**U.S. Department of Justice**

Office of the Solicitor General

*The Solicitor General*

*Washington, D.C. 20530*

June 25, 2025

The Honorable Mike Johnson
Speaker
U.S. House of Representatives
Washington, DC 20515

Re: Race- and Sex-Based Presumptions in USDOT Disadvantaged Business Enterprise Program

Dear Mr. Speaker:

Consistent with 28 U.S.C. 530D, I write to advise you that the Department of Justice (Department) has concluded that certain aspects of United States Department of Transportation (USDOT) disadvantaged business enterprise (DBE) program violate the Constitution, that the Department will no longer defend those aspects of the program in court, and that the Department has taken that position in ongoing litigation. See D. Ct. Doc. 82 (May 28, 2025), *Mid-America Milling Co.* v. *USDOT*, No. 23-cv-72 (E.D. Ky.) (*MAMCO*). Specifically, the Department has determined that the program is unconstitutional to the extent that it creates a presumption of social or economic disadvantage based on race or sex.

Congress enacted the USDOT DBE program in 1983 and has reauthorized the program in recent years. See FAA Reauthorization Act of 2024, Pub. L. No. 118-63, § 730(a), 138 Stat. 1272; Infrastructure Investment and Jobs Act (IIJA), Pub. L. No. 117-58, § 11101(e), 135 Stat. 448-450. The program requires, "[e]xcept to the extent that the Secretary [of Transportation] determines otherwise," that a certain portion of federal funds authorized for highway, transit, and aviation projects "be expended through small business concerns owned and controlled by socially and economically disadvantaged individuals." IIJA § 11101(e)(3), 135 Stat. 449; see 49 U.S.C. 47113(b). Under the program, individuals who are "women, Black American, Hispanic American, Native American, Asian Pacific American, Subcontinent Asian American, or other minorities found to be disadvantaged by the Small Business Administration (SBA), are rebuttably presumed to be socially and economically disadvantaged." 49 C.F.R. 26.67(a)(1); see IIJA § 11101(e)(2)(B), 135 Stat. 449; 15 U.S.C. 637(d)(3); 49 U.S.C. 47113(a)(2); 13 C.F.R. 124.103(b)(1). In *MAMCO*, plaintiffs have challenged the constitutionality of the program's race- and sex-based presumptions, arguing that they violate the equal protection component of the Fifth Amendment's Due Process Clause.

In *Students for Fair Admissions, Inc.* v. *President & Fellows of Harvard College*, 600 U.S. 181 (2023) (*SFFA*), the Supreme Court recently held that race-based preferences in the admissions programs at Harvard and the University of North Carolina violated the Fourteenth

Amendment's Equal Protection Clause. *Id.* at 213. In so holding, the Court rejected the argument that race-based admissions programs can be justified by the government's interest in "remedy[ing] the effects of societal discrimination." *Id.* at 226. In addition, the Court explained that by relying on "racial categories" that were "arbitrary," "overbroad," and "underinclusive," the admissions programs at issue had "fail[ed] to articulate a meaningful connection between the means they employ and the goals they pursue." *Id.* at 215-216. The Court also emphasized that the programs' reliance on race had no "logical end point." *Id.* at 221 (citation omitted).

The Department has now reevaluated its litigating position in *MAMCO* and has determined that the USDOT DBE program is unconstitutional to the extent that it creates a presumption of social or economic disadvantage based on race or sex. The Department had previously defended the DBE program's race- and sex-based presumptions by "point[ing] to societal discrimination against minority-owned businesses generally." D. Ct. Doc. 44, at 18 (Sept. 23, 2024), *MAMCO*, *supra* (No. 23-cv-72). Consistent with *SFFA*'s rejection of a similar justification in the university-admissions context, the Department has determined that an interest in remedying the effects of societal discrimination does not justify the use of race- and sex-based presumptions in the DBE program. The Department has also determined that, like the admissions programs at issue in *SFFA*, the DBE program relies on arbitrary, overbroad, and underinclusive racial categories and lacks any logical end point. For those reasons, the Department will no longer defend the constitutionality of the DBE program's race- and sex-based presumptions. The Department, however, continues to defend other aspects of the DBE program that employ race- and sex-neutral criteria for determining social or economic disadvantage.

Please let me know if I can be of further assistance in this matter.

Sincerely,

D. John Sauer
Solicitor General