No. _____

In The Supreme Court of the United States

ROTHE DEVELOPMENT, INC.,

Petitioner,

v.

U.S. DEPARTMENT OF DEFENSE and the SMALL BUSINESS ADMINISTRATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Section 8(a) program of the Small Business Act ("Act"), 15 U.S.C. § 631 *et seq.*, grants the Small Business Administration the authority to, *inter alia*, set aside contracts for, and give other benefits to, "small business concerns" that are owned by "socially and economically disadvantaged individuals." *Id.* § 637(a)(1). Section 8(a)(5) of the Act defines "socially disadvantaged individuals" as "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." *Id.* § 637(a)(5). Although Section 8(a)(5) does not expressly define "socially disadvantaged individuals," Congress determined in Section 2(f) of the Act that many persons "are socially disadvantaged because of their identification as members of certain groups" and listed "such groups" as including "Black Americans, Hispanic Americans, Native Americans . . . , Asian Pacific Americans . . . , and other minorities. . . ." *Id.* § 631(f)(1)(B)-(C). Petitioner, Rothe Development, Inc., a non-minority-owned, federal contractor, facially challenged the statutory provisions of the Section 8(a) program under the equal protection component of the Due Process Clause of the Fifth Amendment. A majority of a three-judge panel of the U.S. Court of Appeals for the D.C. Circuit ruled that the statutory provisions are facially race neutral. Based upon that ruling, the panel majority eschewed strict scrutiny in favor of rational basis review and rejected Rothe's equal protection challenge.

QUESTIONS PRESENTED – Continued

The questions presented are:

1. Whether a statutory program that requires an agency to distribute benefits to "socially disadvantaged individuals," and defines "socially disadvantaged" in terms of membership in certain racial minority groups, classifies on the basis of race and is thus subject to strict scrutiny.

2. Whether a statute that may not classify exclusively on the basis of race, but uses race as a factor in determining eligibility for benefits, is subject to strict scrutiny.

PARTIES TO THE PROCEEDINGS

Petitioner, Rothe Development, Inc., was the plaintiff in the district court and the appellant before the D.C. Circuit.

Respondents, U.S. Department of Defense and the Small Business Administration, were defendants in the district court and appellees before the D.C. Circuit.

CORPORATE DISCLOSURE STATEMENT

Petitioner, Rothe Development, Inc., certifies that it is privately held, has no parent corporation, has never issued any public stock, and no publicly held company owns 10 percent or more of its stock.

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PETITION FOR WRIT OF CERTIORARI

Rothe Development, Inc. ("Rothe") respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the D.C. Circuit in this case.

OPINIONS BELOW

The opinion of the D.C. Circuit is reported at 836 F.3d 57, and is reproduced at Petitioner's Appendix ("App.") 1a-64a. The opinion of the district court is reported at 107 F. Supp. 3d 183, and is reproduced at App. 67a-127a.

STATEMENT OF JURISDICTION

The judgment of the D.C. Circuit was entered on September 9, 2016. App. 65a. Rothe filed a timely petition for panel rehearing and/or rehearing en banc, and that petition was denied on January 13, 2017. App. 128a-130a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment provides, "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law[.]" U.S.

Const. amend. V. This Clause contains an equal protection component applicable to the federal government. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

The statutory provisions at issue are in the Small Business Act ("Act"), 15 U.S.C. § 631 *et seq*. Section 8(a) of the Act authorizes the Small Business Administration ("SBA") to, *inter alia*, enter into contracts with federal agencies, which the SBA then lets to eligible "small business concerns" that compete for the contracts in a sheltered market. 15 U.S.C. § 637(a)(1)(A)-(D); App. 133a-134a. Only "small business concerns" that are owned by "socially and economically disadvantaged" individuals are eligible to participate in the 8(a) program. 15 U.S.C. § 637(a)(1)(B); App. 133a-134a. "[S]ocially disadvantaged individuals" are persons "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)(5); App. 134a. Section 2(f)(1) of the Act, in turn, provides:

> (A) that the opportunity for full participation in our free enterprise system by socially and economically disadvantaged persons is essential if we are to obtain social and economic equality for such persons and improve the functioning of our national economy;
>
> (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; [and]
>
> (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); App. 131a-132a. The SBA may also add "group[s]" to those in 15 U.S.C. § 631(f)(1)(C) "after consultation with the Associate Administrator for Minority Small Business and Capital Ownership Development." *Id*. § 637(a)(8); App. 135a. Finally, Congress has set a "[g]overnment-wide goal" that "small business concerns owned and controlled by socially and economically disadvantaged individuals" receive "not less than 5 percent of the total value" of all government contracts awarded each year. 15 U.S.C. § 644(g)(1)(A)(iv); App. 136a.

STATEMENT OF THE CASE

I. LEGAL BACKGROUND.

In 1958, Congress created the Section 8(a) program to "aid, counsel, assist, and protect . . . the interests of small-business concerns" and to "insure that a fair proportion of the total purchases and contracts for property and services for the Government . . . be placed with small-business enterprises. . . ." Pub. L. No. 85-536, § 2, 72 Stat. 384 (1958). In furtherance of the Section 8(a) program, Congress delegated to the SBA the

authority to enter into contracts with federal agencies to furnish goods and services. *Id*. § 2, 72 Stat. at 389-90. The SBA is also authorized to let contracts to "small-businesses concerns" for the performance of such contracts. *Id*. § 2, 72 Stat. at 390.

Prior to 1978, the statutory provisions of the Section 8(a) program were race neutral. *See* Pub. L. No. 85-536, § 2, 72 Stat. at 384 (defining "small-business concern" as "one which is independently owned and operated and which is not dominant in its field"). In 1978, Congress amended the Section 8(a) program to make it an affirmative action program. *See* Pub. L. No. 95-507, §§ 201-233, 92 Stat. 1757, 1760-73 (1978); H.R. Conf. Rep. No. 95-1714, at 20-21 (1978) (explaining that the 1978 amendments are focused on introducing a race-based remedy to counter perceived discrimination in government contracting). In fact, the 1978 amendments were a legislative response to past administrative efforts "to increase the level of business ownership by minorities" and were intended to provide "a strong, clear legislative mandate for minority business development." 124 Cong. Rec. S8695-98 (daily ed. June 7, 1978) (statement of Sen. Nunn); *see* H.R. Rep. No. 94-468, at 1-2 (1975). Specifically, Congress declared that it is "the purpose of section 8(a) to . . . foster business ownership by individuals who are both socially and economically disadvantaged[.]" Pub. L. No. 95-507, § 201, 92 Stat. at 1760-61 (codified as amended at 15 U.S.C. § 631(f)(2)). Congress also determined that many "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[,]" and "that such *groups* include, but are not limited to, Black Americans, Hispanic Americans, Native Americans, and other minorities[.]" Pub. L. No. 95-507, § 201, 92 Stat. at 1760-63 (all emphasis added) (codified as amended at 15 U.S.C. § 631(f)(1)(B)-(C)).[1] Finally, Congress mandated that the SBA give preference to "socially and economically disadvantaged small business concerns" in awarding contracts under the Section 8(a) program. Pub. L. No. 95-507, § 202(a) (codified at 15 U.S.C. § 637(a)(1)(A)-(C)); *id*. § 204 (codified at 15 U.S.C. § 636(j)(4)) (the SBA "*shall* give preference to . . . small businesses eligible to receive contracts pursuant to Section 8(a) of this Act." (emphasis added)).

Since the 1978 amendments, the statutory provisions of the Section 8(a) program have remained largely unchanged. In order for a "small business concern" to participate in the Section 8(a) program, the SBA must certify that the firm is a small disadvantaged business ("SDB"), defined as a business concern that is at least 51 percent "owned by one or more socially and economically disadvantaged individuals." 15 U.S.C. §§ 637(a)(4)(A)(i)(I), 636(j)(11)(E), (F); 13 C.F.R. § 124.1002 (2016). "Socially disadvantaged individuals are those who have been subjected to racial or ethnic

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[1] These provisions of Section 201 of Public Law 95-507 were originally designated as Section 2(e) of the Act, but are now designated, and are referred to herein, as Section 2(f). *See* Pub. L. No. 100-418, § 8002, 102 Stat. 1107, 1553 (1988); 15 U.S.C. § 631(f).

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)(5) (emphasis added). "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) (emphasis added). "Economically disadvantaged individuals" are therefore a subset of "socially disadvantaged individuals." *See Dynalantic Corp. v. Dep't of Defense*, 115 F.3d 1012, 1017 (D.C. Cir. 1997) ("*Dynalantic II*") ("[T]he statute treats the concept of economic disadvantage as a subset of social disadvantage, not vice versa."), *rev'g sub nom*. *Dynalantic Corp. v. U.S. Dep't of Defense*, 937 F. Supp. 1 (D.D.C. 1996) ("*Dynalantic I*").

II. PARTIES AND PROCEEDINGS BELOW.

Rothe is a small business concern based in San Antonio, Texas, that provides computer services and regularly bids on Department of Defense ("DOD") contracts. App. 75a. Because Rothe is not an SDB, it is prohibited from participating in the Section 8(a) program. *Id*. 75a-76a. Rothe is thus barred from bidding on numerous DOD contracts within its area of expertise that have been and will be awarded to SDBs under the Section 8(a) program. *Id*. As Rothe cannot compete for DOD contracts on an equal footing with minority-owned businesses, Rothe filed suit against the DOD

and the SBA asserting a facial challenge to the statutory provisions of the Section 8(a) program. *Id*. 4a, 76a. Specifically, Rothe alleged that the statutory provisions of the Section 8(a) program contain a racial classification that denies Rothe equal protection of the law in violation of the equal protection component of the Due Process Clause of the Fifth Amendment. *Id*. 4a.

On cross-motions for summary judgment, the district court determined that the statutory provisions of the Section 8(a) program classify on the basis of race. App. 113a ("[T]he Section 8(a) program is specifically directed toward 'socially disadvantaged individuals' and that category of persons is presumptively determined by reference to race." (citing 15 U.S.C. §§ 637(a)(5), 631(f)(1)(B)-(C))). Accordingly, the district court subjected the statutory provisions of the Section 8(a) program to strict scrutiny. App. 113a-122a.

In holding that the provisions survived strict scrutiny, the district court first ruled that Congress had a "compelling interest" for the 8(a) program, *i.e*., "remedying race-based discrimination and its effects." App. 116a (quotation and alteration omitted). Then, relying primarily on post-enactment evidence, the district court ruled that Congress had a strong basis in evidence that the identified compelling interest mandated "race-based remedial action."[2] App. 94a-96a, 116a. Finally,

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[2] *But see Shaw v. Hunt*, 517 U.S. 899, 910 (1996) (The government must have a "strong basis in evidence" to conclude that remedial action is necessary, "'*before* it embarks on an affirmative-action program[.]' " (emphasis in original) (quoting *Wygant v. Jackson Bd. of Educ*., 476 U.S. 267, 277 (1986) (plurality opinion))); *Rothe Dev.*

the district court ruled that the Section 8(a) program is narrowly tailored.[3] App. 117a-118a.

On appeal, both Rothe and the government agreed that strict scrutiny applied because the statutory provisions of Section 8(a) classify on the basis of race. *E.g.*, Gov't C.A. Br. at 2 (Reframing the issue as "[w]hether the race-conscious provisions in Section 8(a) of the [Act] are constitutional on their face.); *id*. at 4 ("Members of certain racial and ethnic groups . . . are presumed to be socially disadvantaged because Congress found that members of these groups 'have suffered the

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Corp. v. Dep't of Defense, 413 F.3d 1327, 1338 (Fed. Cir. 2005) ("[T]o be relevant in the strict scrutiny analysis, the evidence must be proven to have been before Congress prior to enactment of the racial classification.").

[3] Because the statutory race-based presumption of social disadvantage is effectively absolute, the district court's ruling that the statutory provisions of the Section 8(a) program are narrowly tailored was in error. *Compare* App. 117a-118a (district court asserting that the program is "neither over- nor under-inclusive"), *with Dynalantic II*, 115 F.3d at 1016-17 ("[O]ver 99% of the firms [in the 8(a) program] qualified as a result of race-based presumptions[.]"). Because eligibility for the benefits awarded under the statutory provisions of the Section 8(a) program are primarily based on one's membership in a racial minority group regardless of actual social disadvantage, the program is not narrowly tailored. *See Gratz v. Bollinger*, 539 U.S. 244, 270-76 (2003) (a program where "the factor of race" is effectively "decisive" in distributing benefits is not narrowly tailored (quotation omitted)); *see also* George R. La Noue, *Defining Social and Economic Disadvantage: Are Government Preferential Business Certification Programs Narrowly Tailored?*, 12 U. Md. L.J. Race, Religion, Gender & Class 274, 316-17 (2012) (concluding that the social disadvantage presumption is not narrowly tailored because it "eliminates individualized consideration").

effects of discriminatory practices or similar invidious circumstances.'" (quoting 15 U.S.C. § 631(f)(1)(B)-(C))). In fact, the government admitted that "[s]trict scrutiny applies because Section 8(a) employs a race-conscious rebuttable presumption to define socially disadvantaged individuals." *Id*. at 16 (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 212-13 (1995)).

Notwithstanding the government's admission, in a 2-1 decision the panel majority affirmed the district court's judgment on the basis that strict scrutiny did not even apply. App. 6a. According to the panel majority, the 8(a) program "do[es] not on [its] face classify individuals by race" because the statutory provisions use "facially race-neutral terms" to determine eligibility. App. 4a-5a. In reaching that conclusion, the majority ignored Congress's list of socially disadvantaged racial groups in Section 2(f) of the Act, 15 U.S.C. § 631(f)(1)(B)-(C), because "Section [2(f)] is located in the findings section of the statute, not in the operative provision that sets forth the program's terms and the criteria for participation." App. 14a-15a. The majority also suggested that the statutory provisions of the Section 8(a) program do not "expressly limit participation . . . to racial or ethnic minorities" and asserted that Section 8(a) "envisions an individual-based approach that focuses on experience rather than on a group characteristic." App. 5a, 9a. In the majority's view, the fact that Section 8(a)(5) uses the word "individual" distinguishes the Section 8(a) program from similar affirmative action programs that "provide for preferential treatment based on an applicant's race – a *group*

classification. . . .” App. 10a (alteration and quotation omitted) (emphasis in original). In short, by reading each of the relevant statutory provisions of the 8(a) program in a vacuum, the majority determined that Section 2(f)’s list of “socially disadvantaged” racial groups was irrelevant to Section 8(a)’s mandate that the SBA set aside contracts for “socially and economically disadvantaged” individuals who are deemed to have suffered discrimination based upon their membership in such a racial group. App. 14a-15a, 19a.

Judge Henderson authored a strong dissent, explaining that the statutory provisions of the Section 8(a) program contain a “paradigmatic racial classification.” App. 36a-44a (Henderson, J., dissenting). She emphasized that Section 8(a)(5) defines social disadvantage by membership in a group, and, in Section 2(f), Congress lists socially disadvantaged groups, all of which are racial minorities. App. 36a-39a. The only reasonable way to read these provisions *in pari materia*, Judge Henderson explained, is to give effect to Congress’s unambiguous intent to grant preferences to small businesses owned by racial minorities. App. 39a. In fact, that is precisely the way that the SBA interprets the statutory provisions of the Section 8(a) program, *i.e.*, as mandating that an individual’s membership in a certain racial minority group constitutes social disadvantage. App. 43a (Judge Henderson quoting the government’s counsel as arguing “[the] SBA is just carrying out what is in the statute, that Congress provided the standards in the statute, and SBA in the

regulations are [sic] just applying what's in the statute, the standards in the statute.").

Judge Henderson also pointed out that Congress not only statutorily listed racial groups as socially disadvantaged groups, but later granted the SBA authority to add to that list. App. 40a, 57a-59a. And, because "Congress plainly made the 'group' criterion preeminent[,]" it is "*group* membership – and the prejudice or bias the group has experienced – that triggers social disadvantage." App. 37a-38a (emphasis in original). Accordingly, Judge Henderson concluded that the statutory provisions of the Section 8(a) program are subject to strict scrutiny, regardless of the fact that non-minority individuals are not *per se* excluded from demonstrating eligibility for the program. App. 51a ("It makes little sense to say that the Section 8(a) program is race-neutral because it only demotes non-minority applicants rather than locking them out entirely.").

Rothe now seeks this Court's review to ensure that strict scrutiny applies to statutory provisions that bestow a presumption of eligibility for billions of dollars' worth of government contracts on members of certain racial minority groups. *See Adarand*, 515 U.S. at 227 ("[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.").

REASONS FOR GRANTING THE PETITION

I. THE PANEL MAJORITY'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS THAT HOLD STRICT SCRUTINY APPLIES TO ALL RACIAL CLASSIFICATIONS.

A. The Statutory Provisions Of The Section 8(a) Program Contain A Paradigmatic Racial Classification.

This Court's decisions have made clear that drawing distinctions between citizens based on their race or ancestry is "odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). Racial classifications "are simply too pernicious to permit any but the most exact connection between justification and classification[.]" *Gratz*, 539 U.S. at 270 (internal quotation omitted). Therefore, "[i]t is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007).

The current Section 8(a) program is "a congressionally mandated affirmative action program. . . ." Jess H. Drabkin, *Minority Enterprise Development and the Small Business Administration's Section 8(a) Program: Constitutional Basis and Regulatory Implementation*, 49 Brook. L. Rev. 433, 442 (1983); *see United States v. Harris*, 821 F.3d 589, 591 (5th Cir. 2016). In turning the Section 8(a) program into an affirmative

action program, Congress intended to benefit "[s]ocially disadvantaged individuals . . . who have been subjected to racial or ethnic prejudice . . . because of their identity as a member of a group without regard to their individual qualities." 15 U.S.C. § 637(a)(5). Congress also identified such individuals "as members of certain groups that have suffered the effects of discriminatory practices or similar invidious circumstances over which they have no control[,]" including such groups as "Black Americans, Hispanic Americans, Native Americans, Indian tribes, Asian Pacific Americans, Native Hawaiian Organizations, and other minorities."[4] 15 U.S.C. § 631(f)(1)(B)-(C). Until the panel majority decision in the instant case, it was recognized by Congress, the federal government, and the courts that the statutory provisions of the Section 8(a) program use race-conscious means to distribute burdens and benefits.[5] *See* App. 34a-35a, 64a (Henderson, J., dissenting) (noting the "chorus of voices" opining that the statutory

[4] Rothe is not challenging any Section 8(a) preferences accorded to "Indian tribes" and "Native Hawaiian Organizations." *See* App. 4a n.1.

[5] Even commentators have agreed that the statutory provisions of the Section 8(a) program classify on the basis of race, regardless of whether they are critiquing or defending the program. *E.g.*, Drabkin, 49 Brook. L. Rev. at 441 ("Socially disadvantaged groups are defined as including but not limited to 'Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities.'" (quoting 15 U.S.C. § 631(f)(1))); Note, *Presumed Disadvantaged: Constitutional Incongruity in Federal Contract Procurement and Acquisition Regulations*, 115 W. Va. L. Rev. 847, 855 (2012) (The Act contains a "statutory presumption" "that certain racial minorities are socially disadvantaged.").

provisions of the Section 8(a) program contain a racial classification).

