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INTRODUCTION

The federal government admittedly seeks to treat American citizens differently on the basis of race when competing for valuable government contracts.¹ It does so explicitly by conferring upon virtually all racial and ethnic minorities a presumption of "disadvantage" and insulating those classified as "disadvantaged" from full, open and fair competition for many contracts. These include lucrative opportunities in the simulation and training industry – the industry in which Plaintiff DynaLantic Corp. competes, and in which Defendants' use of set-asides precludes Plaintiff from competing for such valuable contracting opportunities.

The use of race, including racial and ethnic presumptions, is inherently suspect and presumptively unconstitutional. The government only can use race if it demonstrates a compelling governmental interest and programs which are narrowly tailored to meet that interest. Here, the federal government must show that it is remedying the effects of its own identified prior discrimination and that its programs are the least restrictive means to that end.

Yet, Defendants cannot offer any evidence of discrimination – anecdotal, statistical, or otherwise – in the simulation and training industry. That is dispositive. Outside that industry, their "evidence" is non-existent, flawed or inadequate, and out-dated. Non-racial alternatives were not considered. Defendants' proof constitutes neither a strong basis in evidence nor a compelling interest, and fails to establish narrow tailoring. Accordingly, there is no genuine issue of material fact and Plaintiff is entitled to summary judgment.

¹ The term "race" herein refers to both "race" and "ethnicity." See Johnson v. Bd. of Regents of the Univ. of Georgia, 263 F.3d 1234, 1241 n.6 (11th Cir. 2001).

BACKGROUND

Pursuant to Local Rule 7.1(h), Plaintiff DynaLantic Corp. (“DynaLantic”) has filed an accompanying Statement of Undisputed Material Facts As to Which There is No Genuine Issue (“Plaintiff’s Undisputed Facts”).² However, for the convenience of the Court, DynaLantic has summarized certain of those facts below:

A. The Parties.

DynaLantic is a New York corporation that is a "small business" as that term is defined by the rules and regulations of the U.S. Small Business Administration (“SBA”). DynaLantic designs and manufactures aircraft, submarine, ship and other simulators and training devices, and is a small but established manufacturer of military equipment simulators experienced in supplying the U.S. Department of Defense (“DoD”). (Plaintiff’s Undisputed Facts, No. 1).

Since DynaLantic’s inception in 1984, most of its revenues have been generated from prime contracts with the U.S. Department of the Army (“Army”) and the U.S. Department of the Navy (“Navy”) and specifically from NAVAIR Orlando (formerly, the Naval Air Warfare Center, Training Systems Division, Orlando, Florida (“NAWCTSD”)) of the Navy, and from the Simulation, Training and Instrumentation Command (“STRICOM”) of the Army. These agencies, and their predecessors, traditionally buy most of the training equipment and services for the Navy and Army, respectively. (Plaintiff’s Undisputed Facts, Nos. 2-3).

DoD, Navy and SBA (“Defendants”) are three agencies of the United States government

² Unless otherwise noted, all cites herein are to Plaintiff’s Undisputed Facts or to the exhibits in support of Plaintiff’s motion.

that procure, among other things, equipment which simulates the operations of aircraft, submarine, ship and other military equipment. The Navy and Army are part of DoD. (Plaintiff's Undisputed Facts, No. 4).

B. The APT Procurement

On April 13, 1995, the Commerce Business Daily ("CBD") published the first synopsis of a new procurement known as the Aircrew Procedures Trainer Program for the Navy's UH-1N Helicopters (the "APT Procurement"). The CBD synopsis described the APT Procurement and announced, in part, that "[c]ompetition will be restricted to Small Disadvantaged Minority-owned, 8(a) contractors [i.e., Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a).]"³ (Plaintiff's Undisputed Facts, No. 6).

DynaLantic was and is qualified, ready, willing and able to compete for the APT procurement. The previous designation of the APT procurement as a set-aside "restricted to Small Disadvantaged Minority-owned, 8(a) contractors" was a full and complete bar to DynaLantic's ability to compete. DynaLantic is qualified, ready, willing and able to bid on and compete for procurement contracts and subcontracts similar to the APT Procurement. (Plaintiff's Undisputed Facts, No. 7).

In its First Amended Complaint, DynaLantic challenged the constitutionality of the Navy's decision to set aside the APT Procurement. After this Court ruled against DynaLantic,

³ 15 U.S.C. § 637(a) and its implementing regulations hereinafter are referred to as the "Section 8(a) Program." 10 U.S.C. § 2323 and its implementing regulations hereinafter are referred to as the "DoD Program."

and while this action was pending on appeal, the Navy cancelled the APT Procurement.⁴

C. There Is A Recognized Simulation And Training Industry and DynaLantic Operates In That Industry.

There is a “simulation and training industry” in the United States and the international economy. The manufacture of military simulation equipment is part of the broader “simulation and training industry.” The simulation and training industry is composed of those organizations that develop, manufacture, and acquire equipment that is used to train personnel in any activity where there is a man/machine interface. (A device to train a person, which does not actually perform the task of the real device, but that replicates the interface between the human being and the device is a simulator.) Firms that manufacture simulation and training equipment, and that operate in the simulation and training industry, must possess specialized skills, qualifications and knowledge which are not found in the general population. Defendants do not maintain separate statistics for the simulation and training industry. (Plaintiff's Undisputed Facts, Nos. 8-12).

DynaLantic bids on, competes for, operates in, and performs contracts and subcontracts in the simulation and training industry. DynaLantic typically bids on, or competes for, contracts and subcontracts up to \$15,000,000 with most of the contracts and subcontracts being under \$5,000,000 in value. Generally speaking, within this dollar range, DynaLantic's main competitors are not large businesses but rather other small businesses, including small disadvantaged businesses (“SDBs”) such as Section 8(a) firms.⁵ DynaLantic is not, and has never been, a

⁴ The earlier procedural history of this action is set forth in DynaLantic Corp. v. Department of Defense, 937 F. Supp. 1 (D.D.C. 1996), and DynaLantic Corp. v. Department of Defense, 115 F.3d 1012 (D.C. Cir. 1997).

⁵ Firms participating in the Section 8(a) Program hereinafter are sometimes referred to as

participant in the Section 8(a) Program; DynaLantic is not, and never has been, self-certified or certified as an SDB. (Plaintiff's Undisputed Facts, Nos. 13, 84).

D. DynaLantic's Claims in this Motion.

DynaLantic seeks an award of summary judgment that the following violate DynaLantic's civil rights and right to equal protection, and are unconstitutional facially and as administered and applied by Defendants, including in the simulation and training industry:

- (i) the Section 8(a) Program;
- (ii) the provisions of the DoD Program that use or incorporate the Section 8(a) Program;
- (iii) the provisions of 10 U.S.C. § 2323(e)(4) which state that "[t]o the extent practicable, the head of an agency shall maximize the number of minority small business concerns . . . participating" in the DoD Program; and
- (iv) DoD's prime contract goals for awarding contracts (1) to Section 8(a) firms and (2) to small business concerns owned and controlled by "socially and economically disadvantaged individuals" (as the term is used in 15 U.S.C. § 637(d) and its implementing regulations).

DynaLantic requests the Court to enter (1) a declaratory judgment that (i)-(iv) are unconstitutional and violate DynaLantic's rights to equal protection under the U.S. Constitution and DynaLantic's rights under 42 U.S.C. §§ 1981 and 2000d, as amended; (2) a permanent injunction preventing Defendants from using (i)-(iv) to award any contracts, including in the simulation and training industry; (3) an award to DynaLantic of reasonable attorneys' fees and

(..continued)

“Section 8(a) firms.” All Section 8(a) firms are, by definition, also SDBs (*i.e.*, small businesses owned and controlled by one or more individuals who are required to be socially and economically disadvantaged, but who can have a higher net worth than 8(a) participants). See 13 C.F.R. § 124.1002 (using 8(a) social disadvantage test with higher net worth figure).

costs in this action (pursuant to any applicable authority); and (4) any other relief that the Court deems just.⁶

E. Section 8(a) Program Background.

The SBA administratively implemented the Section 8(a) Program in 1969 to provide federal contracts to minority-owned firms. Eligibility initially was based on social or economic disadvantage. Race was a major consideration in determining disadvantaged status. Congress codified the Section 8(a) Program in 1978 with passage of Public Law No. 95-507 which established the program to assist small companies owned by socially and economically disadvantaged persons. The law designated certain minority groups as socially disadvantaged. (Exhibit B49 (U.S. Small Business Administration Management of the 8(a) Program Narrow Tailoring ("8(a) Document")), pp. 12-13, No. 1; Plaintiff's Undisputed Facts, No. 14).

As enacted, Sections 8(a) and 7(j) of the Small Business Act (15 U.S.C. §§ 637(a) and 636(j)) authorize a "Minority Small Business and Capital Ownership Development Program" which the SBA in its regulations refers to as the "8(a) Business Development" or "8(a) BD" program. This Minority Small Business Program is the Section 8(a) Program. See 13 C.F.R. § 124.1.

Section 8(a) of the Small Business Act itself authorizes SBA to enter into "tripartite agreements" for goods and services with other government departments and agencies (such as

⁶ So as to expedite this action and to prevent confusion, DynaLantic and Defendants are attempting to negotiate a stipulation concerning the claims and requested relief in the Second Amended Complaint. DynaLantic reserves all rights and remedies against Defendants (including, without limitation, the right to seek additional judicial relief and/or to assert additional claims and grounds for relief) should, inter alia, the parties be unable to agree on such a stipulation.

DoD, which sets aside certain contracts for award under the Section 8(a) Program), and to subcontract the performance of those agreements to small business concerns owned and controlled by socially and economically disadvantaged individuals. 15 U.S.C. § 637(a). Hence, Section 8(a) agreements are, in reality, subcontracts. However, the government for administrative and goal-counting purposes classifies Section 8(a) agreements as prime “contracts.” (See Plaintiff’s Undisputed Facts, No. 65).⁷

Section 8(a) contracts, including those awarded for defense contracts, can be awarded on a “sole source” basis (i.e., reserved to one firm) or on a “competitive” basis (i.e., between two or more Section 8(a) firms). 13 C.F.R. § 124.501(b). The majority of DoD contract dollars, and contract actions, awarded under the Section 8(a) program are sole source. (Exhibit B33 (Foreman Dep.), p. 250, line 22 through p. 251, line 18). Sole source 8(a) awards generally can have a value of as much as \$3 million for service contracts and \$5 million for manufacturing contracts. 13 C.F.R. § 124.506. Provided that an award comports with applicable regulations, there is no statutory or regulatory limit to the size of “competitively” awarded Section 8(a) contracts. See 15 U.S.C. § 637(a); 13 C.F.R. Part 124. The Federal Acquisition Regulations do

⁷ SBA has used its authority to delegate the privy of contracting to other government agencies, such as DoD, thereby enabling DoD to award Section 8(a) contracts directly to firms. (See Exhibit B30 (Excerpts of Deposition Transcript (January 15, 2003) and errata sheets of Darryl Hairston, the Fed. R. Civ. P. 30(b)(6) witness of SBA, in *DynaLantic* (“Hairston Dep.”), p. 159, line 8 through p. 160, line 14; Exhibit B33 (Excerpts of Deposition Transcript (January 24, 2003) and errata sheets of Timothy Foreman, the Fed. R. Civ. P. 30(b)(6) witness of DoD, in *DynaLantic* (“Foreman Dep.”)), p. 56, line 16 through p. 58, line 8). The SBA continues to have responsibility for determining which firms are eligible for the Section 8(a) Program, to certify those as eligible, and to provide counseling and assistance to 8(a) contractors. See, e.g., 13 C.F.R. part 124; Small Business Size Regulations, 8(a) Business Development/Small Disadvantaged Business Status Determinations, Rules of Procedure Governing Cases Before the Office of Hearings and Appeals, 63 *Federal Register* 35726, 35734 (June 30, 1998).

not require notice to members of the public (including other contractors) prior to the award of Section 8(a) sole source contracts.

The Section 8(a) Program itself has no termination date or sunset provision. (Plaintiff's Undisputed Facts, No. 135). The SBA has never discussed or taken any position as to when the need for race-conscious mechanisms in federal procurement should end. (Exhibit B30 (Hairston Dep.), p. 218, line 17 through p. 219, line 4).

F. DoD Program: Overview of Certain Sections.

The DoD Program was established by Section 1207 of the National Defense Authorization Act for Fiscal Year 1987 (Pub. L. No. 99-661). When enacted, the program was entitled "Contract Goal for Minorities." Section 801 of the National Defense Authorization Act for Fiscal Year 1993 (Pub. L. No. 102-484) codified the Section 1207 program at 10 U.S.C. § 2323, and renamed it the "Contract Goal for Small Disadvantaged Businesses and Certain Institutions of Higher Learning."

The DoD Program provides, in part, that:

a goal of 5 percent . . . shall be the objective of [DoD] . . . in each fiscal year for the total combined amount obligated for contracts . . . entered into with --

small business concerns, including mass media and advertising firms, owned and controlled by socially and economically disadvantaged individuals (as such term is used in section 8(d) of the Small Business Act (15 U.S.C. 637(d)) and regulations issued under that section), the majority of the earnings of which directly accrue to such individuals

10 U.S.C. § 2323(a)(1). Pursuant to 15 U.S.C. § 637(d), "Black Americans, Hispanic Americans,

Native Americans, Asian Pacific Americans, and other minorities, or any individual found to be disadvantaged by the [SBA] pursuant to Section 8(a) of the Small Business Act" are presumed to be socially and economically disadvantaged. See 15 U.S.C. § 637(d)(3)(C)(ii).

The DoD Program also provides, in part, that "[t]o the extent practicable, the head of an agency shall maximize the number of minority small business concerns, historically Black colleges and universities, and minority institutions participating in the program." 10 U.S.C. § 2323(e)(4). DoD procurement officials also are graded on awarding contracts: "one factor used in evaluating the performance of a contracting officer [is] the ability of the officer to increase contract awards to [small business concerns owned and controlled by socially and economically disadvantaged individuals; qualified HUBZone small business concerns; historically Black colleges and universities; minority institutions of higher learning]." 10 U.S.C. § 2323(e)(5)(G); 10 U.S.C. § 2323(a)(1).

The DoD Program authorizes several approaches to attain the statutory goal of awarding five percent of contracts to "small business concerns owned and controlled by socially and economically disadvantaged individuals."⁸ The approaches have included, among other things, awards through the Section 8(a) Program (whether competitive or sole source); SDB set-asides, and the use of a price evaluation adjustment factor of ten percent (*i.e.*, increasing the bids of non-

⁸ The DoD Program incorporates the definition of such term in 15 U.S.C. § 637(d) and its implementing regulations (hereinafter sometimes referred to collectively as "Section 8(d)"). Section 8(d) refers to such firms as SDBs. See 13 C.F.R. § 124.1002(b). Although the DoD Program incorporates some of the definitions and procedures of Section 8(d), the so-called "8(d) Program" is a distinct SBA program. The SBA certifies firms for the Section 8(a) Program, and has responsibility for such certification for purposes of Section 8(d) (*i.e.*, determining which firms are SDBs). See 13 C.F.R. § 124.204 (Section 8(a)); 13 C.F.R. § 124.1001 (SDB). There is no separate certification for the DoD Program.

SDBs by ten percent relative to SDBs).⁹ However, with respect to prime contracts, DoD's representative testified that the Section 8(a) Program is the only preferential prime contracting program that DoD currently is using for which SDBs are eligible. (Exhibit B33 (Foreman Dep.), at p. 27, line 20, through p. 28, line 16; p. 260, lines 19-21).¹⁰ DoD can meet its five percent SDB prime contract goal by awarding contracts through the Section 8(a) Program because all Section 8(a) firms are, by definition, SDBs. *See* 10 U.S.C. § 2323(e)(3) (DoD can use the Section 8(a) Program to help fulfill its five percent goal); 13 C.F.R. § 124.1002 (definition of SDB). (*See also* Exhibit B30 (Hairston Dep.), p. 225, lines 2-4) (all 8(a) firms are SDBs).

The Section 8(a) Program continues to enjoy a high priority within DoD's Small Business Program. In fact, DoD can use the Section 8(a) Program to set aside contracts in any industry. (Plaintiff's Undisputed Facts, No. 18).

