No.

In the Supreme Court of the United States

MARTY HIERHOLZER; MJL ENTERPRISES, LLC, a Virginia corporation,

Petitioners,

v.

KELLY LOEFFLER, in her official capacity as Administrator of the Small Business Administration; SMALL BUSINESS ADMINISTRATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

JOSHUA P. THOMPSON
Pacific Legal Foundation
555 Capitol Mall,
Suite 1290
Sacramento, California
95814
Telephone: (916) 419-7111

GLENN E. ROPER
Counsel of Record
Pacific Legal Foundation
1745 Shea Center Dr.,
Suite 400
Highlands Ranch, Colorado
80129
Telephone: (916) 419-7111
GERoper@pacificlegal.org

Counsel for Petitioners

QUESTION PRESENTED

The Small Business Administration's Section 8(a) Business Development Program provides valuable benefits to small businesses owned by individuals deemed "socially disadvantaged." Members of favored racial and ethnic groups are presumed to be disadvantaged, while other applicants must prove it. Small businesses in the program receive exclusive access to contracts with the federal government and other training and business development opportunities.

Marty Hierholzer, a service-disabled veteran, has twice been denied entry to the program after SBA concluded that evidence of his social disadvantage was insufficient. The Fourth Circuit held that he lacks standing to challenge the race-based rule that unequally excuses some applicants from demonstrating their social disadvantage.

The question presented is:

Whether a small-business owner who was denied entry into SBA's Section 8(a) Business Development Program for failing to prove "social disadvantage" has Article III standing to challenge a race-based presumption that excuses certain applicants from making that showing.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners were plaintiffs in the district court. They are Marty Hierholzer and MJL Enterprises, LLC.

Respondents were defendants in the district court. They are Kelly Loeffler,[1] in her official capacity as Administrator of the Small Business Administration, and the Small Business Administration (SBA).

Mr. Hierholzer is a natural person. Petitioner MJL Enterprises is a Virginia limited liability company that does not issue shares to the public and has no parent corporation.

RELATED PROCEEDINGS

There are no proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case under Supreme Court Rule 14.1(b)(iii) except as follows:

- *Hierholzer v. Guzman*, No. 2:23-cv-00024-RAJ-DEM, E.D. Va. (Feb. 15, 2024) (granting defendants' motion to dismiss)
- *Hierholzer v. Guzman*, No. 24-1187, 4th Cir. (Jan. 3, 2025) (reversing in part and affirming in part the grant of the motion to dismiss)
- *Hierholzer v. Guzman*, No. 24-1187, 4th Cir. (Mar. 4, 2025) (denying petition for rehearing en banc)

[1] The original defendant was Isabel Guzman, former Administrator of the Small Business Administration, who has since been substituted.

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PETITION FOR A WRIT OF CERTIORARI

Marty Hierholzer and MJL Enterprises, LLC, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The decision of the Fourth Circuit is available at 125 F.4th 104 and reprinted at App. 1a. The Fourth Circuit's denial of en banc review is reprinted at App. 48a.

The decision of the United States District Court for the Eastern District of Virginia is not reported but is available at 2024 WL 894896 and reprinted at App. 27a.

JURISDICTION

The final decision of the Fourth Circuit sought to be reviewed was issued on January 3, 2025. App. 1a. Denial of en banc review was issued on March 4, 2025. App. 48a. On May 2, 2025, the Chief Justice granted a motion to extend the deadline to file a petition for writ of certiorari to July 2, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the U.S. Constitution provides, in relevant part, "nor shall any person . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

INTRODUCTION AND SUMMARY OF REASONS TO GRANT THE PETITION

Justice Alito recently expressed "concern[] that some federal courts are succumbing to the temptation to use the doctrine of Article III standing as a way of avoiding some particularly contentious constitutional questions." *Parents Protecting Our Children, UA v. Eau Claire Area Sch. Dist., Wis.*, No. 23-1280, slip op. at 2 (Dec. 9, 2024) (Alito, J., dissenting from denial of certiorari). This case exemplifies that very phenomenon.

The Court has repeatedly held that individuals suffer a justiciable injury when denied equal treatment as to eligibility for a government benefit—even if they cannot show that they would receive the benefit absent the discrimination. *Ne. Fla. Chapter of the Assoc. Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656 (1993); *Adarand Constrs., Inc. v. Pena*, 515 U.S. 200 (1995). Yet the Fourth Circuit held that Petitioners lack standing to challenge a federal program's race-based presumption of social disadvantage because they failed to show they would be admitted to the program absent the presumption.

That conclusion undermines this Court's precedents and imposes a standing requirement that would effectively insulate the government's racial classifications from judicial review. The question is a recurring and important one that has divided the lower courts, and it warrants the Court's intervention.

Petitioner Marty Hierholzer is a service-disabled Navy veteran and small business owner who seeks to participate in the Small Business Administration's Section 8(a) Business Development Program. The 8(a) program is designed to assist deserving small busi-

nesses in developing business and procuring federal contracts. But, pursuant to statute and regulation, it admits businesses to the program under different rules based on each business owner's race.