For example, in passing the 1978 amendments to the Act, Congress established race-based eligibility criteria for the Section 8(a) program and "provide[d] the SBA with the necessary guidance to assure proper administration of this important program." 124 Cong. Rec. S17908-09 (daily ed. Oct. 10, 1978) (statement of Sen. Weicker); 124 Cong. Rec. H11818-19 (daily ed. Oct. 6, 1978) ("Our criteria for eligibility are 'social and economic disadvantage' and the social disadvantage criterion not only takes into account race and ethnic status, but in many cases recognizes that such status is the sole cause of social disadvantagement." (statement of Rep. Addabbo)); S. Rep. No. 95-1070, at 16 (1978) (Tying Section 2(f) to Section 8(a)(5) and asserting that "the procurement authority under section 8(a) . . . should be used only for developing minority and other socially and economically disadvantaged businesses."). In short, Congress viewed Section 2(f) as providing the definition of "socially and economically disadvantaged" groups eligible for the Section 8(a) program. S. Rep. No. 95-1070, at 3 ("The purpose of this chapter is to clarify which groups and persons may be eligible to receive assistance under 8(a).").

Similarly, following *Adarand*, the Department of Justice explained:

> Through its initial authorization of the use of section 8(a) of the Small Business Act to expand opportunities for minority-owned firms

> and through reenactments of this and other programs designed to assist such businesses, *Congress has repeatedly made the judgment that race-conscious federal procurement programs are needed to remedy the effects of discrimination* that have raised artificial barriers to the formation, development and utilization of businesses owned by minorities and other socially disadvantaged individuals.

61 Fed. Reg. 26,042, 26,042 (May 23, 1996) (emphasis added). The SBA's understanding of the statutory provisions of the Section 8(a) program mirrors that of the Department of Justice. *See, e.g.*, 45 Fed. Reg. 79,413, 79,414 (Dec. 1, 1980) (With the 1978 amendments, "[Congress] sought to single out for special treatment those persons who have had greatest difficulty, through no fault of their own, in achieving a competitive position in the business world. *Hence, its designation of members of certain minority groups as socially disadvantaged.*" (emphasis added)).

In addition, prior to the panel majority's decision in the instant case, the D.C. Circuit had ruled that a federal contractor had standing to bring an equal protection challenge to the Section 8(a) program. *Dynalantic II*, 115 F.3d. at 1015-20. Although the court did not expressly rule that the statutory provisions of the program contained a racial classification, it labeled the government's argument that the "8(a) statute is not itself race-conscious" as "rather dubious." *Id.* at 117; *see id*. at 117 n.3 (noting that "[t]he statute itself actually might *require* race-conscious regulations"

(emphasis in original)). Importantly, on remand, the district court agreed with the parties that the statutory provisions of the 8(a) program contain a racial classification. *Dynalantic Corp. v. U.S. Dep't of Defense*, 885 F. Supp. 2d 237, 250 (D.D.C. 2012) ("*Dynalantic III*"); *see* App. 113a-114a (district court in the instant case relying on *Dynalantic III* in concluding that the statutory provisions of the Section 8(a) program utilize race-based criteria).

In breaking from the consensus that the statutory provisions of the Section 8(a) program contain a racial classification, the panel majority reasoned that Section 8(a) "uses facially race-neutral terms of eligibility to identify individual victims of discrimination, prejudice, or bias," App. 4a-5a, and "envisions an individual-based approach that focuses on experience rather than on a group characteristic." *Id*. 9a-11a. The panel majority also ignored the significance of Section 2(f) of the Act based on its conclusion that Section 2(f) "is located in the findings section of the statute, not in the operative provision that sets forth the program's terms and the criteria for participation." *Id*. 14a. Although the flaws in the panel majority's reasoning are numerous, two are particularly egregious.[6]

First, the panel majority's assertion that Section 8(a) "uses facially race-neutral terms" ignores the plain

[6] As set forth in Section II, *infra*, the panel majority compounded these errors by violating this Court's principles of statutory construction in concluding that the statutory provisions at issue are facially race neutral.

language of Section 8(a)(5), which defines "[s]ocially disadvantaged individuals" based upon "their identity as a member of a group without regard to their individual qualities."[7] 15 U.S.C. § 637(a)(5). Section 2(f), in turn, describes the characteristics of socially disadvantaged groups, *id.* § 631(f)(1)(B), and lists racial minority groups as examples of such groups. *Id.* § 631(f)(1)(C). In addition to the racial groups listed by Congress in Section 2(f), Section 8(a)(8) authorizes the SBA to add additional racial groups to the list when it makes a finding that "a group has been subjected to prejudice or bias. . . ." *Id.* § 637(a)(8); *see* 13 C.F.R.

[7] By focusing on the word "individuals" within the term "socially disadvantaged individuals" in Section 8(a)(5) and ignoring the rest of the language of that provision, as well as the other statutory provisions, the panel erroneously interpreted Section 8(a)(5) as employing an "individual-based approach. . . ." App. 9a. Section 8(a)(5) and the other statutory provisions, however, demonstrate that an "individual-based approach" is used primarily in determining economic disadvantage, not social disadvantage. *See* 15 U.S.C. § 637(a)(6). Only if the presumption of social disadvantage in Sections 8(a)(5) and 2(f) is not invoked would an "individual-based approach" ever be utilized for determining social disadvantage. *See Dynalantic III*, 885 F. Supp. 2d at 244, 285-86; 13 C.F.R. § 124.103(c) (2016). In any event, under this Court's precedents, whether a government classifies on the basis of race as an individual characteristic goes to whether the race-conscious program is narrowly tailored, not to whether strict scrutiny applies in the first place. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (opinion of Powell, J.) (distinguishing between a racial quota system and an admissions system that considers race as an individual factor, but assuming that both are subject to strict scrutiny); *Grutter v. Bollinger*, 539 U.S. 306, 326, 337 (2003) (Even the "highly individualized, holistic review" of "applicants of all races" " 'must be analyzed by a reviewing court under strict scrutiny.' " (quoting *Adarand*, 515 U.S. at 227)).

§ 124.103(b)(1) (2016) (indicating that the SBA has added "Subcontinent Asian Americans" to Congress's list). Thus, in statutorily designating certain racial groups as "socially disadvantaged," 15 U.S.C. § 631(f)(1)(B)-(C), and granting the SBA the authority to do the same, Congress created a presumption of eligibility and, thus, "distributed . . . benefits on the basis of individual racial classifications[.]" *Parents Involved*, 551 U.S. at 720. In fact, the only way to read the statutory provisions of the Section 8(a) program *in pari materia* is to give effect to the plain language of the provisions in the context of the program's "race-conscious theme. . . ." *Dynalantic II*, 115 F.3d at 1017. As Judge Henderson recognized in her dissent: "The message is clear – groups suffer discrimination and therefore persons who are members of those groups are socially disadvantaged."[8] App. 39a.

Second, the panel majority relied on the location of Section 2(f) in the "findings" section of the Act and analogized it to a preamble of a statute in order to read Section 2(f) out of the Act and out of the Section 8(a) program. App. 14a-15a. But Congress voted on and passed Section 2(f), and therefore Section 2(f) is not a "preamble," but a critical component of both the Act

[8] This reading is reinforced by 15 U.S.C. § 644(g)(1)(A)(iv), which sets a government-wide goal of awarding at least 5 percent of the total value of government contracts to "small business concerns owned and controlled by socially and economically disadvantaged individuals[.]" Even if 15 U.S.C. § 644(g)(1)(A)(iv) merely sets a goal, "it is a line drawn on the basis of race and ethnic status." *See Bakke*, 438 U.S. at 289 (opinion of Powell, J.).

and the statutory Section 8(a) program.[9] *See* Pub. L. No. 95-507, § 201, 92 Stat. at 1760 (Section 2(f) language located after the enactment clause); *cf. Yazoo & M.V.R. Co. v. Thomas*, 132 U.S. 174, 188 (1889) (Where "the preamble is no part of the act, [it] cannot enlarge or confer powers, nor control the words of the act, unless they are doubtful or ambiguous. . . ."). In fact, analogizing Section 2(f) – a statutory provision that provides further clarity to the very term at issue – to a preamble requires a leap of logic not explained by the panel majority. This is especially true considering that Section 2(f)'s language is materially different from the "general language of a preamble[.]"[10] *See* App. 47a-48a (Henderson, J., dissenting) ("Traditionally, a 'preamble' to a statute is a prefatory explanation or statement that customarily precedes the enacting clause in the

[9] Contrary to the panel majority's reasoning, all sections of a duly enacted statute are "operative." *See Corley v. United States*, 556 U.S. 303, 314 (2009) ("a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant" (quotations and alteration omitted)).

[10] Even if the panel majority were correct in analogizing a duly enacted statutory provision to an unenacted preamble, this Court has long considered the preamble "a key to open the understanding of a statute[.]" *Coosaw Mining Co. v. South Carolina*, 144 U.S. 550, 562-63 (1892). As Section 2(f) illuminates the meaning of "group" in Section 8(a)(5), the panel majority erred in not considering it. Joseph Story, *Commentaries on the Constitution of the United States*, § 218, at 163 (abridged ed. 1833) ("[T]he preamble of a statute is a key to open the mind of the makers, as to the mischiefs, which are to be remedied, and the objects, which are to be accomplished by the provisions of the statute.").

text of a bill, and consequently is frequently understood not to be part of the law." (quotation and footnote omitted)). In fact, Section 2(f) reads like a definitional section. 15 U.S.C. § 631(f)(1)(B)-(C). Further, a court should always review the entirety of a statute, in construing a provision thereof, regardless of whether the provision is ambiguous, and that includes reviewing Congress's findings. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); *Gonzales v. Raich*, 545 U.S. 1, 20-21, 33 (2005) (relying on congressional findings to hold that the Controlled Substances Act was constitutional).

In sum, the statutory provisions of the Section 8(a) program contain a paradigmatic racial classification because they distribute burdens and benefits on the basis of race. *See* App. 44a (Henderson, J., dissenting). Because the panel majority's contrary conclusion and failure to apply strict scrutiny are irreconcilable with the plain language of the provisions and this Court's precedents, review is warranted.

B. The Panel Majority's Determination That Strict Scrutiny Does Not Apply Because Race Is Not The Sole Factor In Distributing Burdens And Benefits Conflicts With This Court's Precedents.

In ruling that the statutory provisions of the Section 8(a) program do not classify on the basis of race, the panel majority placed great emphasis on its belief that "individuals of any race" could "be considered

'socially disadvantaged.'" App. 11a. Although the panel majority did not think "such inclusiveness *alone* renders the statute race neutral[,]" it considered it to be a substantial factor. *Id.* (emphasis added).

The panel majority's ruling directly conflicts with this Court's precedents. Whether a statute entirely bars non-minorities goes to whether the statute is narrowly tailored, not to whether strict scrutiny applies. *See Grutter*, 539 U.S. at 334-35. In contrast, whether a racial classification exists so as to trigger strict scrutiny requires only a determination that non-minorities are disadvantaged. *See Gratz*, 539 U.S. at 271-72 (admissions program that "automatically distributes" an advantage to applicants that are members of minority groups, but does not shut out non-minorities entirely, is subject to strict scrutiny); *Grutter*, 539 U.S. at 334 (Whether a government program considers race or ethnicity "only as a plus" "without insulating the individual from comparison with all other candidates" goes to whether the program is narrowly tailored under a strict scrutiny inquiry (quotations and alteration omitted)); *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 508 (1989) (giving applicants "an absolute preference over other citizens based solely on their race[]" is not only subject to strict scrutiny; it fails the test). In short, this Court applies strict scrutiny whenever the government uses race as a factor in distributing burdens and benefits, regardless of whether race

is the sole factor.[11] *See Adarand*, 515 U.S. at 208-10 (non-mandatory racial preferences are subject to strict scrutiny); *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411, 2416 (2013) ("*Fisher I*") (applying strict scrutiny even where race was "not assigned an explicit numerical value" because "it is undisputed that race is a meaningful factor"). In fact, whether race is the deciding factor or "but a factor of a factor of a factor" – strict scrutiny still applies. *Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198, 2207 (2016) ("*Fisher II*") (internal quotation omitted).

Here, the statutory provisions of the Section 8(a) program are basically indistinguishable from the racial classifications that were subjected to strict scrutiny in *Gratz*. As Judge Henderson recognized, "Congress has ordered that certain contracts be set aside for 'socially disadvantaged' individuals . . . , and has declared that members of certain *racial* groups are presumed to be socially disadvantaged. It cannot get more explicit than that." App. 51a (citing 15 U.S.C. §§ 637(a), 631(f)(1)(C)) (quotation omitted) (emphasis in original). Thus, the statutory provisions of the Section 8(a) program do exactly the same thing that the admissions policy in *Gratz* did – they "tak[e] into account diversity within and among all racial and ethnic groups" but "automatically" distribute a benefit to members of

[11] By way of contrast, when "consideration of race is not directly related to the allocation of burdens or benefits[,]" for example, "gathering racial data for research purposes[,]" strict scrutiny is not triggered. Angelo N. Ancheta, *Contextual Strict Scrutiny and Race-Conscious Policy Making*, 36 Loy. U. Chi. L.J. 21, 27 (2004).

certain minority groups. 539 U.S. at 277 (O'Connor, J., concurring). Like the admissions policy in *Gratz*, the availability of a preference for individuals who suffer "socioeconomic disadvantage" independent of minority status does not save the statutory provisions of the Section 8(a) program from strict scrutiny.[12] *See id.* at 255. The inescapable result of Congress's designation of certain racial minority groups as "socially disadvantaged" is that members of those groups receive an advantage over non-minorities based on their race.[13] Accordingly, this Court's review is warranted because the panel majority's decision conflicts with this Court's decisions that hold that strict scrutiny applies whenever race is a factor.

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[12] Indeed, the admissions program in *Gratz* considered race as only one of several factors, but still failed strict scrutiny. 539 U.S. at 275.

[13] Assuming the panel majority was correct in erasing Section 2(f) from the statute, the statutory provisions of the Section 8(a) program would *still* be subject to strict scrutiny because Section 8(a)(5) directs the SBA to make determinations of social disadvantage on the basis of "racial or ethnic prejudice or cultural bias. . . ." 15 U.S.C. § 637(a)(5); *see*, 15 U.S.C. § 637(a)(8); *see also Adarand*, 515 U.S. at 223 ("[a]ny preference based on racial or ethnic criteria" is subject to strict scrutiny (quotation omitted)). In fact, even the panel majority does not dispute that race is a factor in Section 8(a)(5) – it simply deemed this factor neutral because Section 8(a)(5) does not expressly identify specific races. App. 3a, 10a-11a.

C. In Eschewing Strict Scrutiny, The Panel Majority Misread The Legislative History, Which Demonstrates That Congress Created A Racial Classification.

The "cardinal canon" of statutory construction is that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992); *Aldridge v. Williams*, 44 U.S. 9, 24 (1845) ("The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself. . . ."). A corollary to this canon is that only in the rarest of circumstances should a court ever resort to the legislative history in an effort to determine the meaning of a statute. *See Blanchard v. Bergeron*, 489 U.S. 87, 99 (1989) (Scalia, J., concurring). Here, the panel majority erroneously relied on a snippet from the legislative history to conclude that the statutory provisions of the Section 8(a) program do not contain a racial preference because Congress allegedly "jettison[ed] an express racial presumption that appeared in an earlier version of the bill." App. 20a-21a. Even if the panel majority were correct in looking at the legislative history, it misinterpreted its cherry-picked portion of that history. *See* App. 53a-59a (Judge Henderson explaining that the panel majority's reading of the legislative history ignores significant portions of that history that demonstrate a clear intent to enact a racial preference, as well as Congress's own explanations for the evolution in the bill's language.).

In 1972, the House Select Committee on Small Business issued a report discussing the "unique dilemma[s]" faced by minority business owners. H.R. Rep. No. 92-1615, at 18-19 (1972). Subsequent reports continued to cite statistical disparities regarding small business ownership and contracting opportunities, and concluded that "remedial action must be considered. . . ." H.R. Rep. No. 94-468, at 1-2; *see* H.R. Rep. No. 94-1791, at 182 (1977). In fact, the SBA had previously promulgated an inconsistently applied regulation in response to executive orders and reports recommending that "steps be taken to increase the level of business ownership by minorities. . . ."[14] 124 Cong. Rec. S8695-98 (daily ed. June 7, 1978) (statement of Sen. Nunn). Thus, in passing the 1978 amendments, Congress intended to provide a strong statutory basis for the SBA's existing, and perhaps *ultra vires*, race-based program. *See id*. (indicating that Congress sought to provide "a strong, clear legislative mandate for minority business development").

As noted above, through the 1978 amendments to the Act, Congress laid out the statutory provisions of the current Section 8(a) program. Pub. L. No. 95-507, 92 Stat. at 1760. From the beginning, Congress's intent was to remedy "the pattern of social and economic discrimination that continues to deprive racial and ethnic minorities, and others, of the opportunity to participate fully in the free enterprise system." S. Rep. No.

[14] The regulation considered race as a possible "contributing factor in establishing social or economic disadvantage" but did not treat it as conclusive. 13 C.F.R. § 124.8-1(c) (1977).

95-1070, at 14. Consistent with this focus, the House bill included a rebuttable presumption of social disadvantage for Black Americans and Hispanic Americans. H.R. Rep. No. 95-949, at 24-25 (1978). The conference committee removed that language in favor of the Senate's broader "socially and economically disadvantaged" language to account for both group-based and individual-based showings of prejudice or bias. H.R. Conf. Rep. No. 95-1714, at 21-22. The reason given for "replac[ing] the rebuttable presumption language" in Section 8(a) was that "Americans [other than minorities] may also suffer from social disadvantagement. . . ." *Id*. Yet, the conference committee still intended "that the primary beneficiaries of th[e] program w[ould] be minorities. . . ." *Id*. More importantly, the conference committee retained the language from the House bill that members of certain racial groups are socially disadvantaged, *i.e*., Black Americans and Hispanic Americans, and added "Native Americans" to the list of racial groups. *Id*. at 20-21. In other words, the conference committee broadened the scope of the Section 8(a) program so that more racial groups would be presumed socially disadvantaged, but that non-minorities would not be completely barred from participating in the program. *Id*.

This conclusion is supported by the 1980 amendments to the Section 8(a) program. Through the 1980 amendments, Congress added "Asian Pacific Americans" to the list of socially disadvantaged groups in Section 2(f) and made this addition retroactive to 1978. Pub. L. No. 96-302, § 118, 94 Stat. 833, 840

(1980). The House Report explained that adding Asian-Pacific Americans to Congress's list of socially disadvantaged groups would allow "Asian-Pacific Americans [to] be afforded the same *presumption* of 'social disadvantage' as extended under present law to 'black Americans', 'Hispanic Americans', and 'native Americans'."[15] H.R. Rep. No. 96-998, at 3 (1980) (emphasis added). Later that year, Congress amended Section 8(a)(8) to clarify the SBA's authority to make determinations with respect to whether other groups have been "subjected to prejudice or bias[,]" and whether those groups should be added to the list going forward. Pub. L. No. 96-481, § 105, 94 Stat. 2321, 2322 (1980).

It goes without saying that, if Section 2(f) were mere prefatory policy language, as suggested by the panel majority, *see* App. 15a, Congress would have neither amended its list of socially disadvantaged groups in Section 2(f), nor clarified the SBA's authority to add to that list going forward. In any event, because the panel majority eschewed strict scrutiny based on an obvious misreading of the legislative history, this Court's review is warranted.

