

U.S. COMMISSION ON CIVIL RIGHTS

+ + + + + **EDITED**

BRIEFING

REGULATORY AND OTHER BARRIERS TO
ENTREPRENEURSHIP THAT IMPEDE BUSINESS
START-UPS

+ + + + +

FRIDAY, FEBRUARY 8, 2013

+ + + + +

The Commission convened in Suite
1150 at 1331 Pennsylvania Avenue, Northwest,
Washington, D.C. at 9:30 a.m., Martin R.
Castro, Chairman, presiding.

PRESENT:

MARTIN R. CASTRO, Chairman

ABIGAIL THERNSTROM, Vice Chair

ROBERTA ACHTENBERG, Commissioner

TODD GAZIANO, Commissioner

GAIL L. HERIOT, Commissioner

PETER N. KIRSANOW, Commissioner

DAVID KLADNEY, Commissioner

MICHAEL YAKI, Commissioner (via telephone)

VANESSA EISEMANN, Parliamentarian

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STAFF PRESENT:

PAMELA DUNSTON, Chief, ASCD

ALFREDA GREENE

JENNIFER CRON HEPLER

LENORE OSTROWSKY, Acting Chief, PAU

ELOISE PLATER

EILEEN RUDERT

MICHELE YORKMAN

COMMISSIONER ASSISTANTS PRESENT:

NICHOLAS COLTEN

ALEC DEULL

TIM FAY

JOHN MARTIN

CARISSA MULDER

MARLENE SALLO

ALISON SOMIN

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1 P-R-O-C-E-E-D-I-N-G-S

2 (9:34 a.m.)

3 **I. INTRODUCTORY REMARKS BY CHAIRMAN**

4 CHAIRMAN CASTRO: Good morning,
5 everyone. The meeting will come to order. My name
6 is Marty Castro. I am Chair of the U.S. Commission
7 on Civil Rights. And I wish to thank everyone for
8 being here and welcome you to our briefing,
9 "Regulatory and Other Barriers to Entrepreneurship
10 that Impede Business Start-Ups." It is now 9:34
11 a.m. on February 8th, 2013.

12 The purpose of this briefing is to
13 examine the regulatory and financial contracting,
14 legal and other barriers that negatively impact
15 smaller, less experienced business enterprises. I
16 want to acknowledge that this is a briefing that
17 was brought to our attention and supported in a
18 bipartisan manner by our Vice Chair. I know this
19 is an issue that she has been interested in for
20 quite a while. So we are pleased to be able to
21 have the hearing today.

22 In my perspective, you know, according

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1 to the U.S. Department of Commerce, when we are
2 looking at minority businesses, in particular, they
3 have been and continue to be key drivers of our
4 economy, generating over \$1 trillion of economic
5 impact for our economy. In order, I think to
6 continue to bolster our economic recovery, it is
7 very important that we look at the challenges and
8 opportunities that face our small and
9 disadvantaged, especially minority, businesses and
10 determine what works and what doesn't, what can
11 continue to empower them, and what may, in fact, be
12 a hindrance.

13 So today I know we are going to hear
14 from a group of very distinguished panelists about
15 your perspective on those issues and how the
16 diverse array of regulations may or may not impact
17 small businesses.

18 So during this briefing, each of you is
19 going to have ten minutes to speak. After all of
20 the panelists have made their presentations, the
21 Commissioners will then have an opportunity to ask
22 you questions based on your presentations.

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1 What we are going to do is, as much as
2 possible, try to maximize the opportunity for
3 interaction between the Commissioners and each of
4 you. So I am going to try to enforce that
5 ten-minute time frame as best as possible. You are
6 going to see here a series of warning lights, just
7 like traffic lights. So when you see it is green,
8 you go ahead. When it turns yellow, just like we
9 do when we are driving, we're speeding up to try to
10 finish. And when it hits red, I ask you to stop so
11 that we can then move on to the next panelist and
12 ultimately get to our Commissioners.

13 Commissioners are going to, as always,
14 be very considerate of the panelists. They are
15 going to try to keep their questions concise, but
16 they may have some follow-up questions. And I will
17 be recognizing the Commissioners who speak. And
18 they will be allowed to do some follow-up. But I
19 also want to make sure that all Commissioners have
20 had an opportunity to speak and ask questions. So
21 I may at times shift to other Commissioners.

22 So, with those bits of housekeeping out

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1 of the way, I want to proceed with the briefing.
2 So, first of all, I am going to introduce each of
3 the panelists. Then I am going to swear you in.

4 Our first panelist is Alex Cristofaro,
5 Office Director of the Regulatory Policy and
6 Management Division. That's ORPM within the Office
7 of Policy, Economics, and Innovation at the U.S.
8 Environmental Protection Agency.

9 Our second panelist is Harry Alford,
10 President and CEO of the National Black Chamber of
11 Commerce.

12 Our third panelist is Timothy Sandefur,
13 Principal Attorney at the Pacific Legal Foundation.

14 Our fourth panelist is Omar Duque,
15 President and CEO of the Illinois Hispanic Chamber
16 of Commerce.

17 And our fifth panelist is George
18 LaNoue, Professor of political science and
19 Professor of public policy at the University of
20 Maryland Baltimore County and the University of
21 Maryland Graduate School in Baltimore.

22 I will now ask each of the panelists to

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1 swear or affirm that the information that you are
2 about to provide is true and accurate to the best
3 of your knowledge and belief. Do you so affirm or
4 swear?

5 (Whereupon, there was a chorus of
6 "I do.")

7 CHAIRMAN CASTRO: Thank you.
8 Please proceed.

9 **II. PANEL DISCUSSION**

10 **GOVERNMENT, SCHOLARS AND ADVOCACY GROUPS PANEL**

11 MR. CRISTOFARO: Thank you, Mr.
12 Chairman.

13 Being from the federal government --

14 CHAIRMAN CASTRO: Let me just say, too,
15 if you could speak into that gray box there, it's
16 voice-activated. So in order for us to hear you,
17 you have got to speak up.

18 MR. CRISTOFARO: Okay. Thank you, Mr.
19 Chairman. Coming from the Environmental Protection
20 Agency, I am so used to talking and giving
21 briefings using PowerPoint. I am going to
22 PowerPoint presentation. Thank you.

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1 I was asked to provide some information
2 on how EPA considers small business impacts as it
3 regulates. And, moving to the first slide, we were
4 actually required to consider small business
5 impacts by a statute, an environmental statute, or,
6 actually, not -- we are required to consider small
7 business impacts under a statute that was passed by
8 the Congress. And, specifically, in 1980, the
9 Congress passed the Regulatory Flexibility Act. It
10 was amended in 1996. And it imposes the
11 requirements on the Environmental Protection Agency
12 to consider small business impacts as it proceeds
13 with fulfilling its statutory mandates.

14 MS. DUNSTON: I'm going to switch this
15 mike. Excuse me. Sorry.

16 VICE CHAIR THERNSTROM: Something's got
17 to be done about this.

18 MS. DUNSTON: I'm working on it.

19 MR. CRISTOFARO: Okay. Thank you.

20 VICE CHAIR THERNSTROM: Thank you.

21 MR. CRISTOFARO: So, anyway, EPA is
22 required to consider small impacts procedurally for

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1 fulfilling our statutory mandates to protect the
2 environment. And in 1996, the Regulatory
3 Flexibility Act was amended. And, specifically,
4 whenever we issue a rule that has a -- and we use
5 this term all the time. It's called SEISNOSE,
6 which is a Significant Economic Impact on a
7 Substantial Number of Small Entities. Whenever we
8 think one of our rules is going to impose a
9 SEISNOSE, we are required to undertake a certain
10 process for doing -- which results in our trying to
11 consider, as best we can, how to accommodate the
12 needs of small business as we go forward.

13 Now, we actually are required to
14 undertake this process if we cannot certify no
15 SEISNOSE. That means that whenever we suspect that
16 there might be a significant impact, we go through
17 this process that I was about to describe.

18 Now, we consider SEISNOSE on a
19 case-by-case basis. We define it - we don't have,
20 really, a precise definition.

21 Generally, we look at costs that we're
22 imposing as a percentage of revenues and, in

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1 addition to the number of firms regulated.

2 We encounter situations all the time
3 where we might have a regulation that affects an
4 industry. The industry might have only five firms
5 in the industry. And then we might have an impact
6 on one of those firms that could be large.

7 And then the question is, well, is that
8 a significant impact? Because one could argue that
9 it's one-fifth of the industry or one could argue
10 that it's only one firm in a very large economy.
11 So everything that we do is done on kind of a
12 case-by-case basis, looking at the specifics of the
13 situation.

14 Next slide, please. So what I will
15 tell you this morning is what is this process?
16 What is a small business advocacy review panel?
17 How does this kind of input fit into our overall
18 rulemaking process?

19 We actually go and we solicit input
20 from small businesses. We call them a small
21 entities because our rules affect not just business
22 but also small governments. And so we use a

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1 broader term. And then I will tell you what we do
2 with the recommendations that we do get from this
3 panel.

4 Next slide, please. Okay. So what is
5 this panel? So let's suppose that we think, the
6 EPA thinks that it has a regulation that is going
7 to have a significant impact on small entities. We
8 will then form a panel, which consists of the EPA,
9 the Office of Management and Budget in the Small
10 Business Administration. And this panel is charged
11 with preparing a report which will advise the
12 administrator of the EPA on a number of issues
13 concerning small business.

14 Next slide, please. And the issues are
15 actually laid out for us in the statute. And we
16 are to share. The EPA is to share with this panel
17 all the information that we have prepared. If we
18 have a draft rule that we will share with the
19 panel, we will. We are charged with collecting
20 advice and recommendations from small businesses on
21 specific issues. And these are listed here.

22 Have we truly captured the small

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1 entities to which the rule, the proposed rule, will
2 apply? What are the compliance requirements? We
3 are to solicit information on what small businesses
4 think, compliance assistance, what compliance
5 assistance might be needed. We are charged with
6 looking at whether other federal rules overlap or
7 conflict with the regulation that we are proposing.

8 And then it is really the fourth item
9 that is of most interest, which is are there ways
10 that we can achieve our statutory or our
11 environmental objectives while that could minimize
12 the impact on small entities? So we specifically go
13 out and we solicit from small businesses ideas in
14 that regard.

15 Next slide, please. So, as I
16 mentioned, we have this government panel, but the
17 government panel is charged with soliciting small
18 business input. So we actually go out and invite
19 participation from small entities to participate in
20 this process. And the way we do that is we use the
21 Web to solicit small entity participation. We mine
22 our contacts and trade associations and

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1 professional associations to find people that we
2 think represent small businesses that may be
3 affected by our rules. And we invite them to
4 participate in the process.

5 Once we identify a group of small
6 entities, we have a couple of meetings with them.
7 The first is to give them an overview of what the
8 process requirements are and what their role in the
9 process is. We give them a lot of background
10 material on our regulations, what we are thinking
11 about.

12 And then we have a second meeting with
13 them, which, actually, I chair. And that meeting
14 is basically spent discussing regulatory
15 alternatives and anything that the small entities
16 want to discuss.

17 So we invite small entities to submit
18 comments to the panel. And we ensure that all of
19 their comments are attached to an appendix. So we
20 have a transparent process to see what everybody is
21 thinking about our regulations.

22 Now, to be honest, I would have to say

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1 that the EPA is very difficult to be green. Okay?
2 And it's very difficult to satisfy everybody. Some
3 people believe that we don't provide enough
4 information. If we get very specific about what we
5 are thinking, then we might be way down the line in
6 terms of already have -- we will be criticized for
7 basically presenting the panel with a cake that is
8 already three-quarters baked. And if we come in
9 too early and just solicit ideas, sometimes we are
10 criticized for not really sharing our specific
11 thinking on specific alternatives with the panel.
12 So there is always a little bit of we always have
13 to weigh at what point and what kind of information
14 we share and at what period of time and where in
15 the decision process we get this or we solicit
16 this information.

17 Next slide, please. Once we have this,
18 once we go through this process, the EPA, the OMB,
19 and the SBA prepare a panel report. And that
20 report is submitted to the EPA administrator with
21 the goal of submitting it at a time when senior
22 management decision-making can consider the

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1 alternatives. Once the rule is proposed, we place
2 the report in a rulemaking docket.

3 I have to tell you that while we are
4 required to go through this process and while the
5 administrator is required to consider these
6 recommendations, there is nothing in the statute
7 that binds the administrator to the panel's
8 recommendations.

9 And while the process requirements are
10 judicially reviewable, as I just mentioned, the
11 administrator still retains the discretion to
12 accord whatever weight she wants to the actual
13 recommendations.

14 I would say that so far, I don't recall
15 the actual number of panels that we have held. I
16 think it is probably around 30 or 40. And so far I
17 could say that the EPA has never lost a case with
18 respect to complying with SBREFA requirements.

