No. 25-14

In the Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

This case presents a textbook reason for granting certiorari: a conceded legal error on a foundational question of Article III standing, in conflict with multiple circuits and this Court's own precedents. The Fourth Circuit adopted a framework that, if uncorrected, will insulate unconstitutional racial classifications from judicial review.

It held that Petitioners lacked standing to challenge SBA's race-based presumption of social disadvantage because they had not proven that Hierholzer was himself socially disadvantaged. But as the government now admits, that was incorrect. Petitioners can "have standing to challenge discrimination in the 'social disadvantage' requirement, even if they could not establish that Hierholzer himself is 'socially disadvantaged'. . . ." Resp. 13. The government acknowledges that it "erred in arguing otherwise" and that, insofar as the Fourth Circuit accepted that argument, it "erred as well." *Id.* at 14.

That error goes to the heart of this Court's equal-protection doctrine. The Fourth Circuit's rule bars plaintiffs from challenging discriminatory eligibility criteria unless they first prove they otherwise qualify for the benefit—effectively requiring success under discriminatory criteria as a precondition for challenging them. That circular reasoning conflicts with *Northeastern Florida*, *Adarand*, and *Parents Involved*, and creates a split with multiple circuits. *See* Pet. 15-22. It also threatens to block judicial review of racial classifications across numerous federal programs. The question is clean, recurring, and outcome-determinative. The Court's review is

urgently needed. Given the government's concession of error, summary reversal would be appropriate.

The government tries to shift the focus to economic disadvantage. But the Fourth Circuit's ruling on economic disadvantage identified, at most, a routine, easily curable pleading defect. *See* Fed. R. Civ. P. 15. Its economic-disadvantage ruling was wrong in any event. Economic disadvantage is a subset of social disadvantage—not a threshold requirement. *See* 15 U.S.C. § 637(a)(6)(A). Plaintiffs need not plead downstream eligibility criteria to challenge upstream discriminatory barriers. And regardless of its correctness, the panel's economic disadvantage discussion does not affect its core holding on social disadvantage, which rests on a categorical and concededly incorrect understanding of standing. That is the ruling that demands this Court's review.

The government's recent disavowals only underscore the need for intervention. It no longer defends the 8(a) program's racial presumption; it admits the SBA regulation is unconstitutional; and it has paused enforcement following the district court's injunction in *Ultima*. But none of those steps moot this case, and the government never argues that it does. SBA has not rescinded the presumption. No final judgment has issued in *Ultima*. And the statutory requirement that applicants prove social disadvantage remains. Future regulations are likely to impose similar unequal burdens, making it essential that this Court resolve whether plaintiffs have standing to challenge them.

The conflict is clear. The error is conceded. And the consequences for equal-protection litigation are profound. The petition should be granted.

I. The Fourth Circuit's Decision Conflicts with Multiple Circuits and This Court's Precedents

The government concedes that under this Court's precedents, Petitioners can challenge the 8(a) program's discriminatory presumption even if they cannot independently establish social disadvantage—and that it erred in arguing otherwise below. Resp. 13-14. The government equivocates by suggesting the Fourth Circuit may not have fully adopted its error, *see id.* at 14, but the panel expressly held otherwise.

It clearly accepted the government's position, stating that "the Government is correct" and that Hierholzer was "required to plead facts to support . . . that [he] is socially . . . disadvantaged." Pet. App. 21a, 23a. In the panel's view, proof of social disadvantage was necessary to establish injury, causation and redressability. *Id.* at 23a-26a. In other words, the court fully accepted the government's argument and required Petitioners to succeed under the unequal standard they seek to challenge before it would allow their challenge to proceed.

That circularity creates a structural Catch-22: plaintiffs must overcome the burden they seek to challenge in order to have standing to challenge it. *See* Pet. 22. If allowed to stand, the decision will insulate unconstitutional racial classifications—the very harm this Court's equal-treatment doctrine exists to prevent. *See also* Pet 23 n.14; Amicus Br. of Wisc. Inst. for Law & Liberty (WILL) 4-8 (cataloguing dozens of federal statutes employing similar race-based presumptions). Given the government's effective concession that the decision below is contrary

to *Northeastern Florida* and its progeny, certiorari—and even summary reversal—is warranted.

