

## **Federal DOT's Disadvantaged Business Enterprise Program Challenged as Unconstitutional**

Article By:

William S. Wilson

---

In the wake of the U.S. Supreme Court's decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181 (2023) (*SFFA*), which limits the reach of race-based affirmative action programs in college admissions, a federal lawsuit was recently filed in the Eastern District of Kentucky alleging discrimination against the U.S. Department of Transportation's Disadvantaged Business Enterprise (DBE) program: *Mid-America Milling Co., LLC v. Department of Transportation*, Case No. 3:23-cv-72.

Initially adopted in 1983, the DBE program aimed to address discrimination in federally assisted transportation projects. Most recently, it was reauthorized in November 2021 when President Biden signed the Infrastructure Investment and Jobs Act (IIJA). The IIJA also mandated that 10% of all new surface transportation funding (which amounts to more than \$37 billion) shall be expended through small business concerns owned and controlled by socially and economically disadvantaged individuals. The DBE program requires state and local transportation agencies receiving federal assistance to establish overall goals for the participation of disadvantaged business enterprises and contract-specific DBE

subcontracting goals. The applicable federal regulations (15 U.S.C. § 637(d) and 13 C.F.R. § 124.103-104) require the local transportation agencies to presume that certain racial and ethnic groups and women are socially and economically disadvantaged when considering bids for federally funded projects.

The plaintiffs in *Mid-America* have challenged the use of the DBE presumption when determining whether a person is socially disadvantaged on the grounds that such an affirmative action program giving preference to certain companies based on race and gender constitutes unconstitutional racial discrimination. The plaintiffs allege that such a program prevents them from competing on government contracts on equal footing with firms owned by women and certain racial minorities and should be permanently dismantled under *SFFA*.

The plaintiffs seek a court order declaring the race and gender-based classifications in the DBE program unconstitutional and an order to enjoin the federal government from applying both the presumption of social disadvantage in the DBE program and the IIJA 10% set aside for socially and economically disadvantaged individuals. *Mid-America* may be heading toward the U.S. Supreme Court, where the viability of the DBE program will hang in the balance.

---

Copyright © 2024 Robinson & Cole LLP. All rights reserved.

---

National Law Review, Volumess XIII, Number 334

Source URL: <https://natlawreview.com/article/federal-dots-disadvantaged-business-enterprise-program-challenged-unconstitutional>