT's DBE program, a DBE is a for-profit small business concern:
  - with at least 51% ownership by one or more individuals who are both socially and economically disadvantaged, and
  - of which the management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals
  - firm size limitation
    - Must be a small business as defined by the Small Business Administration, but. . . .
    - Annual gross receipts averaged over the previous three fiscal years cannot exceed $30.72 million
    - The amount is to be adjusted annually and posted on the U.S. DOT's Web site
  - socially and economically disadvantaged individual personal net worth cannot exceed $2.047 million
    - To be adjusted every three years

# What is “Socially and Economically Disadvantaged”?

- Can be determined on a case-by-case basis, or
- The following groups are rebuttably presumed to be socially and economically disadvantaged:
  - Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, women, and groups whose members are designated as socially and economically disadvantaged by the SBA
  - Further distinguished by countries of origin, culture, race, or tribes
  - Being born in a particular country does not necessarily mean the person is socially and economically disadvantaged
    - In other words, taken alone, simply because some is from a certain country of origin does not automatically qualify them as socially and economically disadvantaged

# What is an Equal Protection challenge?

**Equal Protection (Fifth and Fourteenth Amendments to the U.S. Constitution)**

- Neither the federal government nor any state may deny to any person within its jurisdiction the equal protection of the laws
- Three tiers of scrutiny:
  - Strict scrutiny
  - Intermediate scrutiny
  - Rational basis review

# What is an Equal Protection challenge?

**Equal Protection (Fifth and Fourteenth Amendments to the U.S. Constitution)**

- Strict scrutiny:
  - Compelling government interest
  - Narrowly tailored to achieve that interest
  - Applicable when action involves a “suspect classification”: race, religion, national origin, or citizenship
- Intermediate scrutiny:
  - Important government interest
  - Means are substantially related to that interest
  - Applicable when action involves “quasi-suspect classification”: gender and birth legitimacy

# *Mid-America* Overview and Status

***Mid-America Milling Co., LLC v. U.S. Department of Transportation***

- On October 26, 2023, Mid-America and its co-Plaintiff, Bagshaw Trucking Inc., filed a complaint in the Eastern District of Kentucky challenging the constitutionality of the U.S. DOT DBE program
- Each Plaintiff regularly bids on U.S. DOT-funded contracts
- Neither Plaintiff qualifies as a DBE under the “rebuttable presumption”
- Plaintiffs allege that DBE “goals” amount to discriminatory barriers, preventing many construction companies from competing for contracts on an equal footing with firms owned by women and certain racial minorities

# *Mid-America* Overview and Status

## Standing

- A Plaintiff must have "standing" in order to bring its claims, which means the Plaintiff:
  - Suffered an injury in fact, and
  - That the injury is fairly traceable to the challenged conduct of the Defendant, and
  - That the injury is likely to be redressed by a favorable judicial decision
- An "injury in fact" in the context of an equal protection challenge means:
  - That the government erected a barrier that makes it more difficult for one group to obtain a benefit than it is for members of another group, and
  - The injury is the denial of equal treatment resulting from imposition of the barrier, not the inability to obtain the benefit

# *Mid-America* Overview and Status

## Race-Based Presumption – Strict Scrutiny Examination

- Two-part test
  - Does the racial classification further a compelling government interest?
  - If so, is the use of race narrowly tailored to achieve that compelling interest?
- Demonstrating a "compelling government interest"
  - Is there evidence of specific past discrimination?
  - If so, was the past discrimination intentional?
  - Did the government have a hand in the past discrimination?
  - The Court acknowledges that while U.S. DOT relies on "general" evidence of past discrimination, it did not offer specific evidence of past discrimination against the groups within U.S. DOT's rebuttable presumption

# *Mid-America* Overview and Status

## Race-Based Presumption – Strict Scrutiny Examination

- Demonstrating "narrow tailoring"
  - Can race neutral alternatives adequately achieve the government's compelling interest?
  - Does the use of racial classifications have a logical end point?
  - The Court found that U.S. DOT generally demonstrated discrimination against minority-owned businesses, but then carved out preferences only for selected minority groups
  - The Court further found that the fact that the U.S. DOT DBE program has been in existence for four decades demonstrates that it lacks a logical end point

# *Mid-America* Overview and Status

## Gender-Based Presumption – Intermediate Scrutiny Examination

- Two-part test
  - Does the classification serve an important governmental objective?
  - If so, is the classification substantially and directly related to those objectives?
  - The Court found that the U.S. DOT's evidence does not demonstrate specific and intentional discrimination
  - More specifically, the court found no clear record that women-owned contractors regularly bid for U.S. DOT-funded contracts but fail to receive them because of blatant discrimination

