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Submitted Electronically to
Regulations.gov

Hon. Sean Duffy, Secretary
U.S. Department of Transportation
Office of the General Counsel
1200 New Jersey Avenue, S.E.
Washington, DC 20590
Attn: Daniel Cohen, Office of the General Counsel

Re: Regulatory Reform RFI
Document ID DOT-OST-2025-0026-0001, Published Document 2025-05557, 90 Fed. Reg. 14593 (Apr. 3, 2025)

Dear Secretary Duffy:

Southeastern Legal Foundation (SLF)[1] appreciates the opportunity to submit a response to your request for information regarding regulations to repeal under Executive Order 14219, "Ensuring Lawful Governance and Implementing the President's 'Department of Government Efficiency' Deregulatory Initiative," issued on February 19, 2025, and Executive Order 14192, "Unleashing Prosperity Through Deregulation," issued on January 31, 2025.

Furthermore, although issued after your request for information and thus unmentioned in the request for information, two other presidential actions are relevant to this letter. The first was issued on April 9, 2025. That day, the White House issued a Presidential Memorandum, "Directing the Repeal of Unlawful Regulations" (Presidential Memo). That Memorandum directs agencies to prioritize review of regulations for their legality under ten recent watershed United States Supreme Court cases, including *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.* (*SFFA*), 600 U.S. 181 (2023). The second, issued on April 23, 2025, was Executive Order 14281, "Restoring Equality of Opportunity and Meritocracy." Executive Order 14281 restores American meritocracy and a colorblind society by abandoning disparate impact theory. It directs agencies,

[1] Southeastern Legal Foundation is a national, nonprofit legal organization dedicated to defending liberty and Rebuilding the American Republic®. Founded in 1976, SLF has made it its mission to protect the American people from government overreach, challenge government policies when they violate the Constitution, and restore constitutional balance in our system of government. SLF is proud to serve as Freedom's lawyers.

in coordination with the Attorney General, to report to the President all existing regulations, guidance, rules, or orders that impose disparate-impact liability or similar requirements, and detail agency steps for their amendment or repeal, as appropriate under applicable law.

As you will see, the Department of Transportation (DOT) maintains two programs that are not lawful under *SFFA* and were unconstitutional long before that decision. The programs also incorporate disparate impact theory requirements and fall well under the Executive Orders and the Presidential Memo.

Introduction

The two regulations are "Participation of Disadvantaged Business Enterprise in Airport Concessions" (ACDBE), *see* 49 C.F.R. §§ 23 *et seq.*, and "Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs" (DBE), *see* 49 C.F.R. §§ 26 *et seq.* We have focused on these two programs because they fall under an umbrella of unconstitutional programs which SLF has extensive experience litigating—programs that carve out a "socially disadvantaged" category, a term that discriminates based on race and sex in violation of both the Constitution and civil rights laws. *See, e.g.*, *Holman v. Vilsack*, No. 21-1085, 2021 U.S. Dist. LEXIS 127334, at *35 (W.D. Tenn. Jul. 8, 2021) (enjoining program to forgive 120% of loans to "socially disadvantaged" farmers and ranchers); *see also Strickland v. USDA*, 736 F. Supp. 3d 469, 487 (N.D. Tex. 2024) (enjoining 8 disaster relief programs that provided additional benefit to "socially disadvantaged" farmers and ranchers).

Our prior challenges involved USDA, but both DOT programs are similarly targeted towards "socially disadvantaged" groups, defined in such a way that they mandate the use of race and sex preferences in transportation projects using virtually identical racial categories. *Compare* 49 C.F.R. § 23.3 (listing races and women for ACDBE program) *and* 49 C.F.R. § 26.5 (listing races and women for DBE program), *with Holman*, 2021 U.S. Dist. LEXIS 127334, at *2 (listing races) *and Strickland*, 736 F. Supp. 3d at 475 (listing races and women). As discussed below, the term "socially disadvantaged" is a euphemism for a race and sex preferences. Because these regulations involve state-sponsored discrimination, they undermine the national interest as declared by EO 14219 because they raise serious constitutional difficulties (to say the least) under current law governing racial preferences. *See* EO 14219 § 2(i). In truth, they lack even a glimmer of hope of surviving review in the post-*SFFA* legal landscape and should be prioritized in the agency's review-and-repeal process. *See* Presidential Memo.

