## TABLE OF CONTENTS

**PUBLISHED**

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

**No. 24-1187**

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

Plaintiffs - Appellants,

v.

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

Defendants - Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk.
Raymond A. Jackson, Senior District Judge.
(2:23-cv-00024-RAJ-DEM)

Argued: October 29, 2024 Decided: January 3, 2025

Before DIAZ, Chief Judge, WYNN and THACKER, Circuit Judges.

Reversed in part, affirmed in part, and remanded by published opinion. Judge Thacker wrote the opinion, in which Chief Judge Diaz and Judge Wynn joined.

**ARGUED:** Glenn Evans Roper, PACIFIC LEGAL FOUNDATION, Highlands Ranch, Colorado, for

Appellants. Ellen L. Noble, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. **ON BRIEF:** Joshua P. Thompson, PACIFIC LEGAL FOUNDATION, Sacramento, California, for Appellants. Kristen Clarke, Assistant Attorney General, Bonnie I. Robin-Vergeer, Teresa Kwong, Appellate Section, Civil Rights Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Eric S. Benderson, Associate General Counsel for Litigation, David A. Fishman, Deputy Associate General Counsel for Litigation, Office of the General Counsel, UNITED STATES SMALL BUSINESS ADMINISTRATION, Washington, D.C., for Appellee.

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THACKER, Circuit Judge:

Marty Hierholzer ("Hierholzer") is the sole owner, president, and chief executive of MJL Enterprises, LLC ("MJL") (collectively "Appellants"). Appellants allege that the Small Business Administration's ("SBA") Section 8(a) Business Development Program ("8(a) Program") discriminated against Hierholzer based on his race. The 8(a) Program employs a race conscious, rebuttable presumption allowing members of certain racial and ethnic groups to establish that they are "socially disadvantaged." 13 C.F.R. § 124.103(a).

Appellants appeal the district court's dismissal of their case based on mootness and lack of standing. As explained below, we reverse the district court's dismissal of the case as moot. However, we affirm the district court's dismissal based on Appellants' inability to establish the elements of Article III standing.

## I.

### A.

In 1953, Congress enacted the Small Business Act ("the Act") to "aid, counsel, assist, and protect" small businesses, to ensure a "fair proportion" of government contracts go to small businesses, 15 U.S.C. §§ 631(a)-(b), and to "preserv[e] the competitive free enterprise system." *Id.* § 631a. The Act established the SBA to manage several programs to assist the business development and competitive viability of small businesses by providing contract, financial, technical, and management assistance, including programs requiring federal agencies to reserve certain contracts exclusively for small businesses. *See id.* §§ 633, 644(j)(1). The Act includes several programs that create contracting preferences for small businesses in general and for those that satisfy certain criteria, including small businesses owned and controlled by women, *see id.* § 637(m); small businesses owned and controlled by service-disabled veterans, *id.* § 657f-1; and the program at issue here, small businesses owned and controlled by "socially and economically disadvantaged" individuals. *Id.* § 637(a).

Through the 8(a) Program, the SBA provides assistance to small businesses owned and controlled by "socially and economically disadvantaged" individuals. 15 U.S.C. § 637(a). The 8(a) Program authorizes the SBA to enter into agreements for goods and services with other federal agencies and to subcontract those agreements to socially and economically disadvantaged small businesses. *Id.* § 631(f)(2). The Act aims to award at least five

percent of the total value of federal contracts to small businesses owned by socially and economically disadvantaged individuals each year, with an overall goal of awarding at least 23 percent of the total value of all contracts in a fiscal year to small businesses. *Id.* §§ 644(g)(1)(A)(i), (iv).

Eligibility for the 8(a) Program is limited to small businesses that are at least 51 percent unconditionally owned and controlled by one or more "socially and economically disadvantaged" individuals who are of good character, are citizens of the United States, and who demonstrate a potential for success in competing in the private sector. *Id.* §§ 637(a)(4)(A), (7)(A); 13 C.F.R. § 124.101.

"Socially disadvantaged individuals are those who 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." 15 U.S.C. § 637(a)(5). SBA regulations require that the social disadvantage must have resulted from "circumstances beyond [the individual's] control." 13 C.F.R. § 124.103(a). The SBA regulations further provide that members of certain designated groups, including "Black Americans, Hispanic Americans, Native Americans . . . , Asian Pacific Americans . . . , Subcontinent Asian Americans . . . , and members of other groups designated from time to time by [the] SBA," are entitled to a rebuttable presumption of social disadvantage. *Id.* § 124.103(b)(1). This presumption may be rebutted with "credible evidence to the contrary." *Id.* § 124.103(b)(3). 8(a) Program applicants owned and controlled by individuals who are not members of one of these groups may show social

disadvantage by submitting evidence that demonstrates, by a preponderance of the evidence:

(i) At least one objective distinguishing feature that has contributed to social disadvantage, such as race, ethnic origin, gender, identifiable disability, long-term residence in an environment isolated from the mainstream of American society, or other similar causes not common to individuals who are not socially disadvantaged;

(ii) The individual's social disadvantage must be rooted in treatment which he or she has experienced in American society, not in other countries;

(iii) The individual's social disadvantage must be chronic and substantial, not fleeting or insignificant; and

(iv) The individual's social disadvantage must have negatively impacted on his or her entry into or advancement in the business world. SBA will consider any relevant evidence in assessing this element, including experiences relating to education, employment and business history . . . .

(A) Education. SBA considers such factors as denial of equal access to institutions of higher education, exclusion from social and professional association with students or teachers, denial of educational honors rightfully earned, and social patterns or pressures which discouraged the individual from pursuing a professional or business education.

> (B) Employment. SBA considers such factors as unequal treatment in hiring, promotions and other aspects of professional advancement, pay and fringe benefits, and other terms and conditions of employment; retaliatory or discriminatory behavior by an employer; and social patterns or pressures which have channeled the individual into nonprofessional or non-business fields.
>
> (C) Business history. SBA considers such factors as unequal access to credit or capital, acquisition of credit or capital under commercially unfavorable circumstances, unequal treatment in opportunities for government contracts or other work, unequal treatment by potential customers and business associates, and exclusion from business or professional organizations.

*Id.* §§ 124.103(c)(1)-(2). Additionally, the applicant must provide evidence establishing that the purported social disadvantage has "negatively impacted his or her entry into or advancement in the business world." *Id.* § 124.103(c)(3).

Regardless of how social disadvantage is established, all applicants for the 8(a) Program must be a small business owned by an individual who is both "socially and economically disadvantaged." 15 U.S.C. § 637(a)(4)(A)(i)(I) (emphasis supplied). An economically disadvantaged individual is one whose "ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." *Id.* § 637(a)(6)(A); 13 C.F.R. § 124.104(a). In evalua-

ting economic disadvantage, the SBA "shall consider, but not be limited to [considering], the [individual's] assets and net worth." 15 U.S.C. § 637(a)(6)(A). SBA regulations provide that the SBA will consider "the personal financial condition of any individual claiming disadvantaged status, including income for the past three years . . . , personal net worth, and the fair market value of all assets . . . ." 13 C.F.R. § 124.104(c). Importantly, the rebuttable presumption that applies regarding social disadvantage does not apply regarding economic disadvantage.

**B.**

Hierholzer is a service-disabled veteran who served twenty two years in the Navy as a diver before retiring in 2002. As a result of his military career, Hierholzer lives with knee, lower back, and shoulder pain; hearing loss and tinnitus; decreased mobility; and clinically recognized depression and anxiety disorders.

MJL is a small business owned by Hierholzer. MJL provides equipment and office supplies to military bases and Veterans Affairs hospitals, provides high-tech safety and security equipment to first responders, and provides logistical labor and personnel services for Veterans Affairs hospitals.

Hierholzer is of Scottish and German descent and is not a member of a group with a presumption of social disadvantage pursuant to 13 C.F.R. § 124.103(b)(1). Therefore, when MJL applied to the 8(a) Program in 2009 and 2016, it was required to present evidence to support that Hierholzer was socially disadvantaged pursuant to Section 124.103(c). He was not. Therefore, in both 2009 and

2016, the SBA notified Appellants of MJL's ineligibility, "despite [the SBA's] recognition of [Hierholzer's] disabilities and veteran status." J.A. 16.[1] *See generally In re: MJL Enters., LLC*, SBA No. BDPE-566, 2017 WL 8231365, at *1, *7 (Dec. 18, 2017) (detailing MJL's applications and affirming MJL's 2016 denial).

The SBA denied both applications, which included incidents of Hierholzer's claimed social disadvantage, along with supporting evidence. Hierholzer believes that he "would have been accepted into the 8(a) Program without having to prove his social disadvantage if he belonged to one of the favored races listed" in the Act and regulations (i.e., if Hierholzer received a presumption of social disadvantage). J.A. 17. Thus, Appellants allege injury based on an inability to "stand[] on equal footing for 8(a) [P]rogram eligibility"; to "compet[e] for exclusive 8(a) contracting opportunities based on race"; or to "access other benefits provided to 8(a) Program companies," including "access to business development assistance, free training opportunities through the SBA, and federal surplus property access." *Id.* at 18. As a result, Appellants allege that MJL "is at a competitive disadvantage when competing for . . . contracts" and "in accessing the 8(a) Program itself" as compared to "members of minority groups." *Id.* at 18-19.

**C.**

Appellants sued Isabel Guzman, in her official capacity as Administrator of the SBA, and the SBA

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[1] Citations to the "J.A." refer to the Joint Appendix filed by the parties in this appeal.

(collectively, "the Government") in the Eastern District of Virginia alleging violations of: (i) the Equal Protection Clause of the Fifth Amendment based on SBA's regulations and the Act; and (ii) the Administrative Procedure Act based on the SBA exceeding its statutory authority, acting in an arbitrary and capricious manner, and exercising an unconstitutional delegation of authority by promulgating the regulations setting forth the race conscious presumption of social disadvantage. Appellants seek a declaration that "Section 8(a)'s racial classifications found in 15 U.S.C. §§ 637(a)(5), (8), and 631(f)(1)(b) and 13 C.F.R. § 124.103(a), (b)(1) are facially unconstitutional"; permanent injunctions against the enforcement of the Section 8(a) Program's rebuttable presumption of social disadvantage; and costs, attorneys' fees, and expenses. J.A. 26.

The Government moved to dismiss, arguing that the district court lacked subject matter jurisdiction because Appellants lacked standing. Specifically, the Government argued that Appellants could not establish an injury in fact because they were not "able and ready to bid" on 8(a) Program contracts. J.A. 98 (quoting *Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993)). Additionally, the Government argued that Appellants had not established an injury in fact because they did not adequately allege social or economic disadvantage. The Government argued that Appellants failed to plausibly allege social disadvantage in the absence of the race conscious presumption, highlighting that Appellants were already twice denied entry to the 8(a) Program based on their failure to establish social disadvantage and

that the complaint failed to include any allegations that would yield a different result. The Government also argued that, even if Appellants had alleged economic disadvantage, Appellants would still fail to demonstrate Hierholzer's economic disadvantage as required by the 8(a) Program because Appellants "participated in thousands of contract actions with federal government agencies totaling close to $130 million dollars." J.A. 47. The Government further argued that Appellants did not plausibly allege causation, particularly considering the lack of pleading regarding economic disadvantage—meaning that Appellants had not plausibly alleged that they could participate in the 8(a) Program without satisfying the race conscious presumption. Finally, the Government argued that Appellants did not plausibly allege redressability because a favorable decision enjoining the use of the race conscious presumption would not alter Appellants' position, given their inability to establish either social or economic disadvantage as illustrated by their two previous denials.

Appellants opposed the motion to dismiss. Appellants argued that they plausibly pled the elements of standing. To rebut the Government's arguments regarding lack of standing, Appellants attached a declaration by Hierholzer in which he averred that he believed himself to be economically disadvantaged. The declaration noted that Hierholzer had a net worth of $850,000 and that his adjusted gross income averaged over the prior three years did not exceed $400,000. Therefore, Appellants asserted they had alleged standing.

