APPENDIX

TABLE OF CONTENTS

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-35749
D.C. No. 3:16-cv-05582-RJB

[Filed December 19, 2018]

ORION INSURANCE GROUP, a Washington Corporation; RALPH G. TAYLOR, an individual, Plaintiffs-Appellants,	)
v.	)
WASHINGTON'S OFFICE OF MINORITY & WOMEN'S BUSINESS ENTERPRISES; EDWINA MARTIN-ARNOLD; DEBBIE MCVICKER; PAMELA SMITH; SARAH ERDMANN; STACEY SAUNDERS, individuals; U.S. DEPARTMENT OF TRANSPORTATION; STEPHANIE JONES, an individual, Defendants-Appellees.	)

MEMORANDUM[*]

Appeal from the United States District Court
for the Western District of Washington
Robert J. Bryan, District Judge, Presiding

Argued and Submitted December 3, 2018
Seattle, Washington

Before: W. FLETCHER, BYBEE, and WATFORD, Circuit Judges.

Plaintiffs-Appellants Orion Insurance Group and its owner Ralph Taylor (collectively "Taylor") appeal the district court's partial dismissal and partial summary judgment in favor of the U.S. Department of Transportation ("USDOT"), the Washington State Office of Minority & Women's Business Enterprises ("OMWBE"), and other federal and state defendants sued in both their official and individual capacities. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm the district court.

1. Order to Dismiss

We review the district court's order dismissing various claims under Fed. R. Civ. P. 12(b)(2) and 12(b)(6) de novo. *Arias v. Raimondo*, 860 F.3d 1185, 1189 (9th Cir. 2017) (reviewing Rule 12(b)(6) dismissal for failure to state a claim de novo); *Ziegler v. Indian River Cty.*, 64 F.3d 470, 473 (9th Cir. 1995) (reviewing dismissal for lack of personal jurisdiction de novo). Here, we hold that the district court did not err when

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

it dismissed Taylor's claims against the federal defendants. First, the district court correctly dismissed Taylor's claims against Stephanie Jones, former Acting Director of the USDOT's Office of Civil Rights, in her individual capacity, under Fed. R. Civ. P. 12(b)(2) because the district court lacked personal jurisdiction. Jones does not have sufficient "minimum contacts" with Washington "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citation omitted); *see Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 801–02 (9th Cir. 2004). Second, the district court correctly dismissed Taylor's discrimination claims under 42 U.S.C. § 1983 because the federal defendants did not act "under color of state law" as required by the statute. 42 U.S.C. § 1983; *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986). Third, the district court correctly dismissed Taylor's claims for damages because the United States has not waived its sovereign immunity on those claims. Fourth, the district court correctly dismissed Taylor's claims for equitable relief under 42 U.S.C. § 2000d because the federal disadvantaged business enterprise program does not qualify as a "program or activity" within the meaning of the statute. Lastly, the district court correctly dismissed Taylor's claims against the United States for equitable relief under Washington state law because Taylor failed to make a showing that the relief he sought was available under Washington state law.

2. Summary Judgment Order

We review the district court's order granting summary judgment de novo. *Universal Health Servs. Inc. v. Thompson*, 363 F.3d 1013, 1019 (9th Cir. 2004). Taylor argues the district court erred when it granted summary judgment in favor of federal and state defendants on his claims for violation of the Administrative Procedure Act ("APA"), violation of the Equal Protection Clause, discrimination under 42 U.S.C. § 1983, and discrimination under 42 U.S.C. § 2000d. In addition, Taylor argues the district court erred when it declined to exercise supplemental jurisdiction over his claims under the Washington State Constitution and Washington Law Against Discrimination. We disagree.

A. Claims under the Administrative Procedure Act

The district court did not err when it granted summary judgment to state and federal defendants on Taylor's APA claims. As a preliminary matter, despite Taylor's assertions to the contrary, there were no issues of material fact. Fed. R. Civ. Pro. 56(a); *see also Occidental Eng'g Co. v. I.N.S.*, 753 F.2d 766, 769–70 (9th Cir. 1985) (discussing summary judgment in the context of an administrative proceeding and stating that a district court "is not required to resolve any facts in a review of an administrative proceeding . . . the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did"). In addition, when analyzing Taylor's APA claims, the district court did not abuse its discretion in refusing to consider documents outside

the administrative record because those documents did not fall into one of the recognized exceptions permitting review. *See Lands Council v. Powell*, 395 F.3d 1019, 1029–30 (9th Cir. 2005).

Taylor argues that state and federal defendants violated the APA by acting in an arbitrary and capricious manner. *See* 5 U.S.C. § 706(1)-(2). When considering whether to set aside an agency action as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," courts must determine "whether the agency considered the relevant factors and articulated a rational connection between the facts found and the choices made." *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agr.*, 499 F.3d 1108, 1115 (9th Cir. 2007) (internal quotations omitted); *see also* 5 U.S.C. § 706(1)–(2).

Here, OMWBE did not act in an arbitrary and capricious manner when it determined it had a "well founded reason" to question Taylor's membership claims and, after requesting additional documentation from Taylor, determined that Taylor did not qualify as a "socially and economically disadvantaged individual." *See* 49 C.F.R. §§ 26.5, 26.61(c), 26.63(a)–(b), 26.67(a)(1). In addition, OMWBE did not act in an arbitrary and capricious manner when it did not provide an in-person hearing under 49 C.F.R. §§ 26.67(b)(2) and 26.87(d) because Taylor was not entitled to a hearing under the regulations. USDOT did not act in an arbitrary and capricious manner when it affirmed the state's decision because the decision was supported by substantial evidence and consistent with federal regulations. *See*

49 C.F.R. § 26.89(e), (f)(1)–(2). USDOT considered and discussed numerous pieces of evidence in its decision letter and "articulated a rational connection" between the evidence and the decision to deny Taylor's application for certification. *Ranchers Cattlemen*, 499 F.3d at 1115. In addition, Taylor's argument that USDOT violated 49 C.F.R. § 26.89(f)(8) is now moot.

B. Claims under the Equal Protection Clause and 42 U.S.C. §§ 1983 and 2000d

The district court did not err when it granted summary judgment to federal and state defendants on Taylor's equal protection claims because defendants did not discriminate against Taylor, did not intend to discriminate against Taylor, and did not treat Taylor differently from others similarly situated. *See Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam); *Hispanic Taco Vendors of Wash. v. City of Pasco*, 994 F.2d 676, 679–81 (9th Cir. 1993). The district court also did not err when it granted summary judgment to state defendants on Taylor's discrimination claims under 42 U.S.C. §§ 1983 and 2000d because neither statute applies to Taylor's claims. In addition, the district court correctly declined to apply the *McDonnell Douglas* burden-shifting framework because that framework does not apply to Taylor's claims. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Lastly, having dismissed or granted summary judgment on all of Taylor's claims under federal law, the district court did not abuse its discretion when it declined to exercise supplemental jurisdiction over Taylor's state law claims.

AFFIRMED.[1]

[1] We DENY Appellants' motion to take judicial notice. *See* Dkt. Nos. 17, 20, 23, 24, 41–44. The motion by Jeremy I. Levitt to file an amicus curiae brief (Dkt. Nos. 62, 64) is DENIED for failure to comply with Federal Rule of Appellate Procedure 29(a) and Ninth Circuit Rule 29-3. Appellants' motion to strike the amicus brief is DENIED as moot (Dkt. No. 61).

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CASE NO. 16-5582 RJB

[Filed August 22, 2017]

ORION INSURANCE GROUP, a Washington Corporation; RALPH G. TAYLOR, an individual,
Plaintiffs,

v.

WASHINGTON STATE OFFICE OF MINORITY & WOMEN'S BUSINESS ENTERPRISES; EDWINA MARTIN-ARNOLD; DEBBIE MCVICKER; PAMELA SMITH; SARAH ERDMANN; STACEY SAUNDERS, individuals, and UNITED STATES DEPARTMENT OF TRANSPORTATION, and LESLIE PROLL, an individual,
Defendants.

ORDER DECLINING SUPPLEMENTAL JURISDICTION AND DISMISSING STATE CLAIMS

This matter comes before the Court on the August 7, 2017 order for the Plaintiffs and Washington State Office of Minority & Women's Business Enterprises ("OMWBE"), Edwina Martin-Arnold, Debbie McVicker, Pamela Smith, Sarah Erdmann, and Stacey Saunders (collectively the "State Defendants") to show cause, if any they had, why this Court should not decline to exercise supplemental jurisdiction and dismiss the remaining state law claims without prejudice. Dkt. 80. The Court has considered the pleadings filed in response (Dkt. 81) and the file herein.

Plaintiffs, Orion Insurance Group ("Orion"), a Washington corporation, and its owner, Ralph Taylor, filed this case alleging violations of federal and state law due to the denial of their application for Orion to be considered a disadvantaged business enterprise ("DBE") under federal law. Dkt. 1. On August 7, 2017, all federal claims were dismissed. Dkt. 80. The background facts and procedural history are in the August 7, 2017 order (Dkt. 80, at 1-12) and are adopted here.

Plaintiffs and the State Defendants were ordered to show cause, if any they had, why this Court should not decline to exercise supplemental jurisdiction to dismiss the remaining state law claims without prejudice on or before August 17, 2017. Dkt. 80. The State Defendants responded. Dkt. 81.

DISCUSSION

Jurisdiction is a threshold issue that must be raised *sua sponte*. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95 (1998). As is relevant here, a federal court has original jurisdiction over cases involving federal questions, 28 U.S.C. § 1332, or where the parties are diverse citizens and the amount in controversy is over $75,000, 28 U.S.C. § 1331. A federal court may exercise supplemental jurisdiction over state law claims asserted in cases in which the court has original jurisdiction. 28 U.S.C. § 1367(a).

Pursuant to 28 U.S.C. § 1367(c), district courts may decline to exercise supplemental jurisdiction over a state law claims if: (1) the claims raise novel or complex issues of state law, (2) the state claims substantially predominate over the claim which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction. "While discretion to decline to exercise supplemental jurisdiction over state law claims is triggered by the presence of one of the conditions in § 1367(c), it is informed by the values of economy, convenience, fairness, and comity." *Acri v. Varian Associates, Inc.*, 114 F.3d 999, 1001 (9th Cir. 1997)(*internal citations omitted*).

The Court should decline to exercise supplemental jurisdiction and dismiss the remaining state law claims without prejudice. Two of the four conditions in § 1367(c) are present. As above, all of Plaintiffs' federal claims have been dismissed in the order granting

Defendants' motions for summary judgment on the federal claims. Dkt. 80. Accordingly, this Court has "dismissed all claims over which it has original jurisdiction," and so has discretion to decline to exercise supplemental jurisdiction over the state law claims under § 1367(c)(3). Moreover, the remaining state claims "raise novel or complex issues of state law" under § 1367(c)(1), determinations for which the state court is uniquely suited.

Contrary to the State Defendants' assertions, the values of economy, convenience, and fairness may well be served by this Court's declining to exercise supplemental jurisdiction. *See Acri v. Varian Associates, Inc.*, 114 F.3d at 1001. Insofar as economy is concerned, it is certainly more "economic" to federal courts if they are not spending time resolving state issues. As much as is reasonably practical, the time of federal courts should be spent resolving cases involving some federal nexus. There is no longer a federal nexus in this case. Further, this Court would have to decide unique questions that would arise under the Washington Constitution and Washington Law Against Discrimination. Because state courts have a strong interest in enforcing their own laws, *See Carnegie-Mellon University v. Cohill,*484 U.S. 343, 352 (1988), the value of comity is also served by this court declining jurisdiction. The values of economy, convenience, fairness and comity are well served by this Court's declining to exercise supplemental jurisdiction. The court should decline to exercise supplemental jurisdiction over plaintiff's state law claims, and these claims should be dismissed without prejudice.

I. ORDER

Therefore, it is hereby **ORDERED** that:

- This Court **DECLINES TO EXERCISE SUPPLEMENTAL JURISDICTION** over the state law claims;
- The state law claims are **DISMISSED WITHOUT PREJUDICE**.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

Dated this 22nd day of August, 2017.

/s/ Robert J. Bryan
ROBERT J. BRYAN
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CASE NO. 16-5582 RJB

[Filed August 7, 2017]

ORION INSURANCE GROUP, a Washington Corporation; RALPH G. TAYLOR, an individual,
Plaintiffs,

v.

WASHINGTON STATE OFFICE OF MINORITY & WOMEN'S BUSINESS ENTERPRISES; EDWINA MARTIN-ARNOLD; DEBBIE MCVICKER; PAMELA SMITH; SARAH ERDMANN; STACEY SAUNDERS, individuals, and UNITED STATES DEPARTMENT OF TRANSPORTATION, and LESLIE PROLL, an individual,
Defendants.

ORDER ON CROSS MOTIONS
FOR SUMMARY JUDGMENT

This matter comes before the Court on the Plaintiffs' Motion for Partial Summary Judgment on Liability for Certain Causes of Action (Dkt. 48), the Federal Defendants' Motion for Summary Judgment on Administrative Procedure Act ("APA"), Equal Protection, and Void for Vagueness Claims (Dkt. 54), and the State Defendants' Cross Motion for Summary Judgment (Dkt. 58). The Court has considered the pleadings filed in support of and in opposition to the motions, including the supplemental briefing (Dkts. 76, 78 and 79), and the file herein.