Vitolo shows the proper approach. *See Vitolo v. Guzman*, 999 F.3d 353 (6th Cir. 2021). There, the Sixth Circuit addressed the same SBA regulation and rejected the very argument the Fourth Circuit embraced—and the government now concedes was error. *See* Pet. 16-17; Resp. 14. That is a clean, outcome-determinative split. The relevant legal question is whether a plaintiff must establish social disadvantage in order to challenge the presumption in 13 C.F.R. § 124.013. *Vitolo* answers no; the Fourth Circuit answers yes. The conflict is direct and irreconcilable.

The conflict with the Second and Eleventh Circuits is equally clear. In *Vivenzio*, plaintiffs had standing to challenge a racial hiring preference even though their exam scores were below the hiring cutoff. *See Vivenzio v. City of Syracuse*, 611 F.3d 98, 105 (2d Cir. 2010). The relevant injury was unequal treatment in the process—not ultimate success. *Wooden* confirms the same principle: even a plaintiff who would not ultimately benefit under a race-neutral policy has standing if race skewed the evaluation process. *See Wooden v. Bd. of Regents of Univ. Sys. of Ga.*, 247 F.3d 1262, 1278-79 (11th Cir. 2001).

The government's attempt to distinguish these cases fails because it ignores the central holding of *Northeastern Florida* that the Sixth, Second, and Eleventh Circuits followed and that the Fourth Circuit rejected: plaintiffs need not prove eligibility for a benefit they were denied on unequal terms in order to have standing. They must only show that

they were denied an opportunity to compete on equal footing. That is what Petitioners alleged here.[1]

In short, the Fourth Circuit's circuit-splitting rule is not only wrong, but dangerous. Left uncorrected, it will prevent courts from reaching the merits of racial classifications in federal programs—exactly when judicial review is most essential.

II. The Fourth Circuit's Economic Disadvantage Ruling Does Not Undermine the Need for Review

A. It reflects a routine, curable pleading issue—not a basis to deny certiorari

The government argues that this Court should deny review because the Fourth Circuit issued an economic-disadvantage ruling in Petitioners' case that is an "independent ground" for dismissal. Resp. 14. That mischaracterizes both the panel's analysis and the nature of the supposed defect.

The panel linked its economic-disadvantage reasoning to its now-conceded error regarding social disadvantage. It stated that Petitioners "were required to plead . . . that Hierholzer is socially and economically disadvantaged." Pet. App. 21a. It further held that Petitioners were "simply ineligible" based on "their failure to allege economic

[1] As to *Wooden* specifically, the government seizes on the example of plaintiff Davis, who was denied standing. Resp. 16-17. But that was because she was not treated unequally, having been eliminated from consideration at an earlier step, before race was used. *Wooden*, 247 F.3d at 1281-82. In contrast, Hierholzer was denied entry into the 8(a) program based solely on a social disadvantage determination—the very step at which the racial presumption applies. Pet. App. 20a, 31a.

disadvantage and their inability to prove social disadvantage." *Id.* at 24a. The two rationales were intertwined, such that a ruling by this Court reversing the social-disadvantage holding would require the lower courts to reconsider the economic-disadvantage holding as well.

Even if the economic-disadvantage analysis were deemed an independent ground, it is wholly different in kind from the social-disadvantage holding. The panel did not find that Hierholzer is *not* economically disadvantaged, but only that the complaint "failed to allege" it. Pet. App. 20a. Never mind that Petitioners submitted an unrebutted declaration showing Hierholzer satisfies every economic-disadvantage criterion in SBA's regulations. Pet. App. 81a-82a. The court declined to consider that evidence, citing Rule 12(b)(6) pleading limits. Pet. App. 20a-21a. But the appropriate framework for standing is Rule 12(b)(1), which allows courts to consider extrinsic evidence, including declarations. *See Land v. Dollar*, 330 U.S. 731, 735 n.4 (1947); *Tandon v. Captain's Cove Marina of Bridgeport, Inc.*, 752 F.3d 239, 243 (2d Cir. 2014) ("Where jurisdictional facts are placed in dispute, the court has the power *and obligation* to decide issues of fact by reference to evidence outside the pleadings, such as affidavits.") (emphasis added).