In the midst of the litigation of this lawsuit, the District Court for the Eastern District of Tennessee enjoined the SBA from using the rebuttable presumption of social disadvantage in 13 C.F.R. § 124.103(b) in administering the 8(a) Program. *See Ultima Servs. Corp. v. U.S. Dep't of Agric.*, 683 F. Supp. 3d 745, 752 (E.D. Tenn. 2023). The district court in the *Ultima* case held that the rebuttable presumption violated Ultima's Fifth Amendment right to equal protection of the law. Thereafter, the Government moved to stay proceedings in the present case pending a final order in *Ultima*. In the motion to stay, the Government included two declarations of John W. Klein, the deputy general counsel and associate general counsel for procurement law at the SBA. Klein's declarations explained changes to the 8(a) Program subsequent to the *Ultima* injunction:

- "Since the Court's July 19, 2023 Order, SBA is making all social disadvantage determinations pursuant to the standard for nonpresumptive applicants as directed in 13 C.F.R. § 124.103(c). This includes social disadvantage determinations for new and pending applications from individual business owners and for 8(a) participants that previously relied on the rebuttable presumption."
- "The social disadvantage determination involves reviewing a business owner's narrative of social disadvantage and ensuring that the information provided satisfies each of the elements in 13 C.F.R. § 124.103(c) by a preponderance of the evidence."
- SBA reevaluated both *previously admitted* applicants who had been admitted using the

rebuttable presumption and applicants with *pending awards* based on the nonpresumptive social disadvantage standard in 13 C.F.R. § 124.103(c). SBA required previously admitted and pending participants to submit evidence of social disadvantage for reevaluation.

- SBA created a portal for previously admitted applicants to submit evidence of social disadvantage and set a submission deadline of September 30, 2023.
- SBA began making social disadvantage determinations "for any contract action [requiring] an SBA eligibility determination."
- SBA had suspended pending applications after the *Ultima* July 19, 2023, order, but it reopened its online portal for new submissions on September 29, 2023.
- All 8(a) Program applicants are required to submit evidence of social disadvantage.

J.A. 129-35.

The district court held a hearing regarding the Government's motion to dismiss and motion to stay. At the hearing, the Government argued that "the claims for relief that [Appellants] sought in their complaint simply don't exist anymore" because "the presumption at issue in th[e] case has been purged from the process" following the Ultima injunction. J.A. 138, 140. Additionally, the Government argued that the changes it made to the program following the injunction to remove the race conscious presumption emphasize the Government's point that Appellants are unable to establish injury, causation, or redressability, and, therefore, do not have standing.

For their part, Appellants argued that that no final judgment had been issued in the *Ultima* case, so the question remained "whether SBA [was] continuing to provide a discriminatory approach to those who would have fallen under the presumption." J.A. 145. Appellants also noted that the Government had not indicated whether it would appeal the *Ultima* decision and highlighted that the SBA's changes to the 8(a) Program should not be considered because standing is determined at the time that a complaint is filed.

The district court granted the Government's motion to dismiss, holding that Appellants "no longer have a personal stake in the outcome of th[e] litigation. Therefore, [Appellants'] claim is moot . . . ." J.A. 175. The district court also held that Appellants failed to establish the elements of standing because they did not allege eligibility and did not sufficiently plead economic disadvantage in the first instance or social disadvantage in the absence of the presumption. And the district court explained that Appellants' position would not change if their requested relief were granted because Appellants would still have to establish social and economic disadvantage. The district court denied as moot the motion to stay.

Appellants timely appealed.

**II.**

We review de novo the district court's determination that a case is moot. *See S.C. Coastal Conservation League v. U.S. Army Corps of Eng'rs*, 789 F.3d 475, 482 (4th Cir. 2015) (citing *Simmons v. United Mortg. & Loan Inv., LLC*, 634 F.3d 754, 762 (4th Cir. 2011)). We also review de novo the legal

question of whether a plaintiff has standing to bring a claim. *Buscemi v. Bell*, 964 F.3d 252, 258 (4th Cir. 2020) (citing *South Carolina v. United States*, 912 F.3d 720, 726 (4th Cir. 2019)).

**III.**

**A.**

Appellants first argue that the district court erred in holding that the case is moot.

Pursuant to Article III of the Constitution, the jurisdiction of the federal courts is limited to "Cases" and "Controversies." *See* U.S. Const. art. III, § 2. "When a case or controversy ceases to exist, the litigation is moot, and the court's subject matter jurisdiction ceases to exist also." *S.C. Coastal Conservation League v. U.S. Army Corps of Engineers*, 789 F.3d 475, 482 (4th Cir. 2015) (citation omitted). "A case can become moot due either to a change in the facts or a change in the law." *Id.* (citing *Ross v. Reed*, 719 F.2d 689, 693-94 (4th Cir. 1983)); *see also Deal v. Mercer Cnty. Bd. of Educ.*, 911 F.3d 183, 191 (4th Cir. 2018) ("A case becomes moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." (internal quotation marks omitted) (quoting *Simmons v. United Mortg. & Loan Inv., LLC*, 634 F.3d 754, 763 (4th Cir. 2011))).

"If an intervening circumstance deprives the plaintiff of a personal stake in the outcome . . . at any point during litigation, the action . . . must be dismissed as moot." *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 160-61 (2016) (internal quotation marks omitted) (citation omitted). "A case becomes moot, however, only when it is impossible for a court to grant

any effectual relief whatever to the prevailing party." *Id.* at 161 (internal quotation marks omitted) (citation omitted).

The district court held that because the "SBA changed the 8(a) Program application and removed the race conscious presumption from all stages of the process[,] [Appellants] no longer have a personal stake in the outcome of this litigation. Therefore, [Appellants'] claim is moot . . . ." J.A. 175.

On appeal, Appellants argue that the SBA has not conceded that the race conscious "presumption is unconstitutional or made any permanent changes in response to the *Ultima* case; it has only paused use of the presumption so as to not violate the . . . injunction." Appellants' Opening Br. at 35 (citing *Ultima Servs. Corp. v. U.S. Dep't of Agric.*, 683 F. Supp. 3d 745, 774 (E.D. Tenn. 2023)). Appellants further argue in their reply brief that the district court's order in *Ultima* is not final because it may still be appealed. To its credit, the Government concedes that the case is not moot: "in the absence of a final judgment in *Ultima*, [Appellants'] claim is technically not moot." Gov't's Resp. Br. at 39 n.9.

Here, the subsequent events, namely the injunction in *Ultima* and the changes to the 8(a) Program as a result of the injunction, have not rendered Appellants' claims moot. Despite the changes made to the 8(a) Program by the SBA pursuant to the injunction, the controversy has not ceased to exist. *See S.C. Coastal Conservation League*, 789 F.3d at 482. The controversy is still live because the *Ultima* decision has not resulted in a final judgment. *See Deal*, 911 F.3d at 191.

Therefore, the district court erred in holding that Appellants' case is moot. We reverse.

**B.**

Appellants next argue that the district court erred in holding that Appellants lacked standing to challenge the 8(a) Program. The Government responds that Appellants have experienced no injury traceable to the 8(a) Program because they are simply ineligible, so a favorable decision in Appellants' favor would not redress their claimed injury. This is so, according to the Government, because, even without the race conscious presumption, Appellants cannot compete for 8(a) Program contracts given that Hierholzer is not socially or economically disadvantaged.

The Supreme Court has long understood the cases and controversies limitation imposed by Article III of the Constitution "to require that a case embody a genuine, live dispute between adverse parties, thereby preventing the federal courts from issuing advisory opinions." *Laufer v. Naranda Hotels, LLC*, 60 F.4th 156, 161 (4th Cir. 2023) (internal quotation marks omitted) (quoting *Carney v. Adams*, 592 U.S. 53, 58 (2020)). The Court "has identified the doctrine of standing as a means to implement that requirement." *Id.*

In order to possess Article III standing to sue, plaintiffs must plausibly allege: "(1) [they] suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (citation omitted). These requirements for standing

ensure that the plaintiff has "a personal stake in the outcome." *Gill v. Whitford*, 585 U.S. 48, 54 (2018) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). Appellants, as "the parties invoking federal jurisdiction, bear the burden of establishing these elements." *Disability Rts. S.C. v. McMaster*, 24 F.4th 893, 899 (4th Cir. 2022) (cleaned up) (quoting *Spokeo, Inc.*, 578 U.S. at 338).

**1.**

**Injury in Fact**

An injury in fact is "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Laufer*, 60 F.4th at 161 (internal quotation marks omitted) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). "The 'threatened injury must be certainly impending,' and '[a]llegations of possible future injury' are insufficient." *Buscemi v. Bell*, 964 F.3d 252, 259 (4th Cir. 2020) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)). "An injury reliant on a highly attenuated chain of possibilities does not qualify as being certainly impending." *Id.* (cleaned up). "The 'injury in fact' in an equal protection case . . . is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." *Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (citation omitted). "And in the context of a challenge to a set-aside program, the injury in fact is the inability to compete on an equal footing in the bidding process, not the loss of a contract." *Id.* (citation omitted). Therefore, "a party

challenging a set-aside program . . . need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis." *Id.*

The district court held that Appellants' injury was not "'concrete' or 'actual or imminent'" because they failed to allege that they lost contract bids as a result of the race conscious presumption. J.A. 168. Moreover, the district court held that Appellants failed to allege that Hierholzer was economically disadvantaged pursuant to 13 C.F.R. § 124.104, so Appellants could not demonstrate that they were "able and ready" to bid on 8(a) Program contracts due to "[Appellants'] own failure to meet the 8(a) Program eligibility requirements—social and economic disadvantage." J.A. 169.

On appeal, Appellants argue that it is unnecessary to show economic disadvantage, that the race conscious presumption caused their injury because it is a "barrier that denies them equal treatment," and that "admission is more difficult for [Appellants] than for an applicant who qualifies" for the presumption. Appellants' Opening Br. at 22-23, 26-28.

The Government counters that Appellants' complaint fails to allege necessary facts to support finding that Appellants suffered an injury in fact because it fails to allege (1) that Appellants are able and ready to bid on contracts, or (2) that they could meet the race neutral requirements of the 8(a) Program. In support of its argument, the Government highlights Appellants' receipt of $130 million in government contracts since 2006, their previous two denials of admission based on Hierholzer's lack of social disadvantage, and the fact that Appellants pled

no facts indicating a change in circumstances since the denials.

Appellants contest the district court's holding that they failed to make a showing of "lost contracts." Appellants' Opening Br. at 23-25. However, the Government responds that "without any allegations that plaintiffs have lost business in the *past* or that they *are ready and able to bid on future business* set aside in the 8(a) Program, their alleged injury is not at all concrete, particularized, imminent, or certainly impending." Gov't's Resp. Br. at 30-31 (emphasis supplied) (citing *Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367, 368 (2024) ("[R]equiring the plaintiff to show an injury in fact . . . screens out plaintiffs who might have only a general legal, moral, ideological, or policy objection to a particular government action.")).

We hold that, although Appellants were not required to allege the loss of contract bids in order to establish an injury in fact as a result of the race conscious presumption, they were still required to demonstrate that they were "able and ready" to bid on contracts. *City of Jacksonville*, 508 U.S. at 666. And, as the district court held, Appellants failed to demonstrate that they were "able and ready" to bid on 8(a) Program contracts. *Id.*

Here, the 8(a) Program's basic requirements are that each applicant must be: (1) a small business; (2) unconditionally owned and controlled by; (3) a socially disadvantaged individual; (4) who is also economically disadvantaged. 15 U.S.C. § 637(a)(4)(A); 13 C.F.R. § 124.101.

Appellants' complaint acknowledges that the 8(a) Program benefits socially and economically

disadvantaged businesses and explains that Appellants unsuccessfully applied for the 8(a) Program in 2009 and 2016. Despite Appellants' belief that MJL "would qualify for 8(a) participation" based on "'cultural bias' [experienced by Hierholzer] due to his status as a service-disabled veteran," the SBA rejected Hierholzer as not socially disadvantaged twice. J.A. 11-12, 17. Appellants' complaint includes three pages dedicated to explaining their claimed bases for social disadvantage (physical and psychological disabilities) but does not contain any pleading with regard to Hierholzer's economic disadvantage, as required by the Act and implementing regulations. 15 U.S.C. § 637(a)(6)(A) (defining individuals as economically disadvantaged when their "ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged"); 13 C.F.R. § 124.104(c) (requiring submission of information relevant to the applicant's personal financial condition, including income for the prior three years, personal net worth, and the fair market value of all assets).

