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**ASSESSING THE POTENTIAL CONSEQUENCES OF STUDENTS
FOR FAIR ADMISSIONS, INC. (SFFA) ON THE SMALL BUSINESS
DEVELOPMENT PROGRAM**

BY RALPH CAPIO AND ERIN M. CARR*

ABSTRACT

Small businesses play a pivotal role in the United States job market, constituting the largest source of employment throughout the national economy and employing more than 60 million Americans. However, small socially and economically disadvantaged firms, particularly those owned and operated by minoritized entrepreneurs, face substantial underrepresentation and challenges in securing government contract awards. Minority-owned firms have historically had difficulty in securing capital investments in comparison to non-minority-owned businesses due to having had to contend with the ongoing effects of systemic racism over generations.

Acknowledging the tremendous value of small socially and economically disadvantaged businesses to the overall health and vitality of the economy, Congress and multiple presidential administrations have committed to investing in these businesses over a period spanning seven decades. Through the targeted provision of technical expertise, access to much-needed capital, and, perhaps most importantly, through contract opportunities exclusively available to qualifying minority-owned businesses, minoritized business owners have been able to gain a footing in the national economy. The Small Business Administration's Section 8(a) Program has largely been responsible for effectuating this important national policy priority.

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*Despite having significant congressional support, the Small Business Development Program has not been without its challenges. Over the years, some consternation and litigation have challenged the restrictive definitions of companies that can be enrolled in and receive the benefits of this extensive government program. The primary constitutional challenge has been centered on the affirmative action nature of a program designed to promote the interests of companies based largely on racial classifications. Although the Small Business Development Program has in the past successfully navigated constitutional challenges, the Supreme Court's recent decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* ("SFFA") suggests that programmatic and legislative changes may be necessary to ensure the long-term survivability of the program. The Small Business Development Program, one of numerous race-conscious federal programs that have been developed to remediate structural inequalities, will almost certainly be subject to future legal challenges in the wake of SFFA.*

This Article delves into the historical evolution and structure of the Small Business Development Program in light of the Supreme Court's rejection of race-based remedial measures. Fundamentally, this Article argues that, despite the Supreme Court's recent affirmative action decision in SFFA, the Small Business Administration's Section 8(a) Program remains socially desirable, economically and ethically necessary, and legally permissible.

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INTRODUCTION

The U.S. economy is—in no small measure—held up by small businesses. Between 1995 and 2021, small businesses drove the creation of more than seventeen million new jobs, comprising roughly 60% of all new positions in the country.¹ In fact, 99.9% of all U.S. businesses are small businesses, translating to more than thirty-three million small businesses and sixty million jobs.² Within this context of robust small business contributions to the national economy, it is notable that nearly 20% of small businesses are minority-owned.³

Nevertheless, despite their significance in the national economy, small socially and economically disadvantaged businesses have encountered considerable challenges in competing against large businesses due to persistent structural inequalities. As a remedy, Congress established the Small Business Development Program to institutionalize and administer a wide array of offerings to assist small socially and economically disadvantaged businesses in developing their competitive skills. Central to this initiative is the Small Business Administration's Section 8(a) Program, which selectively and non-competitively awards government supplies, services, and construction contracts to small and socially disadvantaged businesses.⁴ The Program is aimed at developing small businesses into viable, stand-alone companies positioned for strategic advantage in the competition for government and commercial contracts.⁵

1. *Frequently Asked Questions About Small Business 2023*, U.S. SMALL BUS. ADMIN. OFF. OF ADVOC. (Mar. 7, 2023), <https://advocacy.sba.gov/2023/03/07/frequently-asked-questions-about-small-business-2023> [hereinafter OFFICE OF ADVOCACY, *FAQ*].

2. The total number of small businesses in the U.S. varies from time to time as economic conditions and incentives change. *Id.* See also U.S. SMALL BUS. ADMIN., *Strategic Plan: Fiscal Years 2022–2026*, at 2, <https://www.sba.gov/sites/default/files/2022-04/FY%202022-2026%20Strategic%20Plan%20for%20Publication%20%28R2%29.pdf> (last visited Feb. 25, 2024).

3. Of these firms, the business ownership by demographic is as follows: 6.2% were Hispanic-owned, 2.4% were Black-owned, 10.4% were Asian-owned, 0.5% were American Indian or Alaska Native-owned, and 0.1% were Native Hawaiian or other Pacific Islander-owned. OFFICE OF ADVOCACY, *FAQ*, *supra* note 3.

4. “Small and socially disadvantaged businesses” are defined as firms that are at least 51% owned and controlled by individuals that are both socially and financially disadvantaged. 15 U.S.C. § 637(a)(4)(A).

5. 13 C.F.R. § 124.1.

Small businesses⁶ are of critical importance to the national economy, making up the lion's share of U.S. employer firms nationwide.⁷ As such, the impact of small businesses on job creation and the equitable distribution of wealth is incredibly important to the underlying fairness and functioning of the economy. Ensuring that small socially and economically disadvantaged businesses can compete in the marketplace—without social or legal barriers—is essential to the equitable distribution of opportunity and wealth in the American economy.⁸ Whether through job creation or innovation, small businesses add to the vitality of the U.S. economy and, consequently, play an important role in the country's ability to compete on the world stage.⁹

However, small socially and economically disadvantaged businesses—most notably those owned and operated by minoritized entrepreneurs—have historically had great difficulty in winning bids for government contracts.¹⁰ Such businesses are frequently unable to navigate cumbersome statutory and regulatory procurement rules, and,

6. The average small business has approximately twenty-five employees. OFFICE OF ADVOCACY, *FAQ*, *supra* note 3.

7. *Id.*

8. See generally U.S. DEPT. OF JUST., *The Compelling Interest to Remedy the Effects of Discrimination in Federal Contracting: A Survey of Recent Evidence* (2022), <https://www.justice.gov/crt/page/file/1463921/download>; see also *Fact Sheet, White House, Joe Biden, President, Biden-Harris Administration Announces New Actions to Build Black Wealth and Narrow the Racial Wealth Gap*, THE WHITE HOUSE (June 1, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/01/fact-sheet-biden-harris-administration-announces-new-actions-to-build-black-wealth-and-narrow-the-racial-wealth-gap/>.

9. Justin Siken, *Small Businesses Awarded Record \$159 Billion from Federal Government in 2022*, HIGHERGOV (Feb. 13, 2023), <https://www.highergov.com/reports/small-business-trends-2022/>; Kelly Main & Cassie Bottorff, *Small Business Statistics of 2023*, FORBES ADVISOR (Dec. 7, 2022), <https://www.forbes.com/advisor/business/small-business-statistics/>.

10. See U.S. DEP'T OF COM., MINORITY BUS. DEV. AGENCY, *Contracting Barriers and Factors Affecting Minority Business Enterprises: A Review of Existing Disparity Studies*, at 70 (Dec. 2016), chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.mbda.gov/sites/default/files/migrated/files-attachments/ContractingBarriers_AReviewofExistingDisparityStudies.pdf; see also COMPELLING INTEREST FOR RACE- AND GENDER-CONSCIOUS FEDERAL CONTRACTING PROGRAMS: AN UPDATE TO THE MAY 23, 1996 REVIEW OF BARRIERS FOR MINORITY- AND WOMEN-OWNED BUSINESSES 10 (2010) (citing a review of approximately seventy studies documenting significant disparities in almost every aspect of business activity that constitute a pattern of substantive and pervasive discriminatory barriers).

more markedly, are unable to successfully compete against large businesses with greater experience and resources.¹¹ Though minority business ownership is crucial to the overall economic equity of the United States, minority-owned businesses have been systematically excluded and, hence, remain underrepresented.¹²

The Small Business Development Program is one of several race-conscious federal programs established to remediate structural inequalities perpetuated through government policy that have disadvantaged minority entrepreneurs.¹³ During much of its history, the Small Business Development Program has represented a bipartisan legacy of

11. See generally Votey Cheav, *Programs of Parity: Current and Historical Understandings of the Small Business Act's Section 8(a) and HUBZone Programs*, 12 DEPAUL BUS. & COM. L.J. 477 (2014); *Government Shutdown's Impact on Small Businesses*, C-SPAN, at 09:52–13:36, 1:26:34–1:27:10 (Feb. 6, 2019), <https://www.c-span.org/video/?457614-1/government-shutdowns-impact-small-businesses> (discussing research conducted on the impact of the 2013 government shutdown on the economy, paying attention to the impacts on “[s]mall businesses in particular” as “large institutions usually have a buffer.” Speaking to this, Charles Rowe, President and CEO of Americas Small Business Development Centers, asserts “we are fighting for the small business with one arm tied behind our back”).

12. OFFICE OF ADVOCACY, *FAQ*, *supra* note 3; Paul M. Ong, *Set-Aside Contracting in SBA's 8(a) Program*, 28(3) REV. OF BLACK POL. ECON. (2000). See also Drabkin, *supra* note 2; see generally Andre Perry et al., *Five Star Reviews, One Star Profits: The Devaluation of Businesses in Black Communities*, BROOKINGS INST. (Feb. 2020), https://www.brookings.edu/wp-content/uploads/2020/02/2020.02_DevOfBizInBlackCommunities_Perry-Rothwell-Harshbarger-final.pdf.

13. The Disadvantaged Business Enterprise (DBE) Program, one of the largest and most well-established race-conscious remedial programs, is administered by the Department of Transportation to address persistent discrimination in federally assisted highway, transit, airport, and highway safety financial assistance transportation contracting markets. See generally Infrastructure Investment and Jobs Act, Pub. L. 117–58, 135 Stat. 429 (2021) (23 U.S.C. § 101) (describing congressional findings regarding the ongoing need for the DBE Program due to discrimination and related barriers that pose significant obstacles for minority and women-owned businesses seeking federally-assisted transportation contracts). *Id.* The program awards contracts to minoritized businesses for transportation infrastructure projects. *Id.* It was most recently reauthorized by Congress in 2021. *Id.* Similar to the Small Business Administration's 8(a) program, the Supreme Court's ruling in *SFFA* has invited constitutional challenges to the race-conscious aspects of the DBE that presume that certain groups are socially and economically disadvantaged based on gender and race. See Julian Mark, *Government Presumption of Racial Disadvantage Under Siege by White Plaintiffs*, WASH. POST (Dec. 18, 2023), <https://www.washingtonpost.com/business/2023/12/18/minority-business-programs-racial-disadvantage/>.

robust policy support for small socially and economically disadvantaged businesses.¹⁴

Nevertheless, a jurisprudential shift in the Supreme Court's acceptance of race-conscious measures may portend future legal challenges to the Small Business Development Program. During the past several decades—and accelerated over recent Supreme Court terms—race-based affirmative action policies and programs have increasingly found themselves on the losing end of constitutional battles.¹⁵ In June 2023, the Court deemed the use of race in college admissions unconstitutional, overturning 45 years of legal precedent.¹⁶ Writing for the majority in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* (“SFFA”),¹⁷ Chief Justice John Roberts emphasized

14. The Small Business Development Program was repeatedly reauthorized with bipartisan support during the first half-century of the Program's existence. MICHELLE KUMAR ET AL., SMALL AGENCY, BIG MANDATE: A BIPARTISAN ROAD MAP 4–5 (2023). However, since 2000, the Program has been reauthorized on a disjointed, piece-meal basis. *Id.*

15. *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013) (invalidating sections of the Voting Rights Act based on the reasoning, as expressed by Chief Justice Roberts, writing for the majority, that “our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.”); *Students for Fair Admissions, Inc. v. President and Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023) (holding that race-based affirmative action programs in college admissions violates the Equal Protection Clause of the Fourteenth Amendment); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007) (holding that programs that use race in student assignment to public schools are unconstitutional); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 520 (1989).

16. *Students for Fair Admissions, Inc.*, 143 S. Ct. 2141.

