

May 20, 2025

Secretary Sean P. Duffy  
U.S. Department of Transportation  
1200 New Jersey Ave, SE  
Washington, DC 20590

RE: April 24, 2025 “Follow the Law” Letter to Recipients of Federal Transportation  
Funding

Dear Secretary Duffy,

We write to urge you to rescind your April 24, 2025, “Follow the Law” letter to recipients of federal transportation funding,<sup>1</sup> which outlines recipient’s legal obligations in vague and misleading terms in order to chill lawful efforts to create equal opportunity. For over eight decades, the NAACP Legal Defense and Educational Fund, Inc. (LDF) has been a stalwart advocate for the dignity and freedom of Black people in the United States. Through executive orders<sup>2</sup> and other actions, the Trump administration has created confusion about the legality of diversity, equity, inclusion, and accessibility efforts and sought to suppress the view that these efforts advance fundamental American values. Your letter claims that “any policy, program, or activity that is premised on a prohibited classification, including discriminatory policies and practices designed to achieve so-called ‘diversity, equity, and inclusion,’ or ‘DEI,’ goals, presumptively violate federal law” and threatens to cut U.S. Department of Transportation (DOT) funding to state and local jurisdictions whose contracting and employment practices do not conform with this skewed interpretation.<sup>3</sup> This statement is incredibly misleading. Courts have long held that many diversity, equity, inclusion, and accessibility programs are lawful, and have upheld narrowly tailored programs that remedy discrimination against people of color and women, including in contracting. Your letter uses the threat of civil rights enforcement to pressure recipients of federal transportation funding to roll back lawful programs, with serious consequences for Black communities and other communities of color, women, LGBTQ+ people, and other groups that have been historically denied full participation in the nation’s economy. We urge DOT to reverse course.

#### **A. DOT Policies and Practices Have and Continue to Discriminate Against Black People**

Congress passed the Civil Rights Act of 1964 and other civil rights laws to remedy and prevent discrimination against people of color and other protected groups, including discrimination by DOT policies and practices. When the highway system was constructed, DOT allowed its grantees to remove homes and businesses of Black and Latino people deemed

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<sup>1</sup> Letter from Sean P. Duffy, U.S. Secretary of Transportation, to All Recipients of U.S. Transportation Funding (Apr. 25, 2025), <https://www.transportation.gov/sites/dot.gov/files/2025-04/Follow%20the%20Law%20Letter%20to%20Applicants%204.24.25.pdf> (“DOT Follow the Law Letter”).

<sup>2</sup> See Ending Radical and Wasteful Government DEI Programs and Preferencing (Jan. 20, 2025), Exec. Order No. 14,151, 90 Fed. Reg. 8339 (Jan. 29, 2025); Ending Illegal Discrimination and Restoring Merit-Based Opportunity (Jan. 21, 2025), Exec. Order No. 14,173, 90 Fed. Reg. 8633 (Jan. 31, 2025).

<sup>3</sup> DOT Follow the Law Letter, *supra* note 1, at 2.



undesirable and construct a freeway system that erected physical boundaries separating people and communities of color.<sup>4</sup> Between 1957 and 1977, more than an estimated 475,000 households were displaced for the highways' construction, most of whom were urban, lower-income communities of color.<sup>5</sup> For example, when New Orleans built the Claiborne Expressway in the 1960s, it tore apart a thriving Black neighborhood. Before the construction of the expressway, Claiborne Avenue was the epicenter of economic and cultural life for Black New Orleans and home to more than 120 Black owned businesses.<sup>6</sup> Today, only a few dozen remain. Too often federal planners purposefully planned for highways to cut through Black and Brown communities.<sup>7</sup> In Montgomery, Alabama, state and federal planners put an interstate highway through the city's only middle-class Black neighborhood "to displace and punish the organizers of the civil rights movement."<sup>8</sup> Federally-funded highways also physically isolated people of color from public facilities, services, quality schools and access to jobs outside the impoverished boundaries of these segregated neighborhoods.<sup>9</sup> DOT's transportation policy and highway development deprived many Black communities of economic opportunity and has contributed to and sustained the underdevelopment of Black communities.<sup>10</sup> Title VI of the 1964 Civil Rights Act and other civil right protections are intended to remedy these issues by ensuring that Black communities and other communities of color are not targeted for displacement and other harms and equally benefit from federal funding.