As a result, Appellants failed to allege in their complaint economic disadvantage sufficient to "demonstrate" that they are "able and ready" to bid or that the alleged discriminatory policy is their only barrier to participation in the 8(a) Program on an equal basis. *City of Jacksonville*, 508 U.S. at 666. Nor can Appellants' later filed declaration, in which Hierholzer attempts to allege economic disadvantage, cure Appellants' pleading deficiency. We have held that parties may not "amend their complaints through

briefing." *S. Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 184 (4th Cir. 2013); *see also U.S. ex rel. Nathan v. Takeda Pharms. N. Am., Inc.*, 707 F.3d 451, 459 n.8 (4th Cir. 2013) ("[A plaintiff] cannot cure pleading deficiencies in the complaint with later-filed supporting documentation [on a motion to dismiss]."). Even if Hierholzer's declaration was sufficient to allege economic disadvantage, Appellants still failed to plead that they could satisfy the 8(a) Program's race neutral social disadvantage requirements.

Appellants contest that they were required to plead facts to illustrate their basic eligibility to the 8(a) Program. Oral Argument at 04:59-5:25, *Hierholzer v. Guzman*, No. 24-1187 (4th Cir. Oct. 29, 2024), https://www.ca4.uscourts.gov/OAarchive/mp3/24-1187-20241029.mp3 ("Oral Argument") ("It simply makes no sense to say that you have to prove social disadvantage in order to challenge the presumption of social disadvantage . . . . [I]f a plaintiff can already prove social disadvantage to SBA's satisfaction, that's when they arguably would have a standing problem."). But, it is elemental that "the party invoking federal jurisdiction, bears the burden of establishing" standing. *McMaster*, 24 F.4th at 899. Therefore, contrary to Appellants' assertion, they were required to plead facts to support that they would be eligible for the program—i.e., that Hierholzer is socially and economically disadvantaged. Because Appellants failed to do so, Appellants have not demonstrated that they suffered an injury in fact.

As the Government aptly stated, "without any allegations that . . . [Appellants] are ready and able to

bid on future business" through the 8(a) Program, Appellants' "alleged injury is not at all concrete, particularized, imminent, or certainly impending." Gov't's Resp. Br. at 30. Appellants' alleged injury is, therefore, entirely conjectural or hypothetical rather than actual or imminent. *See Laufer*, 60 F.4th at 161. And Appellants do not have a "personal stake in the outcome" of the controversy because, as the district court noted, Appellants' failure to allege an injury is based on "their own failure to [demonstrate] the 8(a) Program eligibility requirements [of] social and economic disadvantage." J.A. 169. Appellants' alleged injury is a "generally available grievance about government" insufficient to confer standing. *Gill*, 585 U.S. at 54.

Therefore, we affirm the determination of the district court that Appellants failed to allege an injury in fact.

**2.**

**Traceability**

"To be 'fairly traceable,' there must be 'a causal connection between the injury and the conduct complained of.'" *Laufer*, 60 F.4th at 161 (quoting *Lujan*, 504 U.S. at 560).

The district court held that Appellants could not establish that the race conscious presumption caused their harm because Appellants failed to meet the required criteria—social and economic disadvantage—for the 8(a) Program even without the presumption. Again, the district court held that the pleading deficiency could not be cured with Appellants' later filed declaration in which Hierholzer attempted to establish his economic disadvantage

because the declaration was "inadequate to cure [the] deficiencies in the complaint." J.A. 171. The district court also focused on Appellants' history of being denied by the 8(a) Program for failure to establish social disadvantage.

On appeal, Appellants argue that they need not illustrate social disadvantage because the presumption makes it harder to get into the 8(a) Program and that their injury can be traced to the SBA's enforcement of the 8(a) Program. The Government counters that Appellants are unable to meet the program requirements, and, therefore, Appellants fail to adequately allege causation.

Here, again, the Government is correct. There is no causal connection between Appellants' claimed injury (i.e., that it is more difficult to get into the 8(a) Program) and the conduct complained of (i.e., the existence of the presumption). Appellants cannot meet the requirements of the 8(a) Program regardless of the presumption. In arguing otherwise, Appellants wish to convert the 8(a) Program into a double dipping opportunity. *See* J.A. 15-17 (discussing the "social disadvantages stemming from his service-disabled veteran status"). 15 U.S.C. § 657f-1 exists to assist small, service-disabled veteran owned businesses. And Appellants have benefitted from that program immensely. *See* J.A. 58-61 (discussing the fact that Appellants have been awarded 3,630 contracts totaling nearly $130 million since 2006—$76,059,043 of which was awarded through the Service-Disabled Veteran Owned Small Business Program).

In contrast, the 8(a) Program was not created to assist small, service-disabled veteran owned businesses. It was created to assist eligible, socially

and economically disadvantaged small business owners. Yet, as the district court held, Appellants are simply ineligible for the program because of their failure to allege economic disadvantage and their inability to prove social disadvantage—the core requirements that must be met for admission into the program.

Therefore, we affirm the determination of the district court that Appellants failed to allege causation.

**3.**

**Redressability**

For Appellants to establish redressability, "'it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'" *Laufer*, 60 F.4th at 161 (quoting *Lujan*, 504 U.S. at 561). "Additionally, where injunctive relief is sought, the plaintiff must show a 'real or immediate threat that [they] will be wronged again.'" *Id.* (quoting *City of L.A. v. Lyons*, 461 U.S. 95, 111 (1983)).

The district court held that Appellants failed to plausibly allege that striking down the race conscious presumption would redress Appellants' alleged injury. Nor did the district court accept Appellants' argument that the presumption made it less likely that Appellants would be granted 8(a) Program eligibility, which the district court called "pure speculation." J.A. 173.

Appellants argue that the elimination of the presumption of social disadvantage would redress the difficulty that they experienced in getting into the 8(a) Program. The Government counters that even if Appellants are granted the relief sought—an

injunction against the presumption—Appellants' position would not change because, as the district court pointed out, the presumption is severable from the rest of the regulation, which would simply continue to operate without the presumption and would continue to bar Appellants from the program based on Hierholzer's previous and continued lack of social and economic disadvantage. *See* Oral Argument at 14:56-15:36 ("[The] relief [Appellants] seek . . . happened over a year ago . . . . [And Appellants] have already twice failed to make [a showing of social disadvantage]. They are in no different a position today than they were when they previously applied to the program . . . . Tellingly, in the year since the presumption has been eliminated, [Appellants] have not reapplied to the program. Because they failed to allege that they can satisfy those race neutral eligibility requirements for the 8(a) Program, their injury cannot be redressed.").

Appellants counter that their prior "rejections for failure to satisfy the social disadvantage criterion underscore the inherent inequality of SBA's process." Appellants' Reply Br. at 13.

But it is clear that a favorable decision would not redress Appellants' claimed injury. Despite Appellants' attempts to argue otherwise, their prior rejections underscore their ineligibility for the 8(a) Program. Even if Appellants were granted an injunction, the race neutral criteria that Appellants would face upon application to the 8(a) Program would remain the same. *See* 15 U.S.C. § 637(a)(4)(A)(i)(I) (requiring all applicants for the 8(a) Program to be both "socially *and* economically disadvantaged" (emphasis supplied)). Therefore, Appellants would

still be required to demonstrate social and economic disadvantage, among other requirements, to be admitted to the program—which they cannot do.

On multiple occasions, Appellants have been unable to meet the program requirements—hurdles that would continue to bar Appellants from the 8(a) Program even if their requested relief were granted. For that reason, Appellants have not and cannot show a "real or immediate threat that [they] will be wronged again" because they were not wronged in the first place—they were simply ineligible. *Laufer*, 60 F.4th at 161 (internal quotation marks omitted) (citation omitted). Because Appellants' claimed injury cannot be redressed by a favorable decision, Appellants have failed to establish the redressability requirement of standing.

Therefore, there is no "genuine, live dispute between adverse parties." *Laufer*, 60 F.4th at 161. Consequently, we affirm the district court's determination that Appellants have failed to establish injury in fact, causation, or redressability, and they lacked Article III standing to sue. We affirm the district court's dismissal based on a lack of subject matter jurisdiction.

## IV.

For these reasons, the district court's order is reversed in part and affirmed in part. We remand for further proceedings consistent with this opinion.

*REVERSED IN PART, AFFIRMED IN PART, AND REMANDED*

Case 2:23-cv-00024-RAJ-DEM Document 49
Filed 02/15/24

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

| | |
|---|---|
| MARTY HIERHOLZER, an individual<br>and<br>MJL Enterprises, LLC, a Virginia corporation<br>Plaintiffs,<br><br>V.<br><br>ISABEL GUZMAN, in her official capacity as Administrator of the Small Business Administration<br>and<br>SMALL BUSINESS ADMINISTRATION,<br>Defendants. | Civil Action No. 2:23-cv-00024 |

**MEMORANDUM OPINION AND ORDER**

Before the Court is a Motion to Dismiss the Complaint pursuant to the Federal Rules of Civil Procedure ("FRCP") Rule 12(b)(1) and 12(b)(6) filed by Isabel Guzman, Administrator of the Small Business Administration, and the Small Business Administration ("SBA") (collectively, "Defendants"). ECF Nos. 19, 20 ("Defs.' Mot."). Marty Hierholzer

("Hierholzer"), an individual, and MJL Enterprises. LLC ("MJL"), a Virginia corporation (collectively "Plaintiffs") filed a response to Defendants' Motion. ECF No. 26 ("Pls.' Resp."). Defendants filed their reply. ECF No. 27 ("Defs.' Reply"). Plaintiffs also filed their Notice of Supplemental Authority. ECF No. 34 ("Pls.' Supp. Auth."). On January 31, 2024, the Court heard oral argument on the Motion. The Court has considered the parties' memoranda. For the reasons stated herein, Defendants' Motion to Dismiss is **GRANTED**.

## I. FACTUAL AND PROCEDURAL HISTORY

Relevant to Defendants' Motion to Dismiss and stated in the light most favorable to Plaintiffs, the following alleged facts are drawn from the Complaint and attachments thereto.

*Marty Hierholzer and MJL Enterprises*

On January 18, 2023, Hierholzer and MJL filed their Complaint against Defendants. ECF No. 1 ("Pls.' Compl."). In 2006, Hierholzer started his business, MJL, which provides government contracting services to the United States military. *Id.* ¶ 14. Allegedly, MJL is a small business, and Hierholzer is the president and chief executive officer. *Id.* Hierholzer is a service-disabled veteran who served twenty-two years in the Navy as a saturation diver. *Id.* ¶¶ 15-16. Hierholzer sustained many injuries in the line of duty, rendering him disabled. *Id.* ¶¶ 16-19. The Department of Veteran Affairs ("VA") rates Hierholzer as 60% disabled. *Id.* After Hierholzer retired in 2002, he started his own business providing "medical, maintenance, and repair equipment to military bases and VA hospitals. MJL also delivers office supplies to

VA hospitals and offices and high-tech safety and security equipment to first responders. Additionally, MJL provides logistical labor and personnel services for VA hospitals." *Id.* ¶¶ 20-22.

*The Small Business Administration 8(a) Program*

Congress enacted the Small Business Act of 1953 ("the Act") to protect small businesses and preserve the free competitive enterprise system. 15 U.S.C. § 637. The Act established various programs including the 8(a) Program. Section 8(a) of the Act authorizes the SBA to enter into agreements for goods and services with other federal agencies, and to subcontract those agreements to socially and economically disadvantaged small business concerns. Pls.' Compl. ¶¶ 27-28. The purpose of the 8(a) program includes "promot[ing] the business development of small business concerns owned and controlled by socially and economically disadvantaged individuals so that such concerns can compete on an equal basis in the American economy." 15 U.S.C. § 631(f)(2). Socially disadvantaged individuals are "those who 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." 15 U.S.C. § 637(a)(5). Hierholzer believed his business would qualify because he allegedly had been subjected to "cultural bias" because of his service-disabled veteran status. Pls.' Compl. ¶ 32. Economically disadvantaged individuals are those "socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities." *Id.* ¶ 33; 15 U.S.C. § 637(a)(6).

Section 631(f) of the Act contains additional racial classification for those who are socially disadvantaged, including members of certain racial groups that enjoy a rebuttable presumption such as "Black Americans, Hispanic Americans, Native Americans, Indian tribes, Asian Pacific Americans, Native Hawaiian Organizations, and other minorities." Pls.' Compl. ¶ 34; 15 U.S.C. § 631(f)(1). An individual in those groups must demonstrate that "he or she has held himself or herself out, and is currently identified by others, as a member of a designated group if SBA requires it." Pls.' Compl. ¶ 42; 13 C.F.R. § 124.103(b)(2). "The presumption of social disadvantage may be overcome with credible evidence to the contrary." 13 C.F.R. § 124.103(b)(3).

