[Oral Argument Not Yet Scheduled]

Appeal No. 15-5176

United States Court of Appeals
For The District of Columbia Circuit

Rothe Development, Inc.,

Appellant,

v.

United States Department of Defense and
United States Small Business Administration,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMICUS BRIEF IN SUPPORT OF APPELLANT AND REVERSAL

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Certificate As To Parties, Rulings, and Related Cases

Pursuant to D.C. Circuit Rule 28(a)(1)(A), all parties, intervenors, and amici appearing before the district court and in this Court are listed in the Certificate as to Parties, Rulings, and Related Cases filed by Appellant Rothe Development, Inc. on October 13, 2015.

References to the rulings at issue appear in the Certificate as to Parties, Rulings, and Related Cases filed by Appellant on October 13, 2015.

References to all related cases appear in the Certificate as to Parties, Rulings, and Related Cases filed by Appellant on October 13, 2015.

All applicable statutes, etc., are contained in the Certificate as to Parties, Rulings, and Related Cases filed by Appellant on October 13, 2015.

Statement Regarding Consent to File and Justification for Separate Briefing

All parties have consented to the filing of this brief. After consulting with counsel for other parties planning to file *amicus curiae* briefs, counsel for the Center for Individual Rights is filing separately because no other brief is covering the precise subject matter of this brief. Furthermore, this brief is covering a "point not made or adequately elaborated upon in the principal brief, although relevant to the issues before this court." D.C. Cir. R. 29(a).

Corporate Disclosure Statement

Pursuant to Fed. R. App. P. 26.1 and D.C. Circuit Rules 26.1 and 29(b), the undersigned hereby certifies that the Center for Individual Rights ("CIR") is a non-profit, public interest law firm incorporated under the laws of the District of Columbia. CIR is not a publicly owned corporation, has issued no stock, and has no parent corporations, master limited partnerships, real estate investment trusts, or other legal entities whose shares are publicly held or traded. No publicly held corporation has a direct financial interest in the outcome of this litigation due to CIR's participation.

/s/ Michael E. Rosman

Michael E. Rosman

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SBA	The United States Small Business Administration
DoD	The United States Department of Defense
Defs.' SOF	Defs.' Statement of Material Facts & Resp. to Pl.'s SOF, ECF No. 64-2
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Identity and Interest of the Amicus Curiae

The Center for Individual Rights ("CIR") is a public interest law firm based in Washington, D.C. It has litigated many discrimination lawsuits, including several in this Court. It has a particular interest in, and has brought numerous cases concerning what it views as unconstitutional racial classifications by government, particularly in education, employment, and government contracting. Attorneys for CIR represented the plaintiff in *DynaLantic Corp. v. U. S. Dep't of Defense*, 885 F. Supp. 2d 237 (D.D.C. 2012), upon which the court below relied extensively. *See, e.g.*, *Rothe v. Dep't of Defense*, 2015 WL 3536721, *18 (D.D.C. June 5, 2015) ("[T]his Court incorporates by reference the reasoning in Parts III. A through III. D. 1.(c) and Part III. E of the *DynaLantic* memorandum opinion, and adopts it as its own."). Given its significant role in the long history of the *DynaLantic* litigation (which began in 1995), CIR believes it has insights into the analysis of that court, and, accordingly, the near-identical analysis of the court below, that will aid this Court. [1]

[1] Pursuant to Fed. R. App. P. 29(c), counsel certifies that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the participation or submission of this brief. No person other than *amicus curiae* Center for Individual Rights or its counsel made a monetary contribution to its preparation or submission.

Statement of the Issues

1. Did the court below err as a matter of law when it granted summary judgment to defendants on plaintiff's facial challenge to 15 U.S.C. § 637(a) and its accompanying regulations (the "Section 8(a) program")?

2. Did the court err as a matter of law when it denied plaintiff's motion for summary judgment on that facial challenge?

Statement of Facts

Plaintiff Rothe Development, Inc. ("Rothe"), is a Texas corporation that is a "small business" as that term is defined by the rules and regulations of defendant U.S. Small Business Administration ("SBA"). Rothe operates in the computer services industry and bids on and performs government contracts on a nationwide basis. Ex. 1 to Pl.'s Compl., ECF No. 1-1, at 3; Defs.' Statement of Material Facts & Resp. to Pl.'s SOF ("Defs.' SOF"), ECF No. 64-2, par. II.23; Pl.'s Resp. to Defs.' Statement of Material Facts ("Pl.'s SOF Resp."), ECF No. 68-1, par. I.1.[1] Rothe derives approximately 85-90% of its annual gross income from government

[1] Because defendants did not dispute most of the facts upon which Rothe based its summary judgment motion in the court below, this brief will frequently refer to Rothe's Statement of Undisputed Facts and defendants' response thereto in the district court. That being said, with respect to the court's grant of summary judgment to the Government, all of the evidence, and any of inferences from the evidence, must be construed in Rothe's favor.

contracts. Pl.'s Statement of Material Facts ("Pl.'s SOF"), ECF No. 55-1, par. 24.

