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Government Contracting and Business Development
U.S. Small Business Administration

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Comments of the Center for Individual Rights in support of the proposed revision to 13 CFR 124.103 to eliminate the "rebuttable" presumption of social disadvantage—and to recommend further elimination of racial preferences in the Section 8A BD Program

The Center for Individual Rights (CIR) submits these comments concerning the Small Business Administration (SBA) proposal to eliminate the presumption of social disadvantage for members of certain racial and ethnic groups for purposes of the Section 8(a) Business Development Program (the "8(a) BD Program"). CIR supports the elimination of the presumption because it is unconstitutional. In addition, CIR urges the agency to go farther and remove all illegal race-based preferences, including those for Native Hawaiians, from the final rule.

CIR has a uniquely strong interest in this proposed rule. CIR represents Ultima Services Corporation in the ongoing litigation referenced several times in the notice of proposed rulemaking. 91 FR 35433 (June 11, 2026). As the notice states, the Court in that case concluded that the rebuttable presumption of social disadvantage in 13 CFR 124.103(b) was unconstitutional because it violated the equal protection component of the Fifth Amendment's Due Process Clause.[1]

CIR also represents clients in an Administrative Procedure Act case seeking to have the regulations in question vacated. *Revier Technologies, Inc. v. Loeffler*, E.D. La. Case No. 2:25-cv-02328. As CIR has noted in that case, the regulations in Part 124 relating to the rebuttable presumption of social disadvantage are relied upon by numerous other agencies in the federal government, which have incorporated them into their own benefits or regulatory programs.

[1] *Id.* at 35433-34 (citing *Ultima Services Corp. v. U.S. Dep't of Agriculture*, 683 F. Supp. 3d 745 (E.D. Tenn. 2023)).

I. The Rebuttable Presumption of Disadvantage Is Unlawful

Section 8(a) of the Small Business Act (introduced in current form in 1978 by Public Law 95-507) created a "small business and capital ownership development program," the purpose of which was and is to assist "socially and economically disadvantaged small business concerns." Those small businesses eligible for the program are eligible for a wide variety of financial benefits, including loans up to $750,000 (15 U.S.C. §§ 636(a)(20), 636(j)(13)(B)) and assistance in the development of business plans (15 U.S.C. § 636(j)(10)(A)(i)), among other benefits. Most significantly, qualified business concerns can obtain contracts, reserved for the program, to provide goods or services to government agencies. 15 U.S.C. §§ 636(j)(13)(A), 637(a)(1)(B), (C).

The statute defines a "socially and economically disadvantaged business concern" as one that is at least 51% unconditionally owned, and whose operations are managed by, (1) one or more socially and economically disadvantaged individuals, (2) an economically disadvantaged Indian tribe (which is defined to include Alaskan Native Corporations), or (3) an economically disadvantaged Native Hawaiian organization. 15 U.S.C. §§ 637(a)(4), 637(a)(13), 637(a)(15). "Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." 15 U.S.C. § 637(a)(5).

Although the determination of which individuals qualified as "socially disadvantaged" was done on a case-by-case basis after the statute was initially passed, in 1986 the SBA began applying a supposedly rebuttable presumption that members of certain racial or ethnic groups were socially disadvantaged. 51 Fed. Reg. 36144 (Oct. 8, 1986). That presumption is now set forth in 13 C.F.R. 124.103(b)(1). As explained below, the federal court in the *Ultima* held that the presumption was not rebuttable in any meaningful sense.

"Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). The Due Process Clause of the Fifth Amendment to the United States Constitution has an "equal protection" component that provides the same protection against federal government classifications on the basis of race that the Equal Protection Clause of the Fourteenth Amendment provides against similar state and local government classifications. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 224 (1995). Such government classifications must meet the Supreme Court's "strict scrutiny" test: they must be narrowly tailored to achieve a compelling governmental interest. *Id.* at 227.

One of the primary characteristics of strict scrutiny is skepticism concerning racial classifications. *Id.* at 223 ("'Any official action that treats a person differently on account of his race or ethnic origin is inherently suspect.'") (*quoting Fullilove v. Klutznick*, 448 U.S. 448, 491 (1980) (Stewart, J., dissenting)). Accordingly, "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny." *Adarand*, 515 U.S. at 224. The standard does not depend upon the race of those burdened or benefited. *Id.*

The government actors using race have the burden of demonstrating that its use meets strict scrutiny. *Johnson v. California*, 543 U.S. 499, 505 (2005) ("Under strict scrutiny, the government has the burden . . .").

CIR supports the elimination of the presumption as set out in the proposed rule because it is unconstitutional and because this crude racial proxy for social disadvantage does not reasonably target that interest. As set forth in the SBA's notice, the effectively irrebuttable presumption discriminates on the basis of race and national origin—and it would apply an illegal racial preference even if the presumption was rebuttable. Accordingly, the Court in *Ultima* found it does not meet either prong of the Supreme Court's strict scrutiny test. The government's interest in the presumption is not compelling, and its operation is not narrowly tailored to further the governmental interest in any event.