Whatever the merits of that evidentiary dispute (discussed more fully below), this supposed pleading technicality could be readily corrected through amendment—which courts "should freely give . . . when justice so requires." Fed. R. Civ. P. 15(a)(2).[2] It

[2] Given the lower courts' holdings on *social* disadvantage, there was no practical or legal basis for Petitioners to seek leave to

poses no obstacle to this Court's review. The error in the *social*-disadvantage holding, by contrast, erects a categorical standing barrier that forecloses judicial review of unconstitutional racial presumptions. *See also* Pet. App. 21a (the panel's holding that even if economic disadvantage were satisfied, dismissal is required because Petitioners "failed to plead that they could satisfy the 8(a) Program's race neutral social disadvantage requirements"). That is the issue that matters here, and only this Court can resolve it.

B. The panel's economic disadvantage ruling was incorrect in any event

Even if it were relevant, the panel's economic-disadvantage reasoning was legally wrong.

1. By statute, economic disadvantage is not an independent gateway requirement. It presupposes—and depends on—social disadvantage. *See* 15 U.S.C. § 637(a)(6)(A) (defining "economically disadvantaged individuals" as "those socially disadvantaged individuals whose ability to compete . . . has been impaired"); *Dynalantic Corp. v. Dep't of Defense*, 115 F.3d 1012, 1017 (D.C. Cir. 1997) ("[T]he statute treats the concept of economic disadvantage as a subset of social disadvantage . . . ."). SBA applies the economic-disadvantage criteria only after it determines that an applicant is socially disadvantaged. That was the case here: SBA denied both of Hierholzer's prior applications at the social-disadvantage step. *See* Pet.

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amend their complaint to add allegations of *economic* disadvantage, since they would be held to lack standing regardless. That is precisely why the social-disadvantage ruling—not any curable pleading omission—is the dispositive barrier that this Court must address.

App. 20a, 31a. It never reached economic disadvantage. Because Petitioners are challenging the *antecedent* barrier—the unconstitutional racial presumption that determines social disadvantage—they were not required to plead downstream eligibility criteria that SBA never reached. The panel incorrectly held otherwise.

Nor is the Fourth Circuit's conclusion defensible under the "able and ready" rubric. *See* Resp. 10-12. *Northeastern Florida* and *Carney* require only that a plaintiff credibly seek the opportunity to compete—not that he pre-prove satisfaction of every eligibility criterion before challenging an unconstitutional barrier. *Ne. Fla.*, 508 U.S. at 666; *Carney v. Adams*, 592 U.S. 53, 59 (2020). Petitioners alleged that Hierholzer owns and operates a small business, previously applied to the 8(a) program, and seeks to participate on equal terms. Pet. App. 60a-71a. That easily satisfies "able and ready." What the Fourth Circuit demanded—proof of social and economic disadvantage as a precondition to challenging the presumption—is precisely the merits-like threshold inquiry that *Northeastern Florida* forbids.

2. Even if economic disadvantage were relevant at the pleading stage, courts evaluating jurisdiction may consider extrinsic evidence, including sworn declarations. *See, e.g.*, *Land*, 330 U.S. at 735 n.4; *Tandon*, 752 F.3d at 243; *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988); *U.S. ex rel. Vuyyuru v. Jadhav*, 555 F.3d 337, 348 (4th Cir. 2009). The panel's refusal to consider Hierholzer's declaration rested on inapposite authorities. Pet. App. 20a-21a (citing *U.S. ex rel. Nathan v. Takeda Pharmacies North America, Inc.*, 707 F.3d 451, 453, 459 n.8 (4th Cir. 2013) (addressing Rule 12(b)(6), not Rule

12(b)(1)); *South Walk at Broadlands Homeowner's Ass'n, Inc. v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 184 (4th Cir. 2013) (addressing only whether plaintiffs can "amend their complaints through briefing or oral advocacy," not through the submission of additional evidence)). That was clear error.