A. The Section 8(a) Program

Initially passed in 1978, the Section 8(a) program is codified at 15 U.S.C. § 637(a) and administered pursuant to regulations that appear in Subpart A of Part 124, Chapter 1, Title 13 of the Code of Federal Regulations.

Section 8(a) of the Small Business Act itself authorizes the SBA to enter into agreements for goods and services with other government departments and agencies, and to subcontract the performance of those agreements to socially and economically disadvantaged small business concerns. 15 U.S.C. § 637(a)(1)(A), (B). (Hence, contracts between Section 8(a) firms and the SBA are actually subcontracts.) These contracts can be "sole source" (reserved to one firm) or competitive within the Section 8(a) program such that only Section 8(a) firms can bid. 13 CFR § 124.501(b).

"Socially and economically disadvantaged small business concerns" are (with exceptions not relevant here) "small business concerns" at least 51% owned, and operated, by individuals who are socially and economically disadvantaged. 15 U.S.C. § 637(a)(4); 13 CFR § 124.102. "Socially disadvantaged individuals" are 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 individual qualities." 15

U.S.C. § 637(a)(5). "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).

B. Qualification for the Section 8(a) Program

Regulations provide that members of certain racial and ethnic groups are presumed to be "socially disadvantaged." These include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and Subcontinent Asian Americans. 13 CFR § 124.103(b). The regulation lists various countries of origin associated with the last two categories, but warns that "[b]eing born in a country does not, by itself, suffice to make the birth country an individual's country of origin. . . . " *Id.* The regulation does not say what does suffice.

Although the definition of "economic disadvantage" requires a comparison of the "capital and credit opportunities" of businesses in the Section 8(a) program and those outside the program, the SBA apparently has no basis for making this comparison. Rather, the SBA relies on a "narrative statement" from the applicant describing its economic disadvantage. 13 CFR § 124.104(b). Neither the

regulations nor defendants in this case have explained how an applicant can obtain knowledge about capital or credit opportunities of other people in the "same business area" (15 U.S.C. § 637(a)(6)(A)) and there is nothing in the record to suggest that the SBA itself actually makes the comparison called for by Section 637(a)(6). Instead, the SBA examines the "personal financial condition" (13 CFR § 124.104(c)) of the owners and/or operators of a potential Section 8(a) firm.

Thus, the SBA regulations state that the "net worth" of an individual claiming to be economically disadvantaged should be less than $ 250,000 upon application to the Section 8(a) program, and less than $ 750,000 after admission. However, these "net worth" calculations exclude the value of the individual's primary residence, the individual's ownership interest in the Section 8(a) business, and any retirement accounts. *Id.*, § 124.104(c)(2). An individual's total assets (excluding retirement accounts) cannot exceed $ 4 million upon application or $ 6 million after admission. *Id.*, § 124.104(c)(4). Income averaged over the past three years should not exceed $ 250,000 per year upon application, and $ 350,000 after admission, although the SBA will consider explanations that income for particular years was aberrational. *Id.*, § 124.104(c)(3). The income and assets of the applicant's spouse do not count unless the spouse is involved with, or has helped to financially support, the business. *Id.*, § 124.104(b)(2).

Argument

"Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). The Due Process Clause of the Fifth Amendment to the United States Constitution has an "equal protection" component that provides the same protection against federal government classifications on the basis of race that the Equal Protection Clause of the Fourteenth Amendment provides against similar state and local government classifications. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 224 (1995). Such government classifications must meet "strict scrutiny": they must be narrowly-tailored to achieve a compelling governmental interest. *Id.* at 227. One of the primary characteristics of strict scrutiny is skepticism concerning racial classifications. *Id.* at 223 ("'[A]ny official action that treats a person differently on account of his race or ethnic origin is inherently suspect'" *quoting Fullilove v. Klutznick*, 448 U.S. 448, 491 (1980) (Stewart, J., dissenting)). Accordingly, "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." *Adarand*, 515 U.S. at 224.