17. *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina et al.* (“SFFA”) are a pair of consolidated Supreme Court cases that addressed the constitutionality of race-based affirmative action in higher education admissions at private and public universities. Lulu Garcia-Navarro, *He Worked for Years to Overturn Affirmative Action and Finally Won. He's Not Done*, N.Y. TIMES (July 8, 2023), <https://www.nytimes.com/2023/07/08/us/edward-blum-affirmative-action-race.html>. The plaintiff, a non-profit legal advocacy organization founded by conservative legal activist Edward Blum, alleged that Harvard College and the University of North Carolina violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964 because their admissions process intentionally discriminated against Asian American applicants based on their race and ethnicity. *Id.* SFFA is one of over two dozen cases initiated by Blum seeking to eliminate all considerations of race and ethnicity from the law. *Id.*

the need for a “color-blind” approach to equal protection jurisprudence.¹⁸ “Color-blind” constitutionalism, as envisioned by the Roberts Court, holds that there is no place for the consideration of race in judicial decision-making. The Court’s “color-blind” antidiscrimination jurisprudence will have the effect of placing substantial and, in some cases, insurmountable legal hurdles to long-supported race-conscious programs critical to advancing national objectives.

This Article considers the policy imperatives underlying the Small Business Development Program within the current context of the Supreme Court’s skepticism of affirmative action initiatives in favor of a “color-blind”¹⁹ interpretation of the Constitution that negates the use of race-conscious remedial measures. Though acknowledging that the Court’s recent decision in *SFFA* may generate future legal challenges questioning the constitutionality of affirmative action aspects of the Small Business Development Program, this Article provides a legal basis for the Program’s continued support of small socially and economically disadvantaged businesses. Specifically, the Small Business Administration’s Section 8(a) Program could be validly justified as advancing a compelling, narrowly tailored interest. Should such an argument be rejected by the Court, however, the statutory presumption of “social and economic disadvantage” (often regarded as constitutionally offensive) could be replaced with a permissive inference that looks at factual evidence of social disadvantage to authorize aid. In doing so, it may be possible to continue the long-established legislative mandate and national commitment to small minority-owned businesses, irrespective of the unprecedented policymaking occurring from the federal bench.

I. THE SMALL BUSINESS DEVELOPMENT PROGRAM

Public procurement expenditures, in excess of over a trillion dollars a year, are used not only to acquire government supplies but also as a primary vehicle to leverage the tremendous purchasing power of the

18. *Id.*

19. See generally Randall Kennedy, *Colorblind Constitutionalism*, 82 FORDHAM L. REV. 1 (2013); Theodore R. Johnson, *How Conservatives Turned the ‘Color-Blind Constitution’ Against Racial Progress*, THE ATLANTIC (Nov. 19, 2019), <https://www.theatlantic.com/ideas/archive/2019/11/colorblind-constitution/602221/>.

government to achieve critical socio-economic goals.²⁰ The federal government uses its substantial procurement program to foster small socially and economically disadvantaged businesses so that they may become stand-alone commercial enterprises capable of successfully competing in the commercial marketplace.

Through the public procurement process, the federal government acquires its needs for supplies, services, and construction, ranging from paper clips to major weapons systems to space shuttles.²¹ The government does this by awarding fixed-price and cost-reimbursement contracts to commercial firms through a complex source-selection process.²² This sophisticated and complex process is controlled by statutes and agency regulations.²³

In 2022, nearly \$163 billion in government contracts were awarded to small businesses.²⁴ Approximately 62% of that total was awarded as a result of small business set-asides, an agency source selection process that prohibits large businesses from competing.²⁵ Of that total, roughly \$62 billion was awarded by the Small Business Association; \$21 billion went to Section 8(a) Program businesses; \$12 billion were awarded to service-disabled veteran-owned businesses; \$3 billion went to

20. The U.S. government is the largest procurer of goods and services in the world. See U.S. SMALL BUS. ADMIN., *Strategic Plan: Fiscal Years 2022–2026*, at 2, <https://www.sba.gov/sites/default/files/2022-04/FY%202022-2026%20Strategic%20Plan%20for%20Publication%20%28R2%29.pdf> (last visited Feb. 25, 2024); see also, generally Fatima Hafsa et al., *Social Public Purchasing: Addressing a Critical Void in Public Purchasing Research*, 82(5) PUB. ADMIN. REV. 818 (2021).

21. CONG. RSCH. SERV., RS22536, OVERVIEW OF THE FEDERAL PROCUREMENT PROCESS AND RESOURCES (2023).

22. KATE M. MANUEL, CONG. RSCH. SERV., COMPETITION IN FEDERAL CONTRACTING: AN OVERVIEW OF THE LEGAL REQUIREMENTS, at 7 (2011), <https://sgp.fas.org/crs/misc/R40516.pdf>.

23. *Id.*

24. Press Release 23-47, U.S. Small Business Admin., Biden-Harris Administration Sets Record-Breaking \$163 Billion in Federal Procurement Opportunities to Small Businesses (Jul. 18, 2023), <https://www.sba.gov/article/2023/07/18/biden-harris-administration-sets-record-breaking-163-billion-federal-procurement-opportunities-small>.

25. Siken, *supra* note 11.

“HubZone” businesses;²⁶ and \$1 billion were awarded to woman-owned small businesses.²⁷ Although the amount of federal contracts awarded to small businesses (including small socially and economically disadvantaged businesses) represented a historic high, by its own admission the federal government failed to meet its 3% statutory goal in empowering HUBZone small businesses.²⁸

A. *A Pragmatic Overview*

To assist small socially and economically disadvantaged businesses in developing business capabilities that will enable them to become successful competitors, the government established the Small Business Development Program, a congressionally mandated plan administered by the Small Business Administration.²⁹ The objective of this program is to aid small socially and economically disadvantaged businesses in becoming viable, stand-alone companies able to successfully compete for both government and commercial contracts and, thereafter, play a vital role in the national economy and to aid in the fair distribution of wealth.³⁰ The government has created several programs to manage the competitive environment and support qualifying firms in achieving these goals.³¹

26. The HUBZone program offers federal contracting assistance to qualified small businesses located in historically underutilized business zones to increase economic development in those areas. 15 U.S.C. §§ 632(a), 632(j), 632(p), 644, 657(a).

27. Siken, *supra* note 11.

28. Press Release 23-47, *supra* note 25.

29. See 15 U.S.C. §§ 636(f), 636(j)(10); see also U.S. SMALL BUS. ADMIN., 8(a) *Business Development Program*, <https://www.sba.gov/federal-contracting/contracting-assistance-programs/8a-business-development-program#id-program-overview> (last accessed Nov. 22, 2023) [hereinafter 8(a) *Business Development Program*].

30. U.S. SMALL BUS. ADMIN., *Grow the number of 8(a)-certified disadvantaged small businesses*, PERFORMANCE.GOV, <https://obamaadministration.archives.performance.gov/content/grow-number-8a-certified-disadvantaged-small-businesses.html> (last accessed Nov. 26, 2023) [hereinafter *Grow the number of 8(a)-certified disadvantaged small businesses*]. See 15 U.S.C. §633(h)(1); see also Katie Toyoshima et al., *Small Business Development Centers and Rural Entrepreneurial Development*, J. OF SMALL BUS. STRATEGY, 31(4), 57–63 (2021).

31. Illustrative of such programs are the Women-Owned Small Business Federal Contract Program, SBA Mentor-Protégé Program, the HUBZone program, and veteran contracting assistance programs. See generally *Women-Owned Small Business Federal Contract Program*, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/federal->

The Small Business Administration's Section 8(a) Program, also known as the Minority Small Business and Capital Ownership Development Program, is a business development initiative that specifically provides technical training and contract opportunities to small socially and economically disadvantaged businesses.³² To enroll in the Small Business Administration's Section 8(a) Program, a company must submit a formal application demonstrating its compliance with eligibility criteria and undergo a rigorous Small Business Administration status evaluation.³³ While the Small Business Administration has a ninety-day window to review an application, it can take much longer than that, with most applications being rejected as incomplete.³⁴ Due to significant administrative barriers, typically only a quarter of applicants are able to successfully navigate the process each year (equating to roughly 500–600 out of approximately 2,000 applicants).³⁵ The onerous administrative requirements of the Small Business Administration's Section 8(a) Program have resulted in an approval rate that rarely exceeds 50%.³⁶ The application process has proven so challenging that the number of participating businesses has dropped from 9,000 participants to less than 4,700 in recent years.³⁷

Once enrolled and certified in the Small Business Administration's Section 8(a) Program, participants can continue in it for a period of up to nine years.³⁸ Participants are eligible for assistance in the form of contracting sole-source preferences, as well as training and loan

contracting/contracting-assistance-programs/women-owned-small-business-federal-contract-program (last visited Feb. 23, 2024); *SBA Mentor-Protégé Program*, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/federal-contracting/contracting-assistance-programs/sba-mentor-protege-program> (last visited Feb. 23, 2024); *HUBZone program*, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/federal-contracting/contracting-assistance-programs/hubzone-program> (last visited Feb. 23, 2024); *Veteran Contracting Assistance Programs*, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/federal-contracting/contracting-assistance-programs/veteran-contracting-assistance-programs> (last visited Feb. 23, 2024).

32. *8(a) Business Development Program*, *supra* note 31.

33. *Id.*

34. *Grow the number of 8(a)-certified disadvantaged small businesses*, *supra* note 32.

35. *Id.*

36. *Id.*

37. *Id.*

38. *8(a) Business Development Program*, *supra* note 31.

guarantees not otherwise available to small socially and economically disadvantaged businesses that are not certified as an 8(a) company.³⁹ Importantly, small socially and economically disadvantaged businesses are also entitled to compete and receive critical set-aside and sole-source contracts which are limited to qualifying small businesses alone.⁴⁰

Defining which companies qualify for entry into the program is critical. The Small Business Administration defines firms that are eligible to participate in the program as for-profit firms, independently owned and operated, not dominant in their field, with a number of employees ranging from between 1 and 500 (sometimes more or less, depending on the field of economic endeavor).⁴¹

Also, firms owned and controlled by socially and economically disadvantaged persons are eligible for the Business Development Program.⁴² More specifically, these entrants must be “51% 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” that demonstrate “potential for success.”⁴³

Demonstrating “good character,”⁴⁴ to the satisfaction of the Small Business Administration, can be somewhat daunting. Generally, the Small Business Administration will assess this requirement by ascertaining if the applicant firm has any adverse information in its past record. To some extent this is a judgment call, but the Small Business Administration generally considers whether (1) the firm or its principals

39. *Id.*

40. *Id.* See also U.S. SMALL BUS. ADMIN., *Types of Contracts*, <https://www.sba.gov/federal-contracting/contracting-guide/types-contracts> (last accessed Nov. 26, 2023).

41. Andrew W. Hait, *The Majority of U.S. Businesses Have Fewer Than Five Employees*, U.S. CENSUS BUREAU: WHAT IS A SMALL BUSINESS? (Jan. 19, 2021) [https://www.census.gov/library/stories/2021/01/what-is-a-small-business.html#:~:text=It%20defines%20small%20business%20by,of%20%2416.5%20million%20or%20less;see%20generally%20Susan%20Turner%20&%20Al%20Endres%20Strategies%20for%20Enhancing%20Small%20Business%20Owners'%20Success%20Rates,16%20INT'L%20J.%20APPLIED%20MGMT.%20&%20TECH.34%20\(2017\).](https://www.census.gov/library/stories/2021/01/what-is-a-small-business.html#:~:text=It%20defines%20small%20business%20by,of%20%2416.5%20million%20or%20less;see%20generally%20Susan%20Turner%20&%20Al%20Endres%20Strategies%20for%20Enhancing%20Small%20Business%20Owners'%20Success%20Rates,16%20INT'L%20J.%20APPLIED%20MGMT.%20&%20TECH.34%20(2017).)

42. Hopkins, *supra* note 2.

43. 15 U.S.C. §§ 637(a)(4)(A)–(B)); 13 C.F.R. § 124.105. See also CONG. RSCH. SERV., R44844, SBA’S “8(A) PROGRAM”: OVERVIEW, HISTORY, AND CURRENT ISSUES (July 29, 2022), <https://crsreports.congress.gov/product/pdf/R/R44844> [hereinafter SBA’S “8(A) PROGRAM”].