19 So that concludes my presentation.
20 Thank you.

21 CHAIRMAN CASTRO: Thank you, Mr.
22 Cristofaro.

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1 Before I proceed to Mr. Alford, I would
2 like to make a motion. One of our panelists, Marc
3 Law, could not be here today because of illness.
4 So I would like to make a motion that his statement
5 be included in the record in lieu of his actual
6 testimony before us. Do I have a second?

7 VICE CHAIR THERNSTROM: Second.

8 CHAIRMAN CASTRO: All those in favor
9 say aye.

10 (Whereupon, there was a chorus of
11 "Ayes.")

12 CHAIRMAN CASTRO: Any opposed?

13 (No response.)

14 CHAIRMAN CASTRO: Any abstentions?

15 (No response.)

16 CHAIRMAN CASTRO: Thank you.

17 Mr. Alford, please proceed.

18 MR. ALFORD: Thank you, Mr. Chair,
19 panel. Thank you for inviting me to come and
20 speak.

21 Project labor agreements, one of the
22 items I am discussing. A project labor agreement

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1 is between an owner of a specific construction
2 project and applicable labor unions. It is an
3 agreement that union rules must be followed from
4 the beginning to the end of the project. In
5 essence, it becomes very cumbersome for a non-union
6 shop to participate.

7 For instance, union wages must be paid
8 to the non-union shop, plus the union-level medical
9 benefits and pension plan, even though the money
10 will never be credited to the non-union shop
11 employees. Also, the non-union shops must pay
12 union dues. Consequently, a project labor agreement
13 pretty much blocks the use of non-union shops and
14 their employees.

15 PLAs are mainly used on local, state,
16 and federal projects as private corporations find
17 them wasteful and too expensive. Ninety-eight
18 percent of black and Hispanic construction
19 companies are non-union shops. Thus, a project
20 labor agreement greatly limits the opportunities
21 for black and Hispanic firms whenever they are
22 used. The possibility of black and Hispanic labor

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1 is greatly suppressed also.

2 There was a serious matter over the use
3 of project labor agreements when the Woodrow Wilson
4 Bridge was about to be rebuilt. Maryland's Governor
5 Glendenning demanded the use of PLA while
6 Virginia's Governor Gilmore insisted on no usage.

7 Through research, we compared the
8 utilization of black firms and employment on
9 highway construction work for the States of
10 Virginia and Maryland. Maryland had a statewide
11 PLA on this highway program while Virginia's was a
12 right-to-work program. Virginia's utilization of
13 black firms and employees was greater than Maryland
14 by a ratio of three to one. That caught the
15 attention of President George W. Bush. And he
16 ordered no PLA on the bridge project. From there,
17 he eventually banned all PLAs on federally funded
18 projects as they "discriminated against women,
19 minorities, and small business," quote, unquote.
20 Right after his inauguration, President Barack
21 Obama issued his first executive order, February
22 9th, 2009. E.O. 13-502 ordered all majority

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1 federally funded projects to operate under a
2 project labor agreement. This was a major blow to
3 women and minority-owned businesses and employees.
4 Diversity is negatively affected.

5 If the U.S. Civil Rights Commission
6 would do an audit on Executive Order 11-248, they
7 would find that discrimination exists. The U.S.
8 Department of Labor hides this by reporting racial
9 employment by unit as a total number. They do not
10 report exclusively on construction units by craft.
11 If they did, it would uncover a disgrace. The
12 NAACP has been trying to get these numbers
13 beginning in 1987 but has failed.

14 Small business, which is 98 percent of
15 black construction firms, happens to be best
16 developed in a right-to-work environment. This has
17 a direct impact on jobs and sustainability of such
18 firms.

19 Okay. I'm going to speak off the cuff
20 now. Section 3 of the HUD Act, that was
21 implemented in 1968 by then HUD Secretary George
22 Romney in response to the WATS riot of Los Angeles

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1 in 1965. It was further strengthened in 1992 by
2 then Secretary Jack Kemp after the Rodney King
3 riots. It is also known as the Equal Opportunity
4 Act for Low and Very Low Income Persons. It says
5 "If there is HUD funding in a project or program,
6 30 percent of all new jobs are to go to residents
7 of public housing or people living under the
8 poverty level. Ten percent of all of those
9 contracts are to be set aside by companies who hire
10 these Section 3 residents. Those companies are
11 known as Section 3 companies."

12 It is a beautiful piece of work,
13 race-neutral, and lifting people from poverty into
14 the workforce and out of public housing and out of
15 poverty. But, for some reason, it has never been
16 implemented. It has never been enforced. We have
17 been watching this since 1993.

18 Over 6,000 grantees received HUD money.
19 None of them implement Section 3, even though it is
20 a requirement. At most, we may find three or four
21 in the nation, but that would be short-term because
22 unions will run off the Housing Authority president

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1 or change the board of a Housing Authority so they
2 won't have this Section 3. Six thousand grantees
3 are supposed to submit annual reports. We denied
4 it three years ago.

5 I met with the National Black Chamber
6 of Commerce with the U.S. Chamber of Commerce and
7 found that 96 percent of the grantees weren't even
8 filling out annual reports. We threatened to sue
9 HUD. Today, about 80 percent will fill out the
10 annual reports. Still, they won't implement the
11 program.

12 As an example, Chicago Housing
13 Authority, they did a review, a three-year review,
14 on Chicago Housing Authority. They received a
15 billion dollars in HUD monies. Not one job or one
16 contract went to Section 3. And the last time I
17 checked, there is plenty of poverty in the City of
18 Chicago.

19 This is an outrage. And what is needed
20 from a legal opinion we obtained is that the
21 Legislature should make it allowable for HUD
22 residents, Section 3 residents, to sue for

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1 noncompliance of Section 3. Right now they laugh.

2 Example: City of Jacksonville. We found
3 it in noncompliance in 1993. HUD found it in
4 noncompliance in 1993. Today, 2013, they're still
5 in noncompliance. They will not get in
6 noncompliance. Now, what HUD can do is refuse to
7 fund, give further funding to an entity in
8 noncompliance. They have never done that once.
9 That is a pain in my side. And I will fight it
10 probably to the grave. We have been through three
11 administrations, six administrations, three
12 presidents, and still no compliance of Section 3.

13 The last thing I want to talk about:
14 EPA. I had never heard of these sessions that EPA
15 is to be outreaching with small businesses. The
16 National Black Chamber of Commerce is the largest
17 black business association in the world. We have
18 140 chapters throughout this nation. And I haven't
19 heard of one business being asked for a response to
20 some of the activity that goes on with EPA.

21 They are notching up. They are
22 unchained with this new administration rules and

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1 regulations. They have got probably 6,000 rules
2 this year alone, most of which will negatively
3 affect small business.

4 When cap and trade was in the
5 legislature in 2009, we did a study that showed
6 that cap and trade will negatively impact 65
7 percent of the black population in the United
8 States economically. That was the beginning of the
9 end for cap and trade. It went away. But now it
10 is coming back piece by piece, rule by rule, and
11 using many unconventional means, such as sue and
12 settle, where an environmental group will sue the
13 EPA and quickly the EPA will come to settle with
14 that group, going along with every allegation or
15 claim that they make. That is legislating through
16 the courts, illegally I think it would be.

17 So those three items, the EPA, Section
18 3 of the HUD Act, project labor agreements, are
19 probably three of the biggest items that hurt and
20 negatively affect small business, particularly my
21 constituency. And I pray and plead for your
22 attention and perhaps assistance in the matter.

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1 Thank you.

2 MR. SANDEFUR: Thank you very much,
3 Commissioners. I am honored to be here today.

4 I would like to talk about, mostly
5 about, a state-oriented problem. I regard economic
6 liberty as the leading neglected civil right in
7 America. And when you look at American history, I
8 think American history, the history of civil rights
9 in this country, is largely the history of
10 entrepreneurship. And the history of
11 entrepreneurship is largely the history of racial
12 minorities and immigrants. And nobody I think has
13 articulated this better than one of my heroes:
14 Frederick Douglass.

15 In his autobiography, Douglass talked
16 about how when he escaped from slavery to
17 Rochester, New York, he said he was walking down
18 the street when he had first arrived. And he
19 saw -- back then they used to deliver coal from a
20 wagon. They would put a pile of coal in front of
21 your house. And you had to shovel it down the coal
22 chute into your basement.

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1 And Douglass said he was walking down
2 the street. And he saw a pile of coal. And he
3 decided to knock on the door and ask the woman
4 inside if he might shovel the coal down her coal
5 chute for her for some money. And she said, "Yes."

6 And he said quote, "I was not long in
7 accomplishing the job when the dear lady put into
8 my hand two silver half-dollars. To understand the
9 emotion which swelled my heart as I clasped to this
10 money, realizing that I had no master who could
11 take it from me, that it was mine, that my hands
12 were my own and could earn more of the precious
13 coin, one must have been in some sense himself a
14 slave." I think Douglass well-articulates a sense
15 of empowerment and individual liberty that comes
16 with the right to own a business and operate that
17 business without being told no by somebody else.

18 Unfortunately, barriers to
19 entrepreneurship, particularly at the state and
20 local levels, infest this country, depriving a lot
21 of hard-working people of the opportunity to pursue
22 what everybody regards as the American dream. I

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1 will talk in particular about two, which I go into
2 more in depth in the written submission that I have
3 given you. And that is occupational licensing and
4 certificate of public convenience and necessity
5 laws.

6 Occupational licensing is the idea that
7 you can require somebody to obtain education and
8 training prior to going into practice, like a bar
9 license for me, for example, or for a medical
10 license for a doctor. The Supreme Court first
11 reviewed the constitutionality of these laws in
12 1884 in *Dent v. West Virginia*, when the Supreme
13 Court said that medical licensing was okay, but any
14 kind of licensing requirement had to be related to
15 the business and couldn't just be arbitrary and
16 impose burdens on people going into business that
17 were designed to exclude them as competitors.
18 Unfortunately, that aspect of the *Dent* case has not
19 been enforced, certainly not in recent years.

20 Occupational licensing laws require
21 extensive, time-consuming, and very expensive
22 training and educational training requirements.

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1 For example, many occupational licensing rules say
2 you must have a college degree even to take the
3 examination.

4 A lot of these are time-consuming,
5 something that a lot of poor people, a lot of
6 people who are immigrants or members of racial
7 minorities cannot reasonably obtain. The
8 examinations are often administered in inconvenient
9 places and at inconvenient times, requiring people
10 to travel long distances and stay overnight in
11 hotel rooms to take examinations. Some of these
12 examinations last for more than a full day. And
13 the problem is that these licensing laws are used
14 to exclude entrepreneurs and to benefit established
15 politically well-connected insiders.

16 Probably the most heinous example is
17 the Louisiana law requiring a license and a
18 training regimen to become a florist. Now, to be a
19 florist requires no particular educational
20 requirement, you would think, but no. According to
21 Louisiana, you have to have a training regimen.
22 You have to take an examination, which, again, is

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1 administered rarely and in inconvenient places.
2 And until recently, you were graded not only on
3 whether you could identify flowers but on the
4 beauty and effects of your floral design, wholly
5 subjective requirements. That part was only
6 eliminated from the law last year, I believe.
7 Nevertheless, this legal requirement remains on the
8 books.

9 Now, floristry is not an industry that
10 rich white guys go into. And these licensing laws
11 are used to protect established florists from
12 entrepreneurs who need this protection for economic
13 liberty. They are precisely the people who might
14 use floristry as an opportunity to obtain the kind
15 of economic security and freedom that they could
16 not obtain without it because they lack the kind of
17 educational or the kind of family fortune
18 background that might otherwise secure them.

19 Another good example is the interior
20 designer law in Florida and in other states that
21 requires you to have a college degree to be an
22 interior designer. That is, if you want to take

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1 money from somebody in exchange for telling them
2 how to hang their drapes or something, where to
3 place the tables in their house for the most
4 beautiful effect, you have to have a college degree
5 and take an examination and get the state's
6 permission to do that. It is shameful, and it is
7 particularly true about inner city residents,
8 immigrants, members of minority groups that they do
9 not live in the ownership society. They live in
10 the permission society, where they have to get
11 government bureaucrat permission to go into
12 business to do practically anything.

13 Another example is a case I won not
14 long ago in the Ninth Circuit Court of Appeals
15 challenging California's law regulating pest
16 control workers. My client installed spikes on
17 buildings to keep birds from landing on them. You
18 know these things? Nixalite they call it, right?
19 Well, in California, you had to get a Branch 2
20 structural pest control operator's license to do
21 this. And that required two years of training
22 learning how to handle, use, and store pesticides,

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1 even though my client never used pesticides. You
2 then had to take a 200-question multiple choice
3 exam, testing your knowledge of insect life, even
4 though my client never dealt with insects. He only
5 put spikes on buildings to keep birds away.

6 And it gets even worse because the law
7 only applied to pigeons. If you wanted to put the
8 same spikes on the same building to keep seagulls
9 or starlings away, you didn't need any license at
10 all.

11 Now, in deposition, the state's expert
12 witness testified under oath about his law. And I
13 said to him, "Now, this law requires you to get two
14 years of training to put spikes on a building to
15 keep pigeons away?"