The last Administration injected what it called "diversity, equity, and inclusion," or DEI, into every area of federal regulation and demanded active discrimination throughout the federal government. Although it used various euphemisms when it tried to disguise its unconstitutional actions—one preferred term was "socially disadvantaged"—the last Administration's DEI initiatives always involved racial discrimination and often included sex discrimination.

In contrast, this Administration has shown a commitment to our Constitution by ending all forms of state-sanctioned discrimination. Even if this Administration opts not to use these two programs in a constitutionally suspect manner, DOT's "socially disadvantaged" preferences in the ACDBE and DBE programs remain on the books and are discriminatory. These regulations should be included in the list you send to the Office of Information and Regulatory Affairs (OIRA) for rescission or modification under EO 14219. And due to the obvious conflict with the Supreme

Court's watershed *SFFA* decision, this should be a high priority. Further, under EO 14281, you should identify these regulations as based on disparate impact theory and work with the Attorney General and President for their rescission or amendment. Until rooted out, they will remain available for a future administration to resume the "sordid business [of] divvying us up by race." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part).

We support you in this effort to eliminate discrimination in all its forms and stand by ready to assist you in any way possible as you restore DOT's commitment to colorblindness and equality. All Americans deserve it.

I. DOT's ACDBE and DBE regulations discriminate based on race and sex.

The ACDBE program originates in a statute that conditions project grant applications for federal funds for airport development on written assurances that the airport will "take necessary action to ensure . . . that at least 10 percent of all businesses at the airport . . . are small business concerns . . . owned and controlled by a socially and economically disadvantaged individual . . . ." 49 U.S.C. § 47107(e)(1).

The DBE program addresses grants separate from airports (although airports can also use the DBE program for DOT grants that do not involve concessions or car rentals) and originates with 23 U.S.C. § 304. It declares it to be in the national interest to encourage the development of small businesses and directs the Secretary to assist small businesses in obtaining contracts in connection with highway funds. *Id.* When DOT issued regulations for these two statutes to create the DBE program, it created a program that explicitly discriminates in favor of "socially and economically disadvantaged individuals" in the name of halting discrimination.

The preference involves constitutionally protected characteristics: race and sex. "Socially and economically disadvantaged individual" is defined by reference to 49 U.S.C. § 47113(a). *Id.* § 47107(e)(1). That section defines the term by reference to section 8(d) of the Small Business Act located at 15 U.S.C. § 637(d), except that it also adds a presumption that women are socially and economically disadvantaged. *See* 49 U.S.C. § 47113(a)(2). Section 637(d)(3) then specifies that Black Americans, Hispanics, Native Americans, Asian Pacific Americans, and "other minorities, or any other individual found to be disadvantaged by the Administrator" are presumed socially and economically disadvantaged. Both the DBE and ACDBE programs discriminate based on race and sex.

A. The ACDBE program

The ACDBE program is fully fleshed out in regulations found at 49 C.F.R. § 23. The regulations apply to any recipient for a grant that has received a grant at any time after January 1988. 49 C.F.R. § 23.5. The ACDBE program defines the term, "socially and economically disadvantaged" by express reference to race and sex. 49 C.F.R. § 23.3. Two racial groups—"Alaska Native" and "Native Hawaiian"—are separately defined by reference to their "bloodlines," "blood quantum" and ancestral "native" heritage. *Id.* (defining "Alaska Native" by reference to their "bloodlines," and "minimum blood quantum" and "Native Hawaiian" by reference to whether the individual's "ancestors were natives, prior to 1778, of the area that now comprises the State of Hawaii").

