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Before NIEMEYER and MOTZ, Circuit Judges, and JAMES A. BEATY, JR., Chief United States District Judge for the Middle District of North Carolina, sitting by designation.

ARGUED: Ralph William Kasarda, Jr., Pacific Legal Foundation, Sacramento, California, for Appellant. Christopher Grafflin Browning, Jr., North Carolina Department of Justice, Raleigh, North Carolina, for Appellees. ON BRIEF: Kevin Van Parsons, Smith, Parsons & Vickstrom, PLLC, Charlotte, North Carolina; James S. Burling, Sharon L. Browne, Pacific Legal Foundation, Sacramento, California, for Appellant. Roy Cooper, Attorney General of North Carolina, John F. Mad-drey, Assistant Solicitor General, Tiare B. Smiley, Special Deputy Attorney General, Elizabeth Leonard McKay, Special Deputy Attorney General, North Carolina Department of Justice, Raleigh, North Carolina, for Appellees. Joshua Civin, NAACP Legal Defense & Educational Fund, Inc., Washington, D.C.; John Payton, Director-Counsel, Debo P. Adegbile, Matthew Colangelo, Joy Milligan, NAACP Legal Defense & Educational Fund, Inc., New York, New York, for NAACP Legal Defense and Education Fund, Inc., Amicus Supporting Appellees.

OPINION

This case arises from the attempt by the people of North Carolina and their elected representatives to end racial and gender-based discrimination in state highway construction subcontracting. The State's statutory scheme-the product of extensive study and refinement in response to developments in federal law-requires prime contractors to engage in good faith efforts to satisfy participation goals for minority and women subcontractors on state-funded projects. Through these nonmandatory, project-specific participation goals, the State seeks to provide a fair opportunity for all subcontractors to compete for public work.

Denied a contract because of its failure to demonstrate good faith efforts to meet these participation goals, a prime contractor brought this action, asserting that the goals violate the Equal Protection Clause, and seeking injunctive relief and money damages. After extensive discovery and a bench trial, the district court held the challenged statutory scheme constitutional both on its face and as applied. The contractor appeals.

We do not believe that the State met its burden of proof in all respects. But we agree with the district court that the State produced a strong basis in evidence justifying the statutory scheme on its face, and as applied to African American and Native American subcontractors, and that the State demonstrated that the scheme is narrowly tailored to serve its compelling interest in remedying discrimination against these racial groups. Accordingly, for the reasons that follow, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I.

We begin with a summary of the statutory scheme and the litigation at issue here.

A.

In 1983, the North Carolina General Assembly enacted a statute setting forth a general policy promoting the use of “small, minority, physically handicapped and women contractors” in State construction projects. N.C. Gen.Stat. § 136-28.4 (1983). The statute directed the North Carolina Department of Transportation (“the Department”) and other State agencies to “encourage and promote” this policy. *Id.* In 1989 and 1990, the legislature amended section 136-28.4 to set specific participation goals on State transportation construction contracts, first for minority-owned businesses (10 percent) and then for women-owned businesses (5 percent). N.C. Gen.Stat. § 136-28.4(b) (1990). The Department promulgated and implemented regulations pursuant to section 136-28.4 titled “Minority Business Enterprise and Women Business Enterprise Programs for Highway and Bridge Construction Contracts” (collectively “the Program”). 19A N.C. Admin. Code 2D.1101 (1997). The North Carolina statutory scheme largely mirrored the federal Disadvantaged Business Enterprise (“DBE”) program, with which every state must comply in awarding highway construction contracts that utilize federal funds. ¹ For example, as in the DBE program, a prime contractor in North Carolina would be excused from the specific subcontracting participation goals by demonstrating good faith efforts to attain such goals. See *id.* at 2D.1110; 49 C.F.R. § 26.53 (1999).

In 1991, a North Carolina prime contractor challenged in state court the constitutionality of section 136-28.4. See *Dickerson Carolina, Inc. v. Harrelson*, 443 S.E.2d 127 (N.C.Ct.App.1994), appeal dismissed, 448 S.E.2d 520 (N.C.1994). The contractor relied on City

of *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989), which affirmed the principle that courts must apply strict scrutiny to all race-conscious legislation. In *Croson* the Supreme Court recognized that “[i]t is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.” *Id.* at 492. The Court held, however, that to remedy such discrimination through race-conscious measures, a governmental entity must identify with “some specificity” the racial discrimination it seeks to remedy and present a “strong basis in evidence for its conclusion that remedial action [is] necessary.” *Id.* at 500, 504 (internal quotation marks omitted). ² In response to the *Dickerson* lawsuit, the State suspended operation of section 136-28.4.

