

November 3, 2025

U.S. Department of Transportation  
Docket Operations  
M-30  
West Building Ground Floor  
Room W12-140  
1200 New Jersey Ave. SE  
Washington, D.C. 20590

*Via regulations.gov*

RE: Disadvantaged Business Enterprise Program and Disadvantaged Business Enterprise in Airport Concessions Program Implementation Modifications. (Docket No. DOT-OST-2025-0897).

To Whom It May Concern,

The NAACP Legal Defense and Educational Fund, Inc. (“LDF”) strongly opposes the U.S. Department of Transportation’s (“DOT”) Interim Final Rule (“IFR”) on “Disadvantaged Business Enterprise Program and Disadvantaged Business Enterprise in Airport Concessions Program Implementation Modifications,”<sup>1</sup> which threatens decades of hard-won progress. For over 40 years, the Disadvantaged Business Enterprise (“DBE”) and the Airport Concession Disadvantaged Business Enterprise (“ACDBE”) Programs (collectively, the “Programs”) have served as critical tools to combat and remedy discrimination in government contracts for transportation and airport concessions, respectively. This discrimination persists today, barring Black business owners, other business owners of color, and women business owners from competing on a level playing field for taxpayer dollars.<sup>2</sup> While the facts and the law governing the program have not changed, DOT now proposes to (1) eliminate race- and gender-based presumptions of social and economic disadvantage, now forcing firms to individually prove these disadvantages; and (2) immediately suspend existing DBE certifications, compelling firms to undergo burdensome revaluation to recertify any DBE or ACDBE that meets the new certification standards and to decertify any DBE or ACDBE that does not meet the new certification standards before their participation can count toward program goals.<sup>3</sup> This IFR, issued without a prior opportunity for public comment, threatens to undermine equity in federal programs.

LDF strongly urges DOT to withdraw the IFR in its entirety and restore the prior version of its rules. If DOT does not withdraw the rule, we urge DOT to revise the rule to require

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<sup>1</sup> 40 Fed. Reg. 47969 (Oct. 3, 2025), <https://www.federalregister.gov/documents/2025/10/03/2025-19460/disadvantaged-business-enterprise-program-and-disadvantaged-business-enterprise-in-airport> (hereinafter “IFR”).

<sup>2</sup> The White House, *Racial Disparities in Government Contracting*, THE WHITE HOUSE (Dec. 20, 2024), <https://bidenwhitehouse.archives.gov/cea/written-materials/2024/12/20/racial-disparities-in-government-contracting/#:~:text=Given%20the%20importance%20of%20government,that%20could%20compete%20for%20contracts> (explaining that people of color and women make up 33.7 percent of all businesses in the United States but account for only 10.1 percent of federal contracting dollars, and that these disparities are likely the result of race and gender discrimination).

<sup>3</sup> See *supra*, note 1.

continued data collection and allow states to provide targeted programming to DBEs to meet their participation goals.

Founded in 1940 by Thurgood Marshall, LDF is the nation's oldest civil rights law organization.<sup>4</sup> LDF was launched at a time when America's aspirations for equality and due process of law were stifled by widespread state-sponsored racial inequality. LDF has long played an instrumental role in litigation and policy to remedy discrimination against Black people and define the scope of the Equal Protection Clause. Notably, LDF has participated in all U.S. Supreme Court cases involving affirmative action in higher education,<sup>5</sup> including representing students and alumni in the fight to defend race-conscious admissions policies in *Students for Fair Admissions* ("SFFA") v. *Harvard*.<sup>6</sup> LDF has also participated as an *amicus* in cases such as *H.B. Rowe Co., Inc. v. Tippet*, *DynaLantic Corp. v. U.S. Dep't of Defense*, and *Rothe Dev. Corp. v. U.S. Dep't of Defense*, defending the constitutionality of government programs aimed at remedying discrimination against economically and socially disadvantaged small businesses.<sup>7</sup>

## **I. Black Business Owners Continue to Experience Racial Discrimination, Preventing Them from Effectively Competing for Government Contracts**