Plaintiffs, Orion Insurance Group ("Orion"), a Washington corporation, and its owner, Ralph Taylor, filed this case alleging violations of federal and state law due to the denial of their application for Orion to be considered a disadvantaged business enterprise ("DBE") under federal law. Dkt. 1. Plaintiffs now move the Court for an order that summarily declares that the Defendants violated the APA, declares that the denial of the DBE certification for Orion was unlawful, and reverses the decision that Orion is not a DBE. Dkt. 48. The United States Department of Transportation ("USDOT") and Leslie Proll, the Acting Director of USDOT, (collectively the "Federal Defendants") move for a summary dismissal of all the claims asserted against them. Dkt. 54. The Washington State Office of Minority & Women's Business Enterprises ("OMWBE"), Edwina Martin-Arnold, Debbie McVicker, Pamela Smith, Sarah Erdmann, and Stacey Saunders (collectively the "State Defendants") move for summary

dismissal of all claims asserted against them. Dkt. 58. For the reasons provided herein, Plaintiffs' motion for partial summary judgment (Dkt. 48) should be denied, in part, and stricken, in part, the Federal Defendants' motion for summary judgment (Dkt. 54) should be granted, and the State Defendants' motion for summary judgment (Dkt. 58) should be granted, in part, and stricken, in part.

I. BACKGOUND FACTS AND PENDING MOTIONS

A. FEDERAL DBE PROGRAM

The federal DBE program, established in the early 1980s, sets a goal of not less than ten percent of federal funds authorized to be spent on highway and transit programs be expended through "small business concerns that are owned and controlled by socially and economically disadvantaged individuals." Surface Transportation Assistance Act, Pub. L. No. 97-424, 96 Stat. 2097 (1983); Moving Ahead for Progress in the 21st Century Act, Pub. L. No. 112–141, § 1101(b), 126 Stat. 405, 414–16 (2012); in its most recent form, Fixing America's Surface Transportation Act, Pub. L. No. 114-94, § 1101, 129 Stat. 1312 (2015). "Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities. Social disadvantage must stem from circumstances beyond their control." 49 C.F.R. § Pt. 26, App. E. Further, "[e]conomically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free

enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged." *Id.* In passing the current relevant reauthorizing legislation and the prior statutes, Congress considered and documented discriminatory hurdles faced by women and racial minorities in being awarded federally funded transportation contracts. *Id.,* and *Western States Paving Co. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005). Those hurdles include: discrimination by trade unions and financial institutions in gaining capital to begin a business; and even after a business is started, discrimination by "prime contractors, business networks, suppliers and bonding companies." *Id.* Under the DBE, women and racial minorities are presumed to be "socially and economically disadvantaged." 49 C.F.R. 26.67 (a)(1). The presumption that an individual is in a disadvantaged group, and/or is socially or economically disadvantaged, can be rebutted. *Id.*; 26 C.F.R. 26.63.

The current and former statutes that created the program do "not establish a uniform national affirmative action program. Each state that receives federal funds must implement a preference program that complies with federal regulations." *Associated Gen. Contractors of Am., San Diego Chapter, Inc. v. California Dep't of Transp.*, 713 F.3d 1187, 1190 (9th Cir. 2013). Under the regulations, recipients of federal funds (here the State of Washington) may certify firms as eligible to participate as DBEs in accord with the federal regulations. 49 C.F.R. §§ 26.61 and 26.5. The

state may also maintain its own program, as Washington does. If a firm's DBE certification application is denied, the applicant may appeal to the USDOT, where it is directed to the Office of Civil Rights. 49 C.F.R. 26.89(a) and (d).

B. WASHINGTON'S MINORITY BUSINESS ENTERPRISE PROGRAM

Washington has a program in which qualifying individuals or businesses can obtain a certification that they are a minority business enterprise ("MBE") under the state regulations. OMWBE is charged with reviewing and making determinations for the state program using the applicable Washington Administrative Code ("WAC"). WAC 326-20-010, *et seq*. Under the state program:

> The [OMWBE] presumes that citizens of the United States or lawfully admitted permanent residents who are women, African Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the program, are socially and economically disadvantaged individuals. Applicants are required to submit a signed, notarized certification that each disadvantaged owner is, in fact, socially and economically disadvantaged.

WAC 326-20-048. Unlike in the federal DBE certification process, Washington law does not provide that the presumption (that women and the listed racial

minorities are "socially and economically disadvantaged individuals") is rebuttable.

C. PLAINTIFF TAYLOR LEARNS OF HIS RACIAL HERITAGE

On August 25, 2010, Plaintiff Ralph Taylor received results from a genetic ancestry test that estimated that he was 90% European, 6% Indigenous American, and 4% Sub-Saharan African. Dkt. 50-1, at 27. The test has an error rate of 3.3%. Dkt. 50-1, at 55.

Mr. Taylor acknowledges that he grew up thinking of himself as Caucasian, but asserts that in his late 40s, when he realized he had Black ancestry, he "embraced his Black culture." Dkt. 59-2, at 8.

D. PLAINTIFFS APPLY FOR STATE MBE CERTIFICATION

On April 19, 2013, Mr. Taylor submitted an application to OMWBE, seeking to have Orion, his insurance business, certified as a MBE under Washington State law. Dkt. 50-1, at 31. In the application, Mr. Taylor identified himself as Black, but not Native American. *Id.* His application was initially rejected (Dkt. 50-1, at 31), but after Mr. Taylor appealed the decision (Dkt. 49, at 2), OMWBE voluntarily reversed their decision and certified Orion as an MBE under the Washington Administrative Code and other Washington law (Dkt. 50-1, at 36).

E. PLAINTIFFS APPLY FOR FEDERAL DBE CERTIFICATION

On March 31, 2014, Plaintiffs submitted, to OMWBE, Orion's application for DBE certification under federal law. Dkt. 50-1, at 76. His application indicated that Mr. Taylor has owned Orion since 1995. Dkt. 50-1, at 76. Orion's gross receipts for the year 2013 were $1,083,204; for the year 2012 were $902,191; and for the year 2011 were $878,044. Dkt. 50-1, at 77. Orion has 15 employees. Dkt. 59-2, at 121. Orion had two loans outstanding at the time: one for $250,000 (the balance remaining was estimated at $58,000) and one for $75,000 (with an estimated remaining balance of $18,000). Dkt. 50-1, at 81. Mr. Taylor has a Bachelor of Arts degree from Washington State University (Dkt. 59-2, at 121) and a license to sell insurance (Dkt. 50-1, at 81). Mr. Taylor identified himself as Black American and Native American in the Affidavit of Certification submitted with the federal application. Dkt. 50-1, at 83. Considered with his initial submittal were the results from the August 25, 2010 genetic ancestry test that estimated that he was 90% European, 6% Indigenous American, and 4% Sub-Saharan African (Dkt. 50-1, at 27), a copy of his Washington State driver's license, which includes his picture (Dkt. 59-1, at 2), his birth certificate which did not state his ethnicity (although his parents are listed as Caucasian)(Dkt. 59-2, at 9), and a February 9, 2011 letter from Mr. Taylor's father to an unknown entity requesting that Mr. Taylor's birth certificate be changed to reflect that he is "Caucasian, African, and American Indian" (Dkt. 50-1, at 29). Mr. Taylor submitted the results of his father's genetic results,

dated March 18, 2011, which estimated that he was 44% European, 44% Sub-Saharan African, and 12% East Asian. Dkt. 50-1. Mr. Taylor included a 1916 death certificate for a woman from Virginia, Eliza Ray, identified as a "Negro," who was around 86 years old (50-1, at 62), with no other supporting documentation to indicate she was an ancestor of Mr. Taylor.

On May 16, 2014, OMWBE notified Mr. Taylor, that pursuant to 49 C.F.R. § 26.63, it was questioning whether he was a member of the Black American or Native American groups, and explained why it was questioning his membership. Dkt. 50-1, at 70-74. OMWBE requested that Mr. Taylor provide an additional narrative and further documentation of his membership in either or both racial groups, that he held himself out as a member of either racial group, or is considered, by the relevant community, to be a member of either racial group over a long period of time prior to his application. Dkt. 50-1, at 70-74. OMWBE further asked for any "additional narrative and/or documentation regarding how [he], as an individual, [was] socially and economically disadvantaged." *Id*. Mr. Taylor was also asked to submit a form entitled "Personal Financial Statement." Dkt. 50-1, at 70. This "Personal Financial Statement" is not in the record.

On May 27, 2014, Mr. Taylor responded to the request by letter. Dkt. 50-1, at 55-60. He attempted to explain the differences in his DNA test results and his father's DNA test results. Dkt. 50-1, at 55-57. He asserted that, based on family names and a timeline he constructed, an "inference can be made" that the Virginia woman was related to him on his mother's

side. Dkt. 50-1, at 57-58. (He discusses Ulysses S. Grant and the U.S. military's campaign of burning important buildings at the end of civil war and implies that could have caused his failure to have documents showing his relationship to this Virginia woman.) Dkt. 50-1, at 58. Mr. Taylor also pointed to a birth certificate for a paternal relative, born in 1914, whose father's race is listed as "white?" (Dkt. 50-1, at 61). Dkt. 50-1, at 60. He acknowledged that he had no documentation regarding his membership in the Native American racial group. Dkt. 50-1, at 59. Mr. Taylor stated that he considered himself to be Black based on his DNA test results, that he joined the NAACP, subscribed to Ebony magazine, and has "taken a great interest in Black social causes." Dkt. 50-1, at 58. Mr. Taylor acknowledged that he does not know how he is perceived in the "relevant communit[ies]." Dkt. 50-1, at 59. Mr. Taylor submitted letters from two individuals who stated that they viewed him as a person of "mixed race" or "mixed heritage" (Dkts. 50-1 at 63-64). Neither of these individuals indicated with which racial group they identified or which one Mr. Taylor identified. *Id.* In regard to evidence that he has experienced social and economic disadvantage, Mr. Taylor refers to his answer to a similar inquiry during the State certification process for MBE status where he discusses being ill as a child, his father's return from Vietnam; and his father's subsequent abuse of alcohol and physical abuse of Mr. Taylor (Dkt. 50-1, at 108-109). Dkt. 50-1 at 60.

On June 27, 2014, Orion's DBE application was denied because there was insufficient evidence that he was a member of a racial group recognized under the

regulations, was regarded by the relevant community as either Black or Native American, or that he held himself out as being a member of either group over a long period of time prior to his application. Dkt. 50-1, at 46. OMWBE also found that even if there was sufficient evidence to find that Mr. Taylor was a member of either of these racial groups, "the presumption of disadvantage has been rebutted," and the evidence Mr. Taylor submitted was insufficient to show that he was socially and economically disadvantaged. *Id.*, at 48.

F. PLAINTIFFS APPEAL OMWBE'S DENIAL TO USDOT AND FILE A WRIT OF MANDAMUS IN THE WESTERN DISTRICT OF WASHINGTON

Around September 22, 2014, through counsel, Mr. Taylor appealed the denial of the DBE certification to the USDOT. Dkt. 50-1, at 16-22. On September 29, 2014, USDOT acknowledged receipt of Orion's appeal, and stated that it would docket the appeal after receiving the complete administrative record. Dkt. 50-1, at 52. USDOT stated that there were several appeals pending so Plaintiffs would have to wait six months for a decision. *Id.* Plaintiffs were further directed to email the department if it had not contacted them after that time. *Id.* On October 13, 2014, USDOT received the administrative record. Dkt. 50-1, at 7. After three requests by Plaintiffs regarding the status of the appeal (Dkt. 50-1, at 10-15), in February of 2015, the USDOT acknowledged that it had received the administrative record and had docketed Orion's appeal (Dkt. 50-1, at 7).

On April 24, 2015, Plaintiffs filed a Petition for Writ of Mandamus in an effort to get the USDOT to make a decision on the appeal. *Orion Insurance Group v. Washington State Office of Minority & Women's Business Enterprises, et al.* U.S. District Court for the Western District of Washington case number 15-5267 BHS. Plaintiffs asserted that their APA rights had been violated when USDOT failed to make a decision within 180 days or provide information for when a decision was forthcoming. *Orion Insurance Group v. Washington State Office of Minority & Women's Business Enterprises, et al.* U.S. District Court for the Western District of Washington case number 15-5267 BHS, Dkts. 1 and 15. The parties stipulated to a stay of the case, which was granted, after the USDOT committed to providing a decision by December 2015. *Orion Insurance Group v. Washington State Office of Minority & Women's Business Enterprises, et al.* U.S. District Court for the Western District of Washington case number 15-5267 BHS, Dkt. 15 and 16. The parties' stipulation provided that: "the parties agree that if the USDOT makes a decision by December 31, 2015, further proceedings in the above captioned matter will be rendered moot, and this case should be dismissed." *Orion Insurance Group v. Washington State Office of Minority & Women's Business Enterprises, et al.* U.S. District Court for the Western District of Washington case number 15-5267 BHS, Dkt. 15, at 2. Plaintiffs voluntarily dismissed this case after the USDOT issued its decision. *Orion Insurance Group v. Washington State Office of Minority & Women's Business Enterprises, et al.* U.S. District Court for the Western District of Washington case number 15-5267 BHS, Dkt. 17.

