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Established 1969

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July 13, 2026

Kelly Loeffler
Administrator
U.S. Small Business Administration
409 3rd St. SW
Washington, DC 20416

RE: USET SPF Comments in Response to SBA's Notice of Proposed Rulemaking to Remove the 8(a) Program's Rebuttable Presumption of Social Disadvantage for Individually Owned Firms, Docket ID No. SBA-2026-0133

Dear Administrator Loeffler,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we submit these comments in response to the Small Business Administration's (SBA) publication on June 11, 2026, of a notice of proposed rulemaking (NPRM) to remove the 8(a) Business Development Program's (8(a) Program) regulatory rebuttable presumption of social disadvantage for individually owned firms.[1] While SBA justifies the NPRM based on its position that the rebuttable presumption was applied in an unconstitutionally race-based manner, the revisions in the NPRM extend well beyond what is necessary to resolve SBA's stated goal. We write to express appreciation that the NPRM does not purport to limit Tribally owned businesses' access to the 8(a) Program, while also expressing our concern that the NPRM as written risks unintended harm to Tribal Nations, Tribal entities, and Native-owned businesses participating in the 8(a) Program.

USET SPF is a non-profit, inter-Tribal organization advocating on behalf of thirty-three (33) federally recognized Tribal Nations from the Northeastern Woodlands to the Everglades and across the Gulf of Turtle Island.[2] USET SPF is dedicated to promoting, protecting, and advancing the inherent sovereign

[1] *Reforms to Remove SBA's 8(a) Program's Rebuttable Presumption of Social Disadvantage for Individually Owned Firms Only*, 91 Fed. Reg. 35433 (proposed June 11, 2026) (to be codified at 13 C.F.R. pt. 124).
[2] USET SPF member Tribal Nations include: Alabama-Coushatta Tribe of Texas (TX), Catawba Indian Nation (SC), Cayuga Nation (NY), Chickahominy Indian Tribe (VA), Chickahominy Indian Tribe–Eastern Division (VA), Chitimacha Tribe of Louisiana (LA), Coushatta Tribe of Louisiana (LA), Eastern Band of Cherokee Indians (NC), Houlton Band of Maliseet Indians (ME), Jena Band of Choctaw Indians (LA), Mashantucket Pequot Indian Tribe (CT), Mashpee Wampanoag Tribe (MA), Miccosukee Tribe of Indians of Florida (FL), Mi'kmaq Nation (ME), Mississippi Band of Choctaw Indians (MS), Mohegan Tribe of Indians of Connecticut (CT), Monacan Indian Nation (VA), Nansemond Indian Nation (VA), Narragansett Indian Tribe (RI), Oneida Indian Nation (NY), Pamunkey Indian Tribe (VA), Passamaquoddy Tribe at Indian Township (ME), Passamaquoddy Tribe at Pleasant Point (ME), Penobscot Indian Nation (ME), Poarch Band of Creek Indians (AL), Rappahannock Tribe (VA), Saint Regis Mohawk

rights and authorities of Tribal Nations and to assisting its membership in dealing effectively with public policy issues.

The 8(a) Program is, in essence, a Tribal program—in that it is an integral part of the United States' delivery on its trust and treaty obligations. The 8(a) Program is a proven tool to advance Tribal Nations' economic sovereignty and self-determination. It has created successful pathways for Tribal Nations, Tribal entities, and Native people to pursue economic development and job creation in our communities, efforts that are critical to addressing the federal government's longstanding failure to uphold its trust and treaty obligations to fully fund Tribal programs and services. Aside from Tribal gaming, 8(a) contracting has been the most successful initiative for boosting economic development in Indian Country, and every dollar lost from this source is a dollar Tribal governments and communities will have to make up elsewhere—as it is unlikely the federal government will soon step up to truly fulfill its long-underfunded trust and treaty obligations. Further, the *Ultima* decision, as discussed herein, does not require otherwise—*Ultima* did not apply to Indian Country because the United States' relationships with Tribal Nations, Tribal communities, and Native people are not unconstitutionally race-based but rather political in nature, and the 8(a) Program delivers on the United States' trust and treaty obligations. For these and all the reasons articulated herein, SBA must protect the ability for both Tribally owned and Native-owned businesses to participate in the 8(a) Program.

I. USET SPF's Positions Regarding NPRM

We commend SBA for maintaining the current 8(a) Program status of entity-owned firms, which include those owned by Tribal Nations, Alaska Native Corporations (ANCs), and Native Hawaiian Organizations (NHOs), by clarifying the new conditions proposed in the NPRM do not apply to them. This regulatory status is consistent with the political, government-to-government relationship between Tribal Nations and the United States, and with the statutory eligibility of Tribal Nations and Tribal entities for the 8(a) Program.

Given SBA's recognition of this status, we echo calls from organizations like the Native American Contractors Association (NACA) for SBA to *promptly resume processing 8(a) Program applications for Tribally owned firms, which appear to have stalled since August 2025*.[3]

However, we have deep concerns about the NPRM's impact on businesses owned by individual Native people. Such individuals are statutorily eligible for the 8(a) Program. Further, SBA would be acting on a political classification, not racially discriminating, if it preserves Native individuals' access to the 8(a) Program without requiring them to affirmatively demonstrate social disadvantage. The proposed changes to the 8(a) Program eligibility criteria for Native-owned businesses violate trust and treaty obligations, extend beyond what recent court rulings require, and threaten economic development in Indian Country.

We call on SBA to continue to maintain the 8(a) Program eligibility status of Tribally owned businesses and to protect the eligibility of Native-owned businesses in accordance with the federal government's trust and treaty obligations and the 8(a) Program's governing statute. The 8(a) Program remains a significant

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Tribe (NY), Seminole Tribe of Florida (FL), Seneca Nation of Indians (NY), Shinnecock Indian Nation (NY), Tunica-Biloxi Tribe of Louisiana (LA), Upper Mattaponi Tribe (VA) and the Wampanoag Tribe of Gay Head (Aquinnah) (MA).

[3] *See* Letter from Native Am. Contractors Ass'n to Kelly Loeffler, Admin'r, U.S. Small Bus. Admin. (May 4, 2026) (noting "Native community-owned 8(a) business application approvals . . . appear[] to have stopped since August of 2025"); Jason Miller, *Tribal-Owned Firms Want Answers About State of 8(a) Program*, Fed. News Network (May 8, 2026); Brian Edwards, *Native Contractors Press SBA Over 8(a) Approval Delays*, Tribal Bus. News (May 10, 2026).

economic component in Indian Country, and any revisions to it should focus on advancing the financial stability and economic advancement of Tribal enterprises *and* Native-owned businesses. These enterprises are proven economic assets and fulfill critical community service functions.

USET SPF strongly recommends that SBA consider these factors and conduct meaningful Tribal consultation before finalizing this rule so that we may work together to improve the 8(a) Program for Tribal Nations, Tribal entities, and Native-owned businesses.

II. Background

Indian Country's Political Status Under Constitutional Equal Protection Review

Tribal Nations are and always have been inherently sovereign governments, a status that predates the arrival of colonizing forces. This inherent sovereignty, while existing independently from the United States' affirmation, is recognized in the U.S. Constitution, by the U.S. Supreme Court, in treaties and legislation, and via other legal proclamations.[4] Many Tribal Nations choose to carry on a government-to-government relationship with the United States,[5] and Tribal Nations also share political relationships with their own Tribal citizens and community members.[6]

Prior to the arrival of colonizing forces to our shores, Tribal Nations fully exercised our sovereign jurisdiction over all two billion acres of what is now called the United States, developing robust local economies and complex, wide-ranging trade networks alongside effective governance structures. In taking for itself nearly all our original territory through war, treaty-making, and other political means, the United States incurred a debt to Tribal Nations that manifests in trust and treaty obligations to provide services and funding to Tribal

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[4] *See Haaland v. Brackeen*, 599 U.S. 255, 308 (2023) (Gorsuch, J., concurring) (explaining Tribal Nations "existed as 'self-governing sovereign political communities'" that "d[id] not 'cease to be sovereign and independent'" after colonization (first quoting *United States v. Wheeler*, 435 U.S. 313, 322–23 (1978), then quoting *Worcester v. Georgia*, 31 U.S. [6 Pet.] 515, 561 (1832))); *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014) (describing Tribal Nations as "separate sovereigns pre-existing the Constitution" (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978))). Tribal Nations' inherent sovereignty and right to self-determination is further supported by international law principles adopted into the foundations of federal Indian law that carry through to the present day. *Worcester*, 31 U.S. at 520 (describing Tribal Nations' retained sovereignty and right to self-government as consistent with "the settled doctrine of the law of nations"); *Brackeen*, 599 U.S. at 308 (Gorsuch, J., concurring) (describing the concept of retained sovereignty as a "long-held tenet of international law"); *see also* G.A. Res. 61/295, arts. 3–5, U.N. Declaration on the Rights of Indigenous Peoples (Oct. 2, 2007).

