No. 25-14

IN THE

Supreme Court of the United States

MARTY HIERHOLZER; MJL ENTERPRISES, LLC, A VIRGINIA CORPORATION, PETITIONERS

v.

KELLY LOEFFLER, ADMINISTRATOR, SMALL BUSINESS ADMINISTRATION; SMALL BUSINESS ADMINISTRATION, RESPONDENTS.

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

AMICUS CURIAE BRIEF OF THE AMERICAN CIVIL RIGHTS PROJECT AND MANHATTAN INSTITUTE SUPPORTING PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The American Civil Rights Project (the "ACR Project") is a public-interest law firm, dedicated to protecting and where necessary restoring the equality of all Americans before the law.

The Manhattan Institute for Policy Research ("MI") is a nonpartisan public policy research foundation whose mission is to develop and disseminate new ideas that foster greater economic choice and individual responsibility. To that end, it has historically sponsored scholarship supporting educational excellence and racial nondiscrimination, from thinkers such as Thomas Sowell, Walter Williams, Seymour Fliegel, John McWhorter, Abigail and Stephan Thernstrom, Jay Greene, and Marcus Winters. Current MI scholars, including Jason Riley, Wai Wah Chin, and Renu Mukherjee, continue this research, including at the policy nexus of education and race underlying this litigation.

This case interests *amici* because it involves the appropriate application of constitutional principles central to the rule of law and because it focuses on racial nondiscrimination, a policy commitment that we share.

SUMMARY OF ARGUMENT

Marty Hierholzer is a service-disabled veteran and the owner of MJL Enterprises. Twice, Hierholzer and MJL applied to the Small Business Administration's Section 8(a) Business Development Program, which provides

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[1] No counsel for a party authored any part of this brief. No one other than *amici*, their members, or their counsel financed the preparation or submission of this brief. *Amici* provided parties' counsel timely notice under Rule 37.2 of their intent to file this brief.

federal government contracts and other opportunities to small businesses whose owners are socially disadvantaged. Twice, the SBA rejected Hierholzer and MJL from entering the Program.

After Hierholzer brought an equal protection challenge, challenging the program's race-based disadvantage presumptions, the Fourth Circuit held that he lacked standing. The court's holding was wrong for three reasons.

First, the Fourth Circuit erred in holding that Hierholzer failed to establish injury in fact. The court held Hierholzer to a higher standard for establishing injury than is demanded by precedent. Second, the Fourth Circuit erred in holding that Hierholzer failed to establish causation. The error stemmed from the court's failure to correctly identify the injury that Hierholzer suffered. Finally, the Fourth Circuit erred in holding that Hierholzer failed to establish redressability, once again reflecting its misunderstanding of Hierholzer's injury.

Hierholzer's case here represents the latest in a series of cases over the years in which courts' application of standing doctrine has undermined plaintiffs' ability to bring equal protection and civil rights challenges. But that puts things too gingerly—the Fourth Circuit's treatment of Hierholzer highlights that its misapplication of standing doctrine assures that *no one* will *ever* have standing to challenge racially discriminatory policies like those applied against him.

Given the errors of the Fourth Circuit in applying standing doctrine in this case, as well as the important and

recurring role of standing doctrine in similar cases, the Supreme Court should grant the petition for a writ of certiorari.

ARGUMENT

I. The Fourth Circuit Erred in Holding That the Petitioners Lack Standing

Article III of the Constitution limits the "judicial power" of the federal courts to "Cases" and "Controversies." The Supreme Court has explained that "standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). To establish standing, a "plaintiff must have (1) 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).

The Fourth Circuit held that the petitioners did not satisfy any of these three components ("injury in fact, causation, or redressability") and, therefore, failed to establish standing. *Hierholzer v. Guzman*, 125 F.4th 104, 117 (4th Cir. 2025).

The Fourth Circuit is wrong. The petitioners established injury in fact, causation, and redressability. They pleaded their standing.