# *Mid-America* Overview and Status

## Preliminary Injunction

- The Court issued its Opinion and Order on September 23, 2024
  - Limited redressability only to the Plaintiffs
  - Enjoined U.S. DOT from mandating the use of race- and gender-based rebuttable presumptions for U.S. DOT-funded contracts upon which the Plaintiffs bid in Kentucky and Indiana
- The Court issued a clarifying Opinion and Order on October 31, 2024
  - Enjoined U.S. DOT from mandating the use of race- and gender-based rebuttable presumption for U.S. DOT-funded contract upon which the Plaintiffs bid in any state in which Plaintiffs operate or bid on such contracts

# *Mid-America* Overview and Status

## Federal Highway Administration Guidance

- Issued November 18, 2024
  - Within five business days after advertisement of bids, the Plaintiffs are required to submit a list of contracts on which they intend to bid, to the Department of Justice
  - U.S. DOT will review the list and notify the states of any contracts identified by the Plaintiffs and that have a DBE goal greater than 0%, after which the state is required to reset the DBE goal at 0%
  - If the implementation of 0% goals affects a state's ability to meet its overall annual goal, the state must implement good faith efforts to identify other contracts on which DBE goals may be established
  - If a state is still unable to achieve its overall annual DBE goal, the state must submit a shortfall analysis to the FHWA
- Similar guidance issued by Federal Aviation Administration November 20, 2024

# *Mid-America* Overview and Status

## Next steps

- **The Parties' Joint Proposed Discovery Plan – Submitted on 12/6/2024**
  - The Parties submitted a Joint Proposed Discovery Plan to the District Court for consideration regarding the forthcoming scheduling order
  - Subjects requiring discovery: All claims of Plaintiffs and all defenses of Defendants, including whether the Court has subject matter jurisdiction over Plaintiffs' claims under Article III of the U.S. Constitution
    - Anticipate that discovery will be completed within 7 months following the entry of the scheduling order

# *Mid-America* Overview and Status

## Next steps

- **Pre-trial Motions – Favored by litigants as it is the "quickest" and cheapest way to litigate a case**
  - Motion for Summary Judgment: The District Court grants summary judgment if the party filing the motion shows that there is no genuine dispute as to any material fact and that party is entitled to judgment as a matter of law
    - Based on the Joint Proposed Discovery Plan, the Parties will file their respective opening motions for summary judgment within 30 days of the close of all discovery
    - Parties likely to reassert some of the arguments raised in the briefs regarding the motion for preliminary injunction and motion to dismiss, in addition to the facts and information gathered during discovery
- **Trial – Bench trial as this case presents a question of constitutionality**

# *Mid-America* Overview and Status

## Next steps

- **Appeal – Slow-paced process**
  - *United States Court of Appeals for the Sixth Circuit:*
    - According to the Sixth Circuit Appellate Blog, the average time for the Sixth Circuit to render a decision is around 8.5 months, making it one of the faster circuits in the country; however, this can vary depending on the complexity of the case and other factors
  - *Supreme Court of the United States:*
    - Petitioning party files a *writ of certiorari* and, if *cert* is granted, briefs are submitted, oral arguments are held, Supreme Court recesses, and decision rendered
    - According to the SCOTUS blog, after the Supreme Court grants certiorari, it usually takes at least three months before the case is ready for oral argument; the Supreme Court renders a decision before the end of the term

# How Did We End Up Here?

***Students for Fair Admissions, Inc. v. President and Fellows of Harvard College***

- SFFA contended that Havard's and University of North Carolina's use of race in a "holistic" evaluation of prospective students in their admissions processes violates the Equal Protection Clause of the U.S. Constitution
  - Note that Harvard's and UNC's admissions processes were in compliance with prior Supreme Court of the United States ruling in *Grutter v. Bollinger* (2003)
- SCOTUS ruled in June 2023
- **Holding:** The lack of sufficiently focused and measurable objectives warranting the use of race, unavoidable employment of race in a negative manner, involvement of racial stereotyping, and lack of meaningful endpoints cannot reconcile the admissions programs with the guarantees of the Equal Protection Clause

# How Did We End Up Here?

***Ultima Service Corp. v. U.S. Department of Agriculture***

- Ultima, a  small business owned by a white woman, brought an action against the USDA and the SBA contending that use of a “rebuttable presumption” of social disadvantage for certain minority groups to qualify for inclusion in the SBA’s 8(a) program, which awards federal government contracts on a preferred basis to businesses owned by individuals in certain minority groups, violates the Fifth Amendment of the U.S. Constitution
- Eastern District of Tennessee ruled in July 2023