[5] *See, e.g.*, *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 196 (1876) ("From the commencement of its existence, the United States has negotiated with the Indians in their tribal condition as nations[,] . . . following the practice of Great Britain before the Revolution."); Matthew L.M. Fletcher, *The Original Understanding of the Political Status of Indian Tribes*, 82 St. John's L. Rev. 153, 180 (2008) (describing how the early historical record "provides remarkably unambiguous support" for the idea that the United States approached "Indian affairs . . . in the context of tribal political relationships with the federal government"); *see also* H.R. Rep. No. 103–781 (1994) (accompanying the Federally Recognized Indian Tribe List Act of 1994 and explaining federal recognition "permanently establishes a government-to-government relationship between the United States and the recognized tribe"); 25 C.F.R. § 83.2(a) (acknowledging the "government-to-government relationship" between Tribal Nations and the United States).

[6] *See, e.g.*, *United States v. Antelope*, 430 U.S. 641, 645 (1977) (recognizing Tribal Nations have sovereignty over our people, including the power to regulate internal and social relations); Citizenship Code of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians, ch. CTZ.1 pmbl. ("This ordinance is enacted pursuant to the inherent sovereign authority of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians to determine its Tribal citizenship which predates its Treaties . . . with the United States Government.").

Nations, Tribal communities, and Native people, including for economic development purposes.[7] As explained in more detail herein, these debt-based trust and treaty obligations and the political relationship they entail flows from the United States through Tribal Nations and to Native people.[8]

Thus, there are longstanding and still-existing political relationships between inherently sovereign Tribal Nations and the United States, and, by extension, Native people (*i.e.*, the individuals with whom Tribal Nations establish a political relationship and those to whom the United States otherwise owes trust and treaty obligations). On this basis, the U.S. Constitution itself singles out Tribal Nations and Native people in recognition and furtherance of Tribal Nations' sovereign governmental status, the political relationships Tribal Nations and Native people carry on with the United States, and the United States' trust and treaty obligations, which are themselves political in nature.[9] Congress has reaffirmed that the U.S. Constitution recognizes the government-to-government relationship between Tribal Nations and the United States many times, including in celebrating the 200th anniversary of its signing.[10]

In 1974, the U.S. Supreme Court in *Morton v. Mancari* unanimously affirmed the principle that the United States may lawfully deliver on its trust and treaty obligations without running afoul of the U.S. Constitution's equal protection requirements.[11] While this concept was long understood by that time, the U.S. Supreme Court in 1954 had held that the Fourteenth Amendment's equal protection requirements applied to the federal government's actions as incorporated via the Fifth Amendment,[12] thus requiring the Court to articulate why this new holding did not prevent the United States from fulfilling its trust and treaty obligations to Indian Country. Since *Mancari*, courts have continuously upheld this principle.[13]

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[7] *See Morton v. Mancari*, 417 U.S. 535, 551–52 (1974); *Seminole Nation v. United States*, 316 U.S. 286, 296–97 (1942) ("In carrying out its treaty obligations with the Indian tribes the Government . . . has charged itself with moral obligations of the highest responsibility and trust."). Indeed, many of the statutes authorizing or appropriating funds for Tribal programs carry out trust and treaty obligations, whether or not they specifically acknowledge this fact, and those statutes serve as independent mandates. *See, e.g.*, Indian Health Care Improvement Act, 25 U.S.C. § 1602 (declaring "the policy of this Nation" with respect to the health care of Native people is carried out "in fulfillment of its special trust responsibilities and legal obligations to Indians"); Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 5301(a) (recognizing "the Federal Government's historical and special legal relationship with, and resulting responsibilities to, American Indian people"); *see also Antelope*, 430 U.S. at 647 n.8 ("[L]egislation directed toward Indian tribes is a necessary and appropriate consequence of federal guardianship under the Constitution.").

[8] *See, e.g.*, U.S. Const. art. I, § 2, cl. 3 (distinguishing "Indians not taxed" for apportionment purposes); *id.* amend. XIV, § 2 (same); *see also Brackeen*, 599 U.S. at 323 (Gorsuch, J., concurring) (stating "because Tribes are collections of *people*, the Indian Commerce Clause endows Congress with the 'authority to regulate commerce with Native Americans' as individuals," so long as it does not intrude on internal Tribal affairs) (quoting *McGirt v. Oklahoma*, 591 U.S. 894, 903 (2020)); *Antelope*, 430 U.S. at 645–46.

[9] This includes through direct reference in the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3, and the "Indians not taxed" portion of the Apportionment Clause, *id.* art. I, § 2, cl. 3, as well as through the implementation of the Treaty Clause, *id.* art. II, § 2, and "the Constitution's adoption of preconstitutional powers," *United States v. Lara*, 541 U.S. 193, 201 (2004). *See also* U.S. Const. art. IV, § 3, cl. 2 (Territory Clause); id. art. VI, cl. 2 (Supremacy Clause); *id.* amend. XIV, § 2 (distinguishing "Indians not taxed" for apportionment purposes); *Brackeen*, 599 U.S. at 307, 310 (Gorsuch, J., concurring) (referring to the "Indian-law bargain struck in our Constitution," the terms of which include that "Indian Tribes remain independent sovereigns"); *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 172 n.7 (1973); *United States v. Holliday*, 70 U.S. 407, 418 (1865).

[10] H.R. Con. Res. 331, 100th Cong. (1988) (reaffirming "the continuing government-to-government relationship between Indian tribes and the United States established in the Constitution").

[11] *Mancari*, 417 U.S. at 554–55; *see also id.* at 555 (acknowledging many laws "derived from historical relationships and explicitly designed to help only Indians" have been repeatedly upheld).

[12] *Bolling v. Sharpe*, 347 U.S. 497 (1954).

[13] *E.g.*, *Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979); *United States v. Antelope*, 430 U.S. 641 (1977); *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73 (1977); *W. Flagler Assocs., Ltd. v. Haaland*, 71 F.4th 1059 (D.C.

Small Business Act

Congress enacted the Small Business Act (Act) in 1953 to expand free market competition by encouraging and developing the capacity of small businesses through the provision of federal procurement contracting opportunities—meaning more opportunities for small businesses to contract to provide goods or services to the federal government.[14] The Act includes the 8(a) Program, which Congress created in 1978 to "promote the business development of small business concerns owned and controlled by socially and economically disadvantaged individuals."[15] Congress found that "it is in the national interest to expeditiously ameliorate the conditions of socially and economically disadvantaged groups,"[16] including but not limited to "Native Americans, Indian tribes [defined to include ANCs], . . . [and] Native Hawaiian Organizations."[17] Thus, as discussed further below, Congress in creating the 8(a) Program provided Tribal Nations an important path for generation of Tribal government revenue—much needed due to a long history of the United States preventing us from generating funding for Tribal government functions and services.

To achieve its goal, Congress authorized SBA under the 8(a) Program to award procurement contracts from other federal agencies to "**socially and economically disadvantaged small business concerns**."[18] Defined primarily by ownership and control, these include but are not limited to small businesses **majority-owned** by "an economically disadvantaged Indian tribe (or a wholly owned business entity of such tribe)"[19] or by "one or more socially and economically disadvantaged individuals,"[20] and **majority-controlled** by one or more "members of an economically disadvantaged Indian tribe,"[21] or by "one or more socially and economically disadvantaged individuals."[22]

Congress set out a standard for "**social disadvantage**" to encompass individuals "who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group

Cir. 2023), *cert denied*, 144 S. Ct. 2671 (Jun. 17, 2024); *United States v. Wilgus*, 638 F.3d 1274 (10th Cir. 2011); *Means v. Navajo Nation*, 432 F.3d 924 (9th Cir. 2005).

[14] 15 U.S.C. § 631(a). The Act in its current form includes dozens of references to Tribal Nations and Native-owned businesses.

