No. 09-1050

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

H.B. ROWE COMPANY, INC.
Plaintiff-Appellant,

v.

W. LYNDO TIPPETT, et al.,
***Defendants-Appellee*s.**

Appeal from the United States District Court
for the Eastern District of North Carolina
Raleigh Division

BRIEF OF AMICUS CURIAE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF RESPONDENTS

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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CERTIFICATE OF SERVICE

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INTEREST OF AMICUS CURIAE[1]

The NAACP Legal Defense & Educational Fund, Inc. (LDF), a non-profit legal corporation established under the laws of the state of New York, has worked for more than six decades to assist African Americans and other people of color to secure their civil and constitutional rights. LDF has appeared as counsel of record or *amicus curiae* in numerous cases involving racial discrimination before the Supreme Court and other federal courts, including significant litigation defending the constitutionality of appropriately tailored race-conscious government programs that redress patterns of racial inequality and exclusion in contracting, education, and other contexts. *See, e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir.), *amended by* 46 F.3d 5 (4th Cir. 1994); *Dynalantic Corp. v. U.S. Dep't of Def.*, 503 F. Supp. 2d 262 (D.D.C. 2007).

INTRODUCTION

As a nation, we have made progress in breaking down barriers to equal opportunity for all citizens; however, "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality," and the Supreme Court has made clear

[1] Pursuant to Federal Rule of Appellate Procedure 29(a), all parties have consented to the filing of this amicus brief.

that "government is not disqualified from acting in response to it." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 237 (1995). The history of our nation, like that of North Carolina, is sufficiently nuanced that we can simultaneously acknowledge and embrace progress even as we address the remaining challenges.

After thoroughly reviewing the evidence, including a 2004 research study (the "2004 Disparity Study"), the North Carolina General Assembly determined that race-conscious remedial measures are still necessary to address discrimination that has impeded minority-owned businesses from bidding and contracting for state-funded road construction projects. *See* N.C. Gen. Stat. § 136-28.4 (2009). As the record in this case underscores, the Minority Business Enterprise (MBE) Program that the General Assembly enacted in 2006—and that the district court upheld—is extremely limited in scope.[2] State law requires the North Carolina Department of Transportation (NCDOT) to establish project-specific goals for prime contractors' utilization of minority subcontractors. These are not quotas. NCDOT can waive the goals for a prime contractor who demonstrates good-faith, albeit unsuccessful, efforts to recruit minority-owned subcontractors.

[2] This brief focuses on the MBE Program, which is subject to a higher level of constitutional scrutiny than North Carolina's Women Business Enterprise (WBE) Program, which the district court also upheld. J.A. 529-30. Often referred to collectively as the M/WBE Program, these initiatives apply to construction projects that are exclusively state-funded. Federally-funded projects are subject to separate race- and gender-conscious requirements not at issue here. J.A. 515-16, 518-19.

The record here bears out the pragmatic flexibility of the MBE Program. Significantly, neither H.B. Rowe nor the winning bidder fulfilled the goal that NCDOT set for minority subcontractor utilization on a road project in Iredell County. NCDOT rejected H.B. Rowe's proposal because, unlike the winning bidder, H.B. Rowe failed to demonstrate the requisite good-faith efforts to recruit minority subcontractors.

SUMMARY OF THE ARGUMENT

The U.S. Constitution does not require North Carolina to award a contract to a company that refuses even to engage in targeted outreach to minority businesses, where, after careful study, the General Assembly made a policy judgment that historical and ongoing discrimination affects access to equal opportunity in the state's construction industry. Under the Fourteenth Amendment, "the State has the power to eradicate racial discrimination and its effects in both the public and private sectors, and the absolute duty to do so where those wrongs were caused intentionally by the State itself." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 518 (1989) (Kennedy, J., concurring in part and concurring in the judgment). In this context, North Carolina's race-conscious remedial measures are lawful provided they meet strict scrutiny—that is, they must be narrowly tailored to further a compelling government interest. *Adarand*, 515 U.S. at 227.

I. The district court properly relied on the 2004 Disparity Study in concluding that North Carolina demonstrated a compelling interest in remedying "the lingering effects of racial discrimination" in the state's construction industry. J.A. 528-29. The 2004 Disparity Study revealed gross statistical disparities in the utilization of minority subcontractors both on NCDOT projects and in the private sector. Surveys of NCDOT contractors included in the 2004 Disparity Study—as well as other evidence readily accessible to the General Assembly prior to its 2006 reauthorization of the MBE Program—indicated that one key reason why these substantial disparities persist is that informal, racially exclusive social networks severely limit access to economic opportunities for minority firms.

II. H.B. Rowe contends that the 2004 Disparity Study is methodologically flawed because it failed to account for every conceivable factor that may have provided a "race neutral" explanation for the under-utilization of minority firms. But the 2004 Disparity Study did address numerous factors, including size and experience, that may have affected a firm's capacity to perform contracts. Moreover, as social science research confirms, an exclusive focus on a firm's current capacity *under*-estimates the true magnitude of discrimination because it ignores barriers to minority business formation and development.