Besides 10 U.S.C. § 2323, DoD's goals also originate in 15 U.S.C. § 644(g). Section 644(g) applies government-wide and establishes goals for, *inter alia*, SDBs. (*See* Plaintiff's Undisputed Facts, No. 59). The goals in Section 644(g) – which is part of the Small Business Act – are in furtherance of the policy stated in 15 U.S.C. § 637(d) that small business concerns owned

⁹ SDB set-asides at DoD (the so-called "Rule of Two") were suspended in 1995 on the advice of the U.S. Department of Justice ("DoJ") and were subsequently dropped from the Federal Acquisition Regulations and Defense Federal Acquisition Regulations Supplement. DoD is no longer using the Rule of Two. (Exhibit B33 (Foreman Dep.), p. 97, lines 3-6; p. 164, lines 1-14. Pursuant to Section 801 of the Strom Thurmond Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, 112 Stat. 1920, the use of price evaluation adjustments for SDBs has been suspended for all DoD contracting activities when DoD's goal of awarding five percent of contracts and subcontracts to SDBs is exceeded during the previous fiscal year. *See* 10 U.S.C. § 2323(e)(3)(B). The suspension currently is in effect until at least February 2004. Notice of Suspension of Price Evaluation Adjustment, 64 *Federal Register* 4847 (February 1, 1999).

¹⁰ Any knowledge of DoD's components – such as the Navy, Air Force, or Marines – would be within the custody, control, or possession of DoD. (*See* Plaintiff's Undisputed Facts, No. 5).

and controlled by socially and economically disadvantaged individuals should have the maximum opportunity to participate in the contracts awarded by federal agencies. With respect to prime contracts, the government-wide goal for such concerns is not less than five percent of the total value of all prime contracts for each fiscal year. Section 644(g)(1) further provides, in part, that: "[n]otwithstanding the Government-wide goal, each agency shall have an annual goal that presents, for that agency, the maximum practicable opportunity for . . . small business concerns owned and controlled by socially and economically disadvantaged individuals . . . to participate in the performance of contracts by such agency." The SBA negotiates those goals with each agency and department, such as DoD. (Plaintiff's Undisputed Facts, No. 64; see also Exhibit B30 (Hairston Dep.), p. 151, line 21 through p. 153, line 15).

G. Participation in the Section 8(a) Program.

Firms certified to participate in the Section 8(a) Program must be owned and controlled at least 51% by individuals who are socially and economically disadvantaged.¹¹ See 13 C.F.R. §§ 124.101, 124.105. (See also Exhibit B7 (Defs. Second Adm. Resp.), No. 115, p. 39).¹² (A copy of the current application form for the Section 8(a) Program is attached hereto as Exhibit B52).

The Small Business Act provides, in part, that "[s]ocially disadvantaged individuals are

¹¹ Except for concerns owned by Indian tribes, Alaska Native Corporations, Native Hawaiian Organizations, or Community Development Corporations (which automatically qualify if they otherwise satisfy pertinent ownership requirements and other regulations). See 13 C.F.R. §§ 124.109, 124.110, 124.111.

¹² DoD defers to the SBA regarding the admissibility, operation and workings of the Section 8(a) Program, including the question of whether a firm is owned and controlled by persons who are socially and economically disadvantaged; how the presumption of social disadvantage operates; and challenges to firms in the programs. (Plaintiff's Undisputed Facts, No. 20).

those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities.” 15 U.S.C. § 637(a)(4)(C)(5). The SBA's implementing regulations make clear that societal discrimination satisfies the test and provide, in part, that “[s]ocially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities. The social disadvantage must stem from circumstances beyond their control.” 13 C.F.R. § 124.103(a).

For purposes of determining social disadvantage, SBA counts any alleged instance of discrimination from any source, whether governmental or private. (Plaintiff's Undisputed Facts, No. 21). A person alleging only private discrimination with no connection whatsoever to governmental acts or omissions, including without any nexus to the federal government, could qualify for socially disadvantaged status. (Plaintiff's Undisputed Facts, No. 22).

"Economically disadvantaged individuals are those socially disadvantaged individuals whose 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." 15 U.S.C. § 637(a)(6)(A). By contrast, SBA's implementing regulations are broader and state, in part, that “[e]conomically disadvantaged individuals are socially disadvantaged individuals whose 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 or similar line of business who are not socially disadvantaged.” 13 C.F.R. § 124.104(a) (emphasis added).

Under either definition, however, economically disadvantaged individuals are a subset of socially disadvantaged individuals. "[T]he 8(a) provisions are much like the program in *Bakke*: 'a minority enrollment program with a secondary disadvantage element.'" *Dynalantic*, 115 F.3d at 1017, quoting *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 281 n.14 (1978) (opinion of Powell, J.).

Persons cannot be considered "economically disadvantaged" and be admitted to the Section 8(a) Program if their "net worth" is \$250,000 or more. 13 C.F.R. § 124.104(c)(2). "For continued . . . eligibility after admission to the program, net worth must be less than \$750,000." *Id.* However, "[i]n determining such net worth, SBA will exclude the ownership interest in the [Section 8(a) firm] and the equity in the primary personal residence (except any portion of such equity which is attributable to excessive withdrawals from the [Section 8(a) firm])." 13 C.F.R. § 124.104(c)(2).¹³

According to data published by the U.S. Department of Commerce ("Commerce"), the vast majority of Americans would qualify as "economically disadvantaged" if any of the definitions identified in the previous paragraph were the sole criterion for identifying "economically disadvantaged" individuals. (Plaintiff's Undisputed Facts, No. 23). In fact, there are wealthy individuals eligible for preferences in the Section 8(a) and DoD Programs and who are participating in those Programs. (See Plaintiff's Undisputed Facts, No. 34). Some have a personal worth of up to \$4,000,000, yet still are considered to be socially and economically disadvantaged and receive preferences. *Id.* Karen S. Lee, Deputy Inspector General of the SBA,

¹³ The test for economic disadvantage for an SDB is a "net worth" of less than \$750,000, excluding the value of an individual's primary residence and equity in the business. See 13 C.F.R. § 124.1002(c); 13 C.F.R. § 124.104(c)(2).

testified that:

Wealthy individuals continued to be eligible for the 8(a) program because the equity in their companies and primary residences and the net worth of their spouses were not considered in determining whether they remained economically disadvantaged due to statutory exclusions. In our sample, 35 of the 50 were millionaires but remained classified as disadvantaged. . . ."

(Plaintiff's Undisputed Facts, No. 25). The SBA Inspector General also identified the presence of wealthy people in the program as one of the Top Ten Issues facing the agency in its December 1999 Activity Update. (Exhibit B54 (Excerpts of SBA Inspector General Report), p. 3).

The presence of such individuals should come as no surprise. There is no set threshold for how much access to capital disqualifies an individual from participating in the Section 8(a) program. (Plaintiff's Undisputed Facts, No. 26). Although an applicant must certify that he knows he has less access to capital than others in the same or similar line of business, the SBA would have no knowledge of what an applicant knows about another individual's circumstances because that is the applicant's burden. (Plaintiff's Undisputed Facts, No. 28).¹⁴ In fact, the SBA does not know the access to capital of specific individuals that do not participate in the Section 8(a) program or who are not presumed to be socially disadvantaged. For example, the SBA does not know the access to capital of DynaLantic or its owners or for individuals that own and control firms that operate in the simulation and training industry. Accordingly, for example, the SBA does not know the average access to capital of firms that operate or participate in the simulation and training industry, whether they are part of the Section 8(a) Program or not.

¹⁴ SBA's representative was unable to explain how an applicant to the Section 8(a) program would be able to have personal knowledge of the access of capital of the owners of, for example, DynaLantic. (Exhibit B30 (Hairston Dep.), p. 42, line 17 through p. 43, line 2).

(Exhibit B30 (Hairston Dep.), p. 46, lines 5-19).

Firms are eligible to remain in the Section 8(a) Program for a maximum of nine years (provided that the individuals who own and control the firm remain socially and economically disadvantaged). 13 C.F.R. § 124.2. Firms that are in compliance with Section 8(a) requirements can receive contract awards right up to the day before they leave the program, even though completion of the contracts might occur after the nine-year period. (See Exhibit C (The Abuses in the SBA's 8(a) Procurement Program, Hearing Before the Committee on Small Business of the House of Representatives, 104th Cong., 1st Sess. 91, 94 (1995) (Statement of Calvin Jenkins of the SBA)). Only nine firms have graduated early from the Section 8(a) Program (i.e., exited the program before nine years). (Plaintiff's Undisputed Facts, No. 123).

H. The Section 8(a) Program and the Provisions of the DoD Program At Issue Are Race-Conscious.

The Small Business Act, the regulations for the Section 8(a) Program, and the DoD Program contain race-conscious mechanisms. (See Plaintiff's Undisputed Facts, No. 33). For example, these presumptions are found on the face of the statute that creates the DoD Program and its SDB goal (see 10 U.S.C. § 2323(a)(1)(A) [incorporating the term "socially and economically disadvantaged individuals" as it is used in Section 8(d)], as well as the implementing regulations that implement the DoD Program (by using and relying on such statutory presumption).¹⁵ As one would expect, then, DoD believes that the goaling process or

¹⁵ Unlike the singular presumption of social disadvantage in the Section 8(a) Program, Section 8(d) provides for a dual presumption of social and economic disadvantage. SBA has the burden of demonstrating that members of designated groups are not economically disadvantaged. Members of non-designated groups have the burden of demonstrating that they

the use of goals with respect to the Section 8(a) Program and 15 U.S.C. § 637(d) and its implementing regulations are race-conscious. (Exhibit B33 (Foreman Dep.), p. 77, line 21 through p.78, line 3; p. 22, lines 8-12).

Part of the Small Business Act, 15 U.S.C. § 631(f), also contains race-conscious mechanisms and provides, in part, that

(1) with respect to the [SBA's] business development programs the Congress finds --

* * *

(B) that many such 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;

(C) that such groups include, but are not limited to, Black Americans, Hispanic Americans, Native Americans, Indian tribes, Asian Pacific Americans, Native Hawaiian Organizations, and other minorities;

15 U.S.C. § 631(f)(1)(B)-(C). These Congressional findings, made in 1978, specify certain groups as being in Congress's view socially disadvantaged in the conference reports and the ultimate text of Pub. L. No. 95-507. Relying on the Congressional findings in 15 U.S.C. § 631(f), the SBA presumes that members of those "groups" are socially disadvantaged for purposes of the Section

(..continued)

are economically disadvantaged. The level of proof that the SBA uses to establish that a member of a presumptively eligible group is "other than economically disadvantaged" is the same for an individual who is not a member of one of the groups. It is based on an evaluation of the data that an applicant makes available to the SBA. The SBA does not use a preponderance of the evidence, beyond a reasonable doubt, or a 100 percent certainty test. The preponderance of the evidence standard relates solely to social disadvantage; it has no implications for economic disadvantage. (Exhibit B30 (Hairston Dep.), p. 135, lines 11-22; p. 136, line 8 through p. 137, line 10).

8(a) Program. (See Plaintiff's Undisputed Facts, No. 38).

Over time, SBA included in its regulations many other groups that SBA believed were subgroups of the groups that Congress specified in the Small Business Act. (Plaintiff's Undisputed Facts, No. 39). Accordingly, the regulations that implement the Section 8(a) Program also are race-conscious. Under the Section 8(a) Program, any U.S. citizen who holds herself or himself out and identifies himself or herself as a member of any of the following racial or ethnic groups is presumed to be "socially disadvantaged": Black Americans; Hispanic Americans; Native Americans (American Indians, Eskimos, Aleuts, or Native Hawaiians); Asian Pacific Americans (persons with origins from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China (including Hong Kong), Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, The Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, or Nauru); Subcontinent Asian Americans (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal) and members of other groups that the SBA designates from time to time. 13 C.F.R. § 124.103(b)(1).¹⁶

The test for social disadvantage, aside from the presumptions, also applies differently to

¹⁶ There is no minimum length of time that an applicant to the Section 8(a) program must identify with or hold himself out as being a member of the designated groups. When a person certifies that he holds himself out as a member of a group presumed to be socially disadvantaged for purposes of the Section 8(a) Program, there is no further inquiry, generally speaking, as to whether such person is, in fact, a member of the group. An applicant to the Section 8(a) program is entitled to the presumption of social disadvantage as long as he is a member of the designated groups, holds himself out and is identified as a member of the designated groups, regardless of the amount of social disadvantage he individually or his designated group may have suffered. (Plaintiff's Undisputed Facts, No. 42).

non-minorities.

In assessing a claim of individual social disadvantage, SBA will consider all relevant information submitted by an applicant. Evidence which tends to show generalized patterns of discrimination against a non-designated group or statistical data showing that businesses owned by a specific non-designated group are disproportionately underrepresented in a particular industry may be used to augment an individual's case. Statistics and generalized patterns are not sufficient by themselves to establish a case of individual social disadvantage. However, an individual's statement of personal experience in combination with the generalized evidence may be sufficient to demonstrate social disadvantage.

Small Business Size Regulations; 8(a) Business Development/Small Disadvantaged Business Status Determinations; Rules of Procedure Governing Cases Before the Office of Hearings and Appeals, 63 Federal Register 35726, 35728 (June 30, 1998).

Social disadvantage actually is defined in terms of "bias" and "prejudice" and not in terms of other types of "disadvantage." See 13 C.F.R. § 124.103(a). Accordingly, the statutory and regulatory definition of "social disadvantage" in 15 U.S.C. § 637(a)(6)(A) and 13 C.F.R. § 124.103(a) favors racial and ethnic minorities: "socially disadvantaged individuals" include those disadvantaged by racial or ethnic prejudice but not those disadvantaged solely by, for example, below average educational opportunities. The effect is to make race and ethnicity paramount in the test, such that (according to the GSA) "the conventional wisdom [is] the problems associated with non-minority eligibility (for instance, the small number of non-minorities admitted to the programs and the perceived difficulty of the standards) stem from the lack of specificity in the criteria and not the standard of proof." (Plaintiff's Undisputed Facts, No. 58).

In light of the presumption and test, it is not surprising that (as of September 3, 1999)

there were approximately 5,830 firms participating in the Section 8(a) Program (and that part of the DoD Program that incorporates the Section 8(a) Program), of which only approximately 105 (approximately 1.8%) were owned and controlled by individuals who established individual social disadvantage pursuant to 13 C.F.R. § 124.103(c) or its predecessor regulation. The other approximately 98.2% of firms that participated were owned and controlled by individuals who were presumed to be socially disadvantaged pursuant to a racial or ethnic presumption. Figures almost four years later showed only a modest increase of non-presumed individuals. As of February 20, 2003, there were 7,117 firms certified to participate in the Section 8(a) Program, of which 511 (approximately 7.18%) were owned and controlled by individuals who are not members of the groups designated in 13 C.F.R. § 124.103(b). (Plaintiff's Undisputed Facts, Nos. 55-56).¹⁷

Going one step further down the race-conscious lane, SBA also has entered into memoranda of understanding ("MOU") with third parties that explicitly refer to minority groups *per se* as beneficiaries instead of Section 8(a) contractors as a whole. (See, e.g., Exhibit B61 (SBA agreement with MBELDEF), p. 2 ("to increase the participation and certification of African-American owned businesses in the 8(a) program"); Exhibit B63 (SBA agreement with National Minority Supplier Development Council), p. 2 ("to increase the participation and certification of minority-owned businesses in the 8(a) program."). See also Exhibits B62 and B63

¹⁷ The reason for the change is unknown and may or may not be related to lowering the evidentiary standard that non-presumed groups must satisfy to establish social disadvantage from "clear and convincing" to a "preponderance of the evidence." Small Business Size Regulations; 8(a) Business Development/Small Disadvantaged Business Status Determinations; Rules of Procedure Governing Cases Before the Office of Hearings and Appeals, 63 Federal Register 35726, 35727 (June 30, 1998). Defendants offered no evidence as to the basis for the admission of the few non-presumed members.

(other MOUs)).¹⁸

ARGUMENT

I. SUMMARY OF ARGUMENT

The Section 8(a) Program, and DoD's use of that program, is unconstitutional as enacted and as applied, including in the simulation and training industry. Defendants do not have a compelling interest to use race and, in any event, their programs are not narrowly tailored to achieve that interest.