The 8(a) program is open only to small business owners who are "socially disadvantaged." An SBA regulation presumes owners are socially disadvantaged if they fall into certain racial or ethnic categories—such as Black Americans, Hispanic Americans, and Asian Pacific Americans. Those who do not, like Hierholzer, must instead prove their social disadvantage to SBA's satisfaction—a demanding burden that he has twice failed to meet in prior applications. As a result of being both ineligible for the presumption and unable to convince SBA he is socially disadvantaged, Hierholzer is excluded from the 8(a) program altogether.

Hierholzer and his company filed suit to challenge their unequal treatment. The Fourth Circuit concluded that Petitioners lack Article III standing because they had failed in the prior applications to establish to SBA's satisfaction that Hierholzer is socially disadvantaged. Yet this is the very thing he would be excused from showing if he qualified for the presumption he is challenging.

The Fourth Circuit's decision creates a Catch-22 under which *no one* has standing to challenge the government's use of race. It held that a plaintiff lacks standing unless he can show he is socially disadvantaged. Thus, in the Fourth Circuit, the only small business owners who could conceivably have standing to challenge the race-based presumption are those who are able to prove social disadvantage through other means. But a plaintiff who can show he

is socially disadvantaged by other means is not injured by the racial presumption, since he already satisfies the social disadvantage criterion for the program.

That standard is not only circular, but it departs from this Court's precedents. This Court has never required a plaintiff to prove it would obtain the benefit before it could challenge discriminatory eligibility criteria for the program. That was the holding of *Northeastern Florida*, and the necessary premise of *Adarand*. The Fourth Circuit replaces that rule with a higher burden: plaintiffs must show they would qualify for the underlying benefit.

That decision also clashes directly with *Vitolo v. Guzman*, 999 F.3d 353 (6th Cir. 2021), which found standing to challenge the same SBA presumption of social disadvantage that is at issue in this case without the plaintiff first needing to establish social disadvantage. And it contradicts the rationales of two other circuits that expressly allow standing to challenge unequal treatment without the plaintiff first proving eligibility for the underlying government benefit. *See Wooden v. Bd. of Regents of Univ. Sys. of Ga.*, 247 F.3d 1262 (11th Cir. 2001); *Vivenzio v. City of Syracuse*, 611 F.3d 98 (2d Cir. 2010). The Court should grant certiorari to resolve this conflict.

Months after Petitioners filed suit, SBA paused its use of the presumption for the 8(a) program in response to a district court's ruling that the presumption is unconstitutional. *See Ultima Servs. Corp. v. U.S. Dep't of Agric.*, 683 F. Supp. 3d 745 (E.D. Tenn. 2023). However, there has been no final decision in *Ultima* (let alone exhaustion of appeals), and SBA has

not rescinded the regulation containing the presumption or conceded its unconstitutionality.

Moreover, the statutory requirement that applicants show social disadvantage was not challenged in *Ultima* and is not going away. Even if SBA replaces the current race-based presumption with a new framework, its application process is likely to impose different evidentiary burdens on different applicants. The Fourth Circuit's standing rule would continue to block judicial review of that process—requiring plaintiffs to prove the very thing they would otherwise be excused from proving. This case is thus an ideal vehicle to resolve the circuit split and to reaffirm that federal courts may not use distorted applications of Article III to avoid difficult constitutional questions.

The petition should be granted.

STATEMENT OF THE CASE

I. The 8(a) Program and its Race-Based Presumption of Social Disadvantage

The 8(a) Business Development Program seeks to "promote the business development" of small business owners who have suffered "social and economic disadvantage." 15 U.S.C. § 631(f)(2). It authorizes the Small Business Administration to enter into contracting agreements for goods and services with other federal agencies, then subcontract those agreements to 8(a) program participants, either through competitive bidding or as "sole-source" awards granted without any competition. 15 U.S.C. § 637(a)(1)(A)-(B); 13 C.F.R. § 124.501(b). Each year, SBA awards billions of dollars' worth of federal

contracts to 8(a) participants.[1] In addition, SBA provides them with valuable technical and financial assistance, business development training and mentoring, and access to federal surplus property. *See* 13 C.F.R. §§ 124.404-405.

To participate in the 8(a) program, small businesses must be at least 51% owned by "socially and economically disadvantaged persons." 15 U.S.C. § 637(a)(4). Business owners are considered socially disadvantaged if they "have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities," *id.* § 637(a)(5), and due to "circumstances beyond their control," 13 C.F.R. § 124.103(a).[2]

When Congress codified the social disadvantage requirement in 1978, it found that "socially disadvantaged" persons include "Black Americans, Hispanic Americans, Native Americans, and other minorities." Pub. L. No. 95-507, Title II, § 201, Oct. 24, 1978, 92 Stat. 1760, 1763 (codified at 15 U.S.C. § 631(f)(1)(C)). It later added "Asian Pacific Americans," "Indian

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[1] *See* U.S. Small Business Admin., *8(a) Business Development Program FY 2023 408 Report to the Congress* 7, https://www.sba.gov/sites/default/files/2024-07/Final%20FY%2023%20408%20Report%20to%20Congress_508.pdf; *see also* 15 U.S.C. § 644(g)(1)(A)(iv) (establishing a "Governmentwide goal" that at least 5 percent of federal contracts go to small businesses with socially and economically disadvantaged owners).