For decades, DOT's DBE program has sought to remedy discrimination and barriers to participation in DOT-funded contracts for socially or economically disadvantaged business owners, including Black business owners.<sup>8</sup> The presumption that Black people and women are disadvantaged socially and economically is rooted in a detailed history that bleeds into today.<sup>9</sup> Black business owners have long faced discrimination in public and private sectors, with the active or passive participation by the federal government,<sup>10</sup> preventing them from accumulating the wealth and capital needed to start a business.<sup>11</sup> As a result of government-sponsored practices like redlining, Black people are far less likely to be homeowners in America compared to white people, intensifying the racial wealth gap and affecting Black people's opportunities to leverage wealth to launch businesses or protect their existing businesses' interests.<sup>12</sup> Black small

<sup>4</sup> LDF has been fully separate from the National Association for the Advancement of Colored People ("NAACP") since 1957.

<sup>5</sup> See, e.g., *Fisher v. Univ. of Tex. at Austin*, 579 U.S. 365 (2016); *Gratz v. Bollinger*, 539 U.S. 244 (2003); & *Grutter v. Bollinger*, 539 U.S. 306 (2003).

<sup>6</sup> *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181 (2023).

<sup>7</sup> See, e.g., *H.B. Rowe Co., Inc. v. Tippet*, 615 F.3d 233 (2010); *DynaLantic Corp. v. U.S. Dep't of Defense*, 937 F. Supp 1 (D.D.C. 1996); & *Rothe Dev., Inc. v. U.S. Dep't of Defense*, No. 15-5175 (D.C. Cir. 2016).

<sup>8</sup> U.S. Dep't of Transp., *Disadvantaged Business Enterprise (DBE) Program*, U.S. DEP'T OF TRANSP. (last updated Oct. 30, 2025), <https://www.transportation.gov/civil-rights/disadvantaged-business-enterprise>.

<sup>9</sup> *Id.*

<sup>10</sup> *Promoting Opportunity: The Need for Targeted Federal Business Programs to Address Ongoing Racial Discrimination: Hearing Before the S. Comm. on Small Business and Entrepreneurship*, 118 Cong. \_\_\_\_ (2024) (Statement of Jin Hee Lee, NAACP LDF), <https://www.congress.gov/event/118th-congress/senate-event/LC73288/text#:~:text=Breaux%2C%20this%20campus%20has%20been.and%20good%20morning%2C%20everyone.%20%5B>.

<sup>11</sup> Terry Gross, *A 'Forgotten History' of How the U.S. Government Segregated America*, NPR. (May 3, 2017), <https://www.npr.org/2017/05/03/526655831/a-forgotten-history-of-how-the-u-s-government-segregated-america>.

<sup>12</sup> Brad Blower et al., *Adding Robust Consideration of Race to Community Reinvestment Act Regulations: An Essential and Constitutional Proposal*, NAT'L CMTY. REINVESTMENT COAL. (Sept. 16, 2021), <https://nrcr.org/adding-robust-consideration-of-race-to-community-reinvestment-act-regulations-an-essential-and-constitutional-proposal/>; See also, Lawrence Yun et al., *Snapshot of Race and Home Buying in America*, NAT'L ASSOC. OF REALTORS,

business owners often face challenges in obtaining funding from banks and other investors at the same rates as their white counterparts, which limits their ability to start and succeed.<sup>13</sup> These disparities exacerbate the harm of the racial wealth gap, restricting Black people's ability to utilize external financing opportunities and forcing them to rely on their limited personal wealth.<sup>14</sup> As testimony at the Senate Small Business Committee's May 2024 hearing, "Promoting Opportunity: The Need for Targeted Federal Business Programs to Address Ongoing Racial Discrimination," showed, the federal government has also turned a blind eye to overt discrimination in the contracting industry, including freezing business owners of color out of the networks needed to sustain their business and overt threats if business owners of color try to compete with white business owners. For this reason, Congress found in 2021 that "discrimination and related barriers continue to pose significant obstacles for minority- and women-owned businesses seeking to do business in Federally assisted surface transportation markets across the United States."<sup>15</sup> For a more detailed analysis of the federal government's participation in discrimination against Black business owners, see Exhibit A ([Testimony of Jin Hee Lee, LDF's Director of Strategic Initiatives, before the U.S. Senate Small Business Committee](#)).<sup>16</sup>