Other groups may petition the SBA to add them as a presumptively socially disadvantaged group. Pls.' Compl. ¶¶ 43-44; 13 C.F.R. § 124.103(c). "Such individual should present corroborating evidence to support his or her claim(s) of social disadvantage where readily available." 13 C.F.R. § 124.103(c). Such individual must include "at least one objective distinguishing feature that contributed to social disadvantage," must be based on treatment in American society that's chronic and substantial, and negatively impacted their entry or advancement in the business world. *Id.* Then SBA would decide whether that group should be considered presumptively disadvantaged. *Id.* § 124.103(d). Allegedly, the SBA has received and rejected many "petitions from Hasidic Jews, women, and Iranians, while it has accepted petitions from Asian Indians (the highest income racial group in the United States) and Sri Lankans." Pls.' Compl. ¶ 45. In 1987, the SBA

allegedly "rejected a petition from service-disabled veterans to be considered presumptively disadvantaged." *Id.* ¶ 46.

*Hierholzer's experience applying for the 8(a) Program*

Hierholzer is of German and Scottish descent and not a member of one of the groups listed as socially disadvantaged. *Id.* ¶ 47. Hierholzer must put forth evidence to support that he is socially disadvantaged, including race, ethnicity, gender, and physical handicap. *Id.* ¶¶ 48-50; *see also* 13 C.F.R. § 124.103(c)(2). Additionally, his disadvantage must be based on treatment in American society that's chronic and substantial and has negatively impacted his entry or advancement in the business world. Pls.' Compl. ¶¶ 51-53; *see also* 13 C.F.R. § 124.103(c)(2). Allegedly, Hierholzer applied in 2009 and 2016 for 8(a) Program eligibilty, and he presented evidence of his disabilities and the disadvantages he faced in his career and personal life. Pls.' Compl. ¶ 54. The SBA denied both applications, and he sought reconsideration of the 2016 denial, which the SBA's Office of Hearings and Appeals affirmed in 2017 because Hierholzer failed to show that his disability resulted in social disadvantage. *Id.* ¶ 55; *see also In the Matter of: MJL Enterprises, LLC, Petitioner*, SBA No. BDPE-556, 2017 WL 8231365 (Dec. 18, 2017). Hierholzer allegedly "became aware that while he was denied eligibility for the 8(a) Program, others were eligible based on their race without having to prove specific social disadvantages." Pls.' Compl. ¶ 63. Hierholzer believes that he would have been accepted into the 8(a) Program "if he belonged to one of the favored races listed in 15 U.S.C. § 631(f)(1)(B), (C) and 13 C.F.R. § 124.103(b)(1)." *Id.* ¶ 64. Allegedly, "the

statute deprived MJL from standing on equal footing for 8(a) Program eligibility and competing for exclusive 8(a) contracting opportunities." *Id.* ¶ 65. Hierholzer believes that the "SBA would accept more program participants based on individualized evidence of disadvantage" rather than racial preference. *Id.* ¶ 66.

*MJL's Injury*

Hierholzer is not a member of one of the classified racial groups, making MJL "unable to compete for contracts under the 8(a) Program that it could successfully procure and perform if allowed to do so." *Id.* ¶ 70. MJL cannot access benefits provided to the 8(a) Program, including "access to business development assistance, free training opportunities through the SBA, and federal surplus property access." *Id.* ¶ 71. MJL is allegedly at a competitive disadvantage when competing for government contracts and does not enjoy a presumption of disadvantage. *Id.* ¶ 73.

Plaintiffs accuse Defendants of violating the Constitution by denying Plaintiffs the ability to participate in the 8(a) Program based on race. Pls.' Compl. Additionally, the SBA allegedly arrogated to itself power beyond what Congress authorized to establish racial classifications and preferences. *Id.* If Congress did give SBA that power, then Plaintiffs allege that Congress violated the United States Constitution nondelegation doctrine. *Id.* Specifically, Plaintiffs assert five claims against Defendants:

Claim 1. The presumption that designated groups are socially disadvantaged denies MJL equal protection in violation of the Fifth Amendment (*Id.* ¶¶ 76-90);

Claim 2. The racial classifications established by the 8(a) Program and implementing the regulations violate the Fifth Amendment's equal protection guarantee (*Id.* ¶¶ 91-98);

Claim 3. The SBA's 8(a) Program rule claiming authority to decide which racial groups enjoy a presumption of social disadvantage (13 C.F.R. § 124.103(b)(1)) violates the Administrative Procedure Act ("APA") (5 U.S.C. § 706(2)) because it exceeds the agency's statutory authority (*Id.* ¶¶ 99-106);

Claim 4. The SBA's 8(a) Program is an unconstitutional exercise of legislative power (Violation of the Nondelegation Doctrine, U.S. Const. art. I, § 1) (*Id.* ¶¶ 107-112);

Claim 5. The SBA 8(a) regulations are arbitrary and capricious in violation of the APA (5 U.S.C. § 706(2)(a)) (*Id.* ¶¶ 113-117).

Plaintiffs sues Isabel Guzman in her official capacity and the SBA as a cabinet-level agency of the United States government. *Id.* ¶¶ 12-13.

## II. LEGAL STANDARD

### A. Federal Rule of Civil Procedure 12(b)(1)

Federal Rule of Civil Procedure 12(b)(1) provides for the dismissal of actions that lack subject matter jurisdiction. Federal courts are courts of limited subject matter jurisdiction. *See Pinkley, Inc. v. City of Frederick, Md.*, 191 F.3d 394, 399 (4th Cir. 1999). Accordingly, "before a federal court can decide the merits of a claim, the claim must invoke the

jurisdiction of the court." *Miller v. Brown*, 462 F.3d 312, 316 (4th Cir. 2006). For a 12(b)(1) motion, a defendant can challenge subject matter jurisdiction in two ways. First, a defendant may argue that "a complaint simply fails to allege facts upon which subject matter jurisdiction can be based." *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982). "[A]ll the facts alleged in the complaint are assumed to be true and the plaintiff, in effect, is afforded the same procedural protection as he would receive under a Rule 12(b)(6) consideration." *Id.*

Second, a defendant may argue that the jurisdictional allegations in the complaint are not true. *Id.* "A trial court may then go beyond the allegations of the complaint and in an evidentiary hearing determine if there are facts to support the jurisdictional allegations." *Id.* The burden is on the plaintiff to prove subject matter jurisdiction and a trial court may consider evidence "by affidavit, depositions or live testimony without converting the proceeding to one for summary judgment." *Id.* "As the Supreme Court has explained with respect to such situations, a trial court should dismiss under Rule 12(b)(1) only when the jurisdictional allegations are clearly . . . immaterial, made solely for the purpose of obtaining jurisdiction or where such a claim is wholly unsubstantial and frivolous." *See Kerns v. United States*, 585 F.3d 187, 193 (4th Cir. 2009) (internal citation and quotation omitted).

**B. Federal Rule of Civil Procedure 12(b)(6)**

Federal Rule of Civil Procedure 12(b)(6) provides for the dismissal of actions that fail to state a claim upon which relief can be granted. Considering a Rule 12(b)(6) motion, courts may only rely upon the

complaint's allegations and those documents attached as exhibits or incorporated by reference. *See Simons v. Montgomery Cnty. Police Officers*, 762 F.2d 30, 31 (4th Cir. 1985). Courts will favorably construe the allegations of the complainant and assume that the facts alleged in the complaint are true. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007). However, a court "need not accept the legal conclusions drawn from the facts," nor "accept as true unwarranted inferences, unreasonable conclusions, or arguments." *Eastern Shore Mkts., Inc., v. J.D. Assocs. Ltd. P'ship*, 213 F.3d 175, 180 (4th Cir. 2000).

A complaint need not contain "detailed factual allegations" to survive a motion to dismiss, but the complaint must incorporate "enough facts to state a belief that is plausible on its face." *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Giacomelli v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008). This plausibility standard does not equate to a probability requirement, but it entails more than a mere possibility that a defendant has acted unlawfully. *Ashcroft v. Iqbal*, 556 U.S. 662, 611-19 (2009). Accordingly, the plausibility standard requires a plaintiff to articulate facts that, when accepted as true, demonstrate that the plaintiff has stated a claim that makes it plausible he is entitled to relief. *Francis v. Giacomelli*, 588 F.3d 186, 193 (4th Cir. 2009) (quoting *Iqbal*, 556 U.S. at 611, and *Twombly*, 550 U.S. at 557). To achieve factual plausibility, plaintiffs must allege more than "naked assertions . . . without some further factual enhancement." *Twombly*, 550 U.S. at 557. Otherwise, the complaint will "stop[] short of the line between possibility and plausibility of entitlement to relief." *Id.*

## III. DISCUSSION

Under Rule 12(b)(1), Defendants move to dismiss all five Claims for lack of standing. Defs.' Mot. at 6. Under Rule 12(b)(6), Defendants move to dismiss Claims One, Two, and Four of the Complaint for failure to state a claim upon which relief can be granted. *Id.* The Court will address whether the Claims lack standing before addressing the plausibility of each Claim.

### A. Standing

As an initial matter, federal district court has jurisdiction to hear cases and controversies arising under the Constitution, laws, or treaties of the United States. U.S. Const. Art. III § 2. "One element of the case-or-controversy requirement is that plaintiffs must establish that they have standing to sue." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013) (internal citations and quotations omitted). Article III standing is designed to "prevent the judicial process from being used to usurp the powers of the political branches." *Id.* "The federal judicial power is not an unconditioned authority to determine the constitutionality of legislative or executive acts." *Carpenter v. Barnhart*, 894 F.2d 401 (4th Cir, 1990).

To establish standing, a plaintiff must allege: "(1) an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant ["causation"], and (3) that is likely to be redressed by a favorable judicial decision." *Buscemi v. Bell*, 964 F.3d 252, 258 (4th Cir. 2020) (internal citation and quotation omitted). These requirements ensure "that the plaintiff has a personal stake in the outcome of the controversy." *Id.* In this case, Plaintiffs allege that the SBA denied them the opportunity to participate in the 8(a) Program based

on race. Pls.' Compl. ¶ 4. However, Defendants argue that Plaintiffs lack standing because "they have not plausibly alleged any of the three elements that are required to establish Article III standing." Defs.' Mot. at 8. The Court will address the elements of standing separately.

*1. Injury in Fact*

According to the Complaint, Plaintiffs assert that the SBA has denied them the opportunity to participate in the 8(a) Program based on race. Pls.' Compl. ¶ 4. Further, Plaintiffs assert that the statutes and regulations for the 8(a) Program prevent MJL from "standing on equal footing for the 8(a) Program eligibility and then from competing for exclusive 8(a) contracting opportunities based on race." *Id.* ¶ 67. Plaintiffs also assert that Hierholzer is not a member of a group that SBA classifies as socially disadvantaged, which puts MJL at a "competitive disadvantage when competing for government contracts." *Id.* 70-73.

Defendants argue that "Plaintiffs fail to point to any specific loss of business and, thus, fail to sufficiently allege an injury in fact." Defs.' Mot. at 17. Additionally, Defendants argue that Plaintiffs fail to allege that MJL ever competed against an 8(a) Program participant for a contract or that they lost any bids to an 8(a) Program participant. *Id.* Plaintiffs respond that their injury is "the denial of equal treatment on the basis of race." Pls.' Resp. at 10. Additionally, Plaintiffs argue that Defendants are wrong in asserting that the "race-based presumption of social disadvantage was not a complete bar to contracts set aside lor 8(a) business." *Id.* Defendants replied that Plaintiffs fail to allege that they are "able

and ready to bid on any Section 8(a) [P]rogram contracts" and the harms Plaintiffs allegedly are suffering are "too speculative to constitute an injury in fact." Defs.' Reply at 2.

