

United States Senate

COMMITTEE ON COMMERCE, SCIENCE,
AND TRANSPORTATION

WASHINGTON, DC 20510-6125

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November 21, 2024

The Honorable Alan Davidson
Assistant Secretary of Commerce for Communications and Information
National Telecommunications and Information Administration
U.S. Department of Commerce
1401 Constitution Ave. NW
Washington, D.C. 20230

Dear Mr. Davidson:

The National Telecommunications and Information Administration (NTIA) is expected to soon begin distributing \$1.25 billion in grants to nonprofits under the “Digital Equity Competitive Grant Program” (Program) “to support efforts to achieve digital equity, promote digital inclusion activities, and spur greater adoption of broadband among Covered Populations.”¹ The Program’s Notice of Funding Opportunity (NOFO) establishes that applicants must use the funding to serve members of “Covered Populations,” defined to include “individuals who are members of a racial or ethnic minority group.”² This instruction makes clear that NTIA will consider the race of the Program’s beneficiaries when issuing grant awards, in violation of the Fifth Amendment to the Constitution. As the Ranking Member of the United States Senate Committee on Commerce, Science, and Transportation, which oversees NTIA, I urge you to withdraw the unlawful NOFO and halt issuing Program grants before you cause real harm.

The NOFO makes clear NTIA will consider race in awarding grants under the Program. It explains the Program’s goal is to “spur greater adoption and meaningful use of broadband among the Covered Populations.”³ Therefore, entities that receive grants must establish they will use those funds for activities benefitting “Covered Populations,”⁴ including “to develop and implement digital inclusion activities that benefit one or more of the Covered Populations,” “to implement training programs for Covered Populations,” and “to construct, upgrade, expand or operate new or existing public access computing centers for Covered Populations.”⁵ The NOFO

¹ 47 U.S.C. § 1724(a)(1); *Digital Equity Competitive Grant*, BROADBANDUSA, https://broadbandusa.ntia.gov/funding-programs/Digital_Equity_Competitive_Grant_Program.

² Notice of Funding Opportunity, *Digital Equity Competitive Grant Program*, 16, 26, 27, NTIA (July 24, 2024) [hereinafter, “NOFO”], <https://www.ntia.gov/sites/default/files/2024-07/de-competitive-nofo-fy24.pdf>.

³ *Id.* at 5.

⁴ *Id.* at 31.

⁵ *Id.* at 14, 31.

requires applicants to identify “the Covered Populations to be served including the expected number of individuals to be served within each Covered Population” and “the amount of funding to be devoted proportionally to each Covered Population.”⁶ And so the NTIA can measure their performance, recipients must collect information regarding “the Covered Populations being served,” “the total number of individuals being served,” and “the number of individuals that belong to each Covered Population.”⁷ The NOFO further states that “in assessing applications, the Assistant Secretary will consider, to the extent practicable, whether the proposed program will increase Internet access and the adoption of broadband among Covered Populations.”⁸ Moreover, when evaluating applications, NTIA will seek to “ensure that all Covered Populations are being served” and can aim “to balance the Covered Populations being served.”⁹ The problem is that the term “Covered Populations” is defined to include “individuals who are members of a racial or ethnic minority group.”¹⁰ Therefore, in issuing grants pursuant to the NOFO, NTIA will consider whether the award will benefit members of a certain race, in violation of the Fifth Amendment.

The federal government is forbidden from engaging in impermissible race-based discrimination under the equal protection component of the Fifth Amendment’s Due Process Clause.¹¹ “When the government distributes burdens or benefits on the basis of racial classifications, that action is reviewed under strict scrutiny,” meaning that to pass muster, the program be “‘narrowly tailored’ to achieve a ‘compelling’ government interest.”¹²

NTIA’s use of racial classifications, as set forth in the NOFO, does not serve a compelling governmental interest. The Supreme Court has “identified only two compelling interests that permit resort to race-based government action. One is remediating *specific, identified instances of past discrimination that violated the Constitution or a statute*. . . . The second is avoiding imminent and serious risks to human safety in prisons.”¹³ “A generalized assertion of past discrimination in a particular industry or region is not adequate” for the government to make this showing.¹⁴

The NOFO provides no evidence racial minorities face discrimination in accessing the internet, let alone specific instances of discrimination that NTIA is seeking to address. And it does not attempt to make any claim that this discrimination is necessary to avoid a prison race riot. The

⁶ *Id.* at 26.

⁷ *Id.* at 20.

⁸ *Id.* at 14.

⁹ *Id.* at 39.

¹⁰ 47 U.S.C. 1721(8); NOFO at 2,13,16.

¹¹ *See Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 204 (1995).

¹² *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 720 (2007).

¹³ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 207 (2023) (emphasis added).

¹⁴ *Shaw v. Hunt*, 517 U.S. 899, 909 (1996).

