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

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| MID-AMERICA MILLING COMPANY, LLC, *et al.*,<br><br>Plaintiffs,<br><br>v.<br><br>U.S. DEPARTMENT OF TRANSPORTATION, PETER P. BUTTIGIEG, SHAILEN BHATT, & TODD JETER,<br><br>Defendants. | Case No. 3:23-cv-00072-GFVT |

**CENTRAL SEAL AND CHARBON'S RESPONSE IN OPPOSITION TO INTERVENOR DBE'S MOTION TO DISMISS AND VACATE**

Proposed Intervenor Plaintiffs Central Seal Company ("Central Seal") and Charbon Contracting, LLC ("Charbon") submit this response in opposition to the Intervenor DBEs' Motion to Dismiss and Vacate (DN 129), and join the response filed by Plaintiffs (DN 132).

Under the standard addressed in *Lackey v. Stinnie*, 604 U.S. 192, 204 (2025), this controversy is not mooted by the Interim Final Rule (IFR). Rather the IFR was promulgated at the agency level to implement the requirements of the Consent Injunction currently pending approval in this Court. The IFR specifically references the Consent Injunction as a predicate for the amendments:

> *On May 28, 2025, DOT (represented by DOJ), along with the plaintiffs in the litigation in the U.S. District Court for the Eastern*

> *District of Kentucky, asked the Court to enter a Consent Order resolving a constitutional challenge to the DBE program. The motion is currently pending. In the proposed Consent Order, DOT stipulated and agreed that "the DBE program's use of race- and sex-based presumptions of social and economic disadvantage. . . violates the equal protection component of the Due Process Clause of the Fifth Amendment of the U.S. Constitution." The parties asked the Court to declare that "the use of DBE contract goals in a jurisdiction, where any DBE in that jurisdiction was determined to be eligible based on a race- or sex-based presumption, violates the equal protection component of the Due Process Clause of the Fifth Amendment," and to "hold and declare that [DOT] may not approve any Federal, State, or local DOT-funded projects with DBE contract goals where any DBE in that jurisdiction was determined to be eligible based on a race- or sex-based presumption." . . . In 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.*

(IFR at 708.)

It would be incongruous to hold that a regulation premised on compliance with the Consent Injunction somehow moots the need for the Consent Injunction.

If, as the Intervening DBE's propose, the preliminary injunction is vacated, and the Consent Injunction abandoned, this virtually assures that the issues addressed therein will continue to be subject to ongoing legal challenges and disputes, opening the possibility that the constitutionally infirmed conduct could recur. Accordingly, under *Lackey*, the case is not moot and remains a live controversy. *Id*. at 204. That the Intervenor DBEs continue to oppose this Court's preliminary injunction order and that proposed Consent Injunction is further confirmation that the controversy remains live. To dismiss the case as moot would serve no purpose other than undoing the progress and work that the parties and the

Court have completed since this action was initiated in 2023 to redress constitutional violations at issue and prevent future ones.

Contrary to Intervenor DBEs' contentions, a "defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case." *Akers v. McGinnis*, 352 F.3d 1030, 1035 (6th Cir. 2003) (citing *Jones v. City of Lakeland*, 224 F.3d 518, 529 (6th Cir. 2000)). And, the "heavy burden of persuading" the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." *Id.* (quotations omitted).

In *Akers*, for example, the Michigan Department of Corrections argued that the plaintiffs' challenges to its prior administrative rule were mooted by a change to that rule. *Akers v. McGinnis,* 352 F.3d at 1035. The Sixth Circuit declined to find mootness and held that there was "no guarantee that [the Michigan Department of Corrections] will not change back to its older, stricter Rule as soon as this action terminates", especially where the rulemaking authority in that area of law resided solely with the defendant. *Id.* at 1035; *see also Carpenter-Barker v. Ohio Department of Medicaid*, 752 Fed. Appx. 215, 223 (6th Cir. 2018) (finding that regulatory change of agency responsible for implementing challenged rule did not moot claim); *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 768 (6th Cir. 2019) ("[W]here a change is merely regulatory, the degree of solicitude the voluntary cessation enjoys is based on whether the regulatory processes leading to the change involved legislative-like procedures or were ad hoc, discretionary, and easily reversible actions.")

The same risk is present here. USDOT's October 2025 IFR merely adjusted the current administration's interpretation of the statutes that created the DBE program, and is not sufficient to either prevent future constitutional violations or to render the current case moot. Indeed, Intervenor DBEs' Motion fails to acknowledge the fact that the very statutory provisions of the Infrastructure Investment and Jobs Act challenged by Plaintiff in this action are still very much intact in Title 23. *See* e.g., Compl. (DN 1) at Count I, ¶ 49 (alleging as unconstitutional Sections 11101(e)(2)–(3) of the Infrastructure and Jobs Act); 23 U.S.C. § 101; *see also* 15 U.S.C. § 637(d)(3) (setting forth race-based presumptions in the statutory definition of "economically disadvantaged individuals"). Absent judicial rulings regarding the constitutional application of these statutes, there are insufficient protections that the USDOT will not simply reverse course upon a change in administration.

Accordingly, Central Seal and Charbon respectfully request (a) that Intervenor DBEs' Motion be denied, (b) that Central Seal and Charbon's motion for reconsideration of the Court's ruling on their motion to intervene be granted, and (c) that the Court enter the previously submitted proposed Consent Order (DN 82).

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

This is to certify that the foregoing was served on all following counsel of record via the Court's electronic filing system on this 13sth day of January, 2025.

*/s/ Frederick R. Bentley III*
Frederick R. Bentley III