44. 13 C.F.R. §§ 124.108(a)(1)–(5).

have engaged in any criminal misconduct; (2) whether the firm has violated any Small Business Administration regulations; (3) whether the firm has been suspended or debarred from doing business with the government; (4) whether the firm has exhibited a lack of business integrity as evidenced in an indictment, guilty plea, or a civil judgment; (5) whether any principal of the firm is incarcerated or is on parole or probation; (6) whether there is evidence to indicate that the firm may have submitted false information during the application process; or (7) whether there is any indication that the firm or any of its principals have failed to pay any financial obligation owed to the government.⁴⁵

“Social and economic disadvantage,” as defined in the Small Business Act, includes “individuals who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities,” notwithstanding the fact that these identities emerge from circumstances beyond their control.⁴⁶ The 1978 Amendments to the Small Business Act established a statutorily rebuttable presumption, based on expressed legislative findings, that “Black Americans, Hispanic Americans, Native Americans, and other minorities”⁴⁷ are deemed to be socially disadvantaged for purposes of satisfying the eligibility requirements for the Small Business Administration’s Section 8(a) Program.⁴⁸ Other groups may gain eligibility by demonstrating their social disadvantage by a preponderance of the evidence.⁴⁹

Economically disadvantaged individuals are further defined as “socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and

45. SBA’s “8(A) PROGRAM,” *supra* note 45, at 13.

46. 15 U.S.C. § 637(a)(5).

47. The meaning of “socially disadvantaged individuals” was the subject of considerable legislative debate. SBA’s “8(A) PROGRAM,” *supra* note 45, at 5. Some members of Congress viewed the 8(a) Program as a program for African Americans, whereas other legislators advocated for a broader definition that encompassed both African Americans and Native Americans. *Id.* There were still others who advocated for a definition of “socially disadvantaged individuals” that was not premised on racial or ethnic identity so as to include women. *Id.*

48. 15 U.S.C. § 631(f)(1)(C).

49. SBA’s “8(A) PROGRAM,” *supra* note 45.

credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged.”⁵⁰

Additionally, the Small Business Administration sets threshold financial standards for determining when an economic disadvantage for socially disadvantaged individuals creates eligibility to participate in the program.⁵¹ This determination considers net worth, income levels, and total assets.⁵² These thresholds were changed in July 2020 by the Small Business Administration, increasing net worth for program entry to \$850,000, annual income to \$400,000, and total business assets to \$6,500,000.⁵³

For a firm to enter into the Small Business Administration’s Section 8(a) Program, the following criteria must be satisfied: (1) it must qualify as a small business; (2) it must be owned and operated by socially and economically disadvantaged individuals; (3) it must submit a formal application to the Small Business Administration for inclusion into the Program; and (4) it must be accepted by the Small Business Administration.⁵⁴ All companies certified by the Small Business Administration to be in the Section 8(a) Program automatically qualify as a small and socially disadvantaged business, but not all small and socially disadvantaged businesses are classified as Section 8(a) firms since that status requires a formal application to the Small Business Administration, approval, and acceptance.

Most government contracts are awarded on the basis of competition. Small socially and economically disadvantaged firms enrolled in the Small Business Administration’s Small Business Development Program, however, are eligible to compete for government contracts

50. 13 C.F.R. § 124.104(a). *See also* Elizabeth Asiedu et al., *Access to Credit by Small Businesses: How Relevant Are Race, Ethnicity, and Gender?*, 102(3) AM. ECON. REV. 532 (May 2012).

51. SBA’s “8(A) PROGRAM,” *supra* note 44, at 38.

52. *Id.*

53. The U.S. Government Accountability Office critically recognized that these thresholds were raised by the Small Business Administration without having done any analysis as to the possible impact that these higher thresholds may have on participants or the future of the program. *See* GOV’T ACCOUNTABILITY OFF., *Small Business Administration: Recent Changes to the 8(a) Program’s Financial Thresholds Need Evaluation*, GAO (Aug. 30, 2022) <https://www.gao.gov/products/gao-22-104512> (last accessed Oct. 4, 2023); 8(a) *Business Development Program*, *supra* note 30.

54. SBA’s “8(A) PROGRAM,” *supra* note 44, at 24–27.

without meeting the ordinary full and open competition standard that applies to most government contracts.⁵⁵ Based on periodically adjusted dollar thresholds, eligible firms compete for projects that are set-aside only for them, in which large businesses are excluded from competition. Procurements ranging from \$10,000 (the micro-purchase threshold)⁵⁶ up to \$250,000 (the simplified acquisition threshold)⁵⁷ must be set aside by procuring agencies for small businesses, but only if it is determined that at least two responsible firms can offer products or services at competitive prices and meet fair market standards of quality and delivery schedule.⁵⁸ This is known as the Rule of Two, authorized by regulation.⁵⁹ For procurements greater than \$250,000, procuring agencies may set contracts aside for eligible small businesses on a discretionary basis, as long as the Rule of Two is satisfied.⁶⁰

B. The Evolution of Non-Discrimination Requirements in Federal Contracting and the Advent of the Small Business Administration's Business Development Program

Federal programs to help minoritized groups participate in the government procurement process belatedly began with President Franklin Delano Roosevelt's 1941 Executive Order No. 8802, which required all agencies to include a clause in federal contracts prohibiting contractors from discriminating on the basis of "race, creed, color, or national origin."⁶¹ The issuance of the Executive Order was in part motivated by the advocacy efforts of A. Philip Randolph and Baynard Rustin, whose leadership drew national attention to discriminatory labor practices that

55. *Id.* at 13–14.

56. FAR 2.101 (2024).

57. FAR 13 (2024) (referring to FAR 2.101 (2024) for definition of simplified acquisition threshold); *see also* Federal Acquisition Regulation: Increased Micro-Purchase and Simplified Acquisition Thresholds, 85 Fed. Reg. 40064 (Jul. 2, 2020) (codified at 41 U.S.C. 1902(a)(1), adjusting the simplified acquisition threshold to \$250,000).

58. FAR 19.502-3(a)(4) (2024) (governing partial set-asides of contracts other than multiple-award contracts).

59. *Id.*

60. *Id.*

61. Exec. Order No. 8802, 3 C.F.R. (1941–1943 Comp.), *reprinted in* 6 Fed. Reg. 3109 (June 25, 1941).

prevented African-American workers from seeking employment in segregated war production factories.⁶² Two years later, President Roosevelt issued a second Executive Order, extending the non-discrimination mandate in federal hiring to all areas of government contracting.⁶³

During the Truman Administration, Executive Order No. 10308 established the Committee on Government Contract Compliance, which was responsible for overseeing the compliance of federal contractors with the non-discrimination provisions of President Roosevelt's earlier Executive Order.⁶⁴ President Dwight Eisenhower expounded upon this compliance infrastructure by directing the creation of the President's Committee on Government Contracts under Executive Order 10479.⁶⁵ Executive Order 10479 strengthened the enforcement responsibilities of the head of each contracting agency of the federal government to "insure compliance with, and successful execution of, the equal employment opportunity program of the United States Government."⁶⁶ It was also during the Eisenhower presidency that Congress passed the Small Business Act, establishing the U.S. Small Business Administration.⁶⁷

Nearly two decades after the issuance of President Roosevelt's initial Executive Order, President John Kennedy signed an Executive Order requiring all federal contractors to take "affirmative action" to ensure all job applicants and employees were treated equally, regardless of race, creed, color, or national origin.⁶⁸ Executive Order 10925, signed shortly after President Kennedy assumed office, was inspired by

62. OFF. OF FED. CONT. COMPLIANCE PROGRAMS, *History of Executive Order 11246*, U.S. DEPT. OF LAB., <https://www.dol.gov/agencies/ofccp/about/executive-order-11246-history#:~:text=Thus%2C%20on%20September%2024%2C%201965,Office%20of%20Federal%20Contract%20Compliance> (last visited Mar. 11, 2024) [hereinafter *History of EO 11246*].

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *About SBA: Organization*, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/about-sba/organization> ("Since its founding, SBA has delivered millions of loans, loan guarantees, contracts, counseling sessions, and other forms of assistance to small businesses.") The U.S. Small Business Administration is an independent federal agency whose purpose it is "to aid, counsel, assist, and protect the interests of small business," thereby strengthening the overall national economy. *Id.*

68. Exec. Order No. 10925, 3 C.F.R. 448 (1959–1963 Comp.), *reprinted in* 26 Fed. Reg. 1977 (Mar. 8, 1961).

the demands and successes of the Civil Rights Movement.⁶⁹ Although the phrase “affirmative action” had previously been associated with labor rights and collective bargaining, President Kennedy’s 1961 Executive Order is considered the first use of this term in a broader policy context involving the advancement of racial equality.⁷⁰ This Executive Order further authorized federal contracting agencies to establish procedures to enforce equal opportunity requirements, enabling federal agencies to sanction non-compliant agencies through the cancellation of contracts and debarment from future contracts.⁷¹ Additionally, the Executive Order resulted in the creation of the President’s Committee on Equal Employment Opportunity, which would later become the Equal Employment Opportunity Committee upon passage of the Civil Rights Act in 1964.⁷²

Thereafter, Presidents Lyndon Johnson and Richard Nixon set events in motion that would eventually lead to the creation of the Small Business Administration’s Section 8(a) Program. In 1965, a few months after delivering the commencement address to graduates of Howard University declaring that “we seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result,” President Johnson signed Executive Order 11246.⁷³ Under the presidential directive, the Secretary of Labor was delegated the authority to administer the order’s non-discrimination and affirmative action provisions.⁷⁴

69. See generally *The History of the EEOC: The Early Years*, U.S. EQUAL EMP. OPPORTUNITY COMM. <https://www.eeoc.gov/history/early-years>; see also Anemona Hartocollis, *How the term ‘affirmative action’ came to be*, N.Y. TIMES (Oct. 31, 2022), <https://www.nytimes.com/2022/10/31/us/politics/affirmative-action-history.html>.

70. Hartocollis, *supra* note 71. See also Jackie Mansky, *The History Behind the Supreme Court’s Affirmative Action Decision*, SMITHSONIAN MAG. (June 29, 2023), <https://www.smithsonianmag.com/history/learn-origins-term-affirmative-action-180959531/>.

71. *History of EO 11246*, *supra* note 6.

72. *Id.*

73. Lyndon B. Johnson, “To Fulfill These Rights” Commencement Address at Howard University, in UNIV. OF CAL., SANTA BARBARA: THE AMERICAN PRESIDENCY PROJECT (June 4, 1965), <https://www.presidency.ucsb.edu/documents/commencement-address-howard-university-fulfill-these-rights>.

74. *History of EO 11246*, *supra* note 64.

President Nixon's program continued the earlier initiatives of his predecessors but focused specifically on minority-owned businesses.⁷⁵ In 1969, President Nixon issued Executive Order 11478, aiming "to promote the full realization of equal employment opportunity through a continuing affirmative program in each executive department and agency."⁷⁶ President Nixon formed the Office of Minority Business Enterprise ("OMBE") and "expanded federal procurement from firms owned by African Americans and Hispanic Americans."⁷⁷ During Nixon's administration, the Small Business Administration articulated, for the first time, its policy to "assist small concerns owned by disadvantaged persons to become self-sufficient, viable businesses capable of competing effectively in the marketplace."⁷⁸

In 1978, Congress amended the Small Business Act to provide the Small Business Administration with express statutory authority for its Small Business Development Program and, furthermore, provided a definition of socially and economically disadvantaged for purposes of the statute.⁷⁹ Congress also went on to find that "Black Americans, Hispanic Americans, Native Americans, and other minorities" are presumed to be socially disadvantaged.⁸⁰ Underlying the Small Business Act is the presumption that certain small business owners are socially disadvantaged on the basis of race. This is evidenced by their disproportionate representation in the economy in comparison to their total population numbers⁸¹ and, because they are underrepresented, they are entitled to receive government contract awards. Consequently, Congress declared it to be a national policy regarding small businesses to:

75. See generally Exec. Order No. 11625, 3 C.F.R. 616 (1971–1975 Comp.); see also Dean Kotlowksi, *Black Power-Nixon Style: The Nixon Administration and Minority Business Enterprise*, 72 BUS. HIST. REV. 409 (Oct. 1998).

