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To: Bradbury, Steven (OST)
Subject: As I mentioned
Attachments: 20250505 SLF comment re. EO 14219.pdf

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May 5, 2025

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

[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).