NOFO instead makes vague appeals for “digital equity and digital inclusion.”¹⁵ As the Supreme Court explained decades ago in *City of Richmond v. J.A. Croson Co.*—holding unconstitutional a city ordinance that required government contractors to subcontract with minority-owned businesses—“the mere recitation of a benign or compensatory purpose for the use of a racial classification” is not a sufficient defense of a race-based measure as this “would essentially . . . insulate any racial classification from judicial scrutiny.”¹⁶ At bottom, however, a “mere recitation of a benign or compensatory purpose” is all the NOFO offers.

Nor is the NOFO’s use of racial classifications narrowly tailored. In determining whether the government’s reliance on race is narrowly tailored, courts consider factors including (1) the duration of the discriminatory program, (2) whether the discriminatory program is over or underinclusive, and (3) whether the discriminatory program has a measurable, coherent goal.¹⁷ The NOFO comes up short on all fronts: First, there is no end date to the discrimination—it will continue so long as the Program has funding.¹⁸ Second, the NOFO does not define “minority,” making it impossible to determine whether it is underinclusive, but in any event it is overinclusive because it includes anyone who falls into some racial group, without any determination that that specific group has faced discrimination in access to broadband.¹⁹ Third, the Guidance offers no way to measure when NTIA will have achieved its vague, stated goal to “achieve digital equity, promote digital inclusion activities, and spur greater adoption and meaningful use of broadband among the Covered Populations.”²⁰

This is not a close call. In the past several years, federal courts have repeatedly held that similar programs were unconstitutional. Most notably, in *Ultima Servs. Corp. v. U.S. Department of Agriculture*, a small business owned by a white woman sued the Department of Agriculture (USDA) and the Small Business Administration (SBA), claiming that agencies’ reliance on race to determine which businesses qualified for the SBA’s 8(a) Business Development Program violated the Fifth Amendment’s Due Process Clause.²¹ The court agreed that the 8(a) Program could not survive strict scrutiny. In reaching this conclusion, the court rejected the government’s evidence regarding disparities minority businesses face nationally as insufficiently specific and concluded that the 8(a) Program’s permanence, over- and under-inclusiveness, and lack of

¹⁵ NOFO at 14.

¹⁶ *City of Richmond*, 488 U.S. at 490.

¹⁷ *Students for Fair Admissions, Inc.*, 600 U.S. at 214–17; *United States v. Paradise*, 480 U.S. 149, 171 (1987).

¹⁸ *See generally* NOFO; 47 U.S.C. 1724 (not identifying an end date for the Program).

¹⁹ As an example of how the NOFO’s failure to define “minority” heightens uncertainty regarding who is included in the program, consider that several states, including Texas, are majority-minority states. *See* Richard Z. Santos, *Texas is Now a Majority-Minority State. Why Haven’t Our Politics Changed?*, TEXAS MONTHLY (Aug. 2023). Applicants from Texas could therefore claim that they are complying with the NOFO’s plain language by improving broadband access for members of any race, including Caucasians.

²⁰ NOFO at 5.

²¹ 683 F. Supp. 3d 745, 753 (E.D. Tenn. 2023).

specific objectives demonstrated that it was not narrowly tailored.²² As a result, the SBA had to revamp the 8(a) program.²³

Courts also struck down race-based programs, which, like the Digital Equity Competitive Grant Program, were initiated during the Biden-Harris administration's woke spending spree. In *Vitolo v. Guzman*, the Sixth Circuit concluded that it was unconstitutional for the Small Business Administration to prioritize COVID relief funding applications that were submitted by minority-owned businesses pursuant to the American Rescue Plan Act of 2021.²⁴ Similarly, in *Strickland v. U.S. Department of Agriculture*, the court concluded that a Farm Service Agency program, which allocated more COVID relief funds to members of certain races, likely violated the Fifth Amendment.²⁵ This Program's NOFO—which was designed to administer government benefits based on race—is just another unconstitutional remnant of the Biden-Harris administration. If NTIA proceeds, it will only invite another successful lawsuit.

NTIA has not yet finalized a grant for any Digital Equity Competitive Grant Program funding to any applicants. Therefore, NTIA still has time to reverse course before it breaks the law. As the Ranking Member of the U.S. Senate Committee on Commerce, Science, and Transportation, we urge you to strike this unlawful Guidance now. No later than December 12, 2024, please provide a response to this letter, confirming that the NOFO is no longer in place and NTIA has halted the process of issuing grants under it, or otherwise setting forth, in detail, the reasons you believe the NOFO does not violate the United States Constitution.

Thank you for your attention to this matter.

Sincerely,



Ted Cruz
Ranking Member

²² *Id.* at 769–74.

²³ Updates on the 8(a) Business Development Program, SBA (Apr. 5, 2024), <https://www.sba.gov/federal-contracting/contracting-assistance-programs/8a-business-development-program/updates-8a-business-development-program>.

²⁴ *Vitolo v. Guzman*, 999 F.3d 353 (6th Cir. 2021).

²⁵ *Strickland v. United States Dep't of Agric.*, 2024 WL 2886574 (N.D. Tex. June 7, 2024).