[2] The 8(a) program's social disadvantage requirement and race-based presumption are nearly identical to those in the disadvantaged business enterprise (DBE) program that underlay the Court's recent decision in *Kousisis v. United States*, 145 S. Ct. 1382, 1389 (2025); *see also id.* at 1399-1400 (Thomas, J., concurring) (discussing the DBE program's race-based presumption of social disadvantage).

tribes," and "Native Hawaiian Organizations" to this list. *See* Act of July 2, 1980, Pub. L. No. 96-302, 94 Stat. 833, 840; Pub. L. No. 99-272, Apr. 7, 1986, 100 Stat. 82; Pub. L. No. 100-656, Nov. 15, 1988, 102 Stat. 3853.

SBA incorporated Congress' findings as to these racial and ethnic groups into the regulation that is at the heart of Petitioners' challenge, 13 C.F.R. § 124.103 (reprinted at App. 49a-56a). That regulation specifies there is a "rebuttable presumption" of social disadvantage for members of certain "designated groups"—including the groups listed in the statute. *Id.* § 124.103(b)(1).[3]

The regulation also partially defines and adds to Congress' list. For example, it defines "Native Americans" as "Alaska Natives, Native Hawaiians, or enrolled members of a Federally or State recognized Indian Tribe." *Ibid.* It defines "Asian Pacific American" as a person "with origins from" any of a list of twenty-six nations in Asia and Oceania. *Ibid.* And it designates a new group, "Subcontinent Asian Americans," as entitled to the presumption of social disadvantage. *Ibid.* (defined as "persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal").[4]

Aside from the designated racial and ethnic groups, a "representative" of another identifiable group may petition SBA to designate that group as presumptively

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[3] The presumption may ostensibly be rebutted by "credible evidence to the contrary." 13 C.F.R. § 124.103(b)(3). *But see id.* § 124.517(a) (prohibiting challenges to an 8(a) participant's eligibility as part of a bid or contract protest).

[4] The regulation does not define the terms "Black Americans" or "Hispanic Americans."

socially disadvantaged. *Id.* § 124.103(d). To succeed, there must be "substantial evidence that members of the group have been subjected to racial or ethnic prejudice or cultural bias." *Id.* § 124.103(d)(1). SBA will then judge whether the group has "suffered prejudice, bias, or discriminatory practices" that resulted in "economic deprivation," and whether those practices have "produced impediments in the business world." *Id.* § 124.103(d)(2).[5]

An applicant who does not belong to a group presumed socially disadvantaged must demonstrate individual social disadvantage by a preponderance of the evidence. *Id.* § 124.103(c)(1). This requires showing that (1) the applicant has at least one objective distinguishing feature that has contributed to his social disadvantage, (2) his disadvantage is based on his experience in American society, (3) it is chronic and substantial, and (4) it has negatively impacted his entry into or advancement in the business world. *Id.* § 124.103(c)(2). In practice, very few 8(a) participants achieve eligibility through demonstrating individual social disadvantage. *See Dynalantic Corp. v. Dep't of Defense*, 115 F.3d 1012, 1016-17 (D.C. Cir. 1997) (noting that "less than one-half of one percent" of 8(a)

[5] SBA has rejected group petitions for Hasidic Jews, women, Iranians, and service-disabled veterans, and has accepted them for Asian Indians, Indonesians, and Sri Lankans. *See* Congressional Research Service, *SBA's 8(a) Business Development Program: Legislative and Program History* 9 (updated Sept. 16, 2024), https://crsreports.congress.gov/product/pdf/R/R44844; George R. La Noue & John C. Sullivan, *Gross Presumptions: Determining Group Eligibility for Federal Procurement Preferences*, 41 Santa Clara L. Rev. 103, 127-29 (2000).

participants "qualified by demonstrating to the SBA . . . that they are socially disadvantaged").

Once an applicant's social disadvantage is established—through either the presumption or an individualized showing—he must also establish his economic disadvantage, meaning that he is a "socially disadvantaged individual[] whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities." 15 U.S.C. § 637(a)(6)(A); *see also Dynalantic*, 115 F.3d at 1017 ("[T]he statute treats the concept of economic disadvantage as a subset of social disadvantage . . . ."). SBA determines economic disadvantage based on three objective criteria: (1) personal net worth less than $850,000; (2) average yearly income less than $400,000 over the three preceding years; and (3) assets whose fair market value does not exceed $6.5 million. 13 C.F.R. § 124.104(c)(2)-(4). A small business owner applicant who satisfies both the social and economic disadvantage criteria qualifies for the 8(a) program.