The discrimination that Black business owners experience results in severe disparities in their participation in government contracts. According to a December 2024 White House report, firms owned by women and people of color comprised 33.7 percent of all businesses in the United States, yet they accounted for only 10.1 percent of all federal contracting dollars.<sup>17</sup> Of the \$560 billion in federal contracts in Fiscal Year 2020, the federal government awarded just 1.6 percent, or \$9 billion, to Black-owned businesses.<sup>18</sup> Dozens of studies examining government contracts in all 50 states have confirmed that these disparities are not the result of differences in the availability of Black-owned businesses but are due to discrimination.<sup>19</sup> In December 2024,

<https://www.nar.realtor/sites/default/files/2025-03/2025-snapshot-of-race-and-home-buying-in-america-03-17-2025.pdf> (last visited Nov. 2, 2025).

<sup>13</sup> Nat'l Urb. League, *Black-Owned Businesses Face Significant Obstacles. Anti-racial Justice Efforts Are Making Them Worse*, NAT'L URB. LEAGUE (June 27, 2025), <https://nul.org/news/black-owned-businesses-face-significant-obstacles-anti-racial-justice-efforts-are-making-them>.

<sup>14</sup> Kristen Broady et al., *An Analysis of Financial Institutions in Black-Majority Communities: Black Borrowers and Depositors Face Considerable Challenges in Accessing Banking Services*, BROOKINGS INST. (Nov. 2, 2021), <https://www.brookings.edu/research/an-analysis-of-financial-institutions-in-black-majority-communities-blackborrowers-and-depositors-face-considerable-challenges-in-accessing-banking-services/>; Mels de Zeeuw & Brett Barkley, *Mind the Gap: Minority-Owned Small Businesses' Financing Experiences in 2018*, CONSUMER & CMTY. CONTEXT, A FED. RSRV. SYS. PUBL'N, Vol. 1, No. 2, p. 16 (Nov. 2019), <https://fraser.stlouisfed.org/title/consumer-community-context-6764/vol-1-2-620674?page=26>.

<sup>15</sup> Pub. L. No. 117-58, tit. VI, § 11101, 135 Stat. 450 (2021).

<sup>16</sup> See *supra*, note 10.

<sup>17</sup> Exec. Order No. 13985, 86 FR 7009, (2021).

<sup>18</sup> *Id.*

<sup>19</sup> U.S. Dep't of Just., *The Compelling Interest to Remedy the Effects of Discrimination in Federal Contracting: A Survey of Recent Evidence*, U.S. DEP'T OF JUST., <https://congress.gov/118/meeting/house/116780/documents/HMKP-118-SMOO-20240131-SD003.pdf> (hereinafter "DOJ, *A Recent Survey of Recent Evidence*") (last visited Nov. 2, 2025); Fed. R.R. Admin., *Report to Congress Concerning Minority- and Women-Owned Small Businesses in Industries Related to the Rail Transportation Sector*, U.S. DEP'T OF TRANSP., <https://web.archive.org/web/20250516174720/https://railroads.dot.gov/elibrary/report-congress-concerning-minority-and-women-owned-small-businesses-industries-related> (last visited Nov. 2, 2025).

40 Rector Street  
5th Floor  
New York, NY 10006

700 14th Street NW  
Suite 600  
Washington, DC 20005

260 Peachtree Street NW  
Suite 2300  
Atlanta, GA 30303

naacpldf.org  
212-965-2200

the White House Council on Economic Advisors similarly concluded that significant racial disparities in contracting persist, likely due to ongoing racial bias.<sup>20</sup>

## **II. Congress Authorized the DBE and ACDBE Programs to Address Discrimination in Federal Contracting Using Narrowly Tailored Means**