[15] *Id.* § 631(f)(2)(A).

[16] *Id.* § 631(f)(1)(D).

[17] *Id.* § 631(f)(1)(C).

[18] *Id.* § 637(a)(1)(B); *see also id.* § 637(a)(4)(A).

[19] *Id.* § 637(a)(4)(A)(i)(II), (A)(ii)(II); *see also id.* § 637(a)(13) (defining the term "Indian tribe" for purposes of the 8(a) Program as "any Indian tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village or regional or village corporation (within the meaning of the Alaska Native Claims Settlement Act [43 U.S.C. 1601 et seq.] which (A) is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or (B) is recognized as such by the State in which such tribe, band, nation, group, or community resides."). The Act makes ANCs eligible for the 8(a) Program via their inclusion in the statutory definition of "Indian tribe," *id.* § 637(a)(13), while NHOs' eligibility is set out in provisions that mirror those applicable to "Indian tribes," *id.* § 637(a)(4)(A)(i)(III), (ii)(III) (referencing small businesses majority-owned by "an economically disadvantaged Native Hawaiian organization"); *id.* § 637(a)(4)(B)(iii) (referencing small businesses majority-controlled by economically disadvantaged "Native Hawaiian organizations"). Both ANCs and NHOs play an important role in delivering trust and treaty obligations owed to individual Native people.

[20] *Id.* § 637(a)(4)(A)(i)(I), (A)(ii)(I).

[21] *Id.* § 637(a)(4)(B)(ii).

[22] *Id.* § 637(a)(4)(B)(i).

without regard to their individual qualities."[23] In contrast, Congress did not place a social disadvantage requirement on Tribal Nations.[24]

For individuals to demonstrate "**economic disadvantage**," Congress directed SBA to consider certain financial information in determining whether the "ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged."[25] Congress set out a distinct standard for "determining the economic disadvantage of an Indian tribe," which involves looking to factors such as the economic status of Tribal community members and the Tribal Nation's "access to capital markets."[26]

Statutorily, 8(a) Program participants are required annually to certify that they meet the Act's ownership and control requirements,[27] and to submit the necessary financial information for establishing economic disadvantage.[28]

<u>SBA Regulations</u>

As authorized by the Act,[29] SBA promulgated regulations to carry out the 8(a) Program.[30] The subject of this NPRM is the regulatory provision helping to define who qualifies as "socially disadvantaged" for purposes of determining which small businesses are majority-owned and majority-controlled by "one or more socially and economically disadvantaged individuals" sufficient to qualify for the 8(a) Program.

To help identify who qualifies as "socially disadvantaged," SBA in 1986 created a "rebuttable presumption" of social disadvantage for individuals impacted by "racial or ethnic prejudice or cultural bias" due to their status as a member of certain groups, including specific groups identified by Congress and others identified by SBA.[31] Among other groups, SBA listed in its rebuttable presumption the statutorily identified group of "Native Americans (Alaska Natives, Native Hawaiians, or enrolled members of a Federally or State recognized Indian Tribe)."[32]

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[23] *Id.* § 637(a)(5); *see also id.* § 631(f)(1)(A)–(B) (finding many "socially and economically disadvantaged persons . . . are socially disadvantaged because of their identification as members of certain groups that have suffered the effects of discriminatory practices or similar invidious circumstances over which they have no control").

[24] *Id.* § 637(a)(4)(A)(i)(II), (A)(ii)(II), (B)(ii) (describing only "economically disadvantaged Indian tribe[s]" and "members of an economically disadvantaged Indian tribe," as opposed to "socially *and* economically disadvantaged" individuals or businesses); *see also* 13 C.F.R. § 124.109(b)(1) (recognizing "Indian tribe[s]" are "considered to be socially disadvantaged").

[25] 15 U.S.C. § 637(a)(6)(A).

[26] *Id.* For context on obstacles to Tribal Nations' ability to access capital, see generally Bd. of Govs., Fed. Rsrv. Sys., *Growing Economies in Indian Country: Taking Stock of Progress and Partnerships* (2012); Native Nations Inst., Univ. of Ariz., *Access to Capital and Credit in Native Communities* (2016).

[27] *Id.* § 637(a)(4)(C).

[28] *Id.* § 637(a)(6)(B).

[29] *Id.* § 634(b)(6) (authorizing the SBA Administrator to "make such rules and regulations as he deems necessary to carry out the authority vested in him by or pursuant to this chapter").

[30] 13 C.F.R. pt. 124.

[31] *Id.* § 124.103(b). SBA's standard for adding new groups to the rebuttable presumption involved finding by "a preponderance of the evidence" that the group had experienced chronic forms of discrimination resulting in certain economic impediments. *Id.* § 124.103(d).

[32] *Id.* § 124.103(b)(1); *see also* 15 U.S.C. §§ 631(f)(1)(C), 637(a)(13).

For individuals not part of any group covered by the rebuttable presumption, SBA provided a process for establishing social disadvantage on a case-by-case basis by demonstrating, "by a preponderance of the evidence," chronic, individualized treatment that negatively impacted their business opportunities.[33]

<u>The *Ultima* Ruling</u>

In July 2023, the U.S. District Court for the Eastern District of Tennessee ruled in *Ultima Services Corp. v. U.S. Department of Agriculture* that, under the traditional equal protection analysis employed for racial classifications, SBA's regulatory rebuttable presumption of social disadvantage for certain groups did not satisfy strict scrutiny and thus violated the plaintiff small business's constitutional equal protection rights.[34]

In *Ultima*, the nature of the rebuttable presumption itself was not at issue, as "[n]either party dispute[d] that the rebuttable presumption [wa]s subject to strict scrutiny,"[35] meaning it would only be constitutional if narrowly tailored to achieve a compelling government interest. The court held that, while it was within SBA's statutory authority to *create* a rebuttable presumption to implement the "race-neutral" Small Business Act,[36] the presumption that SBA had created, as applied to the plaintiff in *Ultima*, and in the plaintiff's contracting industries, could not survive strict scrutiny review.[37] Though the court construed the case as an as-applied challenge, it enjoined SBA from further use of the rebuttable presumption in administering the 8(a) Program.[38]

As a result, SBA discontinued its use of the rebuttable presumption and has instead required individual 8(a) Program participants to establish social disadvantage via the case-by-case regulatory review process previously used for members of groups not covered by the presumption.

Critically, as discussed further below, no party in *Ultima* discussed the unique political status of Tribal Nations or Native people under constitutional equal protection jurisprudence.[39] Instead, the court simply

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[33] 13 C.F.R. § 124.103(c).
[34] *Ultima Servs. Corp. v. U.S. Dep't of Agric.*, 683 F. Supp. 3d 745, 752–53 (E.D. Tenn. 2023). Under traditional equal protection jurisprudence, courts first determine whether the government action involves a constitutionally suspect class, such as one based on race. *See Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 312–14 (1976). Second, courts apply the appropriate level of review based on their determination in step one. If a court finds that the government action does not involve a suspect classification, it will apply rational basis review, which merely requires the action to be "rationally related" to a "legitimate" governmental interest. *Romer v. Evans*, 517 U.S. 620, 631 (1996). If a court finds that the government action *does* involve a constitutionally suspect classification, however, then it will apply strict scrutiny, which requires the government action to be addressing a "compelling governmental interest[]" with "narrowly tailored" measures to achieve that interest. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 206–07 (2023); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995). Strict scrutiny applies even if the government action is intended to benefit the targeted suspect class, such as programs designed to remedy the effects of societal discrimination, *Students for Fair Admissions*, 600 U.S. at 214, 226–30, or when it is otherwise a "benign" racial classification, *Adarand*, 515 U.S. at 218–27.
[35] *Ultima*, 683 F. Supp. 3d at 764 n.6.
[36] *Id.* at 762–63.
[37] *See id.* at 764, 774–75; *id.* at 776 (describing SBA's evidence in support of the rebuttable presumption as too attenuated from the plaintiff's "specific set of industries" to satisfy strict scrutiny review). The court pointed to a number of evidentiary weaknesses that led it to conclude the rebuttable presumption could not survive strict scrutiny review as applied to the plaintiff in the plaintiff's industries, leaving open the possibility that the existence of a regulatory presumption was not the problem, but the way it had been formulated, justified, and applied. *See, e.g.*, *id.* at 765–69.
[38] *See id.* at 764 n.5, 774 & n.10.
[39] As addressed further herein, the traditional equal protection test does not apply to Native people or Tribal Nations due to our political relationships with the United States.

applied the typical equal protection standard of review it would normally apply to race-based classifications and determined that standard was not met. Because that standard of review is not applicable to Native people or Tribal Nations—where Native people were just one of multiple groups referenced in the regulatory provision at issue in the litigation—the *Ultima* holding is irrelevant and inapplicable to the 8(a) Program's application in Indian Country.