On October 15, 2015, the USDOT affirmed the denial of Orion's DBE certification, concluding that there was substantial evidence in the administrative record to support OMWBE's decision. Dkt. 50-1, at 1-6.

G. PLAINTIFFS FILE THIS CASE

This case was filed on July 1, 2016. Dkt. 1. Plaintiffs assert claims for (A) violation of the Administrative Procedures Act, 5 U.S.C. § 706, (B) "Discrimination under 42 U.S.C. § 1983" (reference is made to Equal Protection), (C) "Discrimination under 42 U.S.C. § 2000d," (D) violation of Equal Protection under the United States Constitution, (E) violation of the Washington Law Against Discrimination and Article 1, Sec. 12 of the Washington State Constitution, and (F) assert that the definitions in 49 C.F.R. § 26.5 are void for vagueness. Dkt. 2. Plaintiffs seek damages, injunctive relief: ("[r]eversing the decisions of the USDOT, Ms. Jones and OMWBE, and OMWBE's representatives . . . and issuing an injunction and/or declaratory relief requiring Orion to be certified as a DBE," and a declaration the "definitions of 'Black American' and Native American' in 49 C.F.R. § 26.5 to be void as impermissibly vague,") and attorneys' fees, and costs. *Id.*

H. FEDERAL DEFENDANTS' MOTION TO DISMISS GRANTED, IN PART

On November 17, 2016, the claims asserted against the Acting Director of the USDOT, in her individual capacity, were dismissed for lack of personal jurisdiction and because Plaintiffs failed to show that they were entitled to either monetary or non-monetary

relief from her in her individual capacity. Dkt. 44. All Plaintiffs' claims for monetary damages against the Federal Defendants were dismissed because Plaintiffs failed to show that the United States waived its sovereign immunity on their claims for monetary damages. *Id.* The Plaintiffs' 42 U.S.C. § 1983 claims and 42 U.S.C. § 2000d claims asserted against the Federal Defendants were dismissed. *Id.* Plaintiff's claims against the Federal Defendants for violations of the WLAD and the Washington State Constitution were also dismissed. *Id.* Plaintiff's remaining claims against the Federal Defendants are for equitable relief for violations of the APA, equitable relief for violation of the Equal Protection Clause of the U.S. Constitution, and declaratory relief regarding the claim that the definitions of "Black" and "Native American" in the DBE's regulations are void for vagueness. *Id.*

I. PENDING MOTIONS

In their pending motion for partial summary judgment, Plaintiffs argue that the Court should consider facts beyond the administrative record. Dkt. 48. Plaintiffs move for summary judgment on their APA claims and argue that all Defendants violated the APA when they failed to give Plaintiffs the statutory presumption that he was "socially and economically disadvantaged" based on his appearance on his driver's license and based on the fact that his birth certificate did not indicate ethnicity. *Id.* Plaintiffs argue that the State Defendants violated the APA when they failed to give him notice of their concerns and afford Plaintiffs an in person hearing to provide information and arguments concerning why Orion should have been

certified, which Plaintiffs assert was required under 49 C.F.R. § 26.87(d). *Id.* Plaintiffs argue that the Federal Defendants violated the APA when they failed to reverse the State's decision. *Id.* Plaintiffs argue that the Federal Defendants violated the APA when they failed to adhere to 49 C.F.R. § 26.89(f)(8) regarding the timeliness of a decision. *Id.* Plaintiffs also move for summary judgement against the State Defendants on their claims under 42 U.S.C. § 1983, 42 U.S.C. § 2000d, and the WLAD. *Id.*

The State Defendants move for summary dismissal of the claims asserted against them and argue that the APA claims should be dismissed because they did not act arbitrarily and capriciously. Dkt. 58. The State Defendants assert that Plaintiffs' claims for equal protection asserted against them should be dismissed. *Id.* To the extent that Plaintiffs assert constitutional claims for damages or retrospective relief against the State or the individual state defendants in their official capacities, under § 1983, the State Defendants argue that they are not "persons" under the statute and so those claims should be dismissed. *Id.* To the extent that Plaintiff asserts § 1983 claims against the individual state defendants in their individual capacities, the State Defendants argue that those claims should be dismissed because they are entitled to either absolute or qualified immunity. *Id.* The State Defendants argue that Plaintiffs' claim under 42 U.S.C. § 2000d should be dismissed because there is no evidence of intentional discrimination. *Id.* The State Defendants argue that Plaintiffs' claim under the WLAD should be dismissed because there is no evidence of racial animus. *Id.* They also assert that Plaintiffs' claims under the

Washington Constitution should be dismissed because Plaintiffs fail to identify a private cause of action for violation of the Washington Constitution. *Id.*

The Federal Defendants also move for summary dismissal of all the remaining claims asserted against them. Dkt. 54. They argue that judicial review of the decision to deny DBE status to Orion must be confined to the administrative record. *Id.* The Federal Defendants assert that the APA claims should be dismissed because Plaintiffs were not improperly denied a presumption of social and economic disadvantage, Plaintiffs were not due a hearing, the Federal Defendants' decision was timely, and even if it wasn't, the claim that it was is moot, and lacks merit, and the Federal Defendants' actions were not otherwise arbitrary and capricious. *Id.* The Federal Defendants argue that if the Court finds that they did violate that APA, the proper remedy is remand, not an order certifying Orion as a DBE. *Id.* The Federal Defendants also argue Plaintiffs' claims for equal protection and void for vagueness should be dismissed for failure to state a claim and argue, that if the Court would like to take into consideration discovery responses or the administrative record, summary judgment on these claims is appropriate. *Id.*

On July 10, 2017, the Plaintiffs' motion to continue the State Defendants' summary judgement motion regarding Plaintiffs' equal protection claim was granted. Dkt. 74. In that same order, the parties were notified that the Federal Defendants' motion to dismiss Plaintiffs' equal protection and void for vagueness claims was being converted into a motion for summary

judgment. *Id.* Parties were given an extension of time to file supplemental briefing. *Id.* They have now done so (Dkts. 76, 77, and 79) and the motions for summary judgment are ripe for review.

J. ORGANIZATION OF OPINION

This opinion will first consider the Plaintiffs' motion to consider documents outside the administrative record. It will then address the parties' cross motions regarding Plaintiffs' claims under the APA, Plaintiffs' claims for violation of Equal Protection, Plaintiffs' void for vagueness claims, Plaintiffs' claims against the State Defendants pursuant to 42 U.S.C. § 1983, Plaintiffs' claims against the State Defendants for violation of 42 U.S.C. § 2000d, and, lastly, Plaintiffs' claims against the State Defendants for violations of the Washington State Constitution, and for violation of the WLAD.

II. DISCUSSION

A. CONSIDERING DOCUMENTS OUTSIDE THE ADMINISTRATIVE RECORD FOR APA CLAIMS

In reviewing cases under the APA,

> At the district court level, extra-record evidence is admissible if it fits into one of four "narrow" exceptions: (1) if admission is necessary to determine whether the agency has considered all relevant factors and has explained its decision, (2) if the agency has relied on documents not in the record, (3) when supplementing the record is necessary to explain technical terms or complex

> subject matter, or (4) when plaintiffs make a showing of agency bad faith.

Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agr., 499 F.3d 1108, 1117 (9th Cir. 2007) (*internal citation omitted*).

Plaintiffs' motion to consider documents outside the administrative record (Dkt. 48) should be denied. Plaintiffs acknowledge that the third exception (supplementing the record to explain technical terms etc.) does not apply. There is no showing that any of the other exceptions apply. There is no evidence that the Defendants failed to "consider[] all relevant factors" or failed to explain their decision. There is no evidence that the Defendants "relied on documents not in the record." Plaintiffs fail to make a "showing of agency bad faith." There is no basis to examine evidence outside the administrative record in regard to Plaintiffs' claims under the APA.

B. MOTION FOR SUMMARY JUDGMENT STANDARD

Summary judgment is proper only if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue of fact for trial where the

record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)(non-moving party must present specific, significant probative evidence, not simply "some metaphysical doubt."); Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253 (1986); T.*W. Elec. Service Inc. v. Pacific Electrical Contractors Association*, 809 F.2d 626, 630 (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The court must consider the substantive evidentiary burden that the nonmoving party must meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254, *T.*W. *Elect.*, at 630. The court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elect.*, at 630. Conclusory, nonspecific statements in affidavits are not sufficient, and "missing facts" will not be "presumed." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888-89 (1990).

"[W]hen simultaneous cross-motions for summary judgment on the same claim are before the court, the

court must consider the appropriate evidentiary material identified and submitted in support of both motions, and in opposition to both motions, before ruling on each of them." *Tulalip Tribes of Washington v. Washington*, 783 F.3d 1151, 1156 (9th Cir. 2015).

C. APA STANDARD

Under the APA, this court is authorized to:

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be ... (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity.... [or] (D) without observance of procedure required by law.

5 U.S.C. § 706(1)-(2).

D. CLAIMS FOR VIOLATIONS OF THE APA BASED ON "ARBITRARY OR CAPRICIOUS" ACTION OR ACTION "WITHOUT OBSERVANCE OF PROCEDURE REQUIRED BY LAW"

In considering whether to set aside an agency's action as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law," courts must determine "whether the agency considered the relevant factors and articulated a rational connection between the facts found and the choices made."

Ranchers Cattlemen, at 1115 (*internal quotations omitted*). "This standard of review is highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision." *Id.* "Where the agency has relied on relevant evidence such that a reasonable mind might accept as adequate to support a conclusion, its decision is supported by 'substantial evidence.' Even if the evidence is susceptible of more than one rational interpretation, the court must uphold the agency's findings." *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014)(*citing Bear Lake Watch, Inc. v. FERC*, 324 F.3d 1071, 1076 (9th Cir.2003)).

Plaintiffs assert that the State Defendants acted in an arbitrary and capricious manner in violation of the APA when they failed to give him the presumption of social and economic disadvantage under the DBE governing regulations, failed to give him notice of their concerns, and failed give him an in person hearing. Dkt. 48. Plaintiffs assert that the Federal Defendants acted in an arbitrary and capricious manner in violation of the APA when they affirmed the State decision (considering its failure to give him the presumption and failure to give him notice and a hearing) and failed to timely respond to Plaintiff's appeal. Dkt. 48.

1. State Defendants' Not Giving Plaintiffs the Presumption of Disadvantage

Under 49 C.F.R. § 26.67(a)(1),

> [OMWBE (here)] must rebuttably presume that citizens of the United States (or lawfully admitted permanent residents) who are women, Black Americans, Hispanic Americans, Native Americans, Asian–Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the SBA, are socially and economically disadvantaged individuals. [OMWBE] must require applicants to submit a signed, notarized certification that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged.

Further, under 49 C.F.R. 26.61(c), OMWBE "must rebuttably presume that members of the designated groups in § 26.67(a) are socially and economically disadvantaged. . . In order to obtain the benefit of the rebuttable presumption, individuals must submit a signed, notarized statement that they are a member of one of the groups." Unlike Washington's MBE program, the federal regulations provide further, that "[i]f, after reviewing the signed notarized statement of membership in a presumptively disadvantaged group (see § 26.61(c)), [OMWBE has] a well founded reason to question the individual's claim of membership in that group, [OMWBE] must require the individual to present additional evidence that he or she is a member of the group." 49 C.F.R. § 26.63(a)(1). Further, under the regulations, OMWB was to provide Mr. Taylor a

written explanation of its reasons for questioning his group membership and request additional evidence of "whether the person has held himself out to be a member of the group over a long period of time prior to application for certification," "whether the person is regarded as a member of the group by the relevant community," and "may require the applicant to produce appropriate documentation of group membership." 49 C.F.R. § 26.63(a)(2) and (b). Pursuant to 49 C.F.R. § 26.61(b), "the firm seeking certification has the burden of demonstrating . . ., by a preponderance of the evidence, that it meets the requirements of this subpart concerning group membership or individual disadvantage, business size, ownership, and control."

Considering all the evidence in the record regarding Mr. Taylor's membership in either the Black or Native American group, OMWBE found that:

> Mr. Taylor submitted a birth certificate that did not indicate race, so this document failed to prove that he is a member of a minority group.
>
> Mr. Taylor provided documentation of a Negro woman he claimed is an ancestor. This documentation is incomplete and does not prove that the individual is an ancestor of Mr. Taylor. Even if the individual is an ancestor of Mr. Taylor's, it fails to prove that he is a member of a minority group, or regarded as a member of a minority group.
>
> Mr. Taylor submitted a DNA test to prove he is 4% Sub-Saharan African and 6% Native American. The test results for Mr. Taylor and

his father are highly inconsistent and incomplete. Half of a son's DNA comes from his father and half comes from his mother. OMWBE acknowledges that the pieces of DNA from each parent are random and will not equal exactly half from each parent. The two DNA tests between father and son should, however, be related. Without a complete picture of Mr. Taylor's mother's DNA, OMWBE contends that the tests are not reliable to determine ethnicity. This information fails to prove that Mr. Taylor is a member of a minority group, or regarded as a member of a minority group.

