No. 25-14

In the Supreme Court of the United States

MARTY HIERHOLZER, ET AL., PETITIONERS

v.

KELLY LOEFFLER, ADMINISTRATOR,
SMALL BUSINESS ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly determined that petitioners lack standing to challenge the use of a race-based presumption of social disadvantage in determining eligibility for the Small Business Administration's 8(a) Program, which awards contracts and other benefits to small businesses owned and controlled by "socially and economically disadvantaged individuals," 15 U.S.C. 637(a)(4).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes, and regulations:

Miscellaneous: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 125 F.4th 104. The opinion of the district court (Pet. App. 27a-47a) is available at 2024 WL 894896.

JURISDICTION

The judgment of the court of appeals was entered on January 3, 2025. A petition for rehearing was denied on March 4, 2025 (Pet. App. 48a). On May 2, 2025, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July 2, 2025, and the petition was filed on July 1, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Small Business Act (Act), 15 U.S.C. 631 *et seq.*, "to insure that a fair proportion of the total purchases and contracts or subcontracts for

property and services for the Government * * * be placed with small-business enterprises." 15 U.S.C. 631(a). Section 8(a) of the Act, 15 U.S.C. 637(a), establishes what is known as the "8(a) Program." Pet. App. 3a; see 13 C.F.R. 124.1. As part of that program, the Small Business Administration (SBA) awards various government contracts to eligible businesses. 15 U.S.C. 637(a)(1)(A) and (B). Those contracts are known as "8(a) Program contracts." Pet. App. 19a. SBA also provides eligible businesses with other 8(a) Program benefits, such as management and technical assistance. See 15 U.S.C. 636(j); 13 C.F.R. 124.701-124.704.

To be eligible to receive 8(a) Program contracts and other benefits, a business must meet certain requirements. "Generally," a business must be "a small business which is unconditionally owned and controlled by one or more socially and economically disadvantaged individuals who are of good character and citizens of and residing in the United States, and which demonstrates potential for success." 13 C.F.R. 124.101; see 15 U.S.C. 637(a)(4).

The Act defines "[s]ocially disadvantaged individuals" as individuals "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). The Act's implementing regulations establish a "rebuttable presumption" that "Black Americans," "Hispanic Americans," "Native Americans," "Asian Pacific Americans," "Subcontinent Asian Americans," and "members of other groups designated from time to time by SBA" are "socially disadvantaged." 13 C.F.R. 124.103(b)(1). Under the regulations, "[a]n 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).

The Act defines "[e]conomically disadvantaged individuals" as "socially disadvantaged individuals 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." 15 U.S.C. 637(a)(6)(A). The Act provides that, "[i]n determining the degree of diminished credit and capital opportunities," SBA "shall consider, but not be limited to, the assets and net worth of [the] individual." *Ibid.* Under the Act's implementing regulations, individuals will "generally be deemed to have access to credit and capital" if their net worth exceeds $850,000, if their adjusted gross income averaged over the preceding three years exceeds $400,000, or if their total assets exceed $6.5 million. 13 C.F.R. 124.104(c).

2. Petitioner Marty Hierholzer is a veteran of the United States Navy who "sustained many injuries in the line of duty, rendering him disabled." Pet. App. 28a. Hierholzer owns petitioner MJL Enterprises, LLC (MJL), a small business that "contracts with the government to provide various services and supplies" to military bases and Veterans Affairs hospitals. *Id.* at 57a; see *id.* at 61a. In 2009 and 2016, MJL applied "for 8(a) Program eligibility." *Id.* at 67a. Because Hierholzer "is not a member of a group that enjoys a presumption of social disadvantage" under the regulations, he attempted to establish "social disadvantage" based on his physical and mental disabilities. *Id.* at 66a; see *id.* at 66a-67a. SBA denied both applications. *Id.* at 67a.