16 He said, "That's right."

17 And I said, "And no training at all to
18 put the same spikes on the same building to keep
19 seagulls away?"

20 He said, "Yes. That's right."

21 I said, "Would you call this
22 irrational?"

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1 He said, "Yes, I would."

2 The government's lawyer said, "Um, can
3 we take a break?"

4 (Laughter.)

5 MR. SANDEFUR: We went before the
6 District Court. And we said, "Your Honor, this law
7 is positively irrational. The state's own witness
8 testified that it was irrational." And we lost in
9 the trial court because the constitutional law is
10 so tilted against business owners and entrepreneurs
11 in this country.

12 Fortunately, we won on appeal. And the
13 Ninth Circuit of Appeals said government cannot use
14 its licensing laws simply to protect established
15 businesses against fair competition from
16 entrepreneurs. Unfortunately, that creates a
17 circuit split because the Tenth Circuit Court of
18 Appeals has ruled that government can use licensing
19 laws for no other purpose than to protect
20 established businesses against fair competition.

21 Occupational licensing laws ought to be
22 related to a person's fitness and ability to

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1 practice the profession. That is what the Supreme
2 Court has said. And, yet, the Court refuses to
3 actually enforce this requirement in almost every
4 case, including the Louisiana florist case. In
5 that case, the District Court upheld the
6 constitutionality of that law.

7 Now, the other kinds of laws that are
8 problems are certificate of public necessity and
9 convenience requirements or certificate of need
10 requirements. These are not licenses that test
11 your knowledge or skill. These are requirements
12 that force entrepreneurs to go in front of a
13 bureaucratic body and prove to them that there is a
14 public need for a new business of that sort.

15 For example, in Missouri, I recently
16 sued the State of Missouri over their certificate
17 of necessity requirement for moving companies. My
18 client wanted to start a moving company, but in
19 order to get a license to run a moving company in
20 Missouri, you first have to basically get
21 permission from all of the existing moving
22 companies.

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1 The state as soon as you apply for a license
2 notifies all the existing moving companies and
3 allows them to object for no other reason than that
4 you would compete with them. And when they object,
5 you have to go to an agency and prove to them that
6 there needs to be a new moving company.

7 How do you prove such a thing? That's
8 the right answer. Nobody knows. There is nothing
9 in the statute that says. And you are required to
10 hire a lawyer to attend an administrative hearing
11 if your company is incorporated.

12 These are time and expense requirements
13 that most minority entrepreneurs definitely cannot
14 afford. I am glad to say Missouri repealed that
15 law, thanks to our lawsuit, but other laws remain
16 on the books, including Nevada and Kentucky, which
17 I am currently suing.

18 Public choice theory explains that
19 these kinds of licensing laws are exploited by
20 insiders to prohibit politically less
21 well-connected and less wealthy entrepreneurs and
22 outsiders. And that means that these kinds of

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1 licensing requirements fall hardest on members of
2 racial minorities.

3 And, sadly, thanks to the rational
4 basis test that courts use in assessing the
5 constitutionality of these requirements, it is
6 virtually impossible to win legal challenges in
7 court unless you have a great lawyer like me.

8 What this country needs is new civil
9 rights legislation that protects economic liberty.
10 I would suggest something modeled on the Religious
11 Freedom Restoration Act that forces states and
12 cities to justify their inhibitions on economic
13 freedom by some sort of compelling public interest,
14 not based on protecting established companies
15 against legitimate competition.

16 Thank you.

17 CHAIRMAN CASTRO: Thank you.

18 MR. DUQUE: Good morning. My name is
19 Omar Duque, and I am the President and CEO of the
20 Illinois Hispanic Chamber of Commerce.

21 I am pleased to be here this morning to
22 talk about both real and perceived barriers to

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1 business growth.

2 The Illinois Hispanic Chamber of
3 Commerce represents the interests of Hispanic-owned
4 businesses in the greater Chicago area and
5 throughout Illinois. Our membership ranges from
6 Illinois' largest Hispanic-owned businesses with
7 revenues of close to \$1 billion to very small micro
8 enterprises. By and large, however, the great
9 majority of our time and resources go to working
10 with and helping small businesses.

11 Now, the Small Business Administration
12 defines a small business as one that is
13 independently owned and operated, is organized for
14 profit, and is not dominant in its field. The
15 great majority of the businesses that we work with
16 have annual revenues of between half a million and
17 \$20 million.

18 For the purposes of this briefing this
19 morning, we took a very broad approach to the issue
20 of regulation, rather than looking at any specific
21 regulations that have been addressed here. And we
22 went out, and we talked to our members. And we

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1 surveyed Hispanic-owned businesses to get their
2 perspective on the effect that regulation has on
3 their business.

4 Because of the nature of our work, we
5 are very concerned with the issues that hinder a
6 business' ability to grow. As such, we do not view
7 government regulations as a direct barrier to the
8 growth of the businesses that we represent and work
9 with on a daily basis.

10 We do, however, recognize that there
11 are very real, serious secondary effects some
12 regulations have on businesses. And I will spend a
13 little bit of time talking about how overregulation
14 in the financial industry has hurt businesses'
15 ability to access traditional financing.

16 A 2011 survey of small businesses
17 conducted by McClatchey and the Chicago Tribune
18 suggests small business owners are not concerned
19 with regulations and do not think they are stifling
20 their growth.

21 On September 8th, 2011, the Chicago
22 Tribune reported on a study by writing that none of

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1 the business owners complained, that none of the
2 business owners that they service complained about
3 regulation in their own industries. And some
4 seemed to welcome it. Some pointed to the lack of
5 regulation and mortgage lending as a principal
6 cause of the financial crisis that brought about
7 The Great Recession of 2007 to 2009 and its
8 aftermath.

9 In December of 2011, the Illinois
10 Hispanic Chamber of Commerce conducted its own
11 study of businesses. More than 125 businesses were
12 surveyed. And we asked, what was the biggest
13 barrier to their success? Only nine percent of
14 businesses that we surveyed said that regulations
15 were the biggest barriers to their success.

16 Business owners were asked to name
17 their biggest barriers. And here is what they
18 said. Fifty-one percent of businesses surveyed
19 said accessing financial resources was their
20 biggest concern. Forty-two percent said finding
21 customers. Thirty-four percent said competition
22 from big business. Twenty-six percent said lack of

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1 access to business development and technical
2 assistance resources. Twenty-three percent said
3 taxes. Twenty percent said insurance. Eighteen
4 percent said labor costs. Sixteen percent said
5 inflation. Nine percent said regulation. Four
6 percent listed other. And one percent cited
7 language as their biggest barrier to success.

8 For the purposes of my testimony here
9 today, we again surveyed 35 business owners in
10 January of this year. This time we asked business
11 owners to rank from 1 to 3 the same concerns listed
12 in our 2011 survey. And only 2 of the 35
13 businesses cited regulations as a concern, both
14 ranking regulations as their number three concern.

15 Next, we asked businesses if
16 regulations were of any concern at all to their
17 business. And 66 percent of the businesses we
18 surveyed said that regulations were of no concern
19 to their business. Interestingly, only a few of the
20 34 percent of businesses who said they were
21 concerned with regulations were actually able to
22 point to real business regulations hindering their

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1 growth.

2 Seventy percent of businesses we
3 surveyed said they disagreed that business
4 regulations were one of the principal issues
5 hurting small businesses today. In fact, 60
6 percent of the businesses we surveyed said they saw
7 business regulation as a tool to help level the
8 playing field with larger businesses that they
9 compete with.

10 And, similar to the McClatchey-Tribune
11 study, 95 percent of businesses we surveyed said
12 they thought that lack of regulation in mortgage
13 lending was a major contributing factor that caused
14 The Great Recession of 2007 to 2009.

15 Now, we are not naive to the fact that
16 often regulations that on the surface do not appear
17 to directly impact a business can have very serious
18 secondary effects. I specifically want to spend a
19 little bit of time this morning talking about how
20 regulations in the financial industry continue to
21 have an impact on small businesses' ability to
22 obtain much needed capital. It is a tricky topic.

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1 When the mortgage crisis crippled our
2 economy, federal regulators enacted extra strict
3 regulations that brought mortgage lending to a
4 complete halt. Small community banks, many who
5 were over-leveraged in secondary mortgage
6 securities, as was just about everybody else, were
7 deemed too risky and were forced to close. Their
8 assets sold to large mega banks.

9 This was a very real issue for the
10 great majority of small businesses that we work
11 with because most of them had longstanding business
12 relationships with small community banks. When
13 these banks went away, so did the capital that many
14 of these businesses relied on.

15 New lending regulations along with the
16 terrible economy forced many businesses to close.
17 And for those that survived, many are still
18 struggling to recover.

19 I want to highlight one specific
20 example we saw in 2009 because it speaks to the
21 absurdity of the lending parameters we were seeing
22 at that time. One business that we worked with had

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1 a relationship with a small community bank. That
2 business had a \$500,000 cash deposit with that bank
3 and also a \$500,000 line of credit.

4 After the bank was sold to a large
5 multinational bank, the new bank came in and told
6 the businesses that they were calling their line of
7 credit, giving them 90 days to pay the full
8 balance, at which time it was close to the full
9 limit of a half a million dollars. The business
10 offered to pay the balance out of the \$500,000 cash
11 deposit they had with them but asked to continue to
12 keep the line of credit open and active because
13 they needed it for capital for everyday operational
14 expenses.

15 The bank told them that they could only
16 keep the line of credit open if the business made a
17 new \$500,000 deposit to secure the line of credit
18 again. If it doesn't make sense to you, you are
19 right. It simply doesn't make sense. If
20 businesses had that kind of cash, they wouldn't
21 need the line of credit to begin with. Even the
22 bankers that we were working with said that they

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1 couldn't understand why they couldn't get the deal
2 done.

3 In my capacity as CEO of the Illinois
4 Hispanic Chamber of Commerce, I meet with bank
5 executives all the time. All of them tell me the
6 same thing, that they're lending, that they have
7 money, and that they're looking for deals. But ask
8 a couple of questions, and they will soon let up.
9 They say their hands are tied, that regulators are
10 looking over their shoulder, and if the deal
11 doesn't fit neatly in a prescribed box, they can't
12 do it.

13 I opened my remarks today by saying
14 that government regulations are not barriers to
15 small business growth. And I recognize it sounds
16 like I'm saying that regulations indeed are
17 hindering a business' ability to grow. Yes and no.
18 Clearly, some regulations have very serious
19 secondary effects; in this case, regulations that
20 impact small business lending.

21 Specifically, let's look at what
22 happened and what we can learn from this in other

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1 industries. Prior to the mortgage crisis, the
2 financial industry lacked real common sense and
3 practical regulations. The lack of effective
4 oversight was a contributing factor to the economic
5 crash that nearly collapsed our entire economy.

6 As a result of the crash, regulations
7 were put in place to stabilize and revive the
8 economy. Have they gone too far? Yes. Do
9 financial regulations that speak to lending need to
10 be loosened? Yes. But are regulations, per se,
11 bad for business? No.

12 My point is that if there have been
13 more effective regulations in place, then our
14 financial crisis might never have happened, and it
15 might have been averted. If there had been good,
16 practical regulations, the strict, some might say
17 draconian measures enacted to right wrongs might
18 never have been needed.

19 Too often business groups label
20 government regulations as the primary evil
21 preventing business growth in our nation. We don't
22 think so. In fact, our studies suggest our

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1 businesses welcome regulations because they say it
2 helps create a standard set of rules that everyone
3 must comply with.

4 Interestingly enough, entrepreneurs
5 from across the world find the American markets so
6 attractive because of our defined regulations and
7 our rule of law.

8 As a business community, we must not
9 fear regulations. Business owners thrive on
10 predictability. If we develop a set of rules,
11 enforce them equally and fairly across the board,
12 businesses will thrive.

13 Thank you for the opportunity to be
14 here this morning.

15 CHAIRMAN CASTRO: Professor LaNoue?

16 DR. LANOUE: Good morning. As I listen
17 to the testimony of my colleagues, it seems to me
18 that one of the common themes is that sometimes
19 regulations have illegitimate purposes or
20 unintended consequences. And the answer to the
21 question that I posed in my testimony, are federal
22 disadvantaged, transportation disadvantaged

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1 programs remedied for or a cause of discrimination
2 against smaller or start-up businesses or, in other
3 words, do they create barriers or erase barriers,
4 the answer is they may be both, but we don't really
5 know.

6 And I think whatever our differing
7 views about the meaning and implementation of the
8 constitutional and statutory civil rights
9 provisions, I hope that we might all agree that it
10 is not defensible to know so little about the
11 implementation and effects of a program as large
12 and durable as the transportation DBE programs.
13 For fiscal 2013 and 2014, we are talking about \$110
14 billion dollars.

15 In 2006, I had the privilege of
16 testifying before this body on the subject of
17 disparity studies as evidence of discrimination in
18 federal contracting. I am currently serving as
19 Vice Chair of the Maryland State Civil Rights
20 Advisory Commission, but, of course, I am not
21 speaking for them here.