76. Exec. Order No. 11478, 3 C.F.R. 803 (1966–1970 Comp.).

77. See generally Kotlowksi, *supra* note 77 (detailing the philosophical and political motivations for Nixon's support for minority entrepreneurship).

78. SBA's "8(A) PROGRAM," *supra* note 45.

79. Amendments to the Small Business Act and the Small Business Investment Act of 1958, Pub. L. No. 95-507, §202, 92 Stat. 1757 (1978) (codified at 15 U.S.C. §637(a)(5)).

80. *Id.* See also SBA's "8(A) PROGRAM," *supra* note 45, at 5.

81. Press Release, U.S. Census Bureau, Census Bureau Releases New Data on Minority-Owned, Veteran-Owned and Women-Owned Businesses (Oct. 26, 2023), <https://www.census.gov/newsroom/press-releases/2023/annual-business-survey-employer-business-characteristics.html>.

[I]nsure that a fair proportion of the total purchases and contracts and subcontracts for property and services for the Government . . . be placed with small-business enterprises, to insure that a fair proportion of the total sales of Government property be made to such enterprises . . . to maintain and strengthen the overall economy of the Nation.⁸²

Why has Congress acted to provide such assistance to small and socially disadvantaged businesses? The answer lies within the racial wealth gap, a disparity that remains a persistent national problem.⁸³ By way of illustration, Black families have about one-tenth the net worth of white households.⁸⁴ There are a number of social and legal barriers that keep socially disadvantaged groups from entering into the marketplace and/or succeeding therein.⁸⁵

Some reasons for these barriers include a lack of intergenerational wealth transfers that frequently make it possible for white families to own their own homes, to begin successful businesses, attend universities, and have access to better healthcare.⁸⁶ Absent government assistance, socially disadvantaged individuals must find their own way unaided, making the task of starting a business, for example, much more

82. Small Business Act, 15 U.S.C. § 631(a) (2024) (Declaration of policy).

83. Leigh Jarvis, *Breaking Down Systemic Barriers for Minority-Owned Small Businesses*, POLITICO (Apr. 29, 2021), <https://www.politico.com/sponsored-content/2021/04/breaking-barriers-for-businesses> (explaining that by some estimates, closing the racial wealth gap could expand the U.S. GDP by \$1.5 billion by 2028). See also Regina S. Baker & Fenaba R. Addo, *Barriers to Racial Wealth Equality*, AM. BAR ASS'N (Jan. 6, 2023), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/wealth-disparities-in-civil-rights/barriers-to-racial-wealth-equality/?login; Fenaba R. Addo & William A. Darity, Jr., *Disparate Recoveries: Wealth, Race, and the Working Class after the Great Recession*, 695(1) ANNALS OF THE AM. ACAD. OF POL. AND SOC. SCI., 173, 175–76 (2021).

84. See generally William Darity, Jr., et al., *What We Get Wrong About Closing the Racial Wealth Gap*, SAMUEL DUBOIS COOK CTR. ON SOC. EQUITY & INSIGHT CTR. FOR CMTY. ECON. DEV. (Apr. 2018); Liz Mineo, *Racial wealth gap may be a key to other inequities*, HARVARD GAZETTE (June 3, 2021), <https://news.harvard.edu/gazette/story/2021/06/racial-wealth-gap-may-be-a-key-to-other-inequities/>; Moritz Kuhn et al., *Income and Wealth Inequality in America, 1949–2016*, The Federal Reserve Bank of Minneapolis: Opportunity & Inclusive Growth Institute (June 2018) (working paper).

85. See generally MEIZHU LUI, LAYING THE FOUNDATION FOR NATIONAL PROSPERITY: THE IMPERATIVE OF CLOSING THE RACIAL WEALTH GAP (Insight Ctr. for Cmty. Econ. Dev., Mar. 2009).

86. Mineo, *supra* note 86; see generally Kuhn et al., *supra* note 86.

difficult. Likewise, compounding hardships can be attributed to the geographic isolation of Black communities caused by *de facto* and *de jure* forms of residential segregation and chronic disinvestment in non-white communities. These issues have caused Black communities to endure low homeownership rates, substandard housing and living conditions, poor or very limited healthcare facilities, inferior schools, limited job opportunities, and high unemployment.⁸⁷

Black businesses, in particular, remain grossly underrepresented in the economy.⁸⁸ While Black Americans constitute approximately 12% of the U.S. population, Black-owned businesses constitute only about 4% of the nation's small businesses.⁸⁹ Further, Black entrepreneurs who do start up their own businesses are much more likely to fail than white-owned businesses, largely because of the assiduousness of ongoing structural barriers.⁹⁰

In fact, eight out of every ten Black-owned businesses fail within the first eighteen months.⁹¹ For reasons rooted in our national history of discriminatory treatment of minoritized groups, Black-owned companies are disadvantaged in qualifying for start-up capital⁹² and developing the business, management, and technical expertise necessary to succeed in a highly competitive capitalistic marketplace. Equal access to loans and capital at competitive market rates has been a significant barrier to the success for Black-owned businesses.⁹³ These barriers

87. *Overcoming Historic Barriers for Black-Owned Businesses*, AM. SOC'Y OF ASS'N EXEC.'S RSCH. FOUND., <https://foundation.asaecenter.org/research/centennial-research-initiative/aeo-supporting-black-owned-businesses> (last visited Jan. 16, 2024). See also Jane Kim, *Black Reparations for Twentieth Century Federal Housing Discrimination: The Construction of White Wealth and the Effects of Denied Black Homeownership*, 29 B.U. PUB. INT. L.J. 135, 149 (2019).

88. Perry et al., *supra* note 14.

89. Jarvis, *supra* note 85.

90. MATTHEW J. SIMPSON, ET AL., ILLINOIS BLACK BUSINESS SURVEY, 18–19 (Feb. 2023).

91. *Id.* at 18.

92. See Gabrielle Fonrouge, *Venture Capital for Black Entrepreneurs Plummeted 45% in 2022, Data Shows*, CNBC (Feb. 3, 2023) <https://www.cnbc.com/2023/02/02/venture-capital-black-founders-plummeted.html>. See generally U.S. CHAMBER OF COM., IMPROVING ACCESS TO CAPITAL FOR MINORITY-OWNED BUSINESSES (2021).

93. See MEE JUNG KIM, ET AL., U.S. CENSUS BUREAU, BLACK ENTREPRENEURS, JOB CREATION, AND FINANCIAL CONSTRAINTS (2021), <https://www.census.gov/library/working-papers/2021/adrm/CES-WP-21-11.html>; Jay Lindsay, *Racism and the*

frequently force Black-owned businesses to turn to high-interest credit cards and other high-interest sources of capital, thereby increasing their debt-to-revenue ratios and diminishing the cashflow required to operate and remain in business.⁹⁴

In business, it is often said that “cash is king,”⁹⁵ meaning that having sufficient liquid funds on hand is vital for the continued existence of a business. Yet, only about 6% of Black-owned businesses have more than fourteen days’ worth of cash on hand to conduct day-to-day business operations as well as meet emergencies, compared to 65% of white-owned businesses.⁹⁶

This is the challenging context that must be considered in order to understand the policy imperative driving the Small Business Administration’s Business Development Program. While much can be done at the individual level, solid government programs, such as the Small Business Administration’s Business Development Program, must lead the way. All levels of government can play a role in establishing and strengthening the infrastructure necessary to support programs that spur entrepreneurship within minoritized communities and that provide mentorship, connections, and resources to Black entrepreneurs.⁹⁷

Economy, FED. RSRV. BANK OF BOS. (June 4, 2021), <https://www.bostonfed.org/news-and-events/news/2021/06/racism-and-the-economy-entrepreneurship-focus-federal-reserve.aspx>. See also ALGERNON AUSTIN, CTR. FOR GLOB. POL’Y SOLS., *THE COLOR OF ENTREPRENEURSHIP: WHY THE RACIAL GAP AMONG FIRMS COSTS THE U.S. BILLIONS* (2016); Rieva Lesonsky, *Reports Show Black Small Businesses Still Face Major Challenges*, FORBES (Feb. 20, 2023), <https://www.forbes.com/sites/allbusiness/2023/02/20/reports-show-black-small-businesses-still-face-major-challenges/?sh=5ae8173a74d9>.

94. See KIM, ET AL., *supra* note 95; Lindsay, *supra* note 95; Lesonsky, *supra* note 95.

95. Lotan Levkowitz, *When Cash Is King, Knowledge Is Queen*, MEDIUM (June 23, 2023), <https://medium.com/groveventures/when-cash-is-king-knowledge-is-queen-ea84db9fe8df>.

96. Jarvis, *supra* note 85.

97. See, e.g., NABA, *Breaking Barriers: Why Black Entrepreneurship Is on the Rise*, FORBES (Mar. 30, 2023), <https://www.forbes.com/sites/forbeseq/2023/03/30/breaking-barriers-why-black-entrepreneurship-is-on-the-rise/?sh=2d15759a4282>.

C. *Economic Inequality as the Basis for Program Action*

Ordinarily, as required by statute, government contracts are awarded based on a competitive source selection process.⁹⁸ Conventional wisdom dictates that competition is the proven best way to get the best quality products at the best prices, as well as the best way to ensure the fair distribution of government projects without showing favoritism.⁹⁹ However, systemic racism has adversely impacted the ability of small and socially disadvantaged businesses to compete for government contracts.¹⁰⁰ Much has been studied and written about the condition of economic inequality in the United States.¹⁰¹ Ongoing research dealing with this important issue includes analysis of the differences in wealth between identified racial groups, with the underlying measure of economic wealth being a comparison of assets to liabilities.¹⁰²

Typically, a family's total assets include such items as the value of their home,¹⁰³ the amount they may have in savings and investments, and liquid assets on hand, such as cash. Liabilities are comprised of a

98. MANUEL, *supra* note 24.

99. *Id.* at 2–3.

100. See MARÍA E. ENCHAUTGUI ET AL., THE URB. INST., DO MINORITY-OWNED BUSINESSES GET A FAIR SHARE OF GOVERNMENT CONTRACTS? (1997), <https://webarchive.urban.org/UploadedPDF/DMOBGFSGC.pdf>.

101. See generally Juliana Menasce Horowitz, et al., *Trends in income and wealth inequality*, PEW RSCH. CTR. (Jan. 9, 2020), <https://www.pewresearch.org/social-trends/2020/01/09/trends-in-income-and-wealth-inequality/>.

102. Neil Bhutta et al., *Disparities in Wealth by Race and Ethnicity in the 2019 Survey of Consumer Finances*, FED. RSRV. BD.: FEDS NOTES (Sept. 28, 2020), <https://www.federalreserve.gov/econres/notes/feds-notes/disparities-in-wealth-by-race-and-ethnicity-in-the-2019-survey-of-consumer-finances-20200928.html>; Benjamin Harris & Sydney Schreiner Wertz, *Racial Differences in Economic Security: The Racial Wealth Gap*, U.S. DEP'T OF THE TREASURY (Sept. 15, 2022), <https://home.treasury.gov/news/featured-stories/racial-differences-economic-security-racial-wealth-gap>; see generally, Katherine Schaeffer, 'What's the Difference Between Income and Wealth?' and Other Common Questions About Economic Concepts, PEW RSCH. CTR. (July 23, 2021), <https://www.pewresearch.org/decoded/2021/07/23/whats-the-difference-between-income-and-wealth-and-other-common-questions-about-economic-concepts/>.