To prove injury in fact, a plaintiff must show that the injury is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). "The threatened injury must be certainly impending, and allegations of possible future injury are insufficient." *Buscemi*, 964 F.3d at 259 (alterations omitted). "An injury reliant on a highly attenuated chain of possibilities does not qualify as being certainly impending." *Id.* (alterations omitted). "When a plaintiff challenges the constitutionality of a statute, the plaintiff must show that there is a realistic danger that the plaintiff will sustain a direct injury as a result of the terms of the statute." *Id.* (alterations omitted). Furthermore, when a set-aside program is at issue, "the 'injury in fact' is the inability to compete on an equal footing in the bidding process, not the loss of a contract." *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 666 (1993). Therefore, a plaintiff challenging a set-aside program need only to "demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis." *Id.*

Here, Plaintiffs fail to allege that they lost a contract bid because of the race-conscious presumption to join the 8(a) Program. Plaintiffs' injury is not "concrete" or "actual or imminent" because Plaintiffs have not alleged in their Complaint any specific contract bids that they lost. Additionally,

Plaintiffs fail to allege that they meet the requirements of "economically disadvantaged."[1] *See generally* Pls.' Compl. Plaintiffs' Complaint lacks any allegations that they are economically disadvantaged based on the factors listed in 13 C.F.R. § 124.104. Defendants provided documentation noting that Plaintiffs have participated in the service-disabled veteran-owned small business program and awarded roughly $130 million in contracts. *See* Defs.' Mot. at Exs. 1, 2. Since Plaintiffs fail to allege that they are economically disadvantaged, the race conscious presumption could not have prevented Plaintiffs from being accepted into the 8(a) Program.

Unlike the *City of Jacksonville*, the plaintiffs could not compete for set-aside contracts because a discriminatory policy prevented them from doing so. *City of Jacksonville*, 508 U.S. at 658. The court held that the plaintiffs suffered an injury because the program served as a barrier preventing the plaintiffs from participating. *Id.* at 667-68. In this case, the 8(a) Program does not pose a barrier to Plaintiffs, like the plaintiff in the *City of Jacksonville*, because anyone can participate in the 8(a) Program, no matter their race or gender, if they submit evidence demonstrating social and economic disadvantage.

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[1] Under 13 C.F.R. § 124.104, each individual claiming economic disadvantage must submit a narrative and personal financial information. The SBA will consider the following: (1) the individual's average adjusted gross income cannot exceed $400,000 over three years preceding the submission of an application; (2) the individual's net worth must be less than $850,000; (3) the fair market value of an individual's assets must not exceed $6.5 million; and (4) any asset transfers within two years. *Id.*

The barrier is Plaintiffs' own failure to meet the 8(a) Program eligibility requirements—social and economic disadvantage. Additionally, Plaintiffs have not shown that they are ready and able to bid on the 8(a) Program contracts. *City of Jacksonville*, 508 U.S. at 666. Therefore, Plaintiffs fail to allege an injury in fact.

*2. Causation*

Plaintiffs' allegations in the Complaint are the same as above. *See* Pls.' Compl. ¶¶ 67-75. Defendants argue that Plaintiffs cannot trace their alleged injury to the race-conscious presumption. Defs.' Mot. at 9. Additionally, Defendants argue that Plaintiffs fail to allege that they can participate in the 8(a) Program without satisfying the race-conscious presumption. *Id.* Plaintiffs respond that the 8(a) Program imposes hurdles for Hierholzer because of his race. Pls.' Resp. at 12. Additionally, Plaintiffs argue that Hierholzer must make an additional showing since he is not a member of one of the racial or ethnic groups. *Id.* Plaintiffs also argue that Hierholzer meets the eligibility requirements for economic disadvantage. *Id.* Defendants replied that Plaintiffs cannot cure their failure for not alleging Hierholzer's economic status to prove that he is economically disadvantaged. Defs.' Reply at 8.

To prove causation, Plaintiffs must demonstrate "a causal connection between the injury and the conduct complained of." *Interstate Traffic Control v. Beverage*, 101 F. Supp. 2d 445, 451 (S.D.W. Va. 2000). This means that "it must be likely that the injury was caused by the conduct complained of and not by the independent action of some third party not before the

court." *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 154 (4th Cir. 2000).

Here, Plaintiffs fail to allege that Defendants' use of the race-conscious presumption caused their alleged injuries. Plaintiffs have not alleged that they can compete for the 8(a) Program contracts if the race-conscious presumption was removed because they have not alleged facts demonstrating social and economic disadvantage. In *SRS Techs., Inc. v. U.S. Dep't of Def.*, the plaintiff argued that the race-conscious presumption of social disadvantage prohibited the plaintiff from participating in the 8(a) Program for race-based reasons. 112 F.3d 510, 1997 WL 225979, at *1 (4th Cir. 1997). The court found that the plaintiff was ineligible to participate because its owner is a multimillionaire who failed to meet the economic disadvantage requirement, which is a race-neutral criterion. *Id.* Thus, the court held the race-conscious presumption did not cause the plaintiff to not qualify for the 8(a) Program. *Id.* Like the plaintiff in *SRS*, Plaintiffs fail to meet a race-neutral criterion for participation in the 8(a) Program. The Complaint does not state whether Plaintiffs meet the eligibility requirements for economically disadvantaged. *See generally* Pls.' Compl.; *see also Iqbal*, 556 U.S. at 678 (stating a complaint is not "suffice if it tenders 'naked assertions' devoid of 'further factual enhancement.'") (alterations omitted).

Recognizing this, Plaintiffs filed an affidavit from Hierholzer, which they attached to their response to Defendants' Motion to Dismiss. Although the Court may consider documents presented on the issue of jurisdiction, which Plaintiff failed to attach to their Complaint, the Court finds the affidavit insufficient to

establish that Plaintiffs are economically disadvantaged. *See Beck v. McDonald*, 848 F.3d 262, 270 (4th Cir. 2017) (stating courts may consider evidence beyond the complaint's allegations if there are facts to support or refute the jurisdictional allegations). Hierholzer states that he "believe[s]" he meets the requirements for economically disadvantaged. Hierholzer's beliefs are not enough to demonstrate that he is economically disadvantaged. Even if the Court accepts the affidavit as true, it fails to discuss asset transfers within two years, a factor that SBA will consider in determining if an individual is economically disadvantaged.[2] This leaves open the possibility that Plaintiffs are not economically disadvantaged. Nevertheless, the affidavit is inadequate to cure deficiencies in the Complaint. *U.S. ex rel. Nathan v. Takeda Pharms. N. Am., Inc.*, 707 F.3d 451, 458-59 n.8 (4th Cir. 2013) (stating that a "plaintiff cannot cure pleading deficiencies in the [] complaint with later-filed supporting documentation on a motion to dismiss.").

Furthermore, Plaintiffs have not alleged social disadvantage status in absence of the race-conscious presumption. Plaintiffs applied for the 8(a) Program twice and were denied entry each time. The SBA denied Plaintiffs because they failed to show that they

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[2] *See* 13 C.F.R. § 124.104(c)(1)(i) (stating "SBA will attribute to an individual claiming disadvantaged status any assets which that individual has transferred . . . for less than fair market value, within two years prior to [applying] . . . or within two years of a Participant's annual program review, unless the individual . . . can demonstrate that the transfer is to or on behalf of an immediate family member for that individual's education, medical expenses, or some other form of essential support.").

are socially disadvantaged, not because of their race.[3] Plaintiffs cannot establish causation because they fail to allege the presumption that certain racial and ethnic groups enjoy is causally related to their alleged injury. Therefore, Plaintiffs fail to allege causation.

*3. Redressability*

**A. Motion to Dismiss**

Plaintiffs allege they will continue to suffer irreparable harm if the racial classification remains in effect. Pls.' Compl. ¶ 74. Additionally, Plaintiffs request the Court to declare the racial classifications unconstitutional and to "permanently enjoin enforcement and administration of 15 U.S.C. §§ 631(f)(1)(B) and 637(a)(5), (8) to the extent that they employ a racial preference." *Id.* at 20. Defendants argue that Plaintiffs would be in the same place they are in now if the Court eliminates the race-conscious presumption because they have not sufficiently alleged social disadvantage status. Defs.' Mot. at 13. Plaintiffs respond that a judicial decree directing Defendants to discontinue using the racial presumption would redress their injury. Pls.' Resp. at 14. Defendants argue eliminating the race-conscious presumption would not change the competition Plaintiffs face for government contracts. Defs.' Reply at 11. Additionally, Defendants argue that "Plaintiffs would still compete on the same footing with the same

[3] *See In the Matter of: MJL Enterprises. LLC, Petitioner*, 2017 WL 823 1365, at *7 (concluding "Petitioner has failed to offer evidence showing that his uncontested disability resulted in a social disadvantage impacting his advancement in the business world.").

number of firms in the 8(a) [P]rogram that they compete against today." *Id.*

To prove redressability, Plaintiffs must show that the relief sought will provide redress for the alleged injury. *See Interstate Traffic Control*, 101 F. Supp. 2d at 451. The Court must have the power to provide the requested relief Plaintiffs are seeking. *See Buscemi*, 964 F.3d at 259. Redressability must be "likely" and not "speculative." *See Lujan*, 504 U.S. at 561.

Here, Plaintiffs fail to show that they would be eligible for the program without the race-conscious presumption. Plaintiffs would still have to demonstrate social and economic disadvantage to get into the 8(a) Program. Plaintiffs have not plausibly alleged that striking down the presumption would redress their alleged injury. Additionally, it is pure speculation that the presumption makes it less likely MJL will be granted 8(a) eligibility and that MJL cannot compete for contracts that it could successfully procure and perform. Removing the presumption "would not alter the number or identity of socially and economically disadvantaged individuals eligible to participate." *See Interstate Traffic Control*, 101 F. Supp. 2d at 453. The race-conscious presumption is severable from the rest of the 8(a) Program, and the 8(a) Program would remain operative without the presumption because Plaintiffs would still have to demonstrate social and economic disadvantage. *See e.g.*, *Cache Valley Elec. Co. v. Utah Dep't of Transp.*, 149 F.3d 1119, 1123 (10th Cir. 1998) (stating the disputed preferences are severable from the program because the plaintiff would still have to meet the requirements to participate in the program). Therefore, Plaintiffs fails to allege redressability.

### B. January 31st Oral Argument

On January 31, 2024, the Court held oral argument on Defendants' Motion. ECF No. 46. During oral argument, Defendants stated that since a sister court enjoined Defendants from using the race-conscious presumption,[4] Defendants have "purged" the presumption from the 8(a) Program process. *See* Excerpt of Proceedings at 3. According to Defendants, the SBA used the presumption in three stages: 1) at the application stage, 2) at the award stage, and 3) at the annual review stage. *Id.* However, the presumption is no longer involved in the 8(a) Program. *Id.* Defendants assert that "each individual applicant, regardless of their race or ethnicity, has to go through the exact same process to establish social and economic disadvantage. No change regardless of your racial or ethnic background. Each application is judged independently of that." *Id.* at 4:3-7.

To comply with the *Ultima* Court's injunction, Defendants paused all applications of individuals to the 8(a) Program. *Id.* Additionally, the SBA contacted any individuals accepted into the 8(a) Program through the presumption and required them to reapply without the use of the presumption, demonstrating social and economic disadvantage—the same process new applicants must go through. *Id.* at 4-5. Further, approximately 3,900 individuals were in the program at the time, and if they chose to remain, they were required to go through the same process described above. *Id.* at 5.

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[4] *See Ultima Servs. Corp. v. U.S. Dep't of Agric.*, No. 2:20-cv-00041, 2023 WL 4633481 (E.D. Tenn. July 19, 2023)

Given that the SBA removed the race-conscious presumption, there is nothing for the Court to redress. Plaintiffs assert that the race-conscious presumption hinders their ability to get accepted into the 8(a) Program, and for that same reason, the race-conscious presumption is causing their injury. *See* Pls.' Reply; *see also* Excerpt of Proceedings at 13. Further, since the race-conscious presumption is allegedly injuring them, then removal of the race-conscious presumption would redress their injury. *See* Pls.' Reply; *see also* Excerpt of Proceedings at 13. However, Defendants stated on record that they are no longer using the race-conscious presumption. Plaintiff did not rebut or challenge these representations Defense Counsel made to the Court. Since the race-conscious presumption is no longer causing Plaintiffs alleged injury, then there is nothing to redress.

As the Court stated previously, the Constitution limits federal courts jurisdiction to cases and controversies. U.S. Const. Art. III § 2. "A corollary to this case-or-controversy requirement is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 71, (2013) (internal citations and quotations omitted). "If an intervening circumstance deprives the plaintiff of a 'personal stake in the outcome of the lawsuit,' at any point during litigation, the action can no longer proceed and must be dismissed as moot." *Id.* at 72 (internal citation omitted). Here, the SBA changed the 8(a) Program application and removed the race-conscious presumption from all stages of the process. Plaintiffs no longer have a personal stake in the

outcome of this litigation. Therefore, Plaintiffs claim is moot, and they fail to allege redressability.