22 I have consulted with a number of

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1 governments about contracting program design and
2 evaluation and served as trial expert in more than
3 20 cases regarding constitutionality of such
4 programs. I am currently the plaintiff's expert in
5 a case, Hispanic Chamber of Commerce v. the City of
6 Milwaukee.

7 The Disadvantaged Business Enterprise
8 program was created in 1989. And in its first
9 incarnation, it set ten percent goals on all
10 federal contracting and transportation awards.
11 After the Supreme Court's decision in Adarand v.
12 Pena, the program was changed to require state and
13 local recipients to set those based on their market
14 prices. There are 1,425 recipients of
15 transportation. And I have spent some time
16 examining how these goals are set.

17 The federal government's own
18 examination of the program has been very limited.
19 In 1997, GAO did a study. And it came up with the
20 answer. We don't have our facts to really
21 understand this.

22 Nineteen ninety-eight, Commerce did a

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1 study. And it found that in 19 to 27 geographic
2 3-digit SIC code comparisons, there was not
3 under-utilization among minority businesses.

4 Your organization in 2005 came to the
5 conclusion that federal agencies did not engage in
6 program evaluation, outcome measurements, empirical
7 research, and data collection, and periodic review
8 of DBE programs and have largely failed to consider
9 the alternatives that the Constitution required.
10 But the bottom line is we really don't know a lot
11 about how these programs work.

12 There are two reasons for reexamining
13 this subject now. One is the Ninth Circuit
14 decision in *Western States v. the Washington State*
15 *Department of Transportation*, which essentially
16 found that states must make their own findings of
17 discrimination in their local marketplaces in order
18 to use race-conscious measures. The Department of
19 Justice concurred with that and did not appeal that
20 decision. So you have the states in that area now
21 conducting these kinds of studies.

22 The other source of information that

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1 has been previously not considered is that each one
2 of the federal recipients submits a report called
3 the Uniform Reports of DBE Awards and Commitments.
4 So that we actually do have data on what is going
5 on in these local governments.

6 And I have spent some time analyzing
7 that and published an article on a two airports.
8 And that is figure 1, 2, and 3 on pages 8 to 9 in
9 the reports. It is a detail that I would be happy
10 to discuss. And recently I have done research on
11 all 50 state highway departments. And here is the
12 bottom line. The bottom line is that given the
13 goals that states or other recipients set, DBEs are
14 under-utilized in the award of prime contracts, but
15 greatly over-utilized in the award of subcontracts.

16 There is a certain paradox here because
17 the award of prime contracts is almost always by
18 sealed low bid. It is a race-neutral process. And
19 the federal government regards it as such. The
20 award of subcontracts, however, is subjective. It
21 is based on relationships that firms have with
22 subcontractors and on their subjective evaluations

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1 of the quality and characteristics of those firms.
2 And here we find uniformly massive over-utilization
3 of DBEs.

4 Now, some people might say, "Well, that
5 is a wash. DBEs are under-utilized as primes and
6 over-utilized as subs. So what?" But civil rights
7 belong to individuals. And if we have a situation
8 where the current structures, the current
9 arrangements create over-utilization in the
10 subjective part of the process and
11 under-utilization in the objective central part of
12 the process, I don't think we can simply regard
13 that as a wash.

14 Now, why does this phenomenon occur?
15 It occurs -- and I have got a Law Review article
16 about this, and everything is in the bibliography.
17 It occurs because there are great problems in the
18 way the goals are set in the first place.

19 The Supreme Court said in the Croson
20 decision that you should compare businesses that
21 are comparably qualified, willing, and able to
22 determine whether race or gender might be the

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1 factor that creates differences in their
2 utilization.

3 States and other recipients too often
4 simply do head counts. You can find one airport
5 that actually uses Yellow Pages. And so the goal
6 setting may be flawed from the beginning.

7 The second thing is that when the
8 specific contracts are set, there are two problems.
9 One is that many recipients ignore non-DBE
10 availability. So the goals are set strictly on DBE
11 availability. And then that leads to
12 over-utilization.

13 The second problem is the goals are set
14 on the total amount of a contract, not just on the
15 subcontracting portion. And if you do that, then
16 you force prime contractors to over-utilize DBE
17 subs to meet the goals.

18 Now, this can actually create handicaps
19 for all new and small businesses but sometimes for
20 specifically for minority and women-owned
21 businesses. Let me give you an example. The
22 definition of economic disadvantage would be a

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1 DBE -- you have to be both socially and
2 economically disadvantaged currently -- is that the
3 owner can be
4 considered economically disadvantaged if the owner
5 has a net worth of less than \$1.32 million minus
6 the value of the owner's principal residence and
7 the value of the business.

8 When the Department of Census in 2010
9 asked the same questions and created a national
10 average, it was \$46,000 dollars. So if you are
11 defining economic disadvantage as people who have a
12 net worth of 1.32 minus the exclusions, you are
13 creating an artificial definition of who is
14 actually economically disadvantaged.

15 Furthermore, the worth of the business
16 can be \$22.31 million dollars. In some lines of
17 business, that may not be a huge amount, but when
18 you're talking about guardrail installers or other
19 kinds of businesses, that is a huge amount.

20 Furthermore, there are no limits on the
21 amount of time that a DBE can be in a program or
22 the number of contracts that a firm can win. The

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1 federal regulations suggest that recipients do what
2 are called over-concentration studies. That is,
3 looking if the particular configuration of
4 businesses means that DBEs, the use of DBEs, runs
5 everybody else out of the area. The only state
6 that has done that is Rhode Island.

7 So what I am suggesting, then, is that
8 this Commission revisit its earlier findings and
9 the responses it got from the federal agencies,
10 which were largely not very revealing, and try to
11 get more information about how these programs
12 really work and try to engage in what a narrowly
13 tailored DBE program would really look like for the
14 benefit of non-DBEs and for the benefit of smaller,
15 start-up DBEs that are really being crowded out of
16 the program by the large, well-established DBEs
17 that are getting most of the benefits.

18 Thank you.

19 **SPEAKERS' REMARKS AND QUESTIONS FROM COMMISSIONERS**

20 CHAIRMAN CASTRO: Thank you.

21 At this point Commissioners will have
22 an opportunity to ask questions. I would ask them

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1 to identify by raising their hand or Commissioner
2 Yaki identify on the phone if you would like to ask
3 any questions. Commissioner Gaziano, Kirsanow?
4 Commissioner Gaziano, please proceed.

5 COMMISSIONER GAZIANO: Thank you.

6 CHAIRMAN CASTRO: And then Commissioner
7 Kirsanow will come after you.

8 COMMISSIONER GAZIANO: Thank you all.

9 And I think if the Chairman allows a
10 second round after everyone else has, I may address
11 some other witnesses, but I think my initial
12 question I'd like to ask Messrs. Duque and Sandefur
13 since at least the question I ask is implicated by
14 both of your testimony.

15 In part, I want to ask Mr. Duque a
16 little bit about the methodology or the meaning, I
17 suppose, of the survey that these people in
18 existing businesses were asked about whether
19 regulations hindered their growth.

20 I'm kind of dubious to begin with how
21 regulation was understood by them or whether they
22 are even aware of some of the sea of regulation

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1 that they may or may not be complying with that
2 may -- but, putting that aside, I think one more
3 fundamental question that Mr. Sandefur has written
4 about/talked about is the barriers to entry that
5 certain special regulations, the occupational
6 licenses, the medallions, and the like, if you're
7 going to survey those in an existing business with
8 an occupational license, a medallion, -- and those
9 are extreme examples of barriers to entry, but
10 there are lots of other sort of lesser barriers to
11 entry. But if you are interviewing the people in
12 an existing business, they're the advantaged ones.
13 The licensing regime, the need to get the medallion
14 is a great boon to that. And I wouldn't be
15 surprised if they say, "Yes, those are great things
16 to keep out new entrants."

17 So I suppose I would like both of your
18 comments, but wouldn't you expect if you're just
19 surveying existing businesses, that they would not
20 be objecting to barriers to entry to bring in new
21 competitors?

22 MR. DUQUE: Sure. No. Thank you.

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1 So, first, to speak to the methodology,
2 I just want to be clear. This is something that we
3 conducted internally in our office. We tried to
4 get as large of a sample as possible and ask a
5 broad range of questions.

6 In the strict meaning of an actual
7 study, I don't know that it would necessarily
8 qualify as a scientifically based study. We did it
9 internally. We are confident with the results. We
10 are confident in the feedback that we got. And the
11 results speak to the attitudes of our members and
12 of the businesses that we surveyed. And when we
13 looked at other surveys similar to the ones that we
14 did that were scientifically conducted, like the
15 one that I mentioned that we conducted by
16 McClatchey in partnership with the Chicago Tribune.
17 Many of the answers were similar in nature, the
18 responses that we got were similar in nature.

19 As to the fact that we were surveying
20 existing businesses and compared to Mr. Sandefur's
21 testimony, yes, I would agree that there probably
22 is a bias with somebody who is already in business.

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1 And I want to address also - you know,
2 we were looking at this from a -- if the businesses
3 aren't able to identify what regulations are, what
4 specific regulations, then I think that that is
5 also indicative of their feeling. I mean, if you
6 feel that there is a regulation that is very, very,
7 very much affecting your business, you are going to
8 illustrate that. And when we asked them, when we
9 asked the businesses to name a regulation, only a
10 few could. This just tells me it is not top of
11 mind for these businesses.

12 Do I agree? I think there is also a
13 difference between regulations that have an impact
14 and just silly laws. And I think that, you know,
15 some of the licensing, occupational licensing,
16 issues that Mr. Sandefur brought up, I mean, of
17 course, we would be against that. And, of course,
18 we are against that.

19 Those just seem to be absolutely ridiculous. And
20 they are barriers. And those need to be dealt
21 with.

22 Does that mean necessarily, though,

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1 that all regulations are bad or that we disagree
2 with licensing to begin with? No. Absolutely not.

3 I hope that that addresses your
4 question.

5 COMMISSIONER GAZIANO: Thank you.

6 Just to follow up, Mr. Sandefur, first
7 of all, is it possible that you could provide the
8 detail on your study?

9 MR. DUQUE: I'm happy to provide the
10 detail of the study, including all of the other
11 questions. I'm happy to submit that.

12 COMMISSIONER GAZIANO: In my sort of
13 day job experience, a lot of regulated entities
14 don't know they're regulated until the prosecution
15 begins. Anyway --

16 MR. SANDEFUR: I would agree with what
17 was said before. I suspect that respondents to a
18 survey like that would probably not think of, would
19 not immediately think of, a licensing requirement
20 as a regulation because when you think of
21 regulation, you typically think of something you
22 have to deal with on a daily basis when you are

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1 running a business.

2 But there is also the problem that a
3 lot of these licensing requirements are kind of
4 absurdly disguised as public safety requirements.
5 The most heinous example of that is the Nevada
6 certificate of need requirement for moving
7 companies that I am currently challenging, which is
8 the most anti-competitive law in the nation, I
9 believe. In order to get a license to run a moving
10 company in Nevada, everybody has to go through a
11 hearing. Most states, you only have to go through
12 a hearing if an existing company doesn't want you
13 to get a license. But in Nevada, everybody who
14 applies for a license to run a moving company is
15 required to go to a hearing where you have to prove
16 all sorts of often very complicated things. You
17 have to provide scale maps of the routes you're
18 going to drive as a mover, for example. You have
19 to provide detailed financial information.

20 But the statute breaks it down into
21 several sections. And over and over again, you
22 have to prove you wouldn't compete with existing

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1 moving companies. You have to prove that you
2 wouldn't be a threat to the existing moving over
3 and over. And you also have to prove that you
4 would be in compliance with the policy announced in
5 this other statute. You look that up. It says
6 it's the policy of the state to discourage
7 competition on the moving industry. And maybe that
8 is why there are only 40 licensed moving companies
9 in the entire State of Nevada today.

10 So the problem with asking questions to
11 existing companies is not only that the insiders
12 like the exclusion but also the propaganda value of
13 wrapping these exclusionary rules in something that
14 looks like a public safety measure. And nobody
15 challenges a public safety measure. Everybody is
16 fine with public safety requirements. The problem
17 is that people think of public safety when often
18 these laws have little or nothing to do with public
19 safety.

20 And, finally, there is the problem that
21 it really is kind of unfair to eliminate the
22 barrier to entry after somebody else has already

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1 gone through all of the unfair time and expense of
2 having to get that license, right? When we were
3 suing in Missouri, for instance, I got a couple of
4 nasty emails from existing moving companies in
5 Missouri. And they were like, "You know, we don't
6 like this law either, but we had to go through the
7 time and expense of getting this license. How is
8 it right that your client should be able to sue and
9 get the licensing abolished?" to which my answer is
10 it's not fair, but who is responsible for that
11 unfairness? The State of Missouri for adopting
12 this unjust and unconstitutional licensing
13 requirement.

14 And it is not all that cheap to sue the
15 state and go through. Fortunately, our clients
16 don't have to pay for lawyers because we do it for
17 free. But most people don't have the wherewithal
18 to challenge the constitutionality of these
19 requirements.