III. H.B. Rowe's challenge to the district court's ruling that the MBE Program is narrowly tailored is significantly flawed. NCDOT's policy of waiving

the project-specific goals for prime contractors who demonstrate good-faith efforts to recruit minority subcontractors substantially reduces any burdens that the MBE Program may impose on non-minority contractors. Contrary to H.B. Rowe's assertion, the targeted outreach required by the good-faith efforts provisions serves only to expand the pool of subcontractors and does not independently warrant strict scrutiny analysis. While these good-faith efforts may be "race conscious," they do not compel allocation of contracts or other benefits based on race.

IV. As the party challenging the constitutionality of the MBE program, H.B. Rowe bears the ultimate burden of proof. H.B. Rowe cannot carry this burden with unsupported criticisms of North Carolina's statistical analysis, particularly in light of the state's strong evidentiary showing.

ARGUMENT

I. North Carolina has a compelling interest in counteracting the effects of racially exclusive social networks that limit opportunities for minority-owned businesses in the state's construction industry.

A. The 2004 Disparity Study revealed that racially exclusive social networks have contributed significantly to the under-utilization of minority firms in North Carolina's construction industry.

Severe obstacles to fair competition have made it more difficult to eradicate discrimination in the construction industry than in many other sectors of the economy. The 2004 Disparity Study revealed that minority firms in North Carolina, and especially those operated by African Americans, continue to face

those obstacles. Such evidence provides a firm basis of support for the General Assembly's conclusion that race-conscious measures are necessary to prevent North Carolina from acting as a "'passive participant' in a system of racial exclusion practiced by elements of the local construction industry." *Croson*, 488 U.S. at 492 (O'Connor, J., joined by Rehnquist, C.J., and White, J., concurring).

1. Traditionally in North Carolina and throughout the country, the primary method of filling jobs and awarding contracts in the construction industry has been word-of-mouth dissemination of information through racially exclusive informal social and familial networks; as a result, minority entrepreneurs have been severely limited in their opportunities to start up and develop successful construction firms. *See Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1168 (10th Cir. 2000) (summarizing congressional hearings and other evidence "demonstrat[ing] that prime contractors in the construction industry often refuse to employ minority subcontractors due to 'old boy' networks—based on a familial history of participation in the subcontracting market—from which minority firms have traditionally been excluded"); *see also* 144 Cong. Rec. 2791 (1998) (statement of Sen. Lautenberg) ("Transportation construction has historically relied on the old boy network, which until the last decade, was almost exclusively a white, old boy network. . . . This is an industry that relies heavily on business friendships and

relationships established decades, sometimes generations, ago—years before minority-owned firms were even permitted to compete.").[3]

The construction industry's extensive reliance on informal social networks "not only creates natural barriers to outsider groups but it also thwarts public policies designed to counter discrimination." Roger Waldinger & Thomas Bailey, *The Continuing Significance of Race: Racial Conflict and Racial Discrimination in Construction*, 19 Pol. & Soc'y 291, 293 (1991). In recent years, racial disparities in business ownership rates in the construction industry nationwide remain "strikingly high" in comparison to other industries. David Blanchflower, *Minority Self-Employment in the United States and the Impact of Affirmative Action Programs*, 5 Ann. Fin. 361, 361 (2009) [hereinafter Blanchflower, *Minority Self-Employment*]; *see also* Donald Tomaskovic-Devey et al., *Documenting Desegregation: Segregation in American Workplaces by Race, Ethnicity, and Sex, 1966-2003*, 71 Am. Soc. Rev. 565, 573-74 (2006) (noting that desegregation of construction workplaces stalled in the 1980s, and there is evidence of resegregation more recently).

2. The 2004 Disparity Study indicated that minority-owned firms in North Carolina, like their peers elsewhere in the nation, continue to be adversely affected

[3] Indeed, as the district court recognized during the trial proceedings in this case, "it's no secret that in the '50s, '60s, '70s, at least in that time frame, . . . the highway construction companies that were being awarded bids [were] a fairly closed circle of contractors" in North Carolina. Trial Tr. 217.

by the racially segregated networks that dominate construction contracting. In a survey of NCDOT contractors, 65% of minority and women business enterprise (M/WBE) owners who responded, including 78% of African-American respondents, indicated that "an informal network of prime [contractors] and subcontractors" existed in North Carolina road construction contracting. Ex. Vol. 2, pp. 537-38. Even 47% of white male respondents acknowledged that such a network existed. *Id.*

This informal network disparately impacts opportunities for African-American contractors in particular: 72% of African-American contractors perceived that M/WBE firms were adversely affected by this informal network. *Id.* Underscoring the continued importance of North Carolina's MBE and WBE Programs, 80% of African-American respondents and even 33% of white male respondents agreed with this statement: "Some nonminority firms change their bidding procedures when not required to hire M/WBEs." *Id*.