Also, there is a 3.3% statistical noise associated with each test performed by Ancestry by DNA. Eliminating the statistical noise from the DNA test results provided would indicate that Mr. Taylor's ancestry is 2.7% Indigenous American and 0.7% Sub-Saharan African. Additionally, from reviewing the information on the Ancestry by DNA website, it is unclear if the website's use of the term Sub-Saharan African corresponds to the definition of Black American in the CFR, which refers to "persons having origins in the Black racial groups of Africa." Regardless, the low figures combined with the inconsistencies with the results for Mr. Taylor and his father render the test as insufficient to prove that Mr. Taylor is a member of a minority group, or regarded as a member of a minority group.

Mr. Taylor submitted two letters where the authors state they consider Mr. Taylor to be of

> mixed heritage, however, they do not identify Mr. Taylor as Black or Native American. These letters do not establish that Mr. Taylor, who is visually identifiable as Caucasian, is a member of a non-Caucasian group. Mr. Taylor has failed to meet his burden that he is a member of a minority group, or regarded as a member of a minority group.
>
> Mr. Taylor submitted insufficient evidence when he was asked in an additional information request about his membership in the Black and/or Native American group. The only substantive evidence provided was a statement that he is a member of the NAACP, has a subscription to Ebony magazine, and he is very interested in Black social issues. All individuals, regardless of minority status, may join the NAACP and subscribe to Ebony magazine, or be concerned about issues. This fails to prove that Mr. Taylor is a member of a minority group, or regarded as a member of minority group.

Dkt. 50-1, at 47.

The OMWBE did not act in an arbitrary or capricious manner when it found that there was insufficient evidence that Mr. Taylor was a member of either the Black or Native American groups. The record supports OMWBE's "well founded reason to question" Mr. Taylor's claim of membership in either the Black or Native American groups. The State Defendants considered the evidence submitted initially and the supplemental evidence provided by Mr. Taylor in response to the State's written inquiry which explained

its concerns and asked for him for clarification and other further documentation. The OMWBE's decision then "articulated a rational connection between the facts found and the choices made." *Ranchers,* at 115.

Plaintiffs assert that the OMWBE's decision that he was not a part of either group ran counter to the evidence before the agency because it had already found that he qualified under the state program as a MBE and the definitions of "Black" and "Native American" that are the same or substantially similar to the federal ones. Plaintiff's argument is unpersuasive. OMWBE's decision was guided by the federal regulations. Unlike Washington state law, the federal regulations contain a provision for "well founded reason[s] to question group membership," provided a basis for rebutting presumptions, and shifted burdens of proof. Those provisions were important in the differing results here.

Plaintiff argues that OMWBE decision was arbitrary and capricious because it did not find him to be "Black enough" based on his appearance on his driver's license. OMWBE provided several reasons to question Mr. Taylor's claim of membership in either racial group. Mr. Taylor improperly places heavy emphasis on his genotype rather than his phenotype. "Genes form the basis for hereditary traits in living organisms. The human genome consists of approximately 22,000 genes packed into 23 pairs of chromosomes." *Ass'n for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct. 2107, 2111 (2013)(*internal citation omitted*). Webster's Third New International Dictionary defines a "genotype" as "the genetic

constitution of an individual or group, the totality of genes possessed by an individual or group." In contrast, "a phenotype refers to all the **observable** characteristics of an organism, such as shape, size, color, and behavior, that result from the interaction of the organism's genotype with its environment." *See In re Roslin Inst.* (Edinburgh), 750 F.3d 1333, 1338 (Fed. Cir. 2014)(*emphasis added*). Plaintiff points to no evidence that discrimination regarding the award of federal transportation dollars has occurred because of a person's genetic makeup (genotype) as opposed to their appearance (phenotype), as is well documented by Congress. Plaintiffs' reliance on Mr. Taylor's genetic makeup, without regard to his appearance, is misplaced and does not demonstrate that OMWBE acted arbitrarily or capriciously in finding that there was insufficient evidence that Mr. Taylor was a member of either the Black or Native American groups.

OMWBE did not act arbitrarily or capriciously when it found that the presumption that Mr. Taylor was socially and economically disadvantaged was rebutted because there was insufficient evidence that he was a member of either the Black or Native American groups. Nor did it act arbitrarily and capriciously when it found that Mr. Taylor failed to demonstrate, by a preponderance of the evidence, that Mr. Taylor was socially and economically disadvantaged. Under 49 C.F.R. § 26.63(b)(1), after OMWBE determined that Mr. Taylor was not a "member of a designated disadvantaged group," Mr. Taylor "must demonstrate social and economic disadvantage on an individual basis." Accordingly, pursuant to 49 C.F.R. § 26.61(d), Plaintiffs had the burden to prove, by a preponderance

of the evidence, that Mr. Taylor was socially and economically disadvantaged. OMWBE found that:

> Mr. Taylor submitted insufficient evidence when he was asked in an additional information request how he has experienced social and economic disadvantage. Mr. Taylor did provide evidence of illness and abuse caused by his father who suffered due to experiences in Vietnam, but these matters were unrelated to race and ethnicity. Thus, Mr. Taylor has failed to prove social and economic disadvantage in his individual case.

Dkt. 50-1, at 48. The OMWBE also noted that,

> Mr. Taylor's attorney wrote that Mr. Taylor did not discover the full extent of his heritage until late in life. It is nonsensical for Mr. Taylor to claim that he has encountered social and economic disadvantage due to a heritage he was not aware of until the DNA test conducted in 2010.

Dkt. 50-1, at 48. In making these decisions, OMWBE considered the relevant evidence and "articulated a rational connection between the facts found and the choices made." *Ranchers,* at 1115. By requiring individualized determinations of social and economic disadvantage, the federal DBE "program requires states to extend benefits only to those who are actually disadvantaged." *See Midwest Fence Corp. v. United States Dep't of Transp.*, 840 F.3d 932, 946 (7th Cir. 2016). OMWBE did not act arbitrary or capriciously when it found that Mr. Taylor failed to show he was

"actually disadvantaged" or when it denied Plaintiff's application.

2. OMWBE's Failure to Give an Opportunity for In Person Hearing

Plaintiffs assert that OMWBE acted arbitrary and capriciously when it failed to give Plaintiffs an in person hearing pursuant to 49 C.F.R. § 26.67(b)(2). Under 49 C.F.R. § 26.67(b)(2), "[i]f you have a reasonable basis to believe that an individual who is a member of one of the designated groups is not, in fact, socially and/or economically disadvantaged, you may, at any time, start a proceeding to determine whether the presumption should be regarded as rebutted with respect to that individual."

OMWBE did not act "arbitrarily and capriciously" when it failed to give Mr. Taylor an in person hearing in accord with 49 C.F.R. § 26.67(b)(2). OMWBE found that there was insufficient evidence that Mr. Taylor was a member of one of the designated groups. The plain language of the regulation states it applies only if OMWBE found he was a member of one of the designated groups. It did not. Not only did it not act arbitrarily and capriciously, OMWBE acted in "observance of procedure required by law." 5 U.S.C. § 706 (2)(d). Plaintiffs' claim, on this ground, should be summarily dismissed.

3. USDOT's Decision to Affirm State Denial of DBE Status

Pursuant to 49 C.F.R. § 26.89(f)(1) and (f)(2), the USDOT may reverse an applicant's denial of DBE certification only if it determines, based on the entire

administrative record, that the denial was "unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of [part 26] concerning certification." The USDOT decides the appeal based on the administrative record, which may be supplemented. 49 C.F.R. § 26.89(e).

Plaintiffs contend that the USDOT's decision to affirm the OMWBE's decision to deny Plaintiffs DBE certification was arbitrary and capricious considering the errors made by the OMWBE. The USDOT did not act arbitrarily or capriciously when it found that substantial evidence in the record supported the OMWBE's decision to deny Plaintiffs DBE certification. The USDOT's decision affirming OMWBE's denial provided:

> Orion does not demonstrate that its owner is a member of a group that is presumed to be socially and economically disadvantaged under §26.67(n). The uncontroverted evidence is that Ralph Taylor is as much as 99.3 percent non-Black. The same evidence shows Mr. Taylor to be, minimally, 92.7% non-Black. [OMWBE] states that the bulk of available evidence indicates that Ralph Taylor is Caucasian or at least primarily, overwhelmingly, Caucasian. Accordingly, the Department agrees with [OMWBE] that the seeming inconsistencies (including between Mr. Taylor's appearance and his notarized statement claiming group membership) gave rise to a question under §26.63 which required [OMWBE] to make

further inquiries of the kind described in that provision.

[OMWBE] consequently had grounds ("a well founded reason to question group membership") under §26.63(a) to request additional information under §26.63(b). By operation of §26.63(b)(1), Orion's owner must demonstrate that he meets the §26.67(d) requirements for individual social and economic disadvantage. Under the latter provision, the guidance found at Appendix E applies. As noted in the preceding section, Orion did not produce the evidence that Appendix E requires for an individual showing, of social and economic disadvantage. Accordingly, the firm is ineligible for certification. Orion protests this result as burdensome and discriminatory, but it accurately reflects the analysis that the Regulation requires.

On appeal, Orion would change the inquiry. Orion relies exclusively on the technical argument that one portion of the §26.5 definitional provision speaks simply of "origins," and Orion asserts that the Regulation nowhere prescribes an explicit percentage relating to ancestry. Orion is correct that Black Americans are defined to include persons with "origins" in the Black racial groups of Africa. Orion, however, neglects to note that the broader §26.5 definition of "socially and economically disadvantaged individual" also requires that the person "have been subjected to racial or ethnic

> prejudice or cultural bias within American society because of his or her identity as a members [sic] of groups and without regard to his or her individual qualities." We find no substantial evidence of such bias. See generally §26.67(d) and the Regulation's Appendix E.
>
> Further, construing the narrower definition as broadly as Orion advocates would strip the provision of all exclusionary meaning. It is commonly acknowledged that all of mankind "originated" in Africa. Therefore, if any (Black) African ancestry; no matter how attenuated, sufficed for DBE purposes, then this particular definition would be devoid of any distinction-which was clearly not the Department's intent in promulgating it. There is little to no evidence that Mr. Taylor ever suffered any adverse consequences in business because of his genetic makeup.
>
> Sections 26.61.; 26.63(b)(l), and 26.67(d), in any event, independently require the applicant to demonstrate social and economic disadvantage. Orion fails to make that showing on the record before us, by a preponderance of the evidence. There is little to no persuasive evidence that Mr. Taylor has personally suffered social and economic disadvantage by virtue of being a Black American.

Dkt. 50-1 at 4-5.

The USDOT did not act arbitrarily or capriciously when it found that substantial evidence in the record

supported the OMWBE's decision to deny Plaintiffs' DBE certification. The USDOT considered the relevant evidence and then "articulated a rational connection" between the facts and the decision. *Ranchers,* at 115. Plaintiffs' claim, that the USDOT violated the APA because it affirmed the OMWBE, should be summarily dismissed.

Further, USDOT did not act arbitrarily or capriciously when it affirmed OMWBE's decision despite the fact that no in person hearing under 49 C.F.R. § § 26.67(b)(2) was conducted. As explained above in Section II. C. 2, the regulation applies only if OMWBE found Mr. Taylor was a member of one of the designated groups. It did not do so. USDOT did not violate the APA in affirming OMWBE's decision.

4. USDOT's Failure to Give a Decision within 180 Days

Plaintiffs assert that the USDOT violated the APA when it failed to issue a decision regarding the appeal within 180 days. (To the extent that Plaintiffs sought monetary relief for this violation of the APA, that claim has been dismissed.) Plaintiffs' claim is without merit and has been rendered moot.

Under 49 C.F.R. § 26.89(f)(8), "[t]he Department's policy is to make its decision within 180 days of receiving the complete administrative record." If no decision is rendered in that time frame, "the Department provides written notice to concerned parties, including a statement of the reason for the delay and a date by which the appeal decision will be made." *Id.*

The USDOT did not violate the APA regarding the timing of the decision on appeal. While it did not make a decision within the 180 day timeframe, it wrote Plaintiff a letter and indicated the reason for the delay and indicated that the decision on his appeal would be made and provided an estimate for when the decision would be issued. Dkt. 50-1, at 52. It did not arbitrarily or capriciously and acted in "observance of procedure required by law." 5 U.S.C. § 706 (2)(d).