The certification standards for ACDBEs and DBEs both rely on the same framework. *Id.* § 23.31(a) (adopting the certification for ACDBEs using the procedures for DBEs in Part 26). Under the ACDBE certification standards, the "general rule" is that individuals who are "women, Black American, Hispanic American, Native American, Asian Pacific American, Subcontinent Asian American, or other minorities found to be disadvantaged by the Small Business Administration (SBA), are rebuttably presumed to be socially and economically disadvantaged." *Id.* § 26.67(a)(1). This rebuttable presumption, *see id.* § 26.67(b), places a burden on the non-presumptively favored races to satisfy if they are to be on equal status. *Id.* § 26.67(d)(1) (explaining that members of other groups can "attempt to prove" that they are individually socially disadvantaged through a personal narrative).[2]

Under the ACDBE program, airports must provide goals to DOT, *id.* § 23.25(e)(1) and then lay out the race-neutral measures the airport intends to take to reach those goals. 49 C.F.R. § 23.25(d). **But it must also enact "race-conscious measures" when race-neutral measures alone "are not projected to meet an overall goal**." *Id.* § 23.25(e). "Race-conscious measure" is separately defined to mean "a measure or program that is specifically focused on assisting only ACDBEs, including women-owned ACDBEs." *Id*. § 23.3.

The objective in setting a goal is to estimate the percentage of work that would be performed by ACDBEs "in the absence of discrimination and its effects," and then using that goal as a preference the recipient must meet. *Id.* § 23.51(a). It works in two parts:

- It calculates a base figure for the "relative availability of ACDBEs" available to perform the job using a variety of considerations. *Id.* § 23.51(c) (calculating Step One).
- That base is then adjusted based on "all relevant evidence," *Id.* § 23.51(d) (calculating Step Two).

This produces an overall goal of contracts to award to "socially disadvantaged" firms that the recipient must meet by use of a race and sex preference if necessary.

Pertinent to EO 14281 in particular, the overall goal setting process expressly allows for the inclusion of disparate impact studies. *See id.* §§ 23.51(c)(3) (using disparity studies at Step One), (d)(3)(1) (including statistical disparities in the ability of ACDBEs to get financing, bonding, and insurance in Step Two). But the overall goal framework itself is pure disparate impact theory because it assumes that any differences between ACDBEs and non-favored races in the relevant market is attributable to discrimination.

When that overall goal cannot be met through race neutral measures, DOT *requires* recipients to discriminate. *See id.* § 23.25(e) (directing that ACDBE program "must" implement race- and sex-conscious measures when neutral measures "standing alone are not projected to meet an overall goal"). By demanding finding recipients implement "race-conscious measures," *id.*, to

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[2] Ironically, the CFR also requires recipients to meet general nondiscrimination requirements and provide assurances that they will abide by them in any concession and management agreements, 49 C.F.R. § 23.9, an impossibility if they are to also presumptively favor some individuals because of their race.

"correct" the disparate outcomes between races, the ACDBE program requires recipients reject the basic and foundational American promise of equality.

Nothing could better put on display the foresight of Justice Scalia's warning of the impending "war" between "disparate impact and equal protection." *Ricci v. DeStefano*, 557 U.S. 557, 595–96 (2009) (Scalia, J., concurring). Disparate impact theory has been recycled and reused in another more recent euphemism, "equity," which also assumes that all differences between groups in outcomes is attributable to discrimination and that the government must therefore abandon its commitment to equal protection. *See Rollerson v. Brazos River Harbor Navigation Dist.*, 6 F.4th 633, 648 (5th Cir. 2021) (Ho, J., concurring in part and concurring in the judgment) (explaining that the difference between equity and equality is "the difference between securing equality of opportunity regardless of race and guaranteeing equality of outcome based on race. It's the difference between color blindness and critical race theory . . . .").

In summary, under the ACDBE program, DOT regulations mandate (1) the setting of a goal that assumes any disparate outcomes between races are attributable to historic discrimination and (2) the enactment of discriminatory measures to reach that goal once neutral measures fail.

B. The DBE Program

The DBE program functions the same way and is found at 49 C.F.R. § 26. It is not limited to airports; the regulations apply to recipients of many types of federal highway or transit funds. 49 C.F.R. § 26.3(a). Like the ACDBE program, it defines the term, "socially and economically disadvantaged" by express reference to race and sex. *Id.* § 26.5. It also starts with a general rule that the certain minorities and women are presumed to be socially and economically disadvantaged. *Id.* And it too defines "Alaska Native" by an assessment of their "minimum blood quantum" and "bloodlines." *Id.*

The DBE program works by requiring recipients of certain federal funding projects to have a DBE program. *Id.* § 26.21(a). No one is eligible for DOT funding until and unless DOT approves their DBE program, and the recipient "must" carry out the program until all funds have been expended. *Id.* § 26.21(c); *see also id*. § 26.39(c) (stating that "[y]ou must actively implement your program elements" is a "requirement" of the DBE program).