Furthermore, as the federal government itself has admitted,<sup>11</sup> DOT and state and local transportation departments continue to actively and passively participate in discrimination against small business owners of color and women business owners. Dozens of disparity studies document ongoing discrimination in access to federal contracts across all 50 states.<sup>12</sup> In 2010, only 5% of the \$45 billion in federal transportation stimulus funds went to firms owned by Black-, Latino-, and women-owned businesses, even though these businesses comprised 40% of

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<sup>4</sup> Deborah N. Archer, *White Men's Roads Through Black Men's Homes: Advancing Racial Equity Through Highway Reconstruction*, 73 Vanderbilt L. Rev. 1259 (2020), <https://cdn.vanderbilt.edu/vu-wordpress-o/wp-content/uploads/sites/278/2020/10/19115823/White-Mens-Roads-Through-Black-Mens-Homes-Advancing-Racial-Equity-Through-Highway-Reconstruction.pdf>.

<sup>5</sup> Erin Blakemore, *Interstate Highways Were Touted as Modern Marvels. Racial Injustice Was Part of the Plan*, Wash. Post (Aug. 17, 2021), <https://www.washingtonpost.com/history/2021/08/16/interstate-highways-were-touted-modern-marvels-racial-injustice-was-part-plan/>. See also Sarah Schindler, *Architectural Exclusion: Discrimination and Segregation Through Physical Design of the Built Environment*, 124 Yale L.J. 1934–2024 (2015), <https://www.yalelawjournal.org/article/architectural-exclusion>.

<sup>6</sup> Drew Hawkins, *A New Orleans Neighborhood Confronts the Racist Legacy of a Toxic Stretch of Highway*, KFF Health News (Mar. 15, 2024), <https://kffhealthnews.org/news/article/new-orleans-noise-pollution-highway-divide-infrastructure-racist-legacy/>; see also Livia Gershon, *The Highway That Sparked the Demise of an Iconic Black Street in New Orleans*, Smithsonian Mag. (May 28, 2021), <https://www.smithsonianmag.com/smart-news/documenting-history-iconic-new-orleans-street-and-looking-its-future-180977854/>.

<sup>7</sup> Noel King, *A Brief History Of How Racism Shaped Interstate Highways*, NPR (Apr. 7, 2021), <https://www.npr.org/2021/04/07/984784455/a-brief-history-of-how-racism-shaped-interstate-highways>.

<sup>8</sup> Leah Binkovitz, *How a Montgomery Highway Sought To Disrupt the Heart of the Civil Rights Movement*, Rice Univ. (Jan. 25, 2019), <https://kinder.rice.edu/urbanedge/how-montgomery-highway-sought-disrupt-heart-civil-rights-movement>.

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

<sup>10</sup> See generally, Deborah N. Archer, *Transportation Policy and the Underdevelopment of Black Communities*, 106 Iowa L. Rev. 2125–51 (2021), <https://ilr.law.uiowa.edu/sites/ilr.law.uiowa.edu/files/2023-02/Archer.pdf>.

<sup>11</sup> U.S. Dep't of Just., *The Compelling Interest to Remedy the Effects of Discrimination in Federal Contracting: A Survey of Recent Evidence* (2021) [hereinafter "DOJ, A Recent Survey of Recent Evidence"] [https://web.archive.org/web/20250516154440/https://docs.house.gov/meetings/SM/SM00/20240131/116780/HM\\_KP-118-SM00-20240131-SD003.pdf](https://web.archive.org/web/20250516154440/https://docs.house.gov/meetings/SM/SM00/20240131/116780/HM_KP-118-SM00-20240131-SD003.pdf).