In January 2023, petitioners brought suit against SBA and its Administrator in the United States District

Court for the Eastern District of Virginia, challenging the presumption that members of certain racial groups are "socially disadvantaged" for purposes of 8(a) Program eligibility. Pet. App. 57a-80a. Petitioners alleged, among other things, that the presumption violates the equal protection component of the Fifth Amendment's Due Process Clause. *Id.* at 71a-75a. Petitioners sought forward-looking relief enjoining the use of a presumption that "race alone qualifies an individual as socially disadvantaged." *Id.* at 79a.

The government moved to dismiss petitioners' complaint. D. Ct. Doc. 20 (Mar. 20, 2023). The government argued that petitioners lacked Article III standing to challenge the use of a race-based presumption in determining "social disadvantage" because petitioners had failed to allege that they were otherwise eligible for the 8(a) Program. *Id.* at 9-16. Specifically, the government argued that petitioners had "fail[ed] to allege that Hierholzer is economically disadvantaged—despite it being a necessary criterion to participate in the 8(a) program." *Id.* at 10. In response, Hierholzer filed a declaration expressing the "belie[f]" that he is "economically disadvantaged." Pet. App. 82a. The declaration further stated that Hierholzer's net worth "is less than $850,000," that his "adjusted gross income averaged over the three preceding years does not exceed $400,000," and that his total assets do "not exceed $6.5 million." *Ibid.*

3. While the government's motion to dismiss in this case was pending, the United States District Court for the Eastern District of Tennessee granted summary judgment to the plaintiffs in a similar suit challenging use of the regulations' race-based presumption in determining "social disadvantage" under the 8(a) Program. *Ultima Servs. Corp.* v. *U.S. Dep't of Agric.*, 683 F. Supp.

3d 745, 752-753 (2023). The court in *Ultima* held that the presumption violates equal protection because it "does not further a compelling governmental interest and is not narrowly tailored to achieve such interest." *Ibid.* The court in *Ultima* therefore enjoined the government from using the presumption, while "reserv[ing] ruling on any further remedy." *Id.* at 774.*

In compliance with the injunction in *Ultima*—which remains in effect today—the government has stopped using the regulations' race-based presumption in determining "social disadvantage" for purposes of 8(a) Program eligibility. D. Ct. Doc. 37, at 2 (Jan. 25, 2024). Since July 2023, the government has made "all social disadvantage determinations" pursuant to 13 C.F.R. 124.103(c), which requires each applicant to establish individual social disadvantage by a preponderance of the evidence. D. Ct. Doc. 37-3, at 1 (Jan. 25, 2024).

4. In February 2024, the district court in this case granted the government's motion to dismiss. Pet. App. 27a-47a. The court held that petitioners lacked Article III standing to challenge the use of a race-based presumption in determining "social disadvantage" under the 8(a) Program. See *id.* at 36a-43a. The court explained that because petitioners had "fail[ed] to allege that they are economically disadvantaged," they would be ineligible for the 8(a) Program anyway and would not suffer any Article III injury from the presumption. *Id.* at 39a; see *id.* at 41a ("The Complaint does not state whether [petitioners] meet the eligibility requirements for economically disadvantaged."). The court noted that peti-

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* The *Ultima* plaintiffs subsequently moved for additional relief. See 20-cv-41 D. Ct. Doc. 93 (E.D. Tenn. Sept. 15, 2025). The district court in *Ultima* has yet to rule on that motion or to enter final judgment.

tioners had attempted to establish economic disadvantage through Hierholzer's declaration. *Id.* at 41a. But the court responded that a plaintiff cannot "cure pleading deficiencies" with "later-filed supporting documentation." *Id.* at 42a (citation omitted). And in any event, the court found the declaration "insufficient" because "Hierholzer's beliefs are not enough to demonstrate that he is economically disadvantaged," and because the declaration failed to discuss Hierholzer's "asset transfers" in the preceding two years, which is "a factor that SBA will consider in determining if an individual is economically disadvantaged." *Id.* at 41a-42a; see 13 C.F.R. 124.104(c)(1)(i).