The standard does not depend upon the race of those burdened or benefitted. *Id.*

The Section 8(a) program treats people differently on the basis of race. Members of the favored races are presumed to be "socially disadvantaged"; all others are not. 13 CFR § 124.103(b). Accordingly, courts should analyze the Section 8(a) program under strict scrutiny.

This Court reviews an order granting summary judgment *de novo*.

I. THE DISTRICT COURT ERRED AS A MATTER OF LAW WHEN IT HELD THAT ROTHE'S FACIAL CHALLENGE TO SECTION 8(a) WAS GOVERNED BY UNITED STATES v. SALERNO.

The district court concluded that Rothe's facial challenge was governed by the Supreme Court's decision in *United States v. Salerno*, 481 U.S. 739 (1987), in which the court held that most facial challenges require the plaintiff to show that there are "no set of circumstances" under which the challenged statute is constitutional. *Id.* at 745. *Rothe Development, Inc. v. Dep't of Defense*, 2015 WL 3536271, *16 (D.D.C. June 5, 2015). This conclusion was wrong. *See Rothe Development Corp. v. Dep't of Defense*, 413 F.3d 1327, 1337 (Fed. Cir. 2005) ("Because . . . the strict scrutiny doctrine sets forth the test for determining facial unconstitutionality in this case, *Salerno* is of limited relevance here.").

Strict scrutiny is simply incompatible with *Salerno*. As the court below itself recognized, *Rothe*¸ 2005 WL 3536271 at *17, strict scrutiny always examines

whether the means being provided to achieve a particular goal are overbroad or the benefits provided overinclusive. In *Croson*, for example, the Court found fault in the Richmond ordinance's "random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 506 (1989). *See also, e.g., Monterey Mechanical Co. v. Wilson*, 125 F.3d 702, 714 (9th Cir. 2004) (holding that statute that required general contractors to make efforts to subcontract with minority- or women-owned subcontractors violated equal protection; "The statute at issue is not 'narrowly-tailored.' That it is not is shown by the same overbreadth in its definition of 'minority' that the Supreme Court has noted for years in similar statutes."); *DynaLantic v. Dep't of Defense*, 885 F. Supp. 2d 237, 286 (D.D.C. 2012).

Croson also held that the Richmond program was overbroad because it did not treat all candidates individually, and did not limit its benefits to those that had been likely victims of past discrimination. *Croson*, 488 U.S. at 508 ("[T]he Richmond Plan's waiver system focuses solely on the availability of MBE's; there is no inquiry into whether or not the particular MBE seeking a racial preference has suffered from the effects of past discrimination by the city or prime contractors."). *See also, e.g., Coral Construction Co. v. King County*, 941 F.2d 910, 924 (9th Cir.

1991) ("A valid [Minority Business Enterprise] program should include a waiver system that accounts for both the availability of qualified MBEs *and* whether the qualified MBEs have suffered from the effects of past discrimination by the County or prime contractors" (emphasis in original)).

Overbreadth of this kind is not relevant under *Salerno*. Under the "no set of circumstances" standard, the fact that a race-conscious statute might provide benefits to *some* races or *some* beneficiaries for whom there is an inadequate predicate does not matter so long as there is *one* race or *one* beneficiary for whom the statute might properly be applied. If *Salerno* were applicable to race-conscious statutes challenged under strict scrutiny, the Court's overinclusiveness analysis in *Croson* would make no sense. The overbreadth that the Court found fatal to the statute would have been insufficient to render it facially invalid under the *Salerno* test. But that is what the Court held. *Croson*, 488 U.S. at 485-86) ("[T]he Court of Appeals struck down the Richmond set-aside program [implementing Richmond City Code § 12-156(a)] . . . We now affirm the judgment.").

So, too, here. The fact that the statute might be constitutional in one industry is irrelevant because the statute is not – as the government readily concedes – industry specific. *See, e.g.*, Doc. 65-1, Defendants' Memorandum In Support Of

Their Cross-Motion For Summary Judgment at 10 ("the SBA is authorized to enter into *all types* of contracts") (emphasis added); *id.* at 64 n.35 ("As the Federal Defendants argued in *DynaLantic*, the 8(a) program is not aimed at specific industry, nor does it attempt to raise the amount of contracting with minority-owned businesses in a specific industry. Rather the 8(a) program is a business development program, aimed at addressing the barriers faced by small, minority-owned businesses across industries and the nation."); *id*. at 78 ("The 8(a) program is a business development program, not an industry focused one."); *DynaLantic v. Dep't of Defense*, 885 F. Supp. 2d 237, 280-81 (D.D.C. 2012) ("[T]he Section 8(a) program makes no claim to be directed at discrimination within a single industry or location . . . . Instead, the Section 8(a) program takes aim at problems that cut across industries. . . . its interest is not to channel disadvantaged businesses into particular industries at particular locations, but instead to enable disadvantaged individuals to overcome racial discrimination in business development and equal opportunity in whatever industry they choose to enter.") (quoting the government's opposition to the plaintiff's motion for summary judgment).

