



ALAN WILSON
ATTORNEY GENERAL

November 3, 2025

The Honorable Sean Duffy, Secretary
United States Department of Transportation
Docket Operations, M-30
West Building Ground Floor, Room W-12-140
1200 New Jersey Avenue SE
Washington, DC 20590

Re: Department of Transportation, Disadvantaged Business Enterprise Program
and Disadvantaged Business Enterprise in Airport Program Implementation
Modifications, Docket No. DOT-OST-2025-0897

Dear Secretary Duffy,

I write in support of the Department of Transportation's Interim Final Rule, entitled Disadvantaged Business Enterprise Program and Disadvantaged Business Enterprise in Airport Program Implementation Modifications, which was published in the Federal Register on October 3, 2025.

The Interim Final Rule is a welcome attempt to bring the Disadvantaged Business Enterprise Program and Disadvantaged Business Enterprise in Airport Program in line with the United States Constitution and federal law. Although both programs may be rooted in a laudable desire to "level the playing field for businesses seeking to participate in federally assisted contracts and in airport concessions," Congress has mandated that the programs use improper and discriminatory means to achieve this objective by assuming that certain individuals—namely, women and certain racial and ethnic groups—are presumptively disadvantaged. 90 FR 47969, 47970.

Such presumptions are an affront to both the United States Constitution and federal law. As recently explained by the United States Supreme Court, "racial discrimination is invidious in all contexts." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 214 (2023) (quoting *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991)). And discrimination on the basis of sex in this context is also objectionable. *See United States v. Virginia*, 518 U.S. 515, 531 (1996).

Courts have reached a similar conclusion. For example, in *Mid-Am. Milling Co., LLC v. United States Dep't of Transportation*, No. 3:23-CV-00072-GFVT, 2024 WL

4267183, at *13 (E.D. Ky. Sept. 23, 2024) (“*MAMCO*”), a district court enjoined the Department of Transportation from mandating the Disadvantaged Business Enterprise Program’s use of race- and gender-based rebuttable presumptions in certain contracts. In doing so, the court observed the following:

Attempting to cure [our country’s] imperfect history, Congress enacted the Disadvantaged Business Enterprise program, which requires the Department of Transportation to ensure that a certain portion of federal funds authorized for the highway and transit projects be expended with disadvantaged business enterprises. To execute this requirement, the Department of Transportation affords certain minority- and women-owned businesses a presumption of disadvantage—a rebuttable presumption—but a presumption, nonetheless. These presumptions have been employed since the 1980s, but the Plaintiffs say enough is enough. The Court agrees. Because these race and gender classifications violate the Constitution’s guarantee of equal protection, the pending request for a preliminary injunction will be GRANTED.

MAMCO, 2024 WL 4267183, at *1.

Following the district court’s decision in *MAMCO*, the United States Office of the Solicitor General announced that it would no longer defend the constitutionality of the DBE program’s race- and sex- based presumptions. *See* Letter from United States Solicitor General D. John Sauer to Speaker Mike Johnson (June 25, 2025), <https://www.justice.gov/oip/media/1404871/dl?inline>.

In other contexts, my office has taken a similar position. In an opinion issued by my office on September 18, 2023, on the City of North Charleston’s Small, Disadvantaged, Minority Business program, my office opined that a local disadvantaged minority business program could be unconstitutional if it was applied in a race-conscious way. Op. S.C. Att’y Gen., 2023 WL 6211457 (Sept. 18, 2023). In that opinion, we noted that race-conscious and gender-conscious government programs are “presumptively unconstitutional.” Op. S.C. Att’y Gen., 2023 WL 6211457 at *10 (Sept. 18, 2023) (quoting *H.B. Rowe Co. v. Tippet*, 615 F.3d 233, 258 (4th Cir. 2010) (Niemeyer, J., concurring in judgment)).

To paraphrase Chief Justice John Roberts, the best way to stop discriminating on the basis of race and sex is to stop discriminating on the basis of race and sex. The Department of Transportation’s Interim Final Rule represents a commendable effort to do just that. Thank you for your efforts.

Sincerely,

A handwritten signature in black ink that reads "Alan Wilson". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Alan Wilson
South Carolina Attorney General