103. See e.g., DEBBIE GRUENSTEIN BOCIAN ET AL., CTR. FOR RESPONSIBLE LENDING, UNFAIR LENDING: THE EFFECT OF RACE AND ETHNICITY ON THE PRICE OF SUBPRIME MORTGAGES (2006) (discussing the costs of subprime home loans, and the disproportionate economic effect on African-Americans and other people of color).

family's total debt, in the form of credit card debt, auto loans, and whatever other form its financial obligations may take. It is axiomatic that economic wealth from such sources as earnings and inter-generational gifts from parent to child is fundamental to improving one's security, mobility, and lifestyle opportunities, which, in turn, give rise to access to better education, healthcare, and living conditions.¹⁰⁴

Unfortunately, "racial wealth gaps [in the United States] continue to persist—threatening the economic security of impacted families and weakening the economy as a whole."¹⁰⁵ Even though wealth has increased for some Americans in recent years, growth has largely been confined to those at the upper-income levels.¹⁰⁶ Others less well-off have not matched that increase.¹⁰⁷ In fact, economic inequality in the United States has increased as compared to other countries.¹⁰⁸ Alan Krueger, a former Chairman of the Council of Economic Advisors, referred to this economic imbalance as "The Great Gatsby Curve," whereby poorer families are not able to economically improve their condition from one generation to the next as do richer families, resulting in an ever-increasing concentration of wealth at the top.¹⁰⁹

Research also shows that net worth for Black families (assets over liabilities), an important measure of economic well-being, is less than 15% of that for white families.¹¹⁰ In 2016, approximately 20% of Black families had zero or negative net worth, compared to only 9% for white

104. Harris & Wertz, *supra* note 104.

105. *Id.*

106. Jessica Semega & Melissa Kollar, *Increase in Income Inequality Driven by Real Declines in Income at the Bottom*, U.S. CENSUS BUREAU (Sept. 13, 2022), <https://www.census.gov/library/stories/2022/09/income-inequality-increased.html>.

107. *Id.*

108. Alan B. Krueger, Chairman, Council of Econ. Advisers, Presentation at the Center for American Progress in Washington, D.C.: The Rise and Consequences of Inequality (Jan. 12, 2012), https://obamawhitehouse.archives.gov/sites/default/files/krueger_cap_speech_final_remarks.pdf, at 6.

109. *Id.* at 4; see also David Vandivier, *What is the Great Gatsby Curve?*, THE WHITE HOUSE (June 11, 2013, 1:45 PM), <https://obamawhitehouse.archives.gov/blog/2013/06/11/what-great-gatsby-curve>.

110. Lisa J. Dettling et al., *Recent Trends in Wealth-Holding by Race and Ethnicity: Evidence From the Survey of Consumer Finances*, FED. RSRV. BD.: FEDS NOTES (Sept. 27, 2017), <https://www.federalreserve.gov/econres/notes/feds-notes/recent-trends-in-wealth-holding-by-race-and-ethnicity-evidence-from-the-survey-of-consumer-finances-20170927.html>.

families.¹¹¹ Also, “the median white family had \$184,000 in wealth in 2019 compared to just \$38,000 and \$23,000 for the median Hispanic and Black families, respectively,” a gap that has persisted for decades.¹¹²

Without intergenerational financial support, without equal access to competitive bank financing, and faced with unequal credit scoring, minority-owned businesses often turn to high-interest rate credit cards to start a business, and then frequently fail.¹¹³ Eight out of every ten Black-owned businesses fail within the first eighteen months of operations.¹¹⁴ A comprehensive credit survey conducted by the twelve Federal Reserve Banks reported that Black business owners experience much greater difficulty qualifying for credit and loans compared to their white counterparts,¹¹⁵ putting them at a disadvantage in securing startup capital, having cash on hand for day-to-day transactions as well as emergencies, and putting them in an overall less competitive business condition.

To combat such disparities, we, as a nation, must be mindful of the economic condition of minority-owned firms if we hope to permanently disrupt the cycle of failed minority-owned businesses.¹¹⁶ We must recognize the pernicious long-term consequences of such institutional poverty for all of us, not just for those most directly affected. We must do what we can to address its structural causes by making judicious policy choices to ameliorate them, such as ensuring fair access for all to both adequate housing and education, equal access to hiring and training opportunities, and equal treatment for minority entrepreneurs in labor and financial markets.¹¹⁷

This crushing economic inequality lies at the heart of the government’s small and socially disadvantaged development programs. By harnessing the economic power of the government’s multi-billion-

111. *Id.*

112. Harris & Wertz, *supra* note 104.

113. Kimberly Atkins Stohr, *When Black-Owned Businesses Fail, It Hurts Everybody*, BOS. GLOBE (Apr. 24, 2022), <https://www.bostonglobe.com/2022/04/24/opinion/when-black-owned-businesses-fail-it-hurts-everybody/>.

114. *Id.*

115. Ann Marie Wiersch, et al., *Small Business Credit Survey: 2022 Report on Firms Owned by People of Color*, FED SMALL BUS. (June 29, 2022), <https://www.fedsmallbusiness.org/survey/2022/2022-report-on-firms-owned-by-people-of-color>.

116. Stohr, *supra* note 115.

117. Harris & Wertz, *supra* note 104.

dollar procurement program, much can be done to foster and develop small and minority-owned businesses, thus helping to create jobs and economic wealth, especially in minoritized communities. Although there has been impressive growth in the overall number of minority-owned businesses, past and present systemic discrimination has translated into a loss of an estimated 1.1 million minority-owned businesses that could contribute 9 million jobs to the U.S. economy and produce an additional \$300 billion.¹¹⁸ Expanding entrepreneurship in racially minoritized communities, therefore, remains a necessary policy prerogative that broadly serves all of our communal and national interests.

II. CONSTITUTIONAL CHALLENGES TO THE SMALL BUSINESS DEVELOPMENT PROGRAM

The Small Business Development Program has not been without its challenges. There has been some consternation and litigation surrounding the restrictive definitions of companies that can be enrolled in and receive the benefits of this large government program.¹¹⁹ The major constitutional challenges raised have largely centered on the administrative implementation of the affirmative action-based aspects of the Program designed to promote the interests of companies based in part on racial classifications.¹²⁰

Affirmative action programs consist of policies and procedures designed to ameliorate past and present unlawful discrimination against, and disparate treatment of, minoritized individuals and groups. The goal is to eliminate and redress, in some measure, the systematic exclusion of minoritized groups from participation in the nation's mainstream economic and social life. The Small Business Administration's Business Development Program, including the Section 8(a) Program,

118. ALGERNON AUSTIN, *supra* note 95.

119. *See, e.g., Ray Billie Trash Hauling, Inc. v. Kleppe*, 477 F.2d 696, 703–05 (5th Cir. 1973) (involving a challenge to a challenge to the Small Business Administration's Program for awarding government procurement contracts to small businesses owned by "socially or economically disadvantaged persons"); *Dynalantic Corp. v. U.S. DOD*, 115 F.3d 1012, 1017 (D.C. Cir. 1997) (a business challenged the constitutionality of the Small Business Administration's regulatory presumption of social disadvantage for members of certain racial groups competing for government contracts).

120. *See generally* Drabkin, *supra* note 2, at 438–41; Hopkins, *supra* note 2, at 176–77.

was likewise designed to aid minoritized business owners who have been systematically barred from the opportunity to fairly compete for business, including government contracts.¹²¹ There are those, however, who believe that the Section 8(a) Program does more than merely give minoritized groups an even opportunity to compete.¹²² Instead, they argue, the Program awards contracts to such firms based on race alone.¹²³ They argue that, regardless of past inequities, the time has come for our society to work towards being “colorblind,” including in the matter of the Small Business Administration’s programs to aid socially and economically disadvantaged businesses.¹²⁴

The major Supreme Court decision addressing race-based preferences, *Adarand Constructors, Inc. v. Peña*, requires compliance with the strict scrutiny test, the highest standard of review.¹²⁵ Under strict scrutiny, the proponent of the challenged action or program must make an evidentiary showing that such preferences are necessary to meet a compelling government interest in remedying past racial imbalances.¹²⁶ Moreover, in *City of Richmond v. J. A. Croson Co.*, the Court held that “where there is a significant statistical disparity in the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged in the locality, an inference of discriminatory exclusion could arise.”¹²⁷ The Section 8(a) Program allows priority placement of contracts to socially and economically disadvantaged businesses, based in part on race-based classifications, and this has been challenged, so far unsuccessfully, on the

121. See *supra* Part I.

122. Jennifer Winkler, *The Small Business Administration’s 8(a) Program: An Historical Perspective on Affirmative Action*, 2 GEO. WASH. J. POL’Y PERSP., 17, 24 (1995).

123. *Id.*

124. *Id.*

125. *Strict Scrutiny*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/strict_scrutiny (last visited May 3, 2024) (explaining the strict scrutiny standard of review).

126. *Adarand Constr. v. Peña*, 515 U.S. 200, 224–25 (1995) (plurality holding that racial classifications are subject to strict scrutiny).

127. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493–94 (1989) (applying strict scrutiny to the city of Richmond’s racial classification).

grounds that such preferences are a violation of the equal protection requirement of the Due Process Clause of the Fifth Amendment.¹²⁸

One of the latest such challenges was presented in *Rothe Development, Inc. v. Department of Defense*, in which a contractor challenged as unconstitutional the statute's provisions setting aside procurement actions for contractors defined by a race-based classification.¹²⁹ The case turned on whether or not federal contracting programs for minority-owned and other small businesses constitute a race-based classification, and, therefore, require the application of the strict scrutiny standard of review of *Adarand*. The Court of Appeals for the District of Columbia concluded that the Section 8(a) Program does not facially establish a race-based classification, and, therefore, there was no requirement to test its constitutionality against the strict scrutiny standard.¹³⁰ The constitutionality of the Section 8(a) Program was upheld by applying the less-rigorous rational basis test for the statute's purpose.¹³¹ That decision was appealed to the Supreme Court, but the Court denied the petition for certiorari.¹³² It is not immediately clear whether or not this decision will end the race-based constitutional challenges to the Small Business Administration's programs, especially with respect to the recent decision handed down by the Supreme Court in *SFFA*.¹³³

This is an important question that, at the time of this writing, is the subject of a case recently brought in the U.S. District Court for the Eastern District of Tennessee, *Ultima Services Corporation v. U.S. Department of Agriculture et al.*¹³⁴ In the decision handed down in that case, the presumption of social disadvantage was determined to be

128. U.S. CONST. amend. V; *see* *Rothe Dev., Inc. v. U.S. Dep't of Defense*, 107 F. Supp. 3d 183, 187–88 (D.D.C. 2015).

129. *Rothe Dev., Inc. v. U.S. Dep't of Defense*, 107 F. Supp. 3d 183, 187–88 (D. D.C. 2015).

130. *Id.* at 209.

131. *Rothe Dev. Inc. v. U.S. Dep't of Defense*, 836 F.3d 57, 63 (D.C. Cir. 2016).

132. *Rothe Dev. Inc. v. U.S. Dep't of Defense*, 583 U.S. 931.

133. *See generally* *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 143 S. Ct. 2141 (2023); *see also* Jody Feder & Kate Manuel, *Rothe Development Corporation v. Department of Defense: The Constitutionality of Contracting Programs for Minority-Owned and Other Small Businesses*, CONG. RSCH. SERV., 8 (Mar. 16, 2009), <https://sgp.fas.org/crs/misc/R40440.pdf>.

134. *Ultima Servs. Corp. v. U.S. Dep't of Agric.*, No. 220CV00041DCLCCRW, 2023 WL 4633481, at *1 (E.D. Tenn. July 19, 2023)).

unconstitutional.¹³⁵ If, after whatever appeals may be pursued, that decision stands, the Section 8(a) Program and currently qualifying small businesses could be dramatically affected.¹³⁶

In June 2023, the Supreme Court decided the long-awaited case *Students for Fair Admissions v. Harvard*.¹³⁷ Though the case more narrowly involved an affirmative action challenge within the context of college admissions, the Court indicated broad disapproval towards race-conscious programs generally. In its ruling, the Court definitively struck down the use of affirmative action plans in college and university admissions processes as a violation of the Equal Protection Clause of the 14th Amendment.¹³⁸ Chief Justice Roberts, writing for the plurality, concluded that “eliminating racial discrimination means eliminating all of it.”¹³⁹ Quoting *Regents of Univ. of Cal. v. Bakke*, Chief Justice Roberts further observed that “the guarantee of equal protection cannot

135. *Id.* at *40–41.

136. Darrias Sime & Christopher Slotte, *Update on Challenge to the Constitutionality of the SBA 8(a) Program*, JD SUPRA (Jan. 10, 2021), <https://www.jdsupra.com/legalnews/update-on-challenge-to-the-2640553/>.

