



August 24, 2022

Mindy Weinstein, Director
Debra Lawrence, Regional Attorney
Washington Field Office
U.S. Equal Employment Opportunity Commission
131 M Street NE
Fourth Floor, Suite 4NWO2F
Washington, DC 20507-0100

Investigation Request/U.S. Department of Transportation’s Illegal Race-based Hiring and Promotion Practices

Dear Director Weinstein and Attorney Lawrence:

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.

We write pursuant to 29 C.F.R. § 1601.6(a), providing that “[a]ny person or organization may request the issuance of a Commissioner charge for an inquiry into individual or systemic discrimination,” to request that the Equal Employment Opportunity Commission open an investigation into the Department of Transportation (“Department”) for engaging in unlawful employment practices in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16.¹

AFL obtained internal Department documents² demonstrating that President Biden’s executive orders on “equity”³ 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.⁴

¹ Copies of this letter are also addressed to each Member of the Equal Employment Opportunity Commission, and AFL makes the same request of them pursuant to 29 C.F.R. § 1601.6(a).

² 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>.

³ 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).

⁴ U.S. Dep’t of Transp., EQUITY ACTION PLAN at 6 (Jan. 2022), available at <https://bit.ly/3dGY6Uk>.

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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.⁵ 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.”⁶ 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.”⁷ 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.⁸ 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 Rights Act of 1964 absolutely prohibits federal hiring and promotions based on “equitable opportunities” or “diverse representation” based solely on their race or sex.

42 U.S.C. § 2000e-16(a) provides in relevant part, “[a]ll personnel actions affecting employees or applicants for employment ... in executive agencies ... shall be made free from any discrimination based on race, color, religion, sex, or national origin.” Consequently, if the Department implements the recommendations made in its office’s “Quantitative Workforce Benchmarking”, then it will violate the Civil Rights Act of 1964 and other federal anti-discrimination law, including the Civil Service Reform Act of 1978.⁹

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 done.”¹⁰ More broadly, the discrimination the Department has promised necessarily foments contention and resentment. It is “odious and destructive.”¹¹ The highlighted measures recommended in the

⁵ *Id.* at 4.

⁶ *See supra* note 1 at 4.

⁷ 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>.

⁸ *See supra* note 1 at 31.

⁹ 5 U.S.C. § 2302

¹⁰ *Brown v. Bd. Of Education*, 347 U.S. 484, 494 (1954).

¹¹ *Texas v. Johnson*, 491 U.S. 397, 418 (1989).

“Quantitative Workforce Benchmarking” are facially illegal, and any actions implementing them will necessarily violate the Civil Rights Act of 1964. 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 racist 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.¹² Always has been, always will be.

Please contact us if you have any questions.

Sincerely,

/s/

Reed D. Rubinstein
America First Legal Foundation

Cc: The Hon. Charlotte A. Burrows, Commission Chair
The Hon. Jocelyn Samuels, Commission Vice Chair
The Hon. Janet Dhillon, Commissioner
The Hon. Keith E. Sonderling, Commissioner
The Hon. Andrea R. Lucas, Commissioner

¹² *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part).