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[15] Because the SBA had not yet promulgated any regulatory presumption of social disadvantage, the House Report was clearly referencing the Act. *See* 44 Fed. Reg. 30,672, 30,674 (May 29, 1979).

II. THE PANEL MAJORITY VIOLATED THIS COURT'S PRINCIPLES OF STATUTORY CONSTRUCTION IN CONCLUDING THAT THE STATUTORY PROVISIONS AT ISSUE ARE FACIALLY RACE NEUTRAL.

A. The Panel Majority Ignored The Canon Of Construction That A Statute Should Be Construed As A Whole.

Few principles are more "'fundamental'" than the "'canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Brown & Williamson Tobacco Corp.*, 529 U.S. at 133 (quoting *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989)); *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988) ("[V]iewed in the isolated context of [the statutory provision], the phrase could reasonably be given the meaning petitioner asserts. Statutory construction, however, is a holistic endeavor."). In concluding that the statutory provisions of the Section 8(a) program do not contain a racial classification, App. 19a, the panel majority violated this fundamental canon of construction by reading each of the challenged provisions in isolation and ignoring the overall context of the Section 8(a) program. App. 9a-10a. Specifically, the panel majority reasoned that Section 8(a)(5)'s definition of the term "socially disadvantaged individuals" is focused solely on "individuals," not "groups," and could include persons of any racial or ethnic background. App. 10a. In doing so, the panel majority ignored that Section

8(a)(5) defines "[s]ocially disadvantaged individuals" as "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)(5) (emphasis added). The panel majority also disregarded Congress's list of racial groups in Section 2(f)(1) of the Act as being unrelated to the Section 8(a) program. App. 13a-15a.

Yet, by divorcing the so-called "operative provision that sets forth the program's terms and the criteria for participation" from Congress's statutory determination that membership in certain racial minority groups partially satisfies those criteria, *see* App. 14a, the panel majority failed to construe the statute as a whole. *Util. Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2442 (2014) (A "reasonable statutory interpretation must account for both 'the specific context in which . . . language is used' and 'the broader context of the statute as a whole.'" (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997))); *see Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995) (A court must interpret a statute "as a symmetrical and coherent regulatory scheme[.]"). Reading the statutory provisions in isolation caused the panel majority to ignore the purpose and intent of the statutory provisions of the Section 8(a) program. *See Kelly v. Robinson*, 479 U.S. 36, 43 (1986) (A court must discern congressional intent by looking "to the provisions of the whole law, and to its object and policy." (internal quotation omitted)). In fact, the overall context of the Section 8(a) program is undisputedly race-based, as the primary evil Congress sought to

remedy was racial discrimination. *See* S. Rep. No. 95-1070, at 14-15.

The panel majority's interpretation is especially flawed because Section 2(f) of the Act provides the necessary context for the definition of "socially disadvantaged individuals" contained in Section 8(a)(5). *See Reno v. Koray*, 515 U.S. 50, 56 (1995) ("[I]t is a fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." (internal quotation omitted)). By determining that the phrase "socially disadvantaged individuals" does not, standing alone, constitute a racial classification, the panel majority ignored this Court's admonition that "a reviewing court should not confine itself to examining a particular statutory provision in isolation." *Brown & Williamson Tobacco Corp.*, 529 U.S. at 132. As demonstrated above, Sections 2(f) and 8(a)(5), read together, create a presumption of social disadvantage for members of the identified racial minority groups. *See Dynalantic II*, 115 F.3d at 1017 (Reading the Section 8(a) program in context of "[o]ther sections of the Act [that] are likewise race-conscious" to conclude the statutory provisions of the Section 8(a) program are "much like the program in *Bakke*: 'a minority enrollment program with a secondary disadvantage element.'" (quoting *Bakke*, 438 U.S. at 281 n.14 (opinion of Powell, J.))).

Contrary to the panel majority's decision, *see* App. 21a-22a, reading Section 8(a) in context alongside Section 8(d) further reinforces that the statutory

provisions of the Section 8(a) program contain a racial classification.[16] In holding that Section 8(d) was subject to strict scrutiny, this Court viewed Section 8(a) and Section 8(d) as congruent parts of the whole.[17] *Adarand*, 515 U.S. at 206-08. Specifically, this Court interpreted Section 8(a) as providing the definitions of social and economic disadvantage and Section 8(d) as implementing those statutory definitions in its subcontracting provisions. *Id*. at 207 ("The 8(a) program confers a wide range of benefits on participating businesses . . . , one of which is automatic eligibility for subcontractor compensation provisions of the kind at issue in this case."). In this Court's view, the only difference between Section 8(a) and Section 8(d) was that 8(a) program participants are presumptively socially disadvantaged if they belong to a racial minority group, but still must demonstrate economic disadvantage. *Id*. On the other hand, it was unclear whether "members of minority groups wishing to participate in the 8(d) subcontracting program are entitled to a race-based presumption of social *and* economic disadvantage." *Id.* at 207-08 (emphasis in original). In

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[16] Section 8(d) directs private contractors to use race-based criteria in sub-contracting by providing specific language to be used in prime contracts with the contracting agency. 15 U.S.C. § 637(d)(3)(C)(ii).

[17] Because this Court looked at Sections 8(a) and 8(d) in context of the overall statutory scheme, it also viewed 15 U.S.C. § 644(g)(1)(A)(iv)'s goal of granting 5 percent of the total value of government contracts to SDBs as a "statutory directive[]" furthered by Sections 8(a) and 8(d). *Compare Adarand*, 515 U.S. at 206, *with* App. 12a (panel majority asserting that 15 U.S.C. § 644(g)(1)(A)(iv)'s goal is unrelated to Section 8(a)).

reading Section 8(a) in isolation, the panel majority ignored both the canon of construction that a statute should be construed as a whole and this Court's contextual interpretation of the Section 8(a) program in *Adarand*. Both of these errors merit this Court's review.

B. The Panel Majority Misapplied The Canon Of Constitutional Avoidance.

"Federal statutes are to be so construed as to avoid serious doubt of their constitutionality." *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 749 (1961). However, this canon of constitutional avoidance "does not supplant traditional modes of statutory interpretation." *Boumediene v. Bush*, 553 U.S. 723, 787 (2008). Instead, "[t]he canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as *a means of choosing between them*." *Clark v. Martinez*, 543 U.S. 371, 385 (2005) (emphasis in original).

The panel majority, however, employed the canon of constitutional avoidance to read the statutory racial classification out of a congressionally mandated affirmative action program. App. 19a-20a. Although the majority asserted that it was "declin[ing] to read the statute to create a constitutional difficulty[,]" it employed a myopic reading of the statutory provisions of the Section 8(a) program to get there. App. 19a. The canon of constitutional avoidance, however, applies

only where statutory language has been found to be ambiguous. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009) ("The so-called canon of constitutional avoidance is an interpretive tool, counseling that ambiguous statutory language be construed to avoid serious constitutional doubts."). But a plain, contextual reading of the statutory provisions of the Section 8(a) program demonstrates an unambiguous racial preference based on group membership. For example, Section 8(a)(8) directs the SBA to focus on "groups" – not individuals – in determining whether additional "groups" should be added to Congress's list of socially disadvantaged groups in Section 2(f). 15 U.S.C. § 637(a)(8). Similarly, in Section 2(f), Congress provided a list of racial minority groups that have experienced discrimination. *Id.* § 631(f)(1)(B)-(C). If these provisions are not clear enough, any ambiguity is unmistakably laid to rest by the legislative history, which demonstrates Congress's intent to create a racial classification. *See* Section I.C., *supra*. In addition, the D.C. Circuit previously recognized that it was doubtful that Congress would have created the Section 8(a) program without a racial classification. *See Dynalantic II*, 115 F.3d at 1017 ("[W]e [cannot] assume that Congress would have enacted 8(a) without its race-conscious theme. . . ."). By finding an ambiguity where one does not exist, the panel majority misapplied the canon of constitutional avoidance, in contravention of this Court's precedents. *See, e.g.*, *McFadden v. United States*, 135 S. Ct. 2298, 2307 (2015) (the canon of constitutional avoidance "has no application in the

interpretation of an unambiguous statute" (internal quotation omitted)).

This is especially true considering that the canon of constitutional avoidance does not "give a court the prerogative to ignore the legislative will in order to avoid constitutional adjudication[.]" *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841 (1986) ("'Although this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . . or judicially rewriting it.'" (quoting *Aptheker v. Secretary of State*, 378 U.S. 500, 515 (1964)); *see* App. 44 n.8 (Henderson, J., dissenting) ("[W]here there *is* only one well-founded way to read a statute, it is emphatically not our responsibility to avoid constitutional difficulties." (emphasis in original)). The "legislative will" in enacting the statutory provisions of the Section 8(a) program could not be clearer. Congress sought to, and did, create an affirmative action program to award government contracts to minority-owned businesses. *See* Section I.C., *supra.* Rather than sidestepping the Act's racial classification, the panel majority should have applied strict scrutiny to "smoke out" any illegitimate uses of race. *Croson*, 488 U.S. at 493.

In short, if the panel majority's decision is allowed to stand, federal statutes would be immune from strict scrutiny so long as the statutory provision conferring benefits and the statutory provision identifying the racial groups to receive those benefits are in separate sections of the act. Accordingly, this Court's review is

warranted to reaffirm that all race-based classifications – no matter how "cleverly" drafted – are subject to strict scrutiny. *See Adarand*, 515 U.S. at 235 ("Federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest.").

III. WHETHER THE STATUTORY PROVISIONS OF THE SECTION 8(a) PROGRAM CONTAIN A RACIAL CLASSIFICATION IS AN ISSUE OF NATIONWIDE IMPORTANCE.

There can be little doubt that government contracting is big business, even for small businesses. Indeed, the total amount of federal prime contracts awarded through the Section 8(a) program in 2015 was $16.6 billion. U.S. Gov't Accountability Office, GAO-16-557, *DOD Small Business Contracting: Use of Sole-Source 8(a) Contracts Over $20 Million Continues to Decline* 1 (2016). Because "the [SBA's] 8(a) program is one of the federal government's primary vehicles for developing small businesses[,]" *id*. at 1, the program leaves small, non-minority-owned business concerns like Rothe out in the cold. Moreover, when billions of dollars in government contracts are at stake, any preferential treatment has a nationwide, economic impact.

Additionally, "one of the primary mechanisms agencies use to justify race-conscious programs is reliance on Section 8(a) of the Small Business Act." Zachary C. Ewing, *Feeble in Fact: How Underenforcement,*

Deference, and Independence Shape the Supreme Court's Affirmative Action Doctrine, 17 U. Pa. J. Const. L. 1463, 1477 (2015). This reliance "on SBA-run programs" has resulted in "agencies [that] have largely failed to apply the Supreme Court's requirements, or DOJ's guidelines, to their contracting programs." U.S. Comm'n on Civil Rights, *Federal Procurement After Adarand* 70 (2005). The U.S. Code is replete with statutes that have copied or adopted Section 8(a)(5)'s "socially and economically disadvantaged" language.[18] *See* 51 U.S.C. § 30304 (adopting Section 8(a)'s definition of "socially and economically disadvantaged" in enacting a goal for awarding NASA contracts to SDBs); 42 U.S.C. § 4370d (setting a goal that at least 8 percent of federal funding for grants and contracts from the EPA go to "socially and economically disadvantaged individuals (within the meaning of section 637(a)(5) and (6) of Title 15). . . ."); 7 U.S.C. §§ 1632a, 1935, 1936, 2003(e)(1), 2279, 3319f (programs for socially disadvantaged farmers and ranchers). If the panel majority's decision stands, the pervasiveness of discrimination in government contracting – and in distributing burdens and benefits based on race in other contexts – will continue. Further, Congress will have a roadmap for enacting

[18] Moreover, several states have relied on Section 8(a)(5) in enacting their own affirmative action programs. *See, e.g.*, R.I. Gen. Laws § 37-14.1-3(e)(6) (including in its definition of "Minority" a list of racial groups and "[m]embers of other groups . . . found to be economically and socially disadvantaged . . . under § 8(a) of the Small Business Act"); N.C. Stat. § 143-128.2(g)(3) (North Carolina statute expressly adopting the definition of "socially and economically disadvantaged individual" in Section 8(a)); Miss. Code § 57-69-3(k) (same).

strict-scrutiny-immune racial preferences in the future. This kind of group-based, preferential treatment is exactly the kind of odious discrimination that our Constitution's "single guarantee of equal protection" protects against. *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 610 (1990) (O'Connor, J., dissenting) ("We are a Nation not of black and white alone, but one teeming with divergent communities knitted together by various traditions and carried forth, above all, by individuals."). Thus, the applicability of strict scrutiny to the statutory provisions of the Section 8(a) program is not a mere "lawyers' quibble over words[.]" *Id.* In fact, strict scrutiny "establishes whether and when the Court and Constitution allow the Government to employ racial classifications." *Id.* Because the panel majority's decision "signals that the Government may resort to racial distinctions more readily[,]" *id.*, this Court's review is imperative.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Rothe Development, Inc., Appellant
v.
United States Department of Defense and United States Small Business Administration, Appellees

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|
Argued March 10, 2016
|
Decided September 9, 2016

Affirmed.

Karen LeCraft Henderson, Circuit Judge, wrote opinion concurring in part and dissenting in part.

Appeal from the United States District Court for the District of Columbia (No. 1:12-cv-00744)

Attorneys and Law Firms

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Steven J. Lechner, Denver, CO, was on the brief for amicus curiae Mountain States Legal Foundation in support of appellant.

Michael E. Rosman, Washington, DC, was on the brief for amicus curiae Center for Individual Rights in support of appellant.

Teresa Kwong, Attorney, U.S. Department of Justice, argued the cause for appellees. With her on the brief was Mark L. Gross, Attorney, Washington, DC. R. Craig Lawrence, Assistant U.S. Attorney, entered an appearance.

Sherrilyn Ifill, New York, NY, Janai Nelson, Christina Swarns, and Daniel W. Wolff, Washington, DC, were on the brief for amici curiae NAACP Legal Defense and Educational Fund, Inc., Asian Americans Advancing Justice, AAJC, and the Leadership Conference of Civil and Human Rights in support of appellees.

Christine V. Williams was on the brief for amici curiae Native American Contractors Association, et al. in support of appellees.

Before: Henderson, Griffith and Pillard, Circuit Judges.

Opinion

Opinion concurring in part and dissenting in part filed by Circuit Judge Henderson

Pillard, Circuit Judge:

Plaintiff-Appellant Rothe Development, Inc. (Rothe) alleges that the statutory basis of the Small Business Administration's 8(a) business development program, Amendments to the Small Business Act, Pub. L. No. 95-507, ch. 1, sec. 202(a), 92 Stat. 1757, 1761 (1978) (codified at 15 U.S.C. § 637), violates its right to equal protection under the Due Process Clause of the Fifth Amendment. Congress created the 8(a) program to extend government contracting opportunities to small business owners whose access to such opportunities was impaired by those individuals' experience of racial or ethnic prejudice or cultural bias. Rothe contends that the statute contains a racial classification that presumes that certain racial minorities are eligible for the program. But, in fact, Congress considered and rejected statutory language that included a racial presumption. Congress chose instead to hinge participation in the program on the facially race-neutral criterion of social disadvantage, which it defined as having suffered racial, ethnic, or cultural bias.

The challenged statute authorizes the Small Business Administration (SBA) to enter into contracts with other federal agencies, which the SBA then subcontracts to eligible small businesses that compete for the subcontracts in a sheltered market. 15 U.S.C. § 637(a)(1)(A)-(D). Businesses owned by "socially and economically disadvantaged" individuals are eligible to

participate in the 8(a) program. *Id.* § 637(a)(1)(B).[1] The statute defines socially disadvantaged individuals as persons "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." *Id.* § 637(a)(5).

Rothe is a small business that bids on Defense Department contracts, including the types of subcontracts that the SBA awards to economically and socially disadvantaged businesses through the 8(a) program. Rothe does not purport to be owned by an individual who has experienced racial or ethnic prejudice or cultural bias, and alleges that it "cannot participate in and has no desire to participate in the section 8(a) program." 1 App. 74 (Compl. ¶ 33). It objects to the program because it believes that the statute contains an unconstitutional racial classification that prevents Rothe from competing for Department of Defense contracts on an equal footing with minority-owned businesses.

We disagree, because the provisions of the Small Business Act that Rothe challenges do not on their face classify individuals by race.[2] Section 8(a) uses facially

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[1] Businesses owned by economically disadvantaged Indian tribes or Native Hawaiian organizations also qualify for the 8(a) program, *see* 15 U.S.C. § 637(a)(4)(A), but Rothe does not challenge that aspect of the statute.

[2] We refer to those statutory provisions collectively as "section 8(a)," after the section of the public law that originally authorized the SBA's contracting program, *see* Small Business Act of 1958, Pub. L. No. 85-536, § 8(a)(1)-(2), 72 Stat. 384, 389-91, but otherwise cite the codified versions of the relevant provisions. We

race-neutral terms of eligibility to identify individual victims of discrimination, prejudice, or bias, without presuming that members of certain racial, ethnic, or cultural groups qualify as such. That makes it different from other statutes that either expressly limit participation in contracting programs to racial or ethnic minorities or specifically direct third parties to presume that members of certain racial or ethnic groups, or minorities generally, are eligible. Congress intentionally took a different tack with section 8(a), opting for inclusive terms of eligibility that focus on an individual's experience of bias and aim to promote equal opportunity for entrepreneurs of all racial backgrounds.

In contrast to the statute, the SBA's regulation implementing the 8(a) program does contain a racial classification in the form of a presumption that an individual who is a member of one of five designated racial groups (and within them, 37 subgroups) is socially disadvantaged. *See* 13 C.F.R. § 124.103(b). This case does not permit us to decide whether the race-based regulatory presumption is constitutionally sound, for Rothe has elected to challenge only the statute. Rothe alleged in its complaint that the "racial classification of section 8(a) of the Small Business Act, defined herein, is facially unconstitutional." *Compare* 1 App. 68 (Compl. ¶ 1) *and id.* at 76-77 (claims for relief), *with W. States Paving Co. v. Wash. State Dep't of Transp.*, 407 F.3d 983, 990-91 (9th Cir. 2005) (plaintiff challenged both a statute's race-neutral definition of

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refer to the contracting program as a whole, including the SBA's regulations, as the "8(a) program."

social disadvantage and the agency's racial presumption). Rothe's definition of the racial classification it attacks does not include the SBA's regulation. *See infra* 63-64; 1 App. 71-72 (Compl.); Appellant Br. 2-3.

Rothe's counsel's statements during oral argument confirm the limited scope of Rothe's challenge. When we asked counsel whether Rothe was challenging a racial classification that appeared "[i]n the statute or in the regulations," he specified that Rothe was challenging the presumption "[i]n the statute." Oral Arg. Tr. 4. We followed up: "[I]s the constitutional flaw in the statute alone, or is it in the statute and the regulations together?" Counsel for Rothe reiterated: "It's in the statute alone. . . ." *Id.* at 5. It is thus clear that the regulations are beyond the scope of Rothe's challenge. If there were any doubt, we would be obliged to read the complaint narrowly to reach the same conclusion. *See Am. Fed'n of Gov't Emps., AFL-CIO v. United States*, 330 F.3d 513, 517-19 (D.C. Cir. 2003) (construing plaintiffs' suit in a manner that avoided raising an equal protection problem).