The Section 8(a) program applies in all industries, including those in which there is no predicate of discrimination. *Id.* at 281-82 (holding that Section 8(a) is

unconstitutional as applied to DynaLantic's industry because there was no strong basis in evidence in that industry). But, when *Salerno* is applied to an all-industry program like Section 8(a), the overbreadth of the program – fatal under true strict scrutiny – is rendered irrelevant. The constitutionality of Section 8(a) in just one industry is sufficient to defeat the facial challenge. *Id.* at 271 ("[I]n order for DynaLantic to prevail on its facial challenge, it must show that Congress did not have a strong basis in evidence for permitting race-conscious measures to be used under *any* circumstances, in *any sector or industry in the economy*.") (emphasis added); *id.* (holding that the government had met its "initial burden" of showing a predicate in the construction industry). The application of Section 8(a) throughout the economy renders it overbroad, and *Salerno* cannot save it.[2]

II. THE DISTRICT COURT ERRED AS A MATTER OF LAW WHEN IT HELD THAT EVIDENCE OF PAST DISCRIMINATION ESTABLISHED A COMPELLING GOVERNMENTAL INTEREST.

Remedying the effects of certain kinds of past discrimination can be a compelling governmental interest. But in order to establish that compelling

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2 The fact that Section 8(a) authorizes the SBA to contract with Section 8(a) firms when it is "appropriate" cannot save the statute from its overbreadth. *But compare DynaLantic*, 885 F. Supp. 2d at 271. As noted in the text, the government applies Section 8(a) in any industry and the complete absence of statutory standards for determining in which industry the program can be applied is a constitutional vice, not a virtue. *See* Section III.A, *infra*.

governmental interest, the government must first rely on specific, "identified" discrimination, and then establish a "strong basis in evidence" that remedial action is required *before* adopting a race-conscious program. *Shaw v. Hunt*, 517 U.S. 899, 909-10 (1996). "[A]n effort to alleviate the effects of societal discrimination is not a compelling interest." *Id.* In its "compelling interest" analysis, the court made three plain errors of law. First, it mistakenly placed the burden of persuasion on Rothe. Second, it relied on evidence that did not satisfy the *Croson* standard. Third, the court below failed to show how the federal government acted as a "passive participant" in the alleged discrimination.

A. The Court Below Improperly Placed The Burden On Rothe.

The district court in *DynaLantic* erroneously placed the burden of proof on the plaintiff challenging the 8(a) program. Here, the district court below adopted the *DynaLantic* court's reasoning and analysis. *Rothe*, 2015 WL 3536271 at *17 ("If the government makes both showings, the burden shifts to the plaintiff. . . ."). In *DynaLantic*, the district court claimed that the government need only make an "initial showing" of past discrimination, after which the burden shifted to DynaLantic to present particularized evidence to rebut that initial showing. *DynaLantic*, 885 F. Supp. 2d at 251. It placed the "ultimate burden" to demonstrate unconstitutionality on DynaLantic. *Id*. Accordingly, the court there

claimed that DynaLantic not only had to show that the government's statistics failed to show discrimination, but that proper statistical analysis would show the absence of discrimination. *Id.* at 277 (criticizing DynaLantic because it failed to "demonstrate the disparities shown in those studies are eliminated when there is a control for firm capacity").