# How Did We End Up Here?

## *Ultima Service Corp. v. U.S. Department of Agriculture*

- **Holding:** SBA's and USDA's use of the rebuttable presumption in making preferential contract awards to socially disadvantaged small businesses did not address specific actions, decisions, or programs of intentional discrimination in the past, and thus use of a rebuttable presumption did not serve a compelling governmental interest in remedying past discrimination, as required to survive strict scrutiny
- The SBA issued interim guidance on August 18, 2023, requiring all 8(a) participants whose program eligibility is based upon the rebuttable presumption to establish their individual social disadvantage by completing a social disadvantage narrative.
- Ultima filed a motion for permanent injunction and additional equitable relief
  - *The motion was fully briefed on October 6, 2023, but the Court has not rendered a decision*

# Other Current Challenges: Other Federal Programs Assisting Small, Disadvantaged Businesses

## *Hierholzer v. Guzman*

- A small business owner and Navy veteran named Marty Hierholzer alleged that the SBA has denied him the opportunity to participate in the 8(a) program in part based on his race
- In February 2024, the District Court for the Eastern District of Virginia concluded because the race-conscious rebuttable presumption is no longer causing Hierholzer alleged injury, there is nothing to redress and granted the SBA's motion to dismiss
- Hierholzer filed an appeal in the Fourth Circuit Court of Appeals
  - Oral arguments were held on October 29, 2024
    - *Plaintiffs-Appellants argued the District Court improperly dismissed the case for lack of standing, the mootness holding was incorrect, and they still have valid claims for relief*
    - *Fourth Circuit has not rendered a decision following oral argument*

# Other Current Challenges: Other Federal Programs Assisting Small, Disadvantaged Businesses

- ***Nuziard et al. v. Minority Business Development Agency et al.***
  - Christian Bruckner, Jeffrey Nuziard, and Matthew Piper argued the MBDA's use of a racial and ethnic presumption in providing assistance to businesses is unconstitutional and proper equitable relief would set aside any unconstitutional agency actions
  - Accordingly, the District Court in the Northern District of Texas ordered that the MBDA is permanently enjoined from imposing the racial and ethnic classifications defined in 15 U.S.C. § 9501 and implemented in 15 U.S.C. §§ 9511, 9512, 9522, 9523, 9524, and 15 C.F.R. § 1400.1, or otherwise considering or using an applicant's race or ethnicity in determining whether they can receive Business Center programming

# Other Current Challenges: State Small Business Assistance Program

***Dalton v. Hao***

- Brian Dalton filed a complaint in June 2023 alleging that the Commonwealth of Massachusetts' Inclusive Recovery Grant Program violated the Equal Protection Clause of the Fourteenth Amendment
- The program was introduced to assist small businesses negatively impacted by the COVID-19 pandemic
  - Provided up to $75 million total in funding through grants of between $10,000 and $75,000
  - For businesses owned by people of color, women, veterans, immigrants, individuals with disabilities, or those who identify as part of the LGBTQ+ community; businesses that focus on reaching markets predominantly made up of socially and economically disadvantaged and historically underrepresented groups; and other underserved markets
- Voluntarily dismissed September 22, 2023

# What Could This Mean for the U.S. DOT DBE Program?

- Potential outcomes of the *Mid-America* challenge
  - E.D. Ky could invalidate U.S. DOT's DBE program nationally or continue with a narrow permanent injunction or affirm the program as constitutional
  - If appealed, the Sixth Circuit could invalidate the U.S. DOT DBE program within the circuit (Kentucky, Michigan, Ohio, and Tennessee) or affirm the program as constitutional
  - If SCOTUS grants *cert*, SCOTUS could rule on the U.S. DOT DBE program's constitutionality
  - Courts could instruct U.S. DOT to change its DBE program to remove the rebuttable presumption
  - U.S. DOT could voluntarily change its DBE program by issuing a new rulemaking, or in practice by opting to not strictly enforce the DBE program
  - Other federal agencies could voluntarily revise their DBE programs, or be challenged
  - State minority- and women-business enterprise programs could be voluntarily revised or challenged
  - Surface transportation reauthorization is expected in 2025/2026, at which point Congress could opt to not reauthorize the U.S. DOT's DBE program or to remove the rebuttable presumption from statute

# Implications for A/E Firms

- If you are not a DBE/MBE/WBE, but subcontract with DBEs/MBEs/WBEs
  - Stay up-to-date and follow the guidance
  - Maintain relationships with DBEs, MBEs, WBEs
  - If race- and gender-neutral DBE/MBE/WBE programs are maintained by the federal government and states, there is still a role for DBEs/MBEs/WBEs in your contracts
- If your firm is a DBE/MBE/WBE
  - Stay up-to-date and follow the guidance
  - Understand the nuances of different federal programs and between federal and state programs
  - In a race- and gender-neutral program, there is an important role for you

# Questions?

# Thank You


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