Defendants admit that there is a recognized simulation and training industry. The race-conscious and racially-motivated Section 8(a) and DoD Programs have injured, and continue to injure DynaLantic, by preventing it from competing for contracts and subcontracts, or competing for them on an equal basis.

Defendants have no evidence of any discrimination in that industry, much less the continuing effects of such past discrimination or even of "discriminatory barriers" in that industry (which in and of themselves could not even establish a compelling interest). Indeed, the "discrimination" identified in the "evidence" on which defendants rely is at best, and assuming it exists, broad societal discrimination, not the kind of identified intentional discrimination by the federal government necessary to create a compelling governmental interest. The federal government does not have a past history of engaging in such discrimination, whether in the

¹⁸ In fact, the presumptions and programs at issue benefit certain racial and ethnic groups (including, according to the SBA's regulations, individuals from Spain, Portugal, Burma, Tonga or Maldives Islands) over other American citizens as a whole. See 13 C.F.R. §124.103(b).

simulation and training industry or otherwise. Nor does it have evidence of having "passively" supported such discrimination by others through the use of federal funds. It is for that reason that Defendants resort to relying on allegations of discriminatory barriers in education, employment, and capital/bonding/surety areas and other alleged private societal discrimination.

Defendants' implicit assumption is that since the federal government presumably purchases goods and services in every industry that the federal government must be "passively participating" in the alleged discrimination. In so doing, Defendants hope to use the "exception" of passive participation to swallow the rule against preferences based on societal discrimination. For example, noticeably absent is any nexus between the alleged passive participation and alleged discrimination (including the number of industries affected, the racial and ethnic groups included, or the quantum of discrimination) in the receipt and expenditure of those funds.

Even if there were evidence of the continuing effects of identified past discrimination by the federal government in specific industries, the Section 8(a) and DoD programs are not narrowly tailored. The government claims its use of racial presumptions in the programs are "narrowly tailored" on two main grounds. First, the racial presumptions are rebuttable and, second, that the economic test excludes wealthy individuals from receiving the benefits of those presumptions. Neither saves the day. The presumption of social disadvantage effectively has been dispositive for every member of the preferred groups in the Section 8(a) and DoD Programs. The DoD Program, through its use and incorporation of 15 U.S.C. § 637(d), and by using the Section 8(a) Program itself to award contracts, grants disadvantaged status to groups and individuals that the SBA designates as socially disadvantaged under Section 8(a). Other material shows that Defendants do not follow Congress's definition of "economic disadvantage,"

but rather their own. By ignoring Congress' definition (and permitting comparisons to a "similar line of business"), and by excluding a person's equity in a business and principal residence, wealthy people gain entrance to and remain eligible for preferential treatment. The presumptions and programs are not narrowly tailored.

II. SUMMARY JUDGMENT STANDARD FOR DYNALANTIC'S CLAIMS

The standards for granting DynaLantic's request for a declaratory judgment and permanent injunctive relief are well-established. To secure a permanent injunction, a plaintiff must demonstrate (by a preponderance of the evidence) the existence of irreparable injury and inadequate legal remedies. See Weinberger v. Romero-Barcelo, 456 U.S. 305, 311 (1982) (discussing injury); Orantes-Hernandez v. Thornburgh, 919 F.2d 549, 558 (9th Cir. 1990) (by preponderance). Continuing violations of constitutional rights, including violations to the right of equal protection constitute per se irreparable harm; thus, legal remedies are inadequate. Shaw v. Hunt, 517 U.S. 899, 908 (1996) (racial distinction causes "fundamental injury" to those subjected to it); Elzie v. Aspin, 841 F. Supp. 439, 443 (D.D.C. 1993) (violation of "right to equal protection" is per se irreparable harm; "the loss of constitutional rights for which money damages are inadequate, namely, the right to equal protection under the Fifth Amendment" is "irreparable injury").

For the same reasons, DynaLantic is also entitled to a declaratory judgment. See 28 U.S.C. § 2201(a) ("[i]n a case of actual controversy within its jurisdiction, . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought"); Fed. R. Civ. Proc. 57.

DynaLantic is entitled to an entry of summary judgment on its substantive claims for injunctive and declaratory relief. Summary judgment is appropriate if there is "no genuine issue of material fact and [] the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A factual dispute is "genuine" only where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-250 (1986). Here, the facts are set forth in plaintiffs' statement of undisputed facts, which are based significantly upon defendants' own documents and admissions.¹⁹

¹⁹ DynaLantic has standing to assert these claims for injunctive and declaratory relief, and satisfies the requirements for Article III standing. See Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 180-181 (2000), citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992). DynaLantic is challenging race-conscious and race-based activity of the federal government, which injures DynaLantic by preventing it from competing for valuable contracts. See Exhibit A (Declaration of Jeffrey A. Weinstock, October 3, 2003 ("Weinstock Dec.")) ¶¶ 12, 13, 16, 18, 20, 22 (DynaLantic generally bids on all contracts and subcontracts and Defendants' actions prevent it from bidding). See Gratz v. Bollinger, 123 S. Ct. 2411, 2422-2423 (2003) (discussing, *inter alia*, intent and relation to standing).

Defendants do not and cannot make the contention that Congress would have enacted the Section 8(a) or DoD Programs without the race-conscious mechanisms contained therein. (See Plaintiff's Undisputed Facts, No. 34). Thus, the Programs would not exist in their current form without the racial presumptions, which exponentially expand the number of "disadvantaged." See Dynalantic, 115 F.3d at 1016-17.

DynaLantic's "injury - its inability to compete on equal footing with 8(a) participants - is traceable to the 8(a) program and is likely to be redressed by a decision holding all or part of the program unconstitutional." DynaLantic, 115 F.3d at 1018; see also Northeastern Fla. Chapter of Associated Gen. Contrs. of Am. v. City of Jacksonville, 508 U.S. 656, 666 (1993) ("in the context of a challenge to a set-aside program, the 'injury in fact' is the inability to compete on equal footing in the bidding process, not the loss of a contract"). This is true regardless of whether the set-asides are for racial groups or the "disadvantaged." See W.H. Scott Constr. Co. v. City of Jackson, 199 F.3d 206, 213 n.5 (5th Cir. 1999); Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia, 6 F.3d 990, 995-96 (3d Cir. 1993) (plaintiff had standing to challenge preferences for socially and economically disadvantaged individuals).

III. THE PROGRAMS ARE SUBJECT TO, AND FAIL, STRICT SCRUTINY

Strict scrutiny applies to all racial classifications and race-based actions by the federal government. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995); Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344 (D.C. Cir. 1998) (strict scrutiny applied to federal regulations requiring diversity in broadcasting). "Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination . . ." Grutter v. Bollinger, 123 S. Ct. 2325, 2370 (2003), quoting Bakke, 438 U.S. at 291 (opinion of Powell, J.). Thus, racial classifications are almost never a legitimate basis for governmental decision-making. See Eisenberg v. Montgomery County, 197 F.3d 123, 128 (4th Cir. 1999) (failure to take into account presumption of invalidity of race-based action was error even where court below applied strict scrutiny).

Before the government can employ race it must have a "compelling interest" and the means chosen must be "narrowly tailored" to achieve that interest. Adarand, 515 U.S. at 235. This test ensures that the means chosen fit this compelling goal "so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype." City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 493 (1989) (plurality op.). "[S]imple legislative assurances of good intention cannot suffice." Id. at 500. Both the compelling interest and the narrow tailoring part must withstand such an exacting analysis. Adarand, 515 U.S. at 236 ("requiring strict scrutiny is the best way to ensure that courts will consistently give racial classifications that kind of detailed examination, both as to ends and as to means."). See Lamprecht v. FCC, 958 F.2d 382, 391-392 (D.C. Cir. 1992) (even where the courts must give weight to decisions of Congress, "[they] are still obliged in the end to review the government's

policy -- both the judgment of law that the policy is constitutional and the findings of fact that underlie it." (emphasis original).

A court first must examine the law for "the factual basis for its enactment" and "the nexus between its scope and that factual basis," before a conclusion can be made that a racial classification is "designed to further remedial goals." Croson, 488 U.S. at 494-495 (plurality op., O'Connor, J.). "[T]here is no difference in the evidentiary burden that must be faced during litigation (i.e., a 'strong basis in evidence') and the evidence that a legislature must have before it when it enacts a racial classification." Rothe Dev. Corp. v. U.S. Dept. of Defense, 262 F.3d 1306, 1326-27 (Fed. Cir. 2001), discussing Shaw, 517 U.S. at 910 (1996), and Bush v. Vera, 517 U.S. 952, 982 (1996). In discussing 10 U.S.C. § 2323, the statute that creates the DoD Program, the court in Rothe stated that Congress is entitled to no deference in determining whether Congress had a compelling interest in enacting the racial classification, and that the classification was narrowly tailored in fulfillment of that interest. Rothe, 262 F.3d at 1321.

The government has the burden to prove that its racial classification passes strict scrutiny. Adarand, 515 U.S. at 224 ("any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny."). See also Gratz, 123 S. Ct. at 2427 (quoting the same passage in Adarand above); Croson, 488 U.S. at 510-11 (plurality op., O'Connor, J.) (concluding that the city had failed to demonstrate that its plan was supported by a strong basis in evidence and had "failed to identify the need for remedial action," quoting Wygant v. Jackson Bd. of Education, 476 U.S. 267, 277 (1986)); In re Griffiths, 413 U.S. 717, 721 (1973) ("The Court has consistently emphasized that a State which adopts a suspect classification 'bears

a heavy burden of justification," quoting McLaughlin v. Florida, 379 U.S. 184, 196 (1964)).

Accordingly, the government has the ultimate burden of proving that it has a compelling interest to use race.

The government also has the ultimate burden to prove that the means chosen are narrowly tailored. "With respect to such classifications [that disadvantage a suspect class or impinge on the exercise of a 'fundamental right'], it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest." Plyler v. Doe, 457 U.S. 202, 217 (1981); Gratz, 123 S. Ct. at 2427 (state actors "must demonstrate that the University's use of race in its current admission program employs 'narrowly tailored measures that further compelling governmental interests'," quoting Adarand, 515 U.S. at 227. See Bass v. Board of County Commissioners, 256 F.3d 1095, 1114 (11th Cir. 2001) ("[T]he law now is that insofar as an equal protection claim is concerned the defendant must prove that its affirmative action plan satisfies strict scrutiny.") (citation omitted); Ho v. San Francisco Unified School District, 147 F.3d 854, 865 (9th Cir. 1998) ("When a governmental body is defending racial quotas, the burden of justification falls on the government."); Monterey Mechanical Co. v. Wilson, 125 F.3d 702, 713 (9th Cir. 1997) ("The burden of justifying different treatment by ethnicity or sex is always on the government."); Podberesky v. Kirwan, 38 F.3d 147, 153 (4th Cir. 1994) (the party seeking to implement [a race-conscious program] "must, at a minimum, prove that the effect it proffers is caused by the past discrimination and that the effect is of sufficient magnitude to justify the program."))

In ruling on programs such as these, a court should "set forth detailed findings as to the scope and content of the reports before Congress when it enacted the challenged legislation, and

set forth whatever inferences may be drawn as to whether such reports could constitute a ‘strong basis in evidence’ for remedial action.” Rothe, 262 F.3d at 1323 (citing Croson, 488 U.S. at 510; noting the need for “proper findings” and defining the “scope of the injury and the extent of the remedy necessary to cure its effects”).

A. Defendants Lack A Compelling Interest.

For a wide variety of reasons, Defendants cannot demonstrate that they have a compelling governmental interest.

1. Defendants Do Not Have a Strong Basis in Evidence to Use Race Conscious Programs in the Simulation and Training Industry.

Defendants have claimed that the use of race here is justified by one specific compelling interest: remedying the continuing effects of past discrimination. Defendants have identified the principal facts, documents and grounds in Plaintiff’s Undisputed Facts as supporting their contention that the Section 8(a) Program and DoD Program are lawful and constitutional, including whether they demonstrate the continuing effects of past discrimination and whether they are narrowly tailored to serve that compelling governmental interest. (See Plaintiff’s Undisputed Facts, No. 97) (listing the material, which consists of statutes, regulations, Federal Register references, previous filings in this action, and the documents cited in those materials).²⁰ Of course, “the mere listing of pre-reauthorization references . . . fails . . . to provide adequate

²⁰ Plaintiff has not addressed any issues concerning the so-called "benchmarks" mentioned in certain of the above documents in light of the letter of October 8, 2002 from DoJ. (A copy of that letter was filed with the Court on October 25, 2002).

findings on which to conclude that Congress had a "strong basis in evidence" for reauthorizing the 1207 program." Rothe, 262 F.3d at 1323.²¹

The Supreme Court "never has held that societal discrimination alone is sufficient to justify a racial classification." Wygant, 476 U.S. at 274 (plurality op., Powell, J.); See also Shaw, 517 U.S. at 908. Instead, the government must identify specific discrimination involving governmental actors by industry and region. See Croson, 488 U.S. at 498 ("a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy."); Shaw, 517 U.S. at 909 (specific, identified discrimination is required "in a particular industry or region"). There is no "compelling government interest" unless there is a "strong basis in evidence" of past discrimination in the relevant industry. See Croson, 488 U.S. at 500.

If "amorphous" claims of past discrimination are sufficient, there would be no "logical stopping point to the use of racial preferences." Croson, 488 U.S. at 498-99. Therefore, the general history of racial or societal discrimination in the nation is not a sufficient predicate for a remedial racial or ethnic classification. Shaw, 517 U.S. at 909; Wygant, 476 U.S. at 276 (plurality op.; "Societal discrimination, without more, is too amorphous a basis for imposing a racially

²¹ Defendants have defined the term "discrimination," in this action, to include disparate treatment and disparate impact. (See Exhibit B1 (Excerpts of Response to Plaintiff's First Set of Interrogatories to Defendants), No. 7, pp. 53-54). At the outset, this definition is overbroad for purposes of strict scrutiny. People Who Care v. Rockford Bd. Of Educ., 111 F.3d 528, 534 (7th Cir. 1997) (provision calling for certain percentage of hired teachers to be black or Hispanic could not be justified by statistical disparities or underrepresentation; "there is no finding that the school district has ever discriminated (by which we mean discriminated intentionally [citation omitted] – the only kind of discrimination that violates the equal protection clause)"). See also Michigan Rd. Builders Ass'n. v. Milliken, 834 F.2d 583, 594 n.14 (6th Cir. 1987), aff'd mem., 489 U.S. 1061 (1989) (purposeful discrimination is required).

classified remedy.")²² Accordingly, "generalized assertions of legislative purpose or statements generally alleging societal discrimination or an individual's anecdotal accounts of discriminatory conduct would have little or no probative value in supporting enactment of a race-conscious measure." Rothe, 262 F.3d at 1323 (citing Croson, 488 U.S. at 498 ("[A] generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy.") and Wygant, 476 U.S. at 276).

Yet, in this case, such legally and factually insufficient evidence is all Defendants can muster. There is not even a Congressional report, hearing or finding that references, discusses or mentions the simulation and training industry. (Plaintiff's Undisputed Facts, No. 140).