The *DynaLantic* court erred, as did the court below. The burden of demonstrating that strict scrutiny is met lies entirely with the government defending its inherently suspect use of race. *Fisher v. University of Texas at Austin*, 133 S. Ct. 2411, 2415 (2013) (reversing the court of appeals because it "did not hold the University to the demanding burden of strict scrutiny"); *id.* at 2420 ("[S]trict scrutiny imposes on the [defendant] university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives, do not suffice."); *Parents Involved In Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 720 (2007) ("*Parents Involved*") ("In order to satisfy this searching standard of review [*viz.*, strict scrutiny], the school districts must demonstrate that the use of individual racial classifications in the assignment plans here is 'narrowly tailored' to achieve a 'compelling' government interest"); *id.* at 734 ("'The District has not met its burden of proving these marginal changes . . . outweigh the costs of subjecting hundreds of students to

disparate treatment based solely upon the color of their skin'") (*quoting Parents Involved In Community Schools v. Seattle School Dist. No. 1*, 377 F.3d 949, 984-85 (9th Cir. 2004)); *id.* at 783 (Kennedy, J., concurring); *Johnson v. California*, 543 U.S. 499, 505 (2005) ("Under strict scrutiny, the government has the burden . . ."). *Cf. United States v. Virginia*, 518 U.S. 515, 533 (1996) (holding that, for intermediate scrutiny, "[t]he burden of justification is demanding and it rests entirely on the State"); *Lutheran Church-Missouri Synod v. F.C.C.*, 154 F.3d 487, 492 (D.C. Cir. 1998) (denying rehearing: "Once a government program is shown to call for racial classifications, the heavy burden to justify it shifts to the government.").

In short, the court below made reversible errors of law in holding that the government need only meet an initial burden of production, and that the burden of persuasion shifted to Rothe thereafter.

Moreover, on the government's motion for summary judgment, it had the additional burden of demonstrating the absence of any genuine issue of material fact. Thus, it had to show that there were no issues of fact relating to the existence of a "strong basis in evidence" necessitating remedial action.

B. The Government's Evidence Did Not Meet Its Burden Because It Failed To Meet The *Croson* Standard.

The court below, relying again on *DynaLantic*, concluded that the government's evidence was sufficient to establish a strong basis in evidence that that race-based remedial action was required. It erred.

The Supreme Court uses the phrase "identified" discrimination, to refer to specific instances of discrimination whose effects can be reasonably determined. In *City of Richmond v. J.A. Croson, Co.*, 488 U.S. 469 (1989), the Court rejected a claim that discrimination in primary and secondary schooling could justify a system of race preferences, either for admission to medical school or in government contracting. *Id.* at 499. The problem with relying upon such discrimination was *not* a lack of specificity in identifying the details (the where and the who) of the discrimination. Justice Marshall's dissent in *Croson* pointed out various court decisions which identified many such specific instances *Id.* at 545 (Marshall, J., dissenting). *See also Regents of the University of California v. Bakke*, 438 U.S. 265, 372 (1978) (Brennan, J., concurring in part and dissenting in part). The problem was the causal connection between the discrimination and any subsequent effects that the ordinance was supposedly remedying.

One can always posit some connection between the discriminatory denial of educational or employment opportunities and the number of minorities adequately prepared for medical school or to run a business. *See Croson*, 488 U.S. at 499 ("there is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs"). Such connections cannot meet strict scrutiny because the size of the injury caused by the discrimination in question cannot be ascertained with any degree of certainty:

> It is sheer speculation how many minority firms there would be in Richmond absent past societal discrimination, *just as it was sheer speculation how many minority medical students would have been admitted to the medical school at Davis absent past discrimination in educational opportunities*.

Croson, 488 U.S. at 499 (emphasis added); *id.* at 505 ("the history of school desegregation in Richmond . . . does little to define the scope of any injury to minority contractors in Richmond or the necessary remedy").

Here, defendants' experts were able to say only that the various studies that they reviewed were "consistent" with discrimination. *Rothe v. Dep't of Defense*, 2015 WL 3536271, *11 (D.D.C. June, 5, 2015) (Rubinovitz testimony); *id.* at *12 (Wainwright testimony). But this says nothing particularly useful under *Croson*. First, a conclusion that disparities are "consistent" with discrimination simply states

that discrimination cannot be eliminated as a possible cause for the disparities. That is not the same as saying that discrimination is a likely cause.

More importantly, the testimony does not say *whose* discrimination is causing the disparities. Dr. Wainwright, for example, is well-known for believing that "capacity" should not be taken into account in performing regression analyses because a firm's size might very well be impacted by discrimination. *DynaLantic v. Dep't of Defense*, 885 F. Supp. 2d 237, 277 (D.D.C. 2012). That may well be true, but that only shows that the discrimination causing the disparities could be differences in education or inheritance caused by discrimination in the past. And that is precisely the kind of discrimination – no matter how real it might have been – that *Croson* precludes because any efforts to estimate the consequences of such discrimination in a particular area are nothing better than guesses.