Because the statute lacks a racial classification, and because Rothe has not alleged that the statute is otherwise subject to strict scrutiny, we apply rational-basis review, which the statute readily survives. Rothe's evidentiary and nondelegation challenges to the decision below also fail. We therefore affirm the judgment of the district court granting summary judgment to the SBA and Department of Defense, *see Rothe Dev., Inc. v. Dep't of Def.*, 107 F.Supp.3d 183, 212-13 (D.D.C. 2015), albeit on different grounds.

I.

The central question on appeal is whether section 8(a) of the Small Business Act warrants strict judicial scrutiny. The parties and the district court seem to think it does. *See* Appellant Br. 10; Appellee Br. 16; *Rothe*, 107 F.Supp.3d at 189, 207; *but see* Oral Arg. Tr. 23 (Judge Griffith: "In your view does the statute create racial classifications, or is it the regulations?" Counsel for the government: "I believe it's the regulations. . . ."). That fact does not relieve us of our duty to assess independently the legal issue before us. *See United States v. Bigley*, 786 F.3d 11, 17 (D.C. Cir. 2015) (Brown, J., concurring in the judgment) ("But we are required to 'conduct an independent review' of a legal issue, despite the government's concession on appeal." (quoting *United States v. Russell*, 600 F.3d 631, 636 (D.C. Cir. 2010))); *cf. The Anaconda v. Am. Sugar Refining Co.*, 322 U.S. 42, 46, 64 S.Ct. 863, 88 L.Ed. 1117 (1944) (A party "cannot stipulate away" what "the legislation declares").

There are at least three ways a plaintiff can plead an equal protection violation. A plaintiff may allege that the government has expressly classified individuals based on their race, *see Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 712, 716, 720, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007); that the government has applied facially neutral laws or policies in an intentionally discriminatory manner, *see Yick Wo v. Hopkins*, 118 U.S. 356, 373-74, 6 S.Ct. 1064, 30 L.Ed. 220 (1886); or that facially neutral laws or policies "result in racially disproportionate impact and

are motivated by a racially discriminatory purpose," *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 213, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) (citing *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977), and *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976)). Rothe advances only the first theory – that, on its face, section 8(a) of the Small Business Act contains a racial classification. *See* 1 App. 68 (Compl. ¶ 1) (seeking "to obtain a declaration that the racial classification of section 8(a) of the Small Business Act, defined herein, is facially unconstitutional"). "[A]ll racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny.'" *Grutter v. Bollinger*, 539 U.S. 306, 326, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003) (quoting *Adarand*, 515 U.S. at 227, 115 S.Ct. 2097); *see Fisher v. Univ. of Tex. at Austin*, ___ U.S. ___, 133 S.Ct. 2411, 2419, 186 L.Ed.2d 474 (2013) ("[U]nder *Grutter*, strict scrutiny must be applied to any admissions program using racial categories or classifications.").

According to Rothe, three provisions instantiate the statute's racial classification: (1) the statutory definition of socially disadvantaged individuals; (2) a government-wide goal of letting 5% of federal contracts to small businesses owned by socially disadvantaged individuals; and (3) the findings section of the statute, which Rothe contends includes a presumption that members of the specified racial groups are socially disadvantaged. In our view, none of the three components

– separately or together – imposes an express racial classification subject to strict scrutiny.

A.

Rothe first alleges that 15 U.S.C. § 637(a)(5)'s "definition of the term 'socially disadvantaged' contains a racial classification." 1 App. 71 (Compl. ¶ 21). We disagree. The statute defines socially disadvantaged individuals as "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)(5). That definition does not "distribute[ ] burdens or benefits on the basis of individual racial classifications." *Parents Involved*, 551 U.S. at 720, 127 S.Ct. 2738. "[T]he term 'socially . . . disadvantaged' is race-[ ]neutral on its face. . . ." *W. States Paving Co.*, 407 F.3d at 988 (O'Scannlain, J.). It speaks of individual victims of discrimination. On its face, section 637(a)(5) envisions an individual-based approach that focuses on experience rather than on a group characteristic. Many individuals – of all races – have experienced discrimination on account of their race or ethnicity, and victims of discrimination do not comprise a racial or ethnic group; a person of any racial or ethnic background may suffer such discrimination. And the statute recognizes that not all members of a minority group have necessarily been subjected to racial or ethnic prejudice or cultural bias.

The focus on individuals who have experienced discrimination distinguishes section 637(a)(5) from the racial classification the Supreme Court considered in *Regents of the University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978). There, the university's medical school reserved 16 of 100 spaces in its class for "disadvantaged" students. *Id.* at 272, 279, 98 S.Ct. 2733 (opinion of Powell, J.). But under the *Bakke* program, an explicit factor in determining disadvantage was an applicant's race – not his or her individual experience of racial or ethnic discrimination. *Id.* at 274-75 & n.4, 98 S.Ct. 2733. Thus, Justice Powell concluded, the program "was a minority enrollment program with a secondary disadvantage element" and therefore qualified as a racial classification. *Id.* By contrast, section 637(a)(5) does not provide for preferential treatment "based on [an applicant's] race – a *group* classification long recognized as 'in most circumstances irrelevant and therefore prohibited,'" *Adarand*, 515 U.S. at 227, 115 S.Ct. 2097 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943)), but rather on an individual applicant's experience of discrimination. In other words, this is not a provision in which "the race, not the person, dictates the category." *Palmore v. Sidoti*, 466 U.S. 429, 432, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984) (describing racial classifications).

Unlike the program in *Bakke*, in which disadvantaged nonminority applicants could not participate, 438 U.S. at 281 n.14, 98 S.Ct. 2733, section 637(a)(5)'s

plain terms permit individuals of any race to be considered "socially disadvantaged." Contrary to our dissenting colleague's contention, Dissent at 75, 76-77, 78-79, 80-82 we do not believe such inclusiveness alone renders the statute race-neutral; it is necessary but not sufficient. Our key point is that the statute is easily read not to require any group-based racial or ethnic classification. The statute defines socially disadvantaged *individuals* as "those [individuals] who have been subjected to racial or ethnic prejudice or cultural bias," not, as the dissent suggests, those individuals *who are members of groups* that have been subjected to prejudice or bias. The statute references groups, but it does so not as "a floor for participation," Dissent at 77, but to identify an important kind of social disadvantage Congress had in mind: *individuals*' experience of having suffered "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)(5); *see id.* § 631(f)(1)(B), (C).

Of course, the SBA's implementation of section 637(a)(5)'s definition may well be based on a racial classification if the regulations carry it out in a manner that, like the program in *Bakke*, gives preference based on race instead of individual experience. But as we have explained, Rothe has expressly disclaimed any challenge to the SBA's implementation of section 637(a)(5) or to any other portions of the Small Business Act. As a result, the only question before us is whether the statute itself classifies based on race. Section 637(a)(5) makes no such classification.

B.

Rothe alleges that the second component of the putative "racial classification of section 8(a)" is the "statutory goal" found at 15 U.S.C. § 644(g)(1) "to award a certain percentage of prime- and sub-contracts to socially disadvantaged small business concerns." 1 App. 72-73 (Compl. ¶¶ 24-25). Section 644(g)(1) establishes several government-wide contracting targets, including an aspirational goal that at least five percent of the total value of the government's prime contract and subcontract awards for each fiscal year go to "small business concerns owned and controlled by socially and economically disadvantaged individuals." 15 U.S.C. § 644(g)(1)(A)(iv).

For starters, we take issue with Rothe's characterization of section 644(g)(1)'s goal as part of the 8(a) program. It is not. While contracts let through the 8(a) program may help the government as a whole to meet section 644(g)'s objectives, section 644(g)'s goal is not itself a part of the 8(a) program. *Id.* § 644(g)(1); *see DynaLantic Corp. v. U.S. Dep't of Def.*, 885 F.Supp.2d 237, 244-45 (D.D.C. 2012). Indeed, government contracts awarded to businesses owned by disadvantaged individuals without the benefit of programs such as the 8(a) program – that is, contracts they win through "unrestricted competition" – count toward section 644(g)'s goal. *See* 15 U.S.C. § 644(g)(2)(E). At any rate, section 644(g)(1)'s goal is not a racial classification. Like section 8(a), it refers to "socially and economically disadvantaged individuals"; it does not define the relevant business owners by their race.

C.

Rothe points to a third component of the statute that it argues creates a "presumption that all individuals who are members of certain racial groups are socially disadvantaged." 1 App. 72 (Compl. ¶ 22). According to Rothe, the racial presumption can be found at 15 U.S.C. § 631(f)(1). *Id.*; *see also* Pl.'s Mem. in Supp. of Mot. Summ. J. at 8, *Rothe Dev., Inc. v. Dep't of Def.*, No. 12-cv-744, 2014 WL 11485738 (D.D.C. May 15, 2014), ECF No. 56 ("The statute also contains an additional racial classification in a presumption that all individuals who are members of certain racial groups are socially disadvantaged. [15 U.S.C.] § 631(f)(1)."). But that provision creates no racial presumption or classification.

Section 631(f), which falls under the heading "Declaration of policy," is entitled "Findings; purpose." 15 U.S.C. § 631(f). The provision states Congress's conclusion that it is in the nation's interest "to expeditiously ameliorate the conditions of socially and economically disadvantaged groups," *id.* § 631(f)(1)(D), so that socially and economically disadvantaged persons may fully participate in the economy and "obtain social and economic equality," *id.* § 631(f)(1)(A). *See also id.* § 631(f)(2)(A) (declaring that one purpose of section 8(a) is to "promote the business development of small business concerns owned and controlled by socially and economically disadvantaged individuals so that such concerns can compete on an equal basis in the American economy"). It explains that "many [socially and economically disadvantaged] persons are socially

disadvantaged because of their identification as members of certain groups that have suffered the effects of discriminatory practices or similar invidious circumstances over which they have no control." *Id.* § 631(f)(1)(B). It goes on to observe "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." *Id.* § 631(f)(1)(C) (emphasis added). According to Rothe, section 631(f)(1) creates a presumption that members of the listed groups, and racial minorities more generally, are socially disadvantaged and are thereby eligible to participate in the 8(a) program, absent a showing to the contrary.

We disagree. Section 631(f)(1) is located in the findings section of the statute, not in the operative provision that sets forth the program's terms and the criteria for participation. Section 637(a)(5) is where Congress defined the program's terms. The statutory findings, by contrast, are just that – findings about the social realities that Congress believed supported providing temporary business-development training and contracting opportunity to small disadvantaged firms. Preceded by the statement "Congress finds," *id.* § 631(f)(1), they reflect Congress's determination that many individual business owners were socially disadvantaged because people who would otherwise have done business with them assumed, based on their group-related identifiers (race, ethnicity or culture), that they had disqualifying shortcomings. Congress

reasoned that business owners, underrated due to bias or prejudice, were likely to have been deprived of the opportunities and experiences that help small businesses to develop. Congress's findings that individual business owners may have been unfairly subjected to race-based disadvantage do not, however, impose or necessarily contemplate any race-based classification in the statutory response, nor do such findings supplant the race-neutral definition of social disadvantage found in section 637(a)(5).

As explained above, section 637(a)(5) does not classify on the basis of ethnicity or race. Findings, like a preamble, may contribute to "a general understanding of a statute," but, unlike the provisions that confer and define agency powers, they "are not an operative part of the statute." *Ass'n of Am. R.Rs. v. Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977). The EPA in *Costle* could not rely on the statutory preamble's mention of "major noise sources" to limit the agency to regulating only those sources that were major in the face of operative statutory language imposing an obligation to regulate noise more generally. *Id.* The congressional findings here referring to specified racial and ethnic "groups that have suffered the effects of discriminatory practices" are just as inoperative for the purpose Rothe ascribes to them as was the preamble in *Costle*.

There are many reasons Congress might have identified certain racial groups when announcing the policy behind the 8(a) program. Congress might have wanted to offer paradigmatic examples of the problem or to send a signal of responsiveness to Americans of

minority backgrounds, many of whom felt they lacked a fair shot at the American dream. But our concern in this case is not why Congress identified minority groups in section 631(f)(1), but whether, in doing so, it set special terms of preference for individuals based on their membership in a racial or ethnic minority group. Congress did not. Put simply, the preambulatory language of section 631(f)(1), taken alone or together with section 637(a)(5), does not create a presumption that a member of a particular racial or ethnic group is necessarily socially disadvantaged, nor that a white person is not.

The SBA's first regulation implementing the statutory definition of social disadvantage lends support to that conclusion. *See* 13 C.F.R. Part 124.1-1(c)(3), 44 Fed. Reg. 30672, 30674 (1979). That regulation acknowledged the statute's reference to social disadvantage suffered by members of statutorily identified groups, but eschewed presumptive eligibility based on group membership. The regulation required individualized social-disadvantage showings. It provided that "[t]he social disadvantage of individuals, including those within the above-named groups, shall be determined by the SBA on a case-by-case basis," and further specified that "[m]embership alone in any group is not conclusive that an individual is socially disadvantaged." *Id.* That regulation squarely contradicts the view that the statute forecloses the SBA from requiring "that every individual black American establish *individual* social disadvantage." Dissent at 8. It

demonstrates that the statute need not be implemented through a presumption that members of the named racial groups are, by token of their group membership, socially disadvantaged.

D.

The dissent points to a fourth component of the statute that it believes enacts a racial presumption subject to strict scrutiny – 15 U.S.C. § 637(a)(8). Section 637(a)(8) states:

> All determinations made pursuant to [15 U.S.C. § 637(a)(5), which defines socially disadvantaged individuals,] with respect to whether a group has been subjected to prejudice or bias shall be made by the Administrator after consultation with the Associate Administrator for Minority Small Business and Capital Ownership Development.

According to the dissent, that provision makes membership in a particular racial or ethnic group a proxy for social disadvantage and directs the SBA to identify certain racial groups whose members will be presumed to be socially disadvantaged. Section 637(a)(8), the dissent contends, works together with section 637(a)(5) – the section defining socially disadvantaged individuals – to operationalize Congress's findings in section 631(f)(1). Together, our colleague contends, those components make clear that Congress created a racial presumption. *See* Dissent at 75-77, 78-79.

For several reasons, however, we do not read section 637(a)(8)'s reference to groups, whether alone or together with the other parts of the statute, as creating a racial presumption triggering strict scrutiny.

Most importantly, the text of section 637(a)(8) does not create a racial presumption. It states that "[a]ll determinations made pursuant to [section 637(a)(5), which defines socially disadvantaged individuals,] with respect to whether a group has been subjected to prejudice or bias shall be made" by the SBA Administrator after consultation with the SBA official responsible for minority small business development. To be sure, that clause contemplates that the SBA will identify group-salient traits and accompanying forms of bias that it may consider when evaluating claims of social disadvantage. But we see nothing problematic about that. The definition of socially disadvantaged individuals makes reference to groups; it states that individuals who have been subject to bias because of their group-based characteristics may be eligible for the program. The dissent overlooks the second sentence of section 637(a)(8), which contemplates that "other" determinations, unrelated to group-based characteristics, may be made pursuant to section 637(a)(5), suggesting that the statute allows but does not require determinations about groups as part of section 637(a)(8)'s regulatory implementation.

As we have explained, section 637(a)(8)'s definition of social disadvantage does not amount to a racial classification, for it ultimately turns on a business owner's experience of discrimination. Section 637(a)(8)

shows that Congress was concerned with individuals' experiences of disadvantage due to certain forms of cultural, ethnic, and racial prejudice. But it does not instruct the agency to limit the field to certain racial groups, or to racial groups in general, nor does it tell the agency to presume that anyone who is a member of any particular group is, by that membership alone, socially disadvantaged.

As we read the statute, it neither contains any racial classification nor mandates the SBA to employ one. Even if the statute could be read to permit the agency to use a racial presumption, the canon of constitutional avoidance directs that we not construe the statute in a manner that renders it vulnerable to constitutional challenge on that ground. *See Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 466, 109 S.Ct. 2558, 105 L.Ed.2d 377 (1989) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." (internal quotation marks omitted)).

The dissent believes there is only one way to understand the statute – that it imposes a racial classification – and thus does not address our responsibility to avoid constitutional problems where a reasonable statutory reading so permits. But to reach the dissent's view requires leaps. First, one would have to read section 637(a)(5), either on its own or in tandem with section 637(a)(8), not just to authorize but to require the agency to make group-based determinations of social

disadvantage. *See* Dissent at 77-78. Second, one would have to believe that the language in the findings requires the agency to label all members of those particular groups disadvantaged by virtue of that membership alone. *See id.* at 76-77. We have identified reasons at each step to believe the opposite. And, "when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail. . . ." *Clark v. Martinez*, 543 U.S. 371, 380-81, 125 S.Ct. 716, 160 L.Ed.2d 734 (2005). We decline to read the statute to create a constitutional difficulty. *See INS v. St. Cyr*, 533 U.S. 289, 299-300, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001).

Several contextual considerations confirm that our reading of the text is the better reading:

First, Congress affirmatively chose to jettison an express racial presumption that appeared in an earlier version of the bill. *See INS v. Cardoza-Fonesca* [sic], 480 U.S. 421, 442-43, 107 S.Ct. 1207, 94 L.Ed.2d 434 (1987) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." (citation omitted)). The House version offered two routes to eligibility in the 8(a) program. Individuals who were "Black Americans and Hispanic Americans" were presumed to be socially and economically disadvantaged. H.R. Rep. No. 95-949, at 16 (1978). All other individuals had to demonstrate that

they faced barriers to business formation, development, and success on account of social and economic forces beyond their control. *Id.* The House Committee explained that its race-based presumption of eligibility "[was] based upon the congressional findings" in the first part of the bill. *Id.* In contrast, the Senate version of the bill had no presumption and did not refer to any particular racial groups when defining social and economic disadvantage. *See* S. Rep. No. 95-1070, at 13-16, 25. Critically, the Conference Committee dropped the House's presumption from the final version of the bill and opted, with section 637(a)(5)'s definition of socially disadvantaged individuals, for language much closer to the Senate's version. *See* H.R. Rep. No. 95-1714, at 21-22. That is, Congress ultimately kept the House's findings that racial minorities suffer social disadvantage but dropped the language that transformed that observation into a presumption. The conferees stressed that Congress was not granting the SBA authority "merely to channel contracts at a random pace to a preconceived group of eligibles for the sake of social or political goals." *Id.* at 21-23.

Second, why would Congress announce a racial presumption in the roundabout way Rothe envisions when it straightforwardly enacted a racial presumption elsewhere in the Small Business Act? *See Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) (When "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely

in the disparate inclusion or exclusion." (citation omitted)). In section 8(d) of the Small Business Act – a provision not at issue in this case – Congress directed agencies to include in their prime contracts a clause for subcontracts that states, in part, that the "contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, and any other individual found to be disadvantaged by the Administration pursuant to section 8(a) of the Small Business Act." 15 U.S.C. § 637(d)(3)(C)(ii). Section 8(d)'s express, race-based presumption was part of the Department of Transportation's affirmative-action program at issue in *Adarand Constructors, Inc. v. Peña*, to which the Supreme Court applied strict scrutiny. 515 U.S. at 205-07, 213, 115 S.Ct. 2097. Whatever Congress's reasons for directing private businesses to use race-based criteria under section 8(d)'s subcontracting clause, Congress authorized more nuanced implementation by the agency under section 8(a).