In addition, the district court held that petitioners lacked Article III standing because even if the government stopped using the presumption, petitioners would still be unable to establish "social disadvantage" under race-neutral criteria. Pet. App. 42a. The court further held that even if petitioners could establish standing, their claims were "moot" because SBA had stopped using the regulations' race-based presumption following the injunction in *Ultima*. *Id.* at 47a; see *id.* at 45a-47a.

5. The court of appeals reversed in part, affirmed in part, and remanded for further proceedings. Pet. App. 1a-26a. As an initial matter, the court of appeals reversed the district court's finding of mootness, explaining that "the injunction in *Ultima* and the changes to the 8(a) Program as a result of the injunction" had "not rendered [petitioners'] claims moot" because "the *Ultima* decision ha[d] not resulted in a final judgment." *Id.* at 15a.

The court of appeals then "affirm[ed] the district court's dismissal based on [petitioners'] inability to establish the elements of Article III standing." Pet. App. 2a. The court of appeals reasoned that, "although [pe-

titioners] 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." *Id.* at 19a (quoting *Northeastern Fla. Chapter of the Associated Gen. Contractors of Am.* v. *City of Jacksonville*, 508 U.S. 656, 666 (1993)). The court held that petitioners had failed to meet that requirement. *Id.* at 20a-21a. That holding rested on two independent grounds.

First, the court of appeals held that petitioners had failed "to 'demonstrate' that they are 'able and ready' to bid" because they had "failed to allege" that Hierholzer is "economic[ally] disadvantage[d]." Pet. App. 20a (citation omitted). The court observed that petitioners' complaint "does not contain any pleading with regard to Hierholzer's economic disadvantage." *Ibid.* And the court reasoned that because "parties may not 'amend their complaints through briefing,'" petitioners' "later filed declaration, in which Hierholzer attempts to allege economic disadvantage," could not "cure [their] pleading deficiency." *Id.* at 20a-21a (citation omitted). Second, the court held that "[e]ven if Hierholzer's declaration was sufficient to allege economic disadvantage," petitioners still lacked Article III standing because they had "failed to plead that they could satisfy the 8(a) Program's race neutral social disadvantage requirements." *Id.* at 21a.

6. The court of appeals denied rehearing en banc with no judge requesting a vote. Pet. App. 48a.

ARGUMENT

To be eligible to receive 8(a) Program contracts or other benefits, a business must satisfy various requirements, including that it must be owned by an individual who is "socially *and* economically disadvantaged." 15

U.S.C. 637(a)(4) (emphasis added). The court of appeals in this case held that petitioners lack standing to challenge the use of a race-based presumption in determining whether an individual is "socially disadvantaged" for purposes of 8(a) Program eligibility. Pet. App. 2a (citation omitted). The court's holding rested on two independent grounds: (1) that petitioners failed to establish that Hierholzer is "economic[ally] disadvantage[d]," *id.* at 20a, and (2) that petitioners failed to establish that Hierholzer is "social[ly] disadvantage[d]" under race-neutral criteria, *id.* at 21a. The petition for writ of certiorari addresses only the second ground, while ignoring the first. Because the first ground is sufficient to sustain the judgment below, the petition should be denied.

Even if petitioners had addressed the first ground, further review would be unwarranted. The court of appeals correctly concluded that petitioners lack standing because they failed to establish that Hierholzer is "economic[ally] disadvantage[d]." Pet. App. 20a. That conclusion does not conflict with any decision of this Court or another court of appeals. And this case would be a poor vehicle for further review because the question presented is of limited prospective importance. Since July 2023, the government has not used the regulations' race-based presumption in administering the 8(a) Program, see D. Ct. Doc. 37-3, at 1; the President has ordered Executive-Branch agencies, including SBA, to "terminate all discriminatory and illegal preferences," Exec. Order No. 14,173, 90 Fed. Reg. 8633, 8633 (Jan. 31, 2025); and the Department of Justice has determined that the regulations are unconstitutional to the extent they create a presumption that an individual is "socially disadvantaged" based solely on his membership in a racial group, see Letter from D. John Sauer, Solicitor Gen-

eral, to Mike Johnson, Speaker, U.S. House of Representatives (Nov. 25, 2025). Given that the parties no longer dispute that such a presumption is unconstitutional, this Court's review of whether petitioners have standing to challenge that presumption would serve little purpose.

