

Northern District of Texas Declares Key Provision in Minority Business Development Act of 2021 Unconstitutional in *Nuziard v. Minority Business Development Agency*

Client Alerts

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On March 5, 2024, the United States District Court for the Northern District of Texas struck down key provisions of the Minority Business Development Act of 2021, which promotes the provision of business development services to members of “socially or economically disadvantaged” communities.^[1] In *Nuziard v. Minority Business Development Agency* (“*Nuziard*”),^[2] the court held that the Act violates the equal protection guarantees of the Fifth Amendment by presuming that members of certain racial and ethnic groups are socially or economically disadvantaged. The plaintiffs—three white business owners—challenged this presumption on the ground that it impermissibly discriminated based on race, and the court agreed. In doing so, the court rested in significant part on the Supreme Court’s decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* (“*SFFA*”).^[3] *Nuziard* thus demonstrates the ways in which *SFFA* continues to have wide-reaching effects across legal contexts. It also illustrates the increasing number of challenges to federal DEI programs, which may have spillover effects in the private context.

Background

The Minority Business Development Act of 2021 authorizes the Minority Business Development Agency (“MBDA”), which was first founded by President Richard Nixon in 1969.^[4] The MBDA “foster[s] the economic growth and competitiveness of” Minority Business Enterprises (“MBEs”) through “expand[ed] access to capital, markets, and contracts through public and private sector programs, policy, and research.”^[5]

The MBDA accomplishes this objective, in part, by providing financial assistance to organizations that operate “Business Centers.” Those eligible to operate MBDA Business Centers include nonprofit organizations, for-profit firms, state and local governments, educational institutions, and Native American tribal entities.^[6] These “operators,” in turn, provide services to MBEs focused on

“business development and capacity building” in a variety of ways, including but not limited to “improv[ing] operational efficiencies,” “increasing resource[s],” and “build[ing] scale.”^[7] Congress appropriated \$110 million for the MBDA for each fiscal year from 2021 to 2025 in part to fund these services.^[8]

The Act defines an MBE by reference to “socially or economically disadvantaged individuals,”^[9] and it creates a presumption that “‘socially or economically disadvantaged individual’ includes any individual who is . . . Black or African American; Hispanic or Latino; American Indian or Alaska Native; Asian; Native Hawaiian or other Pacific Islander; or a member of a group” listed by the MBDA in its regulations.^[10] The MBDA regulations include groups that are both different from and duplicative of those listed in the Act. For instance, they include “Hasidic Jews,” on the one hand, but repeat “American Indians,” on the other.^[11] This presumption of social or economic disadvantage was the focus of the plaintiffs’ suit.

District Court Decision

In a 93-page opinion, United States District Judge Mark T. Pittman held that the Act’s presumption violates the Fifth Amendment’s guarantee of equal protection.^[12]

In reaching its holding, the court concluded that the presumption could not survive strict scrutiny, which both the plaintiffs and the United States agreed was the relevant legal standard.^[13] Although the court determined that the presumption furthered a government interest in “remedying past discrimination in government contracting,” the court concluded that the presumption was not narrowly tailored to achieve that interest.^[14] The court emphasized that the presumption was underinclusive because it arbitrarily excluded certain demographics,^[15] that it engaged in impermissible stereotyping by presumptively equating race with disadvantage,^[16] that the statute lacked a logical endpoint,^[17] and that there were race neutral alternatives that could achieve the same result.^[18] In conducting this analysis, the court relied extensively on the *SFFA* decision.

After concluding that the presumption failed strict scrutiny, the court permanently enjoined the MBDA from adhering to the presumption or “otherwise considering or using an applicant’s race or ethnicity in determining whether they can receive Business Center programming.”^[19]

Key Takeaways:

- ***The decision does not eliminate the ability to provide services to MBEs.*** Although the decision invalidated the presumption of social or economic disadvantage for members of certain racial and ethnic groups, it did not alter the eligibility of or provision of services to businesses owned by any of the groups listed under the presumption. Instead, the court’s order merely prohibits the use of race in determining who may receive services. In other words,

Business Centers will continue to be able to provide services to MBEs, but they will be required to provide equal consideration to all requests for services regardless of the identities of the owners and operators of the requesting businesses.