20 CHAIRMAN CASTRO: If you win, maybe
21 Commissioner Kladney can open a moving company.

22 COMMISSIONER KLADNEY: Yes.

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1 (Laughter.)

2 COMMISSIONER KLADNEY: I'm thinking so
3 fondly of that.

4 CHAIRMAN CASTRO: Commissioner
5 Kirsanow?

6 COMMISSIONER KIRSANOW: Again I want to
7 thank the panelists for doing a great job. I wish
8 we had more media coverage here because I think
9 this is an extraordinarily important topic. You
10 know, it should be carried by C-SPAN.

11 We have got an unemployment rate among
12 grads of 13.8 percent, minority participation rate
13 of 58 percent. More than 15 percent of working-age
14 black men in urban areas have no jobs. When I say,
15 "no jobs," that includes being self-employed. We
16 have got an atrocious unemployment rate in the
17 Hispanic community of 9 percent plus. So, you
18 know, this is something of immediate import.

19 Commissioner Gaziano actually asked my
20 question about existing businesses and those who
21 are trying to gain access into a particular market
22 or an existing business trying to gain access to a

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1 new market. So I am going to kind of pivot and ask
2 maybe Mr. Alford a question going to Mr.
3 Cristofaro's point about the Regulatory Flexibility
4 Act and the analysis that goes through that.

5 I have done a fair amount of litigation
6 with respect to the Regulatory Flexibility Act and
7 the Administrative Procedures Act, not with respect
8 to the EPA but other federal agencies. And,
9 unfortunately, -- and I do that portion at least
10 for mammoth enterprises.

11 My understanding is that at the initial
12 stage, the agency head has wide discretion to
13 certify whether or not there is a SEISNOSE,
14 correct?

15 MR. CRISTOFARO: The definition of
16 SEISNOSE is not specified in the statute. So there
17 is discretion.

18 COMMISSIONER KIRSANOW: Right.

19 MR. CRISTOFARO: And so whether one
20 describes it as wide or not, there has to be a
21 rational basis for the determination.

22 COMMISSIONER KIRSANOW: And in my

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1 experience, it is very burdensome, even for a
2 gigantic enterprise, to go through the litigation
3 process to determine whether or not through the
4 volume of paperwork and analyses and experts, to
5 make the determination that, in fact, there is no
6 burden or there is not a substantial burden on a
7 small business, partly daunting enterprise.

8 Mr. Alford, how many of your members
9 have got the resources to challenge the federal
10 government when there is a discrete regulation that
11 may have an impact on you that you think they
12 didn't go through the proper process to get
13 implemented?

14 MR. ALFORD: Maybe five percent.

15 COMMISSIONER KIRSANOW: How many of
16 your members have the ability to weather a blizzard
17 of regulations? Not just one, but when your
18 enterprise is subject to thousands of regulations
19 coming at you or at least hundreds at the same
20 time, what do they do?

21 MR. ALFORD: They shrink. They lay
22 off. They retract. Many go out of business, sir.

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1 COMMISSIONER KIRSANOW: I know a little
2 bit about project labor agreements. Who generally
3 in your experience accesses or which companies get
4 access to those project labor agreements?

5 MR. ALFORD: Large, usually large,
6 construction companies with a high tradition of
7 family-owned businesses, multi-generational
8 businesses.

9 COMMISSIONER KIRSANOW: For a long
10 time, correct?

11 MR. ALFORD: Three or four generations,
12 sir.

13 COMMISSIONER KIRSANOW: Right.
14 And will you be surprised if they might be
15 politically connected?

16 MR. ALFORD: Let's say Turner
17 Construction, a former German company; Fluor;
18 Bechtel. You're talking about companies over 100
19 years old.

20 COMMISSIONER KIRSANOW: How many of
21 your members are that politically connected?

22 MR. ALFORD: They are not connected at

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1 the federal level at all, maybe at the local level
2 with state representatives, maybe with the mayor,
3 but they're not to the point of being outspent by
4 larger corporations.

5 COMMISSIONER KIRSANOW: How many of
6 your members are unionized?

7 MR. ALFORD: Two percent.

8 COMMISSIONER KIRSANOW: How many of
9 your members could sustain unionization in your
10 estimation?

11 MR. ALFORD: I'll give you an example,
12 please: Buffalo, electrical firm. They were
13 forced by the powers that be to join a union. This
14 small outfit had about 15 employees, had his wife
15 and daughter and himself. They became unionized.
16 They had to give their 15 employees to the union
17 shops, to the electrical shop. They never got
18 work. He followed and followed. They never got
19 work. They had to go find other business. That's
20 the game that is played.

21 COMMISSIONER KIRSANOW: One final
22 question. How often do you go out to dinner with

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1 Senator Barbara Boxer?

2 (Laughter.)

3 MR. ALFORD: My wife told me there is
4 this group that is called Left Right and you're
5 supposed to get the most opposite person you can to
6 have lunch with and to write papers with. And my
7 wife suggested that I ask Senator Boxer.

8 COMMISSIONER KIRSANOW: Thank you,
9 Mr. Chairman.

10 CHAIRMAN CASTRO: Thank you.

11 Commissioner Achtenberg? And then
12 Commissioner Kladney.

13 COMMISSIONER ACHTENBERG: Thank you,
14 Mr. Chairman.

15 Mr. Duque, in my experience, I used to
16 be policy director for a Chamber of Commerce
17 myself. And my experience pretty much is
18 consistent with what you described were the
19 impressions of your business members. And it is
20 that regulatory compliance. While they are aware
21 of it, it doesn't rise too high on their list in
22 terms of critical concerns. What is of greater

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1 concern is typically access-to-capital issues and
2 the like.

3 So my own experience is pretty
4 consistent, which doesn't mean -- as has been I
5 think well-pointed-out, that doesn't mean that
6 every business is necessarily aware of every
7 regulatory regime under which they comply but where
8 it is not obvious to them that that is the case or
9 what have you. I
10 mean, I am willing to grant that, but my own -- I
11 just wanted to offer that my own experience was
12 pretty consistent with the observations of your
13 members.

14 I also wanted to observe that I am a
15 director of a small community bank. And we are able
16 to provide working capital through the various SBA
17 programs to emerging businesses in our area on a
18 pretty fair and
19 affordable basis. We have found ways of really
20 assisting growing businesses to comply with the
21 particular requirements of the SBA lending programs
22 and really been able to offer substantial

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1 assistance to those businesses.

2 I am wondering what your experience and
3 the experience of your members has been with the
4 various SBA lending programs and what observations
5 you have for things that might improve on that
6 critical issue of access to capital for small but
7 growing businesses.

8 MR. DUQUE: Sure. Thank you.

9 So many of our members, like I said in
10 the testimony, traditionally have had relationships
11 with small community banks. And it really has been
12 a relationship in the strict sense of the term.

13 COMMISSIONER ACHTENBERG: It is a
14 relationship business.

15 MR. DUQUE: Right. So, you know, you
16 walk in. The president of the bank or your banker
17 has intimate knowledge of your business because
18 they are in the community. And they make decisions
19 based on the strength of your financials, based on
20 the strength of your request, but also based on
21 that relationship and knowing that business and
22 knowing the history of that business.

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1 Banking in many ways and lending is
2 about risk and is about taking that risk. And that
3 is how people make money. That is how banks make
4 money.

5 You make a value judgment on what that
6 risk is. Many community banks for a long time I
7 think did very well and judged these risks very
8 well and were able to make money. And small
9 businesses were able to benefit. Many of our
10 members, many minority and Hispanic-owned
11 businesses, were able to benefit. As we saw those
12 banks, many of those banks, go away, that really
13 just dried up.

14 Our businesses do really well in SBA.
15 And I think SBA has some great programs for small
16 businesses. And we are beginning to see a lot of
17 those opportunities come back.

18 But even the small community banks that
19 are still around, they -- I mean, I talk to them.
20 And they say that they feel that opportunities are
21 beginning to open up again, that they can begin to
22 take more risks. But for too long, you know, they

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1 felt that federal regulations guiding lending were
2 really restricting them from being able to make
3 what might be deemed a risky loan.

4 You know, as to specific examples, I
5 think that, you know, the greater impact, the
6 greater reach of SBA opportunities for the small
7 business community I think would be great, but then
8 also on the technical assistance side, which is
9 what we do, is educating businesses as to what they
10 need to do to prepare themselves.

11 So a lot of times, the barrier as to
12 these businesses just does not have the resources
13 or know how to put together their financials or
14 understand their financials or put together a loan
15 package to come forward. And so that is a great
16 amount of the work that we do, is helping these
17 businesses prepare for that, because many of them
18 just -- either they have never done it or they have
19 never had to. And so I think that is an issue.

20 COMMISSIONER ACHTENBERG: Could I just
21 ask one follow-up question, Mr. Chairman?

22 CHAIRMAN CASTRO: Sure.

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1 COMMISSIONER ACHTENBERG: How many of
2 your members are women-owned businesses?

3 MR. DUQUE: I would say probably about
4 35 to 40 percent, but, again, that's not scientific
5 because I can't remember the last time we looked at
6 that.

7 COMMISSIONER ACHTENBERG: Let me just
8 say I'm disappointed that we don't have any
9 representation for women-owned businesses, which is
10 the fastest growing sector of small business in the
11 country. But thank you very much.

12 MR. DUQUE: Thank you.

13 COMMISSIONER ACHTENBERG: Thank you,
14 Mr. Chairman.

15 CHAIRMAN CASTRO: Commissioner Kladney,
16 please proceed.

17 COMMISSIONER KLADNEY: Mr. Sandefur,
18 thank you for speaking so kindly of my home state.

19 MR. SANDEFUR: Well, you gave us Mark
20 Twain. So it makes up the difference.

21 COMMISSIONER KLADNEY: I guess I am
22 going to ask my question first, but I am going to

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1 follow with a statement. And then maybe you can
2 answer.

3 I empathize with your position. I
4 guess what I am looking at is, how do you discern
5 good from bad regulation in start-up kind of
6 situations? I was involved in an ancillary manner
7 in a case in the '80s where a doctor had gone and
8 bought an MRI in Nevada. He spent \$2 million. He
9 built a building around the MRI. And as he was
10 getting ready to go into business, one of the
11 hospitals went to the medical board and said, "He
12 needs a certificate of need." He fought that case
13 I think for six years. He wound up going bankrupt.
14 And the Supreme Court finally said, "Yes, you can
15 do it," which is a very similar case to what you
16 filed.

17 So, you know, when you talk about trash
18 falling, the taxis, and things like that, how do
19 you discern a good regulation from bad regulation?

20 One of my concerns is - and people on
21 the panel know it -- I am concerned about every one
22 of these regulatory bodies says if you have a

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1 felony, you can't get a license; if you have this,
2 you can't do this; if you have that, you can't do
3 this. So I need some direction in this regard.

4 Obviously you are more toward we don't
5 need any regulation. I am toward, well, we need
6 some regulation. I mean, if I am going to have a
7 taxi, I think I want to know what I am being
8 charged when I get in the cab, something like that.

9 MR. SANDEFUR: Yes. No, I do not favor
10 no regulation. I think regulations ought to be
11 publicly oriented. That is, they should relate to
12 public safety and health and preventing against
13 fraud, things like that.

14 The problem with the certificate of
15 necessity laws, at least when applied to
16 non-monopolistic, non-public utility industries, or
17 with these occupational licensing abuses that are
18 talked about is that they don't relate to the
19 public in this way.

20 My primary reform if I were the emperor
21 of the world and I could make one reform to these
22 kinds of laws, the first thing I would do would be,

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1 first of all, to remove the application and
2 certificate of necessity laws to any
3 non-monopolistic, non-public utility industry.
4 They have no business being there. These laws were
5 created in the 1880s to regulate railroads and,
6 truly by historical accident, have been applied to
7 things like moving companies.

8 Taxicabs are slightly different,
9 although there I think also they should be
10 abolished, but when it comes to moving companies
11 and so forth on the theory I am not making this up,
12 one of the defenses that was put forward in the
13 Oregon case where we sued that state -- they also
14 repealed their law thanks to our lawsuit -- in that
15 case, one of the theories put forward was that
16 these laws were necessary to prevent the roads from
17 becoming degraded by too many moving trucks driving
18 on the asphalt.

19 Now, we laugh at that, but that can
20 pass muster in a court of law because of the
21 rationale basis test. And when you ask a question
22 of how do we determine, I think the broader

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1 question you have to answer first is, how do we go
2 about finding out how to determine whether these
3 laws are legitimate?

4 And the problem we have in the legal
5 community is that, thanks to precedents dating back
6 70 years, courts apply basically no scrutiny to
7 laws that inhibit people's economic liberties.