The North Carolina General Assembly then commissioned a national research and consulting firm, MGT of America (“MGT”), to study the State’s transportation construction industry. In 1993, MGT completed that study, which concluded that North Carolina minority and women subcontractors suffered from discrimination in the road construction industry and were underutilized in State contracts.

After receiving the 1993 study, the General Assembly directed the Department to reimplement the Program to achieve the goals of section 136-28.4. The Department adopted various changes that the 1993 study suggested, but it set the same overall percentage goals for participation by minority and women subcontractors. Nevertheless, in 1994 the Court of Appeals of North Carolina dismissed as moot the pending legal challenge to the statute in *Dickerson*, 443 S.E.2d at 132.

In 1998, the General Assembly commissioned MGT to update the 1993 study. The resulting 1998 study concluded that minority and women subcontractors remained underutilized in state-funded road construction.

B.

Four years later, in October 2002, the Department sought bids on a project to relocate a road in Iredell County, North Carolina. Pursuant to the Program, as reimplemented in 1993, the Department set participation goals for minority and women subcontractors of 10 percent and 5 percent, respectively. H.B. Rowe Co., Inc. (“Rowe”), a general contractor owned and operated by a white male, submitted the lowest bid on the project. Rowe’s bid included 6.6 percent women subcontractor participation, but no minority subcontractor participation. The Department

rejected Rowe's bid in favor of a slightly higher bid, which included 9.3 percent women subcontractor participation and 3.3 percent minority subcontractor participation.

The Department denied Rowe the contract because Rowe failed to demonstrate good faith efforts to attain the pre-designated levels of minority participation on the project. At the time of Rowe's submission, assertedly documenting its good faith efforts, it was one of only 13 submissions that the Department rejected. These 13 rejections constituted 1.5 percent of the 878 good faith efforts submissions that the Department had considered.

The Department determined that, with respect to good faith efforts, Rowe's submission contained discrepancies in the number of minority subcontractors Rowe solicited, did not demonstrate solicitation of enough minority subcontractors to allow for consideration of a fair number of quotes, did not adequately describe the subcontracting work available for the Iredell project, and evidenced no strategy for meeting the Department's participation goals. Rowe unsuccessfully appealed the denial to the State Highway Administrator.

In April 2003, Rowe filed this action in federal district court against the Department and several State officials, including Governor Michael F. Easley and Chief Engineer-Operations W.S. Varnedoe [3](#) in their official capacities, and Secretary of Transportation W. Lyndo Tippet and State Highway Administrator Len A. Sanderson in their official and individual capacities. Alleging that the statute and the defendants' actions in administering the Program violated Rowe's rights under the Equal Protection Clause of the Fourteenth Amendment, Rowe challenged the constitutionality of section 136-28.4 on its face and as applied. (Rowe also alleged a violation of 42 U.S.C. § 1981 (2006), which Rowe has abandoned on appeal.) Rowe sought a declaratory judgment that the statutory scheme was invalid, an injunction against its continued administration, and compensatory and punitive damages.

C.

In 2004, at the State's request, MGT prepared and issued its third study of subcontractors employed in North Carolina's highway construction industry. As detailed within, the 2004 study marshaled a wealth of evidence to conclude that disparities in the utilization of minority subcontractors persisted. In response to this study, the General Assembly substantially amended section 136-28.4, and the Governor signed the amended statute into law on August 27, 2006. The new statute modified the previous statutory scheme in five important respects.

First, the amended statute expressly conditions implementation of any participation goals on the findings of the 2004 study. Section 136-28.4, as amended, authorizes remedial action only in instances in which the study “show [s] a strong basis in evidence of ongoing effects of past or present discrimination that prevents or limits disadvantaged minority-owned and women-owned businesses from participating” as subcontractors in state-funded projects “at a level which would have existed absent such discrimination.” N.C. Gen.Stat. § 136-28.4(b) (2010). The amended statute also requires that the Department, “to the extent reasonably practicable, incorporate narrowly tailored remedies identified in the [2004] Study.” Id. § 136-28.4(b1).

Second, the amended statute eliminates the 5 and 10 percent annual goals set forth in the predecessor statute. Instead, as amended, the statute simply requires the Department to “establish annual aspirational goals, not mandatory goals, □ for the overall participation in contracts by disadvantaged minority-owned and women-owned businesses □ [that] shall not be applied rigidly on specific contracts or projects.” Id. The statute further mandates that the Department set “contract-specific goals or project-specific goals □ for each disadvantaged minority-owned and women-owned business category that has demonstrated significant disparity in contract utilization” based on availability, as determined by the study. Id.