Hierholzer's unrebutted declaration satisfies every relevant economic-disadvantage criterion in SBA's regulations—net worth, income, and assets. *See* 13 C.F.R. § 124.104(c)(2)-(4); Pet. App. 81a-82a. The government's suggestion that it "only" shows that Hierholzer is not "automatically disqualified," Resp. 12, misses the point. It more than plausibly alleges economic disadvantage, which is all that is required at the motion-to-dismiss stage. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

* * * * *

In short, the panel's economic-disadvantage ruling is (1) irrelevant to the circuit-splitting error on social disadvantage; (2) wrong on the law even if it were relevant; and (3) easily cured on remand even if it were right. It offers no basis for denying certiorari—especially where the government concedes the underlying racial presumption is unconstitutional and where the circuit split is outcome-determinative.

III. The Government's Concession of Unconstitutionality Underscores—Rather Than Undermines—the Need for Review

The government suggests that review is unnecessary because it has paused enforcement of the racial presumption, no longer defends its constitutionality, and has informed Congress of its changed position. Resp. at 8-9. But none of that moots

Petitioners' challenge, and none of it justifies allowing the Fourth Circuit's standing rule to remain intact.

This Court has long rejected the idea that voluntary cessation deprives plaintiffs of standing to challenge unlawful government action. *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). Here, the challenged presumption remains on the books; SBA has not rescinded it. And there has been no final judgment in *Ultima*, the district court case that triggered SBA's temporary pause. Moreover, the governing statute itself continues to require differential treatment based on race. *See* 15 U.S.C. §§ 631(f), 637(a)(4)-(5). The government does not—and cannot—argue that Petitioners' challenge is moot.

It is, of course, a positive development that the government is complying with a federal court injunction; that the President has directed agencies to terminate discriminatory preferences; and that DOJ now agrees that SBA's regulations are unconstitutional. Resp. 8-9. But none of these steps remove the presumption from the Code of Federal Regulations; SBA has only suspended its use. And even if the regulatory presumption were repealed tomorrow, the statutory preference for certain races—and the requirement that applicants prove social disadvantage—would remain.

Finally, the government's litigation posture here reflects a broader concern. Article III standing governs who may challenge discriminatory government action across the federal courts, in countless contexts extending well beyond the 8(a) program. *See, e.g.*, Pet. 23 n.14; WILL Amicus Br. 4-7. The question presented is not just fully live, but is

recurring, important, and outcome determinative. The Court should not allow a conceded standing error to become a permanent barrier to equal protection.

IV. As an Alternative to Plenary Review, the Court Should Summarily Reverse

This case presents the rare circumstance where summary reversal is appropriate. The government now concedes that Petitioners may challenge SBA's race-based presumption without first proving social disadvantage and that the Fourth Circuit erred to the extent it held otherwise. Resp. 13–14. But that is exactly what the panel did: it required Petitioners to prove the very condition that the presumption would excuse and dismissed the case on that basis. Pet. App. 21a, 23a–26a.

Thus, the judgment below rests on a plain and now-conceded misapplication of Article III. Petitioners alleged—correctly—the injury of being subjected to a more burdensome eligibility standard because of race. The panel's contrary rule will continue to bar such challenges unless plaintiffs first succeed under the unequal criteria they contest. That logic does not merely affect the 8(a) program, but the numerous federal statutes and regulations that impose differing evidentiary burdens or presumptions based on race or other classifications. If left uncorrected, the Fourth Circuit's approach will prevent courts in that circuit from reaching the merits of equal-protection challenges in a wide range of contexts.

Because the error is clear, conceded, outcome determinative, and consequential well beyond this case, summary reversal is warranted.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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