As the Supreme Court has explained, “[i]t is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.”<sup>21</sup> In 1983, Congress created DOT’s DBE program to address persistent discrimination in federal contracts and level the playing field for Black-owned businesses and other businesses that were the targets of this discrimination.<sup>22</sup> The statute requires DOT to ensure that at least 10 percent of federally-assisted contracts for highway, transit, and aviation projects be made available to small businesses owned and controlled by “socially and economically disadvantaged individuals,” including women and certain racial and ethnic minority groups, including Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and Subcontinent Asian Americans.<sup>23</sup> States must set aspirational goals for DBE participation and show good faith efforts to achieve those goals, which can be waived, and states must try to achieve those goals through race-neutral means.<sup>24</sup> Before the IFR, if a business owner self-identified as part of one of the designated racial or gender groups and met the personal net worth limit (i.e., \$2.047 million), that combination was presumptive proof of social and economic disadvantage.<sup>25</sup> However, individuals who are not members of the traditionally disadvantaged groups could still qualify for DBE certification by demonstrating their social and economic disadvantage. For example, to provide evidence of social disadvantage, an applicant must include in their application (1) at least one objective distinguishing feature that has contributed to social disadvantage; (2) personal experiences of substantial and chronic social disadvantage in American society; and (3) negative impacts on entry into business or advancement in business.<sup>26</sup>

Since its inception, Congress has subsequently reauthorized and amended the DBE program multiple times in each of the federal surface transportation bills.<sup>27</sup> The DBE program was most recently reauthorized on November 15, 2021, as part of the Infrastructure Investment

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<sup>20</sup> White House Council on Economic Advisors, *Racial Disparities in Government Contracting*, THE WHITE HOUSE, (Dec. 20, 2024), <https://web.archive.org/web/20250515213459/https://bidenwhitehouse.archives.gov/cea/written-materials/2024/12/20/racial-disparities-in-government-contracting>.

<sup>21</sup> *City of Richmond v. Croson*, 488 U.S. 469 (1983).

<sup>22</sup> U.S. Dep’t of Transp., *History of the DOT DBE Program*, U.S. DEP’T OF TRANSP. (last updated Jan. 5, 2015), <https://www.transportation.gov/osdbu/disadvantaged-business-enterprise/history-dot-dbe-program>.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Julian A. Haffner, *All DBEs Have Been Decertified: What Just Happened?*, GORDON FEINBLATT, LLC, (Oct. 7, 2025), <https://www.gfrlaw.com/what-we-do/insights/all-dbes-have-been-decertified-what-just-happened>.

<sup>26</sup> Wash. State Office of Minority & Women’s Bus. Enterprises, *Socially and Economically Disadvantaged Business Enterprise Fact Sheet*, WASH. STATE OFFICE OF MINORITY & WOMEN’S BUS. ENTERPRISES, <https://omwbe.wa.gov/certification/frequently-asked-questions-faqs-and-fact-sheets/socially-and-economically-disadvantaged-business-enterprise-fact-sheet> (last visited Nov. 2, 2025).

<sup>27</sup> See *supra*, note 8.

and Jobs Act,<sup>28</sup> and is set to expire on September 30, 2026.<sup>29</sup> Likewise, in 1987, the ACDBE program was established by DOT through regulations issued under the authority of the Airport and Airway Improvement Act of 1982, which sought to ensure disadvantaged businesses participated in airport concessions,<sup>30</sup> and was amended in 1992.<sup>31</sup> As of April 2024, nearly 50,000 certified DBEs and 3,500 ACDBEs exist, reflecting the Programs' efforts to promote economic opportunity for disadvantaged businesses.<sup>32</sup>

### **III. DOT Does Not Have Good Cause to Circumvent the Notice and Comment Process and Issue an Interim Final Rule Revising Its DBE Regulations**

DOT improperly claims that it has “good cause” to forgo the public comment process required by the Administrative Procedure Act of 1946 (“APA”) and proceed directly to an interim final rule because it has decided the current regulations are unconstitutional.<sup>33</sup> While that claim, if accurate, could provide a reason for DOT to rescind the regulations, it does not excuse DOT from following the notice-and-comment procedures mandated by Congress.

