

November 3, 2025

ELECTRONIC SUBMISSION

Attn: DOT-OST-2025-0897

Peter Constantine
Office of the General Counsel
Office of the Secretary
U.S. Department of Transportation
1200 New Jersey Avenue SE
Washington, DC 20590

RE: Disadvantaged Business Enterprise Program and Disadvantaged Business Enterprise in Airport Concessions Program Implementation Modifications

Dear Mr. Constantine:

On October 3, 2025, the Department of Transportation (DOT) published the interim final rule (IFR), “Disadvantaged Business Enterprise Program and Disadvantaged Business Enterprise in Airport Concessions Program Implementation Modifications.”¹ President Trump has rightly called on government agencies to terminate the Federal use of “dangerous, demeaning, and immoral race- and sex-based preferences under the guise of so-called ‘diversity, equity, and inclusion’ (DEI) or ‘diversity, equity, inclusion, and accessibility’ (DEIA) that can violate the civil-rights laws of this Nation.”²

The race- and sex-based presumptions of social and economic disadvantage that DOT has been using to qualify certain small businesses for preferential treatment under these programs is arbitrary and discriminatory, terrible policy, and blatantly unconstitutional. Accordingly, this IFR represents a welcome development in DOT’s administration of the Disadvantaged Business Enterprise (DBE) and Disadvantaged Business Enterprise in Airport Concessions (ACDBE) programs. I congratulate DOT on this development and offer this comment in support.

Discussion

In this comment, I seek to show that DOT’s previous use of race- and sex-based presumptions of economic and social disadvantage under the DBE and ACDBE programs are: (i) unconstitutional; (ii) violate the Civil Rights Act of 1964; and (iii) have deleterious policy consequences.

¹ U.S. Department of Transportation, “Disadvantaged Business Enterprise Program and Disadvantaged Business Enterprise in Airport Concessions Program Implementation Modifications,” *Federal Register*, Vol. 90, No. 190 (October 3, 2025), p. 47,969.

² Exec. Order No. 14,173, “Ending Illegal Discrimination and Restoring Merit-Based Opportunity,” 90 CFR 8633 (2025).

I. DOT's use of the race- and sex-based presumptions is unconstitutional.

The Fifth Amendment to the Constitution requires that, “No person...shall be deprived of life, liberty, or property without due process of law.”³ This language does not contain the same explicit guarantee of equal protection as found in the Fourteenth Amendment,⁴ but the same equal protection analysis nevertheless applies. The Supreme Court articulated this principle as early as 1954, when the Supreme Court struck down racial segregation in the D.C. public schools, to which the 14th Amendment (which was used to strike down school segregation in *Brown v. Board of Education*)⁵ did not apply, because the District of Columbia is not a State. As the Court reasoned, “The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment, which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive.... This Court has recognized, discrimination may be so unjustifiable as to be violative of due process.”⁶

Since then, the Court has consistently and directly held that the “[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.”⁷ The Supreme Court’s “approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fifth Amendment.”⁸ Indeed, “Our whole system of law is predicated on the general, fundamental principle of equality of application of the law.”⁹ The Supreme Court continues to apply equal protection requirements to the Federal Government by way of the Fifth Amendment, for example when it held that Section 3 of the Defense of Marriage Act, which effectively prohibited Federal recognition of same-sex marriage, violated the Fifth Amendment’s due process and equal protection requirements.¹⁰

Certain activists have long advocated that these principles of equal protection allow differential treatment to advance the interests of historically disfavored groups, and their arguments appeared to have successfully persuaded Congress in 2021 to amend the authorizing statutes that form the basis for the DBE and ACDBE programs, to require a presumption that women, “Black Americans,” “Hispanic Americans,” “Native Americans,” “Asian Pacific Americans,” and “Subcontinent Asian Americans” be treated as disadvantaged.¹¹ Yet the Equal Protection Clause protects all demographic groups equally, including majority and historically favored groups, as “the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification.”¹²

³ U.S. CONST. amend. V.