Since Plaintiffs fail to meet the standing requirements, this Court lacks subject matter jurisdiction to entertain this dispute. *See Just. 360 v. Stirling*, 42 F.4th 450, 458 (4th Cir. 2022) ("No matter how interesting or elegant a party's argument, the federal courts have no power to breathe life into disputes."). Thus, Plaintiffs' Complaint is dismissed.

## IV. CONCLUSION

Based on the foregoing reasons, Defendants' Motion to Dismiss is **GRANTED**. ECF Nos. 19, 20. In view of the Court's ruling on this Motion, Defendants' Motion to Stay is **DENIED AS MOOT**. ECF No. 36

The Clerk is **DIRECTED** to send a copy of this Memorandum Opinion and Order to counsel for the Parties.

**IT IS SO ORDERED.**

s/
Raymond A. Jackson
United States District Judge

Norfolk, Virginia
February *15*, 2024

USCA4 Appeal: 24-1187 Doc: 41 Filed: 03/04/2025

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 24-1187
(2:23-cv-00024-RAJ-DEM)

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

Plaintiffs - Appellants,

v.

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

Defendants - Appellees.

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ORDER

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The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 40. The court denies the petition for rehearing en banc.

For the Court

/s/ Nwamaka Anowi, Clerk

**13 C.F.R. § 124.103**

§ 124.103 Who is socially disadvantaged?

(a) General. Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities. The social disadvantage must stem from circumstances beyond their control.

(b) Members of designated groups.

(1) There is a rebuttable presumption that the following individuals are socially disadvantaged: Black Americans; Hispanic Americans; Native Americans (Alaska Natives, Native Hawaiians, or enrolled members of a Federally or State recognized Indian Tribe); Asian Pacific Americans (persons with origins from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China (including Hong Kong), Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, The Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, or Nauru); Subcontinent Asian Americans (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal); and members of other groups designated from time to time by SBA according to procedures set forth at paragraph (d) of this section. Being born in a country does not, by itself, suffice to make the birth country an individual's country of origin for

purposes of being included within a designated group.

(2) An individual must demonstrate that he or she has held himself or herself out, and is currently identified by others, as a member of a designated group if SBA requires it.

(3) The presumption of social disadvantage may be overcome with credible evidence to the contrary. Individuals possessing or knowing of such evidence should submit the information in writing to the Associate Administrator for Business Development (AA/BD) for consideration.

(c) Individuals not members of designated groups.

(1) An individual who is not a member of one of the groups presumed to be socially disadvantaged in paragraph (b)(1) of this section must establish individual social disadvantage by a preponderance of the evidence. Such individual should present corroborating evidence to support his or her claim(s) of social disadvantage where readily available.

(2) Evidence of individual social disadvantage must include the following elements:

(i) At least one objective distinguishing feature that has contributed to social disadvantage, such as race, ethnic origin, gender, identifiable disability, long-term residence in an environment isolated from the mainstream of American society, or other similar causes not common to individuals who are not socially disadvantaged;

(ii) The individual's social disadvantage must be rooted in treatment which he or she has

experienced in American society, not in other countries;

(iii) The individual's social disadvantage must be chronic and substantial, not fleeting or insignificant; and

(iv) The individual's social disadvantage must have negatively impacted on his or her entry into or advancement in the business world. SBA will consider any relevant evidence in assessing this element, including experiences relating to education, employment and business history (including experiences relating to both the applicant firm and any other previous firm owned and/or controlled by the individual), where applicable.

(A) Education. SBA considers such factors as denial of equal access to institutions of higher education, exclusion from social and professional association with students or teachers, denial of educational honors rightfully earned, and social patterns or pressures which discouraged the individual from pursuing a professional or business education.

(B) Employment. SBA considers such factors as unequal treatment in hiring, promotions and other aspects of professional advancement, pay and fringe benefits, and other terms and conditions of employment; retaliatory or discriminatory behavior by an employer; and social patterns or pressures which have channeled the individual into nonprofessional or non-business fields.

(C) Business history. SBA considers such factors as unequal access to credit or capital, acquisition of credit or capital under commercially unfavorable circumstances, unequal treatment in opportunities for government contracts or other work, unequal treatment by potential customers and business associates, and exclusion from business or professional organizations.

(3) An individual claiming social disadvantage must present facts and evidence that by themselves establish that the individual has suffered social disadvantage that has negatively impacted his or her entry into or advancement in the business world.

(i) Each instance of alleged discriminatory conduct must be accompanied by a negative impact on the individual's entry into or advancement in the business world in order for it to constitute an instance of social disadvantage.

(ii) SBA may disregard a claim of social disadvantage where a legitimate alternative ground for an adverse employment action or other perceived adverse action exists and the individual has not presented evidence that would render his/her claim any more likely than the alternative ground.

Example 1 to paragraph (c)(3)(ii). A woman who is not a member of a designated group attempts to establish her individual social disadvantage based on gender. She certifies that while working for company X, she received less compensation than her male counterpart.

Without additional facts, that claim is insufficient to establish an incident of gender bias that could lead to a finding of social disadvantage. Without additional facts, it is no more likely that the individual claiming disadvantage was paid less than her male counterpart because he had superior qualifications or because he had greater responsibilities in his employment position. She must identify her qualifications (education, experience, years of employment, supervisory functions) as being equal or superior to that of her male counterpart in order for SBA to consider that particular incident may be the result of discriminatory conduct.

Example 2 to paragraph (c)(3)(ii). A woman who is not a member of a designated group attempts to establish her individual social disadvantage based on gender. She certifies that while working for company Y, she was not permitted to attend a professional development conference, even though male employees were allowed to attend similar conferences in the past. Without additional facts, that claim is insufficient to establish an incident of gender bias that could lead to a finding of social disadvantage. It is no more likely that she was not permitted to attend the conference based on gender bias than based on non-discriminatory reasons. She must identify that she was in the same professional position and level as the male employees who were permitted to attend similar conferences in the past, and she must identify that funding for training or professional

development was available at the time she requested to attend the conference.

(iii) SBA may disregard a claim of social disadvantage where an individual presents evidence of discriminatory conduct, but fails to connect the discriminatory conduct to consequences that negatively impact his or her entry into or advancement in the business world.

Example to paragraph (c)(3)(iii). A woman who is not a member of a designated group attempts to establish her individual social disadvantage based on gender. She provides instances where one or more male business clients utter derogatory statements about her because she is a woman. After each instance, however, she acknowledges that the clients gave her contracts or otherwise continued to do business with her. Despite suffering discriminatory conduct, this individual has not established social disadvantage because the discriminatory conduct did not have an adverse effect on her business.

(4) SBA may request an applicant to provide additional facts to support his or her claim of social disadvantage to substantiate that a negative outcome was based on discriminatory conduct instead of one or more legitimate non-discriminatory reasons.

(5) SBA will discount or disbelieve statements made by an individual seeking to establish his or her individual social disadvantage where such statements are inconsistent with other evidence contained in the record.

(6) In determining whether an individual claiming social disadvantage meets the requirements set forth in this paragraph (c), SBA will determine whether:

(i) Each specific claim establishes an incident of bias or discriminatory conduct;

(ii) Each incident of bias or discriminatory conduct negatively impacted the individual's entry into or advancement in the business world; and

(iii) In the totality, the incidents of bias or discriminatory conduct that negatively impacted the individual's entry into or advancement in the business world establish chronic and substantial social disadvantage.

(d) Socially disadvantaged group inclusion—

(1) General. Representatives of an identifiable group whose members believe that the group has suffered chronic racial or ethnic prejudice or cultural bias may petition SBA to be included as a presumptively socially disadvantaged group under paragraph (b)(1) of this section. Upon presentation of substantial evidence that members of the group have been subjected to racial or ethnic prejudice or cultural bias because of their identity as group members and without regard to their individual qualities, SBA will publish a notice in the Federal Register that it has received and is considering such a request, and that it will consider public comments.

(2) Standards to be applied. In determining whether a group has made an adequate showing that it has suffered chronic racial or ethnic

prejudice or cultural bias for the purposes of this section, SBA must determine that:

(i) The group has suffered prejudice, bias, or discriminatory practices;

(ii) Those conditions have resulted in economic deprivation for the group of the type which Congress has found exists for the groups named in the Small Business Act; and

(iii) Those conditions have produced impediments in the business world for members of the group over which they have no control and which are not common to small business owners generally.

(3) Procedure. The notice published under paragraph (d)(1) of this section will authorize a specified period for the receipt of public comments supporting or opposing the petition for socially disadvantaged group status. If appropriate, SBA may hold hearings. SBA may also conduct its own research relative to the group's petition.

(4) Decision. In making a final decision that a group should be considered presumptively disadvantaged, SBA must find that a preponderance of the evidence demonstrates that the group has met the standards set forth in paragraph (d)(2) of this section based on SBA's consideration of the group petition, the comments from the public, and any independent research it performs. SBA will advise the petitioners of its final decision in writing, and publish its conclusion as a notice in the Federal Register. If appropriate, SBA will amend paragraph (b)(1) of this section to include a new group.

Case 2:23-cv-00024 Document 1 Filed 01/18/23

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

| | |
|---|---|
| Marty Hierholzer, an individual; MJL Enterprises, LLC, a Virginia corporation,<br>Plaintiffs,<br><br>v.<br><br>Isabel Guzman, in her official capacity as Administrator of the Small Business Administration; Small Business Administration,<br>Defendants. | Civil Case No. 2:23-cv-00024 |

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

**INTRODUCTION**

1. This case is about the right of small business owner and Navy veteran Marty Hierholzer to equal treatment under the law.

2. Marty is a service-disabled veteran and owner of MJL Enterprises, LLC (MJL), which contracts with the government to provide various services and supplies. He served his country with distinction as a Navy deep sea diver. He has persevered through

mental and physical injuries suffered in that work with dignity and a determination to become a successful government contractor supporting the military.

3. As a service-disabled veteran, Marty faces well-documented disadvantages—social, emotional, and physical.

4. The Small Business Administration (SBA) Business Development Program—commonly known as the "8(a) Program"—purports to help small business owners who have faced social disadvantage with a host of benefits, including the chance to compete for contracts set aside for eligible contractors. Yet the SBA has denied Marty the opportunity to participate in the program in part based on his race.

5. The racial preferences and classifications in the 8(a) Program and implementing regulations transgress the Constitution's "simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (quotation omitted).

6. The SBA, moreover, has arrogated to itself the power beyond its enabling legislation to craft its own system of racial preferences. Not only do the agency's race-based rules exceed statutory authority, they also make arbitrary and capricious distinctions among racial groups divorced from evidence and logic.

7. To the extent Congress did in fact authorize the SBA to establish racial classifications and preferences, based not on findings of fact but unexamined policy judgments about race, Congress has abandoned its legislative prerogative, unconstitutionally delegating fundamental policy decisions and violating the

Constitution's vesting legislative power exclusively in the legislative branch.

## JURISDICTION AND VENUE

8. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 702.

9. The Court has authority to issue declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202.

10. Venue is proper under 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to the claims herein occurred in this District. Venue is also proper under 28 U.S.C. § 1391(e)(1)(B) because Defendants are officers, employees, and agencies of the United States and a substantial part of the events or omissions giving rise to these claims occurred in this District. *See also* 5 U.S.C. § 703 (venue for actions under the Administrative Procedure Act are generally proper in "a court of competent jurisdiction").

## PARTIES

11. MJL Enterprises is a limited liability company organized in the State of Virginia, owned and controlled by Marty Hierholzer. Its principal place of business is located in Virginia Beach, Virginia.

12. Defendant SBA is a cabinet-level agency of the United States government.

13. Defendant Isabel Guzman is the Administrator of the SBA. She is sued in her official capacity.

## GENERAL ALLEGATIONS

**Marty Hierholzer and MJL Enterprises**

14. In 2006, Marty Hierholzer started his business, MJL Enterprises, LLC (MJL), providing government contracting services primarily to the United States military. MJL is legally recognized as a small business under the terms of the 8(a) Program. As its sole owner, Marty remains its president and chief executive officer today.

15. After serving twenty-two years in the Navy, Marty returned to civilian life with permanent injuries sustained in the line of duty. He is proud of his service and determined not to be held back by the injuries that classify him as a service-disabled veteran.

16. Marty served the Navy as a saturation diver, deploying to countless countries to perform highly specialized work at depths of a thousand feet or more below sea level. Deep diving is among the most hazardous jobs, where the intense pressure is equally physical and mental. Alone, the processes of pressurization and depressurization required to work at such depths put debilitating strain on divers' bodies. This is all in addition to the extraordinary pressures and perils of war.