The APA provides a vital framework for ensuring transparency, fairness, and accountability in administrative actions, requiring federal agencies to provide the public with notice that they intend to issue a rule and accept input through a comment process before the rule is finalized.<sup>34</sup> Moreover, under the APA, agency rules must be amended through the same process used to issue them.<sup>35</sup> Section 553(b)(B) provides a limited exception to this mandate, permitting agencies to publish a final rule without first seeking public comment on a proposed rule “when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”<sup>36</sup> Courts have held that the good cause exception should be “narrowly construed and only reluctantly countenanced” and that agency findings of good cause should be closely scrutinized.<sup>37</sup>

Here, DOT claims good cause exists to avoid the notice and comment rulemaking procedures because DOT has determined that race- and gender-based presumptions of the DBE

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Alaska Dep’t of Transp. & Pub. Facilities, *Airport Concession Disadvantaged Business Enterprise (ACDBE) Program*, ALASKA DEP’T OF TRANSP. & PUB. FACILITIES, <https://dot.alaska.gov/cvlrts/acdbe.shtml> (last visited Nov. 2, 2025).

<sup>31</sup> 72 Fed. Reg. 15614 (Apr. 2, 2007), <https://www.federalregister.gov/documents/2007/04/02/E7-6054/disadvantaged-business-enterprise-program>.

<sup>32</sup> GreenbergTraurig, *U.S. Department of Transportation Updates DBE and ACDBE Regulations*, GREENBERGTRAURIG (June 24, 2024), <https://www.gtlaw.com/en/insights/2024/6/us-department-of-transportation-updates-dbe-and-acdbe-regulations>.

<sup>33</sup> Cornell L. Sch., *Administrative Procedure Act*, CORNELL L. SCH., [https://www.law.cornell.edu/wex/administrative\\_procedure\\_act](https://www.law.cornell.edu/wex/administrative_procedure_act) (last visited Nov. 2, 2025).

<sup>34</sup> *Id.*

<sup>35</sup> *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 101 (2015) (explaining that the definition of “rule making” in the APA “mandate[s] that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance”).

<sup>36</sup> Andrew S. Coghlan, *The Good Cause Exception to Notice and Comment Rulemaking*, CONGRESS.GOV (Aug. 27, 2025), <https://www.congress.gov/crs-product/R44356>.

<sup>37</sup> *Id.*

and ACDBE programs violate the U.S. Constitution.<sup>38</sup> Even if a federal agency believes a regulation is unlawful, that does not provide the agency with good cause to unilaterally circumvent the notice and comment process for programs as historically and economically significant as the DBE and ACDBE programs. Courts have recognized scenarios as good cause exceptions when they are generally “emergency situations” where “delay could result in serious harm,”<sup>39</sup> such as “imminent” threats to air safety, mine workers, or national security.<sup>40</sup> That is not at all the case here. For example, in *Jifry v. F.A.A.*, the D.C. Circuit Court upheld the revocation of two pilots’ certificates in the wake of the September 11, 2001, terrorist attacks after the Federal Aviation Administration and the Transportation Security Administration (“TSA”) allowed for automatic suspension of airman certificates upon notification from TSA that a pilot posed a security threat.<sup>41</sup> However, in *N.C. Growers’ Ass’n, Inc. v. United Farm Workers*, the Fourth Circuit affirmed a lower court’s ruling that the U.S. Department of Labor did not properly invoke the “for good cause exception” when it suspended certain regulations and reinstated others regarding temporary agricultural workers.<sup>42</sup> A single district court decision should not cause an agency to act with such swift urgency and upend decades of progress because a preliminary injunction is not the type of threat to life, physical safety, or national security that courts have found constitutes an “emergency” that justifies forgoing public input. It is a gross misuse of power to bar the public from commenting before the rule takes effect.

