

No. 25-14

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In the  
**Supreme Court of the United States**

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MARTY HIERHOLZER, et al.,

*Petitioners,*

v.

KELLY LOEFFLER, ADMINISTRATOR,  
SMALL BUSINESS ADMINISTRATION, et al.,

*Respondents.*

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On Petition for Writ of Certiorari to the United  
States Court of Appeals for the Fourth Circuit

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**BRIEF OF AMICUS CURIAE WISCONSIN  
INSTITUTE FOR LAW & LIBERTY, INC.,  
IN SUPPORT OF PETITIONERS**

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## INTEREST OF AMICUS<sup>1</sup>

The Wisconsin Institute for Law & Liberty (WILL) is a public-interest law firm dedicated to advancing individual liberties and equal rights under the law. WILL frequently litigates against government officials that administer programs with racial preferences, including programs that prioritize “socially disadvantaged individuals” or “SDIs”—a euphemism for certain preferred racial groups.

In this case, the Fourth Circuit wrongly required a heightened injury showing to establish standing in equal protection claims. WILL has a vested interest in ensuring (1) that racial classifications in government programs are subject to proper judicial scrutiny and (2) that improper standing requirements do not unduly burden individuals challenging such classifications. This case presents an opportunity for the Court to clarify the requirements for standing in equal protection claims, which is a critical next step following the Court’s landmark decision in *Students for Fair Admission (“SFFA”)*, 600 U.S. 181 (2023).

## SUMMARY OF ARGUMENT

The Fourth Circuit held that a member of a disfavored racial group did not have standing to challenge the racial preference in Section 8(a) of the

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<sup>1</sup> As required by Supreme Court Rule 37.6, Amicus states as follows: No counsel for a party authored this brief in whole or in part. No counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus or its counsel made such a monetary contribution. Counsel of record received timely notice of intent to file this brief under Supreme Court Rule 37.2.

Small Business Act. The mechanism used in Section 8(a)—the presumption of “social disadvantage”—is common to dozens of other federal programs.

SDI programs are typically constructed as follows: government agencies grant a preference to “socially disadvantaged individuals” and then “presume” or automatically grant that SDI status to members of certain racial groups. Other disfavored racial groups, typically whites, are left with an option to “prove” they are “socially disadvantaged” through some other means, like offering evidence to the agency and going through an alternative process that other favored races never have to complete. Creating what can only be called a Catch-22, the Fourth Circuit held that Hierholzer did not have standing because he could not prove “social disadvantage” through the alternative process. App. 21a (holding that Hierholzer was “required to plead facts to support that they would be eligible for the program—i.e., that Hierholzer is socially and economically disadvantaged”).

But if Hierholzer had proven SDI status as demanded by the Fourth Circuit, then he would have no injury and no need to sue—he would have received the benefit he sought. The Fourth Circuit ignored the fact that if Hierholzer were black, he would be automatically conferred SDI status, but because of his race, he was not.

This amicus brief offers three distinct reasons why this Court should grant certiorari. First, dozens of federal statutes use this SDI framework, automatically granting a preference to certain races, while forcing other races to go through a process (if such a process is even available). The Fourth Circuit’s reasoning would effectively insulate these programs

from review and create an incentive for state and local policy makers to create similar standing-proof programs to advance their “diversity, equity, and inclusion” or DEI agendas.

Second, the Fourth Circuit’s reasoning conflicts with several other recent cases holding that SDI preferences do, in fact, harm plaintiffs, even when they could not otherwise “prove” disadvantage through some other program. These include SDI preferences in the Disadvantaged Business Enterprise Program, the Minority Business Development Agency, the Restaurant Revitalization Fund, and the Farmer Loan Forgiveness Program. *See e.g., Mid-Am. Milling Co. v. U.S. Dep’t of Transp.*, No. 3:23-cv-00072-GFVT, 2024 WL 4267183 (E.D. Ky. Sept. 23, 2024); *Nuziard v. Minority Bus. Dev. Agency*, 721 F. Supp. 3d 431 (N.D. Tex. 2024); *Vitolo v. Guzman*, 999 F.3d 353 (6th Cir. 2021); *Faust v. Vilsack*, 519 F. Supp. 3d 470 (E.D. Wis. 2021). These programs impacted millions of Americans each year because of race, and had the Fourth Circuit’s rule been applied, no plaintiff in America could challenge them.