Moreover, 60% of African-American indicated that prime contractors sometimes included M/WBE subcontractors in bid proposals and then dropped them after winning the contract. *Id*. And 75% of African-American respondents also reported that, in their experience, contract specifications were written to limit competition. *Id*. Even 41% of white male respondents concurred. *Id*.

These survey responses echoed comments made in the focus groups and personal interviews conducted as part of the 2004 Disparity Study. One African-American contractor explained that the North Carolina construction industry remains dominated by a "good old boy network." Ex. Vol. 2, p. 527. Another African-American subcontractor elaborated:

> [F]rom what we see in the districts or in the areas we're in, small white contractors are getting all the work. And that goes back to the good old boy thing. . . . They just pick up the phone and call their buddies, the ones that they go deer hunting with every Saturday morning. . . . And so, we find ourselves out of that market completely.

Ex. Vol. 2, p. 532; *see also id.* (Prime contractors "use ones they are familiar with."). Due to the persistence of this "good old boy network," minority contractors feared retaliation if they voiced complaints to NCDOT about disparate treatment in bidding and contracting. *See* Ex. Vol. 2, p. 531.

This significant anecdotal evidence, together with the gross statistical disparities identified in the 2004 Disparity Study, strongly supports the finding that informal, racially exclusionary business networks dominate the construction industry in North Carolina and significantly limit competition from minority firms. Because the 2004 Disparity Study established a link between the anecdotal evidence of the construction industry's heavy reliance on informal social connections and the statistical evidence of under-utilization of minority firms, it is consistent with this Court's directive in *Maryland Troopers Ass'n, Inc. v. Evans*,

993 F.2d 1072, 1077 (4th Cir. 1993) (requiring a connection between "evidence of cronyism" and racial discrimination for the former to provide a strong basis in evidence that race-conscious remedial measures are necessary).

As the district court concluded, North Carolina has a compelling interest in ensuring that NCDOT's road construction contracting does not perpetuate the lingering discrimination in the state's construction industry. J.A 528-29. Indeed, "[i]t is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." *Croson*, 488 U.S. at 492 (O'Connor, J., joined by Rehnquist, C.J., and White, J., concurring); *Norwood v. Harrison*, 413 U.S. 455, 463 (1973) ("That the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires state support for such discrimination.").

B. Further evidence of discrimination in North Carolina's construction industry was publicly available when the General Assembly considered reauthorization of the MBE Program.

During the period in which the General Assembly was reviewing the 2004 Disparity Study and considering whether to reauthorize the MBE Program, legislators had ready access to material from an array of administrative proceedings, court cases, and federal investigations that provided further evidence of discrimination in North Carolina's construction industry. *See Tennessee v.*

Lane, 541 U.S. 509, 524-25 (2004) (cataloguing pre-enactment cases that addressed relevant discrimination and were part of the historical "backdrop" for legislative action).

1. In 1999, African-American subcontractors filed a lawsuit alleging, *inter alia*, that "Caucasian prime contractors engage in a pattern and practice of subcontracting almost exclusively with Caucasian subcontractors. When African-American subcontractors do receive work from Caucasian primes, . . . the Caucasian prime contractors intentionally discriminate against the African-American subs." Ex. Vol. 1, p. 120 (*Waden v. N.C. Dep't of Transp.*, No. 1:99-CV-650, slip. op. at 4 (M.D.N.C. Mar. 27, 2001)). In a 2001 order, the federal district court allowed some of the subcontractors' claims to proceed to trial, Ex. Vol. 1, p. 119 (*Waden*, slip. op. at 3), and the case subsequently settled. *See* Appellees' Br. 29.

In addition, shortly before the General Assembly reauthorized the MBE Program in 2006, another federal district court denied a prime construction contractor's motion to dismiss an African-American subcontractor's claim of intentional discrimination, reasoning that: "Plaintiff alleges white contractors who fell behind were not fired while Plaintiff, a black contractor, was fired when he fell behind schedule. . . . If true and supported by evidence, this allegation may reasonably show an intent to discriminate in violation of § 1981." *Lanier v.*

Weaver Cooke Constr., LLC, No. 1:04-CV-00757, 2006 WL 13197, at *2 (M.D.N.C. Jan. 3, 2006) (emphasis omitted). Thereafter, this case also settled. *See* Docket, *Lanier v. Weaver Cooke Constr., LLC*, No. 1:04-CV-00757 (M.D.N.C.).