#### **IV. Multiple Courts Have Held the DBE and ACDBE Programs Are Constitutional**

The IFR disturbs serious reliance interests by Black business owners and other business owners presumed to be socially and economically disadvantaged due to the long history and ongoing impacts of race and sex discrimination. These business owners have depended on these rules to level the playing field and ensure they can fairly compete for government dollars. The IFR would require them to recertify their eligibility or be excluded from participation in the DBE and ACDBE programs with potentially devastating economic consequences. When an agency substantially alters an existing regulation, it must provide a reasoned explanation for the change.<sup>43</sup> In particular, when rescinding a rule, an agency must explain its departure from the prior policy and show the new policy is supported by “good reasons” and is better, in the agency’s belief, than the previous policy, particularly in light of any serious reliance interests at stake.<sup>44</sup> Yet the IFR relies on a faulty and unfounded belief that the program is unconstitutional in order to impose new, unnecessary burdens on Black businesses. Because DOT lacks a sufficient basis to believe the DBE and ACDBE programs are unconstitutional, it must withdraw the rule.

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<sup>38</sup> See *supra*, note 1 (citing *Mid-America Milling Co. v. U.S. Dep’t of Transp.*, No. 3:23-cv-00072, 2024 WL 4267183 (Sept. 23, 2024) & *Students for Fair Admissions, Inc. v. Harvard*, 600 U.S. 181 (2023)).

<sup>39</sup> *Jifry v. F.A.A.*, 370 F.3d 1174, at 1179 (D.C. Cir. 2004).

<sup>40</sup> See *N.C. Growers’ Ass’n, Inc. v. United Farm Workers*, 702 F.3d 755, 766 (4th Cir. 2012) (citing caselaw).

<sup>41</sup> *Jifry v. F.A.A.*, 370 F.3d 1174 (D.C. Cir. 2004).

<sup>42</sup> See *supra*, note 40.

<sup>43</sup> *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983).

<sup>44</sup> *FCC*, 556 U.S. at 515.

A. *Every Appellate Court Has Upheld the DBE Program, and SFFA Does Not Disturb Their Reasoning.*

Numerous appellate courts have previously held that the DBE program is lawful. The DBE program was the subject of a constitutional challenge in *Adarand Constructors, Inc. v. Peña*,<sup>45</sup> and the program was substantially revised following that case to meet strict scrutiny as outlined in the case. As a result, every federal appellate court that has considered the constitutionality of the DBE program since then has found that program to be facially constitutional.<sup>46</sup> While the ACDBE program has not been subject to the same level of judicial scrutiny, it is structured similarly to the DBE program and would likely be evaluated similarly by the courts.

Despite what DOT and the Solicitor General claim, *SFFA* does not disturb these holdings. In *SFFA*, the Supreme Court held that Harvard and the University of North Carolina's explicit use of race as a boost in their admissions processes in order to further an interest in diversity violated the Equal Protection Clause and Title VI of the Civil Rights Act of 1964.<sup>47</sup> It did not overrule prior precedents holding that the government can remedy discrimination through race-based programs. In fact, the Court reaffirmed the government has a compelling interest to consider race in "remediating specific, identified instances of past discrimination that violated the Constitution or a statute."<sup>48</sup> *SFFA* thus does not undermine prior decisions upholding well-designed programs that consider race and gender to remedy discrimination, including DOT's DBE and ACDBE program. Further, DOT misstates what the government must show to demonstrate a compelling interest. In the IFR, DOT argues that "[t]he government has no compelling justification for engaging in overt race or sex discrimination in the awarding of contracts in the absence of clear and individualized evidence that the award is needed to redress the economic effects of actual previous discrimination suffered by the awardee"<sup>49</sup> and, as a result, the Programs' race- and gender-based presumptions must be repealed.<sup>50</sup> However, DOT's position is inconsistent with the standard set forth in *SFFA* and prior cases, which do not require "individualized evidence" that particular people suffered from discrimination in order to justify government action.<sup>51</sup>

B. *Recent District Court Rulings Are Not Sufficient for DOT to Decide the DBE Program's Statutory Race- And Sex-Based Presumptions Unconstitutional.*

<sup>45</sup> *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000).