III. Comments

A. By maintaining the status quo for entity-owned businesses, the NPRM appropriately reflects that Tribal Nations are sovereign governments that share a political, government-to-government relationship with the United States and ensures the 8(a) Program can continue to carry out the United States' trust and treaty obligations.

SBA has taken the correct approach in the NPRM by preserving the 8(a) Program eligibility of entity-owned small businesses, including those owned by Tribal Nations, ANCs, and NHOs. As described above, Tribal Nations are referenced throughout the 8(a) Program's authorizing statute,[40] and Congress made clear that Tribal Nations need not demonstrate social disadvantage to participate.[41] In fact, as Tribal entities are the only entity-owned businesses statutorily eligible for the 8(a) Program,[42] the 8(a) Program is in many ways a Tribal program in and of itself.

These distinctions in the statute, carried forward in the NPRM, appropriately recognize that Tribal Nations share a government-to-government relationship with the United States, and that the United States delivers federal programs, services, and preferences to Tribal Nations—including government contracting preferences for Tribally owned businesses—in furtherance of its trust and treaty obligations.

As SBA recognizes, the *Ultima* decision does not apply to Tribally owned businesses. First, the 8(a) Program's statute singles out Tribally owned businesses as not required to establish social disadvantage in the first place. Second, as described previously, the *Ultima* decision does not apply to Indian Country because we have a unique political status under equal protection jurisprudence.

Subsequent proceedings in *Ultima* affirmatively demonstrate that its July 2023 ruling was narrow and does not apply to Tribally owned businesses. For example, when the plaintiff sought additional relief, SBA explained that the request would inappropriately exclude from the 8(a) Program "entity-based participants like Indian tribes and Alaska Native Corporations that never relied on the [rebuttable] presumption—and that the parties agree were not affected by the Court's July 19 order."[43] SBA reiterated this position a year later, again stating that "the injunction in this case does not cover these entity-owned firms, which are not—and have never been—entitled to the individual rebuttable presumption of social disadvantage for entry into the 8(a) program," firmly concluding that "[e]ntity-owned firms' eligibility in the 8(a) program is not based on

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[40] *See* 15 U.S.C. § 631(f)(1)(C); *id.* § 637(a)(4)(A)(i)(II), (A)(ii)(II), (B)(ii); *id.* § 637(a)(6)(A), (a)(13).
[41] *Id.* § 637(a)(4)(A), (B).
[42] With the exception of community development corporations, which were only recently made eligible by separate statute.
[43] Defs.' Mem. Opp. Pl.'s Mot. for Additional Equitable Relief at 19, *Ultima*, No. 2:20-cv-41 (E.D. Tenn. Sept. 29, 2023), ECF No. 94. In a subsequent order dealing with a procedural matter, the magistrate judge assigned to the case described the July 2023 order as a "preliminary injunction" that "was quite narrow in scope." *Ultima*, No. 2:20-cv-41, 2025 WL 224635, at *4 (E.D. Tenn. Jan. 16, 2025).

any racial classifications."[44] An amicus brief in *Ultima* filed by the Tunica-Biloxi Tribe of Louisiana and the National Center for American Indian Enterprise Development (NCAIED) expanded on these points.[45] It emphasized that "[p]articipation in the 8(a) Program is integral to furthering Congress's policy of tribal self-governance."[46]

This is why Congress mandated the inclusion of Tribal Nations, Tribal entities, and Native-owned businesses in the 8(a) Program.[47] This is why Congress identified Tribal Nations and Native Americans as specific groups subject to unique standards.[48] And this is why, as SBA itself has long maintained,[49] nothing about the 8(a) Program is unconstitutionally race-based as applied to Indian Country.

Rather than the strict scrutiny that racial classifications must undergo for equal protection review, Indian Country political classifications must meet rational basis review, and government actions that deliver on the United States' trust and treaty obligations satisfy this test. The 8(a) Program is a critical means for delivering on those obligations.

In taking the lands and resources upon which Tribal Nations relied to care for our communities, the United States assumed trust and treaty obligations to us. Yet, by the government's own accounting, the United States has persistently fallen far short of meeting its promises with sufficient federal funding.[50] In addition to failing to provide adequate funding, the United States has erected convoluted legal precedent that siphons revenue away from Tribal lands and prevents Tribal Nations from collecting taxes like other governmental entities do.[51] The federal government also strictly regulates the development activities we attempt to

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[44] Defs' Resp. Opp. Mot. to Intervene at 2, *Ultima*, No. 2:20-cv-41 (E.D. Tenn. Oct. 11, 2024), ECF No. 108; *see also* Press Release, Native Am. Contractors Ass'n, *Native American Contractors Association Statement on* Ultima Servs. Corp. v. U.S. Dep't of Agric. (Nov. 6, 2023) (describing how SBA "provid[ed[clarity for Native entity-owned businesses" shortly after the *Ultima* ruling by "sen[ding] letters to each business stating that the *Ultima* decision does not impact their participation in the 8(a) Program as they are not subject to the rebuttable presumption").
[45] *See* Br. of Tribal Amici, *Ultima*, No. 2:20-cv-41 (E.D. Tenn. Oct. 4, 2023), ECF No. 100.
[46] *Id.* at 6.
[47] *See id.* at 5–6 & n.7.
[48] *See id.*
[49] SBA reaffirmed this position as recently as May 2025, explaining that Executive Order 14151 ("Ending Racial and Wasteful Government DEI Programs and Preferencing") "does not apply to programs or activities of the Small Business Administration that affect or serve AI/ANs [*i.e.*, American Indians and Alaska Natives] . . . given that Tribes are separate sovereigns." Note from Wendell Davis, Gen. Counsel, U.S. Small Bus. Admin., to Wesley Coopersmith, Chief of Staff, U.S. Small Bus. Admin., *Re: Application of DEI Executive Order to American Indians and Alaska Natives* (May 20, 2025); *see also* Letter from Kelly Loeffler, Admin'r, U.S. Small Bus. Admin., to Hon. Dan Sullivan, Hon. Lisa Murkowski, & Hon. Deb Fischer, U.S. Senators (May 20, 2025) (discussing same).
[50] *See* U.S. Comm'n on Civ. Rts., *A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country* ix (2003) (explaining that federal spending fails to "compensate for a decline in spending power" or "overcome a long and sad history of neglect and discrimination"); U.S. Comm'n on Civ. Rts., *Broken Promises: Continuing Federal Funding Shortfall for Native Americans* 4 (2018) (finding that "[f]ederal funding for Native American programs across the government remains grossly inadequate to meet the most basic needs the federal government is obligated to provide"); Off. of Health Pol'y, Dep't of Health & Hum. Servs., *How Increased Funding Can Advance the Mission of the Indian Health Service to Improve Health Outcomes for American Indians and Alaska Natives* 15 (2022) (stating Indian Health Service "appropriations fund approximately half of the total funding that would be required to fully address existing health care resource needs"); Bureau Indian Affs., *Report to the Congress on Spending, Staffing, and Estimated Funding Costs for Public Safety and Justice Programs in Indian Country, 2021*, at 1–2 (Feb. 2024) (describing federal funding at a level of just 13% for Indian Country public safety and justice programs).
[51] *See, e.g.*, *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 176–77 (1989) (permitting states to tax certain activities on Indian Country lands, effectively precluding Tribal Nations from collecting taxes on those same activities to avoid "dual taxation" that would drive business away from Tribal communities); *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 812–13 (2014) (Sotomayor, J., concurring) (describing how destructive former federal policies "left a devastating legacy" on Tribal Nations that

undertake on our lands, for example creating a burdensome process requiring federal approval for entering into leases.[52] This lack of parity with other units of government places Tribal Nations at a disadvantage when trying to fund government services and spur economic development.

