August 24, 2022

The Honorable Gary C. Peters, Chairman
The Honorable Rob Portman, Ranking Member
Committee on Homeland Security and Governmental Affairs
United States Senate
Washington, DC 20510

The Honorable Carolyn B. Maloney, Chairwoman
The Honorable James Comer, Ranking Member
Committee on Oversight and Reform
U.S. House of Representatives
Washington, DC 20515

Investigation Request: Racially Discriminatory Hiring, Promotion, Contracting, and Grant Programs at the U.S. Department of Transportation

Dear Chairman Peters, Ranking Member Portman, Chairwoman Maloney, and Ranking Member Comer:

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 U.S. Department of Transportation documents[1] demonstrating that President Biden's executive orders on "equity"[2] are being implemented by Secretary Pete Buttigieg through unlawful "racial balancing" policies, practices, and quotas in employment training, hiring, and promotion. Also, the Department's publicly available "Equity Action Plan" demonstrates that race is being unlawfully infused into the Department's procurement and grantmaking decisions.[3] In fact, the evidence strongly suggests that Secretary Buttigieg and his political team are knowingly and intentionally violating constitutional prohibitions of racial discrimination, disregarding applicable civil rights laws and regulations, and circumventing the Civil Service Reform Act. Accordingly, AFL respectfully requests that your committees open an investigation of Secretary Buttigieg and of the other political officials responsible for the Department's illegal practices.

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[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.

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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 the Department is a taxpayer-funded exercise in racial "bean counting" to support illegal race-based hiring and promotion practices. Critically, one of its "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 the Department is 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 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 the Department 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 the Department equates "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*.

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[4] *Id.* at 4.
[5] *See supra* note 1 at 4.
[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.

> (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:

> 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 the "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. Pena*, 515 U.S. 200, 227, 236 (1995). And the controlling legal presumption is that 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 ensure the coordinated and effective administration of the transportation programs of the United States Government;

[8] EQUITY ACTION PLAN at 7.
[9] *Id.*
[10] *Id.* at 6.

make easier the development and improvement of coordinated transportation service to be provided by private enterprise to the greatest extent feasible; encourage cooperation of 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, the Department's alleged "equity" activities, as described above, are likely *ultra vires*.

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 the Department has 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.

The Department's racialist 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.

Secretary Buttigieg has made no secret of his continuing intention to ignore the Constitution, disregard applicable civil rights laws, and to circumvent the Civil Service Reform Act, all in the name of "equity." In these circumstances, where there is strong evidence suggesting that a Cabinet Secretary is knowingly violating both Congressional enactments and his obligations under U.S. Const. Art. II, § 3, cl. 4, Congress clearly should use its constitutional oversight power to gather facts and hold investigative hearings. If the facts warrant, then Congress should use its appropriation and other powers to protect the rule of law and to stop the Executive's unlawful conduct. Here, Secretary Buttigieg has gone too far and Congress, in the legitimate exercise of its constitutional authority, should act.

Please do not hesitate to reach out if we can be of further assistance.

[Signature page follows]

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[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).

Sincerely yours,

Reed D. Rubinstein
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Date: 2022.08.24 15:50:03 -04'00'

/s/

Reed D. Rubinstein
America First Legal Foundation

Cc: The Hon. Maria Cantwell, Chair, Senate Committee on Commerce, Science, and Transportation
The Hon. Roger Wicker, Ranking Member, Senate Committee on Commerce, Science, and Transportation
The Hon. Peter A. DeFazio, Chairman, House Committee on Transportation and Infrastructure
The Hon. Sam Graves, Ranking Member, House Committee on Transportation and Infrastructure
The Hon. Pete Buttigieg, Secretary of Transportation
The Hon. John E. Putnam, Esq., General Counsel, U.S. Department of Transportation