<sup>46</sup> See, e.g., *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000); *Sherbrooke Turf, Inc. v. Minnesota Dep't of Transp.*, 345 F.3d 964 (8th Cir. 2003) (holding that Congress had a strong basis in evidence to support its conclusion that race-based measures were necessary and that the program was narrowly tailored); *W. States Paving Co. v. Wash. State DOT*, 407 F.3d 983 (9th Cir. 2005) (holding that Congress had a strong basis in evidence for concluding that discrimination within the transportation contracting industry hinders minorities' ability to compete for federally funded contracts, based on substantial statistical and anecdotal material, and that the DBE program and its implementing regulations possessed all the features of a narrowly tailored remedial program, including that race-conscious remedies were used only when race-neutral means proved ineffective, measures were employed flexibly and for a limited duration, and the program was tied to the state's labor market); *N. Contracting, Inc. v. Illinois*, 473 F.3d 715 (7th Cir. 2007) (held that where a state implements a program with Congressional mandate, it is proper to rely on the government's *compelling interest* in remedying the effects of discrimination in the national construction industry).

<sup>47</sup> *SFFA*, 600 U.S. at 230.

<sup>48</sup> *Id.*

<sup>49</sup> See *supra*, note 1.

<sup>50</sup> *Id.*

<sup>51</sup> See *supra*, note 6.

DOT also relies on several district court cases to determine that the DBE and ACDBE's statutory presumptions are unconstitutional. However, these cases do not outweigh the precedents discussed above. First, DOT points to *Mid-America Milling Co. v. U.S. Department of Transportation*, where the District Court for the Eastern District of Kentucky found that the plaintiffs were likely to succeed on the merits of their claim that the statutory presumptions are unconstitutional and issued a limited preliminary injunction prohibiting DOT from mandating the use of presumptions in contracts on which the two plaintiff entities bid.<sup>52</sup> DOT has implemented the injunction by requiring funding recipients to remove DBE contract goals from any contracts on which the plaintiffs intend to bid.<sup>53</sup> However, this finding, made at a preliminary stage without a factual record, is not sufficient to require DOT to reverse its position on the presumptions, particularly in light of the weight of appellate court case law upholding the DBE program. Second, DOT points to two district court cases discussing different programs—specifically, the Small Business Administration's 8(a) program and programs at the Minority Business Development Agency.<sup>54</sup> While all three programs allowed businesses to qualify as socially and economically disadvantaged based on a statutory presumption that particular groups had experienced discrimination, each program is structured differently and is based on a different legislative history. As such, court holdings regarding whether the government had a strong basis in evidence to establish a compelling interest in remedying discrimination through those programs or whether those programs were narrowly tailored do not directly implicate the legality of the DBE and ACDBE programs.

**V. DOT Must Clarify That Individual Business Owners Can Qualify Based on the Race and/or Sex Discrimination They Experienced**

The IFR only removes the *presumption* of disadvantaged status, requiring everyone to provide individualized evidence of discrimination they suffered to qualify as “socially and economically disadvantaged businesses.” As written, however, the IFR could be misinterpreted to forbid business owners from relying on evidence of race- or gender-based discrimination entirely. As revised, 49 CFR § 26.67 reads, “[A]ll applicants must demonstrate social and economic disadvantage affirmatively based on their own experiences and circumstances within American society, without regard to race or sex.”<sup>55</sup> The corresponding section relating to ACDBEs includes similar language.<sup>56</sup> The IFR should further clarify that, while applicants cannot qualify because of their race, they can nevertheless qualify because they suffered discrimination based on their race. For example, while a Black business owner is no longer presumed to be socially and economically disadvantaged because he or she is Black, the business owner could still qualify based on evidence that he or she suffered discrimination because he or she is Black. Allowing people to certify as “socially and economically disadvantaged businesses”

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<sup>52</sup> *Mid-America Milling Co., LLC, et al., v. U.S. Dep’t of Transp., et. al.*, No. 3:23-CV-00072-GFVT, 2024 WL 4267183 (E.D. Ky. Sept. 23, 2024).

<sup>53</sup> See *supra*, note 1.

<sup>54</sup> See *Ultima Services Corp. v. U.S. Dep’t of Agric.*, 2:20-CV-000041 (E.D. Tenn. 2023); See also *Nuziard v. Minority Bus. Dev. Agency*, 4:2023cv00278 – Document 27 (N.D. Tex. 2023).