Third, and perhaps most significantly, this case presents the Court with a unique occasion to clarify the parameters of standing in an equal protection challenge. In challenges to race-based programs, plaintiffs typically suffer two types of injuries: (1) an opportunity injury (the harm caused by an inability to compete equally for a benefit offered by the government), and (2) dignitary or stigmatic injury (the harm that is inherent to all racial discrimination). The Court has noted both types of injuries but has not clearly explained that racial discrimination can, and does, simultaneously inflict *both* types of injuries.

Accordingly, the petition should be granted.

## ARGUMENT

### **I. The Unconstitutional SDI Framework is Widespread in Federal Programs.**

The 8(a) Program is one of many federal programs that grant nearly identical preferences to SDIs, automatically presuming certain racial groups are in, and others are out. *See* Wisconsin Institute for Law & Liberty, “Current U.S. Code Preferences, Priorities, or other Benefits for Certain Racial Groups Presumed to be ‘Socially Disadvantaged Individuals’ (SDIs).”<sup>2</sup>

Compounding this problem, most of these federal statutes granting SDI preferences rely on the precise mechanics of Section 8(a) of the Small Business Act, which presumes that certain racial groups are “socially disadvantaged,” and then requires non-favored races to establish eligibility through other, more difficult means. *E.g.*, 49 U.S.C. § 47113(a)(2) (airport development program granting racial preferences and incorporating Section 8(a) definitions); 31 U.S.C. § 3718(b)(1)(B) (U.S. Treasury program for collection of claims granting racial preferences and also incorporating Section 8(a) definitions); 51 U.S.C. § 30304 (NASA racial preferences with Section 8(a) definitions); 42 U.S.C. § 13556 (Department of Energy racial preferences incorporating the Section 8(a) definitions); 6 U.S.C. § 321m(b)(3)(D) (Department of Homeland Security

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<sup>2</sup> Available at this link: <https://will-law.org/wp-content/uploads/2024/11/Final-Current-U.S.-Code-Preferences-Priorities-or-other-Benefits-for-Certain-Racial-Groups-Presumed-to-be-Socially-Disadvantaged-Individuals-SDIs-.pdf>.

race-based accreditation program that incorporates the regulations under the Section 8(a) Program). Deciding this important question not only impacts the Section 8(a) Program, but dozens of other federal programs that still grant preferences based on race (and many times sex).

And these programs are not only ubiquitous, they are massive: the Treasury Department’s \$10 billion Homeowner Assistance Fund, which prefers SDIs, 15 U.S.C. § 9058d; the Treasury Department’s State Small Business Technical Assistance Grants, which allocate \$500 million for technical assistance to states to distribute to businesses owned by SDIs, 12 U.S.C. § 5708; and the U.S. Department of Transportation’s DBE program, granting at least ten percent of funding be spent on “small business concerns owned and controlled” by SDIs, 49 U.S.C. § 47113.<sup>3</sup>

Apart from the dozens of federal statutes granting preferences to those automatically deemed “socially disadvantaged,” like Section 8(a), many regulatory provisions in the Code of Federal Regulations use the same presumption architecture as the Small Business Act. For example, the Environmental Protection Agency offer several benefits to “socially disadvantaged individuals.” *See* 42 U.S.C. § 4370d (“at least 8 per centum of Federal funding” spent with SDIs). Like in the Section 8(a) Program, EPA regulations state that “Black Americans, Hispanic Americans, Native Americans, Asian Americans, Women and Disabled Americans are *presumed* to be

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<sup>3</sup> The Biden White House estimated the value of this program to be \$37 billion. *See* <https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2021/11/23/fact-sheet-the-bipartisan-infrastructure-law-will-revitalize-main-street/>.

socially and economically disadvantaged individuals.”<sup>4</sup> 40 C.F.R. § 33.203(d). Non-favored racial groups and men are permitted to “establish[] that they have been impeded in developing a business concern as a result of racial or ethnic discrimination” (yet the regulations do not spell out the process for the non-favored groups to pursue this exception). *Id.* § 33.203(f).