Further, in their earlier suit against the USDOT, Plaintiffs asserted that their APA rights had been violated when USDOT failed to make a decision within 180 days or provide information for when a decision was forthcoming. *Orion Insurance Group v. Washington State Office of Minority & Women's Business Enterprises, et al.* U.S. District Court for the Western District of Washington case number 15-5267 BHS, Dkts. 1 and 15. The parties stipulated to a stay of the case, which was granted, after the USDOT committed to providing a decision by December 2015. *Orion Insurance Group v. Washington State Office of Minority & Women's Business Enterprises, et al.* U.S. District Court for the Western District of Washington case number 15-5267 BHS, Dkt. 15 and 16. That document provided: "the parties agree that if the USDOT makes a decision by December 31, 2015, further proceedings in the above captioned matter will be rendered moot, and this case should be dismissed." *Orion Insurance Group v. Washington State Office of Minority & Women's Business Enterprises, et al.* U.S. District Court for the Western District of Washington case number 15-5267 BHS, Dkt. 15, at 2. Plaintiffs voluntarily dismissed the case after the USDOT issued its decision.

Orion Insurance Group v. Washington State Office of Minority & Women's Business Enterprises, et al. U.S. District Court for the Western District of Washington case number 15-5267 BHS, Dkt. 17.

Plaintiffs' claim, that the USDOT violated the APA when it failed to make a decision on their appeal within 180 days, should be summarily dismissed.

E. CLAIMS FOR VIOLATION OF EQUAL PROTECTION

Plaintiffs assert claims for violation of their Equal Protection rights under the U.S. Constitution against all Defendants. It is not clear whether Plaintiffs intend to assert this claim against the State Defendants via the APA or 42 U.S.C. § 1983. To the extent that Plaintiffs also assert constitutional claims against the State Defendants pursuant to 42 U.S.C. § 1983, the State Defendants' additional defenses to these claims will be addressed below in Section II. H.

To the extent that Plaintiffs assert a claim that, on its face, the federal DBE program violates the Equal Protection Clause of the U.S. Constitution, the claim should be dismissed. Under the Equal Protection Clause of the Fourteenth Amendment, "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." The Ninth Circuit has held that the federal DBE program, including its implementing regulations, does not, on its face, violate the Equal Protection Clause of the U.S. Constitution. *Western States Paving Co. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005). The *Western States* Court held that Congress had evidence

of discrimination against women and minorities in the national transportation contracting industry and the federal DBE program was a narrowly tailored means of remedying that sex and raced based discrimination. *Id.* Accordingly, race-based determinations under the program have been determined to be constitutional. *Id.* Several other circuits, including the Seventh, Eighth, and Tenth have held the same. *Midwest Fence Corp. v. United States Dep't of Transp.*, 840 F.3d 932, 936 (7th Cir. 2016); *Sherbrooke Turf, Inc. v. Minnesota Dep't of Transportation*, 345 F.3d 964, 973 (8th Cir. 2003); *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1155 (10th Cir. 2000).

To the extent that Plaintiffs assert that the Defendants, in applying the federal DBE program to him, violated the Equal Protection Clause of the U.S. Constitution, the claim should be dismissed. Plaintiffs argue that, as applied to them, the regulations "weigh adversely and disproportionately upon" mixed-race individuals, like Mr. Taylor. Dkts. 63, at 15 and 76. This claim should be dismissed. The Equal Protection Clause prohibits only intentional discrimination. *Hispanic Taco Vendors of Wash. v. City of Pasco,* 994 F.2d 676, 679 (9th Cir. 1993). Even considering materials filed outside the administrative record, Plaintiffs point to no evidence that the application of the regulations here was done with an intent to discriminate against mixed-race individuals, or that it was done with racial animus. Further, Plaintiffs offer no evidence that application of the regulations creates a disparate impact on mixed-race individuals. Plaintiffs' remaining arguments relate to the facial

validity of the program, and so, as above, should be dismissed.

To the extent that Plaintiffs base their equal protection claim on an assertion that they were treated differently than others similarly situated, their "class of one" equal protection claim should be dismissed. For a class of one equal protection claim, Plaintiffs must show they have been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

Plaintiffs have failed to show that Mr. Taylor was intentionally treated differently than others similarly situated. Plaintiffs point to no evidence of intentional differential treatment by the Defendants. Plaintiffs fail to show that others that were similarly situated were treated differently. Plaintiffs assert that another company owned by an individual who was acknowledged by a tribe as a member of that tribe, was granted DBE status, when Mr. Taylor, who may have more genetic Native American heritage, was denied certification in the program. These two parties are not similarly situated. Mr. Taylor is not a member of any particular tribe, and was unaware of any Native American heritage prior to his test. He makes no showing that he is similarly situated to anyone else who was granted DBE status when he was not.

Further, Plaintiffs have failed to show that either the State or Federal Defendants had no rational basis for the difference in treatment. Both the State and Federal Defendants offered rational explanations for the denial of the application. Plaintiffs' Equal

Protection claims, asserted against all Defendants, should be denied.

F. VOID FOR VAGUENESS CLAIM

Plaintiffs assert that the regulatory definitions of "Black American" and both the definition of "Native American" that was applied to Plaintiffs and a new definition of "Native American" are void for vagueness, presumably contrary to the Fifth and Fourteenth Amendments' due process clauses. It is again not clear whether Plaintiffs intend to assert this claim against the State Defendants, and whether they intend to make the claim via the APA or 42 U.S.C. § 1983. To the extent that Plaintiffs also assert constitutional claims against the State Defendants pursuant to 42 U.S.C. § 1983, the State Defendants' additional defenses to these claims will be addressed below in Section II. H.

1. Jurisdiction to Consider Revised Definition of "Native American"

The first issue raised in relation to this claim is whether the Court has jurisdiction to address the revised definition of "Native American" which was changed in November of 2014, after Plaintiffs' application was denied. Defendants properly point out that this definition was not ever applied to the Plaintiffs, and so they do not have standing to challenge the revised definition. Dkt. 54-55, at 34 (*citing Calop Bus. Sys., Inc. v. City of Los Angeles,* 614 F. App'x 867 (9th Cir. 2015) (dismissing for lack of standing a challenge to a provision as being unconstitutionally vague because Plaintiff was never subjected to the provision). Plaintiffs do not show that

the definition was applied to them. Accordingly, this Court does not have jurisdiction to consider the claim that the revised definition of "Native American," which was not used in consideration of Plaintiffs' application, was unconstitutionally vague. That portion of the vagueness claim should be dismissed.

2. Vagueness Claim regarding Definitions Applied To Plaintiffs

The void for "[v]agueness doctrine grew out of the due process clauses of the Fifth and Fourteenth Amendments." *See Midwest Fence Corp. v. United States Dep't of Transp.*, 840 F.3d 932, 947–48 (7th Cir. 2016). In the context of criminal statutes, "[a] law is unconstitutionally vague if it fails to provide a reasonable opportunity to know what conduct is prohibited, or is so indefinite as to allow arbitrary and discriminatory enforcement." *United States v. Mincoff*, 574 F.3d 1186, 1201 (9th Cir. 2009). The Ninth Circuit uses the same standard in civil challenges to laws under the void for vagueness doctrine. *See Gammoh v. City of La Habra,* 395 F.3d 1114, 1119 (9th Cir. 2005)(holding that exotic club owner's challenge to city ordinance as unconstitutionally vague because it used subjective terms was properly dismissed because "ordinary people could understand what conduct is permitted and in a manner that does not encourage arbitrary and discriminatory enforcement.") Although it can be applied in the civil context, the Seventh Circuit Court of Appeals has noted that in relation to the DBE regulations, the void for vagueness "doctrine is a poor fit." *See Midwest Fence Corp. v. United States Dep't of Transp.*, 840 F.3d 932, 947–48 (7th Cir. 2016).

Unlike criminal or civil statutes that prohibit certain conduct, the Seventh Circuit noted that the DBE regulations do not threaten parties with punishment, but, at worst, cause lost opportunities for contracts. *Id.*

In any event, Plaintiffs' claims that the definitions of "Black American" and of "Native American" in the DBE regulations are impermissibly vague should be dismissed. The relevant regulations that were applied to Plaintiffs provide:

> Socially and economically disadvantaged individual means any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who has been subjected to racial or ethnic prejudice or cultural bias within American society because of his or her identity as a members of groups and without regard to his or her individual qualities. The social disadvantage must stem from circumstances beyond the individual's control.
>
> (1) Any individual who a recipient finds to be a socially and economically disadvantaged individual on a case-by-case basis. An individual must demonstrate that he or she has held himself or herself out, as a member of a designated group if you require it.
>
> (2) Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:
>
> > (i) "Black Americans," which includes persons having origins in any of the Black racial groups of Africa; . . .

> (iii) "Native Americans," which includes persons who are American Indians, Eskimos, Aleuts, or or Native Hawaiians . . . .

49 C.F.R. § 26.5. As provided above, the regulations require that to show membership, an applicant must submit a statement, and then if the reviewer has a "well founded" question regarding group membership, the reviewer must ask for additional evidence. 49 C.F.R. § 26.63(a)(1). Considering the purpose of the law, the regulations clearly explain to a person of ordinary intelligence what is required to qualify for this governmental benefit. Further, the definition of "socially and economically disadvantaged individual" as a "citizen . . . who has been subjected to racial or ethnic prejudice or cultural bias within American society because of his or her identity as a members of groups and without regard to their individual qualities," gives further meaning to the definitions of "Black American" and "Native American" here. "Otherwise imprecise terms may avoid vagueness problems when used in combination with terms that provide sufficient clarity." *Gammoh v. City of La Habra*, 395 F.3d 1114, 1120 (9th Cir. 2005). Plaintiffs also fail to show that these terms, when considered within the statutory framework, are so vague that they lend themselves to "arbitrary" decisions. Moreover, even if this Court did have jurisdiction to consider whether the revised definition of "Native American" was void for vagueness, a simple review of the statutory language leads to the conclusion that it is not. The revised definition of "Native Americans" now "includes persons who are enrolled members of a federally or State recognized Indian tribe, Alaska Natives, or Native Hawaiian." 49 C.F.R.

§ 26.5. This definition provides an objective criteria based on the decisions of the tribes, and does not leave the reviewer with any discretion. Plaintiffs' void for vagueness challenges should be dismissed.

G. CLAIMS UNDER 42 U.S.C. §1983 AGAINST STATE DEFENDANTS

In order to state a claim under 42 U.S.C. § 1983, a complaint must allege that (1) the conduct complained of was committed by a person acting under color of state law, and that (2) the conduct deprived a person of a right, privilege, or immunity secured by the Constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on other grounds*, *Daniels v. Williams*, 474 U.S. 327 (1986). Section 1983 is the appropriate avenue to remedy an alleged wrong only if both of these elements are present. *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986). To state a civil rights claim, a plaintiff must set forth the specific factual bases upon which he claims each defendant is liable. *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). Vague and conclusory allegations of official participation in a civil rights violations are not sufficient to support a claim under § 1983. *Ivey v. Board of Regents*, 673 F.2d 266 (9th Cir. 1982).

1. Claims for Damages Against the State and Individuals in their Official Capacities

In addition to asserting that the constitutional claims should be dismissed on the merits, the State Defendants move for summary dismissal of Plaintiffs' § 1983 claims, arguing that the State and the

individual state defendants acting in their official capacities should be dismissed. Dkt. 58.

To the extent that Plaintiffs assert § 1983 claims for damages against the State or the individual state defendants acting in their official capacities, the claim should be dismissed. "[A] State nor its officials acting in their official capacities are 'persons' under § 1983." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989). To the extent that Plaintiffs seek prospective injunctive relief, however, state officials acting in their official capacities are considered state actors under § 1983. *Doe v. Lawrence Livermore Nat. Lab.,* 131 F.3d 836, 839 (9th Cir. 1997). Even if the federal constitutional claims were not dismissed by this order, Plaintiffs' damages claims against the State and individual state defendants, acting in their official capacities, should be dismissed pursuant to § 1983.

2. Qualified Immunity for Individual State Defendants in their Individual Capacities

The State Defendants also move for summary dismissal of the § 1983 claims asserted against the individual state defendants, asserting that they are entitled to qualified immunity from suit. Dkt. 58.

Defendants in a Section 1983 action are entitled to qualified immunity from damages for civil liability if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Pearson v. Callahan*, 129 S.Ct. 808, 815 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Qualified immunity balances two important interests: the need to hold public

officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably. *Harlow v. Fitzgerald*, 457 U.S. at 815. The existence of qualified immunity generally turns on the objective reasonableness of the actions, without regard to the knowledge or subjective intent of the particular official. *Id*. at 819. Whether a reasonable governmental official could have believed his or her conduct was proper is a question of law for the court and should be determined at the earliest possible point in the litigation. *Act Up!/Portland v. Bagley*, 988 F.2d 868, 872-73 (9th Cir. 1993).

In analyzing a qualified immunity defense, the Court must determine: (1) whether a constitutional right would have been violated on the facts alleged, taken in the light most favorable to the party asserting the injury; and (2) whether the right was clearly established when viewed in the specific context of the case. *Saucier v. Katz*, 121 S. Ct. 2151, 2156 (2001). The relevant dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable governmental official that their conduct was unlawful in the situation they confronted. *Id*. The plaintiff bears the burden of proving that the particular federal right alleged to have been violated was clearly established at the time. *Pearson v. Callahan,* 555 U.S. 223 (2009).

As to the first *Saucier* inquiry, above, Plaintiffs have failed to show that their federal equal protection or due process rights or other statutory rights were violated.