8 COMMISSIONER KLADNEY: They're
9 presumed.

10 MR. SANDEFUR: They're presumed
11 constitutionally. And the court has said that we
12 have to negative every conceivable rational basis
13 for the law in order to get it struck down. Now,
14 that is literally impossible. That means I have to
15 not only prove a negative, but I have to imagine
16 what reasons the legislature might have had in mind
17 and prove that those aren't true. And then the
18 judge can come up with his own justification for
19 the law --

20 COMMISSIONER KLADNEY: Do me a favor.

21 MR. SANDEFUR: -- even if I do all of
22 that.

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1 COMMISSIONER KLADNEY: Right.
2 Let's short-circuit this. How do we go about
3 trying -- if we were to make a recommendation, how
4 would we make a recommendation as to -- you know,
5 you referred to the states are doing this, --

6 MR. SANDEFUR: That's right.

7 COMMISSIONER KLADNEY: -- you know, the
8 states. Really, it's the businesses involved in
9 the regulatory body.

10 MR. SANDEFUR: No. It's the states
11 that give them the power to block their own
12 competition that is a problem.

13 COMMISSIONER KLADNEY: Right, right.
14 I'm saying that the state -- the businesses
15 pressure the regulatory body for these kinds of --

16 MR. SANDEFUR: Often they do. You
17 know, it's --

18 COMMISSIONER KLADNEY: But it is
19 the state that authorizes --

20 MR. SANDEFUR: That's right. And if
21 you ask me a specific recommendation, I guess I
22 would have two recommendations just to begin with.

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1 The first one, as I mentioned, is to remove the
2 ability of existing companies to exploit this power
3 by saying existing companies if they do file an
4 objection to a licensing application have to state
5 a public justification.

6 In the Missouri case, we got every
7 application since 2005 to the filing of the
8 lawsuit. And there were 75 applications, about 150
9 objections that had been filed. Every single one of
10 them said the only ground for objection was that it
11 would cause competition. Not a single one of the
12 objections filed stated a public justification.

13 So that's the first thing is, at the
14 very least, licenses should be denied only where
15 there is a public reason. And the second one is I
16 think broader civil rights enforcement, possibly
17 new civil rights legislation, modeled on the
18 Religious Freedom Restoration Act that would
19 require states and localities to meet a heightened
20 standard in order to impose these kinds of
21 restrictions on trade.

22 COMMISSIONER KLADNEY: One more

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1 question, if I can, Mr. Chair. And I'll ask too
2 many questions. It's my problem.

3 MR. SANDEFUR: It's a good habit.

4 COMMISSIONER KLADNEY: Contractors.
5 And this was a total surprise to me. A fellow, I
6 hired him to be the lead guy on my house or
7 whatever. And I encouraged him to go and get a
8 contractor's license after we got done building the
9 house.

10 He went down, studied, took the test,
11 working guy like you were talking about and passed
12 the test. And he was all excited. And then the
13 contractor's board gave him a \$20,000 limit. I
14 mean, you can't build a garage for \$20,000.

15 So is it the same kind of process that
16 you recommended just now? I mean, do you
17 understand what I am saying?

18 MR. SANDEFUR: Yes. I have never heard
19 of such a regulation. That is heinous. But I would
20 say that the legislation I have in mind would
21 impose the same kind of restriction. It would be
22 something that says -- the Religious Freedom

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1 Restoration Act says if you impose a substantial
2 burden on people free exercise, you have to prove
3 that it's necessary in some public sense and that
4 it is really tailored to accomplish that. And that
5 is what these kinds of restrictions should be,
6 should have to satisfy also. If it is a limit on
7 what a person can build or whether they can build
8 at all, it should have to satisfy heightened
9 scrutiny.

10 COMMISSIONER KLADNEY: Thank you.

11 CHAIRMAN CASTRO: The Chair recognizes
12 Vice Chair Thernstrom.

13 VICE CHAIR THERNSTROM: Well, I have a
14 question both for Mr. LaNoue and also for Mr.
15 Sandefur. Mr. Sandefur, I'm curious about kind of
16 the political context here. I have never
17 understood why. And maybe you can explain it to
18 me.

19 I have never really understood why the
20 only people -- why the drive for economic liberty
21 has provoked so little interest in the
22 civil rights community. And, really, the people

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1 who are on board with you are almost all
2 libertarians. Why is this such a small community?
3 This may be an off-the-wall question, but I have
4 never known the answer to this.

5 MR. SANDEFUR: Wow. That kind of
6 stumps me, too. You know, honestly, it is so
7 under-covered by the media, for one thing, that the
8 struggles of small businesses is something that is
9 not really publicized the way that other kinds of
10 civil rights issues are.

11 And so, you know, I remember when I
12 first learned about these issues, when I was in law
13 school -- or right before I went to law school,
14 rather. And, you know, it struck me like a
15 thundercloud. I had never heard of these kinds of
16 restrictions. Most people had never heard of
17 certificate of necessity requirements and things
18 like that.

19 So I think part of it is that the media
20 has failed to cover these problems. And I think
21 because, you know, there are lots of different
22 civil rights problems and barriers to

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1 entrepreneurship. The rapid access to capital is a
2 huge problem. And when you are talking about what
3 seemed like more mundane issues, like getting a
4 license to run a moving company, sometimes it's
5 hard to get people really excited about that.

6 However, I like to emphasize the fact
7 that, you know, these issues were central to the
8 civil rights movement in the '60s. Martin Luther
9 King's march was not just for civil rights but for
10 jobs also. Thurgood Marshall wrote in some Law
11 Review articles that he wrote when he was an
12 attorney that these kinds of racially restrictive
13 barriers to economic opportunity were a serious
14 concern, but he didn't have the time and resources
15 to focus on them. So he did schools instead.

16 So I think it is a shame. And if I
17 could get everybody to care about this, I would.

18 VICE CHAIR THERNSTROM: I find little
19 media attention to the cases that you bring.

20 MR. SANDEFUR: Fortunately, I think
21 that is changing. I think that we have won a lot
22 of these lawsuits and we're getting more attention

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1 to the importance of constitutional protection for
2 economic liberty.

3 Now, the reason why the liberal
4 intellectual elite refuses to pay attention to this
5 is because it threatens one of their sacred cows,
6 which is the New Deal. The New Deal legislation so
7 radically broke with constitutional protections for
8 economic liberty that a lot of the Left sees any
9 kind of effort to protect economic liberty as a
10 threat to the New Deal. And perhaps they are right
11 to be worried about that, but that is still not a
12 justification for completely ignoring these issues
13 and relegating them to this toothless rational
14 basis test that says you have to negative every
15 conceivable basis for the law.

16 I have a forthcoming Law Review
17 article, in fact, where I explain how even the New
18 Deal court didn't say that. The New Deal court
19 itself said plaintiffs should have the opportunity
20 to prove that these laws are unconstitutional. And
21 they are not even being allowed that.

22 VICE CHAIR THERNSTROM: And, Mr.

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1 LaNoue, I don't want you to violate client
2 confidentiality, but can you describe the issue in
3 the Hispanic Chamber of Commerce v. City of
4 Milwaukee case?

5 DR. LANOUE: Yes. The case is publicly
6 filed. And so I wouldn't be violating any
7 confidentiality.

8 The City of Milwaukee did a disparity
9 study. And the results were that it found that
10 African American contractors and women-owned
11 contractors were under-utilized.

12 And it created a goals program that excluded
13 Hispanic contractors. And so the Hispanic Chamber
14 of Commerce and the Native American -- I've
15 forgotten the exact name of the organization, but
16 Native Americans have joined as plaintiffs.

17 And I can't describe the current state
18 of discussions about it, but I have concluded that
19 the disparity study is not valid and the Hispanic
20 Chamber of Commerce and the Native Americans want
21 to go back to a race-neutral program.

22 Milwaukee had a race-neutral program

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1 that by any measure of small business and minority
2 participation was enormously successful. And that
3 is their goal.

4 I will follow up if you'd like, but we
5 get close into privileged knowledge.

6 CHAIRMAN CASTRO: Can I ask a question?
7 Then I'll go to Commissioner Heriot.

8 This is a hypothetical question. So,
9 again, I don't want you to violate any
10 attorney-client privilege if this is something that
11 came up. Had the disparity study shown that
12 Latinos were under-represented and they were
13 included in this program, would the chamber you
14 think still have challenged it and favored a
15 race-neutral version?

16 DR. LANOUE: I really can't speculate
17 on the motives and even the personnel in the
18 Hispanic Chamber of Commerce in Milwaukee. My role
19 as expert doesn't get into their internal views.

20 I was pleased to see -- and it would
21 have been a condition for my participation -- that
22 the outcome they wanted was race-neutral. If all

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1 they had wanted was to be added to the preferred
2 groups, I wouldn't have been expert because the
3 disparity study in my view is not a defensible
4 study.

5 CHAIRMAN CASTRO: And a follow-up to
6 the question that the Vice Chair asked Mr. Sandefur
7 about why this issue may not get as much traction
8 as one might expect. As I read your materials and
9 listened to some of the others as well, you clearly
10 are talking about a disparate impact theory here.
11 You are saying that these rules and these
12 regulations have an adverse impact on minority
13 firms and women firms, African American firms.

14 But that is -- I don't want to put
15 words in folks' mouths but an anathema to some of
16 my conservative colleagues when it comes to issues
17 of employment discrimination or bullying. They
18 want to see disparate treatment. So maybe that is
19 one of the reasons that this is not getting as much
20 traction as one might think because you are really
21 advocating a disparate treatment, even though you
22 are not saying it, a disparate impact perspective,

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1 isn't it?

2 MR. SANDEFUR: Well, I think my answer
3 to that would actually be to turn the tables and to
4 say, why is it that the liberal community cares
5 about disparate impact in everything except when it
6 comes to government regulation.

7 VICE CHAIR THERNSTROM: Also, we are
8 talking about something valued deeply; that is,
9 economic liberty, deeply embedded in the U.S.
10 Constitution and fundamental to the thought of the
11 founders.

12 MR. SANDEFUR: That's right. In fact,
13 if you look -- one of my favorite examples of that
14 is when you look at the Summary Review of Rights of
15 British America by Thomas Jefferson, which was the
16 pamphlet that got him invited to write the
17 Declaration of Independence, one of the things he
18 complains about is the British regulation of the
19 iron industry in the colonies. He complains that
20 it was illegal under British law at that time to
21 make things out of iron in the colonies.

22 You had to take the iron, ship it to

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1 England, and have them make the things and then
2 ship them back in order to protect the jobs of
3 established iron mongers in Britain.

4 VICE CHAIR THERNSTROM: This shouldn't
5 be a left-right issue. I have never understood why
6 it is. Left should be --

7 MR. SANDEFUR: And, to be fair, a lot
8 of our liberal colleagues have been allies with us
9 in our fights for economic liberty and private
10 property rights. For instance, in an eminent
11 domain case I did in Michigan, the ACLU cosigned
12 the brief that I wrote, which is, believe me, the
13 first time that has ever happened at Pacific Legal
14 Foundation. And a lot of the time, we find that we
15 are on the same side with Chambers of Commerce and
16 other organizations for racial minority business
17 owners, precisely because they know - or women.

18 I have a case in Nebraska right now
19 where my client is a female entrepreneur actually
20 located in California. She runs a website that
21 helps advertise homes for sale by owner. Nebraska
22 says she is practicing real estate in Nebraska

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1 without a license because her website includes
2 homes for sale that are located in Nebraska.

3 So we find that we are often allied
4 with these groups, but it has been a recent thing.
5 And they are sometimes hesitant to get on board
6 with us. And I hope that that is changing. And I
7 have reason to believe that it is.

8 CHAIRMAN CASTRO: The Chair recognizes
9 Commissioner Heriot and then Commissioner
10 Achtenberg, then Commissioner Kirsanow.
11 Commissioner Yaki, do you want to ask any
12 questions? I can put you on the list. No? All
13 right. Well, Commissioner Heriot?

14 COMMISSIONER HERIOT: I have just got
15 some minor clarifications here. Mr. Cristofaro, at
16 the end of your testimony, you said the EPA had
17 never lost a case with respect to these panels. I
18 just want to clarify. Were you talking about the
19 same thing Commissioner Kirsanow was talking about,
20 where someone actually sues the EPA and says you
21 should have established such a panel in this case
22 but did not?

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1 MR. CRISTOFARO: We have not lost a
2 case on any aspect of SBREFA or --

3 COMMISSIONER HERIOT: How many cases
4 have you had where someone on the outside brings a
5 lawsuit and their claim is that you have failed to
6 establish such a panel when you should have?

7 MR. CRISTOFARO: That I don't know the
8 answer to that question.

9 COMMISSIONER GAZIANO: And is your
10 experience limited to EPA?

11 MR. CRISTOFARO: Yes. Actually, I
12 should say that --

13 COMMISSIONER GAZIANO: SBREFA applies
14 to many agencies?

15 MR. CRISTOFARO: No, it doesn't.
16 SBREFA, these panel requirements only apply to EPA,
17 OSHA, and the new Consumer Finance Corporation.
18 Well, RFA applies to all agencies, but the
19 amendments, the 1996 amendments, SBREFA amendments
20 in this panel process, only applies to three
21 agencies at this time.

22 COMMISSIONER HERIOT: What kind of

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1 cases were you talking about?

