United States Senate
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION
WASHINGTON, DC 20510–6125
WEBSITE: https://commerce.senate.gov

February 15, 2024

The Honorable Gina Raimondo
Secretary of Commerce
1401 Constitution Avenue NW
Washington, D.C. 20230

Dear Madam Secretary:

Congress charged the Department of Commerce with implementing the CHIPS and Science Act of 2022 (CHIPS Act)—a massive piece of legislation which appropriates $39 billion in funding for commercial semiconductor fabrication facilities. We are concerned that certain aspects of the Department's implementation have been marred by irrelevant or illegal policy objectives.

Republican senators previously questioned environmental, social justice, and governance (ESG) requirements in the Department's Notice of Funding Opportunity (NOFO), including liberal wish-list items that Congress had rejected and which were unrelated to the funding's commercial and national security purposes.[1] The Department's recently released "Creating Inclusive Opportunities for Businesses Guide" (Guidance) to the NOFO is even more egregious. The Guidance establishes that the Department will consider the race of an applicant's suppliers when awarding CHIPS funding, in violation of the Fifth Amendment to the Constitution, Title VI of the Civil Rights Act of 1964 (Title VI), and Section 1 of the Civil Rights Act of 1866 (Section 1981). As the Ranking Member of the United States Senate Committee on Commerce, Science, and Transportation, which oversees the CHIPS program, I write to make you aware that the Guidance is illegal and to urge you to withdraw it before it causes real harm.

On August 21, 2023, the CHIPS Program Office released the Guidance as a resource for applicants responding to the amended NOFO.[2] The Guidance explains that "[u]nder the CHIPS Act, and as stated in the NOFO, applicants for CHIPS funding must document . . . how the applicant intends to address the inclusion of . . . minority owned business[es] . . . through a supplier diversity plan."[3] To that end, the Guidance declares that "[t]he CHIPS Program Office is looking for applications with a supplier diversity plan that features a plan to track supplier

[1] Letter from Republican Members of the S. Comm. on Commerce, Science, & Transp. to the Hon. Gina Raimondo, Sec'y, Department of Commerce (Mar. 22, 2023).
[2] CHIPS Program Office, *Creating Inclusive Opportunities for Business Guide*, Department of Commerce (Aug. 21, 2023) ("Guidance"), https://www.nist.gov/system/files/documents/2023/08/21/Creating%20Inclusive%20Opps%20Guide-20230821.pdf.
[3] *Id.* at 1–2.

diversity [and] sets targets."[4] It "encourages companies to fully expand their supplier base" with "minority-owned" businesses—defined as "business[es] where not less than 51 percent of the ownership or control of which is held . . . by one or more *minority individuals*"—a term it does not define.[5] It explains that an applicant's diversity plan should include "measurable targets" for diversity, including how much money it plans to spend on "minority-owned" suppliers by 2030.[6] The Guidance also explains the Department will consider an applicant's diversity plan as part of the merit review process, and assess the plan based on the applicant's strategy for engaging with minority-owned businesses and "commitment to tracking and disclosing disaggregated data on supplier diversity and contractor/subcontractor diversity."[7] By instructing applicants to contract with minority-owned suppliers through this Guidance, the CHIPS Program Office makes clear that it will consider the race of an applicant's suppliers when determining CHIPS funding awards.

Reliance on the Guidance Violates the Fifth Amendment.

The CHIPS Program Office's reliance on the Guidance violates the Fifth Amendment because it encourages applicants to the NOFO to discriminate based on race. 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.[8] And as the Supreme Court has explained, it is "axiomatic that a [government] may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish."[9] When reviewing federal programs that incentivize contractors to hire subcontractors on the basis of race, courts apply strict scrutiny, meaning that to pass muster, the program "must serve a compelling governmental interest, and must be narrowly tailored to further that interest."[10]

The CHIPS Program Office's use of racial classifications, as set forth in the Guidance, 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."[11] "A

[4] *Id.* at 2.
[5] *Id.* at 5 (emphasis added).
[6] *Id.* at 10.
[7] *Id.* at 17.
[8] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224 (1995).
[9] Norwood v. Harrison, 413 U.S. 455, 465 (1973) (internal quotation marks omitted).
[10] *Adarand Constructors, Inc.*, 515 U.S. at 235. The Supreme Court has recognized that the Fifth Amendment's Due Process Clause includes rights to equal protection and therefore the "[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." Buckley v. Valeo, 424 U.S. 1, 93 (1976); *see also Adarand Constructors, Inc.*, 515 U.S. at 227.
[11] Students for Fair Admissions, Inc. v President & Fellows of Harvard Coll., 600 U.S. 181, 207 (2023).

generalized assertion of past discrimination in a particular industry or region is not adequate" for the government to make this showing.[12]

The Department of Commerce's Guidance provides no evidence of disparities minority-owned suppliers face generally, let alone specific instances of discrimination that the Department 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 Guidance instead makes vague appeals to the economic benefits of diversity in the semiconductor industry.[13] 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."[14] At bottom, however, a "mere recitation of a benign or compensatory purpose" is all the Guidance offers.

