



August 24, 2022

The Honorable Pete Buttigieg, Secretary
U.S. Department of Transportation
1200 New Jersey Ave SE
Washington, D.C. 20590

Dear Secretary Buttigieg:

America First Legal Foundation (“AFL”) is a national, nonprofit organization working to protect the rule of law, due process, and equal protection for all Americans. AFL has obtained internal Department of Transportation documents¹ demonstrating that President Biden’s executive orders on “equity”² are being implemented through unlawful “racial balancing” policies, practices, and quotas in employment training, hiring, and promotion. Furthermore, the Department’s publicly available “Equity Action Plan” demonstrates that race is being unlawfully infused into the Department’s procurement and grantmaking decisions.³

I. ILLEGAL RACE-BASED HIRING AND PROMOTION PRACTICES

The Department’s “Equity Action Plan” is apparently designed to achieve “desired [racial] outcomes beyond federal regulations” that prohibit the government from playing favorites based on immutable characteristics.⁴ To that end, the “Quantitative Workforce Benchmarking” carried out by your office is a taxpayer-funded exercise in racial “bean counting” to support illegal race-based hiring and promotion practices. Critically, one of your “ultimate desired outcomes” is “equitable opportunities (sic) to advance in public service at DOT.”⁵ With respect to federal employment, “equitable opportunities” is a term without fixed or discernable legal meaning.

In this case, however, the evidence is that you are using the term as a proxy for unlawful racial quotas in the service of arbitrary and capricious racial balancing. “Equality means each individual or group of people is given the same resources or opportunities. Equity recognizes that each person has different circumstances and

¹ See U.S. Dep’t of Transp., Office of the Secretary, *Diversity, Equity, Inclusion, and Accessibility (DEIA) Assessment Insights Brief: Quantitative Workforce Benchmarking* (Aug. 4, 2022), available at <https://bit.ly/3dNaVg4>.

² Exec. Order No. 13,895, 86 Fed. Reg. 7,009 (Jan. 27, 2021); Exec. Order No. 14,035, 86 Fed. Reg. 34,593 (June 25, 2021).

³ U.S. Dep’t of Transp., EQUITY ACTION PLAN at 6 (Jan. 2022), available at <https://bit.ly/3dGY6Uk>.

⁴ *Id.* at 4.

⁵ See *supra* note 1 at 4.

allocates the exact resources and opportunities needed to reach an equal outcome.”⁶ Our laws mandate equality of opportunity. They forbid “allocating the exact resources and opportunities needed to reach an equal outcome.”

Additionally, the evidence is that your office is setting “specific short-term and long-term targets for diverse representation (sic) in alignment with DOT strategic planning” and creating “SES leadership training for currently underrepresented groups” of federal workers.⁷ Again, although the term “diverse representation” lacks fixed or discernable legal meaning, the evidence is clear that you equate “diversity” with a federal worker’s immutable characteristics or, under some circumstances perhaps, his or her sexual behavior. Regardless, the Civil Service Reform Act absolutely prohibits federal hiring and promotions based on “equitable opportunities” or “diverse representation” and clearly forbids “leadership training” for some workers but not others, based solely on their race or sex.

For example, 5 U.S.C. § 2301(b) provides in relevant part that:

Federal personnel management should be implemented consistent with the following merit system principles:

(1) Recruitment should be from qualified individuals from appropriate sources in an endeavor to achieve a work force from all segments of society, and selection and *advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity.*

(2) All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management *without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.*

(3) Equal pay should be provided for work of equal value, with appropriate consideration of both national and local rates paid by employers in the private sector, and appropriate incentives and recognition should be provided *for excellence in performance.*

(Emphasis added.)

Also, 5 U.S.C. § 2302(b)(1) provides in relevant part that:

⁶ Milken Institute School of Pub. Health, The George Washington University, *Equity v. Equality: What’s the Difference?* (Nov. 5, 2020) (last accessed Aug. 22, 2022), <https://bit.ly/3R04vbJ>.

⁷ See *supra* note 1 at 31.

Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, *shall not...discriminate for or against any employee or applicant for employment* - (A) on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e–16); (B) on the basis of age, as prohibited under sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a); (C) on the basis of sex, as prohibited under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)); (D) on the basis of handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791); or (E) on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation....

(Emphasis added.)

Consequently, if the Department implements the recommendations made in your office’s “Quantitative Workforce Benchmarking”, then it will violate the Civil Service Reform Act and other federal anti-discrimination laws.