1. The court of appeals correctly determined that petitioners lack Article III standing to challenge the use of a race-based presumption in determining whether an individual qualifies as "socially disadvantaged" for purposes of 8(a) Program eligibility. Pet. App. 19a-21a.

a. "Article III of the Constitution limits federal courts' jurisdiction to certain 'Cases' and 'Controversies.'" *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 408 (2013). "One element of the case-or-controversy requirement is that [plaintiffs], based on their complaint, must establish that they have standing to sue." *Raines* v. *Byrd*, 521 U.S. 811, 818 (1997). To have standing to pursue forward-looking relief, plaintiffs must plausibly allege that they "will suffer" an "injury that is 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'" *Murthy* v. *Missouri*, 603 U.S. 43, 57 (2024) (citation omitted).

This Court has addressed the application of those standing requirements to cases, like this one, in which plaintiffs allege discrimination in a government program or other benefits. The Court has explained that, to have standing to pursue forward-looking relief in such cases, plaintiffs need not allege that they would have "obtained" the benefits but for the challenged discrimination. *Northeastern Fla. Chapter of the Associated Gen. Contractors of Am.* v. *City of Jacksonville*, 508 U.S. 656, 666 (1993). The Court has made clear, how-

ever, that plaintiffs do have to establish that they are otherwise "able and ready" to seek the benefits in question. *Ibid.*; see *Carney* v. *Adams*, 592 U.S. 53, 60 (2020).

Thus, plaintiffs who challenge discrimination in an eligibility requirement can claim an "inability to compete on an equal footing" only if they are otherwise "able and ready" to compete—that is, only if they satisfy the program's other eligibility requirements. *Jacksonville*, 508 U.S. at 666. Unless plaintiffs plausibly allege that they are otherwise eligible to seek the benefits in question, they have not established the requisite "injury in fact"—let alone an injury that is fairly traceable to the challenged discrimination or redressable by a favorable ruling. *Ibid.*

For example, to have standing to challenge a college's use of racial preferences in its admissions process, a plaintiff need not allege that he would have obtained admission but for the challenged discrimination. *Gratz* v. *Bollinger*, 539 U.S. 244, 262 (2003). But a plaintiff must still allege that he is "able and ready" to apply for admission, *ibid.*; if, for instance, the plaintiff lacked a high-school diploma, he would not be "able and ready" to apply to a college that required one—and thus would lack standing to challenge the college's use of racial preferences in its admissions process.

Here, petitioners failed to allege that they are otherwise "able and ready" to seek 8(a) Program contracts or other benefits. To be able to seek such contracts or other benefits, an applicant must satisfy numerous eligibility requirements. An applicant must be: "(1) a small business; (2) unconditionally owned and controlled by; (3) a socially disadvantaged individual; (4) who is also economically disadvantaged." Pet. App. 19a; see 15 U.S.C. 637(a)(4); 13 C.F.R. 124.101. Here, as the court of ap-

peals observed, the complaint "does not contain any pleading with regard to Hierholzer's economic disadvantage." Pet. App. 20a. Thus, while petitioners allege discrimination in one of the Program's eligibility requirements (*i.e.*, the "social disadvantage" requirement), they have failed to allege that they would satisfy the Program's other eligibility requirements. Petitioners have therefore failed to establish that they are otherwise "able and ready" to seek 8(a) Program contracts or other benefits.