<sup>12</sup> *Id.*



all businesses.<sup>13</sup> Recent disparity studies confirm that these disparities remain prevalent and are not explained by other factors.<sup>14</sup> For example, a 2021 disparity study in California found that minority-owned businesses were substantially underutilized in DOT contracts, receiving only 20.3% contracts despite being available to perform 27.6% of the construction and professional services contracts funded by DOT.<sup>15</sup> Similarly, in Virginia's 2020 disparity study found that minority- and women-owned businesses received only 13.4 percent of the contract and procurement dollars that the State awarded even though the overall availability of minority- and women-owned businesses was 32.8 percent.<sup>16</sup> Moreover, last year, the Senate Small Business Committee heard testimony from three business owners about the discrimination they faced as women of color, as well as from experts who outlined data showing that these were not isolated experiences, but part of an ongoing pattern.<sup>17</sup> Finally, in December 2024, the White House Council on Economic Advisors similarly concluded that significant racial disparities in contracting persist, likely due to ongoing racial bias.<sup>18</sup>

## **B. DOT's "Follow the Law" Letter Misstates Federal Civil Rights Law**

Despite the past and present racial discrimination in DOT programs, your letter advances a misleading interpretation of federal law and recent cases that threatens programs designed to create equal opportunity. Your letter implies that the Supreme Court's decision in *Students for Fair Admissions v. Presidents and Fellows of Harvard College/University of North Carolina* ("SFFA"),<sup>19</sup> as well as black-letter federal law, requires recipients of federal transportation funding to end diversity, equity, inclusion, and accessibility programs as well as programs designed to address discrimination in contracting. This interpretation is wrong for several reasons:

- SFFA did not pertain to diversity, equity, inclusion, and accessibility programs in employment. As your letter acknowledges, in *SFFA*, the Supreme Court ruled that the use of race as a tip in the admissions programs at Harvard and the University of North Carolina violated the Equal Protection Clause of the Fourteenth Amendment and Title

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<sup>13</sup> JASON REECE, ET AL., THE OHIO STATE UNIVERSITY KIRWAN INST. FOR THE STUDY OF RACE AND ETHNICITY, *ARRA AND THE ECONOMIC CRISIS: ONE YEAR LATER HAS STIMULUS HELPED COMMUNITIES IN CRISIS?* (2010), [https://www.reimaginerpe.org/files/arraequityoneyearanniv\\_kirwan\\_institute\\_feb2010.pdf](https://www.reimaginerpe.org/files/arraequityoneyearanniv_kirwan_institute_feb2010.pdf); See also Hokey Min & James R. Good, *Challenges and Opportunities for Minority Owned Trucking Firms Under Affirmative Actions: A Case Study*, 16 Int'l J. Logistics Sys. & Mgmt 1–20 (2013), <https://doi.org/10.1504/IJLSM.2013.056161>.

<sup>14</sup> U.S. Dep't of Just., *A Survey of Recent Evidence*, *supra* note 11; U.S. Dep't of Transportation Federal Railroad Administration, *Report to Congress Concerning Minority- and Women-Owned Small Businesses in Industries Related to the Rail Transportation Sector* (2022), <https://web.archive.org/web/20250516174720/https://railroads.dot.gov/elibrary/report-congress-concerning-minority-and-women-owned-small-businesses-industries-related>.

<sup>15</sup> BBC Rsch. & Consulting, *Availability and Disparity Study Report 2021: California Department of Transportation* ES 3, 5 (2021), <https://web.archive.org/web/20250516183422/https://www.mbda.gov/sites/default/files/2022-07/caltrans-disparity-study-2021-final-report.pdf>.

<sup>16</sup> BBC Rsch. & Consulting, *2020 Disparity Study: Commonwealth of Virginia* ES-3 (2020), <https://web.archive.org/web/20250516183422/https://www.mbda.gov/sites/default/files/2022-08/2020-Commonwealth-of-Virginia-Disparity-Study-Final.pdf>.