To fill these crippling funding gaps and account for this lack of parity, Tribal Nations have created Tribally owned businesses that generate governmental revenues for services to our citizens. Gaming and federal contracting have been the greatest economic drivers for Indian Country,[53] and, while these businesses sometimes operate as commercial entities, their purpose is the generation of governmental revenue. Congress recognized this when it enacted the Indian Gaming Regulatory Act, finding that many Tribal Nations engage in gaming "as a means of generating tribal governmental revenue,"[54] and that one purpose of Tribal gaming is "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments."[55]

The 8(a) Program serves as another current pillar of Tribal economic development, and it is a proven tool to advance Tribal Nations' economic sovereignty and self-determination.[56] It has created successful pathways for Tribal Nations and Tribal entities to pursue economic development and job creation in our communities. Moreover, supporting Tribally owned businesses' participation in local, regional, and global markets through the 8(a) Program also contributes to economic growth and job creation for non-Native communities alike.[57]

The United States' actions to deliver on trust and treaty obligations to Tribal Nations, Tribal entities, and Native people are political rather than racial in nature, and SBA must make this clear at every opportunity—including with regard to its 8(a) Program. In addition to fortifying the broader federal Indian law principles at stake, it is critically important to protect SBA's 8(a) Program as one of the most utilized economic development programs among Tribal Nations, including USET SPF's member Tribal Nations. The revenues generated through the 8(a) Program are vital to supporting our efforts in Nation building and rebuilding as well as providing essential services to our citizens and communities.

We urge SBA to continue to protect entity-owned firms in further rulemaking, and we ask that SBA take any necessary steps to ensure the efficient processing of 8(a) Program applications and reviews for entity-owned firms, as there is no reason to pause such applications during unrelated rulemaking.[58]

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are "largely unable to obtain substantial revenue by taxing members . . . [because] there is very little income, property, or sales [that Tribal governments] could tax" (quoting Matthew L.M. Fletcher, *In Pursuit of Tribal Economic Development as a Substitute for Reservation Tax Revenue*, 80 N. D. L. Rev. 759, 771, 774 (2004))).

[52] *See, e.g.*, 25 C.F.R. pt. 162.

[53] *See* Hue Nguyen & Jay Weiner, *The Economic Ripple Effects of Tribal Gaming and Federal Contracting*, Ctr. for Indian Country Dev. (Oct. 1, 2024).

[54] 25 U.S.C. § 2701(1); *see also Bay Mills*, 572 U.S. at 812–13 (Sotomayor, J., concurring) ("[T]ribal gaming operations cannot be understood as mere profit-making ventures that are wholly separate from the Tribes' core governmental functions.").

[55] *Id.* § 2702(1). We note that Tribal Nations' continued ability to generate Tribal government revenue from gaming is now separately under threat due to prediction markets infringing on our rights, making our continued access to the 8(a) Program even more important.

[56] *See* Jacqui Baldwin-LeClair, Andrew Huff, & Elijah Moreno, *Native Entities and the Federal Contracting Landscape*, Ctr. for Indian Country Dev. (June 21, 2023).

[57] *See* Nguyen & Weiner, *The Economic Ripple Effects of Tribal Gaming and Federal Contracting* (describing research showing that Tribal enterprises "regularly subcontract to small businesses, many of which are non-Native-owned").

[58] *See* Letter from Native Am. Contractors Ass'n to Kelly Loeffler, Admin'r, U.S. Small Bus. Admin. (May 4, 2026) (noting "Native community-owned 8(a) business application approvals . . . appear[] to have stopped since August of 2025"); Jason Miller, *Tribal-Owned Firms Want Answers About State of 8(a) Program*, Fed. News Network (May 8, 2026); Brian Edwards, *Native Contractors Press SBA Over 8(a) Approval Delays*, Tribal Bus. News (May 10, 2026).

B. SBA must protect 8(a) Program eligibility for individual Native-owned businesses, as the 8(a) Program serves Native people with whom the United States carries on a political relationship—including those affiliated with Tribal Nations via citizenship or otherwise and those owed political trust and treaty obligations.

Though *Ultima* enjoined SBA's use of the rebuttable presumption in the context of a racial equal protection analysis, as discussed above, Native people are not a racial group. The NPRM's failure to distinguish the unique status of Native people runs contrary not only to SBA's own positions but also to longstanding precedent and the United States' trust and treaty obligations. In furtherance of these obligations, SBA should continue to make the 8(a) Program available to businesses owned by Native people without requiring them to demonstrate social disadvantage, and *Ultima* does not mandate otherwise.

The unique political status for Indian Country under equal protection review is not and never has been limited to government actions directed at Tribal Nations. Indeed, the U.S. Constitution singles out Native people as politically distinct,[59] and the U.S. Supreme Court has time and again upheld classifications of Native people as political rather than racial.[60] *Mancari* itself dealt with a hiring preference for Native individuals and, finding this to be a political classification, the Court subjected it only to rational basis review.[61] Thus, the U.S. Constitution and the U.S. Supreme Court recognize what is independently true: Native individuals share a political relationship with the United States.

Further, trust and treaty obligations follow Native people wherever they go—and their political status does not end at the reservation border.[62] This is in part because federal policies bear heavy responsibility for the fact that many Native people today live apart from their Tribal communities. Boarding school initiatives, termination policies, and relocation efforts specifically aimed to sever ties among Native families, Tribal communities, and Tribal lands.[63] Meanwhile, the establishment of reservations and allotments often relegated Tribal communities to remote areas with little development opportunity, meaning individuals must

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[59] U.S. Const. art. I, § 2, cl. 3 (distinguishing "Indians not taxed" for apportionment purposes); *id.* amend. XIV, § 2 (same); *see also Brackeen*, 599 U.S. at 322 (Gorsuch, J., concurring) (explaining the Constitution's framers would have understood the term "Indian Tribes" as one that "necessarily referred to collections of *individuals*" (citations omitted)); *id.* at 308 (Gorsuch, J., concurring) (stating inclusion of language referring to Native individuals in the Fourteenth Amendment confirmed "both the enduring sovereignty of Tribes and the bedrock principle that Indian status is a 'political rather than racial' classification" (quoting *Mancari*, 417 U.S. at 553 n.24)).

[60] *E.g.*, *Moe v. Confederated Salish & Kootenai Tribes of Flathead Rsrv.*, 425 U.S. 463, 479–80 (1976) (rejecting equal protection claims regarding state tax immunity for Native people); *Antelope*, 430 U.S. at 645–46 (noting "[t]he decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications"); *Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 673 n.20 (1979) (explaining special fishing rights for individual Indians do not violate equal protection).

[61] *Mancari*, 417 U.S. at 553–54.

[62] *See, e.g.*, 25 U.S.C. § 1603 (expressly defining "Urban Indians" as a category of individuals who reside in an urban center and who are eligible for federal Indian health services); *see also* S. Rep. No. 100-508, at 25 (1988) ("The responsibility for the provision of health care . . . does not end at the borders of an Indian reservation. Rather, government relocation policies which designated certain urban areas as relocation centers for Indians, have in many instances forced Indian people who did not which [sic] to leave their reservations to relocate in urban areas, and the responsibility for the provision of health care services follows them there.").

[63] *See, e.g.*, U.S. Dep't of Interior, *Federal Indian Boarding School Initiative Investigative Report Vol. I* (2022); U.S. Dep't of Interior, *Federal Indian Boarding School Initiative Investigative Report Vol. II* (2024); Harvard Proj. on Am. Indian Econ. Dev., *The State of Native Nations: Conditions Under U.S. Policies of Self-Determination* 352 (2008) (discussing relocation programs in the 1950s–60s whereby young Native people were sent to urban areas away from their communities for work); S. Rep. No. 100-508, at 25 (1988) (similarly discussing forced relocation of Native people to urban areas).

leave their communities to secure employment and services.[64] Further, Native people living and working apart from their Tribal communities still often meaningfully contribute to those communities, whether by returning for ceremonies, elections, and other gatherings, providing resources to relatives, or even, in the modern era, working remotely for their communities.