The Federal Aviation Administration offers a preference for airport concessions. Again, women and several racial groups “are rebuttably presumed to be socially and economically disadvantaged,” and automatically get the race- and sex-based benefit. 49 C.F.R. § 23.3.<sup>5</sup> Men and those not favored for the benefit are eligible for an alternative track by proving on a “case-by-case basis” that “he or she has held himself or herself out, as a member of a designated group if the certified requires it.” *Id.* Frankly, it is

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<sup>4</sup> This regulation alone, and ones like it, conflicts directly with *SFFA*’s independent rule that race can never be used as a stereotype (that is, the federal rule says that all blacks are disadvantaged), making this regulation facially unconstitutional. 600 U.S. 181, 221 (2023). Yet groups like WILL are forced to litigate such changes, and then unnecessarily obstructed by unreasonable standing rules like the one invented by the Fourth Circuit.

<sup>5</sup> As critiqued in *SFFA*, the FAA has used “underinclusive” racial categories. *Id.* at 216. For example, they attempt to benefit “Asian-Pacific Americans” but exclude Americans from Singapore. FAA has no public document explaining why Malaysia and Indonesia are “Asian-Pacific” countries, but Singapore is not. And of course, the FAA excludes all the Asian countries between Afghanistan and Saudi Arabia, as if those countries are not in Asia (at least a preferred part of Asia). This again demonstrates the absurdity of the Federal Government’s racial categories, which are also present in Section 8(a).

unclear how a man or a white person could ever satisfy this exception to “prove” social disadvantage, yet a white man would not have standing to challenge this rule in the Fourth Circuit.

Even further, some federal programs are modeled after the SDI framework at issue here, but do not use the words “socially disadvantaged,” creating the same standing problem. The McNair Postbaccalaureate Achievement Program aims to support “underrepresented students” with scholarships and other opportunities. 20 U.S.C. § 1070a-15. The regulations define this phrase to exclude whites and Asians. 34 C.F.R. § 647.7. Yet the Department of Education, like other SDI-type programs and Section 8(a), provides an alternative mechanism for whites and Asians who may prove that they are “underrepresented” through another mechanism. 34 C.F.R. § 647.3(c)(3) (providing that whites and Asians may prove they are “underrepresented” by submitting “standard statistical references or other national survey data submitted to and accepted by the Secretary on a case-by-case basis.”) Blacks and Hispanics do not need to make such an evidentiary showing subject to the Secretary’s discretion. Yet according to the Fourth Circuit, whites and Asians could never be injured by the McNair program.<sup>6</sup>

In short, this case has major implications far beyond the 8(a) Program. The SDI framework at issue

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<sup>6</sup> WILL is currently litigating this program on appeal at the Eighth Circuit based on a different standing issue. *See Young Americans for Freedom v. U.S. Dep’t of Educ.*, No. 25-2307 (8th Cir. 2025), 3:24-cv-00163-PDW (D.N.D. May 6, 2025).

here exists in dozens of federal programs, raising a compelling issue of nationwide importance.

## **II. If the Fourth Circuit’s Standard had Been Applied, the Outcome in Several Recent Cases Successfully Defending Equal Rights Would Have Been Different.**

Given the prevalence of the unconstitutional SDI framework, it is up to public-interest law firms, like WILL, to bear the burden of litigating against these programs one at a time to defend Americans’ equal rights. Yet if the Fourth Circuit’s incorrect standing requirements had been applied, then several recent cases in which WILL successfully advocated for equal protection would have had vastly different results.