The 2004 Disparity Study and cases like *Waden* and *Lanier* do not portray a new phenomenon in the North Carolina construction industry. Prior disparity studies commissioned by NCDOT and issued in 1993 and 1998 similarly reflect the adverse impacts of racially exclusive social networks on minority firms' contracting opportunities in the public and private sector of the state's construction industry. *See* J.A. 523-24.[4]

2. The General Assembly's reauthorization of the MBE program in 2006 occurred in a context where publicly available evidence indicated that racial discrimination was not exclusively limited to the private sector of the North Carolina construction industry. *See Grutter v. Bollinger*, 539 U.S. 306, 327 (2003) (holding that "[c]ontext matters" in constitutional strict scrutiny review). At the time of the General Assembly's reauthorization proceedings, it appeared that NCDOT—like other public entities in North Carolina and elsewhere—was still

[4] A little over a year after the General Assembly's 2006 reauthorization of the MBE Program, African-American subcontractors again voiced complaints about a "culture of racism in the [North Carolina] construction industry," and recounted allegations of payment disputes with and disparate treatment by prime contractors on construction projects for the state university system. *See* Mosi Secret, *UNC's Black Contractors Allege Bias: Pay for State Construction Projects Bogs Down in Disputes*, Indep. Wkly. (Durham, N.C.), Dec. 12, 2007.

struggling to eradicate fully the vestiges of racial discrimination in agency decision-making in areas that affect or are related to road construction.[5]

In the same year in which the 2004 Disparity Study was published and submitted to the General Assembly, the U.S. Department of Transportation's Federal Highway Administration (FHWA) reviewed NCDOT's compliance with federal equal opportunity requirements in response to complaints about employment discrimination against African Americans. *See* Lynn Bonner, *Feds Find Lapses at DOT*, News & Observer (Raleigh, N.C.), Sept. 3, 2004, at B5. After interviewing more than 350 employees in a wide array of the agency's divisions, FHWA determined that "[m]ost of the employees felt that there was discrimination and unfairness within NCDOT, due to the 'good ole boy' network, favoritism, politics, etc." *Id.* In addition, FHWA found that NCDOT was not administering its equal opportunity program consistently with federal requirements, and that "many employees fear 'retaliation'" if they complain of discrimination, and therefore avoid using NCDOT's internal agency complaint procedures. *Id.*

The complaints that triggered FHWA's investigation included those contained in a federal suit filed by seven African-American NCDOT mechanics

[5] The General Assembly has subsequently acknowledged the state's own role in the nation's long history of racial discrimination against African Americans and other minorities. *See* N.C. Gen. Assem., J. Res. 2007-21, 2007-67, and 2008-16.

during the same period. *Id.* In 2005, a jury found that the mechanics' coworkers created a racially hostile environment by hanging a noose in the depot where they worked; nevertheless, the jury concluded that NCDOT was not liable because the mechanics did not report the incident prior to filing their claim, and their supervisors were otherwise unaware of it. *See Isaac v. N.C. Dep't of Transp.*, 192 F. App'x 197 (4th Cir. 2006) (per curiam) (upholding trial court's verdict); Andrea Weigl, *Jury Finds Bias in Noose Incident*, News & Observer (Raleigh, N.C.), May 19, 2005, at B1. Upon learning of the jury's verdict, NCDOT's personnel director acknowledged that the agency must "work harder" to make employees more comfortable about filing discrimination complaints. *Id.*[6]

Over the decades, African-American communities have also protested the racially discriminatory impact of NCDOT highway construction on their neighborhoods. *See, e.g.*, Sacoby Wilson et al., *Community-Driven Environmental Protection: Reducing the P.A.I.N. of the Built Environment in Low-Income*

[6] NCDOT undertook reforms in response to the FHWA investigation, but discrimination persists in agency workplaces. *See, e.g.*, *Corbett v. N.C. Div. of Motor Vehicles*, 660 S.E.2d 233 (N.C. Ct. App. 2008), *petition for discretionary review denied*, 675 S.E.2d 41 (N.C. 2009) (upholding trial court's finding that NCDOT's Division of Motor Vehicles engaged in racial discrimination against African-American employees who sought public office); *Perry v. N.C. Dep't of Transp.*, No. 07 OSP 0362, 2008 WL 5726394 (N.C. Office of Admin. Hearings, Dec. 16, 2008) (finding that NCDOT discriminated against an African-American temporary road maintenance worker, based in part on evidence that his supervisor had never hired any African-American temporary workers for permanent jobs in the seven years prior to this case).

African-American Communities in North Carolina, 3 Soc. Just. Context 41, 46-47 (2007-2008) (chronicling a 1990s challenge to the impact of a NCDOT highway project on minority communities in Mebane, North Carolina); *N.C. Dep't of Transp. v. Crest St. Cmty. Council, Inc*., 479 U.S. 6, 8-9 (1986) (determining the propriety of an attorney's fees award to community groups whose complaint triggered a federal investigation that found "reasonable cause" to believe that a NCDOT highway project "would constitute a prima facie violation of Title VI" because it disproportionately displaced an African-American neighborhood in Durham, North Carolina); N.C. Advisory Comm. to the U.S. Comm'n on Civil Rights, *Equal Protection of the Laws in North Carolina* 175 (1962).

North Carolina's struggles to eradicate the vestiges of racial discrimination within state agency decision-making on issues related to road construction reinforce the conclusion that the General Assembly acted well within its constitutional powers by reauthorizing the MBE Program in 2006.

II. A public entity may rely on a well-designed disparity study to justify a race-conscious contracting program under the Fourteenth Amendment.

