

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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III. Adjourn Meeting ..... 120

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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 negate 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.)