II. *Ultima Services Corp. v. U.S. Department of Agriculture*

In July 2023—about six months after Petitioners filed this lawsuit—a federal district court in the Eastern District of Tennessee issued a summary judgment ruling holding that SBA's presumption of social disadvantage is unconstitutional and enjoining its use. *Ultima Servs. Corp. v. U.S. Dep't of Agric.*, 683 F. Supp. 3d 745 (E.D. Tenn. 2023). In response to that ruling, SBA suspended its use of the presumption and began requiring all participants and applicants to submit a personal narrative establishing their social disadvantage—a procedure previously reserved for

those who were not presumed socially disadvantaged.[6]

However, SBA has not adopted or even proposed a revision of 13 C.F.R. § 124.103, the regulation containing the presumption. Nor has the government conceded the correctness of the district court's ruling or the unconstitutionality of the presumption. For its part, the *Ultima* district court has not yet issued a final judgment or ruled on the plaintiff's motion arguing that SBA's revised process may still be discriminatory and that additional equitable relief is needed. *See* Pl.'s Mot. for Additional Equitable Relief, ECF No. 93, *Ultima Servs. Corp. v. U.S. Dep't of Agric.*, No. 2:20-cv-00041 (Sept. 15, 2023). Once the district court decides the pending motion and issues a final judgment, one or both sides may appeal to the Sixth Circuit.[7]

III. Petitioners Marty Hierholzer and MJL Enterprises

Marty Hierholzer is the owner of MJL Enterprises, LLC, in Norfolk, Virginia, which contracts with the federal government to provide services and supplies. App. 57a ¶ 2. He previously served with distinction as a Navy deep sea diver for more than twenty years, where he persevered through mental and physical injuries suffered in the line of duty. App. 60a-61a ¶¶ 15-18. Because of those injuries, the Department

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[6] *See* Congressional Research Service, *supra* n.5, at 14 (discussing SBA's response to the *Ultima* decision).

[7] This Court's recent decision in *Trump v. CASA, Inc.*, may also impact the scope or effect of the eventual final decision in *Ultima*. *See* 606 U.S. __, slip op. at 11 (June 27, 2025) (concluding that "universal injunction[s] . . . fall[] outside the bounds of a federal court's equitable authority").

of Veteran Affairs rates Hierholzer as 60% disabled. App. 61a ¶ 19.

During his time in the Navy, Hierholzer observed that military suppliers sometimes failed to provide adequate and timely supplies. App. 61a ¶ 21. After retiring from the service, Hierholzer set out to fill the void and started his company to provide dependable supplies and services to the military. *Id.* ¶¶ 21-22. MJL Enterprises is legally recognized as a small business under the terms of the 8(a) program. *Id.* ¶ 23. Today, it provides a variety of goods and services—such as medical, maintenance, and repair equipment—to military bases and VA hospitals. *Id.* ¶ 22.

Hierholzer has twice applied to the 8(a) program, in 2009 and 2016. App. 67a ¶ 54. Because he is of German and Scottish descent, he is not a member of a racial group that enjoys a presumption of social disadvantage. App. 66a ¶ 47. Instead, he based his claim of individual social disadvantage on the "cultural bias" he has experienced as a service-disabled veteran. App. 67a-69a ¶¶ 56-62. SBA denied both applications because it concluded that Hierholzer had not sufficiently established his individual social disadvantage. App. 67a, 69a ¶¶ 55, 62.

If Hierholzer had successfully convinced SBA he is socially disadvantaged, he would have been accepted into the 8(a) program because he also meets all the requirements to be considered economically disadvantaged. *See* 13 C.F.R. § 124.104(c)(2)-(4).[8] But because SBA rejected his assertion of social

[8] Hierholzer submitted an unrebutted declaration affirming that he satisfies the three criteria for economic disadvantage—net worth, income, and asset value. *See* App. 82a ¶¶ 4-6.

disadvantage, he is categorically excluded from the program and the valuable opportunities that it provides for small business owners.

IV. Proceedings Below

Hierholzer and MJL Enterprises brought this civil rights lawsuit in the United States District Court for the Eastern District of Virginia to challenge the 8(a) program's race-based presumption of social disadvantage. App. 57a-80a. The complaint asserts claims against SBA and its Administrator under the equal protection component of the Fifth Amendment's Due Process Clause, the Administrative Procedure Act, and the nondelegation doctrine. App. 71a-79a. It seeks prospective declaratory and injunctive relief against SBA's use of racial classifications and a race-based presumption in the 8(a) program. App. 79a-80a.