To support a compelling interest, the D.C. Circuit has stated that "legislation must rest on evidence at least approaching a prima facie case of racial discrimination in the relevant industry." O'Donnell Constr. Co. v. District of Columbia, 963 F.2d 420, 424 (D.C. Cir. 1992). The court stated that "undocumented legislative declarations of remedial purposes count for naught" and stressed that there was no evidence that government agencies discriminated against minorities, or that the typical bidding process somehow was "rigged" to have that effect. O'Donnell, 963 F.2d

²² The 1978 amendments to the Small Business Act contained Congressional "findings" to the effect that many members of minority groups are socially and economically disadvantaged as a result of being identified as members of their respective groups. See 15 U.S.C. § 631(f). The "findings" do not identify any discrimination, whether public or private, with specificity. Therefore, they cannot form a basis for a racial preference. See Croson, 488 U.S. at 504 (discussing Richmond plan). Enacted over twenty-five years ago, these findings are stale. Moreover, they rely on alleged societal discrimination and, thus, are infirm. See Michigan Road Builders, 834 F.3d at 594 (discussing "findings" in Michigan state legislation creating preferences, and legislature's reliance upon societal discrimination, in concluding that the state lacked a compelling interest).

at 425. Moreover, any discrimination must be based on scientific and systemic evidence of discrimination. As the D.C. Circuit instructed, "[w]hile anecdotal evidence may suffice to prove individual claims of discrimination, rarely, if ever, can such evidence show a systemic pattern of discrimination." O'Donnell, 963 F.2d at 427 (quoting Coral Constr. Co. v. King County, 941 F.2d 910, 919 (9th Cir. 1991)). For example, in enjoining the SBA and NASA from awarding a Section 8(a) contract, this court recognized that "agencies have a responsibility to decide if there has been a history of discrimination in the particular industry at issue." Cortez III Service Corp. v. NASA, 950 F. Supp. 357, 361 (D.D.C. 1996).²³ Similarly, the Federal Circuit in Rothe stated that district courts "must also determine whether discriminatory conduct or effects were experienced in the specific industry" 262 F.3d at 1330.

Defendants' proffered justification, including rote bureaucratic rationales, is irrelevant and meaningless. Defendants have no evidence – anecdotal, statistical, or otherwise – of any discrimination in the simulation and training industry. Defendants are unaware of any discrimination. (See Plaintiff's Undisputed Facts, No. 141). None of the documents that they have cited as justification for the race-conscious mechanisms in the Section 8(a) and DoD Programs, including the documents cited in their discovery answers in this action, mention or identify instances of past or present discrimination in the simulation and training industry or in the procurement of simulation equipment or military simulation equipment. (Plaintiff's

²³ Proof of gross statistical discrepancies reflecting "underrepresentation" cannot prove discrimination in and of itself. See Watson v. Ft. Worth Bank & Trust, 487 U.S. 977, 992 (1988) ("[T]he inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures. It is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance.").

Undisputed Facts, No. 142).²⁴

Defendants do not even track the simulation and training industry and are unaware of any disparity study for that industry. Accordingly, they have not presented – and cannot present – any evidence of alleged statistical discrepancies. None of the documents cited or produced in discovery in this action or filed with the court (or otherwise exchanged between counsel in this action) identify, constitute, contain, cite or refer to any disparity study solely or specifically for the simulation and training industry. (Plaintiff’s Undisputed Facts, Nos. 143-144).²⁵ "Statistical evidence is particularly important to justify race-based legislation . . . nearly every court of appeals upholding the constitutionality of a race-based classification has relied in whole or in part on statistical evidence." *Rothe*, 262 F.3d at 1323-34.

The DoD Program was not intended to benefit "socially and economically disadvantaged individuals" in the defense procurement process under such circumstances as presented in the simulation and training industry. See Statement on Signing S. 2638 Into Law (National Defense

²⁴ The federal government must show a variety of requirements, including proof of its discrimination in the relevant industry – here the simulation and training industry – before using race. So-called "discriminatory barriers" that find their origin in societal discrimination cannot form the basis of race-conscious action, and are legally insufficient. In any event, Defendants are unaware of any such "discriminatory barriers" that have prevented a person or firm from forming a business in the simulation and training industry, or that have impaired or hindered a person or firm from bidding on, receiving, pursuing, or competing for a contract or subcontract in the simulation and training industry. (See Exhibit B33 (Foreman Dep.), p. 340, lines 6 through p. 341, line 1; Exhibit B30 (Hairston Dep.), p. 216, line 7 through p. 217, line 2; p. 219, line 17 through p. 220, line 3; p. 217, lines 8-13).

²⁵ Moreover, to the extent that Congress established the preference with economic disadvantage being related to the opportunities within the individual's industry, there is no proof that "socially and economically disadvantaged individuals" are at any disadvantage – much less a disadvantage due to federal discrimination. For example, Defendants do not know the access to capital of the individuals outside of the Section 8(a) Program who operate in the simulation and training industry. (Plaintiff’s Undisputed Facts, No. 30).

Authorization Act for Fiscal Year 1987), 22 Weekly Comp. Pres. Doc. 1573 (Nov. 14, 1986) (participation and goaling provisions must "be premised on findings of actual discrimination in the granting of defense contracts and must be narrowly tailored to remedy such discrimination").

The writings of Defendants' counsel, DoJ, are instructive on this issue. After the Supreme Court's 1995 decision in Adarand, DoJ published legal guidance about the case, including a series of questions to help agencies determine whether or not there was a compelling interest for using race in federal procurement, and if so, whether it was narrowly tailored. Memorandum to General Counsels re: Adarand from W. Dellinger, Assistant Attorney General, Office of Legal Counsel, (June 28, 1995) (the "Dellinger Memo"), pp. 35-38. (A copy of the Memorandum is attached as Exhibit B22 (Deposition Ex. No. 21 to Deposition Transcripts (October 30, 2002 and November 14, 2002) and errata sheets of Michael C. Small, Esq., in DynaLantic ("Small Dep.") (A copy of the Dellinger Memo also is available at <http://www.usdoj.gov/olc/adarand.htm>). This court in Cortez noted the defendants failed to follow the analysis in the Dellinger Memo when the court issued an injunction against a Section 8(a) set-aside by NASA and the SBA. 950 F. Supp. at 361-362.

The court in Cortez noted that an analysis such as the one raised in the Dellinger Memo "is required to ensure that a particular program is narrowly tailored to a compelling government interest." Cortez, 950 F. Supp. at 362. However, the SBA was unaware if it used such analysis as guidance for the Section 8(a) Program. (Exhibit B30 (Hairston Dep.), p. 173, line 4 through p. 174, line 22). In language seemingly written for this action, the court criticized that "the defendants simply rely on the facial constitutionality of Section 8(a) as a basis for broad application of 8(a) set-asides." Cortez, 950 F. Supp. at 362. The SBA's regulations do little to

alter that reality.

Defendants' admissions and lack of discrimination compel a single conclusion. In the simulation and training industry, strict scrutiny is strict in theory and fatal because of the facts.

2. **Outside the Simulation and Training Industry.**

Even outside the simulation and training industry, Defendants have no relevant evidence of past identified discrimination by the federal government.²⁶ However, insofar as Defendants are somehow attempting to justify their use of race (including in the simulation and training industry) with purported "evidence" of discrimination from other industries, Defendants' admissions doom their endeavor.²⁷

²⁶ Unlike in the simulation and training industry, Defendants at least have attempted to allege the existence of discrimination in other areas to defend their actions. (See Plaintiff's Undisputed Facts, No. 97). According to DoJ, which conducted the government-wide post-Adarand review regarding the use of race, the evidence of alleged discrimination sufficient in its view to justify a compelling interest consisted of alleged discrimination by state and local governments, alleged passive participation by the federal government in alleged discrimination by others, and other alleged discrimination by private actors. (See Plaintiff's Undisputed Facts, No. 110). DoJ is not aware of any other category of discrimination used by the federal government to justify the programs. (See *id.*, No. 110). Whether such alleged evidence fails to constitute a strong basis in evidence or the necessary ultimate compelling interest is irrelevant: As shown herein, Defendants alleged evidence is woefully outdated and stale (much of it pre-dating Croson and Adarand with their prohibition against using societal discrimination, and the requirement of an examination of qualified, ready, willing and able pools), flawed or inadequate (resting on allegations of societal discrimination or amorphous claims of discrimination) or non-existent (particularly with regard to the existence of any federal discrimination).

²⁷ In reversing the judgment of the lower court, the Federal Circuit in Rothe went so far as to state that "the evidentiary record, as presented by the district court [which upheld certain provisions of the DoD Program], might, we think, be insufficient even if we evaluated the 1207 program under the more lenient standard of rational basis scrutiny," 262 F.3d at 1324.

a. Defendants Are Unaware of Federal Discrimination or Federal Policies or Practices that Cause a Disparate Impact.

Defendants are unaware of any judicial finding that the United States government discriminates or has discriminated in the solicitation or award of federal government contracts and subcontracts. (Exhibit B10 (Excerpts of Defendants' Response to Plaintiff's Fifth Set of Request for Admissions), No. 6, p. 5). Defendants are unaware of any intentional discrimination by the United States government concerning the solicitation or award of federal contracts and subcontracts or in connection with any particular individual federal procurement. Defendants do not know the identity, number or percentage of firms that allegedly were not awarded (or that did not bid on) contracts and subcontracts because of alleged discrimination or that allegedly were at a disadvantage, treated unequally or discriminated against when bidding on contracts and subcontracts because of alleged discrimination. (Plaintiff's Undisputed Facts, No. 103). DoD does not know what the level of participation or number of 8(a) firms, SDBs or minority-owned firms (including in any industry, category or classification) would be but for alleged discrimination. (See Plaintiff's Undisputed Facts, No. 104).²⁸ Defendants are also unaware of any policies, procedures or practices used by the federal government in its procurements that have or had a disparate impact on minorities' abilities to compete for or to be awarded contracts or subcontracts. (Plaintiff's Undisputed Facts, Nos. 109).

Of course, before implementing the Section 8(a) and DoD Programs (and similar

²⁸ DoJ also does not know the number or identity of minority firms or SDBs that were suppressed or impaired because of alleged discrimination, or how many firms would have been formed in the absence of alleged discrimination. DoJ did not attempt to quantify, and Commerce (which also worked on post-Adarand issues) was unable to quantify, the effect of alleged discrimination in suppressing the formation or operation of minority businesses. (Exhibit B23 (Gross Dep.), p. 152, lines 7-13; p. 287, lines 7-10; p. 312, line 13 through p. 315, line 20).

programs), the federal government was long precluded from engaging in intentional discrimination, and defendants have no evidence that they did otherwise. *See, e.g.*, Executive Order No. 11246 (1965); *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954) (equal protection rights under the 5th Amendment apply to the District of Columbia). So, even if Defendants had statistical or other indirect evidence from which an inference of intentional discrimination could be made, the undisputed evidence that the federal government has not engaged in such discrimination easily rebuts any such inference. *See Brunet v. City of Columbus*, 1 F.3d 390, 407 (6th Cir. 1993) ("those opposing the affirmative action plan may present evidence to rebut the inference [from a prima facie case], thus defeating the validity of the affirmative action plan"). Of course, Defendants have not even succeeded in establishing a prima facie case here.

b. Alleged Passive Participation by the Federal Government, and Alleged Discrimination by State and Local Governments.

Defendants' answers are equally telling with respect to state and local governments (again, even assuming discrimination by such actors would support racial preferences in direct federal procurement programs, such as here). Defendants cannot point to any specific instance of discrimination in the form of disparate treatment in connection with any particular state or local government procurement. Defendants also have not identified any specific practices, policies or procedures by state or local governments that allegedly have or had a disparate impact on the ability of minorities to compete for and to be awarded state or local government contracts or subcontracts. (Plaintiff's Undisputed Facts, No. 112).

To the extent that state and local governments somehow are discriminating against minorities, it would provide no basis to use affirmative action here. The federal government,

which admittedly is not discriminating, could simply award funds directly to intended recipients rather than establish federal financial assistance programs through state and local governments. Moreover, to the extent Defendants are relying on discrimination by state and local actors, they should identify with specificity the states and localities involved, the industries affected, the nexus to expenditure of federal funds, the groups or individuals involved and the effects of the alleged discrimination. Without such evidence, the programs must fail. See Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356, 368 (2001) (the assembled evidentiary record failed to support the legislation because Congress had not "identified a history and pattern of unconstitutional employment discrimination by the States against the disabled."

c. Alleged Discrimination by Private Actors.

The federal government's use of "passive participation" to justify racial preferences because of the actions of private actors is equally, if not more, spurious. In a clever but transparent attempt to circumvent the ban on using race to alleviate "societal discrimination," the federal government in effect argues that because it purchases goods and services in every area of the economy, it is a "passive participant" in all private discrimination. The government hopes that the exception will swallow the rule. According to DoJ, any and all alleged private discrimination is considered by DoJ to suppress, hinder and prevent the formation of SDBs or minority firms competing for government contracts. (Plaintiff's Undisputed Facts, No. 114). DoJ which drafted the Appendix to Public Notice Regarding Proposed Reforms to Affirmative Action in Federal Procurement, 61 Federal Register 26042 (May 23, 1996), entitled "The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey" (hereinafter, "Appendix A"), considered alleged discrimination that exists in society against

minority-owned businesses and people trying to create minority-owned businesses as a justification for why those businesses do not exist and why they cannot compete on the same level as majority-owned businesses for government contracts. (Plaintiff's Undisputed Facts, No. 113).

As with the states, the nexus between receipt or expenditure of federal funds by private persons and alleged discrimination by such persons is conspicuously absent. The person that DoJ selected as its Fed. R. Civ. P. 30(b)(6) witness in this action, who is one of the three Deputy Chiefs of the Appellate Section of the Civil Rights Division, was unaware of (1) any recipient of federal funds in any kind of federal aid program or federal funded assistance programs having discriminated against anyone in connection with the receipt of those funds; (2) any particular suit against a federal procurement funds recipient, such as a state, being accused of having in turn discriminated against anyone in connection with the expenditure of those funds; and (3) any recipient of federal funds that has either prevented, hindered, impaired or made it more difficult for anyone to compete for federal contracts or subcontracts, state contracts or subcontracts, or private contracts or subcontracts. (Exhibit B23 (Gross Dep.), p. 341, line 18 through p. 342, line 12; p. 350, lines 11-21; p. 351, lines 16-21; p. 353, line 17 through p. 354, line 11; p. 62, line 21 through p. 63, line 4).

The Section 8(a) and other race-conscious mechanisms at issue do not in any way target, and cannot by their existence in any way reduce, "passive participation" in private discrimination. Defendants have no evidence that federal dollars were used, knowingly or unknowingly, to promote discriminatory practices. Proof of "passive participation" and its continuing effects must be something more than the simply the existence of past discrimination in general or it would be

the same as the "societal discrimination" whose effects the Supreme Court has concluded are insufficient to justify race-conscious measures. See Builders Ass'n of Greater Chicago v. Cook County, 256 F.3d 642, 645 (7th Cir. 2001) (rejecting "passive participant" argument, stating that "[i]f prime contractors on County projects were discriminating against minorities and this was known to the County, whose funding of the contracts thus knowingly perpetuated the discrimination, the County might be deemed sufficiently complicit (a kind of joint tortfeasor, coconspirator, or aider and abettor) to be entitled to take remedial action. But of that there is no evidence . . ."). As DoJ acknowledged, "affirmative action in federal procurement is not a means to make up for opportunities minority-owned firms may have lost in the private sector" Response to Comments to Department of Justice Proposed Reforms to Affirmative Action in Federal Procurement, 62 Federal Register 25648, 25650 (May 9, 1997).

Realizing that they cannot rely on any contemporaneous evidence that Congress relied upon, Defendants have attempted to create out of whole cloth a "record" of "evidence" that was "available" to Congress that might justify their use of race.²⁹ None of the evidence identifies discrimination in the simulation and training industry or discrimination by federal actors. Much of the evidence was created subsequent to the relevant legislative enactments, so that Congress plainly could not have relied on such evidence. See Shaw, 517 U.S. at 910 (whether a "strong basis in evidence" exists is judged before the government enacts a race-conscious plan).

²⁹ Congressional hearings and reviews of the Section 8(a) Program have not focused on the need for the racial preference, and Congress does not review the racial requirements in the program when new authorization is enacted. (See Plaintiff's Undisputed Facts, No. 136). The SBA also does not evaluate the need for the racial requirement even though "[r]ace is one of several factors used in determining the eligibility of 8(a) program applicants." (Plaintiff's Undisputed Facts, No. 136). The SBA does not even have statistics or other evidence to show the level of participation of minorities before race-conscious programs were established. (Plaintiff's Undisputed Facts, No. 116).