As to the second *Saucier* inquiry, even if Plaintiffs had shown that their federal rights were violated by the individual state defendants here, Plaintiffs have failed to show that their rights were "clearly established" in the specific context of this case. While a case directly on point is not required, "existing precedent must have placed the statutory or constitutional question beyond debate." *Mullenix v. Luna*, 136 S.Ct. 305, 308 (*internal quotations omitted*). Plaintiffs fail to point to any cases that demonstrate that the statutory or constitutional issues in this case were "beyond debate." Plaintiffs broadly assert that the right not to be discriminated against is "clearly established," but that is not sufficient to overcome a claim for qualified immunity. "The clearly established inquiry 'must be undertaken in light of the specific context of the case, not as a broad general proposition.'" *S.B. v. Cty. of San Diego*, 15-56848, 2017 WL 1959984, at *5 (9th Cir. May 12, 2017)(*citing Mullenix,* at 308). Even if Plaintiffs had established a federal constitutional or statutory violation, the claims asserted against the individual state defendants, in their individual capacities, should be dismissed based on qualified immunity. The Court need not reach the State Defendants' additional arguments that the claims should also be dismissed because of their absolute immunity.

H. CLAIMS FOR VIOLATIONS OF 42 U.S.C. § 2000d AGAINST THE STATE DEFENDANTS

Under 42 U.S.C. § 2000d, "[n]o person in the United States shall, on the grounds of race, color, or national

origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Under 2000d-4a, a "program or activity" and "program" is defined generally as (1) an instrumentality of state or local government, including "the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government," (2) an educational institution, or (3) a corporation, partnership or private organization. A private right of action exists under Section 2000d where "(1) the entity involved is engaging in racial discrimination; and (2) the entity involved is receiving federal financial assistance." *Fobbs v. Holy Cross Health Systems,* 29 F.3d 1439, 1447 (9th Cir. 2001)(*overruled on other* grounds).

Plaintiffs' claims against the State Defendants for violation of Title VI (42 U.S.C. § 2000d) should be dismissed. Plaintiffs have failed to show that the State Defendants engaged in intentional impermissible racial discrimination. Moreover, "Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 287 (1978); *Alexander v. Sandoval*, 532 U.S. 275, 280–81 (2001). The DBE regulations' requirement that the State make decisions based on race has already been held to pass constitutional muster in the Ninth Circuit. *Western States Paving Co. v. Washington State Department of Transportation*, 407

F.3d 983 (9th Cir. 2005). As discussed above, Plaintiffs make no showing that the State Defendants violated their Equal Protection or other constitutional rights. Moreover, Plaintiffs failed to show that the State Defendants intentionally acted with discriminatory animus.

Further, to the extent the Plaintiffs assert claims that are based on disparate impact, those claims are unavailable because "Title VI itself prohibits only intentional discrimination." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 178 (2005). This claim should be dismissed.

I. JURISDICTION ON CLAIMS FOR VIOLATIONS OF THE WASHINGTON CONSTITUTION AND WLAD AGAINST THE STATE DEFENDANTS AND ORDER TO SHOW CAUSE

Jurisdiction is a threshold issue that must be raised *sua sponte*. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95 (1998). As is relevant here, a federal court has original jurisdiction over cases involving federal questions, 28 U.S.C. § 1332, or where the parties are diverse citizens and the amount in controversy is over $75,000, 28 U.S.C. § 1331. A federal court may exercise supplemental jurisdiction over state law claims asserted in cases in which the court has original jurisdiction. 28 U.S.C. § 1367(a).

As above, all Plaintiffs' federal claims and the Federal Defendants should be dismissed. Only Plaintiffs' state law claims remain. Further, according to the Complaint the remaining State Defendants and

Plaintiffs are all Washington state residents (Dkt. 1-1), and so are not diverse parties.

Pursuant to 28 U.S.C. § 1367(c), district courts may decline to exercise supplemental jurisdiction over a state law claims if: (1) the claims raise novel or complex issues of state law, (2) the state claims substantially predominate over the claim which the district court has original jurisdiction, (3) the district court has dismissed all claims over which it has original jurisdiction, (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction. "While discretion to decline to exercise supplemental jurisdiction over state law claims is triggered by the presence of one of the conditions in § 1367(c), it is informed by the values of economy, convenience, fairness, and comity." *Acri v. Varian Associates, Inc.*, 114 F.3d 999, 1001 (9th Cir. 1997)(*internal citations omitted*).

Although "it is generally within a district court's discretion either to retain jurisdiction to adjudicate the pendent state claims" or dismiss them without prejudice, or if appropriate, remand them to state court," *Harrell v. 20th Ins. Co.,* 934 F.2d 203, 205 (9th Cir. 1991), in the interest of fairness, the Plaintiffs and State Defendants should be given an opportunity to be heard on whether the state law claims should be dismissed without prejudice. The Plaintiffs and State Defendants should be ordered to show cause, if any they have, why this Court should not decline to exercise supplemental jurisdiction to dismiss the remaining state law claims without prejudice. Parties' briefs, if any, should be due August 17, 2017. Parties'

briefs should not exceed three pages. Consideration of the parties' responses to the Order to Show Cause should be noted for August 18, 2017. In the meantime, the remaining issues in motions for summary judgment (Dkts. 48 and 58), which are based entirely on state law, should be stricken, but may be renoted if the Court ultimately decides to exercise supplemental jurisdiction.

J. CONCLUSION

All Plaintiffs' federal claims asserted against both the Federal and State Defendants should be dismissed. The Plaintiffs and State Defendants should be ordered to show cause, if any they have, why the Court should not decline to exercise supplemental jurisdiction over the remaining state law claims.

III. ORDER

Therefore, it is hereby **ORDERED** that:

- Plaintiffs' Motion for Partial Summary Judgment (Dkt. 48) **IS:**
  - **DENIED** as to the federal claims, and
  - **STRICKEN** as to the state law claims asserted against the State Defendants for violations of the Washington Constitution and WLAD;
- The Federal Defendants' Motion for Summary Judgment on Administrative Procedure Act, Equal Protection, and Void for Vagueness Claims (Dkt. 54) **IS GRANTED**;

- The claims asserted against the Federal Defendants **ARE DISMISSED**; and

- The State Defendants' Cross Motion for Summary Judgment (Dkt. 58) **IS**

  - **GRANTED** as to Plaintiffs claims against the State Defendants for violations of the APA, Equal Protection, Void for Vagueness, 42 U.S.C. § 1983, and 42 U.S.C. § 2000d, those claims **ARE DISMISSED**;

  - **STRICKEN** as to the state law claims asserted against the State Defendants for violations of the Washington Constitution and WLAD; and

- The Plaintiffs and State Defendants **ARE ORDERED TO SHOW CAUSE**, in writing, if any they have, why his Court should not decline to exercise supplemental jurisdiction over the state law claims and should not dismiss the state law claims without prejudice. Parties' briefs, if any, are due **August 17, 2017**. Parties' briefs should not exceed three pages. Consideration of the parties' responses to the Order to Show Cause should be noted for **August 18, 2017**.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

Dated this 7th day of August, 2017.

/s/ Robert J. Bryan
ROBERT J. BRYAN
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CASE NO. 16-5582 RJB

[Filed November 17, 2016]

ORION INSURANCE GROUP, a Washington Corporation; RALPH G. TAYLOR, an individual, Plaintiffs,	)
v.	)
WASHINGTON STATE OFFICE OF MINORITY & WOMEN'S BUSINESS ENTERPRISES; EDWINA MARTIN-ARNOLD; DEBBIE MCVICKER; PAMELA SMITH; SARAH ERDMANN; STACEY SAUNDERS, individuals, and UNITED STATES DEPARTMENT OF TRANSPORTATION, and LESLIE PROLL, an individual, Defendants.	)

ORDER ON PARTIAL MOTION TO DISMISS

This matter comes before the Court on Defendants' United States Department of Transportation

("USDOT") and Stephanie Jones's, Acting Director of the USDOT's Office of Civil Rights, Partial Motion to Dismiss (Dkt. 34), Plaintiffs' Motion to Strike (Dkt. 41) and Plaintiffs' Motion to Amend (Dkt. 37). The Court has considered the pleadings filed in support of and in opposition to the motions and the file herein.

Plaintiffs filed this case alleging violations of federal and state law due to the denial of their application to be considered a disadvantaged business enterprise ("DBE") under federal law. Dkt. 1. The USDOT and Acting Director Jones (collectively the "Federal Defendants") move for a partial summary dismissal of the claims asserted against them. Dkt. 34. For the reasons provided, the motion (Dkt. 34) should be granted, in part, and denied, in part.

I. FACTS

According to Plaintiffs' Amended Complaint, Orion Insurance Group ("Orion") is a Washington corporation owned by Ralph Taylor. Dkt. 2, at 2. Mr. Taylor submitted an application to Washington State's Office of Minority & Women's Business Enterprises ("OMWBE"), seeking to have Orion certified as a minority business enterprise under Washington State law. *Id.*, at 3. In the application, Mr. Taylor identified himself as black. *Id.* His application was initially rejected, but after appealing the decision, OMWBE voluntarily reversed their decision and certified Orion as a minority business enterprise under Washington Administrative Code ("WAC") 326 and other Washington laws. *Id.,* at 3-4.

After March of 2014, Plaintiffs allege that Mr. Taylor submitted, to OMWBE, Orion's application for DBE certification under federal law. Dkt. 2, at 4. The Amended Complaint asserts that OMWBE and its employees, "act as an agent for [USDOT] and federal government by also accepting and determining applications for the parallel federal designation for [DBE] certification under 49 C.F.R. § 26." *Id.* Plaintiffs allege that "in accordance with the definitions set forth in 49 C.F.R. § 26.5, Mr. Taylor identified himself as Black American and Native American in the Affidavit of Certification" submitted with the application. *Id.*, at 5. Plaintiffs assert that OMWBE improperly requested Mr. Taylor provide an additional narrative and further documentation. *Id.,* at 6. Plaintiffs assert that other applicants were not required to provide the additional information. *Id.* Mr. Taylor responded to the request. *Id.* In June of 2014, Orion's DBE application was denied "on the basis that Mr. Taylor was not a member of a minority group under the federal regulations such that he was not entitled to be presumed economically and socially disadvantaged." *Id.,* at 7. Further, Plaintiffs assert that OMWBE found that he "had not proved social and economic disadvantage on an individual basis." *Id.*

The Amended Complaint alleges that in September 2014, Mr. Taylor appealed the denial of the DBE certification to the USDOT. Dkt. 2, at 7. Plaintiffs assert that on September 29, 2014, "USDOT acknowledged receipt of Orion's appeal and stated that it would docket the appeal after receiving the complete administrative record." *Id.* On October 13, 2014, USDOT received the administrative record. *Id.* After

three requests by Plaintiffs to docket the appeal, in February of 2015, the USDOT acknowledged that it had received the administrative record and docketed Orion's appeal. *Id.*

According to the Amended Complaint, on April 24, 2015, Plaintiffs filed a Petition for Writ of Mandamus in the Western District of Washington, case number 15-5267 JRC, in an effort to get the USDOT to make a decision. Dkt. 2, at 9. That case was stayed after the USDOT committed to providing a decision by December 2015. *Id.* Plaintiffs allege that on October 15, 2015, the USDOT affirmed the denial of Orion's DBE certification in a letter signed by Acting Director Jones. Dkt. 2, at 9.

Plaintiffs assert claims for (A) violation of the Administrative Procedures Act, 5 U.S.C. § 706, (B) "Discrimination under 42 U.S.C. § 1983" (reference is made to Equal Protection), (C) "Discrimination under 42 U.S.C. § 2000d," (D) violation of Equal Protection under the United States Constitution, (E) violation of the Washington Law Against Discrimination and Article 1, Sec. 12 of the Washington State Constitution, and that (F) the definitions in 49 C.F.R. § 26.5 are void for vagueness. Dkt. 2. Plaintiffs seek damages, injunctive relief: ("[r]eversing the decisions of the USDOT, Ms. Jones and OMWBE, and OMWBE's representatives . . . and issuing an injunction and/or declaratory relief requiring Orion to be certified as a DBE," and a declaration the "definitions of 'Black American' and Native American' in 49 C.F.R. § 26.5 to be void as impermissibly vague,") and attorneys' fees and costs. *Id.*

The Federal Defendants now move to dismiss claims asserted against Acting Director Jones in her individual capacity, arguing that the Court does not have personal jurisdiction over her. Dkts. 34 and 42. They also move for dismissal of Plaintiffs' claims for "discrimination under 42 U.S.C. § 1983," "discrimination under 42 U.S.C. § 2000d," violation of Equal Protection under the United States Constitution, and for violations of the WLAD and Article 1, Sec. 12 of the Washington State Constitution. *Id.* The Federal Defendants argue that this is an improper venue for the claims asserted against Acting Director Jones in her individual capacity. *Id.*

Plaintiffs respond and oppose the motion. Dkt. 37. The State Defendants do not object to the Federal Defendants' motion to dismiss. Dkt. 40. They also argue that the claims under the Washington State Constitution should be dismissed because Washington does not recognize a cause of action under the state constitution. *Id.*

Plaintiffs file a surreply, seeking to strike the State Defendants' argument regarding the viability of a Washington State Constitution claim because it was raised for the first time in a response. Dkt. 41.