The SBA Administrator recognized the breadth of the United States' political relationship with Native *individuals* in a May 2025 letter to Congress addressing the 8(a) Program. The Administrator affirmed that "programs or activities that affect American Indians or Alaska Natives" are not unconstitutionally race-based, and that, "[f]urther, it would be unreasonable" to reach an alternate conclusion "given that Tribes are separate sovereigns."[65] SBA also affirmed this position internally with respect to SBA programs serving individual Native people.[66] Other agencies as recently as May 2026 have similarly affirmed this position with respect to the 8(a) Program.[67]

The 8(a) Program's statute also specifically identifies Native people as a group the 8(a) Program is intended to benefit. The mere fact that Native people may, in some places, appear in statutory lists that include racially identified groups does not render their classification as any less political. Indeed, "Indian tribes" are also listed in at least one such provision, and it would be entirely specious to suggest that Tribal Nations themselves are racial classifications. In listing both Tribal Nations and Native people, Congress recognized that the 8(a) Program was being made available to each in service of its trust and treaty obligations.[68]

The NPRM would limit 8(a) Program access for Native-owned businesses due to its failure to recognize that Indian Country is different—and it threatens to do so without Tribal consultation and without so much as a nod to the unique political status and trust and treaty obligations owed to Tribal Nations and Native people. It is critical that SBA provide Tribal Nations and Native-owned businesses with the utmost flexibility to participate in the 8(a) Program.

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[64] In addition to employment, the education system, justice system, and child welfare/adoption systems have also resulted in Native people moving away from their communities, including involuntarily.

[65] Letter from Kelly Loeffler, Admin'r, U.S. Small Bus. Admin., to Hon. Dan Sullivan, Hon. Lisa Murkowski, & Hon. Deb Fischer, U.S. Senators (May 20, 2025). The letter specifically addresses the impact of Executive Order No. 14151 ("Ending Racial and Wasteful Government DEI Programs and Preferencing").

[66] Note from Wendell Davis, Gen. Counsel, U.S. Small Bus. Admin., to Wesley Coopersmith, Chief of Staff, U.S. Small Bus. Admin., *Re: Application of DEI Executive Order to American Indians and Alaska Natives* (May 20, 2025).

[67] *E.g.*, Letter from Michael P. Duffey, Under Sec'y of Def. for Acquisition & Sustainment, U.S. Dep't of Defense, to Hon. Dan Sullivan, U.S. Senator (May 28, 2026) (recognizing the importance of the 8(a) Program to national security and that, "as the SBA has acknowledged, participation by federally recognized tribes and Alaska Native Corporations in federal programs is grounded in their political status as Native Americans, not DEI initiatives," and further recognizing "that the 8(a) Program includes a broad range of participants beyond Native-owned enterprises, including service-disabled veteran-owned small businesses").

[68] The United States has created a web of programs spread throughout its many federal agencies that delivers on its trust and treaty obligations—although never at adequate funding levels. In furtherance of its obligations, the federal government sometimes directly delivers Tribal programs and services to Tribal Nations and Native people, and sometimes it instead provides federal funding or program eligibility to Tribal Nations and Tribal organizations or other entities serving Tribal Nations and Native people. Some of these programs are made available only to Tribal entities and Native people, some enumerate Tribal entities and Native people as one type of eligible program recipient, and some are made available more generally but accessed by Tribal Nations and Native people. Indeed, the persistent underfunding of Tribal-specific programs means Indian Country must throw a wider net when accessing federal programs. The fact that Indian Country relies on a federal program that is also made available to non-Native entities or individuals does not detract in any way from the fact that the program is delivering on trust and treaty obligations owed to the recipient Tribal Nation or the Native people served.

SBA has several paths it could take to protect Native-owned businesses, each of which would facilitate delivery on trust and treaty obligations and none of which are prohibited by *Ultima*:

1. Recognize Native-owned businesses as statutorily exempt from the requirement to establish social disadvantage, in the same way that Tribal Nations and Tribally owned businesses are statutorily exempt;[69]
2. Create a new regulatory exemption, presumption, or lesser evidentiary burden for Native-owned businesses to establish social disadvantage that recognizes the unique political status of Native people;
3. Restore the pre-*Ultima* regulatory rebuttable presumption of social disadvantage as applied to Native-owned businesses; or
4. Maintain the post-*Ultima* status quo of individualized review for demonstrating social disadvantage as applied to Native-owned businesses and discussed further in the next section.

C. The NPRM's proposed test for establishing social disadvantage under the 8(a) Program is vulnerable to legal challenge, thereby threatening to stifle a federal program that is extremely important to Indian Country.

While SBA's stated goal for this rulemaking is "to align the [8(a)] program with constitutional and statutory requirements and goals" by removing the rebuttable presumption,[70] the NPRM goes further than *Ultima* requires by proposing an entirely new framework for determining social disadvantage under the 8(a) Program. No court has mandated, and the plaintiff in *Ultima* did not seek, a standard other than SBA's current non-presumptive social disadvantage determination process.[71] The new framework contradicts SBA's prior positions, risks undermining the statutory purposes of the 8(a) Program, and upsets reliance interests, all of which render the NPRM vulnerable to legal challenge and create uncertainty in this critical area of economic development for Indian Country. Moreover, the new standard threatens to further restrict access to the 8(a) Program for Native-owned businesses.

Removing the rebuttable presumption from the 8(a) Program regulations is, according to SBA's own prior positions, a sufficient remedy and all that *Ultima* requires.[72] But the NPRM proposes to go well beyond *Ultima*'s requirements by scrapping the current social disadvantage test entirely—a test that no one has

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[69] Throughout the 8(a) Program's governing statute, Native people are most often referenced in connection with "Indian tribes" and/or "economic disadvantage," while there is no clear requirement that they must independently establish social disadvantage. *See* 15 U.S.C. § 637(a)(4)(A)(i)(II), (A)(ii)(II), (B)(ii) (describing only "economically disadvantaged Indian tribe[s]" and "members of an economically disadvantaged Indian tribe," as opposed to "socially *and* economically disadvantaged" individuals or businesses); *see also* 13 C.F.R. § 124.109(b)(1) (recognizing "Indian tribe[s]" are "considered to be socially disadvantaged"). The statute does not clearly mandate that Native-owned businesses must demonstrate social disadvantage.

[70] 91 Fed. Reg. at 35434.

[71] SBA also references as part of its rationale a letter stating the Solicitor General's position that the 8(a) Program's rebuttable presumption is unconstitutionally race-based and informing Congress that the Department of Justice would "no longer defend the constitutionality of the regulations' race-based presumption." But the letter went no further than that, and in fact it confirmed that the Department of Justice "continues to defend other aspects of the 8(a) program that employ race-neutral criteria for determining social disadvantage." Letter from D. John Sauer, US. Solic. Gen., to Hon. Mike Johnson, Speaker, U.S. House of Representatives, *Race-Based Presumption in the Small Business Administration's 8(a) Program* (Nov. 25, 2025).

[72] *See* Defs.' Mem. Opp. Pl.'s Mot. for Additional Equitable Relief at 17, *Ultima*, No. 2:20-cv-41 (explaining "that 'the most obvious race-neutral alternative' would be 'eliminating any presumption,'" and that "the elimination of a *race-based* barrier is sufficient to afford Ultima relief"); *see also Ultima*, 683 F. Supp. 3d at 761 (acknowledging the playing field would be leveled if the rebuttable presumption were removed).

challenged and no court has ruled against—and replacing it with a very different one that seeks in part "to remedy the previous unconstitutional implementation of the program,"[73] including by allowing the mere ineligibility for the presumption in the past to qualify as new evidence of social disadvantage.[74] As SBA said in *Ultima*, backward-looking remedial action beyond discontinuing the use of the rebuttable presumption would "***disqualify only minority-owned businesses*** from receiving 8(a) awards, ***solely on the basis that they received the presumption through no fault of their own***."[75] Such a result would contradict the very purposes of the 8(a) Program, when SBA is statutorily charged with "ensuring that only eligible firms participate in SBA's various programs and that the programs' intended purposes are not subverted."[76]

Under the current post-*Ultima* test, individuals must establish they are socially disadvantaged by a preponderance of the evidence based on "chronic and substantial" treatment[77] "experienced in American society"[78] that is tied to "[a]t least one objective distinguishing feature"[79] and that "negatively impacted [their] entry into or advancement in the business world."[80] The current regulations also provide additional guidance regarding the types of evidence individuals must provide, including specific examples of evidence and scenarios that would be insufficient.[81]

Under SBA's new proposed test, an individual would instead "[s]elf-certify" as a member of a "clearly definable racial, ethnic, or cultural group" who "[s]uffered material harm" because of a "government's or private entity's action, policy, rule, regulation or other practice" employed "during the [individual's] lifetime" that "favored other groups" or "disadvantaged the [individual's] group."[82] Under this test, the simple fact of an individual's prior ineligibility for the rebuttable presumption would constitute evidence of "material harm."[83]

We note that, even under this rule, we believe the historical record is replete with evidence that Native people suffered and continue to suffer harms and disadvantages, including at the hands of the federal government, and thus Native people should meet this new test as well.

