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U.S. Department of Transportation
Office of the Secretary
1200 New Jersey Avenue, S.E.
Washington, D.C. 20590
September 5, 2025

RE: Indiana Department of Transportation Request for Waiver of Race and Gender Conscious Requirements of the Disadvantaged Business Enterprise Program

Dear Secretary Duffy:

We write in support of the Request for Waiver of Race and Gender Conscious Requirements of the Disadvantaged Business Enterprise ("DBE") Program submitted by the Indiana Department of Transportation ("INDOT") on August 29, 2025. In its request, INDOT seeks a waiver of its obligation to apply the Department of Transportation's race and gender presumption in how it awards contracts in the Department's highway, transit, and airport financial assistance programs. Because the waiver is needed to provide temporary relief for INDOT from unconstitutional requirements contained in the Department's regulations, the waiver request should be granted as soon as possible. If and when other state departments of transportation file similar requests for waiver with the Department, it should, for the same reason, grant such requests as well.

Codified at 49 C.F.R. Part 26, the DBE program requires states to ensure that a certain amount of federal highway, transit, and airport funds are set aside for small businesses owned and controlled by socially and economically disadvantaged individuals. In administering the program, state departments of transportation like INDOT are forced, by the Department's regulations, to apply a presumption that any small business owned by a woman or a member of certain minority groups is socially and economically disadvantaged and therefore eligible for funds set aside as part of the program. Businesses owned by men or non-minorities do not benefit from any such presumption and are therefore at a disadvantage when competing for funds reserved for DBEs.

That is plainly a form of race and gender discrimination. Because it is invidious discrimination caused by the Department's regulations, it is a violation of the Constitution. The Department therefore should act swiftly to alleviate the constitutional harm its regulations are inflicting on INDOT and contractors in Indiana and across the United States. It can do so by granting INDOT—and other state departments of transportation that may submit requests in the future—waivers from the regulations that impose the presumption.

***The DBE Race and Gender Presumption Is Unconstitutional***

The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution makes it unlawful for a state to "deny to any person within its jurisdiction the equal protection of the laws." U. S. Const. amend. XIV, § 1. Central to the Clause's meaning—and a bedrock principle of our Republic—is the notion that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Rice v. Cayetano*, 528 U.S. 495, 517 (2000). Thus, it is well-settled that racial classifications by government "are simply too pernicious to permit any but the most exact connection between justification and classification." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007).

"Any exception to the Constitution's demand for equal protection must survive a daunting two-step examination known . . . as strict scrutiny." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 206 (2023) ("*SFFA*"). Under that standard, racial "classifications are constitutional only if they are narrowly tailored to further compelling governmental interests." *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003). In *SFFA*, the Court explained that "its precedents have identified only two compelling interests that permit resort to race-based government action." *SFFA*, 600 U.S. at 232. One is "remediating specific, identified instances of past discrimination that violated the Constitution or a statute," and the other is "avoiding imminent and serious risks to human safety in prisons, such as a race riot." *Id.* at 207 (citing *Parents Involved*, 551 U.S. at 720; *Shaw v. Hunt*, 517 U.S. 899, 909–910 (1996); *Johnson v. California*, 543 U.S. 499, 512–513 (2005)).

While remediating past instances of discrimination may in some instances serve as a compelling interest that withstands strict scrutiny, that is true only where there is a clear "showing of prior discrimination by the governmental unit involved" that the racial classification is meant to address. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986). The discrimination to be remedied must be specifically identified—"[a] generalized assertion of past discrimination in a particular industry or region is not adequate," *Shaw*, 517 U.S. at 909—and it must be the result of "past *intentional* discrimination," *Parents Involved*, 551 U.S. at 720 (emphasis added). Further, a "statistical disparity" alone, except perhaps in very rare cases, will generally not "demonstrat[e] the kind of prior discrimination in hiring or promotion that would justify race-based relief." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 497 (1989).

We will not rehearse here all of the reasons why the racial and gender presumption of the DBE program fails to satisfy this test. Those reasons are set out persuasively by the Court in *Mid-Am. Milling Co., LLC v. United States Dep't of Transportation*, 2024 WL 4267183 (E.D. Ky. Sept. 23, 2024). The Department has acknowledged the presumption's illegality in a motion for a proposed consent order filed in that case. *See Mid-Am. Milling Co., LLC v. United States Dep't of Transportation*, 3:23-cv-00072, Dkt. 82, Joint Motion (May 28, 2025). And we have explained the reasons why the presumption harms our states and our citizens in an amicus brief we filed in support of the Department's proposed consent order. *See Mid-Am. Milling Co., LLC v. United States Dep't of Transportation*, 3:23-cv-00072, Dkt. 108, States' Amicus Brief (May 28, 2025).