Moreover, the Fourth Circuit's holding imposes a particularly perverse consequence. It holds that only an applicant who pleads facts sufficient to prove actual economic disadvantage can challenge the discriminatory

presumption of economic disadvantage. But no plaintiff who can satisfy this test could be denied due to the presumption, which benefits those who *lack* such proof. According to the Fourth Circuit, therefore, it's *conceptually impossible* for anyone denied pursuant to a discriminatory presumption to have standing to challenge it. The Fourth Circuit twists this Court's case law to create a catch-22 in which no plaintiff *ever* could establish standing to challenge the program's discriminatory presumptions.

A. The Fourth Circuit Erred in Holding That the Petitioners Failed to Establish Injury in Fact

In *Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, the petitioner, a construction contractors' association, challenged the City of Jacksonville's ordinance that set aside a quota of contracts for Minority Business Enterprises. 508 U.S. 656, 656 (1993). The Supreme Court explained that "the 'injury in fact' element of standing in such an equal protection case is the denial of equal treatment resulting from the imposition of the barrier—here, the inability to compete on an equal footing in the bidding process—not the ultimate inability to obtain the benefit." *Id.* at 657. The Supreme Court held that "to establish standing, therefore, a petitioner *need only demonstrate that its members are able and ready to bid on contracts and that a discriminatory policy prevents them from doing so on an equal basis*." *Id.* (emphasis added).

By the standard established in *Northeastern Florida*, the petitioners in this case have clearly established injury in fact. The race-conscious presumption of social

disadvantage prevents the petitioners from competing for admission to Program 8(a) on an equal footing.

The Fourth Circuit, however, disagreed. The Fourth Circuit held that the petitioners "failed to allege an injury in fact" and purported to ground this holding in the standard from *Northeastern Florida*: "Appellants failed to demonstrate that they were 'able and ready' to bid on 8(a) Program contracts." *Hierholzer*, 125 F.4th at 113–116. The Fourth Circuit reached this conclusion by explaining that Program 8(a)'s "basic requirements" include the demonstration of economic disadvantage and that the "appellants failed to allege in their complaint economic disadvantage sufficient to 'demonstrate' that they are 'able and ready' to bid." *Id.* at 114–115.

Now, Hierholzer has "submitted an unrebutted declaration affirming that he satisfies the three criteria for economic disadvantage—net worth, income, and asset value." Petition for Writ of Certiorari, *Hierholzer v. Loeffler*, No. 25-14, 2025 WL 1885200, at *12 (U.S. filed July 1, 2025). But the Fourth Circuit did not find this declaration satisfactory because, in past cases, they "have held that parties may not 'amend their complaints through briefing.'" *Hierholzer*, 125 F.4th at 115. Therefore, "Appellants' later filed declaration" cannot "cure Appellants' pleading deficiency." *Id.* *Amici* do not seek to rebut the Fourth Circuit's ruling on this matter—namely, that petitioners' showing of economic disadvantage was unsatisfactory.

However, the Fourth Circuit's demand in the first place that the petitioners demonstrate that they *meet* the requirements for Program 8(a), including showing

economic disadvantage, went beyond the "able and ready" standard established in *Northeastern Florida*. 508 U.S. at 657. It effectively amounts to requiring the petitioners to show that they *would have* qualified for, and been admitted to, Program 8(a) but for the race-conscious presumption of social disadvantage.

Northeastern Florida explicitly states that this is not the standard for establishing standing: "When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing." *Id.* The Supreme Court later invoked this standard to push back against the view that a petitioner needs to demonstrate that it will qualify for a given benefit to establish standing. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995) ("We note that, contrary to respondents' suggestion … Adarand need not demonstrate that it has been, or will be, the low bidder on a Government contract.").

The Fourth Circuit, therefore, misread *Northeastern Florid*a so badly that the Circuit's holding would have reversed *this* Court's decision if applied in that case. Its ruling that the petitioners failed to establish injury in fact is a flat rejection of this Court's precedents.

B. The Fourth Circuit Erred in Holding That the Petitioners Failed to Establish Causation

The Fourth Circuit held that "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." *Hierholzer*, 125 F.4th at 116.

Whether the petitioners can meet the requirements of the 8(a) Program is irrelevant to the question of whether they have established causation. Establishing causation requires that the petitioners show that the injury in fact "is fairly traceable to the challenged conduct of the defendant." *Spokeo*, 578 U.S. at 338. Here, the injury in fact is not the petitioners' rejection from the 8(a) Program. Rather, as discussed previously, "the 'injury in fact' element of standing in such 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.*, 508 U.S. at 657.

