

APPENDIX B.

Legal Environment for Caltrans DBE Program

The California Department of Transportation (“Caltrans”) is a recipient of federal funds from the United States Department of Transportation (“USDOT”). Therefore, Caltrans must comply with federal regulations (49 CFR Part 26) and implement the Federal Disadvantaged Business Enterprise (DBE) Program. Caltrans is required to develop and submit for approval to the USDOT its DBE program, including an overall goal for DBE participation on federally-funded contracts.¹ The annual DBE goal, depending on the evidence available to Caltrans, may be achieved through the use of race- and gender-neutral means, race- and gender-conscious means, or a combination of these measures.²

Caltrans is responsible for serious, good faith consideration of workable race- and gender-neutral means, including those identified in 49 CFR Section 26.51(b), that can be implemented.³ The USDOT has advised that recipients should take affirmative steps to use as many of the race-neutral means of achieving DBE participation identified at 49 CFR Section 26.51(b) as possible.⁴ The Ninth Circuit Court of Appeals in *Western States Paving Co. v. Washington State DOT* found that “the regulations require a state to ‘meet the maximum feasible portion of [its] overall goal by using race neutral means.’”⁵ In formulating its implementation of the Federal DBE Program, Caltrans must assess how much of the annual DBE goal can be met through neutral means and what percentage, if any, should be met through race- and gender-conscious means.

Race- or gender-conscious measures are not appropriate unless they are to remedy identified discrimination or its effects in the state transportation contracting industry. If Caltrans implements race- and gender-conscious measures, it is subject to the “strict scrutiny” analysis as applied by the courts.⁶ The first prong of the strict scrutiny analysis requires a governmental entity to have a “compelling governmental interest” in remedying past identified discrimination. The Ninth Circuit and other federal courts have held that, with respect to the Federal DBE Program, state departments of transportation (“DOTs”) do not need to independently satisfy this prong because Congress has

¹ 49 CF. Section 26.45.

² 49 CFR Sections 26.45, 26.51.

³ 407 F.3d 983, 993 (9th Cir. 2005) (citing 49 CFR Section 26.51(a)).

⁴ Questions and Answers Concerning Response to *Western States Paving Company v. Washington State Department of Transportation* [hereinafter DOT Guidance], available at http://www.fhwa.dot.gov/civilrights/dbe_memo_a5.htm. See 49 CFR Section 26.9 (January 2006).

⁵ 407 F.3d at 993; 49 CFR Section 26.51.

⁶ See *City of Richmond v. J.A. Croson*, 488 U.S. 469 (1989); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Western States Paving*, 407 F.3d 983. The Ninth Circuit Court of Appeals and other courts have applied “intermediate scrutiny” to gender-conscious programs. The Ninth Circuit has interpreted this standard to require that gender-based classifications be: (1) Supported by both an exceedingly persuasive justification; and (2) Substantially related to the achievement of that underlying objective. See *Western States Paving*, 407 F.3d at 990 n6; *Coral Constr. Co. v. King County*, 941 F.2d 910, 931 (9th Cir. 1991); *Equal. Found. v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997).

satisfied the compelling interest test of the strict scrutiny analysis.⁷ The second prong of the strict scrutiny analysis requires that a state DOT's implementation of the Federal DBE Program be "narrowly tailored" to remedy identified discrimination in a particular state's transportation contracting and procurement market.⁸

The narrow tailoring requirement has several components. According to the Ninth Circuit in *Western States Paving*, a state must have evidence of discrimination within the state's own transportation contracting marketplace in order to determine whether or not there is the need for race- or gender-conscious remedial action.⁹ Thus, mere compliance with the Federal DBE Program does not necessarily satisfy strict scrutiny.¹⁰ Second, the court found that even where evidence of discrimination is present in a state, a narrowly tailored program should apply only to those minority groups who have actually suffered discrimination. For a specific minority group to be included in any race-conscious elements in a state's implementation of the Federal DBE Program, there must be evidence that the group suffered discrimination or its effects within the local marketplace.¹¹