Defendants moved to dismiss under Rule 12(b)(1), arguing that Petitioners lacked standing to challenge the presumption. *See* App. 36a.[9] The district court granted the motion, holding that Petitioners lack Article III standing because they did not identify specific federal contracts that they lost by not being admitted to the 8(a) program and because they did not establish that Hierholzer is socially and economically disadvantaged. App. 38a-41a. The district court also held that the case is moot due to the *Ultima* decision and SBA's pause in use of the presumption. App. 46a-47a.

On appeal, a Fourth Circuit panel reversed the district court's mootness holding, concluding that

[9] Defendants also sought dismissal of some of Petitioners' claims under Rule 12(b)(6), but the district court did not rule on the Rule 12(b)(6) motion. *See* App. 36a.

"[d]espite the changes made to the 8(a) Program by the SBA pursuant to the injunction, . . . [t]he controversy is still live because the *Ultima* decision has not resulted in a final judgment." App. 15a.

The panel also disagreed that Petitioners needed to identify specific federal contracts that they lost by being excluded from the program. App. 19a. However, the panel nonetheless affirmed dismissal, holding that to have standing, Petitioners were required to establish that Hierholzer satisfies the 8(a) program's social and economic disadvantage criteria. *Id.* at 19a-21a (holding that Hierholzer was "required to plead facts to support that [he] would be eligible for the program—i.e., that [he] is socially and economically disadvantaged"). Without such a showing, the panel concluded, the complaint fails all three prongs of standing: injury in fact, causation, and redressability. *Id.* at 17a-26a.

The panel further concluded that Hierholzer's "prior rejections" from the 8(a) program, based on his inability to establish social disadvantage, "underscore [his] ineligibility" for the program. *Id.* at 25a. And because it considered the presumption severable, the panel held that the social disadvantage criterion would "continue to bar [Hierholzer] from the 8(a) Program even if [his] requested relief were granted." *Id.* at 26a. Thus, his "claimed injury cannot be redressed by a favorable decision." *Ibid.*

Petitioners sought *en banc* review, which was denied. App. 48a.

REASONS FOR GRANTING THE PETITION

To establish standing under Article III, "a plaintiff must demonstrate (1) that he or she suffered an injury in fact that is concrete, particularized, and actual or imminent, (2) that the injury was caused by the defendant, and (3) that the injury would likely be redressed by the requested judicial relief." *Thole v. U. S. Bank N.A.*, 590 U.S. 538, 540 (2020). At the pleading stage, a plaintiff need only plausibly allege facts satisfying each element. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

Those jurisdictional requirements must not be manipulated to "avoid[] . . . contentious constitutional questions." *Parents Protecting Our Children,* No. 23-1280, slip op. at 2 (Alito, J., dissenting from denial of certiorari). Instead, federal courts are required to exercise their jurisdiction where there is "a real controversy with real impact on real persons." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 424 (2021) (quoting *Am. Legion v. Am. Humanist Ass'n*, 588 U.S. 29, 87 (2019) (Gorsuch, J., concurring in the judgment)); *see also Cohens v. Virginia*, 19 U.S. 264, 404 (1821) (Marshall, C.J.) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.").

In the equal protection context, this Court has repeatedly held that when the government "makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group who is personally subject to that barrier has standing to challenge the barrier." *Ne. Fla. Chapter of the Assoc. Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993). The

relevant equal protection injury is "the denial of equal treatment," not the "inability to obtain the benefit." *Ibid.* The Fourth Circuit's decision defies that principle by requiring Petitioners to show they would obtain the benefit of admission to the 8(a) program absent the presumption.

The Fourth Circuit decision also creates a direct split with the Sixth Circuit decision in *Vitolo v. Guzman*, 999 F.3d 353 (6th Cir. 2021), which held that a small business owner challenging the same SBA presumption at issue in this case had Article III standing even though he did not establish that he was socially disadvantaged. And the principle announced by the Fourth Circuit contradicts the holdings of the Eleventh and Second Circuit in *Wooden v. Board of Regents of University System of Georgia*, 247 F.3d 1262 (11th Cir. 2001), and *Vivenzio v. City of Syracuse*, 611 F.3d 98 (2d Cir. 2010).

This Court should grant certiorari to reaffirm that *Northeastern Florida* governs equal protection challenges and to resolve a split among the circuits.

I. The Fourth Circuit Decision Conflicts With Decisions of Other Circuit Courts

Many circuit courts have applied *Northeastern Florida* to find standing to challenge unequal treatment without requiring the plaintiff to show he would otherwise obtain the underlying benefit. *See, e.g.*, *Road-Con, Inc. v. City of Philadelphia*, 120 F.4th 346, 358 (3d Cir. 2024); *Midwest Fence Corp. v. U.S. Dep't of Transp.*, 840 F.3d 932, 939-40 (7th Cir. 2016); *Jana-Rock Constr., Inc. v. N.Y. State Dep't of Econ. Dev.*, 438 F.3d 195, 204 (2d Cir. 2006); *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 706 (9th Cir. 1997); *Concrete Works of Colo., Inc. v. City & Cnty. of Denver*,

36 F.3d 1513, 1518 (10th Cir. 1994). The decision below conflicts with those cases for the same reasons it departs from *Northeastern Florida*.