It is also why the vast majority of courts have rejected studies that do not take capacity into account. *See also, e.g.*, *Rothe Development Corp. v. U.S. Dep't of Defense*, 545 F.3d 1023, 1042-43 (Fed. Cir. 2008) (criticizing "the failure of five of the studies to account sufficiently for potential differences in size, or *relative capacity*, of the businesses included in those studies") (emphasis in original); *Associated General Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 736 (6th Cir. 2000) ("If MBEs comprise 10% of the total number of contracting firms in the

state, but only get 3% of the dollar value of certain contracts, that does not alone show discrimination, or even disparity. It does not account for the relative size of the firms, either in terms of their ability to do particular work or in terms of the number of tasks they have the resources to complete"); *Engineering Contractors Ass'n of South Florida, Inc. v. Metropolitan Dade County*, 943 F. Supp. 1546, 1563-66 (S.D. Fla. 1996), *aff'd*, 122 F.3d 895 (11th Cir. 1997); *Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County, Fla.*, 333 F. Supp. 2d 1305, 1322 (S.D. Fla. 2004).

Finally, even if defendants could better identify the discrimination they purport to be remedying, and it was such that its effects could be assessed with confidence, it would still be insufficient. *Croson* did not hold that race-conscious government action is permissible whenever there is any evidence from which some "identified discrimination" can be inferred. Rather, it held that pervasive and egregious discrimination may justify the use of race-based decision-making. *Croson*, 488 U.S. at 509 ("In the extreme case, some form of narrowly tailored racial preference *might* be necessary to break down patterns of *deliberate exclusion.*") (emphasis added). *Cf. Parents Involved*, 551 U.S. at 720 (2007) (stating that government has a "compelling interest [in] remedying the effects of past *intentional* discrimination") (emphasis added). Whatever else the evidence

supplied by the government may show, it did not demonstrate "patterns of deliberate exclusion."

C. The Government Failed To Show its Own Involvement in Discrimination.

Finally, a compelling governmental interest exists only if the government was somehow involved in the discrimination itself. It must, at least, be a passive participant in the discrimination. *Croson*, 488 U.S. at 503 ("city would have a compelling interest in preventing its tax dollars from *assisting* [local contractors associations] *in maintaining a racially segregated construction market*") (emphasis added); *Grutter v. Bollinger*, 539 U.S. 306, 351-52 (2003) (Thomas, J., concurring and dissenting) ("[T]he Court has recognized as a compelling state interest a government's effort to remedy past discrimination for which it is responsible."); *O'Donnell Const. Co. v. District of Columbia*, 963 F.2d 420, 425 (D.C. Cir. 1992) (noting that "[t]he record here . . . is devoid of any evidence that *agencies of the District of Columbia* had been favoring white contractors over non-whites, or that the typical bidding process was somehow *rigged* to have this effect" (emphasis added)); *Rothe Development Corp. v. Department of Defense*, 545 F.3d 1023, 1048 (Fed. Cir. 2008) (noting that a government may take action where it has become a "passive participant" in a system of racial exclusion); *Builders Ass'n of Greater*

Chicago v. County of Cook, Ill., 256 F.3d 642, 645 (7th Cir. 2001). *Cf. United States v. Barnes*, 586 F.2d 1052, 1057 (5th Cir. 1978) (holding that a person is a "passive participant" in a conspiracy if that person had knowledge of the object of the conspiracy and agreed to participate, but took no other overt acts).

Here, as in *DynaLantic*, the government did not point to any instance of its own discrimination. *Rothe*, 545 F.3d at 1048 (noting that the defendants failed to cite to a "a single instance of alleged discrimination by DOD in the course of awarding a prime contract, nor to a single instance of alleged discrimination by a private contractor identified as the recipient of a prime defense contract"). Nor did the court below identify *any* specific federal government spending that was at fault in perpetuating discrimination. Indeed, its reliance on disparity studies of s*tate*-funded projects is particularly perplexing.

The court below relied again on *DynaLantic*'s erroneous findings which were based on the fact that the federal government spends money in the economy and does not "adjust" its "procurement practices" to account for identified discrimination – which amounts to nothing more than a requirement that the federal government spend money. *DynaLantic*, 885 F. Supp. 2d at 275-76. This is incorrect as a matter of law; indeed, courts have rejected more *stringent* understandings of "passive participation." *Rothe*, 545 F.3d at 1049 (stating that

while "it is likely that some money injected by DOD into the nationwide contract market has made its way into hands of contractor, subcontractors, or sub-subcontractors *who have engaged in discrimination*, . . . we are skeptical that this bare likelihood would be sufficient to establish DOD's 'passive participation' in discrimination within the meaning of *Croson* . . . .") (emphasis added). *Cf. Builders Ass'n*, 256 F.3d at 645 ("If 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 . . . .").