Clearly, the petitioners were denied equal treatment in applying to the 8(a) Program, and the denial of this equal treatment can be traced to the race-conscious presumption, which says that "an individual who is not a member of one of the groups presumed to be socially disadvantaged […] must establish individual social disadvantage by a preponderance of the evidence." 13 C.F.R. § 124.103(c)(2). The race-conscious presumption denies the petitioners equal treatment by subjecting them to a higher burden for satisfying the social disadvantage requirement and subjecting other applicants to a lower burden.

Therefore, the Fourth Circuit was wrong to rule that the petitioners failed to establish causation.

C. The Fourth Circuit Erred in Holding That the Petitioners Failed to Establish Redressability

The Fourth Circuit held that the petitioners "failed to establish the redressability requirement of standing." *Hierholzer*, 125 F.4th at 117. The court explained that, even if the petitioners are "granted the relief sought -- an injunction against the presumption," they "would still be required to demonstrate social and economic disadvantage, among other requirements, to be admitted to the program -- which they cannot do." *Id.* Therefore, their "claimed injury cannot be redressed by a favorable decision." *Id.*

But as with the earlier factors, the Fourth Circuit could reach this conclusion only by misunderstanding the petitioners' injury. The petitioners' injury was not denial of admission to the 8(a) Program; it was their inability to compete for admission to the Program on a level playing field. Eliminating the race-conscious presumption would result in all applicants having to prove their social disadvantage in the same way the petitioners attempted. Therefore, the petitioners' injury would, in fact, be redressed by a favorable decision.

But even if we evaluate the court's assertion that the petitioners would not be admitted to the program following a favorable decision because they cannot demonstrate social and economic disadvantage, the Fourth Circuit's assertion would still appear incorrect on multiple bases.

First, the petitioners *are* able to (and arguably have) demonstrate(d) economic disadvantage. As mentioned previously, Hierholzer's uncontested evidence shows that he satisfies the criteria for economic disadvantage. Petition for Writ, *Hierholzer*, 2025 WL 1885200, at *12.

Second, a favorable ruling on this issue would remand the case back to trial court, where the petitioners would have the opportunity to prove Hierholzer's disadvantages. That remand would leave Hierholzer able to demonstrate social disadvantage. In layman's terms, it is hard to imagine a clearer redress for the grievance at issue.

The Fourth Circuit (and the district court) refuse to see these facts, contending that "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." *Hierholzer*, 125 F.4th at 117. The Fourth Circuit viewed the petitioners' failure to prove social disadvantage as independent of the race-conscious presumption of social disadvantage. According to this reasoning, because the petitioners do not benefit from the race-conscious presumption of social disadvantage, and because they could not prove social disadvantage, the petitioners are ineligible for the 8(a) Program regardless of the existence of the presumption.

But while the presumption may be "severable from the rest of the regulation" as a statutory matter, it is not severable from its own effects on the administration of the Program. And that is what the Petitioners challenged in this case. The contention that the challenged provision is

severable from the challenge to it stands preposterous on its face.

Under the status quo, the majority of 8(a) Program participants qualified through the race-conscious presumption. Petition for Writ, *Hierholzer*, 2025 WL 1885200, at *8. In fact, in 1997, "of the approximately 5,700 firms currently in the 8(a) program, only about two dozen—less than one-half of one percent—ha[d] qualified by demonstrating to the SBA by 'clear and convincing evidence,' […] that they [were] socially disadvantaged; thus, over 99% of the firms qualified as a result of race-based presumptions." *Dynalantic Corp. v. Dep't of Defense*, 115 F.3d 1012, 1016–17 (D.C. Cir. 1997).

If the race-conscious presumption were eliminated, Program 8(a) participants would be limited to those firms that had successfully proven their social disadvantage. Currently, the number of such firms is small. Thus, unless the SBA was willing to let the Program drastically shrink, the SBA would likely have to loosen its assessment of whether a firm has proven social disadvantage. Such a change could result in a different, more favorable outcome for the petitioners.

Regardless, the Fourth Circuit erred in concluding that the petitioners failed to establish redressability.