17. For commercial divers alone, the occupational fatality rate is forty times the national average for other professions.

18. It is no surprise then that in the line of duty Marty sustained physical injuries to his knees, lower back, and shoulders; he suffers from hearing loss and tinnitus, along with decreased mobility. The mental impact from stressful events, including combat,

accidents, and losing friends, resulted in clinically recognized depression and anxiety disorders.

19. These injuries and disorders are recognized and documented by Veterans Affairs (VA), rendering Marty a service-disabled veteran in the eyes of the United States government. He is rated as 60% disabled by the VA.

20. Marty retired as a Master Diver in 2002, the highest warfare qualification obtainable by a member of the U.S. Naval diving community.

21. Since his life's work was centered on military service, it was only natural for Marty to start a business whose motto and mission is "serving those who serve." Marty remembers that while he was in the military, government contracting businesses would contract to supply goods or services to the troops, then sometimes fail to deliver, leaving the soldiers high and dry. Marty was determined that MJL would deliver dependably where others fell short.

22. MJL provides medical, maintenance, and repair equipment to military bases and VA hospitals. MJL also delivers office supplies to VA hospitals and offices and high-tech safety and security equipment to first responders. Additionally, MJL provides logistical labor and personnel services for VA hospitals.

23. MJL qualifies as a small business concern owned and controlled by a service-disabled veteran under 15 U.S.C. § 632 and related federal regulations.

24. Marty has sought to use government programs designed to help service-disabled veteran business owners succeed, including through the VA.

25. Because of Marty's veteran status, MJL qualifies for and participates in the VA's service-disabled veteran small business contracting program.

**The SBA 8(a) Program**

26. The SBA's 8(a) Program offers valuable opportunities for MJL and Marty as a service-disabled veteran. He has, therefore, invested time and money to apply for the program, but without success.

**I. The statutory framework**

27. The 8(a) Program provides a host of benefits to socially and economically disadvantaged businesses, including access to exclusive government contracts set aside by the SBA and agencies with which it has partnership agreements.

28. Section 8(a) authorizes the SBA to enter into agreements for goods and services with other government departments and agencies, and to subcontract the performance of those agreements to "socially and economically disadvantaged small business concerns." 15 U.S.C. § 637(a)(1)(A), (B). These contracts can be "sole source" (reserved to one Section 8(a) firm) or competitive within the 8(a) Program, such that only firms qualified for the 8(a) Program can bid. 13 C.F.R. § 124.501(b). The SBA has full discretion to administer this program as it deems "necessary or appropriate."

29. The SBA has granted some federal agencies the authority to contract directly with 8(a) firms.

30. The 8(a) Program is administered by the SBA and other agencies of the federal government pursuant to Section 8(a) of the Small Business Act (15 U.S.C. § 637(a)).

31. The stated purposes of the 8(a) Program include "promot[ing] the business development of small business concerns owned and controlled by socially and economically disadvantaged individuals" and "clarify[ing] and expand[ing] the program for the procurement by the United States of articles, supplies, services, materials, and construction work from small business concerns owned by socially and economically disadvantaged individuals." 15 U.S.C. § 631(f)(2) (2010).

**II. The statute's racial preference**

32. The statute defines socially disadvantaged individuals as "those who 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). Marty believed MJL would qualify for 8(a) participation because he has been subjected to "cultural bias" due to his status as a service-disabled veteran.

33. "Economically disadvantaged individuals are those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities" and are thus a subset of the socially disadvantaged. *Id.* § 637(a)(6)(A). "Economically disadvantaged" is defined broadly enough that almost all small business concerns owned by a socially disadvantaged individual will be considered "economically disadvantaged."

34. The statute also contains an additional racial classification in a presumption that all individuals who are members of certain racial groups are socially disadvantaged: "such groups include, but are not limited to, Black Americans, Hispanic Americans,

Native Americans . . . Asian Pacific Americans . . . and other minorities." *Id.* § 631(f).

**III. The regulation's racial classifications**

35. In addition to the racial groups presumed socially disadvantaged under the statutory presumption, the SBA has designated by regulation that "Subcontinent Asian Americans" are presumptively disadvantaged. 13 C.F.R. § 124.103(b).

36. The regulation also adds detail to the racial groups listed in the statute:

> "Native Americans" are "Alaska Natives, Native Hawaiians, or enrolled members of a Federally or State recognized Indian Tribe."
>
> "Asian Pacific Americans" are "persons with origins from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China (including Hong Kong), Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, The Philippines, U.S. Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, or Nauru."

37. "Subcontinent Asian Americans," a group added exclusively by regulation, are "persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal."

38. The regulation does not specify what subgroups are included within "Black American" or "Hispanic American." However, the SBA relies on the definitions of "Hispanic," "Black," and "White" in the Office of Management and Budget's Directive No. 15,

entitled "Race and Ethnic Standards for Federal Statistics and Administrative Reporting."

39. Under Directive No. 15, "Hispanic" is someone "of Mexican, Puerto Rican, Cuban or South American or other Spanish culture or origin, regardless of race." The Directive does not define "culture or origin," although the SBA does consider individuals with family origins in Portugal or Spain to be Hispanic American.

40. The Directive defines Black Americans as individuals with "origins in any of the black racial groups of Africa."

41. SBA relies on Directive No. 15 despite the directive's exclusive purpose as a tool for record keeping, collection, and presentation of data on race and ethnicity. The directive states that its classifications "should not be interpreted as being scientific or anthropological in nature" and should not "be viewed as determinants of eligibility for participation in any Federal program."

42. SBA can require at its discretion that anyone who claims to be a member of one of these groups enjoying presumptive disadvantage "demonstrate that he or she has held himself or herself out, and is currently identified by others, as a member of a designated group." 13 C.F.R. § 124.103.

**IV. SBA's authority to make additional racial classifications**

43. Under SBA regulation, the SBA may designate "from time to time" any other "identifiable group" as presumptively socially disadvantaged. 13 C.F.R. § 124.103(b)(1), (d).

44. Groups may petition the SBA to be added by regulation as a presumptively socially disadvantaged group. Such groups must present "substantial evidence that members of the group have been subjected to racial or ethnic prejudice or cultural bias." 13 C.F.R. § 124.103(d)(1). The SBA must then determine whether the group has "suffered prejudice, bias, or discriminatory practices" that resulted in "economic deprivation," and the disadvantages faced by the group have "produced impediments in the business world." *Id.* § 124.103(d)(2).

45. The SBA has received a variety of such petitions, most of which it has rejected. For instance, the SBA has rejected petitions from Hasidic Jews, women, and Iranians, while it has accepted petitions from Asian Indians (the highest income racial group in the United States) and Sri Lankans.

46. In 1987, the SBA rejected a petition from service-disabled veterans to be considered presumptively disadvantaged.

**Marty's experience applying for the 8(a) Program**

47. Marty is of German and Scottish descent and therefore is not a member of a group that enjoys a presumption of social disadvantage under the statute and regulations.

48. Thus, Marty must prove social disadvantage to the agency by a preponderance of the evidence.

49. Those like Marty who are not presumed disadvantaged by virtue of their race or ethnicity alone must put forward evidence of the following:

50. At least one "objective distinguishing factor that has contributed to social disadvantage, such as

race, ethnic origin, gender, physical handicap," and so on;

51. The social disadvantage must be based on treatment in "American society;"

52. The disadvantage must be "chronic and substantial;"

53. The disadvantage must have "negatively impacted on his or her entry into or advancement in the business world," such as experiences with education, employment, and business history. *See* 13 C.F.R. § 124.103(c).

54. Marty applied in 2009 and 2016 for 8(a) Program eligibility. He presented evidence regarding his disabilities and the resulting disadvantages that he has faced in his career and personal life.

55. SBA denied both applications. Marty sought reconsideration of the 2016 denial. After reconsideration was denied, Marty appealed to the SBA's Office of Hearings and Appeals, which affirmed denial in 2017.

56. Marty's applications included evidence of multiple incidents of social disadvantage experienced in his business life. For example, he presented evidence that MJL had lost a contract with the New Jersey Department of Transportation after learning of Marty's physical disabilities. Likewise, Marty submitted that he had lost a contract with the United States Air Force for work at Langley Air Force Base because the contract officer knew of Marty's post-war combat depression.

57. Marty has invested substantial money, time, and effort filing multiple applications for MJL to join the 8(a) Program, each time working with 8(a)

Program representatives to ensure he provided appropriate documentation supporting his eligibility, in vain. The SBA has told him repeatedly that he does not qualify, despite its recognition of his disabilities and veteran status.

58. It is broadly accepted by the U.S. Government and the public that people with disabilities suffer social disadvantage daily.

59. As a general matter, veterans face social isolation and separation from mainstream American society. Sixty-four percent of veterans who served in combat feel isolated from civilian life. Eighty-five percent of veterans returning from wartime service carry home the burden of posttraumatic stress disorder. This further widens the gulf between mainstream America and the veterans who return home to a world where they struggle to find belonging and meaning.

60. Marty has experienced these struggles personally. Due to the physical disabilities acquired during his military career, Marty cannot lift more than 25 pounds. He cannot raise his arms above his shoulders. He cannot sit for more than 45 minutes at a time without experiencing excruciating back pain. He faces serious hearing loss that cannot be fixed with current hearing aid technology, affecting interactions with coworkers, customers, family, and friends.

61. Likewise, Marty's psychological disabilities have affected all aspects of his life. These disabilities include depression, anxiety, impaired concentration, indecisiveness, low self-esteem, stress disorder, fatigue, hypersomnia, insomnia, anhedonia, restlessness, and significant weight loss or weight gain. Through grit and determination, Marty has succeeded

despite these limitations, but they have imposed serious handicaps.

62. Marty was denied eligibility for the 8(a) Program after collecting substantial evidence of these facts and demonstrating that he suffered from the well-documented social disadvantages stemming from his service-disabled veteran status.

63. During this period, Marty became aware that while he was denied eligibility for the 8(a) Program, others were eligible based on their race without having to prove specific social disadvantages.

64. Marty would have been accepted into the 8(a) Program without having to prove his social disadvantage if he belonged to one of the favored races listed in 15 U.S.C. § 631(f)(1)(B), (C) and 13 C.F.R. § 124.103(b)(1).

65. The statute enshrining this racial preference, in consort with the broad authority delegated therein to the SBA to add new favored races or groups and set aside contracts as it deems fit, deprived MJL from standing on equal footing for 8(a) Program eligibility and competing for exclusive 8(a) contracting opportunities.

66. While unfair, SBA's denial of Marty's applications is unsurprising. Very few 8(a) Program participants have achieved eligibility through demonstrating disadvantage by a preponderance of the evidence. Most program participants are those businesses that qualify due to the racial presumptions in the statute and regulation. In the absence of the racial preference, SBA would accept more program participants based on individualized evidence of disadvantage.

**Injury to MJL**

67. The statute and regulations described above bar MJL from standing on equal footing for 8(a) program eligibility and then from competing for exclusive 8(a) contracting opportunities based on race.

68. Congress's purported delegation of choosing favored races for preferential treatment to the SBA further prevented MJL from competing on an equal footing for 8(a) Program eligibility and 8(a) contracts.

69. In the absence of the statutory and regulatory racial presumption, MJL would have been equally situated for 8(a) Program eligibility with other businesses regardless of race. The racial presumption makes it less likely that the SBA will grant 8(a) eligibility to MJL.

70. Because Marty is not a member of a group favored as socially disadvantaged by the SBA, MJL is unable to compete for contracts under the 8(a) Program that it could successfully procure and perform if allowed to do so.

71. MJL also cannot access other benefits provided to 8(a) Program companies. These benefits include access to business development assistance, free training opportunities through the SBA, and federal surplus property access.

72. MJL competes with 8(a) Program firms for valuable federal contracts and for third-party suppliers and other services.

73. Because of 8(a) Program benefits, MJL is at a competitive disadvantage when competing for government contracts and third-party contracts with suppliers and other businesses. MJL is also at a competitive disadvantage in accessing the 8(a)

Program itself, as it does not enjoy a presumption of disadvantage, while firms owned and controlled by members of minority groups selected by the SBA do enjoy such a presumption.

74. MJL is harmed by the unconstitutional racial classification scheme of the 8(a) Program and will suffer additional irreparable harm if the scheme remains in effect.