III. THE SECTION 8(a) PROGRAM IS NOT NARROWLY TAILORED.

Even if the government had met its burden of establishing a compelling interest for the Section 8(a) program, it could not demonstrate that the program is narrowly-tailored. Under the narrow-tailoring prong, a court should consider the necessity of the relief, the efficacy of alternative remedies, the flexibility and duration of the relief, the relationship of the goals to the relevant labor market, the impact of the relief on the rights of third parties, and the overinclusiveness or underinclusiveness of the racial classification. *Rothe Development Corp. v. U.S.*

Dep't of Defense, 262 F.3d 1306, 1331 (Fed. Cir. 2001). Part I of this argument demonstrates why the Section 8(a) Program is overbroad. In addition, the following considerations demonstrate a complete lack of narrow-tailoring: the absence of any standards for applying the program in any given industry or for any given group, the absence of any predicate for the goal, the unlimited duration of the program combined with the absence of any review by Congress of its continuing need, and the failure to exclude individuals with high levels of wealth.

A. The Section 8(a) Program As Not Narrowly Tailored Because It Delegates Excessive Authority To The SBA.

A statute that provides no standards whatsoever for determining in *which* industries it should be applied is simply not narrowly tailored. The purpose of strict scrutiny itself is to ensure that the government is pursuing a sufficiently important goal in using a "highly suspect tool" and to "smoke out" illegitimate purposes. *Johnson v. California*, 543 U.S. 499, 506 (2005). *Cf. Bush v. Vera*, 517 U.S. 952, 977 (1996) ("[T]he 'narrow-tailoring' requirement of strict scrutiny allows the States a limited degree of leeway in furthering [compelling governmental] interests."). Section 637(a) provides no guidance at all for the adoption of its race-conscious means. The only standard is that the contracting be done when it is "appropriate." (Although the statute authorizes the SBA to utilize

contracts under Section 8(a) whenever it is "necessary *or* appropriate," any use that is necessary is also appropriate.)

As interpreted by the court below, Section 637(a) is very much like town ordinances that provide for permits to engage in First Amendment-protected activities at the complete discretion of town officials. *E.g., Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 153 (1969) ("a municipality may not empower its licensing officials to roam essentially at will, dispensing or withholding permission to speak, assemble, picket, or parade according to their own opinions regarding the potential effect of the activity in question on the 'welfare,' 'decency,' or 'morals' of the community."). The extraordinary and standardless discretion itself renders the statute facially unconstitutional.

B. There Is An Absence Of Standards For Group Inclusion Or Exclusion.

Narrow-tailoring requires the serious consideration of race-neutral alternatives. Here, the absence of such narrow-tailoring can be seen from one simple fact: groups can be added to the list of favored groups, but they can never be subtracted.

Although the Section 8(a) regulations provide for a process for including new groups as "presumptively socially disadvantaged," 13 CFR § 124.103(d), there is a

conspicuous absence of either a rule or process for determining whether the included groups *remain* "presumptively socially disadvantaged." This goes directly to the necessity of race-conscious relief, flexibility of the program, *and* consideration of efficacy of alternative remedies. Minority business formation is not a static thing, and it is at least possible that some groups might no longer need the presumption. George R. LaNoue & John Sullivan, "*But For" Discrimination: How Many Minority-Owned Businesses Would There Be?*, 24 Columbia Human Rights Law Review 93, 132 (1993) (noting that the business formation rate per 1000 persons was 47.1 for Asian Indians; 47.9 for persons of Cuban ancestry; 64.8 for persons of Chinese ancestry; and 106.4 for persons of Japanese ancestry, as compared with a United States average of 48.9); Doc. 65-1 at 58 (citing Dr. Wainwright's report to the effect that Asian and Pacific Islanders comprise 6.2% of the population and account for 6.0% of businesses).

The standards for inclusion are also unclear. The SBA rejected the application of Hasidic Jews for no apparent reason. In a part of its opinion specifically adopted by the court below, the court in *DynaLantic* was "puzzled" by this, apparently because it could not conceive of Hasidic Jews being the victims of cultural bias. *DynaLantic*, 885 F. Supp. 2d at 286-87. Yet it also justified this exclusion by pointing out that an *individual* in the group *could* qualify as socially

disadvantaged. *Id.* at 287. But, of course, that is only true if the individual could show that (s)he was a victim of cultural bias, 13 CFR § 124.103(a), (c), and neither the *DynaLantic* court, nor the court below that adopted its opinion, could explain why an individual Hasidic Jew might be able to show this, but the group as a whole could not. This "analysis" only demonstrates that there are no clear standards at all for assessing group inclusion or exclusion.