Nor is the Guidance'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.[15] The Guidance comes up short on all fronts: First, there is no end date to the discrimination—it will continue so long as the CHIPS program has funding.[16] Second, the Guidance 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 the CHIPS industry.[17] Third, the Guidance offers no way to measure when the CHIPS Program Office will have achieved its vague, stated goal of "creat[ing] a robust, vibrant, and diverse semiconductor ecosystem in America."[18]

This is not a close call. Indeed, a federal court recently held that a similar federal program was unconstitutional. 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

---

[12] Shaw v. Hunt, 517 U.S. 899, 909 (1996).
[13] Guidance, *supra* note 2, at 4.
[14] *City of Richmond*, 488 U.S. at 490.
[15] *Students for Fair Admissions, Inc.*, 600 U.S. at 214–17; United States v. Paradise, 480 U.S. 149, 171 (1987).
[16] Notice of Funding Opportunity (NOFO), Chips Incentives Programs—Facilities for Semiconductor Materials and Manufacturing Equipment, Department of Commerce (Sept. 23, 2023), at 21 (providing no end date for applications or awards).
[17] As an example of how the Guidance'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 Guidance's plain language by hiring suppliers owned by a member of any race, including white-owned businesses.
[18] Guidance, *supra* note 2, at 3.

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.[19] 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 specific objectives demonstrated that it was not narrowly tailored.[20] As a result, the SBA had to revamp the 8(a) program.[21] It does not take psychic abilities to predict that the Department will find itself in a very similar situation as the USDA and SBA if it continues down this path.

Reliance on the Guidance Violates Title VI.

The Constitution is not the only federal law that the Guidance violates because it subjects people to racial discrimination under a federal program. The Guidance also violates Title VI for the same reason. Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[22] As Supreme Court Justice Neil Gorsuch emphasized in his concurring opinion in *Students for Fair Admission v. Harvard*, "Title VI forbids a recipient of federal funds from intentionally treating one person worse than another similarly situated person on the ground of race, color, or national origin."[23] The Department's Guidance intentionally treats certain applicants worse than others on the ground of the race of their suppliers. Title VI forbids such discrimination.

Reliance on the Guidance Violates Section 1981.

In addition to instructing the federal government to violate the law, the Guidance also encourages private businesses to discriminate on the basis of race in violation of federal law, specifically Section 1981. Section 1981 makes it illegal for private companies to discriminate on the basis of race when making and enforcing contracts.[24] "By its broad terms," Section 1981 "proscribe[s] discrimination in the making or enforcement of contracts against, or in favor of, any race."[25] Because the Guidance warns applicants that the Department will consider the race of its suppliers when making awards, it will likely lead to applicants declining to contract with white-owned suppliers, subjecting them to potential liability under Section 1981.

---

[19] 2023 WL 4633481, at *1 (E.D. Tenn. July 19, 2023).
[20] *Id.* at *12.
[21] Updates on the 8(a) Business Development Program, SBA (Nov. 22, 2023), https://www.sba.gov/federal-contracting/contracting-assistance-programs/8a-business-development-program/updates-8a-business-development-program.
[22] 42 U.S.C. § 2000d.
[23] *Students for Fair Admissions, Inc*, 600 U.S. at 288 (J. Gorsuch, concurring).
[24] 42 U.S.C. § 1981.
[25] McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 295 (1976).

The Department has not yet finalized a grant for any CHIPS funding to any applicants. Therefore, the Department still has time to reverse course before it breaks the law. As members of the U.S. Senate Committee on Commerce, Science, and Transportation, we urge you to strike this unlawful Guidance now. No later than February 29, 2024, please provide a response to this letter, confirming that the Guidance is no longer in place, or otherwise setting forth, in detail, the reasons you believe the Guidance does not violate the United States Constitution or Title VI, or induce private parties to violate Section 1981.

Thank you for your attention to this matter.

Sincerely,

Ted Cruz
United States Senator

JD Vance
United States Senator

Cynthia Lummis
United States Senator