Instead, we write to ask the Department to exercise its administrative authority to grant waivers to the requirements of the DBE program to relieve INDOT of the unlawful requirements of 49 C.F.R. § 26.67 and associated provisions of the DBE regulations. We are optimistic that, in due course, the racial and gender presumption of the DBE program will be consigned by the courts to the same

fate as other unlawful government programs invalidated on equal protection grounds. But parties that seek to defend the discriminatory race and gender presumption of the DBE program have intervened in *Mid-America Milling* to oppose the Department's proposed consent order, and it is likely that litigation over the race and gender presumption will be protracted before it is finally held invalid. In the meantime, the Department should allow INDOT to bring its DBE program into compliance with the Constitution without concern that it will be noncompliant with the Department's regulations.

***The Department Should Grant INDOT's Waiver Request***

Granting INDOT's waiver request would go some way toward satisfying the Department's obligations under both the Constitution and multiple executive orders signed by President Trump to promote and ensure equal protection of the law. Doing so would also be consistent with the Department's DBE regulations. Prompt grant of the request is therefore warranted.

On his first day in office, President Trump signed Executive Order ("EO") 14151, entitled "Ending Radical and Wasteful Government DEI Programs and Preferencing." Through that directive, the President ordered the Director of the Office of Management and Budget to "coordinate the termination of all discriminatory programs, including illegal DEI and 'diversity, equity, inclusion, and accessibility' (DEIA) mandates, policies, programs, preferences, and activities in the Federal Government . . . ." The EO also ordered every head of an executive agency to "recommend actions . . . to align agency or department programs, activities, policies, regulations, guidance, . . . contracts (including set-asides), [and] grants . . . with the policy of equal dignity and respect."

The next day, January 21, 2025, President Trump signed Executive Order 14173, entitled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity." That Order stated that "Illegal DEI and DEIA policies not only violate the text and spirit of our longstanding Federal civil-rights laws, they also undermine our national unity, as they deny, discredit, and undermine the traditional American values of hard work, excellence, and individual achievement in favor of an unlawful, corrosive, and pernicious identity-based spoils system." Accordingly, the Order directed executive agencies, including the Department, "to terminate all discriminatory and illegal preferences, mandates, policies, programs, activities, guidance, regulations, enforcement actions, consent orders, and requirements."

The direction from the President could not be clearer. Federal executive branch agencies should leverage every power at their disposal to eradicate the racially discriminatory practices that have infiltrated federal operations under the guise of DEI and affirmative action.

Likewise, the Constitution dictates that the Department should not allow racially discriminatory programs that are plainly illegal to persist. Executive branch officials have their own "independent obligations to interpret and uphold the Constitution." *Boumediene v. Bush*, 553 U.S. 723, 798 (2008). That obligation should inform how the Department administers the DBE program, including how it assesses waiver requests like the one submitted by INDOT. It is axiomatic that the federal government's spending "power may not be used to induce the States to engage in activities that would themselves be unconstitutional. Thus, for example, a grant of federal funds conditioned on invidiously discriminatory state action . . . would be an illegitimate exercise" of the spending power. *S. Dakota v. Dole*, 483 U.S. 203, 210 (1987). In consequence, to the extent

the Department has discretion to manage the DBE program in a way that relieves INDOT of any obligation to comply with the unconstitutional aspects of the program, it should do so.[1]

The Department's DBE regulations expressly empower the Department to provide that relief, at least temporarily while litigation over the presumption proceeds. In relevant part, the regulations provide that states may apply for, and the Department may grant, a "waiver of any provision of Subpart B or C of this part including, but not limited to, any provisions regarding administrative requirements, overall goals, contract goals or good faith efforts." 49 C.F.R. § 26.15(b). As the Department has explained, administrative waivers under this provision are appropriate for "situation[s] where a recipient believes that it can better accomplish the objectives of the DBE program through means other than the specific provisions of part 26." *Participation by Disadvantaged Business Enterprises in Department of Transportation Programs*, 64 Fed. Reg. 5096, 5105 (Feb. 2, 1999).

That unquestionably describes the waiver INDOT seeks. As explained in INDOT's application, INDOT believes it can operate a DBE program that satisfies the program's objectives—to "create a level playing field on which DBEs can compete fairly for DOT–assisted contracts"—without resorting to invidious race or sex-based discrimination that results from use of the presumption. 49 C.F.R. § 26.1(b). It is hard to imagine a waiver that would do more to facilitate the "better" operation of the program than a waiver that eliminates unconstitutional race discrimination from the program.