Moreover, Defendants do not know whether Congress relied upon any of the documents (or the contents thereof) that Defendants have identified. (Plaintiff's Undisputed Facts, No. 102). Defendants have not conducted any investigation into the truthfulness or accuracy of any documents cited in their interrogatory answers or identified as providing their strong basis in evidence. (Plaintiff's Undisputed Facts, No. 100). In fact, Defendants have not attempted to verify independently any of the alleged instances of discrimination in the documents that they contend constitute a strong basis in evidence in this action. (Plaintiff's Undisputed Facts, No. 101). Of course, "[e]vidence of a few isolated instances of discrimination would be insufficient to uphold the nationwide program. Where to draw the line is in the first instance a task for the district court." Rothe, 262 F.3d at 1330. Such a lack of evidence cannot merit treating Americans differently by race.

Defendants also did not seek objective validation or corroboration that any of the anecdotal allegations cited in Appendix A are true or objectively representative of any discrimination sought to be addressed by the Section 8(a) or DoD Programs. In fact, Defendants do not know whether Congress relied upon any disparity study or piece of social science research cited in Appendix A as the basis for enacting or re-enacting any parts of the Section 8(a) or DoD Programs. (See Plaintiff's Undisputed Facts, No. 102).³⁰

³⁰ A racial classification cannot withstand strict scrutiny based upon speculation about what "may have motivated" the legislature. Shaw, 517 U.S. at 908 n.4. To establish a compelling interest, the government "must show that the alleged objective [to remedy discrimination] was the legislature's 'actual purpose' for the discriminatory classification." Id., citing Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 730 (1982). See United States v. Virginia, 518 U.S. 515, 536 (1996) (equal protection violation where "alleged objective" of diversity differed from "actual purpose underlying the discriminatory classification" of maintaining separate facilities).

3. The Use of Race Here Is Facially Invalid.

Aside from their application to the simulation and training industry (and other industries), the Section 8(a) Program, the part of the DoD Program which uses the 8(a) program, the provisions of the DoD Program providing for maximizing the number of minority small business concerns participating therein, and DoD's goal for awarding prime contracts to Section 8(a) firms and SDBs (defined in terms of Section 8(d)) are also unconstitutional on their face.

The law that codified the Section 8(a) Program itself designated certain minority and ethnic groups as socially disadvantaged. (Plaintiff's Undisputed Facts, No. 14). See 15 U.S.C. § 631(f). In fact, the intent of Congress was to favor virtually all minority groups, in general, over the larger pool of citizens (including those with lower economic opportunity). The very name of the program that Congress authorized – the Minority Small Business and Capital Ownership Development Program (which is still the statutory name of the program) – highlights its true purpose. The law also specified that the individuals in such groups are "socially disadvantaged" because they "have been subjected to racial or ethnic prejudice or cultural bias because of their identities as members of groups and without regard to their individual qualities." 15 U.S.C. § 637(a)(5). The statute, written in the pre-Croson and pre-Adarand world, does not attempt to make the remedial use of race conditional upon any activity (much less discrimination) by the federal government. See Wygant, 476 U.S. at 274 (plurality op.) (societal discrimination alone is not sufficient to justify a racial classification).³¹ Nor do the regulations for the Section 8(a)

³¹ Insofar as Congress intended to create a conclusive presumption of social disadvantage for the specified groups (i.e., the presumption would be rebutted only if a person was not a member of a group, not whether the person had overcome the alleged social disadvantage), the program on its face also would not be motivated to remedy discrimination. Accordingly, it would be facially unconstitutional. See n.30, supra. Before Defendants "changed" or attempted

Program since they provide that societal discrimination can qualify a person as "socially disadvantaged." See 13 C.F.R. § 124.103.³²

For the same reasons as discussed in connection with the Section 8(a) Program, the part of the DoD Program that uses the Section 8(a) Program also is unconstitutional. (Of course, this would include DoD's separate goal of awarding contracts to Section 8(a) firms.)

The subsection of 10 U.S.C. § 2323(e)(4) that provides for the maximizing of the number of minority small business concerns participating in the DoD Program is unconstitutional on its face. As such, the intent of Congress was not to remedy discrimination by the federal government (by maximizing the numbers of truly disadvantaged firms participating in the DoD Program) but to expressly favor certain racial groups to the exclusion of others. See Contractors Ass'n of Eastern Pennsylvania, 91 F.3d at 597 ("The party challenging the race-based preferences can succeed by showing . . . that the subjective intent of the legislative body was not to remedy race discrimination in which the municipality played a role")

DoD's goal in 10 U.S.C. § 2323(a)(1) for awarding prime contracts to SDBs is also race-conscious and facially unconstitutional. Section 2323(a)(1) incorporates the term "socially and economically disadvantaged individuals" as that term is used in 15 U.S.C. § 637(d) and its

(.continued)

to change their discovery answers, they admitted that the presumption in the Section 8(a) Program was conclusive. (See Plaintiff's Undisputed Facts, No. 14 n.4). Now the SBA claims the presumption is "rebuttable" in that a bona fide member of the groups who has lived in the United States can be denied socially disadvantaged status. However, that has never happened. (Plaintiff's Undisputed Facts, Nos. 14 n.4, 122).

³² Aside from the other fatal infirmities discussed in this Memorandum, the use of societal discrimination to establish social "disadvantage" also makes the Section 8(a) Program unconstitutional as applied and administered by the SBA, and as participated in by DoD.

implementing regulations. On the face of 15 U.S.C. § 637(d), Congress conferred a dual, mandatory presumption of social and economic disadvantage on certain racial and groups – the same groups as in the Section 8(a) Program. 15 U.S.C. § 637(d). (See also Plaintiff's Undisputed Facts, No. 51 (dual presumption of social and economic disadvantage)).³³ Language from the House Report is instructive and states that the awarding agency cannot deny the presumption to the specified racial and ethnic groups. See H.R. Rep. No. 949, 95th Cong., 2d Sess., at 11 (1978). It also reveals that the purpose of the mandatory presumption was administrative and bureaucratic convenience, and to promote uniform application, rather than to remedy discrimination. *Id.*³⁴ That is an improper purpose: "[T]he interest in avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered the effects of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification." *Croson*, 488 U.S. at (citation omitted).

Debate surrounding the amount of the prime contract goal in 10 U.S.C. § 2323 for SDBs

³³ As with the Section 8(a) Program, the vast majority of firms owned and controlled by socially and economically disadvantaged individuals under Section 8(d) – so-called SDBs – received a presumption of disadvantage (approximately 97.3% as of November 2, 1999, and 93% as of February 20, 2003). (See Plaintiff's Undisputed Facts, No. 55 n.5).

³⁴ Despite the language of the statute, the SBA claims that it treats the dual presumption in 15 U.S.C. § 637(d) as rebuttable, in the same manner that the SBA now contends it operates the presumption in the Section 8(a) Program. (See Plaintiff's Undisputed Facts, No. 52). Given the meaning of the term "socially and economically disadvantaged individuals" in 15 U.S.C. § 637(d), which is incorporated into the DoD Program (and because the SBA may change its regulations, voluntarily or involuntarily, to conform to 15 U.S.C. § 637(d)), Plaintiff is entitled to an injunction against use of the mandatory dual presumption in connection with DoD's goals. See *Adarand v. Slater*, 528 U.S. 216, 223 (2000) (fact that state agency certified plaintiff as "disadvantaged" did not moot case because federal agency had not yet accepted state agency's certification, and state agency did not give presumption of disadvantage to minority groups as required by federal regulation; "Given the patent incompatibility of the [state] certification with the federal regulations, it is far from clear that these possibilities [that the certification would be challenged] will not become reality").

lends further support to the argument that the goal was designed to benefit minorities *per se* rather than SDBs as a whole. See 132 Cong. Rec. H6320-25 (daily ed. Aug. 14, 1986) (statements of Rep. Dickinson and Rep. Savage). The five percent goal was derived from political considerations, not an attempt to quantify alleged discrimination or a qualified pool. See 132 Cong. Rec. H6324 (daily ed. Aug. 14, 1986) (statement of Rep. Savage).³⁵

The facial inconsistency between Sections 8(a) and 8(d) of the Small Business Act and their implementing regulations (singular presumption versus dual presumption) also means that the set-aside scheme and DoD's use of that scheme cannot be narrowly tailored.

Plaintiff acknowledges United States v. Salerno, 481 U.S. 739, 745 (1987), in which the Supreme Court stated that in a facial challenge a litigant "must establish that no set of circumstances exists under which [a statute] would be valid." However, the language in Salerno was criticized as possibly dictum by a plurality in City of Chicago v. Morales, 527 U.S. 41, 55

³⁵ The five percent goal for SDBs in 15 U.S.C. § 644(g) is in furtherance of the goals and policies of 15 U.S.C. § 637(d)(1) and also is race-conscious. It emerged from the legislative process but without clear legislative history. As with the DoD program, Congress created the race-conscious goals in Section 644(g) without reference to the number of qualified, ready, willing and able minorities – or the number of minorities discriminated against. Accordingly, the numbers amount to overt racial balancing and are unconstitutional. Grutter, 123 S. Ct. at 2329 (“to assure . . . some specified percentage of a particular group merely because of its race or ethnic origin [quoting Bakke, 438 U.S. at 307 (opinion of Powell, J.)] . . . would amount to outright racial balancing, which is patently unconstitutional.”); Freeman v. Pitts, 503 U.S. 467, 494 (1992) (“Racial balance is not to be achieved for its own sake”); Croson, 488 U.S. at 507.

In discussing similar language in Section 987 of S. 14 (Energy Policy Act of 2003) – which uses the term “socially and economically disadvantaged small business concerns” as defined in 15 U.S.C. § 637(a)(4) – the administration of President George W. Bush stated that Section 987 provides for certain preferences based on race. It further stated that Section 987 and other sections of S. 14 should be revised to apply only to the extent consistent with equal protection. (See Exhibit 55 (Statement of Administration Policy, May 8, 2003), p. 3) (The Statement is also available at <http://www.whitehouse.gov/omb/legislative/sap/108-1/s14sap-s.pdf>). For the convenience of the Court, a copy of Section 987 is attached as Exhibit D.

n.22 (1999) (plurality op., Stevens, J.) ("To the extent we have consistently articulated a clear standard for facial challenges, it is not the Salerno formulation, which has never been the decisive factor in any decision of this Court, including Salerno itself We need not, however, resolve the viability of Salerno's dictum. . . ."). Moreover, as the Federal Circuit stated in Berkley v. United States, 287 F.3d 1076, 1090 & n.14 (Fed. Cir.2002), the Supreme Court has not addressed the so-called "Salerno test" in key equal protection cases like Adarand. Among other things, application of the Salerno test to strict scrutiny cases would effectively gut the narrow tailoring test by making a racial classification narrowly tailored if it could be upheld as to merely one person so classified. The Berkley court also noted, 287 F.3d at 1090, n.14, that cases involving facial challenges have included United States v. Virginia, 518 U.S. 515 (1996) (involving the government's facial equal protection challenge to Virginia Military Institute's policy of single-sex education). See also Crosby, 488 U.S. at 483 (noting that Plaintiff filed a facial and an as-applied challenge).

**4. Evidence of Past Discrimination for One Group
Cannot Be Used to Justify Preferences for Other Groups.**

The government has the burden of proving that each of the preferred groups was entitled to the presumption(s) before including them in the programs. Without such proof, the government has no need to resort to race-conscious measures for that group. Where a preference has included groups for which there is no evidence of past discrimination or its continuing effects, or both, some courts have treated the issue as falling under the rubric of narrow tailoring. See Builders Ass'n of Greater Chicago, 256 F.3d at 647-48 (discussing a "laundry list of favored

minorities," including ancestors from Spain and Portugal, and concluding that the list was over-inclusive).³⁶ Of course, the Section 8(a) Program also confers a presumption of social disadvantage on those very groups. (Plaintiff's Undisputed Facts, No. 43). It thereby creates an equally infirm classification.

However, the better conclusion is that without the requisite proof of discrimination against specific groups, the government lacks a compelling interest to use race at the outset in favor of these groups and against others. Contractors' Ass'n of Eastern Pennsylvania, 6 F.3d at 1007 (3d Cir. 1993) (analyzing evidence for each minority under "compelling interest" rubric; "Consistent with strict scrutiny, we must examine the data for each minority group contained in the [City] Ordinance"); Cunico v. Pueblo School District No. 60, 917 F.2d 431, 437 (10th Cir. 1990) ("The purpose of race-conscious affirmative action must be to remedy the effects of past discrimination against a disadvantaged group that itself has been the victim of discrimination"). The Federal Circuit instructed that "the district court should determine whether evidence of discrimination is sufficiently pervasive across racial lines to justify granting a preference to all five purportedly disadvantaged racial groups included under the 1207 program [later codified as 10

³⁶ "Even if 'Hispanic,' . . . can be stretched to include people of Portuguese origin . . . the concern with discrimination on the basis of Hispanic ethnicity is limited to discrimination against people of South or Central American origin, who often are racially distinct from persons of direct European origin. . . . The concern with racial discrimination does not extend to Spanish or Portuguese people, or the concern with ethnic discrimination to persons of Spanish or Portuguese ancestry born in the United States; but even as to those born abroad, there is nothing to differentiate immigrants from Spain or Portugal from immigrants from Italy, Greece, or other southern European countries so far as a history of discrimination in the United States is concerned. . . . Anyone of recent foreign origin might be able to demonstrate that he or she was a victim of ethnic discrimination, but to presume such discrimination merely on the basis of having an ancestor who had been born in the Iberian peninsula is unreasonable." Builders Ass'n of Greater Chicago, 256 F.3d at 647 (internal citations omitted).

U.S.C. § 2323].” *Rothe*, 262 F.3d at 1330.

The government cannot meet its burden of proving discrimination against each preferred group.

B. The Programs Are Not Narrowly Tailored, Especially As Applied to the Simulation and Training Industry.

Any race-conscious programs must be narrowly tailored.³⁷ Accordingly, besides demonstrating the necessary compelling interest, the government also must show that the remedies chosen are the "less restrictive means" for furthering that interest (i.e., they fit with greater precision than any other means). See *Wygant*, 476 U.S. at 280 n.6 (plurality op.); *Croson*, 488 U.S. at 509 (plurality op., O'Connor J.) (race may be used "[i]n the extreme case" of deliberate exclusion); *Engineering Contractors v. Metro. Dade County*, 122 F.3d 895, 926 (11th Cir. 1997) (acknowledging that racial preferences are a "last resort") (citations omitted).

Courts particularly have emphasized (1) the imperative to use race-neutral means before the government takes any race-based action; and (2) the need to ensure that the race-based goal chosen bears a close relationship to the available pool of ready, willing and able minority contractors in the qualified labor pool. This is just one of many reasons why Defendants' use of race fails.

1. Merger of All Racial Groups.

The five percent statutory goal for SDBs (in the DoD Program and Section 644(g)), the

³⁷ Most courts analyze the narrow tailoring part of strict scrutiny using the multi-prong factors in *United States v. Paradise*, 480 U.S. 149, 171 (1987) (plurality op.).

separate 8(a) goal, and the goal of maximizing contracts to minority-owned firms, can be met by an award to any qualified firm in those categories. Just as there is no effort to identify which groups really have been affected by alleged past discrimination, there is no limit to the groups which obtain benefits.³⁸ Even if an industry had evidence only of discrimination against African-Americans, no contract would ever have to be awarded to an African-American firm to satisfy DoD's racial goals. The end result is that the programs do not, and cannot, apportion federal contract dollars only to those groups of individuals who have suffered discrimination in pertinent industries or to those industries where the requisite discrimination may exist. The programs, which use race and must be justified on remedial grounds, dispense their benefits in a non-targeted (and basically random) manner to the presumed groups. While the SBA contends the 8(a) program is intended to facilitate the entry of firms into government procurement and aid their development, the concentration of contract dollars among a few firms denies or limits development opportunities for many other firms. (See Exhibit C (Excerpts of The Abuses in the SBA's 8(a) Procurement Program, Hearing Before the Committee on Small Business of the House of Representatives, 104th Cong., 1st Sess., 7 (1995) (testimony of Karen Lee of the SBA)) (as of December 1995, the largest 200 companies in the Section 8(a) Program commanded 50.4 percent of contracts in terms of dollar value).