⁴ U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws”).

⁵ 347 U.S. 483 (1954).

⁶ *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

⁷ *Buckley v. Valeo*, 424 U.S. 1, 93 (1976).

⁸ *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n. 2 (citing *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Jimenez v. Weinberger*, 417 U.S. 628, 637 (1974); *Frontiero v. Richardson*, 411 U.S. 677 (1973)).

⁹ *Truax v. Corrigan*, 257 U.S. 312, 331 (1921).

¹⁰ *United States v. Windsor*, 570 U.S. 744, 769-70 (2013).

¹¹ Pub. L. 117-58, 11101(e)(2)(B) (2021).

¹² *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 202 (1995).

Thus, the Constitution’s equal protection provisions apply as well in cases of so-called “affirmative action,” which is really a misnomer for what the British more accurately call “positive discrimination.”¹³ Moreover, the Supreme Court has confirmed that this protection applies both to allegedly favored and unfavored demographic groups in a major, high-profile case decided after Congress amended the DBE and ACDBE laws in 2021 to incorporate the race- and sex-based presumptions.

In 2023, the Supreme Court held Harvard’s use of so-called “affirmative action” in admissions to be unconstitutional, given that the “core purpose” of the Equal Protection Clause is to “do away with all governmentally imposed discrimination based on race.”¹⁴ The Supreme Court was unconvinced by Harvard’s arguments that their affirmative action program was only meant to give a leg up to certain applicants, because as the Supreme Court declared, “eliminating racial discrimination means eliminating all of it.”¹⁵ Thus, the Supreme Court “forcefully rejected the notion that government actors may intentionally allocate preference to those who may have little in common with one another but the color of their skin.”¹⁶ Citing this caselaw, the U.S. District Court of Kentucky determined in 2024 that DOT’s DBE statutory race- and sex-based presumptions likely violated the Constitution’s equal protection clause.¹⁷ As these legal developments demonstrate, after Congress enacted these requirements it became clearer than ever that they are in fact unconstitutional.

Although the Harvard case applied only to race-based discrimination, the Supreme Court has held separately that sex-based discrimination also requires heightened Constitutional scrutiny and cannot stand absent a demonstration by the Government of “exceedingly persuasive justification” for its discriminatory actions.¹⁸

Thus, in light of the text of the Fifth Amendment, and the Supreme Court case law both before and especially since Congress enacted these sex- and race-based presumptions, it is clear that these presumptions are unconstitutional and should be eliminated from DOT’s administration of the DBE and ACDBE programs.

II. DOT’s use of the race-based presumption violates the Civil Rights Act.

The Civil Rights Act of 1964 prohibits discrimination in the disbursement of Federal funds. Specifically, “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”¹⁹ Unlike the 2021 law with which Congress purported to require the race- and sex-based presumptions, this

¹³ See, e.g., Government Equalities Office (2010). Equality Act 2010: A quick start guide to positive action in service provision for voluntary and community organisations, p. 5 (under the heading, “What isn’t positive action?”). Available at: <https://assets.publishing.service.gov.uk/media/5a79bdcced915d07d35b7c2a/vcs-positive-action.pdf>

¹⁴ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181, 206 (2023).

¹⁵ *Id.*

¹⁶ *Id.* at 220.

¹⁷ *Mid-America Milling Co. v. U.S. Dep’t of Transp.*, No. 3:23-cv-00072, 2024 WL 4267183 (Sept. 23, 2024).

¹⁸ See *United States v. Virginia*, 518 U.S. 515, 531-33 (1996).

¹⁹ 42 U.S.C. 2000d.

provision of the Civil Rights Act remains operative and unhindered by intervening Supreme Court case law, and is therefore binding, both on DOT generally and specifically with regard to its administration of the DBE and ACDBE programs.