Petitioners attempted to "cure" that "pleading deficiency" by attaching a declaration about Hierholzer's purported economic disadvantage to their response to the government's motion to dismiss. Pet. App. 20a; see *id.* at 81a-82a. But the court of appeals declined to rely on that declaration, reasoning that plaintiffs "may not 'amend their complaints through briefing'" or "'later-filed supporting documentation.'" *Id.* at 20a-21a (citations omitted); see *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (stating that "each element" of Article III standing "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation"). Petitioners do not challenge that factbound decision, which is not worthy of this Court's review.

In any event, even if petitioners' later-filed declaration were considered, it would be "insufficient" to establish that Hierholzer is "economically disadvantaged." Pet. App. 41a-42a. The declaration states that Hierholzer "believe[s]" he is "'economically disadvantaged.'" *Id.* at 82a. But as the district court explained, "Hierholzer's beliefs are not enough to demonstrate that he is economically disadvantaged." *Id.* at 42a. The decla-

ration further states that Hierholzer's net worth "is less than $850,000," that his "adjusted gross income averaged over the three preceding years does not exceed $400,000," and that his total assets do "not exceed $6.5 million." *Id.* at 82a. But even if those facts were accepted as true, they would establish only that Hierholzer should not be *automatically disqualified* from being considered economically disadvantaged. 13 C.F.R. 124.104(c). They would not establish that Hierholzer *is* economically disadvantaged. And as the district court observed, Hierholzer's declaration did not address one of the "factor[s] that SBA will consider in determining if an individual is economically disadvantaged"—namely, the extent of Hierholzer's "asset transfers" in the preceding two years. Pet. App. 42a; see 13 C.F.R. 124.104(c)(1)(i).

Because petitioners have not established that they are otherwise "able and ready" to seek 8(a) Program contracts or benefits, they lack Article III standing to challenge the use of a race-based presumption in determining "social disadvantage." Indeed, petitioners acknowledged below that "'a large company' that 'exceeds the program['s] size limitations'" would not "have standing to challenge the presumption." Pet. C.A. Reply Br. 14 (quoting Gov't C.A. Br. 28 n.8). In petitioners' words, "[i]ndividuals who do not own small businesses cannot plausibly claim an interest in entering the 8(a) program or that they are injured by the race-based presumption of social disadvantage." *Ibid.*

The same principle applies here. Like an individual who does not own a small business, an individual who is not economically disadvantaged is not denied the ability "to compete on an equal footing" by use of a race-based presumption of social disadvantage, *Jacksonville*, 508 U.S. at 666; rather, such an individual, no matter his race,

is treated the same as any other individual who does not meet the 8(a) Program's other, non-discriminatory eligibility requirements. The court of appeals therefore correctly held that because petitioners failed to establish "economic disadvantage," they failed to establish Article III standing to challenge use of a race-based presumption. Pet. App. 20a.

b. Petitioners ignore that holding of the court of appeals. They assert that Hierholzer "meets all the requirements to be considered economically disadvantaged," and they cite the declaration that they attached to their response to the government's motion to dismiss. Pet. 11 & n.8. But petitioners nowhere mention that their complaint "does not contain any pleading with regard to Hierholzer's economic disadvantage," Pet. App. 20a, or that the courts below rejected petitioners' reliance on their later-filed declaration, *id.* at 20a-21a, 41a-42a. The petition for a writ of certiorari thus fails to engage with the court of appeals' holding that petitioners lack standing because they failed to establish "economic disadvantage." *Id.* at 20a. For that reason alone, no further review is warranted.

The petition for a writ of certiorari focuses instead on the court of appeals' separate holding that petitioners lack standing because they failed to establish "*social* disadvantage" under race-neutral criteria. Pet. App. 21a (emphasis added); see, *e.g.*, Pet. 16, 22. It is true that, if petitioners could establish that they satisfied the 8(a) Program's other eligibility requirements, they would have standing to challenge discrimination in the "social disadvantage" requirement, even if they could not establish that Hierholzer himself is "socially disadvantaged" under race-neutral criteria. Cf. *Heckler* v. *Mathews*, 465 U.S. 728, 737-740 (1984) (holding that a

male plaintiff had standing to challenge sex-based discrimination in the provision of government benefits, even if the remedy of equal treatment would still leave him without benefits). The government erred in arguing otherwise below. See Gov't C.A. Br. 25, 35; D. Ct. Doc. 20, at 11. And to the extent the court of appeals accepted that argument, it erred as well. See Pet. App. 21a, 24a.