137. *Students for Fair Admissions, Inc.*, 143 S. Ct. 2141(2023). The long-awaited law pronounced by the Supreme Court in *SFFA* may not be as settled as it appeared when the decision was handed down by the Court. Brought only a year after *SFFA*, the Supreme Court declined to hear a challenge to an admissions policy at a prestigious Virginia magnet school. [Insert source.]. Although the challenged admissions policy did not explicitly consider an applicant’s race, the holistic admissions policy was designed to “promote diversity in many forms” by allowing school administrators to consider a variety of factors, including whether the applicant comes from a low-income family and whether English is the applicant’s second language. Challengers of the new admissions policy asserted that the plan, without explicitly taking into account race, nonetheless violates the Equal Protection Clause because it is “intended to reduce the percentage of Asian-American students [...] with the ultimate goal of racially balancing the school according to the racial demographics of Fairfax County.”

The federal district court held for the petitioners, but a three-judge panel of the Fourth Circuit Court of Appeals, in a 2-1 decision, reversed. Petitioners’ filing for a writ of certiorari was denied by the Supreme Court. In a strong dissent, Justice Samuel Alito, joined by Justice Clarence Thomas, challenged the Court’s refusal to grant the writ and characterized the challenged admissions policy as “as a potential blueprint for evading SFFA.” How this might impact the government’s Small and Socially Disadvantaged Business Program remains to be seen. *Coalition for TJ v. Fairfax County School Board*, 601 U.S. __ (2024) (Alito, J., dissenting).

138. U.S. CONST. amend. XIV, §1; see also *Students for Fair Admission, Inc.*, 143 S. Ct. at 2166.

139. *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2161.

mean one thing when applied to one individual and something else when applied to a person of another color.”¹⁴⁰

While *SFFA*’s immediate application is limited to college admissions, and not the Small Business Administration’s Small Business Development Program, the connection between the two must be considered. The Court in *SFFA* frames race-conscious policies as “zero-sum,” whereby “a benefit provided to some applicants but not to others necessarily advantages the former at the expense of the latter.”¹⁴¹ The same argument could be levied when a minority-owned firm receives preferential treatment over a non-minority owned firm in being awarded a government contract. The Court also dismissed quota-like comparisons of racial representation in admissions to that of the general population, referring to it as “racial balancing” and “patently unconstitutional.”¹⁴² The same representation-based reasoning (unsuccessfully argued in *SFFA*) may serve as a foundation for an argument in support of preferential contract awards to socially disadvantaged businesses. In striking down the subject admissions programs, the Supreme Court also relied on *Adarand*:

[a]ny exception to the Constitution’s demand for equal protection must survive a daunting two-step examination known in our cases as ‘strict scrutiny.’ Under that standard we ask, first, whether the racial classification is used to ‘further compelling governmental interests.’ Second, if so, we ask whether the government’s use of race is ‘narrowly tailored’—meaning ‘necessary’—to achieve that interest.¹⁴³

Despite recognizing the government’s compelling interest to remedy past discrimination, the Court nevertheless determined that race-based decisions are permitted only within “the confines of narrow restrictions . . . [and these decisions] must comply with strict scrutiny, they may never use race as a stereotype or negative, and—at some point—they must end.”¹⁴⁴ Applying these standards, the Court found that “however well-intentioned,” and even if “implemented in good

140. *Id.* at 2162 (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U. S. 265, 289–90 (1978)).

141. *Id.* at 2169.

142. *Id.* at 2172 (citing to *Fisher v. Univ. of Tex. at Austin*, 570 U. S. 297, 311–312 (2013)).

143. *Id.* at 2162 (citations omitted).

144. *Id.* at 2154.

faith,” these types of university admission systems “fail each of these criteria.”¹⁴⁵ For the same reasons, the Small Business Association’s Small Business Development scheme that grants priority consideration in awarding contracts to members of groups “presumed” to be socially disadvantaged may also fail if held to the same standard.

The *SFFA* decision is already impacting the Small Business Administration’s Section 8(a) Program. The Court’s opinion in *SFFA* represents a clear pronouncement by Chief Justice Roberts and his conservative colleagues that the Court has rejected its former position of allowing limited race-conscious measures, replacing it with a deep skepticism supported by a rigid adherence to a myopic conceptualization of “colorblind” constitutionalism. *SFFA*’s holding is critical to understanding the Court’s view of constitutionally imposed boundaries on the government’s ability to bestow favor on certain groups based on race and the presumption that certain races are socially disadvantaged.

More recently, a challenge was heard in the U.S. District Court for the Northern District of Texas regarding the constitutionality of the Minority Business Development Agency (“MBDA”).¹⁴⁶ The court, in ruling against the constitutionality of the MBDA’s Programs,¹⁴⁷ declared that the Biden Administration’s equity agenda administered by the MBDA, which was intended to build community wealth for underserved communities, favors only preferred racial groups contrary to the Constitution’s demand for equal treatment under the law.¹⁴⁸

145. *Id.*

146. *See generally* Nuziard v. Minority Bus. Dev. Agency, No. 4:23-CV-0278-P, 2023 WL 3869323, at *1 (N.D. Tex. June 5, 2023).

147. The Department of Commerce’s Minority Business Development (MBDA) serves as the “as the lead federal agency dedicated to assisting minority business enterprises (MBEs) in overcoming social and economic disadvantages that have limited their participation in the nation’s free enterprise system.” *See* 15 U.S.C. §§ 9501–9598; *see also* JULIE M. LAWHORN, CONG. RSCH. SERV., R46816, THE MINORITY BUS. DEV. AGENCY: AN OVERVIEW OF ITS HISTORY AND PROGRAMS 1 (2023); Press Release, Senator Tammy Baldwin, Baldwin Works to Make Minority Business Development Agency Permanent (Nov. 30, 2021). The MBDA was created by President Nixon as the Office of Minority Business Enterprise (“OMBE”) and underwent multiple permutations before it was made permanent in 2021. *See* Exec. Order No. 11458, 34 Fed. Reg. 4937 (Mar. 5, 1969) (“Prescribing Arrangements for Developing and Coordinating a National Program for Minority Business Enterprise”); *see* Minority Business Development Act of 2021, S. 2068, 117th Cong. (2021).

148. *Id.* at *6–7 (describing the underinclusive nature of the program which includes only preferred groups based on ancestry); Exec. Order No. 13985, 86 F.R. 7009

The government argued that historical societal discrimination against minority business owners, including the effects of redlining and Jim Crow laws, have limited the intergenerational accumulation of Black wealth.¹⁴⁹ According to the government, these past injustices and their ongoing effects on minoritized business owners establish a compelling interest to correct systemic inequities that permit the use of race-based considerations in the administration of government programs such as those offered by the MBDA.¹⁵⁰ However, the court disagreed, citing *Shaw v. Hunt*¹⁵¹ for the proposition that “an effort to alleviate the effects of societal discrimination is not a compelling interest,” nor does alleging “general statistical disparities” having to do with business loans, supply chain networks, and contracting establish “intentional discrimination.”¹⁵² Moreover, the court repeatedly cited *SFFA*, including for the assertion that “race may never be used as a ‘negative’ and . . . may not operate as a stereotype”¹⁵³ and, in doing so, ultimately concluded that:

The Constitution demands equal treatment under the law. Any racial classification subjecting a person to unequal treatment is subject to strict scrutiny. To withstand such scrutiny, the government must show that the racial classification is narrowly tailored to a compelling government interest. In this case, the Minority Business Development Agency’s business center program provides services to certain races and ethnicities but not to others.¹⁵⁴

In finding the MBDA’s racial presumption both over- and under-inclusive and, furthermore, that the government failed to establish the presumption as necessary to remedy the effects of discrimination in public contracting,¹⁵⁵ the court issued a permanent injunction barring

(Jan. 20, 2021) (“equity agenda”) (“build community wealth” for “underserved communities”).

149. *Nuziard*, No. 4:23-CV-0278-P at *5.

150. *Id.*

151. *Shaw v. Hunt*, 517 U.S. 899, 909–10 (1996).

152. *Vitolo v. Guzman*, 999 F.3rd. 353, 361 (6th Cir. 2021).

153. *Nuziard*, No. 4:23-CV-0278-P at *46 (citing *SFFA*, 600 U.S. at 230).

154. *Nuziard v. Minority Bus. Dev. Agency*, No. 4:23-CV-0278-P, 2023 WL 3869323, at *1 (N.D. Tex. June 5, 2023).

155. *Id.* at 62, 64.

the \$550 million agency¹⁵⁶ from relying upon racial presumptions in administering the program.¹⁵⁷

The invalidation of the use of racial presumptions by the federal government in administering its small and socially disadvantaged business program has quickly gathered momentum. A month after the U.S. District Court for the Northern District of Texas enjoined the MBDA from relying on racial presumptions, the U. S. District Court for the Eastern District of Tennessee similarly ruled that the rebuttable presumption that members of certain racial backgrounds are socially disadvantaged, as defined in Section 8(a), violates the Fifth Amendment's Due Process Clause.¹⁵⁸ Based on this finding, the district court enjoined the Small Business Administration from using that rebuttable presumption in administering the Section 8(a) Program.¹⁵⁹

As a result of these court decisions, the Small Business Administration temporarily suspended all new applications for the Section 8(a) Program.¹⁶⁰ As of September 2023, the Small Business Association has reopened the Section 8(a) Program¹⁶¹ and, in late November 2023, the Small Business Association issued new guidance explaining how it intends to proceed in the face of these recent district court decisions.¹⁶²

The Small Business Association has opted to continue the program, but will now require participating small businesses to establish social disadvantage without relying on the racial presumption.¹⁶³ Going forward, for a company to receive Section 8(a) contracts, it must submit "a social disadvantage narrative" that supports its claim to status as a socially

156. See Consolidated Appropriations Act of 2022, Pub. L. No. 117-328, 136 Stat. 4512-13 (2022).

157. *Id.* at 93.

158. *Ultima Servs. Corp. v. U.S. Dep't of Agric.*, No. 2:20-CV-0041-DCLC-CRW (E.D. Tenn. July 19, 2023).

159. *Id.* at *18.

160. *Ultima Servs. Corp. v. U.S. Dep't of Agric.*, No. 2:20-CV-0041-DCLC-CRW (E.D. Tenn. July 19, 2023).

161. U.S. SMALL BUS. ADMIN., *Updates on the 8(a) Business Development Program* (Nov. 2023), <https://www.sba.gov/federal-contracting/contracting-assistance-programs/8a-business-development-program/updates-8a-business-development-program> [hereinafter *Updates on 8(a)*].

162. *Id.*

163. *Id.*

disadvantaged entity.¹⁶⁴ That is, the business must present a narrative that shows that it has “been subjected to racial, ethnic, or cultural bias within American society because of its identity as a member of groups and without regard to its individual qualities.”¹⁶⁵ The business must “describ[e] incidents” when it experienced “discrimination which negatively impacted its entry or advancement in the business world.”¹⁶⁶ Applicants must describe at least two qualifying incidents that occurred during the applicant’s lifetime that indicate “chronic or substantial” discrimination or bias.¹⁶⁷ Although two incidents are generally required, one incident may be sufficient if it is “pervasive or recurring.”¹⁶⁸ Once the Small Business Association reviews and approves a submission, the approved firm will receive a “Social Disadvantage Qualification” letter establishing its eligibility to participate in the Section 8(a) program.¹⁶⁹

Whether or not this new Section 8(a) protocol will be able to overcome future constitutional challenges remains to be seen. Pending questions that will require answers include: (1) what level of proof is required to meet the SBA’s revised minimum standards?; (2) will the SBA decision establishing a firm’s eligibility be subject to administrative or judicial review?; (3) can an unsuccessful applicant appeal an adverse SBA decision?; (4) will the narrative-review phase introduce an unpalatable degree of subjectivity into the decision-making process?; and (5) will ineligible companies see this new process merely as a distinction without a difference and continue to challenge the constitutionality of the program?

III. POTENTIAL LEGAL CONSEQUENCES AND RESPONSES TO *SFFA*

By design, the Small Business Development Program is an explicitly race-conscious affirmative action program.¹⁷⁰ A threshold question

164. *Id.*

165. 13 C.F.R. § 124.103(c) (2023).