But there is an even clearer split. The Fourth Circuit decision squarely conflicts with the Sixth Circuit opinion in *Vitolo*, which found standing to challenge the very same race-based presumption that Petitioners are challenging here, applied to a different government program. 999 F.3d at 353. The Sixth Circuit declined to require the plaintiff there to show that he would qualify as socially disadvantaged in the absence of the racial presumption.

Vitolo addressed a challenge to the Restaurant Revitalization Fund, a COVID-relief fund operated by SBA to aid small, privately-owned restaurants. *Id.* at 356-57. Money under the fund was to be distributed on a first-come, first-served basis, except during the first 21 days of the program, when priority was given to restaurants owned by women, veterans, or the "socially and economically disadvantaged." *Id.* at 357 (quoting Pub. L. No. 117-2, § 5003(c)(3)(A)). In interpreting that term, the fund expressly adopted and incorporated the presumption of social disadvantage in 13 C.F.R. § 124.103. *See id.* at 357-58.

The *Vitolo* plaintiff, a white restaurant owner, sued to challenge the race preference in the fund and sought a preliminary injunction.[10] *Id.* at 358. In opposing the injunction, the government made the same argument adopted by the Fourth Circuit here:

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[10] In the Sixth Circuit, the evidentiary burden to establish standing for a preliminary injunction is higher than at the pleading stage. *See Vitolo*, 999 F.3d at 359 (citing *Waskul v. Washtenaw Cnty. Cmty. Mental Health*, 900 F.3d 250, 255 n.3 (6th Cir. 2018)).

that the plaintiff lacked standing because he "fails to allege, much less establish, that, even in the absence of the race-based presumption, he qualifies as a 'socially disadvantaged' individual." Def.'s Opp. to P.'s Mot. for Prelim. Inj., *Vitolo v. Guzman*, 2021 WL 10861472 (E.D. Tenn. May 21, 2021); *see also Vitolo v. Guzman,* No. 3:21-CV-176, 2021 WL 2132106, at *2 (E.D. Tenn. May 25, 2021) (describing and rejecting the government's standing argument). As the Sixth Circuit put it, the essence of the government's position was that "the plaintiffs lacked standing to challenge [SBA's] use of racial preferences because the plaintiffs may not ultimately succeed." 999 F.3d at 358. That is the very same argument the government makes here. It is not different in any way.

Yet, the Sixth Circuit came to a different conclusion than the Fourth Circuit. Relying on *Northeastern Florida*, it concluded that "[i]t does not matter that the plaintiffs might not otherwise qualify for priority consideration" through establishing their social disadvantage. *Ibid.* (citing 508 U.S. at 666). Instead, they had standing because the race-based presumption treated them unequally, and if an injunction were granted, "the playing field in qualifying for the priority period would be leveled." *Ibid.* (quotation omitted).

Under *Vitolo*, Petitioners would have standing.[11] Under the Fourth Circuit's decision, they do not. The split could not be clearer.

Although they did not directly deal with 13 C.F.R. § 124.103 as did *Vitolo*, the Eleventh and Second

[11] *See also Ultima Servs.*, 683 F. Supp. 3d at 760 (relying on *Vitolo* to find standing to challenge the 8(a) program's race-based presumption).

Circuits have also applied a standing approach that contradicts the Fourth Circuit and would compel recognition of Petitioners' standing in this case. In *Wooden v. Board of Regents of University System of Georgia*, the Eleventh Circuit held that a plaintiff had standing to challenge the University's use of race in admissions, even though he had been denied admission at a step that did not use race and could not show that he would have been admitted under a race-neutral system. 247 F.3d at 1278-79. The Eleventh Circuit held that *Northeastern Florida* and *Adarand* "establish that . . . it is the exposure to unequal treatment which constitutes the injury-in-fact giving rise to standing." *Ibid.* It was immaterial that removing the University's racial preference would not have changed the admission outcome; the plaintiff had standing because his "application was treated differently, and less favorably, than the applications of non-white candidates solely because of race." *Ibid.*

Similarly, in *Vivenzio v. City of Syracuse*, the Second Circuit considered whether white firefighter applicants had standing to challenge a consent decree requiring that a certain proportion of new hires be racial minorities. 611 F.3d at 98. The City argued that the plaintiffs lacked standing because they scored lower on a civil service exam than any candidate that was ultimately hired and thus would not have been accepted even without the consent decree. *See* Br. for Defs., *Vivenzio v. City of Syracuse*, No. 08-2436-cv, 2008 WL 8591087, at *20 (2d Cir. Sept. 8, 2008). Relying on *Northeastern Florida*, the Second Circuit rejected that argument and emphasized that it did not matter whether the plaintiffs would have been hired under a race-neutral process. 611 F.3d at 103-06. The

denial of equal treatment gave them standing to challenge the City's policy. *Ibid.*

Had this case arisen in the Second, Sixth, or Eleventh Circuits, Petitioners would have been permitted to proceed. Their 8(a) applications were treated differently and less favorably than applications of those belonging to racial groups included in the presumption of social disadvantage. Whether Petitioners would ultimately be accepted into the 8(a) program if the presumption were eliminated is beside the point in those circuits, in direct conflict with the Fourth Circuit decision in this case.