2 MR. CRISTOFARO: We have cases -- first
3 off, I would have to say that small businesses are
4 typically -- it is the case that, you know, a small
5 business is not going to sue EPA. It is the case
6 that, though, that their association would sue EPA.
7 And most small businesses are in associations. And
8 those associations do bring litigation on a rather
9 regular basis.

10 But there were cases, such as the
11 American Truckers Association case in I think 1998
12 or so, where we were sued because it was alleged
13 that we didn't follow the Regulatory Flexibility
14 Act because we were establishing a standard for
15 ambient air. And we didn't.

16 We decided that because it was a
17 standard for ambient air, although there might be
18 implications for small businesses coming down the
19 road because eventually the nation will have to
20 attain that standard, small businesses were not
21 subject to that particular action. And we won that
22 case. It was a Supreme Court case, actually.

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1 So these cases are brought in different
2 venues. I'm actually not an attorney. So I am not
3 involved in defending the agency. I am involved in
4 issuing regulations.

5 COMMISSIONER HERIOT: You also said
6 that there is no requirement that the
7 recommendations of these panels be followed.

8 MR. CRISTOFARO: Correct.

9 COMMISSIONER HERIOT: And I think you
10 gave like 30 as the number that --

11 MR. CRISTOFARO: Roughly, yes.

12 COMMISSIONER HERIOT: -- you have had
13 over the years?

14 MR. CRISTOFARO: Yes.

15 COMMISSIONER HERIOT: How many of those
16 have the administrator not --

17 MR. CRISTOFARO: Sometimes the
18 recommendations are -- that is difficult. I mean,
19 I don't know. I mean, we do not keep a record and
20 say that, you know, this was followed by the
21 administrator or there were 16 recommendations on
22 this panel and 14 of them were followed and 2 were

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1 not. We just do not do that.

2 I would say that there have been many
3 cases where we have tailored our regulations
4 to -- typically what we tend to do is we tailor the
5 size requirements. So we would say that -- you
6 know, we are interested in controlling pollution
7 and protecting public health and the environment.

8 So if we can achieve those objectives,
9 typically there might be thousands of sources
10 contributing to an environmental problem. And by
11 focusing on the larger sources, sometimes we sort
12 of have like an 80/20 rule. If you can get 80
13 percent of the benefits by focusing on the 20
14 percent of the top leaders, then maybe that's the
15 desirable thing to do. So we generally kind of
16 defy that logic in this panel process.

17 We often give special -- to the extent
18 that we are authorized by Congress, if we can give
19 extensions in terms of compliance times, we will
20 try to do that in certain cases. We have had some
21 rules that have hardship provisions in them.

22 And we also have a requirement to

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1 develop compliance assistance tools. So in certain
2 cases, we will go out of our way to undertake
3 outreach to do compliance assistance.

4 CHAIRMAN CASTRO: The Chair
5 recognizes -- one more follow-up? Okay.

6 COMMISSIONER HERIOT: I just have a
7 little question for Mr. Sandefur.

8 CHAIRMAN CASTRO: All right. Go ahead.

9 COMMISSIONER HERIOT: And that is that
10 you mentioned that you are in a position sometimes
11 of having to prove multiple negatives. Do courts
12 ever apply the same logic in McDonnell Douglas v.
13 Green and say, "Okay. The city needs to come
14 forward with their reasoning?" and you just have to
15 hit that one back? I mean, that is a limited
16 solution to that problem because, you know, you
17 have got cases like -- what was it? -- St. Mary's
18 Honor Center, which indicates that if some other
19 reason comes up during litigation, you're going to
20 have to hit that one back, too. Do they ever apply
21 that kind of logic?

22 MR. SANDEFUR: Well, keep in mind

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1 that in the cases that we are talking about, when
2 it comes to businesses, it is only constitutional
3 law that applies. There is no statutory basis.
4 And so the courts then apply the ordinary rational
5 basis test. And there is uncertainty in the case
6 law as to whether that requires the government to
7 provide a justification for the law.

8 Veitch Communications is the notorious
9 case that says --

10 COMMISSIONER HERIOT: It doesn't
11 say anything about the -- this is just the judicial
12 gloss. So you might as well have a judicial gloss
13 of that sort on the Constitution.

14 MR. SANDEFUR: I agree with that. And
15 the Veitch Communications case says no, the
16 government -- in fact, it says facts are irrelevant
17 in these cases, but most cases have not gone that
18 far. Mostly the Supreme Court has said there has
19 to be some fit between an identifiable government
20 interest and the law that is at issue.

21 But, of course, whenever I sue these
22 states over these laws, they immediately quote all

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1 the Veitch Communications language and even
2 get -- this is a horrible thing -- even get
3 dismissals of rational basis challenges prior to
4 discovery, which is not justified by the Federal
5 Rules of Civil Procedure, but they get it all the
6 time because of this errant language in some
7 Supreme Court cases that suggests that rational
8 basis means as long as the judge can close his eyes
9 and imagine something right with the statute, it is
10 constitutional.

11 So the bottom line answer is it is not
12 really clear. And the Supreme Court really needs
13 to clarify whether rational basis means a really
14 rational basis or whether it means anything goes,
15 rubber-stamp for the government, which is what a
16 lot of the cases do say.

17 COMMISSIONER HERIOT: In response to
18 Chairman Castro, I assumed that you would take the
19 same position on all of this if there were no
20 racial aspect to it, that this is simply a question
21 of entrepreneurialship and not just disparate
22 impact.

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1 MR. SANDEFUR: That's right.

2 COMMISSIONER HERIOT: That is an
3 interesting angle.

4 MR. SANDEFUR: That's right. The
5 disparate impact is caused by the fact that any
6 time the government has the authority to grant or
7 withhold economic favors from one group and give
8 all of those favors to another group, the people
9 who are going to benefit from that are the most
10 politically adept and the most well-financed, not
11 the most morally deserving. And that fact is true
12 across the board, throughout the regulatory welfare
13 state.

14 No matter how well-intentioned your
15 government redistribution program is, it is going
16 to fall into the hands of those with the best
17 lobbyists, not into the hands of those who deserve
18 it most.

19 CHAIRMAN CASTRO: The Chair recognizes
20 Commissioner Achtenberg. Then it will be
21 Commissioner Kirsanow and Commissioner Gaziano.

22 COMMISSIONER ACHTENBERG: Welcome to

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1 the political system. Mr. Alford?

2 MR. ALFORD: Yes, ma'am?

3 COMMISSIONER ACHTENBERG: I wanted to
4 talk a little bit about the Section 3 issues that
5 you raised. I find myself to have a good bit of
6 sympathy for some of the issues that you raised
7 with regard to the enforcement of Section 3,
8 although I believe you slightly overstate the case
9 in that I once had responsibility for the
10 enforcement of Section 3. And I like to think
11 within the bounds of the law, which only required
12 best efforts, unfortunately, as you and I both
13 know, I tried to make Section 3 worth its salt.

14 So I do have some sympathy for the
15 notion that if there were to be an individual right
16 of action, that that would beef up Section 3
17 substantially. And I'm thinking.

18 Are there other ways in which if HUD
19 were so inclined, they might be able to make
20 Section 3 real for the residents who live
21 surrounding public housing who were meant to
22 benefit from some of the financial investment that

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1 HUD makes in not only public housing but assisted
2 housing of various kinds?

3 MR. ALFORD: Section 3 is so simple.
4 You have landscaping. You have painting. You have
5 janitorial services. You have day care centers.
6 You have accounting done, data processing. Teach
7 the tenants to do it and hire them. And then when
8 they are employed, place them in regular jobs out
9 in the community.

10 Willie Brown had probably the best
11 Section 3 program in the country. And a week after
12 he turned out of his office, they shut everything
13 down, shut it down. Smoot Construction, one of our
14 larger construction companies, had a model program
15 in Columbus, Ohio. And then Secretary of HUD
16 Cisneros came out at Smoot's request. And he
17 showed what he was doing with single parent ladies,
18 mothers, putting them in the construction business,
19 putting them in the landscaping business, bought
20 computers to teach them how to do accounting for
21 the Housing Authority. They shut that down.
22 Cisneros never even talked about it. It's

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1 conspiratorial, really.

2 And what one guy in the Housing
3 Authority in New Orleans told me years ago, "You
4 want us to shrink. You want us to get these people
5 working and out of public housing. Well, what
6 about my job?"

7 And I replied, "I don't think you
8 should have a job doing this. It shouldn't exist"
9 if America is free and we are running a free
10 enterprise.

11 So it is very simple. It is the
12 simplest way to go. And it is a tragedy.

13 I hope I answered your question.

14 COMMISSIONER ACHTENBERG: I mean,
15 again, the best efforts requirement I always found
16 was a little modest, but if there were a more
17 robust requirement, that would be helpful, a) and
18 b) if there were to be an individual right of
19 action, as you were recommending, I think that
20 would be of significant help as well.

21 Anyone charged with enforcement of
22 Section 3 would be helped substantially by the

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1 crowd at the door, at the courthouse door, you
2 know, trying to get in. So I don't disagree with
3 your assessment that an individual right of action
4 would be very helpful in strengthening the hand of
5 the person inside of HUD who has the responsibility
6 for trying to make Section 3 really work. So I do
7 agree with that.

8 I don't necessarily agree with your
9 characterization of the activities of Secretary
10 Cisneros. I would have been his Fair Housing
11 Assistant Secretary at that time. And I completely
12 disagree with your characterization of my
13 activities with regard to the enforcement of
14 Section 3. But, nonetheless, I think you brought
15 on a good point with regard to the individual right
16 of action.

17 MR. ALFORD: Nothing personal intended.

18 COMMISSIONER ACHTENBERG: No, no.

19 And nothing personal intended --

20 MR. ALFORD: We had a Section 3
21 specialist. The Chamber hired one to go to cities
22 and to teach Section 3 and to show people how to

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1 implement Section 3. One day, Secretary Cisneros
2 offered a \$130,000 job to my specialist, an intern
3 at Harvard University, and took him away from me
4 because he was doing his job well.

5 COMMISSIONER ACHTENBERG: Well, I can
6 understand your concern.

7 Thank you, Mr. Chairman.

8 CHAIRMAN CASTRO: The Chair recognizes
9 Commissioner Kirsanow.

10 COMMISSIONER KIRSANOW: I had one more
11 for Mr. Sandefur and one for Professor LaNoue.

12 Mr. Sandefur, this might be outside
13 your area of expertise. It certainly is outside of
14 mine. I spent I think a decade one semester in
15 antitrust law. But if you have a certificate of
16 need, a number of -- have you dealt with nursing
17 homes', for example, certificates of need?

18 MR. SANDEFUR: Not nursing homes, no.

19 COMMISSIONER KIRSANOW: Okay. With
20 nursing homes, for example, it is the same dynamic
21 where you have a number of nursing homes in an area
22 will sometimes challenge a new nursing home's

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1 desire to expand, have more bed space. Could that
2 conceivably be either Section 1 or Section 2,
3 Sherman Act violation if they band together like
4 that and assert that that particular nursing home
5 really doesn't need to expand?

6 MR. SANDEFUR: There have been efforts
7 to use the Sherman Act against certificate of
8 necessity regimes. In fact, the Federal Trade
9 Commission sponsored an effort to use the Sherman
10 Act against moving industry cartels under
11 certificate of necessity laws. Unfortunately, of
12 course, the state action doctrine bars a lot of
13 that, which is the completely made-up idea that
14 government should be immune from the Sherman Act,
15 which I see no basis for in the statute itself.

16 And I would also advocate its immediate
17 abolition and allow the Sherman Act to be used
18 against that entity, which is most likely to create
19 coercive and exclusive monopolies in favor of
20 politically well-connected people. And that is the
21 government. Obviously that is going nowhere.

22 So there have been efforts to use it.

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1 And it hasn't really been an effective tool.

2 COMMISSIONER KIRSANOW: Okay.

3 Thank you.

4 And, Professor LaNoue, you have been
5 expert witness across the country. So I am
6 wondering if what I observe anecdotally might be
7 something that is more broadly applied. And that
8 is, where you have a DBE in a particular locality,
9 very often you have got a single entity that maybe
10 early on in the DBE process, 20, 30, 40 years ago,
11 or simply right after Richmond v. Croson became the
12 go-to DBE for that political subdivision. And from
13 then on, it seems to be that they are the one and
14 no other DBEs seem to be able to develop and
15 flourish as a result.

16 Do you see that happening in your
17 practice?

18 DR. LANOUE: I have seen it happening.
19 And it also I think goes to Chairman Castro's
20 question. It is easy to take a position and say,
21 "I align myself with DBEs" or "I align myself with
22 non-DBEs possibly hurt by these programs," but when

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1 you examine them more carefully, within the DBE
2 community, there are differences between large DBEs
3 that are well-established that virtually get all of
4 the work. And there are differences in various
5 specialties so that in some specialties, DBEs are
6 almost always going to get all the work and various
7 specialties will get very little because you can
8 fulfill the goals that way. And there are
9 differences among various groups, which are
10 advantaged or disadvantaged because, after all, a
11 prime contractor can have a prejudice against a
12 particular minority group or women, never employ
13 them but still meet the goals.