II. ILLEGAL RACE-BASED PROCUREMENT AND GRANTMAKING PRACTICES

A. The Department is engaging in illegal race-based procurement

With respect to procurement, and under the heading “Wealth Creation”, the Department promises to “Increase USDOT direct contract dollars to small disadvantaged businesses to an aspirational goal of 20% by FY25.” It further promises to “focus equity efforts on programs that will have the greatest impact on small disadvantaged business opportunities.” Driving these promises is the claim that “Black [undefined term] and Hispanic [undefined term]-owned businesses were underrepresented, receiving only 1.7% and 2.4% of FY20 USDOT direct contract dollars...” The Department claims that by “Addressing systemic barriers [undefined] and achieving the 20% goal for small disadvantaged businesses” could funnel \$1.6 billion from the taxpayers to them.⁸ In January 2022, the Department purportedly launched an internal “procurement dashboard to drive accountability for small and disadvantaged business goals,” and “[i]ncorporate[d] elements of small disadvantaged business goals into management performance plans” to enforce its quota system.⁹

Regarding federal procurement, “equity” is a word without a legally fixed or discernable meaning. The Supreme Court has repeatedly held that all racial classifications and preferences, including those “directing resources” to “communities of color”, must be analyzed under strict scrutiny. To be constitutional, the Department’s race and national origin-based procurement quotas must serve a compelling governmental interest and be narrowly tailored to further that interest. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227, 236 (1995). And the controlling legal presumption is that

⁸ EQUITY ACTION PLAN at 7.

⁹ *Id.*

government classifications based on race carry a danger of stigma, promote notions of racial inferiority, and lead to a politics of racial hostility. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion).

B. The Department is engaging in illegal race-based grant making

With respect to grants and under the heading “Interventions”, the Department concedes that “The [transportation grant] formulas are not required to account for equity, limiting the Department’s ability to direct resources to underserved, overburdened, and disadvantaged communities.” But with respect to \$196 billion in taxpayer funds, it promises to bypass our laws prohibiting the federal government from simply handing out funds based on race, and launch “a national equity accelerator to provide hands-on support to underserved and overburdened communities accessing USDOT funds.” Tellingly, the Department does not define what “equity” means here, much less cite a clear statutory authority for the creation and funding of a “national equity accelerator” under its auspices. The law, however, expressly prohibits racial and national origin discrimination and racial balancing with respect to federal grant-making. *Vitolo v. Guzman*, 999 F.3d 353, 361 (6th Cir. 2021). When the government promulgates race-based policies, it must operate with a scalpel. And its cuts must be informed by data that suggest *intentional* discrimination. Broad statistical disparities are not nearly enough.

III. THE DEPARTMENT SHOULD CEASE AND DESIST VIOLATING ANTI-DISCRIMINATION LAWS

The Department claims that “equity (sic) is core part of [its] mission.”¹⁰ According to Congress, however, the Department’s mission is to ensure the coordinated and effective administration of the transportation programs of the United States Government; make easier the development and improvement of coordinated transportation services to be provided by private enterprise to the greatest extent feasible; encourage cooperation between federal, state, and local governments, carriers, labor, and other interested persons to achieve transportation objectives; stimulate technological advances in transportation, through research and development or otherwise; provide general leadership in identifying and solving transportation problems; and develop and recommend transportation policies and programs to the President and Congress to achieve transportation objectives considering the needs of the public, users, carriers, industry, labor, and national defense. 49 U.S.C. § 101(b). No statute supports the Department’s claim that “equity (sic) is a core part of [its] mission.” Accordingly, your alleged “equity” activities, as described above, are likely *ultra vires*.

In any event, to protect the civil service merit system, ensure the Department’s compliance with applicable civil rights laws, and meet your Constitutional obligation to faithfully execute the laws, we demand that you immediately cease and desist from all employment and discretionary grantmaking policies and practices that discriminate between employees and/or recipients based on race, color, sex, or national origin,

¹⁰ *Id.* at 6.

whether in the name of “equity” or otherwise. Furthermore, in anticipation of litigation, and in strict compliance with federal records laws and regulations, we demand that you direct the Department to preserve all records relevant to the legal issues and concerns noted above, including but not limited to paper records and electronic information, including email, electronic calendars, financial spreadsheets, PDF documents, Word documents, and all other information created and/or stored digitally. Of particular concern are discretionary grants made after consideration of “equity”, a term apparently created to cloak racially discriminatory conduct. This list is intended to give examples of the types of records you should retain. It is not exhaustive.

Discrimination based on immutable characteristics such as race, color, national origin, or sex “generates a feeling of inferiority” in its victims “that may affect their hearts and minds in a way unlikely to ever be undone.”¹¹ More broadly, the discrimination you have promised necessarily foments contention and resentment. It is “odious and destructive.”¹² The highlighted measures recommended in the “Quantitative Workforce Benchmarking” are facially illegal, and any actions implementing them will necessarily violate the Civil Service Reform Act. Similarly, the “Equity Action Plan” is highly problematic, and many of the measures suggested there too are egregiously wrong and patently unlawful.

Your racist virtue signaling, so redolent of Jim Crow, is illegal and immoral. It truly “is a sordid business, this divvying us up” by race, color, national origin, or sex.¹³ Always has been, always will be.

Sincerely,

/s/

Reed D. Rubinstein
America First Legal Foundation

Cc: John E. Putnam, General Counsel, U.S. Department of Transportation

¹¹ *Brown v. Bd. Of Education*, 347 U.S. 484, 494 (1954).

¹² *Texas v. Johnson*, 491 U.S. 397, 418 (1989).

¹³ *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part).