Indeed, courts that have previously (and incorrectly) upheld the race and gender presumption against equal protection challenges have specifically noted that the waiver provision of 49 C.F.R. § 26.15 gives the Department flexibility to prevent, at least to some degree, the race and gender presumption from leading to constitutional violations. *See Sherbrooke Turf, Inc. v. Minnesota Dep't of Transp.*, 345 F.3d 964, 972 (8th Cir. 2003) (concluding that the DBE program's racial components were narrowly tailored for purposes of strict scrutiny in part because "DOT may grant an exemption or waiver from any or all requirements of the program"). Through grant of a waiver, standards within the DBE program "can be relaxed if uncompromising enforcement would yield negative consequences." *Midwest Fence Corp. v. United States Dep't of Transportation*, 840 F.3d 932, 943 (7th Cir. 2016). There are few, if any consequences that are more negative for the operation of the DBE program than continued use of a presumption that forces INDOT to pick winners and losers in the contracting process based on the color of their skin.

As the Supreme Court has made clear, "all race-based governmental action should remain subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit." *SFFA*, 600 U.S. at 212 (quotations omitted). The Department's grant of INDOT's waiver request would be consistent with its continuing obligation to ensure its regulations are administered in a way that comports with the Constitution.

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[1] We also note that "in rare cases the Executive's duty to the constitutional system may require action in defiance of a statute," or regulation, and that "[i]n such a case, the Executive's refusal to defend and enforce an unconstitutional statute is authorized and lawful." *The Att'y Gen.'s Duty to Defend & Enforce Constitutionally Objectionable Legis.*, 4A U.S. Op. Off. Legal Counsel 55 (1980). However, because the Department has regulatory authority to waive use of the race and gender presumption in how states administer the DBE program, it need not grapple with the more difficult question of whether, absent the option to waive compliance with the presumption, it could still refuse to administer the presumption.

To be clear, we do not regard the grant of INDOT's waiver—or the grant of waivers to any other state—as a long term, adequate solution to the illegality of the race and gender presumption. Under its regulations, the Department may grant a waiver to allow for operation of a modified DBE program only if there is "a reasonable limitation on the duration of [the] modified program." 49 C.F.R. § 26.15(b)(3)(iii). The regulations also provide that the Department "may end a program waiver at any time." 49 C.F.R. § 26.15(b)(4). Thus, even with a waiver, INDOT would still face substantial uncertainty about whether at some point in the future its obligations under the Department's regulations may again conflict with INDOT's duty to uphold the Constitution. But grant of the waiver would at least provide INDOT with temporary relief during the pendency of litigation over the presumption.

There are of course other reasons to grant INDOT's waiver request. For one thing, the race and gender presumption leads to serious inefficiencies in how highway, transit, and airport funds are distributed. There are good reasons to think the presumption inflates costs in the program by at least five percent if not more. *See* Wall Street Journal, *Goodbye to Racial Quotas in Federal Contracts* (May 29, 2025). Eliminating the presumption would open up more competition in the program and drive down prices. INDOT's request also satisfies all of the other criteria set out in 49 C.F.R. § 26.15(b) for grant of a waiver, including that there "is a reasonable basis to conclude that [INDOT] could achieve a level of DBE participation consistent with the objectives of this part using different or innovative means other than those that are provided in subpart B or C of this part."

But paramount among the reasons to grant the waiver—and a reason that on its own is sufficient—is the fact that, without the waiver, INDOT will continue to be subjected to the Department's unconstitutional and unjustifiable requirements that INDOT select contractors based on race and gender.

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The federal government is supposed to act as "a guarantor of basic federal rights." *Mitchum v. Foster*, 407 U.S. 225, 239 (1972). There is thus something especially perverse about the government not only allowing racial discrimination that it can stop to persist but actively aiding and abetting it. That is what the racial presumption of the DBE program does. It forces states and contractors to engage in invidious discrimination. The racially charged presumption never should have been created to begin with. It should—and almost certainly will—eventually be found unlawful by the courts. And until then, the Department should use the administrative tools it has to relieve INDOT of the untenable position, forced on it by the Department's regulations, of having to choose between fidelity to the Constitution or compliance with the Department's regulatory scheme.

Sincerely,

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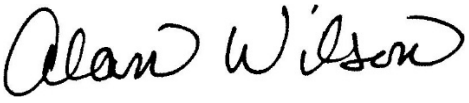

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