- ***This case illustrates the wide-reaching effects of the SFFA*** More broadly, the *Nuziard* equal protection challenge is just one of several that has followed on the heels of the Supreme Court’s *SFFA* decision, which invalidated race-conscious admissions programs at Harvard and the University of North Carolina at Chapel Hill. For example, the United States District Court for the Eastern District of Tennessee recently invalidated a virtually identical presumption of social disadvantage under the 8(a) Business Development Program authorized by the Small Business Act, 15 U.S.C. § 637.^[20] Like the *Nuziard* court, the district court that invalidated the 8(a) presumption relied heavily on *SFFA* in conducting its equal protection analysis, illustrating *SFFA*’s sweeping impact across statutory contexts. In view of these developments, we may continue to see similar challenges to statutory regimes that operate in a similar manner.
- ***Challengers are increasingly focusing on federal programs, which creates new risks for private institutions.*** This case also illustrates the increasing number of post-*SFFA* challenges being brought against federal programs. In the private context, DEI proponents have often defended DEI programs in part by pointing to federal analogs. But challenges to federal programs like this one are mounting. For example, in addition to this suit and the challenge to the 8(a) Business Development Program, suits have been brought against the West Point Military Academy’s admissions criteria^[21] and the National Museum of the American Latino’s internship for “Latino museum leaders.”^[22] To the extent suits against these federal analogs succeed, private DEI programs may become more difficult to defend.
- ***The case has not concluded.*** Although the district court’s decision is final, the government is likely to appeal to the United States Court of Appeals for the Fifth Circuit. We are continuing to pay close attention to this case as it moves forward. Please feel free to reach out if you have any questions about these issues.

Jenner & Block has a deep commitment to diversity, equity, and inclusion as well as extensive experience supporting our clients’ DEI efforts through litigation, investigations, and strategic counseling. In light of this commitment and experience, the firm has launched a task force—composed of leading lawyers serving a wide variety of industries—to develop creative, strategic, and tailored solutions for clients across industries to accomplish their DEI goals while minimizing legal risk. We are currently working with clients, including institutions of higher education and corporations, on ways to maintain diversity in the evolving legal landscape. If you are interested in learning more about our work in this area, please contact Task Force Co-Chairs Ishan Bhabha (ibhabha@jenner.com), Lauren Hartz (lhartz@jenner.com), Marcus Childress (mchildress@jenner.com), Katie Wynbrandt (kwynbrandt@jenner.com), or Erica Turret (eturret@jenner.com).

Footnotes

[1] Pub. L. No. 115-58, 135 Stat. 1445 (codified at 15 U.S.C. § 9501 *et seq.*).

[2] --- F. Supp. 3d ----, No. 23-cv-278, 2024 WL 965299, at *49–50 (N.D. Tex. Mar. 5, 2024).

[3] 143 S. Ct. 2141 (2023).

[4] *See* Exec. Order No. 11,458, 34 Fed. Reg. 4937 (Mar. 5, 1969).

[5] Julie M. Lawhorn, Cong. Rsch. Serv., *The Minority Bus. Dev. Agency: An Overview of Its History and Programs* 8 (2023); *see* 15 U.S.C. § 9522.

[6] *Id.*, at 9, 12.

[7] *Id.* at 12.

[8] *Id.* at 4.

[9] 15 U.S.C. § 9501(9)(A)(i)–(ii).

[10] *Id.* § 9501(15)(B).

[11] 15 C.F.R. § 1400.1.

[12] *See Nuziard*, 2024 WL 965299, at *49–50.

[13] *See id.* at *25.

[14] *Id.* at *33.

[15] *Id.* at *34, 35 (internal quotation marks omitted).

[16] *Id.* at *36, 37.

[17] *Id.* at *37.

[18] *Id.* at *38, 39; *see id.* at *40.

[19] *Id.* at *49; *see id.* at *49–50.

[20] *See generally Ultima Servs. Corp. v. U.S. Dep't of Agric.*, --- F. Supp. 3d ----, No. 20-cv-41, 2023 WL 4633481 (E.D. Tenn. 2023).

[21] *See generally Students for Fair Admissions v. U.S. Mil. Acad. at W. Point*, --- F. Supp. 3d ----, No. 23-cv-8262, 2024 WL 36026 (S.D.N.Y. Jan. 3, 2024).

[22] *See generally Am. All. for Equal Rights v. Zamanillo*, No. 24-cv-509 (D.D.C. filed Feb. 22, 2024)

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