Funding recipients set an overall goal for DBE participation in any contract based on "the relative availability of DBEs" that works the same as the ACDBE overall goal formula. *See id.* § 26.45(b). The overall goal for the DBE program must be based on the availability of "ready, willing and able DBEs" relative to all businesses that assumes that all disparities between races are attributable to discrimination. *Id*. § 26.45(b). The regulation then lays out an elaborate two-step process for calculating goals. *Id.* §§ 26.45(c), (d). This process also expressly allows disparity studies and statistical disparities. *See id*. §§ 26.45(c)(3) (using disparity studies at Step One), (d)(1)(ii), (d)(2)(i) (including statistical disparities in Step Two).

Recipients "must" meet the "maximum feasible" portion of their overall goal by using race-neutral means of facilitating DBE participation. *Id*. § 26.51(a); *see also id.* § 26.51(b) (listing examples of race-neutral means). But the recipient must also establish what it calls "contract goals" to meet any portion of the overall goal that cannot be met through race-neutral means. *Id*. § 26.51(e). Once the recipient establishes a "DBE contract goal," it "must" award the contract to

a bidder or offeror who makes a good-faith effort to meet it. *Id*. § 26.53(a). In conclusion, the DBE program discriminates based on race and sex in a near identical fashion to the ACDBE program.

II. The ACDBE and DBE regulations should be submitted to OIRA for rescission or amendment.

Because the regulations discriminate based on protected characteristics, they are already constitutionally suspect. *See Adarand Constructors v. Pena*, 515 U.S. 200, 217 (1995). Both of DOT's programs are fatally flawed and will fail to satisfy strict scrutiny. Whatever defense DOT may have once had is no longer good enough. The programs fail to satisfy the "twin commands" of equal protection jurisprudence and they lack a logical end point, making them constitutionally infirm. *See SFFA*, 600 U.S. at 216.

The two programs were almost certainly unconstitutional long before *SFFA*. DOT's racial preferences were already subject to the "daunting two-step examination" of strict scrutiny. *Id*. at 184.[3] The rules for strict scrutiny are well-established. These regulations cannot survive it because they lack anything resembling a compelling interest as they are not even presented as efforts to remedy past discrimination that *DOT* or the recipients inflicted. Instead, they are impermissible efforts to remedy broad societal inequities. And the programs have no logical endpoint. Nor are they remotely narrowly tailored; they employ clumsy racial classifications that courts are increasingly skeptical of on their face.

A. The programs are certainly unlawful under *SFFA*, if they ever were constitutional at all.

1. The programs violate the "twin pillars" of equal protection.

The Supreme Court's most recent denouncement on so-called "benign" racial classifications was *SFFA*. In *SFFA*, the Supreme Court rejected a racial preference scheme without regard to a tiers-of-scrutiny test because it failed to satisfy what the Court called the "twin commands" of its equal protection cases. *Id*. at 218 (explaining that, in addition to their inability to satisfy strict scrutiny, Harvard and UNC also "fail[ed] to comply with the twin commands of the Equal Protection Clause that race may never be used as a 'negative' and that it may not operate as a stereotype"). The Supreme Court made abundantly clear that to justify racial discrimination the government must satisfy the "twin commands" *in addition* to strict scrutiny. *See id*. at 214 (explaining that the challenged systems "*also* fail to comply with the twin commands") (emphasis added); *id*. at 219 (expressing that the admissions policies "were infirm *for a second reason as well*" as the failure to satisfy strict scrutiny (quoting *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003) (emphasis added))).