14 So what I am saying is that we just
15 don't have enough information. The federal
16 government I think has been woefully unwilling to
17 actually analyze these programs.

18 When we made a request for the uniform
19 reports that every recipient submits
20 for the 50-state highway programs to the federal
21 government, FOIA requests, they weren't able to
22 comply. We had to go to each state to get them.

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1 Now, that suggests to me that they
2 don't ever analyze them. They don't take them
3 seriously. This is a document that takes a while
4 to compile. And it has really very detailed data
5 about what is going on.

6 So my hope would be this Commission
7 would say that the government needs to do more
8 analysis of the consequences of these programs, who
9 benefits, who doesn't, and probably needs to
10 strengthen the over-concentration requirement that
11 is now only a suggestion and, as I have said, only
12 Rhode Island has ever done it. They did find
13 massive over-concentration.

14 And when you do that, then you will add
15 to leveling the playing field and not just create
16 DBEs and non-DBEs fairly but treat specialists and
17 firms and groups within the DBE community more full
18 than I think is now the case.

19 COMMISSIONER KIRSANOW: There was a
20 flurry of fraud cases immediately after Richmond v.
21 Croson where you had certain DBEs acting as front
22 groups for majority-owned companies. Has that

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1 diminished?

2 DR. LANOUE: I don't know the answer,
3 but I do know that there was a very substantial one
4 brought in New York City where the owner accused of
5 this actually committed suicide.

6 COMMISSIONER KIRSANOW: Mr. Alford, you
7 were shaking your head.

8 MR. ALFORD: Yes. Fronting, as it is
9 called, is flourishing today as it ever has been.
10 And that was, the company, the case you're talking
11 about, he was a vice president of a San Francisco
12 group. In fact, Dianne Feinstein's husband owns
13 that construction company, is the CEO. But no.
14 Fronting is very big.

15 And also may I say DBE refers to small
16 business. So when you are talking about prime
17 contracting, you are not referring to DBEs. That
18 is just a regular business. We have had successful
19 DBEs get kicked out of the program because they
20 were successful.

21 And I believe the standard today is
22 maybe \$35 million a year on the average of 3 years.

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1 You exceed \$35 million a year, you are grown up.
2 You are out of the program.

3 COMMISSIONER KIRSANOW: Thank you.

4 MR. DUQUE: The issue of fronting and
5 fronts, unfortunately, this is still happening.
6 And it is still a very common thing. We see many
7 cases in Chicago.

8 I want to believe that businesses are
9 educated and aware of how severe of an action that
10 this is. And I want to believe that there are less
11 people willing to go about this way because there
12 have been so many high-profile cases. And I want
13 to believe and I do believe that there is more
14 enforcement in these areas.

15 So fronting hurts all of us. It hurts
16 us because it gets to the credibility. It hurts the
17 credibility of the program.

18 As to DBEs and prime contracts and
19 subcontracts, there are a couple of things.
20 One of the things that we see specifically in
21 Illinois that we have been fighting against and
22 that I think that we have made some progress on is

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1 to reach the goals, a lot of times what they do is
2 there is an active suppression of a business'
3 ability to grow, whether this is done on behalf of
4 the actual transportation departments or on some of
5 the large companies. Actually, I believe it's the
6 prime contractors.

7 You have a 20 percent goal. You will
8 spread that 20 percent goal among 10 companies.
9 And those 10 companies get such a small percentage
10 of the work. Those companies, they are getting a
11 small percentage of the work. But in my opinion,
12 these companies should have a larger opportunity so
13 that they can grow, so that they can get the
14 expertise, so that they can participate as a prime
15 contractor, maybe smaller jobs.

16 So if a company can do on the
17 transportation side maybe a \$5 million job or a \$10
18 million job and be in the driver's seat and run
19 that contract and get the experience of putting
20 together and running the entire group, in our
21 opinion, that is the goal. And so the more of that
22 that you have, if you graduate, that is a good

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1 thing because you have grown and you have used the
2 program effectively.

3 You are still at a disadvantage against
4 some of these larger companies, like Turner and
5 Bechtel and others. And we would argue that there
6 is still also a need for programming beyond the
7 graduation point. And some areas are doing it.
8 The city of Chicago is doing something related to
9 small business that is race-neutral. But I think
10 we want to see these companies participate more in
11 the prime level of these DBEs.

12 MR. ALFORD: City of Chicago. We took
13 on United Airlines that was doing a billion-dollar
14 project in Indianapolis. And they were going to
15 use fronting. They admittedly said that they were
16 going to use fronting. And we took them on and won
17 that. It changed Indianapolis around.

18 Today -- that was maybe 20 years ago.
19 Today there are more black construction dollars
20 being earned in Indianapolis than Chicago, a city
21 six times its size, because it's the real deal:
22 Indianapolis. And the majority of the numbers

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1 coming out of Chicago are fake.

2 How can a city with a 25 percent
3 minority goal after Mayor Daly -- you go back to
4 old man Daly, 25 percent. But, yet, they can't
5 have a construction company the size of
6 construction companies in Columbus, Ohio or
7 Indianapolis. It doesn't make sense. It's
8 useless, their program.

9 CHAIRMAN CASTRO: Commissioner Gaziano?

10 COMMISSIONER GAZIANO: Thank you. And
11 there will be a question at the end of this for Mr.
12 Sandefur, but I am going to respond --

13 (Laughter.)

14 CHAIRMAN CASTRO: Duly noted. Duly
15 warned.

16 COMMISSIONER GAZIANO: First, a little
17 bit on the Chairman's challenge that we
18 conservatives have expressed concern about improper
19 uses of disparate impact explain ourselves as to
20 why we should care about this type of disparate
21 impact.

22 First, though, I would note that in

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1 your exchange with Commissioner Heriot, we ought to
2 all concern ourselves with the denial of a civil
3 right. If it didn't have a disparate impact, it
4 just might not be within our jurisdiction.

5 Now, as to our jurisdiction and why we
6 ought to care about this disparate impact, there is
7 a difference between when a disparate impact occurs
8 out in the real world, such as employers who want
9 to conduct background checks or have a high school
10 diploma, whether the federal government or any
11 government, for that matter, has the constitutional
12 power to force them to eliminate a disparate
13 impact. But we always should care, in this
14 Commission and elsewhere, if the government creates
15 the disparate impact, particularly if the
16 government creates a pernicious disparate impact.
17 And it is very much within our jurisdiction to
18 study, comment, recommend ways to eliminate
19 government-caused pernicious disparate impacts. So
20 I am 100 percent consistent, never inconsistent in
21 anything in my --

22 (Laughter.)

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1 COMMISSIONER GAZIANO: The record is
2 now clear on that.

3 My final question, then, is, with
4 regard to some of the occupational license,
5 medallion regimes, particularly the project labor
6 agreements that Mr. Alford talked about, it is
7 certainly my understanding -- and if either of you
8 two know -- that the origin of some of them was not
9 benign but was -- Davis-Bacon, for example, was
10 founded in intentional racism. And it only
11 masqueraded as some other public regarding.

12 So I am not sure how common the racist
13 origin of some of these licensing regimes are, but
14 they were by established people many, many years
15 ago. And the established groups many, many years
16 ago tended not to be the minorities.

17 Are you aware of other examples of this
18 sort of intentionally racist origin of some of
19 these occupational licensing?

20 MR. SANDEFUR: Yes. I would say that
21 the history of occupational licensing is rife with
22 such abuses. Occupational licensing really took

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1 off in this country in the 25 years or so after the
2 Civil War. And one of the primary purposes of them
3 was to exclude primarily the freed slaves but,
4 really, any other racial group.

5 I am from California. We never had
6 slavery in California. The closest thing we had to
7 slavery was the treatment of the Chinese immigrants
8 in California. And when you read, which is, by the
9 way, very hard to do because it is hard to get
10 these records, but when you get the records of the
11 California Constitutional Convention of 1878 to
12 '79, which generated the constitution we still
13 operate under in California, it is 3 volumes of the
14 most disgusting racist tirades that you will ever
15 read.

16 And one of the primary purposes of the
17 convention was to devise occupational licensing and
18 other restrictions under the guise of public safety
19 to exclude the Chinese laborers from any business.
20 They just barely avoided writing a constitution
21 that would have prohibited any corporation from
22 hiring a Chinese person on pain of forfeiture of

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1 assets. Instead, they adopted occupational
2 licensing regimes.

3 In my written submission, I talk about
4 Yick Wo v. Hopkins, which is the most notorious
5 Supreme Court case on the abuse of occupational
6 licensing laws for racist reasons.

7 Unfortunately, most lawyers today are
8 not taught that this is an occupational licensing
9 case. This is a case about economic liberty.
10 They're taught that it is about racism. And it is.

11 But if you take a step back, what
12 happened with San Francisco passed the licensing
13 law for laundries, which were almost all run by the
14 Chinese, that, for one thing, imposed very
15 restrictive requirements on laundry facilities and,
16 secondly, allowed officials unreviewable discretion
17 at their will to grant or withhold licenses in
18 order to exclude minorities.

19 And the history of this is rife.
20 I would recommend that the Commission look at the
21 work of Professor David Bernstein from George Mason
22 University, who is the nation's leading expert on

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1 the abuse of licensing laws for racist purposes.

2 CHAIRMAN CASTRO: Well, that brings us
3 to the conclusion of our panel. I want to thank
4 each of the panelists for your contributions today.
5 This was a very informative panel. We
6 appreciate --

7 COMMISSIONER YAKI: Commissioner?
8 Commissioner? I have been waiting.

9 CHAIRMAN CASTRO: All right. You never
10 responded. Go ahead. Ask your question,
11 Commissioner Yaki.

12 COMMISSIONER YAKI: Well, I'm just
13 going to say I thank you all. Thank the panel for
14 their remarks. I am glad that we closed
15 down -- since I was a member, as was Commissioner
16 Achtenberg, of the Board of Supervisors, whose
17 forbearers were the ones who enacted the draconian,
18 insane, and utterly racist law. We are proud to be
19 descendants of that body but with a little more
20 enlightenment.

21 The only comment I wanted to make about
22 this is that I found this all very interesting, but

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1 to me, what was lacking was a recognition of some
2 of the areas where we need to be looking further.
3 And I think that one of the things that -- I heard
4 what was said about the contracting set-asides,
5 what have you. Part of me believes that while this
6 is a lack of effective government distortion of
7 these laws that results in the disgruntlement by
8 people in the contracting community, it seems to
9 me, I don't blame them.

10 And I think that one of the biggest
11 areas that we need to look at in the future on
12 these sorts of issues is in the area of finance,
13 where we saw in the - bailout and what have you,
14 that most of the gigantic lion's share of the
15 transactions are performed ostensibly to buy, sell,
16 and otherwise deal with the assets of the companies
17 who were desperately trying to keep from blowing up
18 our economy in 2009-2010.

19 I think on that, that the ability of
20 minority firms to participate at the trading level
21 of options, swaps, and other things that
22 essentially the U.S. taxpayer was funding was

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1 almost nonexistent and why in Dodd-Frank, they put
2 in the Office of Minority and Women Businesses and
3 not just for various trade institutions within
4 Treasury and other financial bodies but to also
5 deal with the fact that Wall Street has continued
6 to be an extremely exclusive and racially polarized
7 community. And I hope that in the future, we can
8 take a look at that.

9 But that was just my statement and also
10 to say that, also to correct one thing that the
11 last speaker said. In California, perhaps it
12 wasn't the direct work of the California government
13 per se, but I dare say that there are a fair number
14 of indigenous people to California who were held in
15 slavery, albeit it by the -- it was before
16 Westerners came and took over California.

17 MR. SANDEFUR: Very fair point.

18 CHAIRMAN CASTRO: Thank you,
19 Commissioner Yaki. I also want to thank Lenore
20 Ostrowsky and Tim Fay from our staff for putting
21 together today. And I want to thank Pam Dunston
22 and her staff on the logistics of the event. We

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1 appreciate all of your hard work.

2 Also, the record for this briefing
3 report is going to remain open for the next 30
4 days. If panelists or members of the public would
5 like to submit materials, they can either do it by
6 mailing them to us at the U.S. Commission on Civil
7 Rights, Office of the Staff Director, 1331
8 Pennsylvania Avenue, Northwest, Suite 1150,
9 Washington, D.C. 20425 or via email to
10 publiccomments@usccr.gov. Please be advised that
11 all submissions to the Commission's public comments
12 are part of the public record.

13 If you submit a comment, please
14 indicate if any portion of your submission should
15 be kept private. Unless otherwise specified, the
16 content of submissions is a matter of public
17 record.

18 It is now 11:33. And this portion of
19 our meeting is adjourned. Thank you, everybody.
20 And, Commissioners, we will take a five or
21 ten-minute break. And then we will come back for
22 our business meeting.

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(Whereupon, the above-entitled matter
was concluded at 11:33 a.m.)