For example, in *Mid-American Milling Co. v. United States Department of Transportation* (“MAMCO”), the court granted a preliminary injunction against USDOT’s use of race and sex rebuttable presumptions in granting contracts. No. 3:23-cv-00072-GFVT, 2024 WL 4267183, at \*13 (E.D. Ky. Sept. 23, 2024). As with Section 8(a), non-favored races “must prove, by a preponderance of the evidence, that they are socially and economically disadvantaged.” *Id.* at \*1 (citing 49 C.F.R. § 26.67(a)(3)(i)-(d)). The MAMCO plaintiffs were companies that regularly bid on contracts but (1) did not qualify for the presumption and (2) “fail[ed] to make any showing[] that they would qualify for the DBE program” through the alternative showing. *See id.* at \*4. Judge Van Tatenhove held that the plaintiffs had standing, even in the presence of the alternative process of proving “disadvantage” “by a preponderance of evidence.” *Id.* at \*1. Plaintiffs were injured simply because the “government erect[ed] a

barrier” that created an *unequal* opportunity for the plaintiffs to compete for contracts against those who were presumed socially disadvantaged based on race and gender. *Id.* at \*3–7 (citation omitted). Yet, according to the Fourth Circuit, because these plaintiffs could not alternatively prove “social disadvantage,” they would have no injury at all.

In *Nuziard v. Minority Business Development Agency* (“MBDA”), the court granted a permanent injunction enjoining the MBDA from using racial categories presuming social disadvantage and determining eligibility for federal assistance. 721 F. Supp. 3d 431, 509 (N.D. Tex. 2024). The plaintiffs in that case were business owners who, like the plaintiffs in *MAMCO*, were not presumed to be socially disadvantaged and also could not prove social disadvantage because plaintiffs were told explicitly that “they could not apply because they [were] not minorities.” *Id.* at 460. As Judge Pittman wrote, “Of course, groups not on the list may ‘apply for a designation as socially or economically disadvantaged.’ 15 C.F.R. § 1400.3. But that only reinforces the point: the issue is not that the Agency only serves listed groups, but that it forces those not on the list to overcome additional hurdles.” *Id.* at 473.

Similarly, in *Vitolo v. Guzman*, the Sixth Circuit enjoined the Small Business Administration from presuming social disadvantage for certain racial groups to determine eligibility for coronavirus relief funds. 999 F.3d 353, 365 (6th Cir. 2021). In that case, plaintiffs, a small restaurant owner and his wife, bore the burden of proving social disadvantage while other applicants were presumed disadvantaged and eligible for immediate aid. *Id.* at 358–59. Judge Thapar called the alternative process, whereby an applicant “must

bring forward evidence that they suffered episodes of discrimination, which have ‘negatively impacted’ their ‘advancement in the business world,’ and which caused them to suffer ‘chronic and substantial social disadvantage,” a “high hurdle” that “becomes a wall.” *Id.* at 363 (citations omitted).

Lastly, for yet another example, consider *Faust v. Vilsack*, in which the court granted plaintiffs’ motion for a temporary restraining order enjoining the Department of Agriculture’s loan forgiveness program based on presumed social disadvantage. 519 F. Supp. 3d 470, 478 (E.D. Wis. 2021). There, the plaintiffs were a group of farmers not eligible for federal loan forgiveness because they did not belong to one of the racial groups presumed to be socially disadvantaged. *Id.* at 474.<sup>7</sup>

In each of these cases, WILL successfully defended the equal rights of American small business owners, contractors, and farmers. Yet, if the Fourth Circuit’s standing requirements were applied, and these plaintiffs were forced to show that they were otherwise eligible for the challenged programs, the results would have been reversed. Because none of the