<sup>17</sup> *Promoting Opportunity: The Need for Targeted Federal Business Programs to Address Ongoing Racial Discrimination Hearings Before the U.S. Comm. on Small Bus. & Entrepreneurship* (2024), <https://www.sbc.senate.gov/public/index.cfm/2024/5/promoting-opportunity-the-need-for-targeted-federal-business-programs-to-address-ongoing-racial-discrimination>.

<sup>18</sup> White House Council on Economic Advisors, *Racial Disparities in Government Contracting* (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>19</sup> 600 U.S. 181 (2023).



VI, which prohibits racial discrimination by federal funding recipients.<sup>20</sup> The Court did not alter the law regarding Title VII, which prohibits discrimination in employment, including by state and local governments.

- Federal statutory and constitutional law has long permitted the use of neutral programs to advance the goals of diversity, equity, inclusion, and accessibility. You argue that diversity, equity, inclusion, and accessibility efforts “presumptively violate[] Federal law,” even if “described in neutral terms,” if those efforts are “premised on a prohibited classification.”<sup>21</sup> It is unclear what you mean by the vague phrase “premised on a prohibited classification,” which is not used in federal law. Federal law is clear, however, that while state and local governments can only use race as a criterion to make decisions in limited circumstances, they can use race- and gender-neutral programs to advance diversity, equity, inclusion, and accessibility goals.<sup>22</sup>
- Courts have upheld many diversity, equity, inclusions, and accessibility programs. Lawful programs include broad recruitment efforts designed to expand the applicant pool,<sup>23</sup> diversity policies and statements,<sup>24</sup> and anti-bias trainings.<sup>25</sup> Such efforts are often necessary to ensure civil rights compliance.<sup>26</sup> The Supreme Court’s decision in *SFFA* did not change this longstanding principle.<sup>27</sup>

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<sup>20</sup> DOT Follow the Law Letter, *supra* note 1, at 2.

<sup>21</sup> *Id.*

<sup>22</sup> See, e.g., *City of Richmond v. Croson*, 488 U.S. 469, 509 (1989) (plurality opinion of O’Connor, J.) (“the city has at its disposal a whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races”); see *id.* at 526 (Scalia, J., concurring in judgment) (internal quotation marks omitted) (explaining that the government “can, of course, act to undo the effects of past discrimination in many permissible ways that do not involve classification by race”); U.S. Equal Emp. Opportunity Comm’n, EEOC Compl. Man., *Section 15 Race and Color Discrimination* (2006) [hereinafter EEOC Compl. Man. § 15], <https://web.archive.org/web/20250516182254/https://www.eeoc.gov/laws/guidance/section-15-race-and-color-discrimination> ((noting that “Title VII permits diversity efforts designed to open up opportunities to everyone,” and encouraging employers to engage in proactive steps to recruit a diverse applicant pool and assess and reduce barriers to equal opportunity, in order to “reduce the likelihood of Title VII violations.”)).

<sup>23</sup> *Mlynczak v. Bodman*, 442 F.3d 1050 (7th Cir. 2006) (finding that U.S. Department of Energy’s recruitment policy was intended to ensure “diversity in the applicant pool for positions at the agency” and was not evidence of discrimination because the efforts “were of the type that expand the pool of persons under consideration, which is permitted”); *Duffy v. Wolle*, 123 F.3d 1026, 1038-39 (8th Cir. 1997) (“An employer’s affirmative efforts to recruit minority and female applicants does not constitute discrimination. . . . An inclusive recruitment effort enables employers to generate the largest pool of qualified applicants and helps to ensure that minorities and women are not discriminatorily excluded from employment.”).