Other contracting programs likewise confirm that, when Congress wants to enact expressly race-based preferences, it knows how to do so. Take, for example, the Public Works Employment Act of 1977, Pub. L. 95-28, 91 Stat. 116 (1977), which Congress enacted just a year before section 8(a). It required that ten percent of federal funds granted to localities for public works projects be allocated for contracts with "minority business enterprises," which Congress defined as businesses owned by "minority group members," *i.e.*, "citizens of

the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." *See Fullilove v. Klutznick*, 448 U.S. 448, 454, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980) (opinion of Burger, C.J.) (quoting 42 U.S.C. § 6705(f)(2)).[3] In contrast to section 8(d) and the Public Works Employment Act, section 8(a) benefits "socially disadvantaged" individuals, as defined by their experience of discrimination and not just their racial or ethnic group membership. 15 U.S.C. § 637(a)(5).

It is worth noting that Congress enacted section 8(a) in 1978, a generation before the Supreme Court held that even "benign" congressional classification by race triggers strict judicial scrutiny. It was not until 1995 that the Supreme Court held that expressly race-based preferences in federal contracting are subject to strict scrutiny. *See Adarand*, 515 U.S. at 227, 115 S.Ct. 2097. Congress's use of the facially race-neutral social-disadvantage criteria in section 8(a) therefore cannot be cast as an effort to do covertly what Congress believed it could not do overtly. Rather, it is best understood as a considered effort to aid struggling entrepreneurs of all races who faced bias-induced barriers. In that respect, section 8(a) differs from expressly

[3] The Supreme Court in *Fullilove* sustained the Public Works Employment Act's minority set-aside provision against an equal protection challenge on grounds that the Court in *Adarand* substantially clarified. *See Adarand*, 515 U.S. at 236, 115 S.Ct. 2097 (holding race-based affirmative action subject to strict judicial scrutiny, and noting that, "to the extent (if any) that *Fullilove* held federal racial classifications to be subject to a less rigorous standard, it is no longer controlling").

race-based statutes courts have subjected to strict scrutiny. *See*, *e.g.*, *Croson*, 488 U.S. at 478, 109 S.Ct. 706 (local contracting set-aside program identified eligible businesses as those owned by "minority group members," specifically, "[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts"); *Rothe Dev. Corp. v. Dep't of Def.*, 545 F.3d 1023, 1027, 1050 (Fed. Cir. 2008) (program incorporating section 8(d)'s express racial presumption subject to strict scrutiny); *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 422 (D.C. Cir. 1992) (preliminarily enjoining program allocating 35% of D.C. contracts to "minority business enterprises," where "minority" meant "Black Americans, Native Americans, Asian Americans, Pacific Islander Americans, and Hispanic Americans, who by virtue of being members of the foregoing groups, are economically and socially disadvantaged because of historical discrimination practiced against these groups by institutions within the United States of America").

Third, both the Supreme Court and this court's discussions of the 8(a) program have identified the regulations – not the statute – as the source of its racial presumption. In *Adarand*, the Supreme Court noted that section 8(d) of the Small Business Act contains a race-based presumption. 515 U.S. at 207, 115 S.Ct. 2097. But in describing the 8(a) program, the *Adarand* Court explained that the agency (not Congress) presumes that certain racial groups are socially disadvantaged and cited an SBA regulation (not the statute):

"The SBA presumes that black, Hispanic, Asian Pacific, Subcontinent Asian, and Native Americans . . . are 'socially disadvantaged.'" *Id.* (quoting 13 C.F.R. § 124.105(b)(1)); *see also Fullilove*, 448 U.S. at 463, 100 S.Ct. 2758 (referring to "existing administrative programs promoting minority opportunity in government procurement, particularly those related to § 8(a) of the Small Business Act of 1953").

We said something similar in *DynaLantic*, 115 F.3d 1012. The question there was whether a business that was neither socially nor economically disadvantaged had standing to challenge the constitutionality of the 8(a) program, including the regulatory presumption of social disadvantage. *Id.* at 1013. We explained that "*SBA regulations* presume that, '[i]n the absence of evidence to the contrary,' members of certain racial or ethnic groups – including Black, Hispanic, Native, Asian Pacific, and Subcontinent Asian Americans – are socially disadvantaged." *Id.* (emphasis added) (quoting 13 C.F.R. § 124.105(b)(1)). And we referred specifically to the program's "*regulatory* presumption." *Id.* at 1017 (emphasis added).

Our conclusion that the statute lacks an express racial classification is also consistent with the holding of *DynaLantic*. Over the government's objections, we held that the plaintiff in *Dynalantic* had standing. *Id.* at 1013, 1018. The government had argued that, even if the plaintiff's challenge to the race-based regulatory presumption succeeded, the statutory basis for the program would stand because it was not race-based, and the plaintiff would continue to face competition from

firms that qualified for participation under the race-neutral statutory criteria. *Id.* at 1017. Therefore, the government asserted, even success on its equal protection claim could not redress the plaintiff's injury. *Id.* We thought the government's reading of the statute was "rather dubious" and were unwilling to "assume, certainly at [the pleading] stage of the litigation, that the statute itself [wa]s invulnerable" to constitutional challenge. *Id.*; *but see id.* at 1018 (Edwards, C.J., dissenting) ("The statutory set-aside is not limited in terms of race, so it does not prescribe a benefit that is available only to members of racial minorities."). But, critically, we did not reject the government's position; as the dissent correctly acknowledges, Dissent at 77-78, there was no need to reach it. "[I]f a favorable decision would lead only to the invalidation of the regulations . . . , Dynalantic's injury would still be considerably mitigated," so we left open the question whether 8(a) of the statute contained a racial classification. *Id.* at 1017 (majority op.); *see United States v. Wade*, 152 F.3d 969, 973 (D.C. Cir. 1998) (explaining that, even if an earlier opinion could be read to reach the relevant issue, "[b]ecause that issue was not before the court, its overly broad language would be *obiter dicta* and not entitled to deference").

Fourth, as noted above, in its first implementation of the statutory definition of social disadvantage on the heels of its enactment in 1978, the agency required case-by-case determinations of social disadvantage. The agency used no race-based presumption, but specifically required evaluation of the claimed

social disadvantage of any individual business owner seeking to qualify for the section 8(a) program, whether or not that person was a member of a racial or ethnic minority group deemed to be socially disadvantaged. The dissent suggests that the statute's constitutional defect lies in its putative failure to "provide that 'persons' are socially disadvantaged because of their *individual* experiences of discrimination." Dissent at 76. But that is precisely what the statute does provide. The agency's initial implementing regulation illustrates how the statute might reasonably be enforced in the race-neutral manner that the dissent believes the statute forecloses. *Id.*

Finally, the reality that Congress enacted section 8(a) with a consciousness of racial discrimination in particular as a source of the kind of disadvantages it sought to counteract does not expose the statute to strict scrutiny. Congress intended section 8(a) to secure "the opportunity for full participation in our free enterprise system [for] socially and economically disadvantaged persons" and to "improve the functioning of our national economy." 15 U.S.C. § 631(f)(1)(A). To be sure, Congress foresaw that "the primary beneficiaries of this program will be minorities." H.R. Rep. No. 95-1714, at 22. But Rothe does not argue that the statute could be subjected to strict scrutiny, even if it is facially neutral, on the basis that Congress enacted it with a discriminatory purpose. *See Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979). In the absence of such a claim, we will not subject a facially race-neutral statute to strict scrutiny.

Mere foreseeability of racially disparate impact, without invidious purpose, does not trigger strict constitutional scrutiny. *Id.* ("'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences.").

Policymakers may act with an awareness of race – unaccompanied by a facial racial classification or a discriminatory purpose – without thereby subjecting the resultant policies to the rigors of strict constitutional scrutiny. The Supreme Court has specified that "race may be considered in certain circumstances and in a proper fashion. . . . [M]ere awareness of race in attempting to solve the problems facing inner cities does not doom that endeavor [to foster diversity and combat racial isolation] at the outset." *Tex. Dep't Hous. & Cmty. Affairs v. Inclusive Cmties. Project*, ___U.S. ___, 135 S.Ct. 2507, 2525, 192 L.Ed.2d 514 (2015); *see Shaw v. Reno*, 509 U.S. 630, 646, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993) (recognizing that certain forms of "race consciousness do[] not lead inevitably to impermissible race discrimination"); *Parents Involved*, 551 U.S. at 789, 127 S.Ct. 2738 (Kennedy, J., concurring) (noting several ways of pursuing diversity in education, such as strategic site selection and targeted recruitment, unlikely to trigger strict scrutiny because those "mechanisms are race-conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race").

As Justice Scalia wrote in his concurring opinion in *City of Richmond v. J.A. Croson Company*,

> A State can, of course, act "to undo the effects of past discrimination" in many permissible ways that do not involve classification by race. In the particular field of state contracting, for example, it may adopt a preference for small businesses, or even for new businesses – which would make it easier for those previously excluded by discrimination to enter the field. Such programs may well have racially disproportionate impact, but they are not based on race.

488 U.S. 469, 526, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989). The Supreme Court's ensuing affirmative action decisions confirm that point by countenancing, and characterizing as "race neutral," alternatives designed to advance the same ends as affirmative action programs but that do not rely on racial criteria. *See*, *e.g.*, *Fisher*, 133 S.Ct. at 2420 ("[S]trict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice."). Congress, in crafting section 8(a), was attentive to form as it sought to pursue plainly permissible ends. The lawmakers chose to advance equality of business opportunity and respond to discrimination by conditioning participation in the program on an individual's experience of racial, ethnic, or cultural bias, rather than racial identity. We will not treat as constitutionally suspect an effort that avoids the hazards equal protection doctrine guards against.

E.

Because the statute does not trigger strict scrutiny, we need not and do not decide whether the district court correctly concluded that it is narrowly tailored to meet a compelling interest. *Rothe*, 107 F.Supp.3d at 206-11.[4] We instead consider whether it is supported by a rational basis. *See Ysursa v. Pocatello Educ. Ass'n*, 555 U.S. 353, 358-61, 129 S.Ct. 1093, 172 L.Ed.2d 770 (2009) (upholding under rational-basis review a statutory provision after determining that strict scrutiny does not apply). It plainly is, for "it bears a rational relation to some legitimate end." *Romer v. Evans*, 517 U.S. 620, 631, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996). The statute aims to remedy the effects of prejudice and bias that impede business formation and development and suppress fair competition for government contracts. *See* S. Rep. No. 95-1070, at 2.

Counteracting discrimination is a legitimate interest; indeed, in certain circumstances, it qualifies as

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[4] By the same token, we do not reach the parties' debate over whether to review Rothe's facial equal protection challenge under the standard set forth in *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987), or a less demanding standard. *Compare Rothe Dev. Corp. v. Dep't of Def.*, 413 F.3d 1327, 1337-38 (Fed. Cir. 2005) (explaining that *Salerno*'s "no set of circumstances" standard is of "limited relevance" in analyzing a facial equal protection challenge to which strict scrutiny applies), *with Sherbrooke Turf, Inc. v. Minn. Dep't of Transp.*, 345 F.3d 964, 971 (8th Cir. 2003) ("Appellants' facial challenge to the DBE program requires us to look carefully at DOT's regulations to determine whether they may be constitutionally applied under *any* set of factual circumstances." (citing *Salerno*, 481 U.S. at 746, 107 S.Ct. 2095)).

compelling. *See Shaw v. Hunt*, 517 U.S. 899, 909, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996); *Croson*, 488 U.S. at 492, 109 S.Ct. 706 (plurality op.) ("It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice."). And the statutory scheme is rationally related to that end. Congress conditioned participation in the 8(a) program on social disadvantage, defined as an individual's experience of discrimination or bias. *See* 15 U.S.C. § 637(a)(5). Because "[s]mall businesses owned and controlled by socially and economically disadvantaged individuals (most of whom are minority) receive a disproportionately small share of Federal purchases," H.R. Rep. No. 100-460, at 18 (1987), the program offers those participants technical assistance and the opportunity to bid on federal contracts in a sheltered market. The point of such sheltered markets is to provide disadvantaged business owners opportunities to gain management experience and build performance records – chances they might otherwise lose to competitors unhindered by the disadvantages they have experienced as a result of bias and prejudice. The program therefore provides the benefits socially and economically disadvantaged individuals most need to participate on fair terms in the national economy.

II.

Rothe also appeals the district court's decisions, pursuant to Federal Rule of Evidence 702, on the admissibility of the reports and deposition testimony of the government's expert witnesses and the inadmissibility of the reports and deposition testimony of Rothe's experts. In the context of the parties' cross-motions for summary judgment, each side proffered their expert evidence as probative of whether the government has a compelling interest that would justify use of race in determining social disadvantage under the 8(a) program. We decline to review the district court's admissibility determinations, for we would affirm district court's grant of summary judgment to the defendants even if the district court abused its discretion in making those determinations. The expert witness testimony is not necessary to, nor in conflict with, our conclusion that section 8(a) is subject to and survives rational-basis review.

III.

Finally, Rothe contends that section 8(a) is an unconstitutional delegation of legislative power. The Constitution "permits no delegation of [legislative] powers, and so . . . when Congress confers decisionmaking authority upon agencies *Congress* must lay down by legislative act an intelligible principle to which the person or body authorized to act is directed to conform." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 472, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001) (internal citations, quotation marks, and brackets omitted). According to

Rothe, "Congress cannot delegate the power to racially classify. Alternatively, even if Congress can delegate it, the delegation here lacks the requisite intelligible principle." Appellant Br. 53.

Rothe's first argument is premised on the idea that Congress has created a racial classification. As we have explained, Congress has done no such thing. Rothe's alternative argument also fails. Congress's delegation of power to the SBA to enter into contracts with other federal agencies and subcontract with "socially and economically disadvantaged small business concerns," 15 U.S.C. § 637(a)(1)(A) & (B), "is no broader than other delegations that direct agencies to act in the 'public interest,' or in a way that is 'fair and equitable,' or in a manner 'requisite to protect the public health,' or when 'necessary to avoid an imminent hazard to the public safety,'" each of which the Supreme Court has upheld against nondelegation challenges. *Nat'l Mar. Safety Ass'n v. Occupational Safety & Health Admin.*, 649 F.3d 743, 755 (D.C. Cir. 2011) (citations omitted). Congress's definition of "socially disadvantaged" in 15 U.S.C. § 637(a)(5) provides further "intelligible" guidance to the SBA to implement the 8(a) program.

* * *

For the foregoing reasons, we affirm the district court's grant of summary judgment to the government defendants.

So ordered.

Karen Lecraft Henderson, Circuit Judge, concurring in part and dissenting in part:

> *Judges must beware of hard constructions and strained inferences; for there is no worse torture than the torture of the laws.*
>
> Sir Francis Bacon
> *Essays*, "Of Judicature," LVI

My colleagues hold that the provisions of the Small Business Act (Act) at issue in this case are "facially race-neutral." *See* Maj. Op. at 61. I disagree. And I am in good company. The appellant believes the statute contains a racial classification.[1] The appellees believe the statute contains a racial classification.[2] The district court held that the statute contains a racial classification.[3] The Small Business Administration's (SBA) implementation follows from its view that the

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[1] *See* Appellant's Br. 2-3 (statutory definition of "socially disadvantaged," the "presumption that all individuals who are members of certain racial groups are socially disadvantaged," and the "goal to award a certain percentage" of government contracts "to socially disadvantaged small business concerns" together "comprise 'section 8(a)'s racial classification' ").

[2] *See* Appellees' Br. 16 ("Strict scrutiny applies because Section 8(a) employs a race-conscious rebuttable presumption to define socially disadvantaged individuals.").

[3] *Rothe Dev., Inc. v. Dep't of Def.*, 107 F.Supp.3d 183, 207 (D.D.C. 2015) ("There is no question that 'racial classifications' *such as the ones at issue here* 'are constitutional only if they are narrowly tailored measures that further compelling governmental interests.' " (emphasis added) (alteration and quotation marks omitted) (quoting *DynaLantic Corp. v. Dep't of Def.*, 885 F.Supp.2d 237, 250 (D.D.C. 2012))).

statute contains a racial classification.[4] And to top it off, *this court* found my colleagues' approach "rather dubious" nearly twenty years ago.[5] The chorus swells.

But we need not take the chorus's word for it. Their voices simply confirm what the language of the Act makes plain enough. The majority's analysis, in contrast, is fundamentally flawed, assuming that a statute that does not classify *exclusively* on the basis of race must necessarily be "facially race-neutral." Maj.

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[4] When the SBA first promulgated the regulatory presumption on December 1, 1980, it stated: "Congress did not mean to bestow 8(a) program benefits indiscriminately on small business persons." Definition of Social Disadvantage, 45 Fed. Reg. 79,413, 79,414 (Dec. 1, 1980). "Rather, it sought to single out for special treatment those persons who have had greatest difficulty, through no fault of their own, in achieving a competitive position in the business world. Hence, *its designation of members of certain minority groups as socially disadvantaged*." *Id.* (emphasis added). The SBA also made plain that, in promulgating the regulation, it "adhered to the legislative intent behind Pub. L. 95-507: that *statutorily designated racial and ethnic minorities* be the primary beneficiaries of the 8(a) program, but that other disadvantaged individuals be eligible for the program." *Id.* at 79,413 (emphasis added).

[5] That case involved a company's standing to pursue a constitutional challenge to the section 8(a) program. *See DynaLantic Corp. v. Dep't of Def.*, 115 F.3d 1012, 1013 (D.C. Cir. 1997). The government argued "that the 8(a) statute is not itself race-conscious; only the implementing SBA regulations are." *Id.* at 1017. The majority found "the government's statutory analysis [to be] rather dubious." *Id.* "[T]he Act," the court went on, "includes as a congressional *finding* that certain *racial* groups – the same groups as are identified in [the SBA regulation] – are socially disadvantaged." *Id.* (second emphasis added) (citing 15 U.S.C. §§ 631(f)(1)(B), (C)).

Op. at 61-62. The majority's appeals to statutory context, legislative history and relevant case law likewise miss the mark. On this issue, I respectfully part company with my colleagues.[6]

I. Section 8(a) of the Small Business Act Contains a Racial Classification

"Most laws classify," *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 271, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979), and the Small Business Act is no exception. Indeed, the section 8(a) program at issue classifies in all sorts of ways; as an example, for certain government contracts, it offers a preference to businesses that are "small" if owned by "socially disadvantaged" individuals who are also "economically disadvantaged." *See* 15 U.S.C. § 637(a). The issue here is whether section 8(a)'s classifications are, on their face, race neutral, *see* Maj. Op. at 61-62, or if they instead "distribute[] burdens or benefits" on the basis of race, *see Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007). The inquiry

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[6] I concur in the affirmance of summary judgment to the government on the non-delegation issue. *See* Maj. Op. at 73-74. My colleagues also conclude that we need not review the district court's evidentiary decisions because "[t]he expert witness testimony is not necessary to, nor in conflict with, our conclusion that section 8(a) is subject to and survives rational-basis review." *Id.* at 73. Because I believe we should apply strict scrutiny rather than rational-basis review to the challenged provisions of the Act, however, I disagree with my colleagues on the issue. Nevertheless, my dissent is limited to identifying the correct standard of review rather than its application and therefore the district court's evidentiary holdings are beyond its scope. *See infra n.8*.

boils down to this: Does the Act provide members of certain racial groups an advantage in qualifying for section 8(a)'s contract preference by virtue of their race? A review of its key provisions manifests that it does.