But the court of appeals in this case independently concluded that petitioners failed to establish "economic disadvantage." Pet. App. 20a. And that independent ground—which petitioners ignore—is sufficient to sustain the court's judgment that petitioners failed to establish Article III standing. See pp. 9-13, *supra*. Accordingly, the court's view that petitioners also failed to establish "social disadvantage" had no effect on the judgment below. Pet. App. 21a. And because this Court "review[s] judgments of the lower courts, not statements in their opinions," *Amgen Inc.* v. *Sanofi*, 598 U.S. 594, 615 (2023), further review is unwarranted.

c. Petitioners' contention (Pet. 19-22) that the decision below conflicts with this Court's precedents lacks merit. Those precedents recognize that, in order to establish Article III standing to pursue forward-looking relief from discrimination in the award of government contracts or other benefits, plaintiffs need not allege that they would have "obtained" the contracts or other benefits but for the challenged discrimination. *Jacksonville*, 508 U.S. at 666; see *Parents Involved in Cmty. Schs.* v. *Seattle Sch. Dist. No. 1*, 551 U.S. 701, 718-719 (2007); *Gratz*, 539 U.S. at 262; *Texas* v. *Lesage*, 528 U.S. 18, 21 (1999) (per curiam); *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 211 (1995). But under those precedents, plaintiffs must still allege that they are otherwise "able and ready" to seek the contracts or other

benefits in question in order to establish the requisite "'injury in fact'"—*i.e.*, "the inability to compete on an equal footing." *Jacksonville*, 508 U.S. at 666; see, *e.g.*, *Gratz*, 539 U.S. at 262.

As explained above, the decision below is faithful to those principles. See pp. 9-13, *supra*. As petitioners acknowledge, the court of appeals did not require them "to identify specific federal contracts that they lost by being excluded from the program." Pet. 13; see Pet. App. 19a (recognizing that petitioners "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"). Instead, the court required petitioners to establish that they are otherwise eligible—and thus "able and ready"—to seek 8(a) Program contracts and other benefits. Pet. App. 19a (citation omitted). And the court correctly determined that because petitioners failed to establish that Hierholzer is economically disadvantaged, petitioners lack standing. *Id.* at 20a.

2. Contrary to petitioners' contention (Pet. 15-19), the decision below does not conflict with the decisions of other court of appeals.

a. Petitioners err in asserting (Pet. 16-19) that the decision below conflicts with decisions of the Second, Sixth, and Eleventh Circuits involving racial preferences. In *Vivenzio* v. *City of Syracuse*, 611 F.3d 98 (2010), for example, the Second Circuit held that applicants for positions in a city's fire department had standing to challenge racial preferences in hiring, even if they could not show that they would have been hired in the absence of the preferences. *Id.* at 105-106. The Second Circuit's decision thus reflects the principle that "when a plaintiff challenges a race-conscious affirmative action program, the injury-in-fact is the denial of equal treat-

ment while competing for the desired benefit, not the denial of the desired benefit itself." *Id.* at 103 (brackets and citation omitted). But unlike this case, *Vivenzio* did not involve any suggestion that the applicants were not "able and ready" to seek the positions in question.

