U.S. Department of Justice

Office of the Solicitor General

The Solicitor General

Washington, D.C. 20530

June 28, 2024

The Honorable Mike Johnson
Speaker
U.S. House of Representatives
Washington, DC 20515

Re: *Nuziard* v. *Minority Bus. Dev. Agency*, No. 23-cv-278 (N.D. Tex.)

Dear Speaker Johnson:

Consistent with 28 U.S.C. 530D, I write to advise you that the Department of Justice has decided not to seek further review of the judgment of the United States District Court for the Northern District of Texas in this case. Copies of the judgment and the court's earlier opinion are enclosed.

This case is an equal-protection challenge to a statutory presumption of eligibility for the Business Center Program operated by the Commerce Department's Minority Business Development Agency (MBDA). The Program was originally established by executive order in 1971. See Exec. Order No. 11,625, 36 Fed. Reg. 19,967 (Oct. 14, 1971). In 2021, Congress enacted the Minority Business Development Act to recognize the MBDA as a statutorily authorized agency. Pub. L. No. 117-58, § 100003, 135 Stat. 1448-1449 (15 U.S.C. 9502). Among other things, the Act directs the MBDA to administer the Business Center Program to assist the development of minority business enterprises (MBEs). 15 U.S.C. 9511, 9521-9526.

The Act defines an MBE as a business enterprise that is "not less than 51 percent-owned by 1 or more socially or economically disadvantaged individuals," and "the management and daily business operations of which are controlled by 1 or more socially or economically disadvantaged individuals." 15 U.S.C. 9501(9)(A)(i) and (ii). A "socially or economically disadvantaged individual" is:

> [A]n individual who has been subjected to racial or ethnic prejudice or cultural bias (or the ability of whom to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities, as compared to others in the same line of business and competitive market area) because of the identity of the individual as a member of a group, without regard to any individual quality of the individual that is unrelated to that identity.

15 U.S.C. 9501(15)(A). The Act further provides that the MBDA shall presume that the term "socially or economically disadvantaged individual" includes any individual who is Black or

African American; Hispanic or Latino; American Indian or Alaska Native; Asian; or Native Hawaiian or other Pacific Islander. 15 U.S.C. 9501(15)(B); see 15 C.F.R. 1400.1(b)-(c). The MBDA may designate additional groups for the presumption based on a showing that "the group is, as a whole, socially or economically disadvantaged." 15 C.F.R. 1400.1(b); see 15 U.S.C. 9501(15)(B)(vi); 15 C.F.R. 1400.3-1400.4.

In this case, three white small-business owners filed suit claiming that they were unable to obtain services through the MBDA Business Center Program because of their race, in violation of the equal-protection component of the Fifth Amendment's Due Process Clause. Ruling on cross-motions for summary judgment, the district court held that two of the plaintiffs had standing to bring their challenge and further held that the Act is unconstitutional to the extent that certain racial or ethnic groups are presumed to be "socially or economically disadvantaged." 15 U.S.C. 9501(15)(B). The court noted that the parties agreed that the Act's presumption was subject to strict scrutiny, which required the government to show that it is narrowly tailored to serve a compelling government interest. Order 45-46. The court held that the record in this case demonstrates the existence of a compelling interest in remedying the history of discrimination in public contracting that could justify some race-conscious action. Order 56-61; see, *e.g.*, *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 237 (1995). But the court found that the specific presumption in 15 U.S.C. 9501(15)(B) is not narrowly tailored to serve that compelling interest. Order 61-74.

The district court permanently enjoined the MBDA from using the statutory and regulatory racial and ethnic presumptions to identify individuals who are "socially or economically disadvantaged," and from "otherwise using an applicant's race or ethnicity in determining whether they can receive Business Center programming." Judgment 1; Order 92. But the court rejected the plaintiffs' requests for broader relief, including a declaration that the entire Minority Business Development Act is unconstitutional and vacatur of the MBDA's regulations implementing the Business Center Program. Order 75-92. The court explained that "it is not unconstitutional for a federal program to serve minorities." Order 75. And the court emphasized that its injunction prohibited "only the use of racial presumptions" and thus would not prevent the MBDA from providing assistance to socially or economically disadvantaged individuals by continuing to operate the Business Center program in accordance with the other provisions of the Act. Order 86; see Order 87-89.

Before the district court issued the permanent injunction, the MBDA issued guidance to all Business Centers explaining that an individual does not need to identify as a member of one of the groups enumerated in the statutory presumption provision in order to qualify as a socially or economically disadvantaged individual eligible to receive Business Center services. Instead, any individual may meet the statutory definition of "socially or economically disadvantaged" if her membership in a group has resulted in her subjection to racial or ethnic prejudice or cultural bias or impaired her ability to compete in the free enterprise system. 15 U.S.C. 9501(15)(A). More recently, and in compliance with the permanent injunction, the MBDA instructed all Business Centers that they may not presume social or economic disadvantage for any racial or ethnic group, nor may they deny access to Business Center services on account of race or ethnicity. Instead, Business Centers should apply the statutory, race-neutral definition of

"socially or economically disadvantaged individual," 15 U.S.C. 9501(15)(A), without reference to the statutory or regulatory presumptions.

The Department of Justice vigorously defended the Act and disagrees with the district court's decision. But the Department does not appeal every decision with which it disagrees; instead, it decides whether to seek further review based on the circumstances of each case and careful consideration of all factors relevant to the interests of the United States, including the practical effect of the adverse decision and a "broader view of litigation in which the Government is involved." *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 96 (1994).

Here, the district court rejected the plaintiffs' challenge to the Minority Business Development Act as a whole, as well as their other requests for broad relief blocking the operation of the Business Center Program. And the court emphasized the narrow scope of its injunction, which does not prevent the MBDA from fulfilling its mission by continuing to serve businesses owned and controlled by socially and economically disadvantaged individuals. Business Centers may continue to address the challenges faced by socially or economically disadvantaged business owners—that is, those who have suffered discrimination or diminished opportunities in accessing capital, credit, contracts, and other areas of business development because of their membership in a racial, ethnic, cultural, or other group. And Business Centers may conduct outreach to particular communities that include business owners who may qualify for Business Center services, provided that all outreach makes clear that such services are available to qualifying individuals regardless of race or ethnicity.

The Department is committed to defending the authority of Congress and federal agencies to remedy past discrimination and to ensure equal opportunities for individuals and communities that have suffered such discrimination, including minority business owners. The Department is actively defending programs aimed at achieving those important objectives in several other pending cases, and it will continue to do so. After considering all of the relevant circumstances, however, the Department has determined that it would not be in the best interests of the United States to seek further review of the district court's judgment in this particular case. A notice of appeal would be due July 1, 2024. The Department intends to file a protective notice of appeal on that date and dismiss the appeal on July 15, 2024.

Please let me know if we can be of any further assistance in this matter.

Sincerely,

Elizabeth B. Prelogar
Solicitor General

Enclosures