A. A disparity study satisfies constitutional strict scrutiny where, as here, it takes into account whether firms are ready, willing, and able to perform the work in question.

H.B. Rowe argues that disparity studies "cannot account for all nondiscriminatory factors which may account for the disparity," and, thus, can

never satisfy the compelling interest requirement of constitutional strict scrutiny. Appellant's Br. 13; *see also id.* at 37-38. This wholesale assault on disparity studies is legally unsustainable and inapplicable to the facts of this case.

1. A public entity need not *prove* that it was an active or passive participant in discrimination to justify race-conscious remedial measures. *See Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277-78 (1986) (plurality opinion); *id*. at 290 (O'Connor, J., concurring). Rather, a public entity need only demonstrate a "'strong basis in evidence for its conclusion that remedial action was necessary.'" *Croson*, 488 U.S. at 500 (quoting *Wygant*, 476 U.S. at 277 (plurality opinion)). *Croson* indicated that a properly conceived disparity study could satisfy this strong-basis-in-evidence standard: "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." *Id*. at 509 (plurality opinion).

Following *Croson*, no Court of Appeals has prohibited a public entity from using studies that reveal gross statistical disparities to justify race-conscious remedial measures, especially where, as here, the statistical analysis is accompanied by significant corroborative evidence as discussed in Part I *supra*. *Cf. Maryland Troopers Ass'n*, 993 F.2d at 1078 (rejecting race-conscious measures

based on a record that "discloses no such 'gross statistical disparity,' corroborated by no such anecdotal evidence"). H.B. Rowe fails to acknowledge that several courts have found disparity studies to be critical in assessing the constitutionality of minority contracting programs. *See, e.g.*, *Concrete Works of Colo., Inc. v. City & County of Denver*, 321 F.3d 950, 962-69, 974-89 (10th Cir. 2003) (relying on disparity studies as key evidentiary support in upholding Denver's race-conscious remedial measures for construction contracting that are similar in many respects to NCDOT's MBE Program); *Contractors Ass'n of E. Pa. v. City of Philadelphia*, 6 F.3d 990, 1004-05 (3d Cir. 1993) (relying on disparity studies to reverse summary judgment for contractors challenging a race-conscious municipal program); *Associated Gen. Contractors of Cal. v. Coal. for Econ. Equity*, 950 F.2d 1401, 1414 (9th Cir. 1991) ("[S]tatistical disparities are an invaluable tool in demonstrating the discrimination necessary to establish a compelling interest." (internal quotation marks and citation omitted)).[7]

2. H.B. Rowe's criticisms also overlook the fact that the 2004 Disparity Study did carefully account for factors other than racial discrimination that might

[7] Relying on numerous state and local disparity studies introduced into the congressional record, every Court of Appeals that has considered the issue has held that Congress had a compelling interest in enacting the race-conscious provisions of the U.S. Department of Transportation's disadvantaged business program for federally-funded road construction programs. *See N. Contracting, Inc. v. Illinois*, 473 F.3d 715, 720-21 (7th Cir. 2007); *W. States Paving Co. v. Wash. Dep't of Transp.*, 407 F.3d 983, 991-93 (9th Cir. 2005); *Sherbrooke Turf, Inc. v. Minn. Dep't of Transp.*, 345 F.3d 964, 970 (8th Cir. 2003); *Adarand*, 228 F.3d at 1155.

have affected the availability and relative capacity of contractors to undertake particular projects.

In the 2004 Disparity Study's public sector analysis, the only firms considered available to conduct subcontract work on centrally-let NCDOT construction projects were those that had either actually performed such work during the study period or were registered as subcontractors in NCDOT vendor databases. Ex. Vol. 2, pp. 361-62. Moreover, the 2004 Disparity Study directly addressed the question whether "some M/WBE firms counted as 'available' to conduct business do not, in reality, have the organizational capacity or resources to fulfill the conditions of larger dollar contracts." Ex. Vol. 2, p. 440. Using gross revenues as a measure of firm capacity, the 2004 Disparity Study concluded that the exclusion of African-American subcontractors from NCDOT contracting opportunities—except possibly on the very largest contracts—was "not a function of capacity." Ex. Vol. 2, p. 440, 445.

The 2004 Disparity Study's private sector analysis was even more sophisticated: It used regression analysis to consider the "effect on reported company earnings of variables representing firm capacity, managerial ability and experience." Ex. Vol. 2, p. 593. The analysis revealed that "for African Americans, in particular, the disparity in firm revenue was not due to capacity-related or managerial characteristics alone." *Id.*

These results are consistent with leading research from across the country. In recent testimony before the Committee on Transportation and Infrastructure of the U.S. House of Representatives, Dr. Jon Wainwright, an economist and noted expert on disparity studies, summarized research demonstrating "results consistent with business discrimination" even after controlling for capacity-related factors. *The Department of Transportation's Disadvantaged Business Enterprise Program: Hearing Before the H. Comm. on Transp. and Infrastructure*, 110th Cong. 377 (2009) [hereinafter *Disadvantaged Business Enterprise Program*] (written response of Dr. Jon Wainwright).