The defendants in *Ultima* included both the SBA and the Department of Agriculture. The *Ultima* Court held that those defendants, including the SBA, lacked a compelling governmental interest for the 8(a) BD Program because (a) the SBA's failure to require agencies to have goals and the lack of analyses of whether particular racial groups are underrepresented in particular industries precluded any meaningful analysis of whether the rebuttable presumption was remedying the present effects of past discrimination (*Ultima Services Corp.*, 683 F. Supp. 3d at 765), (b) defendants' failure to identify specific instances of intentional discrimination, and their reliance on disparities that might be explained by other variables precluded a finding that they had a strong basis in evidence that remedial measures were needed (*id.* at 766-67), and (c) defendants failed to show that they were either active or passive participants in any discrimination (*id.* at 768-69).

The Court also found that the 8(a) BD Program was not narrowly tailored because (a) the "rebuttable" nature of the presumption was more theoretical than real (*id.* at 770), (b) the racial presumption had no temporal limit or logical end point (*id.* at 771), (c) the 8(a) BD Program did not have any specific objective linked to their use of the presumption (*id.* at 771), (d) the racial categories are imprecise (rendering the program underinclusive) and the presumption sweeps broadly by including all members of specified minority groups regardless of industry (rendering it overinclusive) (*id.* at 772), (e) defendants failed to consider race-neutral alternatives, noting that the SBA determined social disadvantage on a case-by-case basis prior to 1986 (*id.* at 773), and (f) defendants failed to consider the impact of the presumption on third parties like Ultima, noting that Ultima "operates within a specific set of industries and [contracts in those industries] represent a substantial amount of revenue" (*id.* at 774).

Moreover, despite a regulation that purported to make the presumption "rebuttable" (13 CFR 124.103(b)(3)), asserting that it could be "overcome with credible evidence to the contrary," the SBA had *never* withheld the presumption for any individual whose membership in one of the presumed groups was not in question. *Ultima*, Doc. 65-7, PageID ## 1828-29 (Deposition of John Klein at 113-14); Doc. 60-6, PageID## 873-74 (Response to Int. No. 7). In effect, therefore, eligibility for the 8(a) BD Program has depended heavily on race.

Thus, the SBA is correct that the presumption in 13 CFR 124.103(b) should be eliminated. The U.S. Constitution's guarantee of equal protection of the law requires that it be eliminated.

II. The SBA Should Eliminate All Racial Preferences in the 8(a) BD Program

CIR believes that the SBA can and should go further in eliminating racial preferences. The proposed regulation does not change the preference given to certain entity-owned small businesses. An 8(a) BD Program participant may also be owned by one of three entities: Native Hawaiian Organizations (NHOs), Indian tribes, and Community Development Corporations. A Native Hawaiian Organization is defined by statute (15 U.S.C. § 637(a)(15)); it must be controlled by "Native Hawaiians" and have business activities that principally benefit that group. The statute does not define "Native Hawaiian," but the SBA defines it as "any individual whose ancestors were natives, prior to 1778" of modern-day Hawaii. 13 C.F.R. § 124.3. This definition is a racial one, as the Supreme Court ruled in 2000. *Rice v. Cayetano*, 528 U.S. 495, 516 (2000) (state statute defined "Native Hawaiian" as "any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778," and thus "preserve[d] the explicit tie to race").

Since Congress did not define "Native Hawaiian" in the Small Business Act, the SBA should avoid a racially discriminatory definition that cannot meet strict scrutiny. Indeed, all of the problems that the *Ultima c*ourt identified regarding the presumption of social disadvantage for other racial groups are equally applicable to the SBA's definition of "Native Hawaiian." The SBA has no evidence that would create a compelling governmental interest, there are no goals for small business concerns owned by NHOs, and no evidence that Native Hawaiians are underrepresented in any particular industry. The absence of "narrow tailoring" for the preference for NHOs is precisely the same as its absence for the rebuttable presumption.

Nothing in the statute *requires* the SBA to define "Native Hawaiians" in terms of race, and the law requires that it avoid a definition that would raise a serious constitutional issue. *See Solid Waste Agency v. United States Army Corps of Engineers*, 531 U.S. 159, 173 (2001). The SBA should repeal the current definition of Native Hawaiian and replace it with a non-racial definition. For example, "Native Hawaiian" could be defined as all citizens of the State of Hawaii.[2]

* * *

[2] To be sure, some of the 8(a) BD Program's application to Indian tribes and related entities is set by statute. *See* 43 U.S.C. § 1601 *et seq.* The SBA likely also cannot repeal every questionable aspect of the program in a single proceeding. Nevertheless, CIR encourages the agency to eliminate all forms of racial preferences to the full extent of the agency's regulatory authority.

CIR strongly supports the SBA's proposal to eliminate race-based preferences in the 8(a) BD Program. We agree fully that the presumption of disadvantage found in the current regulations is unconstitutional and should be repealed in full. CIR also urges the agency to eliminate other racial and ethnic preferences in the program where doing so would be consistent with the agency's regulatory authority.

Sincerely,

/s/ Michael E. Rosman
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Center for Individual Rights