Yet, Native people should not have to meet this new test, and this new rule has important legal vulnerabilities. Unlike the current rule, the NPRM establishes no evidentiary standard of review, and there is no definition of "material harm" to guide that review. Applicants may self-certify their socially disadvantaged status, potentially rendering SBA no more than a rubber stamp in the process. There is no requirement that the cause or harm of the social disadvantage be tied to an individual's ability to enter into or advance in the business world, there is no requirement that the evidence be tied to an individual rather

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[73] 91 Fed. Reg. at 35434.
[74] *Id.* at 35437.
[75] Defs.' Mem. Opp. Pl.'s Mot. for Additional Equitable Relief at 14–15, *Ultima*, No. 2:20-cv-41 (emphasis added).
[76] 91 Fed. Reg. at 35434.
[77] 13 C.F.R. § 124.103(c)(2)(iii).
[78] 13 C.F.R. § 124.103(c)(2)(ii).
[79] This includes "race, ethnic origin, gender, identifiable disability, long-term residence in an environment isolated from the mainstream of American society, or other similar causes not common to individuals who are not socially disadvantaged." 13 C.F.R. § 124.103(c)(2)(i).
[80] *Id.* § 124.103(c)(2)(iv). For this factor, "SBA will consider any relevant evidence . . . , including experiences relating to education, employment and business history." *Id.*
[81] *Id.* § 124.103(c).
[82] 91 Fed. Reg. at 35436 (proposed § 124.103(b)(2)–(3)).
[83] *Id.* at 35437 (proposed § 124.103(b)(3)(ii)(A)).

than group experience,[84] and SBA does not explain how or why self-certification would lead to more objective outcomes.

Additionally, the fact that the NPRM identifies ineligibility for the pre-*Ultima* rebuttable presumption as a "specific" example of sufficient evidence for establishing social disadvantage[85] merely flips the prior rebuttable presumption on its head rather than eliminating it. And, it does so in a way that, according to SBA's interpretation of *Ultima* as expressed in the NPRM, could necessarily discriminate on the basis of race in an unconstitutional manner. After all, if the pre-*Ultima* rebuttable presumption were administered in a manner that was unconstitutionally race-based, then a converse presumption would do the same.[86]

Further, a de facto reversal of the presumption would undermine the statutory purpose of the 8(a) Program by heavily favoring majority groups over the disadvantaged interests it was designed to promote. Indeed, the only group the NPRM *affirmatively* suggests may have been harmed by the application of the rebuttable presumption is "white Americans."[87] Similarly, "white Americans" are the common denominator for many of the other examples that SBA identifies as potential evidence for demonstrating social disadvantage.[88]

Again, as SBA warned in *Ultima*, backward-looking remedial action beyond discontinuing the use of the rebuttable presumption would "***disqualify only minority-owned businesses*** from receiving 8(a) awards, ***solely on the basis that they received the presumption through no fault of their own***."[89]

SBA acknowledges in the NPRM that it is statutorily charged with "ensuring that only eligible firms participate in SBA's various programs and that the programs' intended purposes are not subverted."[90] The NPRM does not sufficiently justify or explain how its new social disadvantage test would satisfy these obligations when, facially, it would appear to do the opposite, opening the 8(a) Program up to legal attack. While a reduced evidentiary burden for Tribal Nations or Native people is not racial and thus is not implicated here, legal challenges to new regulations could slow the 8(a) Program in ways that directly harm Indian Country.

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[84] *See id.* at 35435 ("SBA believes that its limited resources are best served through its proposed social disadvantage test because it does not require an individualized narrative of personal disadvantage that opens the program to abuses and unconstitutional discrimination."). We note that SBA's limited resources, which to some extent have been self-inflicted via recent reductions in force (RIFs), are no excuse for failing to comply with its statutory obligations.
[85] *Id.* at 35437 (proposed § 124.103(b)(3)(ii)(A)). As other, more general examples, the NPRM cites other types of policies including those aimed at promoting diversity, equity, and inclusion (DEI) if "unlawful" or unlawfully applied—but the NPRM does not explain what "unlawful" means, nor does it identify any type of evidence that would demonstrate unlawfulness. *Id.* at 35436–37 (proposed § 124.103(b)(3)(ii), (ii)(B)). SBA is not empowered to make such determinations itself. Other examples are notably vague and ambiguous, with no clear necessary tie to the harm alleged. *See id.* at 35437 (proposed § 124.103(b)(4)) (suggesting a policy statement appearing on an entity's website may be sufficient evidence).
[86] *See Parents Involved in Comty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.").
[87] *Id.* at 35434.
[88] *See id.* (discussing forms of evidence, including DEI policies and other minority-serving initiatives).
[89] Defs.' Mem. Opp. Pl.'s Mot. for Additional Equitable Relief at 14–15, *Ultima*, No. 2:20-cv-41 (emphasis added).
[90] 91 Fed. Reg. at 35434.

D. The NPRM's "concerns" with the constitutionality of the 8(a) Program as a whole are unfounded.

SBA suggests that, in addition to removing the rebuttable presumption from its 8(a) Program regulations, the NPRM is intended "to address concerns about the constitutionality of the remaining program."[91] But SBA does not detail the nature of those concerns or provide a source of law or authority requiring SBA to take such action. Nor does SBA explain why it has changed its position since stating in *Ultima* that "a challenge to a presumption-free 8(a) program is not before the Court, and any such challenge would be subject to rational basis review, which it easily would survive."[92]

Instead, SBA simply asserts that "an increasing number of voices have begun to question whether the 8(a) BD program statute is itself a race-based classification for socially and economically disadvantaged individuals which should be subject to strict scrutiny."[93] Then, referring to non-binding case law that does more to contradict SBA's position than to support it, SBA claims that "[s]imilarly worded statutes have faced legal challenges that were only abandoned when the analogous language was removed."[94] Meanwhile, the NPRM fails to mention that the court in *Ultima* itself described the 8(a) Program's governing statute as "race-neutral"—a position that was not even contested by the plaintiff in that case.[95]

Finally, even if SBA's reasoning were persuasive, it does not apply to Indian Country for the same reasons explained above with respect to *Ultima* and the unique political status of Tribal Nations and Native people.

E. SBA must conduct Tribal consultation on the NPRM because it is a policy that has strong implications for Indian Country.

The 8(a) Program falls into the category of federal funding made directly available to Indian Country by Congress, and changes to the 8(a) Program require targeted input from Tribal Nations.

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[91] *Id.*

[92] Defs.' Mem. Opp. Pl.'s Mot. for Additional Equitable Relief at 17, *Ultima*, No. 2:20-cv-41 (citing *Rothe Dev. Corp. v. Dep't of Def.*, 836 F.3d 57, 72–73 (D.C. Cir. 2016)).

[93] 91 Fed. Reg. at 35434.

[94] *Id.* SBA cites without context two non-binding opinions in separate circuit-level cases: *Rothe* and *Holman*. *Id.* (first citing *Rothe Dev., Inc. v. Dep't of Def.*, 836 F.3d 57 (D.C. Cir. 2016) (Henderson, J., concurring in part and dissenting in part), then citing *Holman v. Vilsack*, 117 F.4th 906 (6th Cir. 2024), *cert. granted, judgment vacated*, 146 S. Ct. 985 (2025), *judgment aff'd on remand*, 2026 WL 384150 (Feb. 11, 2026)). Critically, no party in either case raised *Mancari* or otherwise addressed the unique political status of Tribal Nations or of Native people in receipt of trust and treaty obligations, so they should bear no relevance here. Even if they were relevant, however, a closer look at these outlier legal opinions reveals that they do not support SBA's claims. In *Rothe*, SBA points to a minority opinion where the majority ***upheld*** the 8(a) Program's governing statute as facially constitutional under mere rational basis review, finding it did *not* contain any racial classifications. 836 F.3d at 71–72. Judge Henderson's separate opinion differed only in that she would have found the statute *did* contain racial classifications and thus would have applied strict scrutiny. *Id.* at 78–79 (Henderson, J., concurring in part and dissenting in part). Judge Henderson expressly refrained from considering the outcome of that analysis, however, noting that "my dissent is limited to identifying the correct standard of review rather than its application." *Id.* at 75 n.6 (Henderson, J., concurring in part and dissenting in part). Notably, the district court in *Rothe had* applied strict scrutiny and still found the statute passed constitutional muster. *See id.* at 72. Meanwhile, the *Holman* opinion cited by SBA dealt only with a plaintiff's claim for litigation-related fees and has no relevance to the NPRM or the 8(a) Program. 117 F.4th at 910. The underlying dispute involved a challenge to a pandemic-related debt-relief program for "socially disadvantaged" farmers and ranchers created by the American Rescue Plan, but the case was never determined on the merits because the Inflation Reduction Act repealed the program and mooted the case. *Id.* To the extent that the court addressed the parties' merits arguments in the litigation-fee dispute, it found for purposes of that analysis that the government's position in defending the constitutionality of the program was "substantially justified." *Id.* at 916–17.