B. Many of the capacity-related factors that H.B. Rowe suggests disparity studies should be required to analyze are themselves tainted by racial discrimination.

There are sound reasons for rejecting H.B. Rowe's contention that North Carolina should be required to control more aggressively for capacity-related factors than it did in its 2004 Disparity Study. *See* Appellant's Br. 37-39; *cf. Contractors Ass'n of E. Pa., Inc. v. City of Philadelphia*, 91 F.3d 586, 603 (3d Cir. 1996) ("An analysis is not devoid of probative value simply because it may theoretically be possible to adopt a more refined approach.").

First, in dynamic business environments, and especially in the construction industry, a firm's capacity is "highly elastic." *Disadvantaged Business Enterprise Program*, at 377 (written response of Dr. Jon Wainwright). "[I]t is well-known

that small construction companies can expand rapidly as demand changes by hiring workers and renting equipment and making use of sub-contractors." Blanchflower, *Minority Self-Employment*, at 367.

Second, any attempt at measuring the degree of marketplace discrimination through comparison of minority firms' current capacity to their current utilization *under*-estimates the true magnitude of discrimination because it ignores significant barriers to the formation and development of minority businesses. In other words, "focusing on the 'capacity' of businesses in terms of employment, revenue, bonding limits, number of trucks, and so forth is simply wrong as a matter of economics," because "most, if not all, identifiable indicators of capacity are themselves impacted by discrimination." *Disadvantaged Business Enterprise Program*, at 376, 378 (written response of Dr. Jon Wainwright). The following example illustrates this point:

> Suppose that racial discrimination was ingrained in a state's highway construction market. As a result, few minority construction employees are given the opportunity to gain managerial experience in the business; minorities who do end up starting construction firms are denied the opportunity to work as subcontractors for non-minority prime contractors; and non-minority prime contractors place pressure on unions not to work with minority firms and on bonding companies and banks to prevent minority-owned construction firms from securing bonding and capital. In this example, discrimination has essentially prevented the emergence of a minority highway construction industry with 'capacity.' Those minority firms that exist at all

> will be smaller and have lower revenues and employees than firms that are not subject to the same discrimination.
>
> In this situation, excluding firms from an availability measure based on their 'capacity' in a discriminatory market would preclude a government agency from doing anything to rectify the continuing support of a clearly discriminatory system with public dollars.

Id. at 376.

For these reasons, the Tenth Circuit in *Concrete Works* credited Denver's evidence and argument that "a firm's size does not affect its qualifications, willingness, or ability to perform construction services and that the smaller size and lesser experience of [minority- and women-owned business enterprises] are, themselves, the result of industry discrimination." 321 F.3d at 982. As explained in Part II(A) *supra*, North Carolina's 2004 Disparity Study contained similar evidence that capacity-related factors do not provide "race-neutral" explanations for the under-utilization of minority subcontractors evident in both the public and private sector analyses. Moreover, the 2004 Disparity Study relied on *Concrete Works* in concluding that "[i]t is a common practice among construction companies of all sizes to routinely vary the size of their employment ranks depending on the type of project being undertaken." Ex. Vol. 1, p. 298 (citing *Concrete Works*, 321 F.3d at 981).

It is well documented that discriminatory barriers to business formation and development have artificially depressed the capacity of minority-owned

contractors. Such barriers appear particularly severe in North Carolina, which ranks twenty-ninth among the states in terms of African-American business ownership, and forty-eighth in Hispanic business ownership. *See* Corp. for Enter. Dev., *North Carolina: 2007-08 Assets & Opportunity Scorecard* (2008); *see also* Ex. Vol. 2, pp. 574-83; Ex. Vol. 4, pp. 962-63 (finding evidence of significant earnings disparities for minority construction firms compared with similarly situated non-minority firms in North Carolina). In addition to the persistence of racially exclusive informal networks described in Part I *supra*, other discriminatory barriers to fair competition impede the formation and development of minority businesses, and therefore adversely affect their capacity. For instance, recent studies demonstrate that minority entrepreneurs suffer significant disparate treatment from commercial lenders—even after controlling for a range of factors such as firm size and creditworthiness.[8]

There is no evidence that lending discrimination has decreased in the past two decades, or that it is significantly different in different regions or industries. *See Disadvantaged Business Enterprise Program*, at 330 (statement of Dr. Jon

[8] *See, e.g.*, Blanchflower, *Minority Self-Employment*, at 386-92; Lloyd Blanchard et al., *Do Lenders Discriminate Against Minority and Woman Entrepreneurs?* 63 J. Urb. Econ. 467, 492-93 (2008); *Business Start Up Hurdles in Under-Served Communities: Hearing Before the S. Comm. on Small Bus. & Entrepreneurship*, 110th Cong. (2008) (testimony of Dr. Jon Wainwright); David Blanchflower et al., *Discrimination in the Small-Business Credit Market*, 85 Rev. Econ. & Stat. 930, 942-43 (2003); Ken Cavalluzzo et al., *Competition, Small Business Financing, and Discrimination*, 75 J. Bus. 641, 676-77 (2002).