Third, the amended statute narrows the definition of “minority” to encompass only those groups that have suffered discrimination. The statute had previously defined “minority” to include, among others, African Americans, Hispanic Americans, Portuguese Americans, Asian Americans, American Indians, and Alaskan Natives. See N.C. Gen.Stat. § 136-28.4(c) (1989) (incorporating definition of “minority” contained in 49 C.F.R. § 23.5(i) (1989)). The amended statute replaces this list by defining “minority” as “only those racial or ethnicity classifications identified by [the] study □ that have been subjected to discrimination in the relevant marketplace and that have been adversely affected in their ability to obtain contracts with the Department.” N.C. Gen.Stat. § 136-28.4(c)(2) (2010).

Fourth, the amended statute requires the Department to reevaluate the Program over time and respond to changing conditions. Accordingly, the Department must conduct a study similar to the 2004 study at least every five years. Id. § 136-28.4(b). The Department must then promulgate rules “consistent with findings made in the □ subsequent studies,” id. § 136-28.4(b1), and must report to the General Assembly after the release of each study “for the purpose of determining whether the provisions of [the statute] should continue in force and effect,” id. § 136-28.4(d).

Finally, the amended statute contains a sunset provision. As amended in 2006, the statute was set to expire on August 31, 2009. N.C. Gen.Stat. § 136-28.4(e) (2009). The General Assembly subsequently extended the sunset provision to August 31, 2010. N.C. Gen.Stat. § 136-28.4(e) (2010).

Several aspects of the Department-run Program remain unchanged. For example, a prime contractor that does not meet project-specific goals may still demonstrate compliance by making good faith efforts to solicit minority and women subcontractors. 19A N.C. Admin. Code 2D.1110 (2010).

In evaluating whether a bidder has made good faith efforts, the Department considers, inter alia, whether the bidder “[s]olicit[ed] [minority and women subcontractors] through all reasonable and available means” and allowed sufficient time for them to respond; followed up on these solicitations; selected work to be performed by minority and women subcontractors to increase the likelihood of meeting Program goals; provided minority and women subcontractors with adequate information about the “plans, specifications, and requirements of the contract”; negotiated in good faith with minority and women subcontractors; accepted quotes from minority and women subcontractors in the absence of sound reasons to reject them; and assisted minority and women subcontractors in obtaining bonding, lines of credit, or insurance. See 49 C.F.R. § 26 app. A, cited in 19A N.C. Admin. Code 2D .1110.

As discussed above, the good faith requirement proved permissive in practice: prime contractors satisfied the requirement in 98.5 percent of cases, failing to do so in only 13 of 878 attempts.

D.

In light of the 2006 amendments to section 136-28.4, the defendants moved to dismiss all or part of this action on various grounds.

Initially, they contended that the 2006 amendments rendered Rowe's attack on the statute moot. The district court rejected this argument. The court recognized that the amended statute did “away with many of [the] alleged shortcomings” of its predecessor and so “undoubtedly differs from the old [statute] in material respects.” *H.B. Rowe Co., Inc. v. Tippet*, No.

5:03-CV-278-BO at 20-21 (E.D.N.C. March 29, 2007). But the court concluded that Rowe's suit continued to present a live controversy because the statutory amendments did not resolve "the primary problem which the Plaintiff first complained of: the use of remedial race- and gender-based preferences without valid evidence of past racial and gender discrimination." *Id.* at 21-22. The court reasoned that Rowe could "[i]n that sense" contend that the amended statutory scheme " 'disadvantage[s][it] in the same fundamental way.' " *Id.* at 22 (quoting *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 (1993)).

The district court did, however, dismiss all of Rowe's claims for damages against the State officials sued in their individual capacities, concluding that qualified immunity barred these claims. The court also dismissed Easley from the suit, holding that he had no role in implementing the challenged statutory scheme. In addition, the court dismissed Rowe's claims against the Department, as well as its damages claims against the individual defendants in their official capacities, holding them barred by sovereign immunity. But the court concluded that Rowe's claims for declaratory and injunctive relief against Tippet, Varnedoe, and Sanderson survived under the doctrine set forth in *Ex Parte Young*, 209 U.S. 123 (1908).

After extensive discovery and a four-day bench trial at which numerous witnesses testified and over one thousand pages of exhibits were admitted into evidence, the district court upheld the constitutionality of the statutory scheme in all respects. Rowe challenges this holding on appeal.