The random inclusion of racial groups for which there is no evidence of past discrimination, especially in the simulation and training industry, reflects a program that cannot withstand strict scrutiny. See *O'Donnell*, 963 F.2d at 427 (random inclusion of racial groups for

³⁸ The person who claims that he was the principal draftsman of Appendix A did not do a group-specific analysis as part of the post-Adarand review of whether there was alleged discrimination of each group presumed to be socially disadvantaged. (See Plaintiff's Undisputed Facts, No. 107).

which there is no history of discrimination in the construction industry raises doubts about the remedial nature of the legislation); Builders Ass'n of Greater Chicago, 256 F.3d at 646 ("[a] state or local government that has discriminated just against blacks may not by way of remedy discriminate in favor of blacks and Asian-Americans and women" (emphasis in original)); Croson, 488 U.S. at 506 (striking program which, *inter alia*, granted preference to Aleuts in absence of a showing of discrimination). The discrimination of each group must be quantified to avoid one group having to share its "remedial relief" with a group who has not been equally wronged. *See Croson*, 488 U.S. at 506. *See also Wygant*, 476 U.S. at 284 n.13 (plurality op.) ("haphazard" inclusion of racial groups "further illustrates the undifferentiated nature of the plan"); In re Sherbrooke Sodding Co., 17 F. Supp. 2d 1026, 1037 (D. Minn. 1998) ("The inclusion of almost all non-white people does not reflect a 'narrowly tailored' focus to the DBE Program.").³⁹

The Court need only compare the programs at issue here to other government race-conscious programs to conclude that, even according to the federal government, the list of presumed groups in Section 8(a) and for 8(d) purposes is both over- and under-inclusive. (Of course, none of the groups should be treated as presumptively disadvantaged for the reasons set forth in this Memorandum, including because their inclusion rests on amorphous claims of

³⁹ In countries like Pakistan and Afghanistan where tribal loyalties, ethnic divisions and religious affiliations are preeminent, the SBA fails to consider the effect of those relationships on this constitutional analysis. Thus, Basques from Spain (if they are American citizens) are granted a presumption of social disadvantage (because, incredibly, they are considered "Hispanic"); however, Basques from France (if they are American citizens) are not granted a presumption of social disadvantage. Similarly, Pashtuns from Pakistan (who are American citizens) receive a presumption but Pashtuns from Afghanistan (who are American citizens) do not. (*See Exhibit B30 (Hairston Dep.)*, p. 113, lines 2-14; p. 109, line 13 through p. 110, line 6; p. 110, line 20 through p. 111, line 1; p. 106, lines 7-10; p. 107, line 21 through p. 109, line 2).

societal discrimination.)

It is over-inclusive in that virtually every minority group is presumed to be disadvantaged, and the definition of "Hispanic" is so grossly overbroad as to include citizens from Spain and Portugal. (Plaintiff's Undisputed Facts, No. 43). It also includes groups like Tongans, who petitioned to be included because they had difficulty comprehending English, and who the SBA initially turned down, but were later included by regulation. (Exhibit B50 (petition and SBA response); see also Plaintiff's Undisputed Facts, No. 44). Without doubt, many members of the presumed groups are recent immigrants to the United States. Yet, they are beneficiaries of a presumption that supposedly finds its evidentiary basis in an objective state of facts: that the overwhelming majority is or has been so discriminated against (by the federal government) that proof of such discrimination can be assumed. That assumption – which never held true – is now completely undermined by the last few decades of strong immigration by members of these groups.

The SBA recognizes that an "individual's social disadvantage must be rooted in treatment which he or she has experienced in American society. . . . [The Section 8(a) Program] is not designed to assist newcomers to America who have been oppressed in foreign lands." Definition of Social Disadvantage, 45 Federal Register 79414 (December 1, 1980) (preamble). Nevertheless, the presumption of social disadvantage inexplicably applies to some groups for which a history of discrimination is unlikely because they were barely present in the country until recently. See LaNoue, George R. and John C. Sullivan, Presumptions for Preferences: The Small Business Administration's Decisions on Groups Entitled to Affirmative Action, 6 Journal of Policy History 439 (1994). See generally LaNoue, George R. and John C. Sullivan, Gross Presumptions:

Determining Group Eligibility for Federal Procurement Preferences, 41 Santa Clara L. Rev. 103 (2000).

Members of the designated groups who are immigrants do not have to specify the reason for their claim of social disadvantage when they apply to the Section 8(a) program because they also are entitled to rely on the presumption afforded them. (See Exhibit B30 (Hairston Dep.), p. 118, lines 12-18). Of course, Defendants are unaware of the identity or number of firms certified to participate in the Section 8(a) and DoD Programs pursuant to a racial or ethnic presumption which would be able to establish individual social disadvantage without those presumptions. (Plaintiff's Undisputed Facts, No. 57).

The federal government apparently also must believe that the scheme here is underinclusive. Other federal programs, which purport to be remedying the effects of discrimination, also grant certain groups presumptive disadvantaged status and valuable benefits. Since the federal government is not discriminating against minorities – intentionally or through policies or practices that unfairly affect minorities – the federal government is left with having to justify the programs at issue on its alleged passive participation in the discriminatory acts of others. Consequently, the list of presumed groups (logically) should be consistent across the myriad of federal programs – direct procurement, federal financial assistance and other programs. It is not. For example, Section 1101(b)(2)(B) of the Transportation Equity Act for the 21st Century (“TEA-21”), Pub. L. No. 105-178, 112 Stat. 107 – which was at issue in the most recent Adarand proceedings – provides that women also shall be presumed to be socially and economically disadvantaged. Yet, the SBA denied women disadvantaged status for purposes of Section 8(a) in 1982, and Defendants still contend that women are not entitled to such status.

(Plaintiff's Undisputed Facts, No. 50). The SBA also denied presumptive disadvantaged status to Hasidic Jews for the Section 8(a) Program. (Plaintiff's Undisputed Facts, No. 49). However, the U.S. Department of Commerce considers Hasidic Jews to be eligible for assistance under Commerce's Minority Business Development Agency. See 15 C.F.R. § 1400.1(b), (c).

2. The Programs Fail Because The Government Did Not First Consider And Exhaust Race-Neutral Mechanisms.

The Supreme Court found that the race-based program at issue in Croson was not narrowly tailored, in part, because the government apparently had not considered "race-neutral" means that might increase minority (and similarly-situated non-minority) participation in contracting before adopting its race-based measure. 488 U.S. at 507. After a compelling interest has been identified and properly documented, and before any race-conscious efforts may be taken, a legislature or agency first must consider and use race-neutral means. See Adarand, 515 U.S. at 237-238 (remanding action to determine "whether there was 'any consideration of the use of race-neutral means to increase minority business participation' in government contracting") (quoting Croson, 488 U.S. at 507); Walker v. City of Mesquite, 169 F.3d 973, 986 (5th Cir. 1999) ("A race-conscious remedy is justified, after race-neutral remedies have been considered and found wanting, if it is the only effective means by which to remedy the effects of past discrimination"); Williams v. Babbitt, 115 F.3d 657, 666 (9th Cir. 1997) (A "race-conscious remedy will not be deemed narrowly tailored until less sweeping alternatives – particularly race neutral ones – have been considered and tried.").

The Court in Croson emphasized that race-neutral remedies may be sufficiently effective so as to avoid the use of race. Minority businesses tend to be smaller and less established.

Accordingly, race-neutral financial and technical assistance programs can be equally effective in achieving an increase in opportunities for truly disadvantaged businesses, including minority-owned businesses. See Croson, 488 U.S. at 508-510 (plurality op., O'Connor, J). Where race-neutral means have been used, “[t]he Supreme Court has also suggested that the legislative body make findings that pre-existing antidiscrimination provisions have been enforced but unsuccessfully.” Rothe, 262 F.3d at 1331.

Neither Congress nor the SBA considered the operation of non-race-conscious alternatives, such as anti-discrimination laws, before establishing the race-conscious requirements in the Section 8(a) Program. (See Plaintiff's Undisputed Facts, No. 115). In fact, no other alternative to the use of race has ever been used in the Section 8(a) Program. (Plaintiff's Undisputed Facts, No. 35). The SBA also has not used other, race-neutral means that might effectively address the purported present effects of past discrimination for minority contractors (as well as similar problems for non-minorities), such as different standards regarding start-up costs, bonding costs or other criteria for emerging businesses. (See Plaintiff's Undisputed Facts, No. 117).⁴⁰ Those facts alone doom the Section 8(a) Program, and DoD's use of SBA's set-aside scheme.⁴¹

⁴⁰ The SBA also did not have statistics or other evidence to show the level of participation of minorities before race-conscious programs were established. (See Plaintiff's Undisputed Facts, No. 116).

⁴¹ See also Paradise, 480 U.S. at 199-200 (O'Connor, J., dissenting) (district court's race-based remedial order was not narrowly tailored because the court "had available several alternatives" that would have achieved the objectives in a less intrusive manner.)

3. There Has Been No Proper Comparison Of The Numerical Target To A Qualified Contractor Pool In The Relevant Industry.

Because there has been no identified discrimination in the simulation and training industry, Defendants cannot explain how the contract goals for Section 8(a) firms or SDBs (or the maximization of minority contractors participating in the DoD Program) remedy a shortfall between the number of qualified minority firms and the amount of business those firms receive. Indeed, Defendants do not know what proportion of non-SDB awards go to firms owned by minorities. Thus, the goals are unrelated to any discrepancy between the proportion of contracts going to minority-owned firms and the proportion of minority-owned firms that are qualified, ready, willing and able in general or to such firms in the simulation and training industry in particular. The goals simply bear no coherent relationship (i.e., they are wholly unrelated) to any alleged discrimination (including in DoD contracting).

The programs in question here permit, indeed require, Defendants to set aside a percentage of its procurements based primarily on race, without considering whether any discrimination ever existed, whether there are continuing effects of that discrimination or whether those effects would be remedied by awards based on race. Because the racial preferences for minorities employed by Defendants "cannot in any realistic sense be tied to any injury suffered by anyone," *Crosby*, 488 U.S. at 499, Defendants cannot show that those presumptions, or their "goals," or the unequal treatment imposed upon companies like DynaLantic are narrowly tailored to remedy any past discrimination.

Defendants do not maintain separate statistics for the simulation and training industry. Nor do they have any disparity study for the industry. Accordingly, Defendants do not know the

identity or number (including by separate racial/ethnic group) of Section 8(a) firms, SDBs, minority and non-minority firms that were or are qualified, ready, willing or able to perform or bid on contracts or subcontracts in the simulation and training industry or that manufacture simulation and training equipment. (See Plaintiff's Undisputed Facts, Nos. 148, 150). Therefore, neither Congress nor Defendants could have compared the percentage of procurement dollars awarded to qualified minority contractors in the simulation and training industry with the pool of qualified minority contractors in that industry before implementing race-conscious mechanisms.

The same holds true in other industries. Defendants know precious little of the qualified pool of minorities in other areas. Generally speaking, the SBA does not know the number of firms that operate or participate in industries. (Plaintiff's Undisputed Facts, No. 131). DoD's knowledge is almost as sparse. (Plaintiff's Undisputed Facts, No. 130). While working on the post-Adarand review, DoJ also did not know the number of minority firms that were qualified, ready, willing and able to perform in each industry. (Plaintiff's Undisputed Facts, No. 132; see also id., Nos. 133-134). This kind of omission was considered fatal to the race-based remedial legislation at issue in Croson, 488 U.S. at 502, and is equally fatal to the scheme here.

4. The Programs Have No Meaningful Waiver Mechanisms or Protections for Non-Beneficiaries.

In the absence of valid waiver mechanisms, race-conscious programs cannot be considered narrowly tailored. Croson, 488 U.S. at 508. Such provisions include sunset provisions, which are noticeably absent in the Section 8(a) Program. Only nine firms have graduated early (i.e., left before the nine year term) from the Section 8(a) Program throughout its long history. (See Plaintiff's Undisputed Facts, No. 123). Well-crafted administrative waiver

mechanisms also should enable the government to exclude from the scope of beneficiaries of affirmative action those who could compete effectively outside the plan. *See Croson*, 488 U.S. at 507 ("no inquiry into whether or not the particular MBE seeking a racial preference has suffered from the effects of past discrimination"); *Shurberg Broadcasting v. FCC*, 876 F.2d 902, 917 (D.C. Cir. 1989) ("There must be some opportunity to exclude those individuals for whom affirmative action is merely another business opportunity."), *rev'd on other grounds sub nom., Metro Broadcasting v. FCC*, 497 U.S. 547 (1990).

The programs at issue lack crucial waiver provisions and protections for non-beneficiaries. No member of the Section 8(a) Program that has ever spent any time in U.S. society has ever been denied socially disadvantaged status. (Plaintiff's Undisputed Facts, No. 122). When a person certifies that he holds himself out as a member of a group presumed to be socially disadvantaged for purposes of the Section 8(a) Program, there is no further inquiry, generally speaking, as to whether such person is, in fact, a member of the group. (Plaintiff's Undisputed Facts, No. 121). It is difficult for the SBA, which has the burden of proof, to rebut the presumption of social disadvantage for designated group member applicants to the Section 8(a) program. No particular level of educational achievement, professional or career attainment, or net financial worth alone disqualifies a designated group member from the presumption of social disadvantage. In fact, the SBA's representative could not think of any factor that alone would necessarily disqualify a designated group member from the presumption of social disadvantage. (Plaintiff's Undisputed Facts, Nos. 125-128).

In addition, once a group is included as a designated group, there is no subsequent investigation into whether the group should be removed and no longer be entitled to the

presumptions of social and/or economic disadvantage. No group that has ever received a presumption of social disadvantage for purposes of the Section 8(a) program, or a presumption of social and economic disadvantage for purposes of Section 8(d), has ever been removed from that list of designated groups. (Plaintiff's Undisputed Facts, Nos. 118-119). DoJ, in consultation with the SBA, stated that there is an indication that significant numbers of the individuals in the preference classes are not socially disadvantaged. (Plaintiff's Undisputed Facts, No. 120). For example, according to DoJ, 1990 Census figures show that Asian-Americans defy most of the stereotypes surrounding ethnic minorities as they are on par with, or out-performing, whites on important economic indicators. *Id.*⁴²

The definitions of "economic disadvantage" that Defendants use in the Section 8(a) and DoD Programs permit relatively wealthy individuals in our society to participate. The actual participation of wealthy individuals in the Section 8(a) Program remains a significant problem. (See Plaintiff's Undisputed Facts, No. 24).

Further, there is no effective waiver mechanism in the scheme that allows for "individualized" consideration of particular industries. *See Croson*, 488 U.S. at 507-08. If there was, Defendants would not be using affirmative action and set-asides in the simulation and training industry because there is no evidence of discrimination in that industry. Moreover, an individual in one of the groups presumed to be socially disadvantaged in the Section 8(a) Program, or socially and economically disadvantaged for purposes of the DoD Program (including the goal in 10 U.S.C. S 2323(a)(1)), is presumed to be socially disadvantaged without

⁴² DoJ's statements were contained in the March 21, 1995 draft. (See Exhibit B29). In response to a subpoena *duces tecum*, DoJ produced a copy of apparently the same document, without its cover sheet and without the draft legend. (See Exhibit B64).

regard to the industry or industries in which the individual participates. (See Plaintiff's Undisputed Facts, No. 54). The Section 8(a) program applies with equal force in all industries in which the federal government participates, including ones (like DynaLantic's) in which there is no evidence of past discrimination. Any qualified contractor who participates in the Section 8(a) Program may receive a set-aside, including for simulation and training equipment, regardless of whether the set-aside would redress discrimination (including the purported "social disadvantage" that effectively entitled the contractor to participate).⁴³

Unlike the non-minority contractor in Adarand, who was at least permitted to submit a bid, the Section 8(a) Program (and DoD's use of that program) completely precludes DynaLantic from competing. DynaLantic is completely and totally excluded from the procurement process. Indeed, unlike other programs, Defendants can set aside contracts without any statistics in DynaLantic's industry, and without regard to the utilization of minority contractors or small business concerns owned and controlled by "socially and economically disadvantaged individuals."⁴⁴

Firms outside the Section 8(a) Program, like DynaLantic, cannot compete for either sole source or "competitively" awarded Section 8(a) contracts. Because DynaLantic cannot participate in the Section 8(a) Program, DynaLantic generally does not discover that the government has set aside or let sole source contracts until after award. Because sole source

⁴³ The fact that every minority considered to be disadvantaged in the programs is treated as having been equally discriminated against regardless of industry, geographic region or other likely differentiating factors proves that no effort was or is made to tailor the remedy to provide relief for the specific minority groups covered by the program. See O'Donnell, 963 F.2d at 427.