Wainwright). If anything, lending discrimination is *more* pronounced in the construction industry. *See* Caren Grown & Timothy Bates, *Commercial Bank Lending Practices and the Development of Black Owned Construction Companies*, 14 J. Urb. Aff. 25, 34 (1992) (finding that non-minority construction firms received 50 times as many loan dollars as comparable black-owned firms with the same equity). As North Carolina's expert explained, *see* Ex. Vol. 4, pp. 1074-75, such research substantiates the anecdotal evidence of lending discrimination included in the 2004 Disparity Study. Ex. Vol. 2, pp. 518-20.

Not only does this research indicate the methodological flaws that would arise if disparity studies were required to control for capacity-related factors that are themselves tainted by discrimination, but the Tenth Circuit has also held that such evidence of lending discrimination and other discriminatory barriers to business formation and development is "legally relevant" to a public entity's "burden of demonstrating a strong basis in evidence to support its conclusion that remedial legislation was necessary." *Concrete Works*, 321 F.3d at 979-80; *see also Adarand*, 228 F.3d at 1167-68.

III. The MBE Program is narrowly tailored to address the discrimination faced by minority construction firms.

H.B. Rowe contends that the MBE Program cannot be narrowly tailored because, among other reasons, it "only contains race-conscious measures" and

even the good-faith effort requirements impose "obligations" on prime contractors to deal with minority subcontractors "in a preferential way." Appellant's Br. 41-42. This claim mischaracterizes North Carolina's MBE Program.

The good-faith efforts that prime contractors must demonstrate if they fail to meet the project-specific goals include, *inter alia*, attendance at pre-bid meetings scheduled by NCDOT with minority contractors, written notice to and follow-up with minority contractors, good-faith negotiation with interested minority subcontractors, and assistance to minority firms in obtaining any required insurance. *See* 19A N.C. Admin. Code § 2D.1110 (2009) (incorporating 49 C.F.R. pt. 26, subpt. C & appx. A). These requirements may be "race-conscious," but they would not have independently triggered constitutional strict scrutiny if they were the sole obligations that the MBE Program imposed. These requirements merely involve targeted outreach to expand the pool of potential subcontractors, *see* J.A. 111 (describing the M/WBE Program as an "outreach program"), and in no way prohibit prime contractors from recruiting or contracting with non-minority firms.

The MBE Program's good-faith requirements are, thus, functionally quite similar to "recruiting students and faculty in a targeted fashion," which Justice Kennedy listed among the "mechanisms" that he deems "race conscious" but that "do not lead to different treatment based on a classification that tells each student

he or she is to be defined by race, so it is unlikely any of them would demand strict scrutiny to be found permissible." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring in part and concurring in the judgment). Strict scrutiny does not apply to such "race-conscious measures to address [a] problem in a general way," *id.* at 788-89, and that do not involve the allocation of specific benefits to particular individuals or any other "dispositions based on race." *Adarand*, 515 U.S. at 239 (Scalia, J., concurring in part and concurring in the judgment).

The targeted outreach required by the MBE Program does not impose significant burdens on non-minority firms because it simply ensures equal opportunity by transmitting information on subcontracting opportunities to those who have traditionally been shut out by the racially exclusive social networks discussed in Part I *supra*. Given the historical and ongoing discrimination in the state's construction industry, North Carolina legislators should not be prohibited from taking steps to ensure, at the very least, that minority subcontractors receive adequate notice, as well as adequate consideration, of their bids.

IV. H.B. Rowe has the ultimate burden of persuading the district court that the MBE Program is unconstitutional—a burden it failed to carry.

Contrary to H.B. Rowe's assertions, the district court properly allocated the burden of proof. *Cf.* Appellant's Br. 52-55. Because North Carolina is defending

race-conscious remedial measures that triggered strict scrutiny, the district court correctly required the state to make an evidentiary showing sufficient to demonstrate a "strong basis in evidence" that it had a compelling interest in remedying the effects of past and present discrimination, and that its MBE Program was narrowly tailored to meet that compelling interest. *See Croson*, 488 U.S. at 500-01; *Wygant*, 476 U.S. at 274, 277-78 (plurality opinion). If North Carolina satisfies these requirements, H.B. Rowe acknowledges that it retains the ultimate burden of persuading the district court that NCDOT's MBE Program is unconstitutional. Appellant's Br. 53. Yet H.B. Rowe misapprehends the scope of this legal obligation.

It is well established that a plaintiff challenging race-conscious government action can satisfy its ultimate burden of persuasion only if it convinces the court that the public entity's "evidence did not support an inference of prior discrimination and thus a remedial purpose, or that the plan instituted on the basis of this evidence was not sufficiently 'narrowly tailored.'" *Wygant*, 476 U.S. at 292-93 (O'Connor, J., concurring in part and concurring in the judgment); *see also id.* at 277-78 (plurality opinion); *Johnson v. Transp. Agency, Santa Clara County*, 480 U.S. 616, 626 (1987) (affirming *Wygant*'s holding).