Section 8(a)(5) is the starting point. It defines "socially disadvantaged individuals" as "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)(5) (emphases added). Moreover, two other statutory provisions confirm that section 8(a)(5) of the Act (and not only the SBA's implementing regulations) favors certain races in qualifying for participation in the section 8(a) program.

The first of these provisions is section 8(a)(8). It provides that "[a]ll determinations made pursuant to paragraph [8(a)(5)] with respect to whether a *group* has been subjected to prejudice or bias shall be made by the Administrator after consultation with the Associate Administrator for Minority Small Business and Capital Ownership Development." *Id.* § 637(a)(8) (emphasis added). The use of "group" here is key. *Id.* It confirms that the focus of the inquiry under section 8(a)(5) is a "determination[]" of whether an individual is "socially disadvantaged" by virtue of his membership in a *group* that has suffered racial/ethnic "prejudice" or cultural "bias." *See id.* § 637(a)(5), (8). It is *group* membership – and the prejudice or bias the group has experienced – that triggers social disadvantage. *See id.* If, as my colleagues conclude, *see* Maj. Op. at 63-65, section 8(a)(5) instead demanded an inquiry into an

individual's own experience of discrimination, section 8(a)(8) would read something like "all determinations made pursuant to paragraph [8(a)(5)] with respect to whether *an individual* has been subject to prejudice or bias. . . ." But it does not. Instead, the Congress plainly made the "group" criterion preeminent.

Why that is so becomes abundantly clear when sections 8(a)(5) and 8(a)(8) are considered in light of section 2(f) of the Act. Section 2(f) is worth quoting at length:

> [W]ith respect to the [SBA's] business development programs the Congress finds –
>
> (A) that the opportunity for full participation in our free enterprise system by socially and economically disadvantaged persons is essential if we are to obtain social and economic equality for such persons and improve the functioning of our national economy;
>
> (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; [and]
>
> (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)(A)-(C) (footnote omitted).

Like section 8(a)(8), section 2(f)(1)(B) connects social disadvantage to membership in certain "groups." *Id.* § 631(f)(1)(B). Notably, section 2(f) – like 8(a)(8) – does not provide that "persons" are socially disadvantaged because of their *individual* experiences of discrimination. Rather, they 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." *Id.* (emphasis added). The message is clear – groups suffer discrimination and therefore persons who are members of those groups are socially disadvantaged. *See id.*

Section 2(f) also designates "Black Americans, Hispanic Americans, Native Americans, Indian tribes, Asian Pacific Americans, Native Hawaiian Organizations, and other minorities" as "such groups" that "have suffered the effects of discriminatory practices or similar invidious circumstances over which they have no control." *Id.* § 631(f)(1)(B)-(C). When read *in pari materia*, these two provisions are crystal clear: if an individual is a "Black American[], Hispanic American[], Native American[], [member of an] Indian tribe[], Asian Pacific American[], [or] [member of a] Native Hawaiian Organization[]," the individual is "socially disadvantaged" because those "groups" have "suffered the effects of discriminatory practices or similar invidious circumstances." *Id.* Likewise with "other minorities" – if an individual is a member of an unlisted minority group, he is deemed "socially disadvantaged." *Id.*

In my view, then, the Congress has set a floor for participation in the section 8(a) program: members of the statutorily identified groups are deemed to be "socially disadvantaged." *See id.* Under section 8(a)(8), the SBA may, over time, determine that "a group has been subjected to prejudice or bias" and add it to the running list. *Id.* § 637(a)(8). This is why section 8(a)(8) directs the SBA to focus on groups (not individuals) that have experienced discrimination in making its social-disadvantage decisions, *id.* – the Congress itself was focused on the discrimination experienced by groups in making its own findings about social disadvantage, *see id.* § 631(f)(1)(B)-(C). Nothing in the statute prohibits an individual from making a showing that his membership in a group *not* listed has made him "subject[] to racial or ethnic prejudice or cultural bias."[7] *Id.* § 637(a)(5). But "Black Americans, Hispanic Americans, Native Americans, Indian tribes, Asian Pacific Americans, [and] Native Hawaiian Organizations" are statutorily deemed to be "socially disadvantaged"

[7] Because section 2(f) limits the reach of groups that "have suffered the effects of discriminatory practices or similar invidious circumstances" to "other minorities," 15 U.S.C. § 631(f)(1)(B)-(C), a racial non-minority (*i.e.*, a white) plainly cannot qualify for the program based on "racial . . . prejudice," *id.* § 637(a)(5). A white would have to show social disadvantage based on his membership in a minority group that has experienced "cultural bias" or "ethnic prejudice." *Id.* The legislative history provides one example – "a poor Appalachian white person who has never had the opportunity for a quality education or the ability to expand his or her cultural horizons." H.R. Rep. No. 95-1714, at 22 (1978) (Conf. Rep.). But the fact that a white *can* qualify for the section 8(a) preference does not render the statute race-neutral. *See infra* 81-83.

under the Act because the Congress itself has declared that "members of [these] groups . . . have suffered the effects of discriminatory practices or similar invidious circumstances over which they have no control." *Id.* § 631(f)(1)(B)-(C).

An example may help to illustrate the Act's operation. The SBA's implementing regulations, tracking the Act, *presume* that members of certain racial groups are socially disadvantaged but individuals who are "not members of [the] designated groups . . . must establish individual social disadvantage by a preponderance of the evidence." *See* 13 C.F.R. § 124.103(b)-(c) (prescribing "a rebuttable presumption" that members of "designated groups" "are socially disadvantaged"). "Black Americans" currently lead the list of designated groups, the members of which are presumed to be socially disadvantaged. *Id.* § 124.103(b)(1). Assume, however, that the SBA were to decide that black Americans as a group are no longer subject to prejudice or bias and therefore black Americans as a group are no longer entitled to the regulatory presumption. Could the SBA remove them from the list of presumed socially disadvantaged groups and require instead that every individual black American establish *individual* social disadvantage by a preponderance of the evidence? I think not, because such action would conflict with the congressional finding that "Black Americans" *as a group* are socially disadvantaged, *see* 15 U.S.C. § 631(f)(1)(C), and the SBA would have exceeded its statutory authority. Instead, congressional action would be required to "delist" any of the statutorily

designated minority groups. *See*, *e.g.*, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress.").

I am far from the first to read the Act this way. We suggested this relationship between the statute and the race-based regulatory presumption – that the race-based statute demands race-based regulations – in *DynaLantic Corp. v. Department of Defense*. *See* 115 F.3d 1012, 1017 n.3 (D.C. Cir. 1997). Although we did not *decide* in *DynaLantic* whether the statute contains a racial classification, we noted that "[t]he statute itself actually might *require* race-conscious regulations." *Id.* (emphasis in original). We then cited 15 U.S.C. §§ 631(f)(1)(B) and (C), followed by a parenthetical stating, "(congressional finding that certain racial groups are socially disadvantaged)." *Id.* We found the Defense Department's contention to the contrary – "that the 8(a) statute is not itself race-conscious" – to be "rather dubious," explaining that "the Act includes as a congressional *finding* that certain racial groups – the same groups as are identified in [the regulation] – are socially disadvantaged." *Id.* at 1017 (emphasis in original). "In this respect," we said, "the 8(a) provisions are much like the program in [*Regents of the University of California v.*] *Bakke*: 'a minority enrollment program with a secondary disadvantage element.'" *Id.* (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 281 n.14, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978)).

Here, the appellees' reading of the relationship between the statute and regulations echoes our suggested reading in *DynaLantic*, 115 F.3d at 1017 n.3. They did not raise any no-racial-classification-in-the-statute defense in their briefs and, when asked at oral argument about a potential distinction between the regulation's racial presumption and the alleged lack of one in the Act, the appellees' counsel held fast to her position that the race-based SBA regulations flow directly from the statute. *See* Oral Arg. Tr. 25:6-13 ("[W]hat we're arguing is that SBA is just carrying out what is in the statute, that Congress provided the standards in the statute, and SBA in the regulations are [sic] just applying what's in the statute, the standards in the statute."); *see id.* at 26:3-7 ("[T]he SBA is just implementing what Congress has in the statute, so you have to see what Congress knew, and the SBA is just following what Congress has said.").

The moral of the story is that the congressional findings set forth in section 2(f) of the Act constrain the SBA's discretion in making "socially disadvantaged" determinations under section 8(a)(5), *see* 15 U.S.C. § 637(a)(5), and those determinations are tied – *by statute* – to group, not individual, discrimination, *see id.* § 637(a)(8). One of those constraints – and a critical one – is that the Congress has designated certain racial groups and other minorities as socially disadvantaged. *See id.* § 631(f)(1)(C). Accordingly, if not rebutted, the SBA *must* presume members of those groups are socially disadvantaged.

In my view, section 8(a) contains a paradigmatic racial classification. The Congress has "distribute[d] . . . [a] benefit" to members of statutorily-designated racial groups *because of* their membership therein, *see Parents Involved*, 551 U.S. at 720, 127 S.Ct. 2738; namely, they are not required to meet the same standard in establishing their eligibility to participate in the section 8(a) program that members of non-minority races must satisfy. Accordingly, I agree with the parties and the district court that we should apply strict scrutiny in determining whether the section 8(a) program violates Rothe's right to equal protection of the laws.[8]

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[8] According to the majority, I "believe[ ] there is only one way to understand the statute . . . and thus do[ ] not address our responsibility to avoid constitutional problems where a reasonable statutory reading so permits." Maj. Op. at 68. But where there *is* only one well-founded way to read a statute, it is emphatically not our responsibility to avoid constitutional difficulties. *See*, *e.g.*, *McFadden v. United States*, ___U.S. ___, 135 S.Ct. 2298, 2306-07, 192 L.Ed.2d 260 (2015) (constitutional-avoidance canon "has no application in the interpretation of an unambiguous statute" (internal quotation marks omitted)). Here, however, the majority's invocation of the canon is particularly flimsy for two reasons: First, the canon is ultimately "a means of giving effect to congressional intent, not of subverting it," *Clark v. Martinez*, 543 U.S. 371, 382, 125 S.Ct. 716, 160 L.Ed.2d 734 (2005), and, not to belabor the point, but if the Congress did not intend section 8(a) to classify on the basis of race, one wonders why it envisioned that "determinations [would be] made . . . with respect to whether a group has been subjected to prejudice or bias," *see* 15 U.S.C. § 637(a)(8), or found that certain racial groups "have suffered the effects of discriminatory practices or similar invidious circumstances over which they have no control," *see id.* § 631(f)(1)(B)-(C). But second, and perhaps more fundamentally, "the purpose of strict scrutiny is to 'smoke out' illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use

II. The Majority Misreads Section 8(a)

I believe the majority's race-neutral reading is flawed in at least three major respects. First, it fails to give *in pari materia* reading to sections 8(a)(5), 8(a)(8) and 2(f). *See* Maj. Op. at 65-67. Second, it mistakenly assumes that, because a member of a non-minority race (*i.e.*, a white) can participate in the section 8(a) program, the statute must be race-neutral. *See* Maj. Op. at 63-65. Third, the legislative history, statutory context and relevant case law it cites do not support its interpretation. *See* Maj. Op. at 68-72. I address each in turn.

A. *Section 2(f) Should Be Given Effect*

The majority discounts the significance of section 2(f) of the Act by emphasizing that it "is located in the

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of a highly suspect tool." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (plurality opinion). Those efforts would be severely hamstrung if it were the "responsibility," Maj. Op. at 16, of courts to force doubtful readings on statutes to avoid conducting that "searching examination," *Fisher v. Univ. of Texas at Austin*, ___ U.S. ___, 133 S.Ct. 2411, 2419, 186 L.Ed.2d 474 (2013). I recognize that, at times, courts have been less than unequivocal in specifying a tier of scrutiny when greater clarity plainly would not affect the statute's constitutionality, *see*, *e.g.*, *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53, 60-61, 121 S.Ct. 2053, 150 L.Ed.2d 115 (2001); however, I cannot say at this early stage whether that would be true here. Nonetheless, recognizing that the Supreme Court, at times, has also thought it important to specify the degree of scrutiny even when doing so would not change the outcome, *see City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 435, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985), I see little reason to "avoid," Maj. Op. at 68, the threshold question of how searching our review should be.

findings section of the statute, not in the operative provision that sets forth the program's terms and the criteria for participation." Maj. Op. at 66. There are several problems with this approach.

First, our precedent makes plain that, "although the language in the preamble of a statute is 'not an operative part of the statute,' it may aid in achieving a 'general understanding' of the statute." *Wyo. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 53 (D.C. Cir. 1999) (quoting *Ass'n of Am. R.Rs. v. Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977)). Indeed, we have found an agency's decision arbitrary and capricious when it construed a statute without addressing "important language" in congressional findings. *See Ass'n of Am. R.Rs. v. Surface Transp. Bd.*, 237 F.3d 676, 680-81 (D.C. Cir. 2001). Yet the majority brushes off section 2(f). *See* Maj. Op. at 66-67. I believe its approach conflicts with our above-cited case law.

Second, even those cases that discount reliance on congressional findings do so only if a party uses the findings to manufacture ambiguity in an otherwise unambiguous statute. *See*, *e.g.*, *Costle*, 562 F.2d at 1316 ("Where the enacting or operative parts of a statute are *unambiguous*, the meaning of the statute cannot be controlled by language in the preamble." (emphasis added)); *id.* ("We find the reference[s] [in the operative portion of the statute] to be unambiguous and, therefore, do not look to the preamble for guidance as to the legislative intent."); *accord Nat'l Wildlife Fed'n v. EPA*, 286 F.3d 554, 570 (D.C. Cir. 2002); *see also Jurgensen v. Fairfax Cnty., Va.*, 745 F.2d 868, 885 (4th Cir. 1984) (no

need to look to findings if relevant statute is "clear and unambiguous"). Despite the majority's protestations to the contrary, *see* Maj. Op. at 66-67, the language of section 8(a) is not unambiguous. *See Costle*, 562 F.2d at 1316. Moreover, reading sections 8(a)(5) and 8(a)(8) together with section 2(f) to create a statutory presumption that the designated groups are socially disadvantaged does not conflict with either "operative" provision. Under this reading, all three provisions say the same thing: membership in a minority group that, according to the Congress, has experienced prejudice or bias produces social disadvantage. The same is not true of the majority's reading, which ignores section 2(f) and fails to reconcile its hyper-individualized reading of section 8(a)(5) with the Congress's group-focused directive in section 8(a)(8). *See* Maj. Op. at 65-68.

Third, to call the congressional findings here a preamble is "somewhat of a misnomer." *Ivy Sports Med., LLC v. Burwell*, 767 F.3d 81, 93 (D.C. Cir. 2014) (Pillard, J., dissenting). Traditionally, a "preamble" to a statute is a "prefatory explanation or statement" that "customarily precedes the enacting clause[9] in the text

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[9] An enacting clause is "the part of [an] act's body stating precise action taken by the legislature." NORMAN SINGER & SHAMBIE SINGER, 1A SUTHERLAND STATUTES & STATUTORY CONSTRUCTION § 20:6 (7th ed. 2008). The enacting clause in federal legislation – "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*" – has remained remarkably consistent throughout the nation's history. *Compare* Native American Children's

of a bill, and consequently is frequently understood not to be part of the law." NORMAN SINGER & SHAMBIE SINGER, 1A SUTHERLAND STATUTES & STATUTORY CONSTRUCTION § 20:3 (7th ed. 2008). It was just such a "preamble" the Supreme Court discussed in *Yazoo & M.V.R. Co. v. Thomas*, 132 U.S. 174, 10 S.Ct. 68, 33 L.Ed. 302 (1889), a case in which the Mississippi legislature had included a lengthy "whereas" statement before the enacting clause in legislation that chartered a railroad. *See* Act of February 17, 1882, ch. 541, 1882 Miss. Laws 838, 838. It was in *that* context – where "the preamble [was] no part of the act" – that the Court said it could "not enlarge or confer powers, nor control the words of the act, unless they are doubtful or ambiguous." *Yazoo*, 132 U.S. at 188, 10 S.Ct. 68. In *Association of American Railroads v. Costle*, we applied the same rule to congressional findings, 562 F.2d at 1316, even though those findings appeared *after* the enacting clause, *see* Noise Control Act of 1972, Pub. L. No. 92-574, § 2, 86 Stat. 1234, 1234.[10] In doing so, we cited only one case – *Yazoo*. *See Costle*, 562 F.2d at 1316 n.30. We never acknowledged, however, that the preamble in the Mississippi legislation at issue in *Yazoo* differed from the *enacted* congressional findings in the

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Safety Act, Pub. L. No. 114-165, 130 Stat. 415, 415 (June 3, 2016), *with* Act of June 1, 1789, ch. 1, 1 Stat. 23, 23.

[10] The "preamble," if any, in the Noise Control Act of 1972 more closely resembles a title, to wit: "An Act [t]o control the emission of noise detrimental to the human environment, and for other purposes." Noise Control Act of 1972, Pub. L. No. 92-574, 86 Stat. 1234, 1234. The text of the law, including the enacting clause and the findings, then follows. *See id.* §§ 1-18.

Noise Control Act of 1972. Our cases citing *Costle* have likewise not noted the critical difference, primarily because they involved administrative, not statutory, preambles. *See*, *e.g.*, *Nat'l Wildlife Fed'n*, 286 F.3d at 569-70; *Wyo. Outdoor Council*, 165 F.3d at 54.

In my view, then, we should read *Costle* with a grain of salt; at the very least, we should be cautious before applying the Supreme Court's admonition about the minimal effect of an *unenacted* preamble to provisions the Congress saw fit to *enact* into law. I read *Costle* to mean that enacted findings do not "control[]" if they conflict with unambiguous, so-called "operative" provisions of a particular statute, *see Costle*, 562 F.2d at 1316, but *Costle* does not hold that enacted findings are only an interpretative last resort. Instead, we must attempt to read the entire Act – including duly enacted findings – as one "harmonious whole." *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme . . . [and] [a] court must therefore . . . fit, if possible, all parts into an harmonious whole. . . ." (internal quotation marks omitted)).[11]

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[11] The majority's various criticisms of my reading, *e.g.*, that I "overlook[]" certain language, Maj. Op. at 67-68, and that I read "groups" to exclude "individual" experiences of discrimination, *id.* at 71-72, primarily reflect that I read the statute as a whole (including 2(f)) and my colleagues choose not to.

B. *Racial Classification Is Not Affected By "Other" Classifications*

My colleagues also think the statute is race-neutral because "section [8](a)(5)'s plain terms permit individuals of any race to be considered 'socially disadvantaged.'" *See* Maj. Op. at 64. Not so. Although a white business owner *can* qualify for the program, he nonetheless remains at a disadvantage in establishing his eligibility relative to a member of a racial minority group. Assume an admissions policy that sets quotas for "disadvantaged" students and also presumes that both black students and students whose socioeconomic level are below a certain threshold regardless of race are "disadvantaged." The policy plainly classifies on the basis of race; simply because it *also* classifies on a different, non-racial basis does not mean the race-based portions somehow become race-neutral. The same is true here. By designating members of certain racial minorities as socially disadvantaged, and using social disadvantage to separate out those who are presumed eligible to participate in the 8(a) program from those who must prove their eligibility, the Act classifies on the basis of race. *See* 15 U.S.C. §§ 631(f)(1)(B)-(C), 637(a)(5), (8).