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<sup>7</sup> At the time this program started, USDA had no regulations delineating the process, although public statements from USDA officials indicated they would follow a presumption process similar to the current 7 C.F.R. § 760.107, which presumes certain races are disadvantaged, yet allows for an official to expand the list (apparently upon petition). *See generally*, Complaint in *Faust v. Vilsack* (E.D. Wis. 2021) (describing the method of designating racial groups), available here: <https://storage.courtlistener.com/recap/gov.uscourts.wied.94774/gov.uscourts.wied.94774.1.0.pdf>. The Farmer Loan Forgiveness Program was subsequently repealed by Congress and no longer exists.

plaintiffs could show that they qualified as disadvantaged through any alternative (non-presumption) means, the courts would have found the plaintiffs lacked standing, dismissed the cases, and allowed the government to continue utilizing the discriminatory presumptions.

Indeed, under the Fourth Circuit's insurmountable standing requirement, programs like the 8(a) Program, that utilize the same SDI framework, would be insulated from equal protection challenges. Such a freeze on judicial review is problematic: by preventing courts from examining race-based classifications or other discriminatory policies, the Fourth Circuit's standing requirement undermines the fundamental role of the judiciary in safeguarding individual rights and ensuring that government actions comply with the constitutional guarantee of equal protection.

By granting review, this Court can address the Fourth Circuit's inappropriate standard and ensure that Americans can continue to challenge federal programs that unconstitutionally discriminate based on race.

### **III. This Case Provides the Court the Occasion to Delineate the Distinct Opportunity and Stigmatic Injuries that Result from the Denial of Equal Treatment.**

To have standing in federal court, a plaintiff must establish that (1) they suffered an injury-in-fact that is (2) fairly traceable to the challenged conduct of the defendant, and that (3) is likely to be redressed by a favorable judicial decision. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). In equal protection cases,

causation and redressability necessarily flow from the establishment of an injury-in-fact. *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666, n.5 (1993) (explaining that “[i]t follows from our definition of ‘injury in fact’ that a plaintiff who alleges a governmental denial of equal treatment also ‘allege[s] both that the [government’s discriminatory policy] is the ‘cause’ of [the] injury and that a judicial decree directing [the government] to discontinue its [discriminatory policy] would ‘redress’ the injury”); see also *Midwest Fence Corp. v. U.S. Dep’t of Transp.*, 840 F.3d 932, 940 (7th Cir. 2016); *W.H. Scott Const. Co. v. City of Jackson*, 199 F.3d 206, 215, n.8 (5th Cir. 1999); *Contractors Ass’n of E. Pa., Inc. v. City of Philadelphia*, 6 F.3d 990, 995–96 (3d Cir. 1993) (finding standing when an injury has been established under the *Ne. Fla.* framework); *Sherbrooke Turf, Inc. v. Minn. Dep’t of Transp.*, 345 F.3d 964, 967 (8th Cir. 2003) (same). Therefore, in equality cases, establishing a legally cognizable injury is sufficient to establish Article III standing.

This Court has recognized at least two cognizable injuries in equal protection cases. First, there is the opportunity (or competitive) injury: “[T]he inability to compete on an equal footing.” *Ne. Fla.*, 508 U.S. at 666; see also *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007) (“[O]ne form of injury under the Equal Protection Clause is being forced to compete in a race-based system that may prejudice the plaintiff”). This injury recognizes that although “plaintiffs have no right to be appointed [a government benefit,]” “they do have a federal constitutional right to be *considered* for [the benefit] without the burden of invidiously discriminatory

disqualifications.” *Ne. Fla.*, 508 U.S. at 666 (quoting *Turner v. Fouche*, 396 U.S. 346, 362 (1970)) (emphasis in original) (citation modified).