III. DOT's IFR is commendable on normative policy grounds as well.

If any part of the IFR is disappointing, it is that DOT spent so much more time discussing the costs of the IFR in comparison to the benefits.²⁰ DOT is certainly correct to note that the IFR will align DOT with its Constitutional obligations, which is not only an intrinsic benefit but reduces litigation risk as well. DOT is also correct to note that this change “may also improve public trust by reinforcing fairness in eligibility determinations, which, although not easily quantifiable, represent important benefits from improved program integrity.”²¹

Yet it is rather surprising, even dismaying, that after spending approximately a full page detailing the costs of the IFR, DOT only musters this lone paragraph to describe the benefits. To add more benefits to the list, the DBE and ACDBE programs do not come without cost. It is critical that Federal agencies award contracts to the most qualified firms, as doing so lowers the costs to Government and taxpayers and helps ensure that taxpayer funds are deployed on the most cost-effective basis possible. Recognition of this truth presumably underlies the IFR's regulatory changes that require DOT to attempt to achieve its DBE and ACDBE goals through DBE-neutral and ACDBE-neutral processes, before resorting to DBE-conscious and ACDBE-conscious mechanisms to meet whatever goal remains.

Congress has created the DBE and ACDBE programs, so it is fully appropriate that DOT administer these programs as charged by Congress. Yet DOT should do so in full mindfulness of the fact that these programs come at a real cost to the American public, to the extent that they require DOT to award contracts away from vendors who would otherwise be awarded a contract governed by DOT's regular cost and program effectiveness considerations. To bear these considerations in mind, DOT should ensure that program participation is limited to those businesses that actually demonstrate need, rather than simply presume that a potentially large swathe of businesses qualify for this special treatment.

In a similar vein this change is positive in that it ensures that the DBE and ACDBE programs are better tailored to achieve their statutory goals of supporting disadvantaged businesses. In the 21st century, there are many successful minorities, and many successful businesswomen. For DOT, or any Federal Governmental agency, simply to assume that businessmen and businesswomen from such backgrounds are intrinsically disadvantaged, in a way that merits special treatment, is not merely patronizing to everyone from these demographics, but grossly overinclusive in a way that undermines the very statutory goals that these programs are meant to promote. This IFR is an important development to ensure that the resources that Congress has intended for disadvantaged businesses actually go to those businesses, rather than through Constitutionally dubious and factually inaccurate and arbitrary proxies.

²⁰ 90 Fed. Reg. at 47974-75.

²¹ *Id.* at 47975.

Conclusion

The race- and sex- based presumptions of social and economic disadvantage that have characterized the BDE and ACBDE programs are morally odious and blatantly discriminatory, clearly violate the U.S. Constitution, and create a bad deal for the American public and taxpayers. As shocking as it was when Congress wrote these presumptions into the long-standing DBE and ACDBE programs in 2021, it is also understandable that DOT felt compelled to implement this Congressional directive. Yet since then, in 2023 the Supreme Court has confirmed and clarified its stance that the equal protection clause bans all racial discrimination, even in the case of positive discrimination meant to favor allegedly underrepresented demographic groups. This has been reflected in subsequent litigation against DOT's administration of the DBE and ACDBE programs, an adverse district court ruling²² in 2024 followed by a consent order,²³ and a determination by the Department of Justice that these provisions were indefensible in court.²⁴

Accordingly, this IFR represents a welcome modification to the DBE and ACDBE programs, and it is encouraging to see DOT administer these programs in a way that supports the actual statutory goals of advancing the interests of socially and economically disadvantaged businesses, rather than rely on the unconstitutional, sloppy proxies that Congress misguidedly added to the program in 2021.

Respectfully yours,

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The Heritage Foundation²⁵

²² *Supra*, n. 17.

²³ Joint Motion for Entry of Consent Order, *Mid-America Milling Co. v. U.S. Dep't of Transp.*, No. 3:23-cv-00072 (E.D. Ky. May 28, 2025).

²⁴ Letter from Solicitor General D. John Sauer to Hon. Mike Johnson (June 25, 2025).
<https://www.justice.gov/oip/media/1404871/dl?inline>

²⁵ These comments reflect my personal views and not necessarily those of The Heritage Foundation.