For this reason, my colleagues' attempt to distinguish the relevant provisions of the Act from the admissions policy at issue in *Regents of the University of California v. Bakke*, 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750 (1978), is largely unavailing. *See* Maj. Op. at 64-65. The racial classification in *Bakke* was two-fold; the Medical School of the University of California

at Davis set aside sixteen seats to be filled by "disadvantaged" students through a "special admissions program," 438 U.S. at 274-75, 98 S.Ct. 2733, and the "special admissions program involve[d] a purposeful, acknowledged use of racial criteria," *id.* at 289, 98 S.Ct. 2733 n.27. As the majority puts it, "an explicit factor in determining disadvantage was an applicant's race." Maj. Op. at 64 (citing *Bakke*, 438 U.S. at 274-75 & n.4, 98 S.Ct. 2733). So, too, with the section 8(a) program. The Congress has ordered that certain contracts be set aside for "socially disadvantaged" individuals, 15 U.S.C. § 637(a), and has declared that members of certain *racial* groups are presumed to be socially disadvantaged, *id.* § 631(f)(1)(C). It cannot get much more "explicit" than that. *See* Maj. Op. at 64.

The only real difference between the program in *Bakke* and the 8(a) program is that, although whites could apply for admission through the "special admissions program" for "disadvantaged" students in *Bakke*, *see* 438 U.S. at 274-76 & n.5, 98 S.Ct. 2733, "[w]hite disadvantaged students were never considered" to be disadvantaged, *id.* at 281 n.14, 98 S.Ct. 2733. In contrast, a white business owner may be able to establish individual social disadvantage under the section 8(a) program, at least pursuant to the terms of the Act. *See* 15 U.S.C. § 637(a)(5). But the difference is immaterial. It makes little sense to say that the section 8(a) program is race-neutral because it only demotes non-minority applicants rather than locking them out entirely. Just as the *Bakke* program's "purposeful . . .

use of racial criteria" in deciding who had access to certain medical-school seats drew "a line . . . on the basis of race and ethnic status," 438 U.S. at 289 & n.27, 98 S.Ct. 2733, so too does the section 8(a) program's use of racial criteria in deciding who has automatic access to certain contracts.

The Supreme Court's decision in *Grutter v. Bollinger*, 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003), drives home the point. There, the University of Michigan Law School's admission policy "aspire[d] to achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts." *Id.* at 315, 123 S.Ct. 2325 (internal quotation marks omitted). The policy did not "define diversity solely in terms of racial and ethnic status"; rather, it "recognize [d] many possible bases for diversity admissions." *Id.* at 316, 123 S.Ct. 2325 (internal quotation marks omitted). Nevertheless, because the law school specifically considered race as one measure of diversity, *id.* thereby giving minority applicants an advantage in the admissions process, the Court subjected the policy to strict scrutiny, *see id.* at 326-27, 123 S.Ct. 2325. Similarly, in the section 8(a) context, although social disadvantage can result without regard to race, race remains – by statute – a necessary part of the socially disadvantaged inquiry. *See* 15 U.S.C. § 637(a)(5), (8); *see also id.* § 631(f)(1)(B)-(C). That the program *allows* non-minority participation does not erase the race-based presumption contained therein and we must, accordingly, subject that presumption to strict

scrutiny. *See*, *e.g.*, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) ("race-based rebuttable presumption" is racial classification that "must be analyzed by a reviewing court under strict scrutiny"); *see also Grutter* 539 U.S. at 322-26, 123 S.Ct. 2325; *id.* at 323, 123 S.Ct. 2325 ("[W]hen governmental decisions '*touch upon* an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest.'" (emphasis added) (quoting *Bakke*, 438 U.S. at 299, 98 S.Ct. 2733)).

C. *Section 8(a)'s Legislative History, Context and Case Law Do Not Support "No Racial Classification" Reading*

Finally, I believe the majority's reading of the legislative history, statutory context and relevant case law does not support its conclusion that the relevant provisions of the Act are race neutral.

1. Legislative History

The majority claims that the Congress's decision to strike a more explicit race-based presumption means that the statute as finally written lacks a racial classification. *See* Maj. Op. at 68-69. It makes hay of the Conference Committee's decision to endorse what appears to be a compromise between a rebuttable presumption in favor of Black Americans and Hispanic

Americans originally adopted by the House,[12] *see* H.R. Rep. No. 95-949, at 16 (1978), and the provision the Senate adopted, directing the SBA to determine social disadvantage based on "whether the owner or owners of the applicant have been deprived of the opportunity to develop and maintain a competitive position in the economy due to cultural bias, general economic deprivation or other similar causes," S. Rep. No. 95-1070, at 37 (1978).

But the legislative history cuts both ways. In describing the amended language, the Conference Report makes plain that the trigger point is *membership* in a *group* that has experienced discrimination (and not exclusively individual discrimination): "The amendment . . . stat[es] that socially disadvantaged persons are those who have been subject to racial or ethnic prejudice or cultural bias (regardless of their individual qualities or personal attributes) *because* they have been identified as *a member of certain groups that have generally suffered from prejudice or bias*." H.R. Rep. No. 95-1714, at 21-22 (Conf. Rep.) (emphases added). "In other words," the Report goes on, "because of present and past discrimination many *minorities* have suffered social disadvantagement." *Id.* at 22 (emphasis added).

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[12] The presumption the House adopted read: "The [SBA] shall presume that socially and economically disadvantaged groups and group members include, but are not limited to, Black Americans and Hispanic Americans." H.R. 11318, 95th Cong. § 202 (1978), *available at* 124 CONG. REC. 7,529-30 (Mar. 20, 1978).

Moreover, reading sections 8(a)(5), 8(a)(8) and 2(f) to provide a race-based classification does not require concluding that the Congress must have enacted *sub silentio* what it had previously rejected, *see* Maj. Op. at 68-69. Under the original House provision, only Black Americans and Hispanic Americans were presumed to be socially disadvantaged; an individual who was not a member of one of these two groups had to show "impediments to establishing, maintaining, or expanding a small business concern which are not generally common in kind or degree to all small business persons and which result from both social and economic causes over which such individual has no control." H.R. Rep. No. 95-949, at 24-25. The definition of social disadvantage ultimately enacted, however, is different – it focuses on "prejudice" or "bias" experienced because of group membership, 15 U.S.C. § 637(a)(5), not on business-specific impediments. Further, by using a definition of social disadvantage that allows for *both* group-based and individual-based showings of "racial or ethnic prejudice" or "cultural bias" (also naming a handful of socially disadvantaged groups, *id.* § 631(f)(1)(C), and authorizing the SBA to add others, *see id.* § 637(a)(8)), the Congress signaled to the SBA that racial minorities were not to be the *only* beneficiaries of the program. In discussing the changes to the House provision, the Congress went out of its way to make plain that "the Conferees realize that other Americans may also suffer from social disadvantagement because of cultural bias" and to offer the example of the "poor Appalachian white." *See* H.R. Rep. No. 95-1714, at 22

(Conf. Rep.). Notably, this is how the SBA came to understand "the legislative intent behind [the Act]: that *statutorily designated* racial and ethnic minorities be the primary beneficiaries of the 8(a) program, but that other disadvantaged individuals be eligible for the program." Definition of Social Disadvantage, 45 Fed. Reg. 79,413, 79,413 (Dec. 1, 1980) (emphasis added).

In addition, although the Act eliminated the House's explicit presumption, it *included* the House's findings – which formed the basis for the presumption in the first place – and rejected the Senate's – which did not list any racial groups. *See* H.R. Rep. No. 95-1714, at 21 (Conf. Rep.); *see also* S. Rep. No. 95-1070, at 36-37. Specifically, the Conference Committee noted that the House findings "establish the premise that many individuals are socially and economically disadvantaged as a result of being identified as members of certain groups, including but not limited to, black Americans and Hispanic Americans." H.R. Rep. No. 95-1714, at 20 (Conf. Rep.). The Committee "adopt[ed] the House findings" and expanded the list to include Native Americans. *Id.* at 21. It also described the import of the House findings: "[I]n many, but not all, cases[,] *status as a minority can be directly and unequivocally correlated with social disadvantagement* and this condition exists regardless of the individual, personal qualities of that minority person." *Id.* (emphasis added). The legislative history thus confirms my reading of the statute's plain meaning – that the Congress understood its findings to designate certain *racial* groups as socially disadvantaged notwithstanding the

fact that its definition of social disadvantage in section 8(a)(5) is open to members of non-racial but nonetheless minority groups (including whites who by location or otherwise are members of an ethnic/cultural minority).

One other piece of legislative history noticeably absent from the majority's analysis illustrates that the Congress's own views on how the statute operates are consistent with my own. When the Congress originally enacted section 2(f) of the Act in 1978, it recognized only "Black Americans, Hispanic Americans, [and] Native Americans" (along with the open-ended "other minorities") as groups that were socially disadvantaged. *See* Act of Oct. 24, 1978, Pub. L. 95-507, § 201, 92 Stat. 1757, 1760. Several months later, the SBA made an administrative finding that "Asian Pacific Americans" also comprised "a minority group which has members who are socially disadvantaged because of their identification as members of this group, for the purposes of eligibility for SBA's section 8(a) program." Designation of Eligibility Asian Pacific Americans Under Section 8(a) and 8(d) of the Small Business Act, 44 Fed. Reg. 42,832, 42,832 (July 20, 1979). At that time, the SBA had not yet promulgated the regulatory presumption designating certain groups as presumptively disadvantaged; rather, it listed the statutorily-designated racial groups but it made disadvantage decisions on a "case-by-case" basis. *See* The Small Business and Capital Ownership Development Program, 44 Fed. Reg. 30,672, 30,674 (May 29, 1979). The administrative finding meant only that Asian Pacific Americans were

added to the list of groups that had experienced discrimination. *See id.*

In 1980, however, the Congress added "Asian Pacific Americans" to the list of socially disadvantaged groups set out in section 2(f) of the Act. *See* Act of July 2, 1980, Pub. L. No. 96-302, § 118, 94 Stat. 833, 840. The legislative history of the 1980 Amendment is telling. A May 1980 House Small Business Committee Report states: "Present law specifies that, subject to certain specified constraints, 'socially disadvantaged' persons include 'black Americans, Hispanic Americans, native Americans and other minorities.' Therefore, these named groups *are afforded a presumption of 'social disadvantage.'* " H.R. Rep. No. 96-998, at 2 (1980) (emphases added). To repeat, at this point, the SBA had not yet promulgated any *regulatory* presumption of social disadvantage. *See* 44 Fed. Reg. at 30,674. The House Report goes on to state that the "bill would provide that Asian-Pacific Americans be afforded *the same presumption* of 'social disadvantage' as extended *under present law* to 'black Americans', 'Hispanic Americans', and 'native Americans'." H.R. Rep. No. 96-998, at 3 (emphases added). The Conference Report on the final legislation similarly states, "Present law specifies that, subject to certain specified constraints, 'socially disadvantaged' persons include 'Black Americans, Hispanic Americans, Native Americans and other minorities.' " H.R. Rep. No. 96-1087, at 35 (1980) (Conf. Rep.); *accord*

S. Rep. No. 96-703, at 10 (1980) (Senate Select Committee on Small Business report on Senate bill with virtually identical provision).[13]

It was on December 1, 1980 – only after the legislation adding Asian Pacific Americans was enacted – that the SBA first updated its regulations – by way of an interim rule – to provide for a presumption in favor of the statutorily designated racial groups. *See* Definition of Social Disadvantage, 45 Fed. Reg. at 79,413-14. In doing so, it noted that "[s]ince Congress has found that Black Americans, Hispanic Americans, Native Americans, and, with the enactment of Pub. L. 96-302 on July 2, 1980, Asian Pacific Americans, are socially disadvantaged, members of those groups need not, as a general rule, present an individualized case of social disadvantage." *Id.* at 79,414. The history of the relevant legislation – as well as the regulations that follow it – conforms exactly to my reading. The Congress enacted a statutory presumption of social disadvantage for members of certain racial groups, acknowledged that presumption in adding Asian Pacific Americans to its list of groups and the SBA then followed suit in implementing that presumption through race-based regulations.

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[13] The majority apparently reads the SBA's initial 1979 regulation as set in amber, Maj. Op. at 66-67, because it gives no weight to the fact that, just one year later, the Congress itself, in adding Asian-Pacific Americans to the socially disadvantaged groups, intended those groups to be "presumed" socially disadvantaged, as the legislative history discussed above makes clear.

2. Statutory Context

The majority also claims that the Congress's use of a more "straightforward []" racial presumption in section 8(d)(3) belies my reading of section 8(a). *See* Maj. Op. at 69-70. Because the Congress knows how to spell out an explicit presumption – as it did in section 8(d)(3) – a more explicit presumption in section 8(a) is also required. *See id.* I disagree. Whereas section 8(a) is a statutory directive to the SBA that sets forth an overall framework for eligibility in a government contract-preference program, *see* 15 U.S.C. § 637(a), section 8(d)(3) specifies contractual language the Congress requires federal agencies to use in an effort to ensure that prime contractors hire – as subcontractors – businesses owned by socially and economically disadvantaged individuals, *see id.* § 637(d)(3). Indeed, unlike section 8(a), which contemplates detailed implementation by the SBA, *see id.* § 637(a), section 8(d)(3)'s language is meant to be included automatically in each contract with no individual assessment – instead, it uses the SBA's section 8(a)(5) determinations, *see id.* § 637(d)(3)(C) ("The contractor shall presume that socially and economically disadvantaged individuals include . . . any other individual found to be disadvantaged by the [SBA] pursuant to section 8(a) of the Small Business Act."). Given the different contexts, that the Congress would use different language to further the same overall goal should come as no surprise. *See Deal v. United States*, 508 U.S. 129, 134, 113 S.Ct. 1993, 124 L.Ed.2d 44 (1993) ("Congress sometimes

uses slightly different language to convey the same message. . . ." (internal quotation marks omitted)).

Indeed, the majority's reading suggests the Congress sought to achieve *different* ends with these two provisions. The majority believes that, *via* section 8(a), the Congress wants the SBA to award prime contracts to small businesses based exclusively on the business owner's showing that he has personally experienced "prejudice" or "bias." *See* Maj. Op. at 64; *see also* 15 U.S.C. § 637(a)(5). But when it comes to awarding contracts to subcontractors, the Congress wants prime contractors to presume that members of certain groups – the same groups listed in section 2(f) of the Act, no less – are socially disadvantaged with no individualized showing needed. *Id.* § 637(d)(3)(C). Why would the Congress want the government to award prime contracts using a different standard from the one it requires prime contractors to use in subcontracting? The majority offers no explanation. Mine, then, is the better reading – although the contractual provision uses different language, its eligibility inquiry program uses the racial classification provided in section 8(a).

3. Case Law

Finally, the majority asserts that "the Supreme Court and this court's discussions of the 8(a) program have identified the regulations – not the statute – as the source of its racial presumption." Maj. Op. at 70. The assertion is only partly true. Both the Supreme Court and this court have, like my colleagues, noted

that the SBA's implementing regulations are race-based. *See Adarand*, 515 U.S. at 207, 115 S.Ct. 2097; *DynaLantic*, 115 F.3d at 1013. But the Supreme Court has never held that the Act does not contain a racial classification, nor have we.

The statements the majority plucks from *Adarand* do not support any negative inference. The majority claims that "[i]n describing the 8(a) program, the *Adarand* Court explained that the agency (not Congress) presumes that certain racial groups are socially disadvantaged and cited an SBA regulation (not the statute)" for support; thus, in my colleagues' view, the Court must have meant that the Act does not classify on the basis of race. *See* Maj. Op. at 70-71. The smoking gun, it says, is the Court's use of the words "[t]he SBA presumes" in describing the relevant racial classification. *See id.* at 70-71 (quoting *Adarand*, 515 U.S. at 207, 115 S.Ct. 2097). But other statements the Court makes in *Adarand* show that it was not trying to distinguish between statute and regulation. For example, after explaining that "[t]he SBA presumes" social disadvantage for certain racial groups under the section 8(a) program, the Court declared that under the "8(d) subcontracting program," "*the SBA presumes* social disadvantage based on membership in certain minority groups" and the Court again cites to SBA *regulations*. *Adarand*, 515 U.S. at 207, 115 S.Ct. 2097 (emphasis added). By the majority's logic, this must mean that it is the SBA regulations – and "not the statute," Maj. Op. at 70 – that contain a racial classification under the

8(d) program. But, as discussed, *supra* at 71-72, my colleagues point to the statutory presumption in section 8(d) as the exemplar of a *statutory* race-based presumption. *See* Maj. Op. at 69-70. This illustrates a simple point – *Adarand*'s use of "the SBA presumes," 515 U.S. at 207, 115 S.Ct. 2097, is irrelevant here. *Adarand*, which considered the entirety of the SBA programs at issue – including plainly race-based statutes and regulations – says precious little about whether the provisions of the Act applicable to the section 8(a) program contain a racial classification.

The same is true of *DynaLantic*. Although we plainly acknowledged that the regulations classify on the basis of race, *see* 115 F.3d at 1013, 1017, we did not hold that the statute does not. To the contrary, we were unwilling then to reach the conclusion that my colleagues now press, *i.e.*, that the statute is race-neutral. *See id.* at 1017. We labeled such an interpretation "rather dubious," *id.* and noted that the statute "might *require* race-conscious regulations" based on the congressional findings in section 2(f). *Id.* at 1017 n.3 (emphasis in original). Indeed, the only portion of *DynaLantic* that supports my colleagues' reading is the dissent. *See id.* at 1019 (Edwards, J., dissenting) ("The legislation that creates the 8(a) set-aside does not define social and economic disadvantage in terms of race."). But the dissent was a dissent for a reason – the majority was unconvinced by its reading of the statute. In sum, neither of the cases my colleagues put forward bolsters their view of the statute; *Adarand* offers no help and the majority's conclusion in

DynaLantic supports my reading of the statute, not theirs.

* * *

Although "[i]t is emphatically the province and duty of the judicial department to say what the law is," *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803), we should not cast aside the consensus of those charged with drafting and implementing a particular statute without strong reasons for doing so. We are not *bound* by the parties' agreement that the statute includes a racial classification. *See supra* nn.1-2. Nor are we bound by the district court's interpretation, *see supra* n.3, or by the longstanding view of the SBA, *see supra* n.4. Nor, in this case, are we bound by our *DynaLantic* language; the determinative jurisdictional issue there did not require deciding whether the Act contains a racial classification. *See* 115 F.3d at 1017-18. But when such a chorus of voices rises in favor of a particular statutory interpretation, we should be slow to turn a deaf ear. In my view, the statutory language is plain and, for the reasons stated, the majority's defense of its alternative reading falls short of the mark. I would hold that the challenged portions of the Small Business Act include a racial classification and would therefore subject them to strict scrutiny.

Accordingly, I respectfully dissent.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-5176 **September Term, 2016**
FILED ON: SEPTEMBER 9, 2016

ROTHE DEVELOPMENT, INC.,

APPELLANT

v.