<sup>55</sup> 49 C.F.R. § 26.67 (2025).

<sup>56</sup> 49 C.F.R. § 23.3 (2025).

based on their experience of race or gender discrimination is not a racial preference, as an individual of any race has the same opportunity to qualify, provided they proffer similar evidence. Prohibiting such disclosures would subvert the intent of Congress to address race and gender discrimination in contracting.<sup>57</sup> DOT must clarify that business owners can qualify for the DBE and ACDBE programs based on the race and/or sex discrimination that they have experienced.

## **VI. DOT Should Continue to Require States to Collect Demographic Data on Program Participation**

Under the proposed IFR, DOT does not provide a reasoned basis to cease the collection of demographic data on DBE and non-DBE bidders or report DBE certifications by race or sex. Federal agencies have long relied on data collection to reveal whether federal programs are being fairly and faithfully administered.<sup>58</sup> Even if DOT removes the statutory presumptions, it should continue to require states to collect and report data about the percentages of awardees by race and sex to understand whether the program is achieving its intended goal of remedying discrimination. This data would reveal which business owners experience social and economic disadvantage, whether business owners of color and women business owners—who continue to experience intentional discrimination—can participate equally in the DBE program, and whether the DBE program is achieving its goal of a level playing field for all small businesses.<sup>59</sup> Moreover, data collection is necessary to fulfill the statutory mandates of the Infrastructure Investment and Jobs Act, which requires states to report to the Secretary of Transportation the percentage of small business concerns controlled by women, socially and economically disadvantaged individuals (other than women), and individuals who are women and are otherwise socially and economically disadvantaged.<sup>60</sup> Ultimately, without a clear picture of who is participating in the DBE program, DOT will not be able to ensure the program is fulfilling its overall purpose.<sup>61</sup>

## **VII. Conclusion**

DOT cannot take the controversial step of rescinding decades-old race- and gender-based presumptions of social and economic disadvantage in federal contracting without good cause or affording the public a robust opportunity for notice and comment before the rule is finalized. The department also fails to provide a sufficient, reasoned explanation for its change in policy, given the robust evidence of ongoing discrimination against Black business owners and appellate court decisions upholding the program. The DBE and ACDBE programs have sought to level the playing field in federal contracting, allowing persons of color and women to

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<sup>57</sup> 49 C.F.R. § 26.3, 26.5 (2024).

<sup>58</sup> The U.S. Department of Education, for example, collects data on access to education across the country. *See* Office for Civ. Rts., *Data on Equal Access to Education*, U.S. DEP'T OF EDUC., <https://civilrightsdata.ed.gov/> (last visited Nov. 2, 2025).

<sup>59</sup> Ron Busby & Bibi Hidalgo, *Companies Aren't Disclosing Contracting Data. It's Hurting Minority-Owned Businesses.*, BROOKINGS INST. (May 15, 2024), <https://www.brookings.edu/articles/companies-arent-disclosing-contracting-data-its-hurting-minority-owned-businesses/>.

<sup>60</sup> *See supra* note 15.

<sup>61</sup> *Id.*

compete equitably for government contracts. We strongly urge DOT to withdraw the IFR and restore the prior rules.

Thank you for the opportunity to comment. If you have any questions, please contact LaTreshia Hamilton ([lhilton@naacpldf.org](mailto:lhilton@naacpldf.org)) or Maydrian Strozier-Lowe ([mstrozier-low@naacpldf.org](mailto:mstrozier-low@naacpldf.org)).

Sincerely,

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LaTreshia A. Hamilton, Esq.  
Policy Counsel  
NAACP Legal Defense and Educational Fund, Inc.  
700 14th Street NW, Suite 600  
Washington, D.C. 20005

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Maydrian Strozier-Lowe, Esq.  
Marshall Motley Scholar Program Fellow  
NAACP Legal Defense and Educational Fund, Inc.  
700 14th Street NW, Suite 600  
Washington, D.C. 20005