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