75. MJL has no adequate remedy at law.

**CLAIM FOR RELIEF I: The presumption that designated groups are socially disadvantaged denies MJL equal protection in violation of the Fifth Amendment.**

76. By presuming that certain races are socially disadvantaged, the statute and regulations that comprise the 8(a) Program (15 U.S.C. §§ 631, 637, and 13 C.F.R. § 124.103) deny MJL equal treatment for 8(a) Program eligibility, and further deny MJL the ability to bid on SBA contracts as a member of the 8(a) Program. The 8(a) Program likewise places MJL at a competitive disadvantage in the marketplace vis-à-vis businesses participating in the 8(a) Program. Because the 8(a) Program grants special preferences to businesses based on the race of the business owner, it must satisfy strict scrutiny. It fails that exacting standard. *See* 15 U.S.C. § 637(a); 15 U.S.C. § 631(f); 13 C.F.R. § 124.103(b).

77. The SBA does not have a compelling governmental interest that justifies section 8(a)'s racial classification or the accompanying classification in 13 C.F.R. § 124.103(b).

78. Even if the SBA had a compelling interest, the statutory racial classification is not narrowly tailored to meet any such interest.

79. Neither is the regulatory racial classification narrowly tailored to meet a compelling interest.

80. The SBA cannot produce evidence that shows "the most exact connection between justification and classification" required by strict scrutiny. *Fullilove v. Klutznick*, 448 U.S. 448, 537 (1980) (Stevens, J., dissenting). Defendants cannot show a relevant causal relationship between their alleged evidence and the racial classification of the 8(a) Program, whether in terms of a "compelling interest" to enact the racial classification or "narrow tailoring" of its scope. Moreover, there is no causal relationship between the racial classification and any remedy for alleged discrimination.

81. There is no "strong basis in evidence" demonstrating that the racial classification of section 8(a) is supported by a compelling interest, i.e., that it is supported by probative evidence satisfying strict scrutiny.

82. The effort to alleviate the unproven effects of societal discrimination is not a compelling interest for purposes of strict scrutiny analysis of an alleged equal protection violation.

83. In determining whether a particular contract in an industry is appropriate for the 8(a) Program, the SBA does not examine whether a particular racial group is underrepresented in that industry.

84. The SBA has no evidence of any particular racial or ethnic group being underrepresented in the

industry and other areas in which MJL competes for contracts.

85. Even assuming there was evidence of underrepresentation of particular racial groups here, Defendants have no evidence that such underrepresentation was a consequence of discrimination either by the federal government or in which the federal government was a participant, passive or otherwise.

86. In amending Section 8(a) of the Small Business Act in 1978, Congress did not produce or rely on any evidence that an underrepresentation of particular racial groups in federal government contracting was a consequence of discrimination either by the federal government or in which the federal government was a participant, passive or otherwise.

87. Participation goals set for the 8(a) Program are not related to any evidence of the present effects of past discrimination in any particular industry or in the federal government at large.

88. The reservation of industry contracts has not been necessary to achieve any reasonable goals set by Defendants or Congress.

89. Because of the racial presumption of social disadvantage, most 8(a) Program contractors are owned and controlled by members of the racial or ethnic groups given special advantage by that presumption.

90. The SBA's reserving certain industry contracts for the 8(a) Program is racially motivated.

**CLAIM FOR RELIEF II: The racial classifications established by the 8(a) Program and implementing regulations violate the Fifth Amendment's equal protection guarantee.**

91. The 8(a) Program establishes by statute that groups presumed to be socially disadvantaged "include, but are not limited to, Black Americans, Hispanic Americans, Native Americans, Indian tribes, Asian Pacific Americans, Native Hawaiian Organizations, and other minorities." 15 U.S.C. § 631(f)(1)(C).

92. SBA has made racial classifications in addition to those established by Congress in the statute. *See* 13 C.F.R. § 124.103(b)(1).

93. The statutory racial classifications, by including the catch-all "other minorities," are not narrowly tailored as required by the Fifth Amendment equal protection guarantee. Similarly, the SBA's regulatory decisions regarding which groups enjoy presumptively disadvantaged status and which do not are both under- and over-inclusive and thus are not narrowly tailored.

94. The following is a non-exhaustive list of ways in which the SBA's racial classifications fail narrow tailoring:

95. The list of countries of origin that qualify someone as an "Asian Pacific American" includes China but arbitrarily excludes Mongolia.

96. The racial classification recognizes individuals from Pakistan as presumptively socially disadvantaged but arbitrarily excludes individuals from Afghanistan and other Middle Eastern and North African countries.

97. The racial classification recognizes peoples from various Pacific Island nations such as Samoa and Fiji as presumptively disadvantaged but arbitrarily excludes aboriginal peoples from New Zealand and Papua New Guinea, such as the Maori, the indigenous Polynesian people of New Zealand.

98. The racial classification recognizes peoples from Spain and Portugal (included within the meaning of "Hispanic") as presumptively disadvantaged but arbitrarily excludes all other European countries, including the poorest and most ethnically diverse countries in Europe.

**CLAIM FOR RELIEF III: The SBA's 8(a) Program rule claiming authority to decide which racial groups enjoy a presumption of social disadvantage (13 C.F.R. § 124.103(b)(1)) violates the Administrative Procedure Act (5 U.S.C. § 706(2)) because it exceeds statutory authority.**

99. "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). Thus, "an agency literally has no power to act . . . unless and until Congress confers power upon it." *La. Publ. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). The Administrative Procedure Act (APA) directs a court to "hold unlawful and set aside agency action" that is "in excess of statutory jurisdiction [or] authority." 5 U.S.C. § 706(2)(C).

100. The Small Business Act does not authorize the SBA to make racial classifications.

101. The SBA nonetheless has made racial classifications in addition to those established by Congress in the statute. *See* 13 C.F.R. § 124.103(b)(1).

102. The regulation makes a racial classification by determining which countries of origin qualify to make someone an "Asian Pacific American." Likewise, SBA regulation determines which aboriginal peoples are included as "Native Americans."

103. The regulation also makes a racial classification by adding "Subcontinent Asian American" as a distinct race that enjoys the presumption of social disadvantage, with an accompanying description of which countries of origin qualify someone as a "Subcontinent Asian American."

104. The regulation arrogates to the SBA the authority to designate "members of other groups from time to time" to be included in the list of presumptively disadvantaged minority groups.

105. These racial classifications, as well as the power to create additional racial classifications as the agency sees fit, exceed statutory authority in violation of the Administrative Procedure Act.

106. The agency also exceeds statutory authority by sub-delegating to other federal agencies the authority to choose at whim which, and how many, contracts will be fulfilled by 8(a) Program firms. The statute vests these administrative decisions exclusively in the hands of the SBA.

**CLAIM FOR RELIEF IV: The SBA'S 8(a) Program Is an Unconstitutional Exercise of Legislative Power (Violation of the Non-delegation Doctrine, U.S. Const. Art. I, § 1).**

107. The APA directs courts to "hold unlawful and set aside" an agency's rule that is "contrary to constitutional right." 5 U.S.C. § 706(2)(B).

108. Article I, § 1, of the Constitution says: "All legislative Powers herein granted shall be vested in a Congress of the United States." Congress may not "abdicate or [] transfer to others the essential legislative functions with which it is thus vested." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935).

109. The racial classification of the 8(a) Program is a facially unconstitutional delegation of legislative power to the SBA to the extent it delegates the authority to make or enact racial classifications as the SBA deems "necessary or appropriate" for "those who 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" or "other minorities" and delegates the authority to decide how to determine whether someone belongs to a particular minority group.

110. As operated by the SBA, the 8(a) Program has no criteria by which the SBA can determine that specific racial groups should no longer have members presumed to be socially disadvantaged.

111. In fact, although racial and ethnic groups have been added to those given presumptive 8(a) Program access, no racial or ethnic group has ever been removed from that list on the ground that the group is

no longer adversely affected by the present effects of past discrimination.

112. The 8(a) Program grants the SBA sweeping authority to select which contracts to reserve for the 8(a) Program as the SBA deems "necessary or appropriate." This language does not provide an intelligible principle by which to guide agency discretion and thus violates the nondelegation doctrine.

**CLAIM FOR RELIEF V: The SBA 8(a) regulations are arbitrary and capricious in violation of 5 U.S.C. § 706(a).**

113. The APA requires a reviewing court to hold unlawful and set aside agency action that is arbitrary and capricious.

114. Agency action must have "a rational connection between the facts found and the choice made." *Department of Commerce v. New York*, 139 S. Ct. 2551, 2569 (2019) (quotation omitted). While courts cannot substitute their own judgment for that of the agency's policy choices, such choices must remain "within the bounds of reasoned decisionmaking." *Id.*

115. The racial classifications made by SBA in 13 C.F.R. § 124.103(b)(1), which add and define terms such as "Subcontinent Asian American" in a manner that is both under- and overinclusive, do not fall "within the bounds of reasoned decisionmaking" and therefore are arbitrary and capricious.

116. The method by which the agency determines whether someone is or is not a member of a minority group is likewise arbitrary and capricious. At its discretion, the SBA may require an 8(a) Program

applicant to "demonstrate that he or she has held himself or herself out, and is currently identified by others, as a member of a designated group" that is presumed to be socially disadvantaged. In determining someone's racial or ethnic background, the agency's reliance on the subjective views of the applicant and an undefined set of "others" rather than objective considerations—such as national origin, cultural and linguistic background, family history, and so on—is arbitrary and capricious.

117. SBA's reliance on Directive No. 15, "Race and Ethnic Standards for Federal Statistics and Administrative Reporting," is likewise arbitrary and capricious. The directive expressly warns that its classifications are not "scientific or anthropological in nature" and directs agencies not to use the classifications "as determinants of eligibility for participation in any Federal program." Yet the SBA has done just that.

**PRAYER FOR RELIEF**

Wherefore, Plaintiffs pray for the following relief:

A. Declare that Section 8(a)'s racial classifications found in 15 U.S.C. §§ 637(a)(5), (8), and 631(f)(1)(b) and 13 C.F.R. § 124.103(a), (b)(1) are facially unconstitutional;

B. Permanently enjoin enforcement and administration of 15 U.S.C. §§ 631(f)(1)(B) and 637(a)(5), (8) to the extent that they employ a racial preference in presuming that race alone qualifies an individual as socially disadvantaged and thus eligible to receive the benefits of the 8(a) Program;

C. Permanently enjoin enforcement and administration of 15 U.S.C. § 637(a)(1) to the extent

that it delegates legislative authority exclusively reserved to Congress by empowering the SBA to determine which contracts are awarded exclusively to 8(a) Program participants as the SBA deems "necessary or appropriate;"

D. Permanently enjoin and set aside 13 C.F.R. § 124.103(a), (b) to the extent that it makes racial classifications and employs a racial preference in presuming that race alone qualifies an individual as socially disadvantaged and thus eligible to receive the benefits of the 8(a) Program;

E. Award Plaintiffs the costs of this action and attorneys' fees and expenses; and

F. Grant such other relief as the Court deems just and proper.

DATED: January 18, 2023.

Respectfully submitted,

PACIFIC LEGAL FOUNDATION

s/ Alison Somin

Alison Somin

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Ethan W. Blevins

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*Attorneys for Plaintiffs*

Case 2:23-cv-00024-RAJ-DEM Document 26-1
Filed 04/07/23

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

| | |
|---|---|
| Marty Hierholzer, an individual; MJL Enterprises, LLC, a Virginia corporation,<br>Plaintiffs,<br><br>v.<br><br>Isabel Guzman, in her official capacity as Administrator of the Small Business Administration; Small Business Administration,<br>Defendants. | Civil Case No. 2:23-cv-00024-RAJ-DEM |

**DECLARATION OF MARTY HIERHOLZER IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

I, Marty Hierholzer, declare under penalty of perjury that the following is true and correct to the best of my present knowledge, information and belief:

1. I am a citizen of the United States, over 18 years of age, and a Plaintiff in this matter.

2. I am the owner of Plaintiff MJL Enterprises, a limited liability company organized in the State of Virginia.

3. I have reviewed 13 C.F.R. § 124.104 entitled "Who is economically disadvantaged?" I believe I am an "economically disadvantaged" individual as defined in that regulation.

4. My net worth as calculated pursuant to 13 C.F.R. § 124.104(c)(2) is less than $850,000.

5. My adjusted gross income averaged over the three preceding years does not exceed $400,000.

6. The fair market value of all of my assets does not exceed $6.5 million.

Signed this 29th day of March, 2023, at the City of Virginia Beach, State of Virginia.

s/Marty Hierholzer

[MJL Enterprises, LLC Corporate Seal, Commonwealth of Virginia]