166. *Updates on 8(a)*, *supra* note 163.

167. *Id.*

168. U.S. SMALL BUS. ADMIN., *Guide for Demonstrating Social Disadvantage*, <file:///C:/Users/dlmcc/Downloads/Guide%20for%20Demonstrating%20Social%20Disadvantage.pdf> (last visited Feb. 2, 2024).

169. *Updates on 8(a)*, *supra* note 156.

170. *See supra* Part I.

that now must be considered is, in light of *SFFA*'s holding, could the renewed Section 8(a) guidelines pass constitutional muster?

Despite the current narrow application of *SFFA* to affirmative action programs within higher education admissions systems, the impact of the decision is unlikely to remain limited to the facts of that case. The overturning of the formerly well-established precedent has rapidly reverberated across wide swathes of the public and private sectors, inviting a torrent of legal challenges to race-conscious programs across all sectors of the economy.¹⁷¹ The American Alliance for Equal Rights, the entity that successfully led the challenge to affirmative action in college admissions, has since initiated several other lawsuits targeting corporate diversity programs.¹⁷² Simultaneously, an organization headed by former Trump advisor Stephen Miller filed several complaints with the Equal Employment Opportunity Commission ("EEOC") alleging that the nation's largest corporations are violating federal law by "hiring people based solely on immutable characteristics, like race or sex, rather than qualifications or abilities."¹⁷³ The same organization also sent a letter to the CEOs of Fortune 100 companies on behalf of thirteen state Attorneys General equating race-conscious initiatives with racial discrimination.¹⁷⁴ The letter, relying on the Supreme Court's reasoning in *SFFA*, cautioned employers to "immediately cease any unlawful race-based quotas or preferences . . . adopted

171. See e.g., Elena Moore, *With affirmative action gutted for college, race-conscious work programs may be next*, NPR (June 30, 2023). See also Julian Mark & Eli Tan, *Affirmative action ruling puts target on corporate diversity programs*, WASH. POST (June 29, 2023), https://www.washingtonpost.com/business/2023/06/29/affirmative-action-business-diversity/?utm_medium=social&utm_campaign=wp_main&utm_source=twitter; Cheryl Winokur Munk, *The next big post-affirmative action legal ruling to drop targets billions in small business contracts*, CNBC (Oct. 25, 2023), <https://www.cnbc.com/2023/10/25/in-post-affirmative-action-era-billions-in-federal-contracts-targeted.html>; Emily Peck, *DEI backlash hits corporate America*, AXIOS (Nov. 27, 2023), <https://www.axios.com/2023/11/27/dei-affirmative-action-supreme-court>.

172. Julian Mark & Taylor Telford, *Conservative activist sues 2 major law firms over diversity fellowships*, WASH. POST (Aug. 23, 2023), <https://www.washingtonpost.com/business/2023/08/22/diversity-fellowships-lawsuit-affirmative-action-employment>.

173. Mark & Tan, *supra* note 173.

174. See Letter from various State Attorney Generals to Fortune 100 CEOs (July 13, 2023) (available online at https://ag.ks.gov/docs/default-source/documents/corporate-racial-discrimination-multistate-letter.pdf?sfvrsn=968abc1a_2).

for . . . employment and contracting practices.”¹⁷⁵ These are just a few examples of how the *SFFA* ruling is already spilling over into private and public sector affirmative action programs.

There is strong reason to believe that the Roberts Court would find that the current rendition of the Section 8(a) Program is likely not in compliance with *SFFA*. As a result, Congress may have to restructure the Section 8(a) Program. The Small Business Development Program must meet any reasonable definition of what constitutes an affirmative action program. The Court’s insistence on a “colorblind” interpretation of the law is best exemplified by its demand that “[e]liminating racial discrimination means eliminating all of it.”¹⁷⁶ This statement may be a prelude to the Court’s approach to the remedial race-conscious elements of the Section 8(a) Program moving forward.

In reaching its conclusion in *SFFA*, the Court relied on *Grutter v. Bollinger*¹⁷⁷ for the principle that “racial classifications, however compelling their goals” are “dangerous.”¹⁷⁸ Moreover, the Court cited *Grutter* for the proposition that “quotas for members of certain racial groups” cannot be established;¹⁷⁹ nor can “applicants who belong to certain racial or ethnic groups” be “insulated from . . . competition.”¹⁸⁰ These contentions would likely be found equally applicable to the affirmative action aspects of the Small Business Development Program should such a constitutional challenge find its way before the Supreme Court.

The *SFFA* opinion also notes that “[i]t is far from evident . . . how assigning [applicants] to . . . racial categories and making decisions based on them furthers” the program’s goals if “the categories are themselves imprecise in many ways” and “opaque.”¹⁸¹ The opinion observed that distinguishing candidates on the basis of race without an

175. See *id.*; Trisha Thadani & Jacob Bogage, *The campaign against affirmative action shifts to corporate America*, WASH. POST (July 13, 2023), <https://www.washingtonpost.com/technology/2023/07/15/affirmative-action-work-place-diversity-equity-inclusion/>.

176. *Students for Fair Admissions, Inc. v. President and Fellows of Harv. Coll.*, 143 S. Ct. 2141, 2161 (2023).

177. *Grutter v. Bollinger*, 539 U.S. 306, 333 (2003).

178. *Id.* at 342.

179. *Id.* at 334.

180. *Id.*

181. *Students for Fair Admissions, Inc.*, 143 S. Ct. at 2167–68.

“exceedingly persuasive justification that is measurable and concrete” is generally impermissible, concluding that racial classifications are “simply too pernicious to permit any but the most exact connection between justification and classification.”¹⁸² The Court concluded that the admissions programs at issue in *SFFA* did not satisfy these standards,¹⁸³ stating that it has “time and again forcefully rejected the notion that government actors may intentionally allocate preference to those ‘who may have little in common with one another but the color of their skin.’”¹⁸⁴

For these same reasons, the affirmative action aspects of the SBA’s Section 8(a) Program would likely be determined to be constitutionally unsatisfactory by the Roberts Court. That does not mean Section 8(a) could not be brought into compliance. It is incumbent upon Congress and the Small Business Administration to reconsider Section 8(a) in a manner that best ensures that minority-owned businesses retain the full level of federal support necessary to ameliorate historical wrongs and permit them to fully contribute to the national economy. In doing so, Congress and the SBA may choose to do any number of things in response.

A. *Legislative Inaction*

First, true to form when faced with a policy choice, Congress may simply elect to take no action at all. This would allow the Small Business Development Program to lapse. Such inaction by Congress would be tantamount to recognizing that the circumstances that caused it to authorize the SBA’s Small Business Development Program in the first place no longer exist. This obviates the need to further assist small and socially disadvantaged businesses, it would also indicate congressional support for the Supreme Court’s judicial position in *SFFA* that race-based affirmative action programs are no longer an acceptable way to address systemic racial inequities. This could otherwise be known as the Acquiescence Doctrine, a rule of statutory interpretation; however, this is not without controversy.¹⁸⁵ According to the doctrine, if

182. *Id.* at 2168 (citing *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003)).

183. *Id.* at 2175.

184. *Id.* at 2170 (quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1993)).

185. *See generally* *Bob Jones Univ. v. United States*, 461 U.S. 574, 608 (1983) (Powell, J., concurring).

Congress is aware of an authoritative agency or judicial interpretation of a statute and does nothing to amend the statute, such legislative inaction gives rise to the presumption that “Congress has ‘acquiesced’ in it by not overruling it.”¹⁸⁶

There is current precedent for Congress to ignore the U.S. Supreme court decision when those decision are no longer viable. In *Shelby County v. Holder*,¹⁸⁷ the Court determined that the formula contained in the Voting Rights Act of 1965¹⁸⁸—requiring certain specially covered state jurisdictions to seek “preclearance” from the U.S. Department of Justice before proceeding with changes to election procedures or practices—was no longer viable as presented in the statute, thus freeing jurisdictions previously covered by the requirement from having to do so.¹⁸⁹ Congress could have addressed the Court’s decision by amending the law, but they have not as of yet, giving rise to the inference that Congress concurs with the judicial decision (or, in the alternative, is otherwise incapable of effectuating a legislative response).

The arguments against accepting legislative inaction as acquiescence are equally well-founded. *Argumentum ex Silentio*, derived from the Latin phrase “argument from silence,” are generally regarded as fallacious arguments that seek to draw a conclusion based on someone’s silence. Such arguments are still generally considered to be fallacy.¹⁹⁰ There could be plenty of reasons—political, social, or legal—why a particular legislative body may choose to act (or not act) in response to a court decision. Some critics argue that it would be both logically and legally improper to infer that Congress’ inaction after a decision is handed down by the Court is meant to signal Congressional agreement with the Court’s decision:

There is no general presumption that Congressional inaction in the face of interpretation bespeaks acquiescence, and there is no consistent pattern of application by the Court. When the Court does infer

186. William N. Eskridge Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 68, 68 (1988–1989).

187. See generally *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013).

188. Pub. L. No. 89-110, 52 U.S.C. § 10101.

189. *Shelby Cnty.*, 570 U.S. at 557.

190. See, e.g., Timothy McGrew, *The Argument from Silence*, 29 ACTA ANALYTICA 215 (2014).

acquiescence, the most important factor seems to be congressional awareness that an interpretation has generated widespread attention and controversy.”¹⁹¹

Furthermore, in Justice Scalia’s opinion in *Johnson v. Transportation Agency*, “vindication by congressional inaction is a canard.”¹⁹² Scalia further asserted that:

[it is] impossible to assert with any degree of assurance that congressional failure to act represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice.¹⁹³

Inaction on the part of Congress, without more to indicate its intent, would be problematic and would not likely be Congress’ preferred response to the *SFFA* decision.

B. *Amend the Small Business Development Program*

Congress could choose to amend the Small Business Development Program to bring it into compliance with the constitutional standards articulated in *SFFA*.¹⁹⁴ There are at least two approaches Congress should consider in this regard.

First, Chief Justice Roberts made a special point in the *SFFA* opinion to note that nothing “prohibit[s] . . . considering . . . how race affected [the applicant’s] life”¹⁹⁵ If Section 8(a)’s presumption that social disadvantage attaches only to certain identified minoritized groups is determined to be constitutionally offensive by the modern Court, social disadvantage could then be established on alternate bases. For example, in making the determination of eligibility for preferential

191. *Bob Jones Univ. v. United States*, 461 U.S. 574, 599 (1983); see also Larry Eig, *Statutory Interpretation: General Principles and Recent Trends*, CONG. RSCH. SERV. (Sept. 24, 2014), <https://sgp.fas.org/crs/misc/97-589.pdf>, at 51.

192. *Johnson v. Transp. Agency*, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting).

193. *Id.*

194. *Students for Fair Admissions, Inc. v. President and Fellows of Harv. Coll.*, 143 S. Ct. 2141 (2023).

195. *Id.* at 2176.

treatment of minority-owned firms in making contract awards, the facts should be reviewed on an individual basis, relying on actual evidence. This would require a change by Section 8(a) where firms claiming social disadvantage would have to carry the burden of proving the existence of disadvantage during the application process.

Alternatively, the statutory presumption in favor of social disadvantage could be changed to allow a permissive inference of social disadvantage instead. From here, a conclusion of social disadvantage could be reached upon a minimally satisfactory showing of supporting factual evidence by a program applicant. A permissive inference would be far less likely to be constitutionally impermissible compared to a rebuttable presumption.¹⁹⁶ The administrative task of producing minimally acceptable evidence of social disadvantage by a small business in the application process is also likely to be less burdensome.

Second, Congress could, while keeping Section 8(a) intact, eliminate any preference based on race or ethnicity by making the benefits of the Program available to any small businesses.¹⁹⁷ This permits all small businesses to compete for contracts set aside for small businesses. This would foster and develop small businesses and could easily be established as a legitimate, and compelling, national interest, an appropriate government objective. There are more than 33 million small businesses in the U.S., employing 61.7 million people.¹⁹⁸ Aiding small businesses in success is a legitimate government objective.