Those twin commands are that "race may never be used as a 'negative[,]' and . . . it may not operate as a stereotype." *Id*. at 218. And the Court was express that these are *absolute*

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[3] Regulations that discriminate based on sex trigger intermediate scrutiny. *United States v. Virginia*, 518 U.S. 515, 531 (1996). DOT would need to show that it has an exceedingly persuasive justification. *Id*. That means that the programs must (1) serve "important governmental objectives" and (2) be "substantially and directly related" to such objectives. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724, 730 (1982).

command—that is, they can "never" be violated, no matter what kind of compelling interest the government purports to have. *Id*. That precludes the notion that programs can ever survive if they violate the twin commands, no matter how they fare under strict scrutiny.[4]

The ACDBE and DBE programs fail to comply with either of the twin commands. Race definitively operates as a negative. Certain races and women are presumptively favored. An individual who is not among them gets treated worse. Grant recipients must discriminate in favor of the preferred races in women in order to meet their overall goals if they cannot reach the racial balancing goal through neutral means. The non-favored races and men also have their race and sex operate as a negative because those characteristics adversely affects their ability to compete for federal dollars. The whole point of the goal-setting framework is to allow access to some races and women "in greater numbers than they otherwise would have been," so "[h]ow else but 'negative' can race be described?" *Id*. at 219. Any suggestion that the programs do not treat race as a negative is "hard to take seriously." *Id*. at 218.

Race and sex also operate as a stereotype. It is embedded in the regulations themselves because certain races and women are presumptively socially disadvantaged. It demeans the "dignity and worth" of individuals to assume that just because of their skin color or sex they are (or are not) disadvantaged. *Id.* at 220 (quoting *Rice v. Cayetano*, 528 U.S. 495, 517 (2000)). Individuals falling under these racial umbrellas have nothing in common with each other "but the color of their skin," and the Supreme Court has "time and again forcefully rejected the notion that governmental actors may allocate preference" on this basis. *Id*. (quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1993)).

Other courts have noticed that the illogic of these sorts of "socially and economically disadvantaged" categories is "absolutely radiant" because it treats "Oprah Winfrey [as] presumptively disadvantaged, while . . . even more disadvantaged Americans are not." *Nuziard v. Minority Bus. Dev. Agency*, 721 F. Supp. 3d 431, 491–92 (N.D. Tex. 2024). The programs are reliant on stereotypes and will fail.

2. The discriminatory programs lack a "logical end point."

The two programs must also have a logical endpoint. Yet they continue to exist with no end in sight, making them impermissible considering *SFFA*.

In addition to satisfying the twin commands and strict scrutiny, race-based programs must have a "'logical end point.'" *SFFA*, 600 U.S. at 221 (quoting *Grutter*, 539 U.S. at 342). The programs have no sunset provision and appear designed to exist in perpetuity. DOT's goals

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[4] Commentators have read *SFFA* as articulating new requirements to satisfy in addition to strict scrutiny. *See* Dan Lennington & Skyler Croy, *The Twin Commands: Streamlining Equality Litigation Based on Students for Fair Admissions*, 25 Federalist Society L. Rev. 359 n. 80 (2025) (citing Larry J. Pittman, *The Supreme Court's Erroneous Equal Protection Clause Analysis: Societal Discrimination, the Harvard College Decision as the New Plessy v. Ferguson-Lite, and the Thirteenth Amendment,* 57 Creighton L. Rev. 189, 234 (2024) (noting the twin commands "appear[]" to be a new requirement, separate from strict scrutiny)).

framework suggests that the programs are designed to remain until any statistical disparities between the favored and non-favored races cease. That is unconstitutional.

"The problem with [this] approach[] is well established." *Id.* at 223. "Even if it is not outright racial balancing," it treats individuals "as simply components of racial, religious, sexual or national class," because the racial preferences will only cease to be mandatory "when some rough percentage of various racial groups" is included in the total funding picture. *Id.* (quoting *Miller v. Johnson*, 515 U.S. 900, 911 (1995)). Much like Harvard, DOT "thinks about the use of race" and sex in its funding provisions the same way as it did when the programs began decades ago—until all races are represented in its programs to the same degree as their number of minority-owned businesses, discrimination is necessary. *Id*. at 225. And these programs have been alive and discriminatory for far longer than the 25-year period the Supreme Court gave racial preferences in higher education to run out. *See id.* at 224 (citing *Grutter*, 539 U.S. at 343). *Adarand*, which concerned a preference for "socially disadvantaged" races in DOT funding that had existed for years before it first reached the Supreme Court in 1995, was *30 years* ago. If 25 years was too long to discriminate in college admissions, 30 years and counting of discrimination in DOT funding is far, far too long.