II. This Case Highlights How Standing Doctrine Gets Twisted to Block Valid Civil Rights Challenges: *Someone* Must Have Standing to Challenge the SBA's Race Discrimination

This case offers a particularly stark example of the way that courts' application of standing doctrine can stymie equal protection and civil rights challenges. Sadly, it is not the first.

In *Aiken v. Hackett*, White police officers sued the city of Memphis for discrimination under affirmative action programs in the city's police promotions. 281 F.3d 516, 517 (6th Cir. 2002). The Sixth Circuit held that the police officers "failed to allege an injury in fact and they therefore lack standing." *Id.* at 520. Because the police officers "sought no forward-looking relief that would allow them to compete on an equal footing," they could not merely rely on the equal footing standard to establish standing. *Id.* Rather, they had to "show that 'under a race-neutral policy' they would have received the benefit." *Id.* at 519. The Sixth Circuit held that they could not do so because their "composite scores (not the City's affirmative action program) kept them from being promoted." *Id.*

In *Young v. Colorado Department of Corrections*, Joshua Young, a former employee for the Colorado Department of Corrections, sued the Department under Title VII and the Equal Protection Clause, "alleg[ing] that the Department implemented mandatory Equity, Diversity, and Inclusion training that subjected him to a hostile work environment." 94 F.4th 1242, 1244 (10th Cir. 2024). The Tenth Circuit held that "Mr. Young has not pleaded

sufficient facts to establish Article III standing to pursue his equal protection claim in the amended complaint because he did not plead an ongoing injury that a favorable judgment will redress." *Id.* at 1255–56. The court explained that "because he no longer works for the Department and he has not requested reinstatement as a remedy, any relief in the form of a change in Department policy will not redress an ongoing injury to him." *Id.* at 1256.

In *Do No Harm v. Pfizer Inc.*, Do No Harm, a nationwide membership organization of healthcare professionals, sued Pfizer, alleging that Pfizer discriminated against White and Asian-American applicants by excluding them from its fellowship program. 126 F.4th 109, 115 (2d Cir. 2025). In support of its motion for preliminary injunction, Do No Harm "submitted anonymous declarations from two of its members identified by the pseudonyms 'Member A' and 'Member B.'" *Id.* Applying the standard for "standing on a motion for preliminary injunction," the district court "held that Do No Harm lacked standing because it failed to identify any of its injured members by name." *Id.* at 116. On appeal, the Second Circuit did not reverse this judgment, but held that the district court should not have dismissed the plaintiff's claims entirely, given the lower standard governing motions to dismiss. *Id.* at 122-23.

These examples indicate the important and recurring role of standing doctrine in equal protection and civil rights cases. But the instant case goes further.

The Fourth Circuit's reasoning requires a plaintiff to establish standing by showing that he satisfies the

Program's economic disadvantage test. But if he demonstrated the economic disadvantage the Fourth Circuit proposes that standing doctrine requires, he wouldn't be denied the benefit, and he would *still* lack standing to challenge the presumption. The Fourth Circuit thus effectively concludes that Congress and the SBA may continue unlawful racial discrimination indefinitely, because it is *conceptually impossible* for *any* plaintiff to establish standing to challenge their lawbreaking, no matter how severely it harms him.

That's not a sustainable equilibrium for Constitutional law. It's not a good-faith application of this Court's jurisprudence, either. At best, it invites future "corrective" distortions of standing law by the Fourth Circuit, when it seeks to blunt the future impact of its current blunder. More ominously, it could demonstrate the Fourth Circuit's establishment of a two-tiered system of analysis, through which the Fourth Circuit intends to reject all equal protection claims brought by Americans from disfavored groups, without applying the same scrutiny to challenges filed by others.[2]

It would far better serve the nation to simply correct the Fourth Circuit's blunder than to wait to find out which unacceptable alternative will follow from it.

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[2] This Court recently rejected—unanimously—such a two-tiered system of justice in the Title VII context, noting that "Title VII's disparate-treatment provision draws no distinctions between majority-group plaintiffs and minority-group plaintiffs." *Ames v. Ohio Dept. of Youth Svcs.*, 605 U.S. 303, 309 (2025). The text of the Constitution, of course, likewise draws no such racist distinctions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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