As many socially disadvantaged businesses are also small businesses, they would still be able to benefit from the Program's preferential award of federal contracts based on a preference in favor of small businesses rather than a preference based on race or ethnicity.¹⁹⁹ This option also has the added advantage of being easily and quickly implemented, thus reestablishing the now-suspended Small Business Development Program in relatively short order.

196. *See, e.g., Sandstrom v. Montana*, 442 U.S. 510, 514 (1979).

197. This approach, while most likely to placate the Court's concerns, would transform the Section 8(a) Program into an entirely race-neutral program divorced from the congressional objectives foundational to the Program.

198. OFFICE OF ADVOCACY, *FAQ*, *supra* note 3.

199. Press Release, U.S. Census Bureau, Annual Business Survey Release Provides Data on Minority-Owned, Veteran-Owned and Women-Owned Businesses (Jan. 28, 2021) <https://www.census.gov/newsroom/press-releases/2021/annual-business-survey.html>.

However, Congress and the SBA must also address the reality that if Section 8(a) were made available to all small businesses, not all small businesses would be able to equally compete. The degree to which a company has grown while still remaining “small” is likely a measure of its innate ability to win competitive awards. While Section 8(a) limits competition by setting aside contracts to small businesses, the playing field is not level between a small business of five competing against a “small” business of five hundred. Racial discrimination, which is often invidious, has contributed to the likelihood that not all small businesses have equally experienced the burden of dealing with the pernicious effects of structural discrimination. They will have not had greater opportunities to thrive and to grow in size as compared to those businesses that have been so fortunate. To counter this competitive advantage in size, enjoyed by the larger small businesses, the effects of Section 8(a)’s regulations could be drafted so that once a small business competitor enrolled in the program reaches a certain dollar-threshold of awarded contracts in any given period, they would no longer be eligible to compete for additional contracts set aside preferentially for small businesses. They would be able still to compete for any contracts where the competition is not restricted and is free and open.

Alternatively, or additionally, to compensate for differences in business size, the Section 8(a) Program regulations could, for example, be rewritten to set aside a certain percentage of procurements for so-called microbusinesses. These are businesses that have less than ten employees and are less likely to have a credit history or, perhaps, have an unfavorable one.²⁰⁰ For these smaller microbusinesses, available collateral is usually nonexistent or limited.²⁰¹ These businesses are also usually undercapitalized, and short on liquid funds with which to operate their businesses.²⁰² Moreover, many are without much, if anything, in terms of a successful contracting track record (commercial or government) for review.²⁰³ Many socially disadvantaged firms fit into this category.²⁰⁴ In fact, 95% of Black-owned business, 93% of Hispanic-owned businesses, and 92% of Asian-owned businesses employ fewer than twenty

200. *See supra* Part I.

201. *See supra* Part I.

202. *See supra* Part I.

203. *See supra* Part I.

204. *See supra* Part I.

people.²⁰⁵ Establishing a program limited only to microbusinesses would be a positive way to help eliminate this as an issue that is completely unrelated to the racial makeup of the business owner.

C. *Small Business Subcontracting*

The Federal Acquisition Regulation (“FAR”) includes a requirement that federal prime contract awards over a certain dollar-threshold made to large business must contain a Small Business Subcontracting Plan (“SBSP”) setting forth goals within the prime contractor plans that must be met in awarding subcontracts to small and disadvantaged businesses.²⁰⁶ This goal, agreed to between the government and the prime contractor, is then incorporated into the resulting prime contract, becoming one of its many terms and conditions. While this requirement is expressed as a goal only, the prime contractor is under a good-faith obligation to meet it, just as it must meet, or attempt to meet, any other contract term or condition. Failure to meet the agreed-upon goal without having made a demonstrable good-faith effort to do so is considered a material breach of the contract, subjecting the prime contractor to a number of graduated contract penalties up to and including (where appropriate) termination for default.

Small Business Subcontracting Plans, if vigorously enforced, could be useful as incentives for prime contractors to hire small and disadvantaged businesses as subcontractors. In addition to the negative consequences that would attach for failure to meet stated contract goals, it would not be difficult to also fashion positive incentives for meeting such stated goals, such as awarding higher ratings in after-performance reports for those prime contractors that meet or exceed the contract goal, or structuring fee arrangements based upon the degree of compliance.

One might also argue that such plans fit within the confines of *United Steelworkers of America v. Weber*.²⁰⁷ There, the Supreme Court, in addressing a matter brought before it under the auspices of Title VII of the Civil Rights Act of 1964, opined that the prohibition “against racial discrimination does not condemn all private, voluntary, race-conscious affirmative action plans.”²⁰⁸ Nothing in *SFFA* addresses

205. Wiersch, et al., *supra* note 117.

206. FAR 52.219-9 (2023).

207. *Steelworkers v. Weber*, 443 U.S. 193 (1979).

208. *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 208 (1979).

this issue, nor is it immediately obvious in *SFFA*'s holding that the Court intended to overrule *Weber*. Hence, voluntary plans considering race in making subcontracting awards may yet be a possibility, albeit, admittedly, a tenuous one.

D. *Additional Considerations*

The Competition in Contracting Act ("CICA")²⁰⁹ is the fundamental statutory authority requiring competition in the award of government contracts.²¹⁰ Ordinarily, as required by CICA, and by regulation, to wit, FAR Subpart 6, "Full and Open Competition," government contracts are awarded competitively because competition is the proven best way to get the best quality products at the best prices, as well as the best way to ensure the fair distribution of government projects without unequal favoritism in the contractor selection process.²¹¹

However desirable free and open competition might be, though, there are circumstances where full and open competition either may not be legally possible or not programmatically desirable. Hence, there are three categories or levels of competition contemplated in the procurement regulations: (1) Full and Open Competition; (2) Full and Open Competition after Exclusion of Sources; and (3) Other than Full and Open Competition.²¹² "Full and Open Competition" permits all responsible sources to compete. "Full and Open Competition after Exclusion of Sources" permits a restricted competition. It permits the government to exclude potential offerors from the competition based upon an identified government purpose to be served thereby. "Other than Full and Open Competition" permits a noncompetitive award to be made.

From a social policy perspective, Congress has recognized that small and socially disadvantaged businesses historically have been handicapped in successfully competing for and winning government awards for the procurement of supplies, services, and construction. Therefore, Congress has directed federal agencies to use the engine of the massive federal procurement program to foster and develop small businesses. Thus, "[i]t is the declared policy of the Congress that the

209. 41 U.S.C. § 253 (1984).

210. Hopkins, *supra* note 2; *Competition in Contracting Act (CICA)*, ACQUISITION NOTES, <https://acqnotes.com/acqnote/careerfields/competition-contracting-act-cica> (Aug. 17, 2023).

211. FAR 6.1 (2024).

212. FAR 6.101 (2024). *See also* MANUEL, *supra* note 24.

Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small business concerns . . .”²¹³ and “[t]o the maximum extent practicable, procurement strategies used by a Federal department or agency having contracting authority shall facilitate the maximum participation of small business concerns as prime contractors, subcontractors, and suppliers”²¹⁴ These statutes are implemented in the governing procurement regulation at FAR 19.202-1.²¹⁵

Consequently, the government procurement program has been used to offer a broad range of assistance to firms that meet the small business statutory definitions. The regulatory mechanisms to do that are found in FAR Part 6.2. Specifically, FAR 6.201 permits the exclusion of sources and then requires competition, but only among those firms that remain eligible.²¹⁶ Under this authority, after excluding all large businesses from the competition, procurements may be set aside for competition among small and socially disadvantaged businesses that qualify for the Small Business Development Program having met the Program’s selection criteria (e.g., business size; ethnicity, gender, and racial makeup of the owners; and business operating locations).²¹⁷ And, under the authority of FAR 6.302-5, sole-source awards may be made to Section 8(a) firms, HUBZone contractors, veteran-owned, and women-owned businesses.²¹⁸

The set-aside preferences of the Small Business Administration’s SBD Programs, leading to restricted or sole-source contract awards to small and socially disadvantaged firms have been challenged by ineligible firms on the grounds that they violate CICA’s basic requirement for competition. Yet, the agency primarily responsible for hearing such protests, the Government Accountability Office (“GAO”), has consistently ruled over a considerable period of time that in view of the “broad discretion accorded Small Business Administration under 8(a) . . . [the GAO] will not review decisions to set aside procurements under the [Section] 8(a) Program” unless the challenging party makes “a showing

213. 15 U.S.C. § 631.

214. 15 U.S.C. § 644.

215. FAR 19.202-1 (2024).

216. FAR 6.201 (2024). *See also* “SBA’s 8(A) PROGRAM,” *supra* note 44, at 13–18.

217. *See* FAR 6.201; *see also* SBA “8(A) PROGRAM,” *supra* note 44, at 13–15.

218. FAR 6.302-5(2024). *See also* SBA “8(A) PROGRAM,” *supra* note 44, at 1.

of fraud on the part of Government officials or such willful disregard of the facts by Government officials as to necessarily imply bad faith.”²¹⁹ Protests on these grounds brought by excluded contractors, while likely to continue, are also likely to be dismissed. In light of the Court’s *SFFA* decision, if the Small Business Administration’s Small Business Development Programs are determined to be constitutionally impermissible, one would expect challenges to continue, unless Congress and the Small Business Administration bring the Section 8(a) Program into compliance with the Court’s “colorblind” interpretation of the Constitution.

CONCLUSION

Congress established the Small Business Administration’s Section 8(a) Program for small and socially disadvantaged firms that, upon submission and approval of an application for entry documenting compliance with the selection criteria, then become eligible to receive sole-source (non-competitive) contract awards. The jurisprudence involving the intersection of government procurement and antidiscrimination law has long provided the federal government—through the legislative and executive branches—with a basis to exercise their constitutional authority to advance national policies of critical economic and social importance, including the Section 8(a) Program. To this aim, the federal government has leveraged its massive procurement system as an engine to foster and develop small and socially disadvantaged businesses so that they might become stand-alone commercial enterprises capable of successfully competing in and contributing to the commercial marketplace.

Despite a clear and pronounced judicial shift away from race-conscious programs, the Court’s abandonment of its antidiscrimination jurisprudence need not translate into a relinquishment of an important national policy. It remains possible to continue to strengthen the national economy through government promotion of the development of small socially and economically disadvantaged businesses. When the national government is committed to investing in small socially and economically disadvantaged businesses, it has a positive transformative effect on the entirety of the national economy. Indeed, small businesses

219. U.S. GOV’T ACCOUNTABILITY OFF., GAO-B-193874, MATTER OF VECTOR ENG’R, INC. (1979). *See also* GAO-B-413837, NTELX, INC., (2016).

now constitute the largest source of employment throughout the national economy, a trend that the country has a vested interest in maintaining.²²⁰

The Small Business Administration's Section 8(a) Program will be faced with legal challenges in the wake of *SFFA*, but those anticipated challenges can be effectively mitigated through a combination of small and large-scale legislative and administrative action. Although it is plausible that the racial preferences of the Section 8(a) Program could satisfy the strict scrutiny standard in demonstrating that it serves a compelling interest that is narrowly tailored, legislators should be prepared that the same cynicism of race-conscious admissions in higher education that premised the Court's decision in *SFFA* may engender similar results to a future related challenge to the Section 8(a) Program. Replacing the statutory presumption of social and economic disadvantage that underlies the Section 8(a) Program with a permissive inference would enable federal aid and technical assistance to be administered on an individual basis, thereby permitting the Small Business Administration reasonable latitude and discretion to administer the legislative aims of the Program with minimal judicial interference.²²¹ Modifying the existing Section 8(a) Program to administer non-competitive federal contracts based on business size to provide preference to microbusinesses could additionally allow for the continuation of support to small socially and economically disadvantaged firms.

Minority business ownership is important to the overall economic functioning and basic norms of economic equity. It also remains a fundamental policy embedded in U.S. law.²²² Affirmatively advancing racial justice, economic equity, equal opportunity, and civil rights is a responsibility of the whole of our government that must, and can endure, irrespective of the judicial headwinds that it presently faces.

220. OFFICE OF ADVOCACY, *FAQ*, *supra* note 3.

221. In theory—though perhaps not in practice—such a proposal should garner bipartisan legislative support.

222. Exec. Order No. 13985, 86 C.F.R. 7009 (2021).