This opinion will first consider the Plaintiffs' motion to strike, and then the Federal Defendants' partial motion to dismiss.

II. DISCUSSION

A. PLAINTIFFS' MOTION TO STRIKE

Plaintiffs' motion to strike the State Defendants' motion to dismiss claims under the state constitution (Dkt. 41) should be granted. The Court is mindful that "Washington courts have consistently rejected invitations to establish a cause of action for damages based upon constitutional violations without the aid of augmentative legislation." *Blinka v. Washington State Bar Association,* 109 Wash.App. 575 (2001); *Reid v. Pierce County,* 136 Wash.2d 195 (1998). The parties have not had an opportunity to fully brief the question, but the issue may be raised by an appropriate motion.

B. FEDERAL DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION

Fed. R. Civ. P. 12(b)(2) provides that a complaint shall be dismissed for lack of personal jurisdiction over a defendant. *Boschetto v. Hansing,* 539 F.3d 1011 (9th Cir 2008). "In opposition to a defendant's motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of establishing that jurisdiction is proper." *Boschetto,* at 1015 (*citing Sher v. Johnson*, 911 F.2d 1357, 1361 (9th Cir.1990)).

"Where, as here, there is no applicable federal statute governing personal jurisdiction, the district court applies the law of the state in which the district court sits." *Schwarzenegger v. Fred Martin Motor Co.,* 374 F.3d 797, 800 (9th Cir.2004)(*citing* Fed.R.Civ.P. 4(k)(1)(A); *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1320 (9th Cir.1998)). Washington's long-arm jurisdictional statutes, RCW 4.28.185 and RCW

4.28.080, are coextensive with federal constitutional due process requirements. *Amoco Egypt Oil Co. v. Leonis Nav. Co., Inc.,* 1 F.3d 848, 850-851 (9th Cir. 1993). Accordingly, "the jurisdictional analyses under state law and federal due process are the same." *Schwarzenegger,* at 800 (*internal citations omitted*).

Under the due process clause, "[f]or a court to exercise personal jurisdiction over a nonresident defendant, that defendant must have at least 'minimum contacts' with the relevant forum such that the exercise of jurisdiction 'does not offend traditional notions of fair play and substantial justice.'" *Id.* (*quoting Int'l Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945)). "There are two forms of personal jurisdiction that a forum state may exercise over a nonresident defendant-general jurisdiction and specific jurisdiction." *Boschetto,* at 1016.

Plaintiffs argue that they would need to conduct discovery to determine whether the Court has general jurisdiction over Acting Director Jones. Dkt 37. According to Defendants, Acting Director Jones lives and works in the Washington D.C. area. Plaintiffs have not made any showing that discovery should be conducted regarding whether the Court has general jurisdiction over Acting Director Jones. "Where a plaintiff's claim of personal jurisdiction appears to be both attenuated and based on bare allegations in the face of specific denials made by the defendants, the court need not permit even limited discovery." *Pebble Beach Co v. Caddy,* 453 F.3d 1151, 1160 (9th Cir. 2006).

Plaintiffs also argue that the Court has specific jurisdiction over Acting Director Jones, in her individual capacity. Dkt. 37. A three-part test is applied to determine whether the exercise of specific jurisdiction over a nonresident defendant is appropriate:

> (1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
>
> (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and
>
> (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.

Boschetto, at 1016 (*internal quotations and citations omitted*). Plaintiff bears the burden on the first two prongs. *Id.* "If the plaintiff establishes both prongs one and two, the defendant must come forward with a compelling case that the exercise of jurisdiction would not be reasonable." *Id.*

Under the first prong of the specific personal jurisdictional test, the analysis is divided into two sections: purposeful direction and purposeful availment. *Schwarzenegger,* at 802. "A purposeful direction analysis is most often used in suits sounding

in tort and a purposeful availment analysis is most often used in suits sounding in contract." *Id.*

"A showing that a defendant purposefully directed his conduct toward a forum state . . . usually consists of evidence of the defendant's actions outside the forum state that are directed at the forum, such as the distribution in the forum state of goods originating elsewhere." *Schwarzenegger,* at 802. "[D]ue process permits the exercise of personal jurisdiction over a defendant who purposefully directs his activities at residents of a forum, even in the absence of physical contacts with the forum." *Id.*, at 803 (*internal quotations omitted*). Under the "purposeful availment" portion of the test, the plaintiff must show "that a defendant purposefully availed himself of the privilege of doing business in a forum state" which "typically consists of evidence of the defendant's actions in the forum, such as executing or performing a contract there." *Schwarzenegger,* at 802.

To the extent that Plaintiffs' assert the Acting Director Jones was acting in her individual capacity when she made the decision to deny Orion's DBE certification, Plaintiffs' fail to show that Acting Director Jones purposefully directed her activities to Washington state or that she purposefully availed herself of the privilege of doing business in Washington. They have failed to carry their burden to show that the Court has personal jurisdiction over her in her individual capacity. They have "failed to allege sufficient minimum contacts with the state of Washington sufficient to satisfy the traditional notions of fair play and substantial justice required by

International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) and the Washington long-arm statute." *Gilbert v. DaGrossa*, 756 F.2d 1455, 1459 (9th Cir. 1985). This Court does not have personal jurisdiction over her in her individual capacity.

In light of this ruling, the Court need not reach whether the claims against her in her individual capacity should also be dismissed for improper venue. Further, even if they had established that the Court has personal jurisdiction over her in her individual capacity or that this was the proper venue for such claims, Plaintiffs have failed to state claims against her in her individual capacity, and those claims should be dismissed as more fully described below in Sections D and E.

C. MOTION TO DISMISS UNDER FED. R. CIV. P. 12(b)(6) STANDARD

Fed. R. Civ. P. 12(b) motions to dismiss may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Department*, 901 F.2d 696, 699 (9th Cir. 1990). Material allegations are taken as admitted and the complaint is construed in the plaintiff's favor. *Keniston v. Roberts*, 717 F.2d 1295 (9th Cir. 1983). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007)(*internal citations omitted*).

"Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id*. at 1965. Plaintiffs must allege "enough facts to state a claim to relief that is plausible on its face." *Id*. at 1974.

D. CLAIMS UNDER 42 U.S.C. §1983 AGAINST FEDERAL DEFENDANTS

In order to state a claim under 42 U.S.C. § 1983, a complaint must allege that (1) the conduct complained of was committed by a person acting under color of state law, and that (2) the conduct deprived a person of a right, privilege, or immunity secured by the Constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on other grounds*, *Daniels v. Williams*, 474 U.S. 327 (1986). Section 1983 is the appropriate avenue to remedy an alleged wrong only if both of these elements are present. *Haygood v. Younger*, 769 F.2d 1350, 1354 (9th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986). To state a civil rights claim, a plaintiff must set forth the specific factual bases upon which he claims each defendant is liable. *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). Vague and conclusory allegations of official participation in a civil rights violations are not sufficient to support a claim under § 1983. *Ivey v. Board of Regents*, 673 F.2d 266 (9th Cir. 1982).

To the extent Plaintiffs make claims against the Federal Defendants under 42 U.S.C. § 1983, the claims should be dismissed. "[B]y its very terms, § 1983 precludes liability in federal government actors." *Morse v. N. Coast Opportunities, Inc.*, 118 F.3d 1338, 1343

(9th Cir. 1997)(noting that conduct complained of must be by a person acting under the color of **state** law)(*emphasis added*). Further, to the extent Plaintiffs intend to premise the Federal Defendants' liability on an agency theory, that theory is foreclosed. *Ashcroft v. Iqbal,* 556 U.S. 662, 676 (2009(vicarious liability inapplicable for *Bivens* and § 1983 claims). Plaintiffs appear to be conflating the § 1983 claims made against the State Defendants and the law potentially applicable to them (*Monell* etc.), and the law applicable to the Federal Defendants. There is no motion regarding the § 1983 claims against the State Defendants pending before the Court at this time. The § 1983 claims asserted against the Federal Defendants, however, should be dismissed.

E. MONETARY AND NON-MONETARY RELIEF CLAIMS AGAINST THE FEDERAL DEFENDANTS AND SOVEREIGN IMMUNITY

The United States, as sovereign, is immune from suit unless it consents to be sued. *See United States v. Mitchell*, 445 U.S. 535, 538 (1980); *Cato v. United States*, 70 F.3d 1103, 1107 (9th Cir. 1995). If a claim does not fall squarely within the strict terms of a waiver of sovereign immunity, a district court is without subject matter jurisdiction. *See, e.g., Mundy v. United States*, 983 F.2d 950, 952 (9th Cir. 1993). "Where a suit has not been consented to by the United States, dismissal of the action is required." *Gilbert v. DaGrossa*, 756 F.2d 1455, 1458 (9th Cir. 1985). Plaintiffs have the burden of establishing that their "action falls within an unequivocally expressed waiver

of sovereign immunity by Congress." *Dunn & Black, P.S. v. United States*, 492 F.3d 1084, 1088 (9th Cir. 2007).

1. Claims for Monetary Relief Against the United States and Acting Director Jones in her Official Capacity

The Federal Defendants' partial motion to dismiss Plaintiffs' claims for monetary damages against the United States and against Acting Director Jones, in her official capacity, should be granted. Plaintiffs make no showing that the United States has waived its sovereign immunity on their claims for monetary damages for the violation of the Equal Protection clause under the United States Constitution, 42 U.S.C. § 2000d, the Washington Law Against Discrimination or the Washington Constitution such that this Court has jurisdiction over these claims. Any waiver of sovereign immunity "must be unequivocally expressed in statutory text." *Munns v. Kerry*, 782 F.3d 402, 412 (9th Cir. 2015)(*internal citations and quotations omitted*) (affirming dismissal, based on sovereign immunity, of monetary claims for relief for violations of the due process clause, takings clause of the U.S. Constitution, failure to pay back pay and other benefits asserted against the United States). Plaintiffs point to no such waiver. Further, "[a]n action against an officer, operating in his or her official capacity as a United States agent, [like Ms. Jones here] operates as a claim against the United States." *Solida v. McKelvey*, 820 F.3d 1090, 1095 (9th Cir. 2016). The monetary claims for violation of the Equal Protection clause, 42 U.S.C. § 2000d, the WLAD, and the Washington Constitution

asserted against the United States and Acting Director Jones should be dismissed.

Plaintiffs' reference to *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 236 (1995) is not helpful. The plaintiff in that case sought only "forward looking relief," that is non-monetary injunctive relief. *Id.* The Court there specifically stated that it "expressed no view" on whether sovereign immunity would bar a monetary damages claim - presumably because the question was not before the court. *Id.,* at 210.

Plaintiffs refer to the Federal Torts Claims Act, 28 U.S.C. § 2674 ("FTCA"). Dkt. 37, at 18. This is also not helpful to them. "The FTCA requires, as a prerequisite for federal court jurisdiction, that a claimant first provide written notification of the incident giving rise to the injury, accompanied by a claim for money damages to the federal agency responsible for the injury." *Munns,* at 413 (citing 28 U.S.C. § 2675(a); 28 C.F.R. § 14.2(b) and *Johnson v. United States*, 704 F.2d 1431, 1442 (9th Cir.1983) ("Exhaustion of the claims procedures established under the Act is a prerequisite to district court jurisdiction."). Plaintiffs here "have not alleged or provided evidence that they have exhausted their administrative remedies under the FTCA, so they cannot rely on that statute's waiver of sovereign immunity for jurisdiction." *Id.*

Plaintiffs cite no authority to support their theory that the government's decision to intervene in another case involving some of the claims raised here mean that the government has waived sovereign immunity in this case. Further, Plaintiffs make no reasonable

argument that Acting Director Jones acted *ultra vires* in denying their application.

The motion to dismiss the monetary relief sought against the Federal Defendants for violations of the Equal Protection clause under the United States Constitution, 42 U.S.C. § 2000d, the Washington Law Against Discrimination or the Washington Constitution should be granted.

2. Claims for Non-Monetary Relief Against the United States and Acting Director Jones in her Official Capacity

To the extent that the United States and Acting Director Jones, in her official capacity, move for dismissal of Plaintiffs' claims for non-monetary relief, based on sovereign immunity, the motion should be denied.

Under the APA, the government has waived sovereign immunity for claims for equitable relief. *See* 5 U.S.C. § 702 ("An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States...."). Section 702 "is an unqualified waiver of sovereign immunity in actions seeking nonmonetary relief against legal wrongs for which governmental agencies are accountable." *The Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 525 (9th Cir. 1989). In *The Presbyterian Church*, the Ninth Circuit noted that this was a sweeping

waiver and that Congress stated in passing the most recent version of §702 that it was time to "eliminate the sovereign immunity defense in all equitable actions for specific relief against a Federal agency or officer acting in an official capacity." *Id.* The Federal Defendants' motion to dismiss Plaintiffs' claims for equitable relief sought against the United States and Acting Director Jones, in her official capacity, should be denied.