⁴⁴ The SBA has never waived consideration of race in contracting because there were not enough qualified minority contractors in an area. (Plaintiff's Undisputed Facts, No. 124).

awards are not advertised, there is generally no way for someone, including members of the public, to find out about sole source awards under the Section 8(a) Program before the awards are made. (Plaintiff's Undisputed Facts, No. 17).

5. Race is the Primary Factor In Determining Eligibility.

Race is the primary factor in the programs, and certainly is in effect the dispositive factor for determining eligibility for presumptively disadvantaged members given the high "net worth" standard. Where race is the primary factor for determining eligibility into a program, it is difficult to sustain a claim of narrow tailoring. See Croson, 488 U.S. at 508 (race-based set-aside program was problematic because it made the color of an applicant's skin the sole relevant consideration). Here, the vast majority of firms participating in the Section 8(a) Program are owned and controlled by individuals who were presumed to be socially disadvantaged. (Plaintiff's Undisputed Facts, Nos. 55-56). Race is the real litmus test for eligibility, and the true gateway to the programs.

6. The Section 8(a) Program, and DoD's Use Of That Program, Has Unlimited Duration, and Is Not Subject to a Meaningful or Periodic Review.

Affirmative action must only be a "temporary" deviation from "the norm of equal treatment of all racial and ethnic groups." Croson, 488 U.S. at 510. A particular measure therefore should only last as long as it is needed. See Adarand, 515 U.S. at 238 (quoting Fullilove v. Klutznick, 448 U.S. 448, 513 (1980) (Powell, J., concurring) (inquiry must be into "whether the program was appropriately limited such that it 'will not last longer than the discriminatory effects it is designed to eliminate.'")); O'Donnell, 963 F.2d at 428 (ordinance setting aside a percentage of

city contracts for minority businesses was not narrowly tailored, in part, because it contained no "sunset provision" and no "end [was] in sight").

Even though it is over twenty years old, the Section 8(a) Program does not have sunset provision. (See Plaintiff's Undisputed Facts, No. 135). Although the DoD Program has a sunset provision, the DoD Program itself has been constantly extended by Congress (in 1989, 1992, 1999, and 2003). The current expiration date is 2006, with no real expectation that the statute and its race-conscious mechanisms will end. Accordingly, there is no assurance that these race-based presumptions of social disadvantage will remain in effect only so long as is necessary to remedy past discrimination.

Moreover, Congressional hearings and reviews of the Section 8(a) Program have not focused on the need for the racial preference, and Congress does not review the racial requirements in the program when new authorization is enacted. (Plaintiff's Undisputed Facts, No. 136). The SBA does not evaluate the need for the racial requirement either. The government may not leave "the remedy in force indefinitely, with no effort to determine whether, the remedial purpose attained, continued enforcement of the remedy would be a gratuitous discrimination against non-minority persons." Builders Ass'n. of Greater Chicago, 256 F.3d at 646.⁴⁵ Without a

⁴⁵ The SBA identified to the GAO seven alleged narrow tailoring factors for the Section 8(a) Program. (See Plaintiff's Undisputed Facts, Nos. 98-99 and Exhibit B32 (Hairston Dep. Ex. No. 24), p. 8-9). None carry the day. Responding to the seven factors, Plaintiff notes that (1) the test for social disadvantage disfavors non-presumed group members and lacks sufficient specificity to permit their meaningful participation; (2) the test for economic disadvantage permits wealthy individuals to participate, as repeatedly documented; (3) participating individuals can accumulate significant wealth from set-asides, and the Program itself is of unlimited duration; (4) annual review of participants has not weeded out the wealthy or prevented repeated abuses; (5) the SBA lessened the evidentiary standard but the program still overwhelmingly is comprised of individuals presumed to be socially disadvantaged; (6) firms can receive virtually unlimited competitive Section 8(a) awards and the "limitation" on sole source awards still is far too large;

meaningful periodic review of the use of race the programs become "institutionalized" and their constitutional *raison d'être* ceases to exist. Such is the case here.

Because Defendants have neither a compelling interest to use race nor demonstrated that their use of race is narrowly tailored, their actions violate Plaintiff's right to equal protection under the Fifth Amendment to the U.S. Constitution. For the same reasons, they violate Plaintiff's rights under 42 U.S.C. § 1981 (outlawing racial discrimination in the making of contracts) and 42 U.S.C. §§ 2000d, *et seq.* (outlawing the use of federal funds for a discriminatory purpose).⁴⁶

(.continued)

and (7) Defendants have never used the so-called benchmarks to administer the program. The "certification process," which relies on a presumption of social disadvantage for specified group members and excludes significant assets from the net worth calculation, does little to remedy the problem.

⁴⁶ Prior to the passage of the Civil Rights Act of 1991, it was well-settled that both Sections 1981 and 1982 (which are *in pari materia*) reached discrimination by the federal government. *E.g.*, District of Columbia v. Carter, 409 U.S. 418, 422 (1973) (Section 1982 is “an ‘absolute’ bar to all such [racial] discrimination, private as well as public, federal as well as state” (emphasis original)); Baker v. F&F Investment Co., 489 F.2d 829, 833 (7th Cir. 1973) (same rule applies to Section 1981); La Compania Ocho, Inc. v. U.S. Forest Service, 874 F. Supp. 1242, 1251 (D.N.M. 1995) (federal government subject to Section 1981).

The Supreme Court has held that there is a strong presumption against repeal by implication. *See Morton v. Mancari*, 417 U.S. 535, 549 (1974) (discussing the “cardinal rule . . . that repeals by implication are not favored.”). Accordingly, even though Section 1981 does not explicitly state that it reaches discrimination under color of federal law, it does. *See La Compania Ocho*. Accordingly, Plaintiff is entitled to injunctive and declaratory relief against Defendants. The D.C. Circuit in Hohri v. U.S., 782 F.2d 227, 245 n.43 (D.C. Cir. 1986), stated that the Civil Rights Acts do not waive sovereign immunity against the United States for monetary relief. However, the court did not consider declaratory relief. *Id.*, 782 F.2d at 242, n.33.

With respect to Section 2000d, federal funding is given to non-federal entities (*i.e.*, the Section 8(a) firms). In turn, those firms provide financial assistance – accrual of earnings and other support – to the ultimate beneficiary (*i.e.*, the individuals presumed to be disadvantaged). *See* 13 C.F.R. § 124.404 (Section 8(a) firms may receive, for example, financial assistance and surplus government property).

C. Defendants' Use of the Programs Unfairly Has Harmed and Continues to Harm DynaLantic.

SBA and DoD use, or can use, the Section 8(a) program to contract for goods and services wherever permitted or applicable by regulation or law. They have not made a decision to refrain from using the Section 8(a) program for any particular procurement of goods or services. (Plaintiff's Undisputed Facts, Nos. 76-77). The Section 8(a) program was not established to remediate any disparity or deficiency in any particular industry in terms of federal contracting. (Exhibit B30 (Hairston Dep.), p. 243, line 14 through p. 245, line 5). It is the SBA's position that, for purposes of the Section 8(a) Program, contracts can be awarded in a particular industry even if there is no evidence or proof of discrimination in that industry. (Exhibit B30 (Hairston Dep.), p. 227, lines 12-19). Generally, including with respect to the simulation and training industry, the decision to set aside contracts pursuant to the Section 8(a) Program is not dependent on findings of discrimination in any particular industry or region. (Plaintiff's Undisputed Facts, No. 15). Nor is the award of Section 8(a) contracts dependent on any statistical study (i.e., a finding of alleged underutilization or disparity is not required before the government can set aside and award contracts). See 15 U.S.C. § 637(a); 13 C.F.R. Part 124.⁴⁷

According to DoD, the preferences or priorities for awarding DoD contracts, from highest to lowest, is (a) Federal Prison Industries; (b) the National Industries for the Blind and National Industries for the Severely Handicapped (“NIB/NISH”) programs; (c) 8(a) concerns that are also

⁴⁷ Of course, this is in direct contrast to the provisions of the Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, which established the government-wide SDB program. In that program, according to the SBA's representative, the award of contracts would not be permitted unless there was proof or evidence of discrimination. (Exhibit B30 (Hairston dep.), p. 227, line 21 through p. 228, line 10).

HUBZone businesses; (d) 8(a) concerns generally; (e) HUBZone businesses generally; (f) Small Business Set-Asides; and (g) full and open competition. (Exhibit B33 (Foreman Dep.), p. 105, line 9 through p. 106, line 13; p. 322, lines 9-20; errata sheets, p. 354). The priorities exist irrespective of particular industries or the types of procurements, and are not dependent on the level of minority, SDB or 8(a) participation regarding past or future procurements or a particular industry or Standard Industrial Classification ("SIC") Code or North American Industrial Classification System ("NAICS") Code. (Exhibit B33 (Foreman Dep.), p. 108, lines 8-13; p. 109, lines 13-19).

Similarly, where procurement activities otherwise satisfy applicable requirements, DoD can use the Section 8(a) Program to procure equipment, goods and services in the simulation and training industry. Although Defendants withdrew the APT procurement from any outside contracting process, Defendants have not disclaimed the intention to use the Section 8(a) Program (or DoD's use of that program) in connection with any future procurement of military simulation equipment when the use of such program(s) would be otherwise appropriate. (See Plaintiff's Undisputed Facts, No. 79). In fact, DoD still is procuring simulation and training equipment, and goods and services in the simulation and training industry. (*Id.*, No. 82).⁴⁸

Defendants do not contest that firms have been admitted to the Section 8(a) Program (and may continue to be admitted to the Section 8(a) Program), pursuant to a presumption of social disadvantage, without making an individualized showing of social disadvantage, and that certain

⁴⁸ In reality, the Section 8(a) Program is the highest priority for the types of contracts and equipment that DynaLantic bids on or seeks to bid on, like the APT Procurement and the CH-46E procurement. It is such set-aside awards, not the other "priorities," that have prevented DynaLantic from competing. (See Exhibit A (Weinstock Dec.), ¶ 21) (noting the set-aside pursuant to the Section 8(a) Program).

of those firms have received (and may in the future receive) through their participation in the Section 8(a) Program, contracts to supply “simulation and training equipment.” (Plaintiff’s Undisputed Facts, No. 83). Defendants have continued to use Section 8(a) set asides, which have injured and continue to injure DynaLantic. For example, pursuant to the Section 8(a) Program, on or about February 5, 1999, the procurement for the CH-46E Aircrew Procedures Trainer Modification Update was set aside and awarded to a Section 8(a) firm. (Plaintiff’s Undisputed Facts, No. 80). But for the set-aside pursuant to the Section 8(a) Program, DynaLantic would have been qualified, ready, willing and able to bid on the CH-46E Aircrew Procedures Trainer Modifications Update. (Plaintiff’s Undisputed Facts, No. 81).

Defendants’ use of set-asides completely prevents DynaLantic from even competing for contracts. (See Plaintiff’s Undisputed Facts, Nos. 7, 81, 84, 137).⁴⁹ The effect is to unfairly and unduly burden non-preferred groups, especially in the simulation and training industry.⁵⁰

SDBs (such as Section 8(a) firms) and non-SDBs compete for the same types of contracts awarded by DoD. (See Plaintiff’s Undisputed Facts, No. 85). However, DynaLantic and other

⁴⁹ “The exclusion of even one [person] for impermissible reasons harms that [individual] and undermines public confidence in the fairness of the system.” I.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 142 n.13 (1994). Here, there are many other small businesses besides DynaLantic that are harmed by Defendants’ impermissible use of race. Such set-asides are highly disfavored by other departments of the federal government even when, unlike here, there may be alleged discrimination in an industry. The set-aside provisions of TEA-21, dealing with federal financial assistance to states and local governments, in transportation contracts are a notable contrast to the set-aside scheme at issue here. See U.S. Dept. of Transportation, The New DoT DBE Rule Is Narrowly Tailored at 1 (Set-asides are limited to egregious cases of discrimination where other remedial mechanisms have not worked) (available at <http://osdbuweb.dot.gov/business/dbe/NTcht.html?prettyprint=yes>). (A copy also is attached as Exhibit B65).

⁵⁰ This Section also discussed the sixth narrow tailoring factor under Paradise – the degree and type of burden caused by the Programs.

similar businesses are ineligible to bid for contracts that DoD lets through the Section 8(a) Program because DynaLantic has never been a participant in the Section 8(a) Program. Since SDBs and non-SDBs compete for the same type of contracts, the increase in contracts to SDBs comes at the expense of non-SDBs. Thus, besides total exclusion from open competition, Section 8(a) set-asides doubly penalize firms like DynaLantic because the set-asides strengthen DynaLantic's competitors. Given DoD's system of priorities, there is less opportunity for non-Section 8(a) small businesses to compete for any work at STRICOM, NAWCTSD or other procurement agencies that let contracts for which DynaLantic is qualified, ready, willing and able to bid.⁵¹ DynaLantic and other non-minority-owned small businesses are unable to compete for many small dollar programs and, by reason of their small size, unable to compete for high dollar value programs. (See Exhibit A (Weinstock Dec.) ¶ 13). DynaLantic is consequently caught in the ultimate Catch-22.

Accordingly, Defendants' practice of setting aside certain contracts to meet DoD's goals (and maximize the participation of minority firms) injures DynaLantic by disqualifying it from bidding on the business for which it is qualified, ready, willing and able to compete for and bid on. (See Plaintiff's Undisputed Facts, Nos. 7, 81, 84, 137). The injury does not stop when a competitor exits the Section 8(a) Program. History tends to repeat itself regarding the types of awards and use of the Section 8(a) Program because the Section 8(a) Program is DoD's highest priority (other than the Federal Prison Industries and the NIB/NISH programs). Once DoD procures a requirement through the Section 8(a) Program (such as for a helicopter simulator), the

⁵¹ DoD has never done any kind of undue burden or disproportionate impact analysis, review or investigation in connection with the Section 8(a) Program because, according to DoD's representative, the program falls within the purview of the SBA and is statutorily based. (Plaintiff's Undisputed Facts, No. 138).

requirement generally will stay in the Section 8(a) Program (even if the original firm that first received the contract has exited the program) so long as there are other firms in the program that can perform the requirement at a fair market price. Even if a second requirement (e.g., a helicopter simulator) was similar to, but not identical to, the first requirement, the second requirement would go through the Section 8(a) Program (assuming purchase at a fair market price) because of the Federal Acquisition priority system. (See Exhibit B33 (Foreman Dep.), p. 308, lines 9-13; p. 255, line 6 through p. 256, line 13; p. 257, lines 6-13; p. 258, lines 2-22).

Even before strict scrutiny applied to federal race-based programs, DynaLantic formally complained in writing to DoD about the harm and undue burden DynaLantic was suffering. (See Exhibit A3 (May 12, 1995 letter from DynaLantic); Plaintiff's Undisputed Facts, No. 86). In response, DoD conducted a review and determination pursuant to 10 U.S.C. § 2323(g) (the "Review") at NAWCTSD in or about Fall 1995. The review, which concerned NAWCTSD, evaluated the use of SDB set-asides (i.e., the so-called "Rule of Two") at NAWCTSD. The review mentioned but excluded the Section 8(a) Program and the ten percent price evaluation adjustment (which was still in effect in 1995). (Plaintiff's Undisputed Facts, Nos. 86-87).

The Review confirmed the injury to DynaLantic. In reviewing SIC Code 3699 (one of the business codes that NAWCTSD assigned to its contracts and the code that the government assigned to the APT Procurement), the Review stated that:

[d]ata comparing use of the SDB [set-aside] to the total program within the SIC strongly suggests that use of SDB set-asides has caused SIC 3699 to bear a disproportionate share of the contracts awarded by NAWC-TSD to achieve its SDB goal. Further, there is strong evidence that the use of the SDB set-aside, particularly when combined with the use of the 8(a) program in the SIC, is having a substantial negative effect of the ability of non-SDB firms to participate in this SIC at NAWC-TSD.

