**UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF KENTUCKY**
**CENTRAL DIVISION**
**FRANKFORT**

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MID-AMERICA MILLING COMPANY, LLC, *et al.*,

Plaintiffs,

v. Case No. 3:23-cv-00072-GFVT

UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,

Defendants.

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**PLAINTIFFS' RESPONSE IN OPPOSITION TO INTERVENOR DBE'S MOTION TO DISMISS AND VACATE**

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## INTRODUCTION

Plaintiffs sued Defendants to stop the race- and sex-based preferences in the Disadvantaged Business Enterprise (DBE) program. The DBE program was created by Congress and signed into law most recently by the President as the Infrastructure Investment and Jobs Act (49 U.S.C. §§ 47113, 47107) and the Small Business Act (5 U.S.C. §§ 632, 637). Over the years, Defendants promulgated various regulations to implement these statutes, including 49 C.F.R. parts 23, 26 and 13 C.F.R. parts 121 and 124.

On October 3, 2025, Defendants promulgated an Interim Final Rule (IFR) amending 49 C.F.R. parts 23 and 26. The IFR does not purport to amend the Infrastructure Act, the Small Business Act, or 13 C.F.R. parts 121 and 124. Defendants are reviewing comments to the IFR and may make changes under the Administrative Procedures Act. *See* 5 U.S.C. § 553.

Intervenors move to dismiss based solely on the existence of the IFR. Intervenors argue that the case is now moot because of the regulatory changes, and no exceptions to the mootness doctrine apply. The case should be dismissed and the preliminary injunction vacated, according to Intervenors.

Intervenors are wrong. Last term, the Supreme Court confirmed that "voluntary cessation of the challenged conduct does not moot an action 'unless it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Lackey v. Stinnie*, 604 U.S. 192, 204 (2025). It certainly is not "absolutely clear" that the DBE program could not be restarted in the next

Administration. The IFR does not amend the statutes creating and authorizing the DBE program. While the current Administration is not running the DBE program with the race- and sex-based provisions permitted by federal law, the next President could simply re-promulgate the DBE regulations on day one. Although such action would undoubtedly be challenged in court, nothing would prevent a different administration from reversing the IFR and re-imposing the race- and sex-based preferences explicitly authorized by the Infrastructure Act and the Small Business Act.

Plaintiffs are entitled to a permanent injunction and a declaration that the DBE program, created by Congress in the Infrastructure Act and the Small Business Act, is unconstitutional. And after denying this motion, this Court should then enter the pending motion for a consent decree, or in the alternative, convert that motion into a motion for summary judgment, and enter judgment in Plaintiffs' favor. Plaintiffs do not believe there is any need for a trial in this case.

## BACKGROUND

The DBE program was most recently reauthorized in November 2021 when President Biden signed the Infrastructure Investment and Jobs Act, P.L. 117-58 (the "Infrastructure Investment and Jobs Act"). *See* 49 U.S.C. §§ 47113, 47107. As part of this legislation, Congress mandated that 10% of all new surface transportation funding—over $37 billion— "shall be expended through small business concerns owned and controlled by socially and economically disadvantaged individuals." PL 117-58, Sec. 11101(e), 135 Stat. 429 (Nov. 15, 2021). The word "disadvantaged" is

simply code for women and certain minorities. *See id.* Moreover, the Infrastructure Act's definition of the phrase "socially and economically disadvantaged individual" incorporates the same definition in the Small Business Act, 15 U.S.C. § 637(d). *See* 42 U.S.C. § 47113(a)(2). This term is further defined in 13 C.F.R. 124.103 ("who is socially disadvantaged?").

Defendants promulgated rules to effectuate the DBE program under 49 C.F.R. parts 23 and 26. These regulations explain how the U.S. Department of Transportation and recipients of USDOT funding will execute the federal laws found in Title 49 of the U.S. Code.

On October 3, 2025, Defendants released the IFR.[1] The IFR amends only the regulations. According to Defendants, "[i]n light of DOT and DOJ's determination that the DBE program's race- and sex-based presumptions are unconstitutional, DOT is issuing this IFR to remove the presumptions from the DBE program regulations set forth in 49 CFR part 26 [and 23]." 90 Fed. Reg. 47971 (Oct. 3, 2025).