C. Goals Are Unrelated To Any Identified Effect Of Past Discrimination.

Section 644(g) sets a government-wide goal of 5% for SDBs. 15 U.S.C. § 644(g)(1)(A)(iv). It has remained at 5% since its introduction in 1988. *See* Henry B. R. Beale, *Evaluation Of The Small Business Procurement Goals Established in Section 15(g) of the Small Business Act: A Report Pursuant To Section 1631(d) of the National Defense Authorization Act of 2013*, 4 (2014) (available at https://www.sba.gov/sites/default/files/files/rs423tot.pdf). In the years 2005-11, the government exceeded that goal by a considerable margin. *Id.* at 10.

The goal is an SDB goal, and not a goal for any particular racial group, or even all of the racially-favored groups as a whole. At least theoretically, the goal could be achieved using many minority-owned businesses or very few. Thus, if the compelling interest for giving advantages to minority-owned businesses is to

remedy the effects of past discrimination on such businesses, the goal is an extraordinarily imprecise way of achieving that so-called compelling interest.

Further, it treats all minority-owned Section 8(a) firms as one undifferentiated mass; an award to a firm owned and controlled by Hispanics counts toward the goal even if all previous contracts in a given area were also awarded to Hispanics, and none provided to firms owned by African Americans. No effort is made to determine whether any particular group has suffered more or less from the purported discriminatory acts that justify the program.

D. The Definition Of Economic Disadvantage Renders The Program Overinclusive

Yet another problem is the inclusion of firms owned by minorities who, by any reasonable definition, have overcome any possible discrimination. The court below ignored the incredibly generous limits on who can be classified as "economically disadvantaged." The $ 4 million / $ 6 million standard for total assets, as well as the other very generous limits, means that any member of the favored groups *claiming* social and economic disadvantage can participate in the Section 8(a) program. The loose definition of "economic disadvantage," excluding only a few percent of the richest Americans, means that the race-conscious "social disadvantage" definition is the only constraint on participation and guarantees that

the program will be overinclusive. *E.g.*, *Shaw v. Hunt*, 517 U.S. at 915 (comparing the narrow-tailoring inquiry "to the remedial authority of a federal court" and quoting *Missouri v. Jenkins*, 515 U.S. 70, 88 (1995) as follows: "The remedy must . . . be related to the *condition* alleged to offend the Constitution . . . . and must be *remedial* in nature, that is, it must be designed as nearly as possible to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.") (emphasis in original, internal citations and quotation marks omitted); *Connerly v. State Personnel Bd.*, 92 Cal. App. 4th 16, 38, 112 Cal. Rptr. 2d 5, 24 (Ct. App. 3d Dist. 2001) (a racial-classification "remedy must be designed as nearly as possible to restore the victims of specific discriminatory conduct to the position they would have occupied in the absence of such conduct.").

E. Duration

Section 8(a) was passed in 1978 and amended in 1988. It has no sunset provision, and Congress has never reenacted or amended it since.

The court below concluded that the program's perpetual duration was acceptable because it "impose[s] temporal limits on every individual's participation." *Rothe*, 2015 WL 3536271 at *18. This time limitation says nothing at all about the duration of the *program*. Indeed, the fact that individual firms may be limited in their participation to nine years has not prevented the

program from enduring since at least 1978. Apparently, there are plenty of replacements for firms who "graduate" from the program.

From Rothe's perspective, what difference does it make that the identity of the Section 8(a) firms changes over time, so that the firms to which it lost contract opportunities ten years ago are different from the firms to which it loses contract opportunities today or tomorrow? Rothe is still shut out from these contracts and cannot compete because of the racial advantage given to others. The purpose of the "duration" prong of narrow tailoring is not to prevent unjust enrichment, but to avoid undue harm to the disfavored. Changing the identity of those receiving advantages does nothing to avoid that harm.

Conclusion

For the foregoing reasons, the judgment below should be reversed.

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Certificate of Compliance

I certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 29 and Fed R. App. P. 32(a)(7)(B) because it contains 6203 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B) and D.C. Cir. R. 32(e)(1), as counted using the word-count function of Microsoft Word software.

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