(Plaintiff's Undisputed Facts, No. 88).⁵² Defendants nevertheless planned to proceed with the APT Procurement for award through the Section 8(a) Program. (Plaintiff's Undisputed Facts, No. 89). See also Exhibit B51 (handwritten notes produced by Defendants in discovery).

Shortly after conducting the Review, DoD suspended its use of the so-called Rule of Two based on advice from DoJ. The Rule of Two violated strict scrutiny. It looked like a sheltered market program where, if there were two or more SDBs qualified to perform a contract, that contract was set aside for bidding between only those minority firms. However, at the time, the term "SDB" essentially meant minorities, and so the Rule of Two was an overly rigid use of race involving minorities and minorities alone. (Exhibit B20 (Small Dep.), p. 179, line 19 through p. 180, line 3; p. 180, lines 13-22; p. 182, lines 1-20). Despite protests to the contrary, the Rule of Two is strikingly similar to the Section 8(a) Program, with its overwhelming membership composed of minority firms whose owners received the benefit of a racial or ethnic

⁵² As stated earlier, Defendants do not track the simulation and training industry *per se*. Despite the separate, recognized existence of the industry, Defendants administer the programs by defining "industry" – for purposes of any disproportionate review, comparison of access to capital and credit opportunities in the Section 8(a) application process, etc. – in terms of six digit NAICS codes (and previously by four digit SIC Codes) published by Commerce. See, e.g., 10 U.S.C. § 2323(g) (no particular "industry category" shall bear a disproportionate share of awards to attain DoD's goals). See also Exhibit B33 (Foreman Dep.), p. 78, line 22 through p. 80, line 13) (using Codes to define industry); Exhibit B30 (Hairston Dep.), p. 202, lines 7-16. The only "industries" that SBA deals with are those that are defined by the NAICS codes. However, there is no code or classification that entirely involves solely goods and services in the simulation and training industry. According to Defendants, that industry is scattered about as part of different codes and activities. (Exhibit B33 (Foreman Dep.), p. 194, lines 5-18; p. 195, line 12 through p. 196, line 4; p. 206, lines 7-13; p. 206, lines 4-6).

presumption.⁵³

To compensate for the loss of the Rule of Two, DoD officials were asked to “make participation of SDBs in [their] contracting and subcontracting programs a number one priority and redouble [their] efforts to achieve and exceed past levels of SDB participation.” DoD Officials also were asked to “increase 8(a) awards, particularly in industries and services where SDBs have not traditionally participated and for firms that have yet to receive an 8(a) award” and “re-emphasize the requirement in 10 U.S.C. 2323(e)(5)(G) that one factor that must be used in evaluating the performance of a contracting officer is the ability of the officer to increase contract awards to SDBs. . . .” It was DoD's policy in 1995 to increase Section 8(a) awards as requested,

⁵³ DoD agrees that the following statements, contained in a letter of February 24, 1998 from DoJ to the Hon. Charles Canady (Foreman Dep. Ex. No. 29), accurately summarizes how DoD had been operating the program known as the Rule of Two (except for perhaps the dollar amount cited):

the Department of Defense (DoD) had been operating a program known as the "Rule of Two," under which procurement contracts were set aside for bidding only by SDBs where the contracting officer found that there were two or more qualified SDBs that could perform the contract. While [DoJ] found that there may be some limited circumstances in which that kind of program might be permissible due to significant disadvantages hindering the ability of minority firms to compete, DoD was implementing it in a manner that was not limited only to such circumstances, but was being administered in all contracting venues. Under this practice, DoD issued approximately \$1 billion of contracts to SDBs every year. In October 1995 [DoJ] directed DoD to end its use of this method of issuing contracts to SDBs.

(Exhibit B40 (DoJ Letter), pp. 4-5; Exhibit B33 (Foreman Dep.), p. 309, line 19, through p. 311, line 5). Like the unconstitutional Rule of Two, the Section 8(a) priorities also apply regardless of industries and operate whenever there are one or more qualified Section 8(a) firms available.

and that policy still is in effect. (Plaintiff's Undisputed Facts, No. 94).⁵⁴

Although total exclusion at the hands of DynaLantic's competitors is serious injury enough, DoD's five percent SDB contract "goal" in 10 U.S.C. § 2323(a)(1) and 15 U.S.C. § 644(g), and its self-established Section 8(a) "goal" figure, are really minimum requirements and unlawful quotas.

As set forth above, DoD's so-called "goals" originate in 10 U.S.C. § 2323 and 15 U.S.C. § 644(g).⁵⁵ Some appear on the face of the statute. Others are negotiated or, in the case of Section 8(a) awards, self-established. (Plaintiff's Undisputed Facts, Nos. 64, 66; Exhibit B30 (Hairston Dep.), p. 151, line 21 through p. 154, line 1). DoD views goals as a floor not to be missed rather than as a ceiling, and seeks to exceed its goals. (Plaintiff's Undisputed Facts, Nos. 60-61). Goals that operate as "floors" are quotas and are unconstitutional. See Bakke, 438 U.S. at 319-320 (opinion of Powell, J.) (even where the Constitution permits consideration of race, it generally

⁵⁴ In connection with this process, the Deputy Secretary of Defense stated that:

I am continuing the initiative I began in fiscal year 1995 to expand the number of individual small disadvantaged business (SDB) concerns to which the Army [Navy, and Air Force] awards at least one contract of \$25,000 or more in fiscal year 1998. Special emphasis should be placed on increasing the number of 8(a) contractors that participate in contracting with the Department, and specifically, 8(a) concerns that have never received a Federal contract. I am pleased to announce that this initiative has resulted in 243 new identifiable SDB concerns that received at least one DoD contract valued at \$25,000 or more in FY 1996.

(Plaintiff's Undisputed Facts, No. 95).

⁵⁵ The methodology for calculating goals is different under the two statutes. According to DoD, both are correct. Using Section 644(g) results in the percentage figure being described in a lower amount. (Exhibit B33 (Foreman Dep.), p. 221, lines 11-18; p. 224, lines 2-12; p. 289, lines 3-17).

forbids the use of racial quotas). Procurement officers at DoD who meet goals get even higher goals subsequently to meet or exceed. Whether procurement officers meet or exceed their goals should be at least a factor in evaluating the officers, including their performance and overall job rating. (Plaintiff's Undisputed Facts, No. 61).⁵⁶

DoD's goals at issue are defined in terms of a racial presumption (i.e., 8(d) for purposes of SDB awards in 10 U.S.C. § 2323(a)(1)(A) and 15 U.S.C. § 644(g), and Section 8(a) for purposes of 8(a) awards). Thus, it would be impossible to achieve such goals (which are race-conscious) without using race as a factor.⁵⁷ In trying to achieve or exceed its five percent goal of awards contracts to "small business concerns owned and controlled by socially and economically disadvantaged individuals," DoD is not guided, concerned or constrained by any alleged utilization or capacity of 8(a) firms, SDBs or minority businesses. (Plaintiff's Undisputed Facts, No. 63). Goals are not tied to data on workforce, whether minority or otherwise, or the existing number of prospective contractors. The "goals" for participation by small disadvantaged businesses or Section 8(a) firms are unrelated to the effect of discrimination by the government on the amount of business for which such firms allegedly were unable to compete. See Builders Ass'n of Greater Chicago, 256 F.3d at 647 (discussing the issue in context of state and local

⁵⁶ Aside from constitutional prohibitions against quotas, Defendants also have ignored Presidential "policy principles" (particularly in the simulation and training industry) regarding the use of race. President Clinton's July 19, 1995 Memorandum for Heads of Executive Departments and Agencies stated as its "policy principles" that "any program must be eliminated or reformed if it: (a) creates a quota; (b) creates preferences for unqualified individuals; (c) creates reverse discrimination; or continues even after its equal opportunity purposes have been achieved." (Exhibit B56 (Memorandum from President Clinton); B20 (Small Dep.), p. 215, line 14 through p. 217, line 12 (authenticating the memorandum)).

⁵⁷ DoD's representative also testified that without the Section 8(a) Program, DoD would not have met its five percent goal for awarding contracts to SDBs. (Exhibit B33 (Foreman Dep.), p. 288, lines 10-20).

programs). Accordingly, regardless of that data (assuming it even exists or is accurate), DoD has at least the goals specified in the statutes.

Besides the statutory goals, SBA negotiates department-wide goals with the DoD pursuant to Section 644(g). When negotiating goals, the SBA starts from the premise that an agency's new goals should be at least the statutory goals or, if higher, the agency's previous goals. (Exhibit B30 (Hairston Dep.), p. 150, line 19 through p. 152, line 13). How DoD then allocates the accomplishment of those goals through its subordinate departments is DoD's choice. (Plaintiff's Undisputed Facts, No. 64). The government-wide SDB goal is statutory (see 15 U.S.C. §644(g)); the SBA is unaware of any provision in the statute that would require or permit an adjustment of a particular numerical goal should any of the programs result in a disproportionate impact on non-8(a) firms or non-SDBs. In fact, SBA's representative did not know if the Section 8(a) program goals or the SDB goals were ever adjusted if the use of any of the programs resulted in a disproportionate impact on non-8(a) firms or non-SDBs. (Plaintiff's Undisputed Facts, No. 70).

According to DoD, in fiscal year 2002, DoD had a goal of awarding 5.1 percent of its prime contracts dollars to SDBs and a goal of awarding 2.0 percent of its prime contracts dollars through the Section 8(a) Program; in fiscal year 2003, DoD has a goal of awarding 5.2 percent of its prime contracts dollars to SDBs and a goal of awarding 2.1 percent of its prime contracts dollars through the Section 8(a) Program. (Exhibit B70 (DoD document)).⁵⁸

⁵⁸ Section 8(a) contracts are technically subcontracts but are counted as prime contracts by DoD for its data collection purposes. (Plaintiff's Undisputed Facts, No. 65). Before DoD's self-created 8(a) goal, DoD believed that it could never simply satisfy its five percent SDB goal by awarding all the contracts to non-Section 8(a) SDBs because there is an independent obligation

DoD's Section 8(a) goal was not negotiated with the SBA; it was self-established. It was based on DoD's performance in the past, some other things, and an effort to satisfy some Congressional requests to support President Clinton's mandate (including, among other things, DoD's desire "to be somewhat sensitive to [the] needs" of Congresswoman Nydia Valasquez of New York). (Exhibit B33 (Foreman Dep.), p. 224, line 13 through p. 225, line 8).

If an 8(a) firm in open competition with members of the public (i.e., not through the Section 8(a) Program) wins a particular contract, that contract is not counted towards DoD's Section 8(a) goal. However, the award does count for purposes of the five percent goal in 10 U.S.C. § 2323. (Exhibit B33 (Foreman Dep.), p. 147, line 12 through p. 148, line 7; p. 150, lines 8-11; p. 155, lines 10-15). If DoD included Section 8(a) contracts and contract actions outside of the Section 8(a) Program, DoD awarded approximately three percent of all contracts and contract actions to Section 8(a) firms in fiscal year 2002. (See Exhibit B33 (Foreman Dep.), p. 156, line 20 through p. 157, line 3; p. 30, lines 15-18).

DoD's representative testified that the Section 8(a) Program is the only preferential prime contracting program that DoD currently is using for which small disadvantaged businesses are eligible. (Exhibit B33 (Foreman Dep.), p. 28, lines 11-16). Thus, according to DoD, the Section 8(a) Program is the only "preferential" prime contract program that DoD can use to fulfill its larger SDB goal. Without the use of the race-conscious Section 8(a) Program, DoD would not have met its SDB goal as established in 15 U.S.C. § 644(g). (Exhibit B33 (Foreman Dep.), p. 288, line 10 through p. 289, line 17).

(.continued)

for DoD to participate in the Section 8(a) Program. (Exhibit B33 (Foreman Dep.), p. 225, line 14 through p. 226, line 3).

Moreover, since the vast majority of Section 8(a) firms are owned and controlled by minorities, the system also permits DoD to fulfill its requirement in 10 U.S.C. § 2323(e)(4) for maximizing minority small business participation. DoD can satisfy several goal categories by awarding contracts to an entity that falls within multiple categories. (Plaintiff's Undisputed Facts, No. 72).

DoD's goal of awarding five percent of contracts and subcontracts to SDBs, and the two percent goal of contracts to Section 8(a) firms, is an overall DoD goal. There are some entities within DoD that exceed the goal and others that achieve less than the five or two percent goals. It is up to the Navy, Army and Air Force, respectively, to allocate their goals within their component entities in a way that they believe will help them achieve their overall goal. (Exhibit B33 (Foreman Dep.), p. 231, lines 7 through p. 232, line 1; p. 236, lines 19-21). Goals are not allocated by industry at DoD. (If they were, there would be no need for Section 8(a) goals or the higher SDB goals in the simulation and training industry because there is no history of discrimination in that industry and no need to use "goals" to accomplish any objective). SBA also does not have separate goals for the simulation and training industry or for simulation and training equipment. (Exhibit B30 (Hairston Dep.), p. 156, lines 9-12).

It is ironic (and outrageous) that in the simulation and training industry, where Defendants have no evidence of discrimination, they should establish significantly higher goals (or let significantly higher number of contract dollars) at NAWCTSD and STRICOM – which traditionally buy most of simulation equipment for the Army and Navy and where DynaLantic has received most of its government contracts. (See Plaintiff's Undisputed Facts, Nos. 2-3). In FY 2002, the percentage of the actual amount in dollar terms awarded to SDBs for NAVAIR

Orlando (formerly NAWCTSD) and PEO STRI (formerly STRICOM) was 10.56 percent, and for FY 2003, the percentage of the goal in dollar terms for SDBs at those facilities was 12.60. The percentage of the actual amount in dollar terms awarded to SDBs at NAWCTSD and STRICOM was 18% in FY 1995, 18% in FY 1996, and 16% in FY 1997. The percentage of the goal in dollar terms for SDBs at the facilities was 17% for FY 1998. (Plaintiff's Undisputed Facts, Nos. 73-74; Exhibit A (Weinstock Dec.), ¶ 11).

As set forth above, SBA and DoD procurement officers have an incentive to exceed the Section 8(a) goal and the goal of awarding contracts to small business concerns owned and controlled by socially and economically disadvantaged individuals. DoD's interlocking system of goals, rewards and penalties wreaks havoc on DynaLantic. The system has the effect of depriving DynaLantic of valuable contract opportunities which, over the years, has found fewer and fewer government contract opportunities to bid on. (Exhibit A (Weinstock Dec.) ¶ 12).⁵⁹ The goals also are especially pernicious and unconstitutional considering that Defendants have no or little knowledge of the number of minority businesses, Section 8(a) firms and SDBs that are qualified, ready, willing and able to compete for contracts. (See Plaintiff's Undisputed Facts, Nos. 129-134). See *O'Donnell*, 963 F.2d at 427 (the goal was not linked to any racial discrimination,

⁵⁹ Executive Orders confirm the emphasis of special treatment for Section 8(a) firms and other SDBs, which comes at the expense of other small businesses, like DynaLantic. Executive Order 13170 (2000) orders every department and agency with procurement authority to, *inter alia*, "aggressively use the firms in the section 8(a) program" and provide Section 8(a) firms and SDBs with benefits. *Id.*, Section 2(a)(iv). The Order also states that the each agency, like DoD, shall establish separate Section 8(a) goals, which "shall be considered the minimum goals and every effort shall be taken to exceed these goals wherever feasible." *Id.*, Section 2(a)(xi; see also *id.*, Section 3(b)). The Order even prescribes steps for increasing the share of federal advertising awarded to minority-owned entities. *Id.*, Section 4. See also Executive Order 12928 (encouraging departments and agencies to set, *inter alia*, SDB goals in excess of statutory requirements). See also Exhibit B57 (Memorandum of August 5, 1983 from President Reagan describing minority business procurement goals).

and unsupported by any "strong basis in evidence").

Considered together or separately, the intersecting laws and implementing regulations that comprise the programs create a requirement-in-fact not susceptible of waiver, consideration of merit, or determination of actual need. The result is unfair and unconstitutional discrimination against DynaLantic because of the race of its owners.

CONCLUSION

For the foregoing reasons, Plaintiff DynaLantic Corp. respectfully requests that the Court grant Plaintiff's Motion for Summary Judgment, and award any other relief that the Court deems just.

Respectfully submitted,

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