Federal courts have held that additional factors may also be pertinent in determining whether a state DOT's implementation of the Federal DBE Program is narrowly tailored: flexibility and duration of a race-conscious remedy, relationship of the numerical DBE goals to the relevant market, effectiveness of alternative race- and gender-neutral remedies, and impact of a race-conscious remedy on third parties.¹²

In *Western States Paving*, the United States intervened to defend the Federal DBE Program's facial constitutionality, and, according to the court, stated "that [the Federal DBE Program's] race conscious measures can be constitutionally applied only in those states where the effects of discrimination are present."¹³ Accordingly, the USDOT has advised federal aid recipients that any use of race-conscious measures must be predicated on evidence that the recipient has concerning discrimination or its effects within the local transportation contracting marketplace.¹⁴

⁷ *Northern Contracting, Inc. v. Illinois DOT*, 473 F.3d 715, 721 (7th Cir. 2007), *reh'g and reh'g en banc denied* (7th Cir. 2007); *Western States Paving*, 407 F.3d at 991; *Sherbrooke Turf, Inc. v. Minnesota DOT and Gross Seed Co. v. Nebraska Dep't of Road*, 345 F.3d 964, 969 (8th Cir. 2003); *Adarand Constructors, Inc. v. Slater (Adarand VII)*, 228 F.3d 1147, 1176 (10th Cir. 2000).

⁸ *Western States Paving*, 407 F.3d at 995-998; *Sherbrooke Turf*, 345 F.3d at 970-71.

⁹ *Western States Paving*, 407 F.3d at 997-98, 1002-03.

¹⁰ *Id.* at 995-1003. In the recent *Northern Contracting* decision (January 8, 2007), the Seventh Circuit held "that a state is insulated from [a narrow tailoring] constitutional attack, absent a showing that the state exceeded its federal authority. IDOT here is acting as an instrument of federal policy and Northern Contracting (NCI) cannot collaterally attack the federal regulations through a challenge to IDOT's program." 473 F.3d at 722. The Seventh Circuit distinguished both the Ninth Circuit decision in *Western States Paving* and the Eighth Circuit decision in *Sherbrooke Turf*, relating to an as-applied narrow tailoring analysis. The court held that IDOT's application of a federally mandated program is limited to the question of whether the state exceeded its grant of federal authority under the Federal DBE Program. *Id.* at 722. The court affirmed the district court upholding the validity of IDOT's DBE program.

¹¹ *Western States Paving*, 407 F.3d at 996-1000.

¹² *See, e.g., id.* at 995; *Sherbrooke Turf*, 345 F.3d at 971; *Adarand VII*, 228 F.3d at 1181.

¹³ *Western States Paving*, 407 F.3d at 996; *see also* Br. for the United States, at 28 (April 19, 2004).

¹⁴ *DOT Guidance*, available at http://www.fhwa.dot.gov/civilrights/dbe_memo_a5.htm (January 2006).

Following *Western States Paving*, the USDOT has recommended the use of disparity studies by state DOTs to examine whether or not there is evidence of discrimination or its effects, and how remedies might be narrowly tailored in developing their DBE Program to comply with the Federal DBE Program.¹⁵ The USDOT suggests consideration of both statistical and anecdotal evidence, which should be examined separately for each group presumed to be disadvantaged in 49 CFR Part 26.¹⁶

Therefore, Caltrans is engaging in a disparity study to comply with the federal regulations and the Federal DBE Program, based on the most recent authority regarding the Federal DBE Program.¹⁷

¹⁵ *Id.*; see also 42 CFR Section 26.45.

¹⁶ *DOT Guidance*, available at http://www.fhwa.dot.gov/civilrights/dbe_memo_a5.htm (January 2006).

¹⁷ See *Northern Contracting*, 473 F.3d 715; *Western States Paving*, 407 F.3d 983; *Sherbrooke Turf*, 345 F.3d 964; *Adarand VII*, 228 F.3d 1147.