B. The programs are certain to fail to satisfy strict scrutiny.

Both the ACDBE and DBE programs also certainly fail under the demanding strict scrutiny test that ensures that racial classifications are used "only as a last resort." *Bartlett v. Strickland*, 556 U.S. 1, 21 (2009). Also, the racial classifications "must further compelling government interests." *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003). Second, the use of race must be "'narrowly tailored'—meaning 'necessary'—to achieve that interest." *SFFA*, 600 U.S. at 207 (quoting *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 311–12 (2013)).

1. The programs lack a compelling interest

Remediating specific, identified instances of past discrimination on the part of the government is one of the few compelling interests that permits state-sanctioned discrimination. *See id.* To satisfy this interest, the government must make three showings. *Vitolo v. Guzman*, 999 F.3d 353, 361 (6th Cir. 2021). First, "[i]t cannot rest on a 'generalized assertion that there has been past discrimination in an entire industry.'" *Id.* (quoting *City of Richmond v. J.A. Croson Co*., 488 U.S. 469, 498 (1989)). "Second, there must be evidence of *intentional* discrimination in the past." *Id.* at 361 (emphasis original) (citing *Croson*, 488 U.S. at 503). "Third, the government must have had a hand in the past discrimination it now seeks to remedy." *Id*.

The ACDBE and DBE programs do not come close to satisfying these criteria. First, DOT requirements only rest on generalized assertions of past discrimination. It requires recipients to set overall goals based on the relative availability of ACDBE and DBE entities that are ready, willing, and able to do the particular job in the relevant market in the presumed absence of discrimination. 49 C.F.R. §§ 23.51(a); 26.45(b). And that goal is determined by looking at the number of available ACDBEs and DBEs and comparing them with the overall market, with the assumption being that any gap is attributable to the effects of discrimination thus necessitating an overall goal, even if it involves a race or sex preference. *See id.* §§ 23.51(c), (d) (calculating ACDBE overall goals); 26.45(c), (d) (calculating DBE overall goals).

The Constitution requires a showing of discrimination, not disparities. These are not synonymous terms; "there are simply too many variables to support inferences of intentional discrimination." *Vitolo*, 999 F.3d at 362 (6th Cir. 2021) (citing *Croson*, 488 U.S. at 501–03; *Associated Gen. Contrs. of Ohio, Inc. v. Drabik*, 214 F.3d 730, 736–37 (6th Cir. 2000)). Many factors can lead to disparities that appear to cut along racial lines, and it is wrong to assume all disparities equate to racial discrimination. *See Mich. Road Builders v. Milliken,* 834 F.2d 583, 592 (6th Cir. 1987) ("Small businesses, *as a result of their size*, were unable to effectively compete for state contracts.") (emphasis preserved); *Eng'g Contrs. Ass'n v. Metro. Dade Cnty.*, 122 F.3d 895, 917 (11th Cir. 1997) ("More simply put: Because they are bigger, bigger firms have a bigger chance to win bigger contracts."). DOT's regulations accord these disparities "talismanic significance" by authorizing racial goals that must be met when the Constitution demands far more. *Peightal v. Metro. Dade Cnty*., 26 F.3d 1545, 1556 (11th Cir. 1994). DOT's regulations fail to meet this most basic requirement.

At most, statistical evidence can show that disparities exist, but this does not amount to a "strong basis" in evidence of intentional discrimination. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986). Even if the gaps identified by DOT's overall goal requirement were attributable to the legacy effects of historic discrimination, "alleviat[ing] the effects of societal discrimination is not a compelling interest." *Vitolo,* 999 F.3d at 362 (quoting *Shaw*, 517 U.S. at 909–10). It is not even an important enough interest to satisfy intermediate scrutiny. *Id.* at 364 (stating that "general claims of societal [sex] discrimination are not enough") (citing *Hogan*, 458 U.S. at 727–29). DOT cannot require discrimination until discrimination is solved. After all, "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. I*, 551 U.S. 701, 748 (2007) (plurality op.).