<sup>24</sup> *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004) (goal of diversity policy to reduce sexual orientation discrimination is consistent with goals of civil rights laws); *Bernstein v. St. Paul Companies, Inc.*, 134 F. Supp. 2d 730, 739 (D. Md. 2001) (“A company’s (or its CEO’s) commitment to ‘diversity,’ if expressed in terms of creating opportunities for employees of different races and both genders, or fostering workplace tolerance, is not proof of discriminatory motive with respect to any specific hiring decision.”); *Lutes v. Goldin*, 62 F. Supp. 2d 118, 131 (D.D.C.1999) (concern for ensuring equal opportunity and removing barriers does not support a claim of discrimination when there is no evidence of any preference for one group over the other).

<sup>25</sup> See, e.g., *Young v. Colorado Dep’t of Corr.*, 94 F.4th 1242 (10th Cir. 2024); *Vavra v. Honeywell*, 106 F.4th 702 (7th Cir. 2024).

<sup>26</sup> *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (discussing affirmative defense to harassment liability available where, among other things, an employer “exercised reasonable care to prevent and correct promptly any sexually harassing behavior” such as by informing employees of internal anti-harassment policies); EEOC Compl. Man. §15, *supra* note 22, at Section IX (encouraging employers “to reduce the likelihood of Title VII violations and to address impediments to equal employment opportunity” through proactive measures such as conducting self-analyses and enhancing outreach).

<sup>27</sup> 600 U.S. 181 (2023).



- SFFA does not prohibit narrowly tailored programs that consider race or gender in order to remedy racial discrimination. In *SFFA*, the Supreme Court reaffirmed that 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>28</sup> Any such programs must be narrowly tailored to meet that interest. In light of the well-documented, ongoing discrimination faced by small business owners of color and women small business owners, courts have upheld well-designed programs that consider race and gender in order to overcome unfair barriers, including DOT’s Disadvantaged Business Enterprise Program.<sup>29</sup> Indeed, every federal circuit court that has considered the constitutionality of the federal DBE program since it was revised in the aftermath of *Adarand Constructors, Inc. v. Peña*,<sup>30</sup> has found that program to be facially constitutional.<sup>31</sup>

As you know, letters and other guidance documents cannot rewrite Title VI, Title VII, and other federal statutes or the U.S. Constitution. The misleading statements in your letter thus should not discourage recipients of federal transportation funding from pursuing lawful efforts to advance equal opportunity in employment and contracting.

Importantly, DOT cannot unilaterally impose the Trump administration’s inaccurate views of the law on the nation. Should DOT attempt to halt funding to an entity engaged in lawful efforts to ensure equal opportunity, that action can be challenged in court. The Trump administration does not have the authority to control activities that are not federally-funded—and similar agency actions have already been challenged in court.

We urge you to rescind your misleading “Follow the Law” letter.

Sincerely,

NAACP Legal Defense and Educational Fund, Inc.  
Minority Business Enterprise Legal Defense and Education Fund

CC: State Departments of Transportation

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<sup>28</sup> *Id.* at 207.

<sup>29</sup> *Midwest Fence Corp. v. Dep’t of Transp.*, 840 F.3d 932 (7th Cir. 2016); *Associated Gen. Contractors of Am., San Diego Chapter, Inc. v. Cal. Dep’t of Transp.*, 713 F.3d 1187 (9th Cir. 2013); *W. States Paving Co. v. Wash. State DOT*, 407 F.3d 983 (9th Cir. 2005); *N. Contracting, Inc. v. Illinois*, 473 F.3d 715 (7th Cir. 2007); *Sherbrooke Turf, Inc. v. Minnesota Dept. of Transp.*, 345 F.3d 964 (8th Cir. 2003); *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000).

<sup>30</sup> 515 U.S. 200 (1995).

<sup>31</sup> *See, for example, Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000); *Sherbrooke Turf, Inc. v. Minnesota Dept. of Transp.*, 345 F.3d 964 (8th Cir. 2003); *W. States Paving Co. v. Wash. State DOT*, 407 F.3d 983 (9th Cir. 2005); *N. Contracting, Inc. v. Illinois*, 473 F.3d 715 (7th Cir. 2007).