3. Claims for Monetary Relief Against Acting Director Jones in her Individual Capacity

To the extent that Plaintiffs assert a claim for monetary damages against Acting Director Jones, in her individual capacity, the claim should be dismissed because there is no showing that an implied private right of action against a federal officer for damages is appropriate here.

In *Bivens v. Six Unknown Named Agents of the Bureau of Narcotics,* 403 U.S. 388 (1971), the "Supreme Court provided a judicially-created cause of action for damages arising out of constitutional violations by federal officers, holding that 'petitioner is entitled to recover money damages for any injuries he has suffered as a result of the agents' violation of the Fourth Amendment.'" *Solida v. McKelvey*, 820 F.3d 1090, 1094 (9th Cir. 2016). "The Court explained that the remedy filled a gap in cases where sovereign immunity bars a damages action against the United States." *Id.* The Supreme Court has extended the *Bivens* holding in only two other cases: in *Davis v. Passman*, 442 U.S. 228 (1979), the Court permitted a political appointee to bring a claim for sex-discrimination "against a congressman, despite the absence of such a remedy in

Title VII of the Civil Rights Act of 1964, because there was no evidence that Congress intended to prevent political appointees from seeking relief under a judicially created remedy." *Western Radio Services Co. v. U.S. Forest Service,* 578 F.3d 1116, 1119 (2009). Likewise, in *Carlson v. Green*, 446 U.S. 14 (1980), "the Court allowed a prisoner's action against prison officials for failure to provide proper medical attention in violation of the Eighth Amendment's prohibition against cruel and unusual punishment, notwithstanding the availability of a remedy under the FTCA, because there was evidence that Congress did not intend the FTCA to be a substitute for recovery under *Bivens*." *Id.*

Since *Carlson,* the Supreme Court has not extended *Bivens,* however. *Id.* It did not permit a *Bivens* remedy for claims for violations of federal employees' First Amendment rights by their employers, *Bush v. Lucas*, 462 U.S. 367 (1983); harms suffered incident to military service, *United States v. Stanley*, 483 U.S. 669 (1987); denials of Social Security benefits, *Schweiker v. Chilicky*, 487 U.S. 412 (1988); decisions by federal agencies, *FDIC v. Meyer*, 510 U.S. 471 (1994); actions by private corporations operating under federal contracts, *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61 (2001); retaliation by federal officials against private landowners, *Wilkie v. Robbins*, 551 U.S. (2007); or Eighth Amendment claims against private contractors hired to administer public prisons, *Minneci v. Pollard*, 132 S.Ct. 617 (2012). *Mirmehdi v. United States*, 689 F.3d 975, 980–81 (9th Cir. 2012).

In order to determine whether a *Bivens* remedy (that is a damage claim against a federal officer) is appropriate, the courts use a two-step analysis: (1) the "court determines whether there is 'any alternative, existing process for protecting' the plaintiff's interests;" and if there is no such "statutory remedial scheme to take the place of a judge-made remedy," (2) the court "next asks whether there nevertheless are 'factors counseling hesitation' before devising such an implied right of action." *Western Radio,* at 1120 (*quoting Wilkie,* at 550).

As to the first step, the APA provides an "alternative, existing process for protecting the plaintiff's interests here, raising the inference that Congress "expected the Judiciary to stay its *Bivens* hand." *Western Radio,* at 1122 (*quoting Wilkie,* at 550). The core of Plaintiffs' complaint is an unfavorable agency decision. As noted in *Western Radio,* "[t]he APA expressly declares itself to be a comprehensive remedial scheme: it states that a 'person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review,' and then sets forth the procedures for such review." *Id.* (*quoting* 5 U.S.C. § 702 *and citing* §§ 704, 706). The APA allows "any person 'adversely affected or aggrieved' by agency action to obtain judicial review thereof, so long as the decision challenged represents a 'final agency action for which there is no other adequate remedy in a court.'" *Id.* (*quoting Webster v. Doe*, 486 U.S. 592, 599, 108 S.Ct. 2047, 100 L.Ed.2d 632 (1988) (*quoting* 5 U.S.C. §§ 701–06)). Under the APA, a court is authorized to:

> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be ... (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; [or] (B) contrary to constitutional right, power, privilege, or immunity....

Id. (*quoting* 5 U.S.C. § 706(1)-(2)). "The APA's comprehensive provisions provide the backup or default remedies for all interactions between individuals and all federal agencies." *Id.,* at 1123. "The fact that APA's procedures are available where no other adequate alternative remedy exists further indicates Congress's intent that courts should not devise additional, judicially crafted default remedies." *Id.* While the APA does not provide for monetary damages, does not allow claims against individuals, or right to a trial by jury, "remedial schemes lacking such features may be adequate alternatives, provided that the absence of such procedural protections was not inadvertent on the part of Congress." *Id.* The Ninth Circuit concluded "that the design of the APA raises the inference that Congress expected the Judiciary to stay its *Bivens* hand and provides a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages." *Id.* Accordingly, it held that "the APA leaves no room for *Bivens* claims based on agency action or inaction." *Id.*

In light of the Ninth Circuit holding in *Western Radio*, the Plaintiffs' claims against Acting Director Jones in her individual capacity for damages should be

dismissed because the APA provides an alternative, existing process for protecting the plaintiff's interests. As such, the Court need not consider the second factor under *Wilkie*, whether there are other "factors counseling hesitation." *See Western Radio,* at 1120.

4. Claims for Non-Monetary Relief from Acting Director Jones in her Individual Capacity

To the extent that Plaintiffs seek non-monetary relief from Acting Director Jones, in her individual capacity, they make no showing that she can afford them such relief. Plaintiffs make no showing that Ms. Jones, as an individual, has the authority to certify Orion as a DBE under federal law, to declare definitions in 49 C.F.R. 26.5 as "impermissibly vague," or provide them other equitable relief. *Solida v. McKelvey*, 820 F.3d 1090, 1095 (9th Cir. 2016). Only the Court or the United States - through its officers – has the power to take the action that Plaintiffs seek. *Id*.

F. CLAIMS FOR VIOLATIONS OF THE EQUAL PROTECTION CLAUSE ASSERTED AGAINST THE UNITED STATES FOR EQUITABLE RELIEF

Insofar as Plaintiffs seek equitable relief against the United States for violation of the equal protection clause of the United States Constitution, the motion to dismiss should be denied. The Federal Defendants do not advance any other basis for dismissal of Plaintiff's claim for equitable relief for violation of the equal protection clause under the United States Constitution.

G. CLAIMS FOR VIOLATIONS OF 42 U.S.C. § 2000d AGAINST THE UNITED STATES FOR EQUITABLE RELIEF

Under 42 U.S.C. § 2000d, "[n]o person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Under 2000d-4a, a "program or activity" and "program" is defined generally as (1) an instrumentality of state or local government, including "the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government," (2) an educational institution, or (3) a corporation, partnership or private organization. A private right of action exists under Section 2000d where "(1) the entity involved is engaging in racial discrimination; and (2) the entity involved is receiving federal financial assistance." *Fobbs v. Holy Cross Health Systems,* 29 F.3d 1439, 1447 (9th Cir. 2001)(*overruled on other* grounds).

In addition to asserting sovereign immunity against claims for damages for violations of § 2000d, the Federal Defendants argue that Plaintiffs' claim asserted against the United States should be dismissed because the United States' DBE program is not a "program or activity" receiving federal financial assistance within the meaning of the statute. Dkt. 34. The Federal Defendants' motion to dismiss the § 2000d

claim asserted against them (Dkt. 34) should be granted. The plain language of the statute provides that the program or activity must be in connection with an instrumentality of state or local government. Plaintiffs' claims against the Federal Defendants arise under a program of the federal government, and the final decision of which Plaintiffs complain was rendered by the federal government.

Plaintiffs' reference to the claims made in the U.S. District Court in *Adarand Constructors,* and not addressed by either the U.S. Supreme Court or the Tenth Circuit Court of Appeals is not helpful. Dkt. 37. As is Plaintiffs' supposition that "[i]f the DBE program was not a program, this surely would have been raised before the matter went to the U.S. Supreme Court." *Id.* This claim should be dismissed.

H. CLAIMS FOR VIOLATIONS OF WASHINGTON LAW AGAINST DISCRIMINATION AND THE WASHINGTON CONSTITUTION AGAINST THE UNITED STATES

Plaintiffs' claims against the United States for violation of the Washington State Constitution or the WLAD should be dismissed. Plaintiffs failed to show that the United States waived sovereign immunity for these damages on these claims. Further, Plaintiffs make no showing that the non-monetary relief they seek (a declaration that Orion is a DBE under federal law or that the definitions in 49 C.F.R. 26.5 are "impermissibly vague") is available under the WLAD and/or the Washington Constitution. These claims

asserted against the United States should be dismissed.

I. CONCLUSION ON MOTION TO DISMISS

The Federal Defendants' Partial Motion to Dismiss should be granted as to: (1) the claims asserted against Acting Director Jones, in her individual capacity, for lack of personal jurisdiction and for failure to state a claim, (2) the claims for monetary relief against the United States, and Acting Director Jones, in her official capacity, for violations of the Equal Protection Clause of the United States Constitution, 42 U.S.C. § 2000d, the Washington Law Against Discrimination, and the Washington Constitution, and (3) the claims for equitable relief asserted against the United States and Acting Director Jones, in her official capacity, for violations of 42 U.S.C. § 2000d, the Washington Law Against Discrimination, and the Washington Constitution.

Plaintiffs remaining claims against the United States and Acting Director Jones, in her official capacity, are for equitable relief for violation of the Equal Protection Clause of the United States Constitution and for violation of the APA. (The APA claim was not the subject of this motion).

F. MOTION TO AMEND

Fed. R. Civ. P. 15(a)(2) provides that "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." A motion to amend under Rule 15(a)(2), "generally shall be denied only upon showing of bad faith, undue delay, futility, or

undue prejudice to the opposing party." *Chudacoff v. University Medical Center of Southern Nevada,* 649 F.3d 1143, (9th Cir. 2011).

Plaintiffs, in their Response, request leave to amend, "to the extent that the court finds any deficiencies in the pleadings that can be cured by amendment." Dkt. 37. The claims dismissed by this order cannot be cured by amendment, so to the extent Plaintiffs seek to leave to amend to plead these claims again, the motion should be denied.

Plaintiffs also state that they seek to add additional claims. Dkt. 37. It is not clear what claims or against whom the Plaintiffs intend to add by amendment. Plaintiffs' motion should be denied without prejudice, to be re-filed in accord with the Federal and Local Civil Rules (including filing a draft copy of the proposed amended complaint), to give all parties notice of the proposed amendments and a chance to be heard.

III. ORDER

Therefore, it is hereby **ORDERED** that:

- Plaintiffs' Motion to Strike (Dkt. 41) **IS GRANTED**; and
- Defendants' United States Department of Transportation and Acting Director Stephanie Jones's Partial Motion to Dismiss (Dkt. 34) **IS:**
    - **GRANTED** as to: (1) the claims asserted against Acting Director Jones, in her individual capacity for lack of personal jurisdiction and failure to state a claim,

(2) the claims for monetary relief against the United States, and Acting Director Jones, in her official capacity, for claims for violations of the Equal Protection Clause of the United States Constitution, 42 U.S.C. § 2000d, the Washington Law Against Discrimination, and the Washington Constitution for failure to state a claim, (3) the claims for equitable relief asserted against the United States and Acting Director Jones, in her official capacity, for violations of 42 U.S.C. § 2000d, the Washington Law Against Discrimination, and the Washington Constitution for failure to state a claim, and

- **DENIED** as to the motion to dismiss Plaintiffs' claims against the United States and Acting Director Jones, in her official capacity, for equitable relief for violation of the Equal Protection Clause of the United States Constitution; and

- Plaintiffs' Motion to Amend (Dkt. 37) **IS DENIED WITH PREJUDICE,** as to the claims dismissed by this Order, **and DENIEDWITHOUT PREJUDICE,** as to the remainder of the motion to amend.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

Dated this 17th day of November, 2016.

/s/ Robert J. Bryan
ROBERT J. BRYAN
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 17-35749
D.C. No. 3:16-cv-05582-RJB
Western District of Washington, Tacoma

[Filed February 19, 2019]

ORION INSURANCE GROUP, a Washington Corporation; RALPH G. TAYLOR, an individual, Plaintiffs-Appellants,	)
v.	)
WASHINGTON'S OFFICE OF MINORITY & WOMEN'S BUSINESS ENTERPRISES; EDWINA MARTIN-ARNOLD; DEBBIE MCVICKER; PAMELA SMITH; SARAH ERDMANN; STACEY SAUNDERS, individuals; U.S. DEPARTMENT OF TRANSPORTATION; STEPHANIE JONES, an individual, Defendants-Appellees.	)

ORDER

Before: W. FLETCHER, BYBEE, and WATFORD, Circuit Judges.

Plaintiffs-Appellants filed a petition for rehearing en banc on January 18, 2019 (Dkt. No. 70). Judges W. Fletcher, Bybee and Watford have voted to deny the petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is **DENIED**.