Second, DOT's regulations do not require a showing of *intentional* discrimination at all and certainly not from the recipients who must do the discrimination. *See Vitolo*, 999 F.3d at 361. The objective in setting the overall goals is to merely estimate the amount of work that would be performed by ACDBEs and DBEs absent the effects of discrimination (which the regulations presume), *see* 49 C.F.R. §§ 23.51(a), 26.45(b)). That's all. To assume that the amount of work that ACDBEs and DBEs would perform in the absence of past discrimination involves "sheer speculation"; the overall goals are not tied "in any realistic sense" to "any injury suffered by anyone." *Croson*, 488 U.S. at 498. Although the recipients are supposed to determine the extent to which firms "suffered discrimination or its effects" in connection with concession opportunities or related opportunities, *see* 49 C.F.R. § 23.51(a)(2), it is unclear how that works in the actual formulation of the overall goals. More importantly, the regulations do not require any showing of past intentional discrimination against the races who benefit.

Still more, the overall goal number that determines the race and sex preference is based on statistics. It is calculated by taking the relative availability of ACDBEs and DBEs—one statistic—and then adjusted by a number of factors including disparity studies—another set of statistics. 49 C.F.R. §§ 23.51(c)-(d), 26.45(c) –(d). But "statistics don't cut it." *Vitolo*, 999 F.3d at 361 (citing *Aiken v. City of Memphis*, 37 F.3d 1155, 1162–63 (6th Cir. 1994) (en banc); *United Black Firefighters Ass'n v. City of Akron*, 976 F.2d 999, 1011 (6th Cir. 1992)). And the statistics can be based on the sort of disparate impact studies that are now impermissible under EO 14281. *See* 49 C.F.R §§ 23.51(c)(3), (d)(3)(1); *id.* §§ 26.45(c)(3), (d)(1)(ii), (d)(2)(i). Without the required

showing of intentional discrimination before resorting to a racial preference, the programs are unconstitutional.

The only limit imposed by the regulations before adopting a racial preference is the requirement to exhaust race-neutral measures first. But this token effort to satisfy narrow tailoring only comes into play if the recipients have a compelling interest in the first place. If there is no showing of intentional discrimination, there can be no compelling interest. The race-neutral measures requirement will not save the programs.

Another reason why the programs fail the intentional discrimination requirement is that they do not purport to address "intentional discrimination against the many groups to whom it grants preferences." *Vitolo*, 999 F.3d at 361. For instance, DOT does nothing to demonstrate intentional discrimination against Native Alaskans before it discriminates in their favor based on an assessment that the individual's "minimum blood quantum" is sufficient. 49 C.F.R. § 23.3. According to the programs, a general showing against racial groups, lumped together, is sufficient to justify this discrimination. But the standard requires a specific showing of intentional discrimination against *each* individual racial group granted a preference. *See Holman v. Vilsack,* 127 F.4th 660, 664 (6th Cir. 2025) (Thapur, J., dissenting from denial of rehearing en banc) ("[T]he government can't sneak in racial discrimination in favor of one group on the back of evidence of past racial discrimination against another.").

The programs also fail to satisfy the third criteria for compelling interest—that the government "had a hand" in the racial discrimination it attempts to remedy. *See Vitolo*, 999 F.3d at 361. The mere fact that someone somewhere may have discriminated against these groups at some point in time does not mean that *the government* did. But that's a necessary showing before the government can discriminate against its citizens. Yet because the programs do not require a showing of intentional discrimination of any kind, they certainly do not require a showing that the government did it. The programs lack a compelling interest.