II. The Fourth Circuit's Decision Is Inconsistent with This Court's Precedents

In *Northeastern Florida*, this Court held that a plaintiff challenging a race-based classification that impedes access to a government benefit suffers injury-in-fact not from denial of the benefit itself, but from the use of a race-based barrier. 508 U.S. at 666. That case centered on an ordinance requiring the City of Jacksonville to set aside 10 percent of city contracts for minority-owned businesses. *Id.* at 658. The circuit court had held that the plaintiff association lacked standing because "it has not alleged that its members would have bid successfully on any one or more of these contracts if not for the ordinance." *Ne. Fla. Chapter of Assoc. Gen. Contractors of Am. v. City of Jacksonville*, 951 F.2d 1217, 1219 (11th Cir. 1992). This Court reversed, holding that when the government "makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group who is personally subject to that barrier has standing to challenge the barrier." 508 U.S. at 666. That is

because the relevant injury is "the denial of equal treatment," not the "inability to obtain the benefit." *Ibid.*

Two years later, the Court followed *Northeastern Florida* in holding that a construction contractor had standing to challenge a contract set-aside for "socially and economically disadvantaged individuals," which was interpreted in a way that benefited racial minorities. *Adarand Constrs., Inc. v. Pena*, 515 U.S. 200, 204 (1995). The Court held that the nonminority plaintiff "need not demonstrate that it has been, or will be, the low bidder on a government contract." *Id.* at 211. Instead, "[t]he injury in cases of this kind is that a 'discriminatory classification prevent[s] the plaintiff from competing on an equal footing.'" *Ibid.* (quoting *Ne. Fla.*, 508 U.S. at 667).

Indeed, this Court has repeatedly emphasized that the harm from the government's use of race-based classifications arises not only from the denial of a desired *result* but from the stigmatizing injury of being subjected to unequal treatment in the application *process*:

- In *Texas v. Lesage*, the Court emphasized that, in contrast to a plaintiff seeking retrospective relief, "a plaintiff who challenges an ongoing race-conscious program and seeks forward-looking relief need not affirmatively establish that he would receive the benefit in question if race were not considered." 528 U.S. 18, 21 (1999). Instead, "[t]he relevant injury in such cases is 'the inability to compete on an equal footing.'" *Ibid.* (quoting *Ne. Fla.*, 508 U.S. at 666).

- In *Gratz v. Bollinger*, the Court rejected the contention that a plaintiff lacked standing to challenge the use of race in admissions to the

University of Michigan. 539 U.S. 244, 260-63 (2003). The plaintiff had previously been denied admission to the University as a freshman, whereas a "minority applicant with his qualifications would have been admitted." *Id.* at 262. This Court held that he had standing to prospectively challenge the University's use of race because "[a]fter being denied admission, [he] demonstrated that he was 'able and ready' to apply as a transfer student should the university cease to use race in undergraduate admissions." *Id.* at 263. He was not required to show he would be *admitted* as a transfer student absent the race-based policy—it was enough that the policy treated him unequally in the application process.

- In *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007), the Court held that one form of equal protection injury "is being forced to compete in a race-based system that *may* prejudice the plaintiff." *Id.* at 719 (emphasis added) (citing *Adarand*, 515 U.S. at 211; *Ne. Fla.*, 508 U.S. at 666). At issue were admissions policies that used race in assigning students to Seattle schools. The Court concluded that the plaintiff association had standing to challenge this use of race on behalf of its members, even though it was "possible that children of [plaintiff] group members will not be denied admission to a school based on their race." *Id.* at 718-19. The determinative injury was the unequal treatment itself, not the outcome.[12]

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[12] *See also Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 591 U.S. 610, 634 (2020) ("[A] plaintiff who suffers unequal treatment has standing to challenge a discriminatory exception that favors others."); *Haaland v. Brackeen*, 599 U.S. 255, 292 (2023) (a race-based barrier that "makes it more difficult for members of one

In disregard of these precedents, the Fourth Circuit imposed an outcome-based standing requirement that would close the courthouse doors to plaintiffs asserting constitutional harms. It required Petitioners to demonstrate that they would obtain the benefit of admission to the 8(a) program in the absence of SBA's race-based presumption by proving their social disadvantage. In so doing, it effectively discarded the rule of *Northeastern Florida* and *Adarand*, which held that Article III does not require plaintiffs to show they would receive the desired benefit in a race-neutral world—only that they were denied the opportunity to compete on equal terms.