Plaintiffs' complaint seeks declaratory and injunctive relief, not only against the regulations impacted by the IFR, but against the statutes at issue here: the Infrastructure Act and the Small Business Act. R.1. Although Defendants have reformed the DBE program, the statutes remain enacted and would authorize the next President to reimpose the discriminatory provisions. The historical record is replete with Presidential administrations simply re-imposing regulations withdrawn

[1] The IFR and related Frequently Asked Questions are available here: https://www.transportation.gov/mission/civil-rights/disadvantaged-business-enterprise/october-2025-interim-final-rule.

by predecessors. *See, e.g.,* Matthew Daly, *Biden Restores Federal Environmental Regulations Scaled Back by Trump*, PBS NewsHour (Apr. 19, 2022), https://www.pbs.org/newshour/politics/biden-restores-federal-environmental-regulations-scaled-back-by-trump.

## ARGUMENT

### I. Defendants' regulatory change does not render this case moot.

"A defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case." *Friends of the Earth, Inc. v. Laidlaw Env't Servs.*, 528 U.S. 167, 174 (2000). Where the defendant voluntarily ceases the challenged conduct, the moving party must establish that: "there is no reasonable expectation that the alleged violation will recur"; and (2) "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Thomas v. City of Memphis*, 996 F.3d 318, 324 (6th Cir. 2021) (citation omitted). "[T]he burden of demonstrating mootness is a heavy one." *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (citation omitted).

Last term, the U.S. Supreme Court reaffirmed the principle that "voluntary cessation of the challenged conduct does not moot an action unless it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Lackey*, 604 U.S. at 204 (citation omitted). This applies even if the plaintiffs seek non-monetary relief, such as injunctive relief. *Id.*

Here, Intervenors have not met this heavy burden. It is not "absolutely clear" that the next administration would refuse to reimpose the discriminatory DBE

provisions. *Id.* And there is no evidence that Defendants have "completely and irrevocably eradicated" the discriminatory provisions. *Thomas,* 996 F.3d at 324. The next administration could simply reverse the IFR. The IFR was promulgated quickly by Defendants and without opposition. No one even sued over the IFR—not even Interventors. There is simply no question that a future president could reverse the IFR (even though litigants certainly could and would sue over the constitutionality of such a move). The mere fact that the IFR could be reversed (and Intervenors do not dispute this) means that it is simply not "absolutely clear" that the DBE program could "reasonably be expected to recur." *Lackey*, 604 U.S. at 204.

Intervenors argue that Defendants have "wholly reimagined—and rewritten—the DBE program, and the challenged components are no longer in effect." R.129:13. Intervenors cite cases about elections that are over, judicial rules that had been abrogated, and a "safety advisory" revoked by a federal agency. R. 129:11-14. None of these factual situations apply here, where a series of federal statutes remain in effect, authorizing the creation of a discriminatory DBE program. The only thing that has changed in this case is the superficial regulatory structure—the underlying statutes creating and authorizing the program are still in place. *See* 42 USC 47113 ("at least 10 percent of amounts available in a fiscal year under section 48103 of this title shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals or qualified HUBZone small business concerns.")

Intervenors "vigorously defend[ ] the constitutionality" of the DBE program, and there is no reason to think a future administration would not take a similar position. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist.* No. 1, 551 U.S. 701, 719 (2007). As such, "voluntary cessation does not moot a case" unless it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* There is no such absolute clarity here. *See West Virginia v. EPA*. 597 U.S. 697, (2022) (deciding case even though the government said "EPA has no intention of enforcing the Clean Power Plan prior to promulgating a new Section 111(d) rule").

## II. The Court should enter the consent decree, or in the alternative, consider the motion for a consent decree as a motion for summary judgment.

Based on this Court's previous holding that the DBE program is likely unconstitutional, Dkt. 44, the Court should enter judgment declaring the federal statutes at issue unconstitutional and enjoining Defendants from discriminating based on those statutes. Although the Court has "continued" the trial date, there is no need for a trial in this case. The parties do not dispute the facts and have proffered sufficient briefing for this Court to enter judgment based on the motion for a consent decree. Procedurally, if the Court would prefer to enter judgment under Rule 56 rather than as a consent decree, the Court could offer the parties an opportunity to supplement briefing in order to rule as a matter of summary judgment.

## CONCLUSION

The motion to dismiss should be denied.

Dated: January 13, 2026,

Respectfully submitted,

WISCONSIN INSTITUTE
FOR LAW & LIBERTY

*Electronically signed by*
*Daniel P. Lennington*

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 13, 2026, a copy of the foregoing was filed electronically with the Clerk of the Court using the CM/ECF system, which will send notice to all attorneys of record.

Dated this 13th day of January, 2026.

s/ *Daniel P. Lennington*

Daniel P. Lennington