It is true that a handful of federal circuits have upheld DOT's use of the "socially disadvantaged" category, but none recently. *See Midwest Fence Corp. v. U.S. Dep't of Transp.,* 840 F.3d 932, 941, 935–36 (7th Cir. 2016); *Sherbrooke Turf, Inc. v. Minn. Dep't of Transp*., 345 F.3d 964, 967–68 (8th Cir. 2003); *W. States Paving Co. v. Wash. State Dep't of Transp*., 407 F.3d 983, 995 (9th Cir. 2005); *cf. Adarand Constructors, Inc. v. Peña*, 16 F.3d 1537, 1539, 1544 (10th Cir. 1994), *vacated and remanded*, 515 U.S. 200 (1995), *sub nom. Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000). And even these precedents must be periodically reexamined given the Supreme Court's admonition that any racial preferences must have a "logical end point." *SFFA*, 600 U.S. at 221 (quoting *Grutter*, 539 U.S. at 342). As it stands, the general statistical disparities that these Circuits once accepted as sufficient based on past historical injustices cannot continue to furnish an evergreen justification for unequal treatment. *Id.* at 227 ("Opening that door would shutter another—'[t]he dream of a Nation of equal citizens . . . would be lost in a mosaic of shifting preferences based on inherently unmeasureable claims of past wrongs.'" (quoting *Croson*, 488 U.S. at 505–06)).

2. Neither program is narrowly tailored.

Even if DOT's programs had a compelling interest, the racial lines they draw are not narrowly tailored on their face. A program is not narrowly tailored if it is "either overbroad or

underinclusive in its use of racial classifications." *Vitolo*, 999 F.3d at 362 (citing *Croson*, 488 U.S. at 507–08; *Gratz*, 539 U.S. at 273–75). The specific racial categories DOT favors as "socially disadvantaged" are a slapdash mess.

The Supreme Court recently called nearly identical categories "imprecise," "overbroad," and "arbitrary or undefined." *SFFA*, 600 U.S. at 216. Justice Gorsuch went so far as to call these categories "incoherent." *Id*. at 291 (Gorsuch, J., concurring). Justice Gorsuch explained how these categories were created by ideological bureaucrats "without any input from anthropologists, sociologists, ethnologists, or other experts," and were then rigidly implemented for decades even though the same federal regulators who devised them cautioned that they "should not be interpreted as being scientific . . . *nor should they be viewed as determinants of eligibility for participation in any Federal program*." *Id.* (quotation marks omitted). Yet DOT employs almost the same baseless racial categories. They are too crude to survive narrow tailoring.

Perhaps no court has better demonstrated how arbitrary this racial framework is than the Court of Appeals for the Sixth Circuit. Recently, the Sixth Circuit wondered aloud how the government could draw lines that discriminated in favor of "Pakistanis but not Afghans; Japanese but not Iraqis; Hispanics but not Middle Easterners . . . ." *Vitolo*, 999 F.3d at 361. Five judges later recognized that the "Asian" category was itself "indefensible," emphasizing that USDA's crude racial categorization are "less refined than that of the 1890 census takers." *Holman,* 127 F.4th at 664 (Thapur, J., dissenting from denial of rehearing en banc) ("If those who used the racially stigmatizing term 'octoroon' can grasp that 'Asians' aren't all the same, surely the government today can too."). DOT's categories, which include an assessment of "bloodlines," 49 C.F.R. § 23.3, or whether one's ancestors were "natives," *id*., are just as indefensible.

Conclusion

It is indeed a "sordid business, this divvying us up by race." *League of United Latin Am. Citizens*, 548 U.S. at 511 (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part). For far too long DOT has forced its funding recipients to do exactly that, sorting Americans into ugly racial boxes and forcing them to compete against each other not based on merit, but skin color and sex. But if "[e]liminating racial discrimination means eliminating all of it," *SFFA*, 600 U.S. at 184, DOT should begin ending these discriminatory programs. The Eos and the Presidential Memo provide a framework for getting that done. DOT should work with OIRA and the Department of Justice to rescind or modify the ACDBE and DBE regulations.

We suggest that you should include these regulations in your list under EOs 14192, 14219, and 14281. In fact, they should be prioritized, as the Presidential Memo directs due to their direct conflict with *SFFA*. If not, then you should include these regulations within your one-page summary of regulations that fall under section 2(a) of EO 14219 that you have not targeted for rescission and that you submit to OIRA explaining your basis. *See* Presidential Memo.

On behalf of SLF, we thank you for the opportunity to be heard in this process. We urge DOT to consider our proposals and incorporate them in full. If we can lend you any additional assistance, please reach out to us.

Yours in Freedom,

SLF
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