This departure from the Court's decisions is particularly troubling since it creates a Catch-22 under which no one has standing to challenge SBA's use of race. Plaintiffs who do not establish their social disadvantage lack standing under the decision below, but those who do establish social disadvantage are not injured by the presumption and so also lack standing.[13] That standard could be used to immunize race-based presumptions in a variety of contexts, from voting to government contracting to public school admissions—thereby eroding the core protection of equal treatment under the law. That outcome cannot be squared with this Court's precedents or with the Constitution.

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group to obtain a benefit than it is for members of another group . . . counts as an Article III injury") (quotation omitted).

[13] As in the movie *WarGames* (MGM/UA Ent. 1983), the only solution is not to play—to refuse to take a position as to whether the plaintiff is socially disadvantaged. But since either option leads to a lack of standing, even that strategy is doomed to fail.

III. This Case Presents a Recurring Issue of Nationwide Importance

Whether a plaintiff has Article III standing to bring an equal protection challenge is an important and recurring issue, including in cases before this Court. *See, e.g.*, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 199 (2023); *Haaland*, 599 U.S. at 291-96; *Va. House of Delegates v. Bethune-Hill*, 587 U.S. 658, 662-71 (2019); *Parents Involved*, 551 U.S. at 718-20; *Gratz*, 539 U.S. at 271-72; *Adarand*, 515 U.S. at 210-11; *Ne. Fla.*, 508 U.S. at 666.

The Court has also made clear that the Constitution demands that the government use race, if at all, only as a last resort. *See Students for Fair Admissions*, 600 U.S. at 206-07 ("Any exception to the Constitution's demand for equal protection must survive a daunting two-step examination known in our cases as 'strict scrutiny.'") (quoting *Adarand*, 515 U.S. at 227); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Roberts, C.J., concurring in part and dissenting in part) (noting that the Constitution demands that the government seek to disengage from the "sordid business" of "divvying us up by race"). Yet, race-based presumptions are often embedded in government programs.[14]

[14] *See, e.g.*, *Kousisis*, 145 S. Ct. at 1399-1400 (Thomas, J., concurring) (discussing the race-based presumption of social disadvantage in the DBE program); *In re Sherbrooke Sodding Co.*, 17 F. Supp. 2d 1026, 1037 (D. Minn. 1998) (finding use of a race-based presumption in an earlier version of the DBE program unconstitutional); *Nuziard v. Minority Bus. Dev. Agency*, 721 F. Supp. 3d 431, 473 (N.D. Tex. 2024) (finding unconstitutional the Minority Business Development Agency's

A consistent and constitutionally faithful framework for evaluating standing to challenge such presumptions is essential.

Here, the Fourth Circuit's decision shielded a likely unconstitutional government policy from review. If that decision—and the resulting circuit split—is allowed to stand, equal protection jurisprudence will become a fragmented muddle governed by varying procedural barriers rather than constitutional principles.

There are no vehicle problems. The issue of Petitioners' standing was fully briefed by the parties and decided at the pleading stage. Although SBA has paused its use of the presumption in response to the *Ultima* injunction, the Fourth Circuit correctly concluded that does not moot Petitioners' claims. *See* App. 15a.[15] Moreover, the statutory requirement that applicants show social disadvantage will remain even when a final decision is reached in *Ultima* and all appeals exhausted. *See* 15 U.S.C. §§ 631(f), 637(a)(4)-(5). SBA's application of that requirement will almost certainly continue to impose different evidentiary burdens on different applicants. The Fourth Circuit's

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race-based presumption of social disadvantage), *appeal dismissed*, No. 24-10603, 2024 WL 5279784 (5th Cir. July 22, 2024); 49 U.S.C. § 47113(a)(2) (incorporating SBA's race-based presumption program into a program for airport development); 31 U.S.C. § 3718(b)(3) (incorporating SBA's race-based presumption into a program for debt collection services); 40 C.F.R. §§ 33.202-.203 (applying the race-based presumption of disadvantage in 13 C.F.R. § 124.103 to EPA contracting programs); 49 C.F.R. § 23.3 (applying a race-based presumption to an airport concession program).

[15] *See also Lujan*, 504 U.S. at 569 n.4 (1992) (noting the Court's "longstanding rule that jurisdiction is to be assessed under the facts existing when the complaint is filed").

standing rule would block judicial review in any future challenges to those burdens, just as it has blocked Petitioners' ability to bring their case.

The decision below turned on the view that a plaintiff must prove eligibility for admission to a government program to have Article III standing to challenge a race-based barrier to entry. This case is a strong vehicle for reviewing that conclusion and providing critical guidance in this area of constitutional law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSHUA P. THOMPSON
Pacific Legal Foundation
555 Capitol Mall,
Suite 1290
Sacramento,
California 95814
Telephone: (916) 419-7111

GLENN E. ROPER
Counsel of Record
Pacific Legal Foundation
1745 Shea Center Dr.,
Suite 400
Highlands Ranch,
Colorado 80129
Telephone: (916) 419-7111
GERoper@pacificlegal.org

Counsel for Petitioners

JULY 2025