Second, there is the stigmatic injury. As this Court has “repeatedly emphasized,” the stigmatization caused by racial discrimination is a “serious non-economic injur[y].” *Heckler v. Mathews*, 465 U.S. 728, 739–40 (1984). Indeed, when the government classifies individuals based on their “ancestry instead of [their] own merit and essential qualities,” the government “demeans [their] dignity.” *E.g.*, *Rice v. Cayetano*, 528 U.S. 495, 517 (2000); *SFFA*, 600 U.S. at 220–21 (“[s]uch stereotyping can only cause continued hurt and injury”) (citation omitted) (citation modified). The Fifth Circuit has further held that “[t]he badge of inequality and stigmatization conferred by racial discrimination is a cognizable harm *in and of itself* providing grounds for standing.” *Moore v. U.S. Dep’t of Agric.*, 993 F.2d 1222, 1224 (5th Cir. 1993) (emphasis added) (citations omitted). As such, the Fifth Circuit confirmed that *either* equal protection injury (opportunity or stigmatic) is sufficient, independently, to establish injury-in-fact, and by extension, Article III standing. *See id.*; *see also Inner City Contracting, LLC v. Charter Twp. of Northville*, 87 F.4th 743, 751–52 (6th Cir. 2023) (explaining that a denial of equal treatment constitutes a “twofold” injury, including “the dignitary harm inherent in racial discrimination”).

Despite recognizing that both injuries occur in equal protection cases, this Court has not explicitly clarified that both opportunity and stigmatic injuries are sufficient *together*, or *by themselves*, to establish injury-in-fact. In clarifying, the Court can confirm that plaintiffs who seek a benefit or opportunity have

standing whenever the government treats them differently based on the color of their skin, reinforcing the Court’s landmark decision in *SFFA*.

This clarification and reinforcement of *SFFA* is crucial because if the Fourth Circuit’s reasoning were applied to *SFFA*, no one could have challenged Harvard’s affirmative-action policy, as non-preferred applicants might always theoretically be admitted through the school’s normal merit-based admission process. An advantage or disadvantage based on race would not be enough to establish an injury, according to the Fourth Circuit. This logic is untenable with equal protection precedent, denies the essence of what an equal protection injury is, and cannot be the true test for standing.

Because the SDI framework is unconstitutional and both the opportunity and stigmatic equal protection injuries are present, this case offers a unique occasion to clarify the parameters of standing in equal protection challenges and reinforce *SFFA*. Under *SFFA*, race-based programs, like the 8(a) Program and the dozens of other federal programs that use the same SDI framework, are unconstitutional unless they meet each of *SFFA*’s five independent and discrete tests. Applying these tests here, the SDI framework fails because it (1) is not being used to remedy “specific, identified instances of past discrimination that violated the Constitution or a statute,” *SFFA*, 600 U.S. 181, 207 (2023), (2) relies on “imprecise” and “overbroad” racial categories, *id.* at 215–16 (2023), (3) uses race as a “negative,” *id.* at 218–19, (4) furthers “stereotypes that treat individuals as the product of their race,” *id.* at 221 (citation modified), and (5) does not have a “logical end point,” *id.* at 221.

In violating these standards from *SFFA*, the SDI framework injures plaintiffs by using race as a negative, denying applicants not presumed disadvantaged the opportunity to compete on an equal basis by requiring proof of disadvantage (while other applicants, from preferred racial groups, are assumed to be disadvantaged *automatically*). And this SDI system stigmatizes plaintiffs by categorizing applicants based on race, treating them not as individuals but as products of their racial group—perpetuating harmful stereotypes and undermining dignity. These are all injuries sufficient to confer standing.

Accordingly, by granting review, the Court can clarify that *either* the opportunity loss *or* the stigmatic injury is sufficient to establish injury-in-fact and Article III standing to challenge unconstitutional race-based government programs. The heightened standing requirements imposed by the Fourth Circuit are egregiously wrong and must be corrected. Federal courts must remain open to Americans seeking redress for unconstitutional government discrimination.

**CONCLUSION**

This Court should grant Petitioners' petition for writ of certiorari.

Dated: July 29, 2025.

*Respectfully submitted,*

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