

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.

May 5, 2025

Page 12 of 12

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,



Southeastern Legal Foundation

From: Matesic, Hannah (OST)
Sent: Wed, 7 May 2025 12:57:01 +0000
To: Perez, Simone <FAA>; Fritz, Trish (OST); Schmoll, Joseph (OST); Priebe, Jack (OST); Clarke, Mike (Appropriations); Eckert, Josephine (Appropriations); Rajat Mathur; kelsey_daniels@appro.senate.gov; doug.disrud@mail.house.gov; Pierson, Avery; Andrew.Giacini@mail.house.gov; christina.monroe@mail.house.gov; jaclyn.kilroy@mail.house.gov
Subject: ATC Infrastructure Plan Briefing

Microsoft Teams [Need help?](#)

Join the meeting now

Meeting ID: (b)(6)

Passcode: (b)(6)

Dial in by phone

(b)(6) United States, Spokane

[Find a local number](#)

Phone conference ID: (b)(6)

For organizers: [Meeting options](#) | [Reset dial-in PIN](#)



The United States Department of Transportation

[Org help](#)