The Sixth Circuit's decision in *Vitolo* v. *Guzman*, 999 F.3d 353 (2021), is likewise inapposite. In that case, Antonio Vitolo and his business challenged SBA's use of a race-based presumption in determining whether Vitolo was "socially disadvantaged" and thus eligible for priority consideration for coronavirus relief. *Id.* at 357. The government had argued that the plaintiffs lacked standing because they had not established that Vitolo himself was "socially disadvantaged" under race-neutral criteria. 21-cv-176 D. Ct. Doc. 30, at 4 (E.D. Tenn. May 21, 2021). The Sixth Circuit rejected that argument, stating that "[i]t does not matter that the plaintiffs might not otherwise qualify for priority consideration." *Vitolo*, 999 F.3d at 359. But unlike this case, *Vitolo* did not involve any suggestion that Vitolo was not "*economically* disadvantaged." The Sixth Circuit thus did not confront the same standing issue here. See Pet. App. 20a-21a.

Petitioners' reliance on the Eleventh Circuit's decision in *Wooden* v. *Board of Regents of the University System of Georgia*, 247 F.3d 1262 (2001), is also misplaced. *Wooden* involved challenges to the University of Georgia's use of racial preferences in its college admissions process. *Id.* at 1264-1265. As part of that process, the University "automatically rejected" any applicant whose "academic index" fell below a certain level. *Id.* at 1266. The University denied admission to one of the plaintiffs, Ashley Davis, because her academic index fell below that level. *Ibid.* The Eleventh Circuit held that Davis lacked standing to challenge the University's

use of racial preferences because she "was deemed unqualified according to entirely race-neutral criteria," *id.* at 1282, and therefore had not been "denied an opportunity to compete 'on an equal footing' with [other] applicants," *id.* at 1283. Likewise here, petitioners lack standing to challenge the use of a race-based presumption in determining "social disadvantage" because they are not otherwise eligible for the 8(a) Program (due to the "economic disadvantage" requirement). Pet. App. 20a-21a. Petitioners ignore (Pet. 18) *Wooden*'s holding that Davis lacked standing. But that holding demonstrates that *Wooden* is consistent with the decision below.

b. Petitioners also contend (Pet. 15) that the decision below conflicts with various decisions of other circuits that have found "standing to challenge unequal treatment without requiring the plaintiff to show he would otherwise obtain the underlying benefit." But as explained above, the court of appeals in this case did not require petitioners to show that that they "would otherwise *obtain* the underlying benefit." *Ibid.* (emphasis added); see pp. 14-15, *supra*. Rather, the court merely required petitioners to establish that they were otherwise *eligible* to seek 8(a) Program contracts and other benefits. The decision below therefore does not conflict with the decisions that petitioners cite (Pet. 15-16).

3. In any event, this case would be a poor vehicle for further review. Not only do petitioners ignore an independent ground for the decision below, see pp. 9-14, *supra*, but the question presented is of no prospective importance. In July 2023, the district court in another case enjoined the government from using the regulations' race-based presumption in determining "social disadvantage" under the 8(a) Program. See *Ultima Servs. Corp.* v. *U.S. Dep't of Agric.*, 683 F. Supp. 3d 745, 752-

753 (E.D. Tenn. 2023). In compliance with that injunction, the government has stopped using the regulations' presumption. D. Ct. Doc. 37-3, at 1. Moreover, the President has directed all Executive-Branch agencies, including SBA, to "terminate, to the maximum extent allowed by law," all "'equity-related' grants or contracts," Exec. Order No. 14,151, 90 Fed. Reg. 8339, 8339 (Jan. 29, 2025), and to "terminate all discriminatory and illegal preferences," Exec. Order No. 14,173, 90 Fed. Reg. at 8633. And in light of this Court's decision in *Students for Fair Admissions, Inc.* v. *President & Fellows of Harvard College*, 600 U.S. 181 (2023), the Department of Justice has determined that the regulations are unconstitutional to the extent they create a presumption that an individual is "socially disadvantaged" based solely on his membership in a racial group. Consistent with 28 U.S.C. 530D, the Department has informed Congress that it will no longer defend the regulations' race-based presumption in court. See p. 9, *supra*. Given that the parties no longer dispute that the regulations' presumption is unconstitutional, this Court's review of whether petitioners have standing to challenge the presumption would serve little purpose.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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