H.B. Rowe failed to meet this rebuttal burden. H.B. Rowe's "general criticism of disparity studies, as opposed to particular evidence undermining the

reliability of the particular disparity studies [in this case] . . . is of little persuasive value." *Adarand*, 228 F.3d at 1173 n.14. To the extent that H.B. Rowe makes specific criticisms of the 2004 Disparity Study, they largely amount to conjecture, unsupported by credible and particularized evidence, that "merely nip[s] at the edges" of the state's well-founded evidence of racial discrimination. *Concrete Works*, 321 F.3d at 991.

For instance, H.B. Rowe provided no evidence—much less contrasting statistical data—to support its expert's hypothesis that, if North Carolina had more rigorously controlled for capacity-related factors, it may have accounted for the statistically significant under-utilization of minority subcontractors in the public and private sectors; nor did H.B. Rowe prove that those factors were, in fact, "race neutral" in the face of record evidence that revenues of North Carolina minority firms are adversely impacted by discrimination.[9] *Cf. Contractors Ass'n of E. Pa.*, 6 F.3d at 1007 (explaining that a plaintiff challenging race-conscious government measures could meet its rebuttal burden by "proving a 'neutral explanation' for the disparity, 'showing the [government's] statistics are flawed, . . . demonstrating that

[9] North Carolina has acknowledged flaws in the disparity analysis of NCDOT divisionally-let contracts, but such flaws did not undermine the statistically significant evidence of racially disparities in centrally-let contracts. Appellees' Br. 26-27. Centrally-let contracts constitute the overwhelming majority of NCDOT road construction projects, *id.*, and, thus, provide ample, unrebutted support for the district court's conclusion that the state satisfied its burden of demonstrating a strong basis in evidence that race-conscious remedial measures were necessary. J.A. 528-29.

the disparities shown by the statistics are not significant or actionable, . . . or presenting contrasting statistical data.'" (quoting *Coral Constr. Co. v. King County*, 941 F.2d 910, 921 (9th Cir. 1991))); *accord Concrete Works*, 321 F.3d at 959.

H.B. Rowe essentially argues that it should not be required to substantiate any of its mere conjectures and, instead, it is incumbent upon North Carolina to refute them. Appellant's Br. 52-55. In support of this burden allocation, H.B. Rowe relies on a single sentence in Justice O'Connor's majority opinion in *Johnson v. California*, 543 U.S. 499, 505 (2005) ("Under strict scrutiny, the government has the burden of proving that racial classifications are narrowly tailored measures that further compelling governmental interests.") (internal citation and quotation marks omitted), as well as a quotation of that sentence in Justice Kennedy's concurrence in *Parents Involved*, 551 U.S. at 783 (Kennedy, J., concurring in part and concurring in the judgment). *See* Appellant's Br. 53, 55.

There is no basis to conclude that Justice O'Connor intended that single sentence in *Johnson* to transform *sub silentio* the well-settled allocation of burdens that she had a leading role in formulating for constitutional challenges to race-conscious government action. *See Wygant*, 476 U.S. at 292-93 (O'Connor, J., concurring in part and concurring in the judgment); *cf. Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000) ("This Court does not normally

overturn, or so dramatically limit, earlier authority *sub silentio*."). Indeed, an explanatory footnote in *Johnson* clarifies that the government entity defending race-conscious measures has the burden of production, but plaintiffs retain the ultimate burden of persuasion, *see Johnson*, 543 U.S. at 506 n.1 ("We put the burden on state actors to demonstrate that their race-based policies are justified."), and the plurality in *Parents Involved* reaffirms this approach by quoting this footnote passage. *See Parents Involved*, 551 U.S. at 744 (plurality opinion).

Moreover, numerous Courts of Appeals have concluded that, once the government actor meets its burden of production, the plaintiff must rebut the evidentiary showing with more than mere conjecture. *See, e.g.*, *Sherbrooke Turf, Inc. v. Minn. Dep't of Transp.*, 345 F.3d 964, 970 (8th Cir. 2003); *Concrete Works*, 321 F.3d at 991; *Eng'g Contractors Ass'n of S. Fla. Inc. v. Metro. Dade County*, 122 F.3d 895, 916-17 (11th Cir. 1997); *Contractors Ass'n of E. Pa.*, 6 F.3d at 1006-07. The district court therefore properly allocated to H.B. Rowe the ultimate burden of proof, and correctly held that H.B. Rowe's speculations were insufficient to meet that burden.

CONCLUSION

For the reasons set forth above and in the Appellees' Brief, the order and judgment of the district court should be affirmed.

Dated: August 20, 2009

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-1050 **Caption:** H.B. Rowe Company, Inc. v. W. Lyndo Tippett, et al.

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