[95] *Ultima*, 683 F. Supp. 3d at 762–63.

USET SPF is not opposed to common-sense reforms to the 8(a) Program, and we are sensitive to SBA's need to comply with the ruling in *Ultima*. However, the NPRM inappropriately sweeps in Native-owned businesses, impacting broader Tribal interests in Indian Country and beyond.[96] SBA is obligated to conduct Tribal consultation on the NPRM throughout the rulemaking process, as well as on any potential additional proposed changes to the 8(a) Program.

Tribal consultation requirements flow from the United States' trust and treaty obligations, and they have been codified in statutes and recognized in other legal mandates. Executive Order (EO) 13175, *Consultation and Coordination with Indian Tribal Governments*, has for more than 25 years required federal agencies to "ensure meaningful and timely input by tribal officials in the development of ***regulatory policies that have tribal implications***."[97] This includes "regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes."[98] Given the stakes involved for Tribal Nations, Tribal communities, and Native people participating or seeking to participate in the 8(a) Program, any 8(a) Program policy revisions clearly meet this standard and therefore require Tribal consultation.[99]

Yet, where other agencies have wrongly concluded that policy changes to implementing regulations do not require Tribal consultation,[100] SBA does not even bother to address EO 13175 in the NPRM, let alone attempt to justify its lack of compliance.[101] This omission runs contrary to SBA's prior statements and its own Tribal consultation policy. Just last year, SBA committed to Congress that it would "work to ensure all input is heard before any potential administrative modifications are made" to the 8(a) Program with respect to Tribal interests.[102] Meanwhile SBA has committed in its Tribal consultation policy that it "will assess the impact of its proposed policies on Native American Tribes and ANCs and engage in consultation and collaboration with Tribes and ANCs early in the decision-making process to ensure that Tribal government and ANC rights and concerns are considered."[103]

As such a successful driver of economic development for Indian Country, any proposed revisions to the 8(a) Program will inevitably impact Tribal Nations. This is true even if revisions do not apply to entity-owned firms, because Native-owned businesses are a critical aspect of economic development for local, regional,

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[96] We note that, even if there were protections in the NPRM for Native-owned businesses, Tribal consultation would still be required.
[97] 65 Fed. Reg. 67249, 67250 (§ 5(a)) (Nov. 6, 2000) (emphasis added); *see also* SBA Tribal Consultation Policy 3–4 (2022) (incorporating same definition of Tribal implications).
[98] 65 Fed. Reg. at 67249 (§ 1(a)).
[99] While EO 13175 has specific procedural requirements for policies that have Tribal implications and *also* impose direct compliance costs on Tribal governments or preempt Tribal law, the presence of Tribal implications in and of itself triggers a duty to engage in Tribal consultation. *See id.* at 67250–51 (§ 5).
[100] *E.g.*, *Removal of National Environmental Policy Act Implementing Regulations*, 90 Fed. Reg. 10616 (Council on Environmental Quality, Feb. 25, 2025).
[101] *See* 91 Fed. Reg. at 35435–36 (addressing five EOs, including EO 13132 that sets out consultation standards with states for policies implicating federalism concerns, but not addressing EO 13175).
[102] Letter from Kelly Loeffler, Admin'r, U.S. Small Bus. Admin., to Hon. Dan Sullivan, Hon. Lisa Murkowski, & Hon. Deb Fischer, U.S. Senators (May 20, 2025).
[103] SBA Tribal Consultation Policy at 4.

and Tribal communities.[104] Further, as described above, support for Native-owned businesses is not race-based. It is provided in furtherance of the United States' trust and treaty obligations and in recognition of the unique political relationships the United States shares with Tribal Nations and Native people. It is critical that SBA provide both Tribal Nations and Native-owned businesses with the utmost flexibility to participate in the 8(a) Program.

USET SPF urges SBA to conduct Tribal consultation on the NPRM and any subsequent rulemaking before issuing a final rule. Tribal consultation respects the government-to-government relationship between Tribal Nations and the United States and is a best practice that fosters collaboration that leads to better outcomes for all. It also reduces the chance that a final rule will trigger uncertainty or costly litigation. Tribal Nations can provide valuable input and work with SBA to reform the 8(a) Program in ways that will improve access and reduce unnecessary and burdensome reporting requirements, while ensuring Tribal Nations, Tribal enterprises, and Native-owned businesses are able to leverage this important program to support Tribal economies. Building strong, vibrant, and mature economies is more than just business development. It requires comprehensive planning to ensure that our economies have the necessary infrastructure, services, and opportunities for our citizens to thrive. The 8(a) Program is an important economic component and has been proven to support these efforts.

We look forward to future dialogue and coordination on these issues, especially through consultation, to support and advance Tribal Nation building and rebuilding through sensible and pragmatic reforms to the 8(a) Program.

IV. Conclusion

USET SPF recognizes SBA's need to revise its 8(a) Program regulations to comply with the July 2023 ruling in *Ultima*, and we commend the NPRM's protection of Tribally owned businesses' access to the 8(a) Program.

However, the NRPM goes far beyond what *Ultima* requires and, in the process, threatens to limit access to the 8(a) Program for Native-owned businesses and to open the 8(a) Program up to new litigation. The NPRM would contravene the federal government's trust and treaty obligations and has the potential to undermine the very purposes of the 8(a) Program. We fear that this NPRM, if finalized in its current form, will do more harm than good, and that Indian Country will bear an outsized portion of that burden.

We call on SBA to continue to maintain the 8(a) Program eligibility status of Tribally owned businesses and to reconsider the implications of the NPRM on the eligibility of Native-owned businesses in accordance with the federal government's trust and treaty obligations and the 8(a) Program's governing statute. The 8(a) Program's application to Native-owned businesses is a political classification, not a racial one, and their ability to participate must be maintained.

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[104] *See, e.g.*, Letter from Native Am. Contractors Ass'n to Kelly Loeffler, Admin'r, U.S. Small Bus. Admin. (May 4, 2026) (expressing concern about how delays in processing 8(a) Program applications "may be creating challenges for prospective participants, particularly for Native-owned firms, which serve broader Tribal and Native communities and carry significant social and economic responsibilities," and explaining that, "[f]or many Native communities, federal contracting represents a significant source of economic activity, with resulting revenues supporting essential services such as healthcare, education, infrastructure, and public safety"); Quinton Carroll, *Letter to the Editor: Don't Kill a Program that Strengthens America's Defense*, Wash. Times (June 3, 2026) (explaining "Native-owned 8(a) firms reinvested nearly $1.5 billion directly into their communities, funding housing, infrastructure, healthcare and public safety").

The 8(a) Program remains a significant economic component in Indian Country, and any revisions to the overall 8(a) Program should be focused on advancing the financial stability and economic advancement of Tribal enterprises *and* Native-owned businesses. These enterprises are proven economic assets and fulfill critical community service functions. USET SPF strongly recommends that SBA promptly resume processing 8(a) Program applications for Tribally owned firms and conduct meaningful Tribal consultations before finalizing this rule so that we may work together to improve the 8(a) Program for Tribal Nations, Tribal entities, and Native-owned businesses.

Should you have any questions or require further information, please contact Ms. Liz Malerba, USET SPF Director of Policy and Legislative Affairs, at LMalerba@usetinc.org or 615-838-5906, or Ms. Katie Klass, USET SPF General Counsel, at KKlass@usetinc.org or 615-838-5906.

Sincerely,

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Kitcki A. Carroll
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