UNITED STATES DEPARTMENT OF DEFENSE AND
UNITED STATES SMALL BUSINESS ADMINISTRATION,

APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 1:12-cv-00744)

Before: HENDERSON, GRIFFITH and PILLARD, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in this cause is hereby affirmed, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Ken Meadows
Deputy Clerk

Date: September 9, 2016

Opinion for the court filed by Circuit Judge Pillard.

Opinion concurring in part and dissenting in part filed by Circuit Judge Henderson.

107 F.Supp.3d 183
United States District Court,
District of Columbia.

Rothe Development, Inc., Plaintiff,
v.
Department of Defense, et al., Defendants.

Civil Action No. 12-cv-0744 (KBJ)
|
Signed June 5, 2015

Attorneys and Law Firms

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MEMORANDUM OPINION

KETANJI BROWN JACKSON, United States District Judge

Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (2012), establishes a business development program for "socially and economically disadvantaged small business concerns[.]" *Id.* § 637(a)(1)(B). Plaintiff Rothe Development, Inc. ("Rothe" or "Plaintiff") is a small business based in San Antonio, Texas that has filed the instant action against the Department of Defense ("DOD") and the Small Business Administration

(collectively, "Defendants") to challenge the constitutionality of the Section 8(a) program on its face. (*See* Compl., ECF No. 1, ¶ 1.) Rothe argues that the statute's definition of "socially disadvantaged" small business owners, 15 U.S.C. § 637(a)(5), is a racial classification that violates Rothe's right to equal protection under the Due Process Clause of the Fifth Amendment of the United States Constitution. (*See* Compl. ¶¶ 1-2.) Rothe also claims that Section 8(a) violates the nondelegation doctrine. (*See id.*; *see also id.* ¶ 30.)

The constitutional challenge that Rothe brings in the instant case is nearly identical to the challenge brought in the case of *DynaLantic Corp. v. United States Department of Defense,* 885 F.Supp.2d 237 (D.D.C.2012). The plaintiff in *DynaLantic* sued the DOD, the Small Business Administration, and the Department of the Navy alleging, *inter alia*, that Section 8(a) was unconstitutional both on its face and as applied to the military simulation and training industry. *See DynaLantic*, 885 F.Supp.2d at 242. The *DynaLantic* court disagreed with the plaintiff's facial attack; it explained in a lengthy opinion the reasoning behind the Court's conclusion that the Section 8(a) program is facially constitutional. *See id.* at 248-80, 283-91. Here, Rothe relies on substantially the same record evidence and nearly identical legal arguments, and it urges this Court to strike down the race-conscious provisions of Section 8(a) on their face and thus to depart from *DynaLantic's* holding in the context of the instant case. (*See, e.g.*, Mot. Hr'g Tr., Oct. 20, 2014, at 27:21

(Plaintiff's counsel asserting that the DynaLantic court "was just wrong").)

Before this Court at present are the parties' cross-motions for summary judgment, as well as the parties' motions to limit or exclude the proffered testimony of each other's expert witnesses – commonly referred to as "*Daubert* motions" based on the Supreme Court's seminal ruling on the admissibility of expert testimony in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). As explained fully below, this Court concludes that Defendants' experts meet the relevant qualification standards under Federal Rule of Evidence 702 and offer what appear to be reliable and relevant opinions; therefore, Plaintiff's *Daubert* motion to exclude Defendants' proffered expert testimony will be **DENIED**. By contrast, this Court finds sufficient reason to doubt the qualifications of one of Plaintiff's experts and to question the reliability of the testimony of the other; consequently, Defendants' *Daubert* motions to exclude Plaintiff's expert testimony will be **GRANTED**. With respect to the cross-motions for summary judgment, this Court agrees with the *DynaLantic* court's reasoning, and thus this Court, too, concludes that Section 8(a) is constitutional on its face. Accordingly, Plaintiff's motion for summary judgment will be **DENIED**, Defendants' cross-motion for summary judgment will be **GRANTED**, and judgment will be entered in Defendants' favor. A separate order consistent with this memorandum opinion will follow.

I. BACKGROUND

A. The Section 8(a) Program

Congress enacted the Small Business Act of 1953 ("the Act"), 15 U.S.C. §§ 631-57s, in order to encourage and develop the "capacity of small business" in America, and thereby to promote national "economic well-being" and "security[.]" 15 U.S.C. § 631(a) (1958). Section 8(a) of the Act grants the Small Business Administration the authority to acquire procurement contracts from other government agencies and to award or otherwise arrange for performance of those contracts by small businesses "whenever [the agency] determines such action is necessary[.]" *Id.* § 637(a). This authority remained "dormant for a decade" after the Act's passage, *DynaLantic,* 885 F.Supp.2d at 253, but over the course of many years and after a series of executive orders and legislative amendments, *see id.* at 253-57, the current Section 8(a) program emerged with the express purpose of helping socially and economically disadvantaged individuals who own small businesses "compete on an equal basis in the American economy[,]" 15 U.S.C. § 631(f)(2)(A) (2012).

The Section 8(a) program provides small businesses that socially and economically disadvantaged individuals own – the Small Business Administration refers to such businesses as "small disadvantaged businesses" or "SDBs," *see* Small Disadvantaged Business Program, 73 Fed.Reg. 57,490 (Oct. 3, 2008) – with valuable "technological, financial, and practical assistance, as well as support through preferential awards

of government contracts[,]" *DynaLantic,* 885 F.Supp.2d at 243; *see also* 15 U.S.C. § 636(j)(10)(A); 13 C.F.R. § 124.404.[1] SDBs can receive myriad types of assistance and support under the Section 8(a) program, including help "develop[ing] and maintain[ing] comprehensive business plans[,]" 15 U.S.C. § 636(j)(10)(A)(i); "nonfinancial services" such as "loan packaging, [] financial counseling, [] accounting and bookkeeping assistance, [] marketing assistance, and [] management assistance[,]" *id.* § 636(j)(10)(A)(ii); assistance "obtain[ing] equity and debt financing[,]" *id.* § 636(j)(10)(A)(iii); and the opportunity to compete for certain government contracts that are limited to Section 8(a) program participants, *see id.* § 637(a)(1)(D). Moreover, once admitted into the Section 8(a) program, participating SDBs may stay in the program for up to nine years, provided that they continue to meet the eligibility criteria for qualifying for – and remaining in – the program. *See id.* § 636(j)(10)(C); 13 C.F.R. § 124.2. Specifically, at all times applicants and participants must: (1) be a "small" business, as that term is defined in 13 C.F.R. § 121, *see* 13 C.F.R. §§ 124.101, 124.102; (2) demonstrate their business's potential to succeed, *see id.* § 124.101; and (3) have a majority owner or owners

[1] A business may obtain SDB status by virtue of applying for and participating in the Section 8(a) program – and only SDBs may participate in the Section 8(a) program – however, a small business may also be deemed an "SDB" for purposes of government contracting *without* participating in the Section 8(a) program. *See, e.g.*, Small Disadvantaged Business Program, 73 Fed.Reg. at 57,491-92. In other words, a small business must be an SDB to participate in the Section 8(a) program, but it need not participate in the program to be an SDB.

who are current U.S. residents and citizens of good character, and who are also "socially and economically disadvantaged" as the statute defines those terms, *id.*

The dispute in the instant case centers on the statutory definition of "socially disadvantaged individuals." Section 637 of Title 15 of the U.S.Code [sic] defines "[s]ocially disadvantaged individuals" as "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)(5); *see also id.* § 631(f)(1)(B) (individuals may be "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"). Pursuant to the statute, "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[.]" *Id.* § 631(f)(1)(C). Thus, the statute establishes "a rebuttable presumption" that members of these particular groups, and certain other groups, are "socially disadvantaged[,]" 13 C.F.R. § 124.103(b)(1), and if an individual business owner is not a member of a presumptively socially disadvantaged group, then he or she "must establish individual social disadvantage by a preponderance of the evidence[,]" *id.* § 124.103(c)(1). *See also id*. § 124.103(c)(2) (explaining that sufficient "[e]vidence of individual social disadvantage" has several "elements[,]" including "[a]t least one objective distinguishing feature that has

contributed to social disadvantage" and "[p]ersonal experiences of substantial and chronic social disadvantage in American society").

In addition to defining "socially disadvantaged individuals[,]" the statute also defines "[e]conomically disadvantaged individuals[.]" 15 U.S.C. § 637(a)(6)(A). These 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 business area who are not socially disadvantaged." *Id.* Factors that determine economically disadvantaged status include "income for the past three years[,] . . . personal net worth, and the fair market value of all assets, whether encumbered or not." 13 C.F.R. § 124.104(c). As explained, a small business that can demonstrate its ability to succeed and that is owned by an individual citizen of good character who is considered socially and economically disadvantaged within the statutory definitions is eligible to participate in the Section 8(a) program. *See id.* § 124.101.

The Section 8(a) program is but "one of a number of government-wide programs [that are] designed to encourage the issuance of procurement contracts to" certain small businesses, *DynaLantic,* 885 F.Supp.2d at 244 (citing 15 U.S.C. § 644), including businesses that are owned by women, businesses that are owned by service-disabled veterans, and businesses that are located in historically underutilized business zones, known as "HUBZones." *See* 15 U.S.C. § 637(m) (establishing procurement program for woman-owned small

businesses); *id.* § 657f (establishing procurement program for small businesses owned by service-disabled veterans); *id.* § 657a (establishing contracting assistance and procurement program for HUBZone small businesses). As part of the legislative scheme that governs the Section 8(a) business development program and similar programs directed toward developing opportunities for small businesses in America, Congress has specifically directed the President to "establish [annual] Government-wide goals for procurement contracts awarded to [various] small business concerns[.]" *Id.* § 644(g)(1)(A). With respect to SDBs in particular, Congress has specified that the goal for participation "shall be established at not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year." *Id.* § 644(g)(1)(A)(iv).[2] The participation goals with respect to other small business programs are similar – *see, e.g.*, *id.* § 644(g)(1)(A)(v) ("not less than 5 percent" for woman-owned small businesses); *id.* § 644(g)(1)(A)(ii) ("not less than 3 percent" for small businesses owned by service-disabled veterans); *id.* § 644(g)(1)(A)(iii) ("not less than 3 percent" for HUBZone small businesses) – and all of the statutory targets are "aspirational" and not mandatory, *DynaLantic,* 885 F.Supp.2d at 244 (quotation marks omitted).

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[2] This five percent goal relates to *all* SDBs, not just those that are Section 8(a) participants, and thus this figure includes, but is not limited to, procurement contracts awarded to Section 8(a) program participants. *See DynaLantic*, 885 F.Supp.2d at 244-45.

B. Rothe's Claim

Rothe is a Texas corporation that operates in the computer services industry and bids on and performs government procurement contracts on a nationwide basis. (*See* Affidavit of Dale Patenaude ("Patenaude Aff."), Ex. 1 to Pl.'s Compl., ECF No. 1-1, at 3; *see also* Defs.' Statement of Material Facts & Resp. to Pl.'s SOF ("Defs.' SOF"), ECF No. 64-2, ¶ II.23; Pl.'s Resp. to Defs.' Statement of Material Facts ("Pl.'s SOF Resp."), ECF No. 68-1, ¶ I.1.)[3] Rothe employs approximately 120 individuals (*see* Patenaude Aff. at 3), and it allegedly qualifies as a woman-owned small business under the Act and its accompanying regulations (*see id.*; Pl.'s SOF Resp. ¶ I.1). According to Plaintiff, Rothe derives "[a]pproximately 85-90%" of its annual gross income from government contracts. (Patenaude Aff. at 4; *see also* Pl.'s Statement of Material Facts ("Pl.'s SOF"), ECF No. 55-1, ¶ 24.) Specifically, Rothe bids on and performs DOD and military contracts that, for the most part, fit into one of the following five North American Industry Classification System ("NAICS") codes: Custom Computer Programming Services (541511); Computer Systems Design Services (541512); Computer Facilities Management Services (541513); Other Computer Related Services (541519); and Facilities Support Services (561210). (Patenaude Aff. at 3-4.)[4]

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[3] Page numbers throughout this memorandum opinion – except for deposition page numbers – refer to those that the Court's electronic filing system assigns.

[4] The NAICS code system "is the standard used by Federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data

Rothe does not participate in the Section 8(a) program and does not allege that it has ever applied to the program or otherwise sought certification as an SDB. (*See* Patenaude Aff. at 2; Pl.'s SOF ¶ 18; *see also* Defs.' SOF ¶ II.18.)

Rothe filed the instant action against the DOD and the Small Business Administration on May 9, 2012. (*See* Compl.) The gravamen of Rothe's complaint is that the Section 8(a) program "prevents Rothe from bidding on [DOD] contracts" on the basis of race in violation of Rothe's rights under the equal protection component of the Due Process Clause of the Fifth Amendment (*id.* ¶ 2), and that the program is an unconstitutional delegation of authority to the Small Business Administration "to make or enact racial classifications" (*id.* ¶ 30). Accordingly, Rothe seeks (1) a declaratory judgment that the definition of "socially disadvantaged individuals" as set forth in the statutes

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related to the U.S. business economy." U.S. Census Bureau, *North American Industry Classification System: Introduction to NAICS*, http://www.census.gov/eos/www/naics/index.html (last visited June 5, 2015). It is a "2-through 6-digit hierarchical classification system," meaning that "[e]ach digit in the code is part of a series of progressively narrower categories, and the more digits in the code signify greater classification detail." U.S. Census Bureau, *North American Industry Classification System: Frequently Asked Questions*, http://www.census.gov/eos/www/naics/faqs/faqs.html (last visited June 5, 2015). In each code, "[t]he first two digits designate the economic sector, the third digit designates the subsector, the fourth digit designates the industry group, the fifth digit designates the NAICS industry, and the sixth digit designates the national industry." *Id.* Some federal agencies use NAICS codes in the course of awarding government contracts to small businesses. *See, e.g.*, 15 U.S.C. § 644(a).

pertaining to the Section 8(a) program is unconstitutional on its face (*see id.* ¶¶ 52-54); (2) a permanent injunction that prevents Defendants from using the "socially disadvantaged individuals" definition to exclude Rothe from bidding on contracts reserved for Section 8(a) participants (*see id.* ¶¶ 56-59); and (3) an award of reasonable attorneys' fees, costs, and expenses (*see id.* ¶¶ 61-64).

Notably, as mentioned earlier, the legal claims in Rothe's complaint are nearly identical to the facial constitutional claim in the second amended complaint that was filed in *DynaLantic Corp. v. Department of Defense,* a case that was pending in this district when Rothe's complaint was filed. *See* Second Am. Compl., *DynaLantic v. Dep't of Defense*, 885 F.Supp.2d 237 (D.D.C.2012) (No. 95-cv-2301) ("DynaLantic's Second Am. Compl."). Given the similarity of the two cases – and also the fact that the *DynaLantic* court considered and reached the merits of the constitutional claim – a brief description of the facts, circumstances, and holding of *DynaLantic* is warranted.

C. *DynaLantic Corp. v. Department of Defense*

In *DynaLantic,* a small business that bid on and performed contracts and subcontracts in the military simulation and training industry – but that did not participate in the Section 8(a) program and was not an SDB – sued the DOD, the Small Business Administration, and the Department of the Navy alleging, *inter*

alia, that the statutory provisions of Section 8(a) limiting certain contract awards to "small business concerns owned and controlled by 'socially and economically disadvantaged individuals' " were unconstitutional on their face and also as applied to the industry in which the plaintiff operated. DynaLantic's Second Am. Compl. ¶ 9; *see also DynaLantic,* 885 F.Supp.2d at 246-47. Specifically, DynaLantic argued that the challenged provisions prevented it and other small businesses "from competing for federal procurements . . . on the basis of race, thereby 'violat[ing] DynaLantic's rights under . . . the equal protection component of the Due Process Clause of the Fifth Amendment of the Constitution.' " *DynaLantic,* 885 F.Supp.2d at 247 (second alteration in original) (quoting DynaLantic's Second Am. Compl. ¶ 23). After extensive discovery, briefing, and submissions by amici, the Court (Sullivan, J.) granted summary judgment on the facial constitutional claim in favor of the government, and granted summary judgment on the as-applied claim to DynaLantic. *See id.* at 248-83.

With respect to the applicable legal standards, the Court explained that to prevail on its facial constitutional claim DynaLantic would have to " 'establish that no set of circumstances exist[ed] under which the [challenged provisions] would be valid.' " *Id.* at 249 (quoting *United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987)). Moreover, because constitutional validity in a particular circumstance turned on the application of strict scrutiny to the admittedly race-conscious provisions at issue, the

government would have to show both the existence of a compelling governmental interest underlying the challenged provisions (supported by a strong basis in evidence that race-based remedial action was required to further such interest) and that the challenged provisions were narrowly tailored to achieve the articulated compelling interest. *See id.* at 250-51.

The Court then engaged in a detailed examination of the challenged statutory provisions, the arguments of the parties and their amici, relevant precedent, and the extensive record evidence, including disparity studies on racial discrimination in federal contracting across various industries. *See id.* at 251-80, 283-91. Ultimately, the Court concluded "that Congress ha[d] a compelling interest in eliminating the roots of racial discrimination in federal contracting, funded by federal money[,]" and also that the government "ha[d] established a strong basis in evidence to support its conclusion that remedial action was necessary to remedy that discrimination" insofar as it provided "extensive evidence of discriminatory barriers to minority business formation . . . [and] minority business development," as well as "significant evidence that, even when minority businesses are qualified and eligible to perform contracts in both the public and private sectors, they are awarded these contracts far less often than their similarly situated non-minority counterparts." *Id.* at 279. The Court also found that Dyna-Lantic had failed "to present credible, particularized evidence that undermined the government's compelling interest [or that] demonstrated that the

government's evidence 'did not support an inference of prior discrimination and thus a remedial purpose.' " *Id.* (quoting *Wygant v. Jackson Bd. of Educ.,* 476 U.S. 267, 293, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986) (O'Connor, J., concurring)).

With respect to narrow tailoring, the *DynaLantic* court considered several factors, including: "(1) the efficacy of alternative, race-neutral remedies, (2) flexibility, (3) over- or under-inclusiveness of the program, (4) duration, (5) the relationship between numerical goals and the relevant labor market, and (6) the impact of the remedy on third parties." *Id.* at 283 (citing *United States v. Paradise,* 480 U.S. 149, 171, 107 S.Ct. 1053, 94 L.Ed.2d 203 (1987) (plurality and concurring opinions)). Upon consideration of all of these factors, *see id.* at 283-91, the Court concluded that "the Section 8(a) program is narrowly tailored on its face[,]" *id.* at 291. Consequently, because the government had demonstrated that Section 8(a)'s race-conscious provisions were narrowly tailored to further a compelling state interest, the Court held that strict scrutiny was satisfied in the context of "the construction industry . . . [and] in other industries such as architecture and engineering, and professional services as well[,]" *id.* at 279-80, and because DynaLantic had thus failed to meet its burden to show that the challenged provisions were unconstitutional in all circumstances, the Court held that Section 8(a) was constitutional on its face

and entered summary judgment on the facial constitutional claim in the government's favor, *see id.* at 293.[5]

The parties in *DynaLantic* cross-appealed to the United States Court of Appeals for the District of Columbia Circuit in October of 2012. *See* Defs.' Notice of Appeal, *DynaLantic v. Dep't of Defense*, 885 F.Supp.2d 237 (D.D.C.2012) (No. 95-cv-2301), ECF No. 252; Pl.'s Notice of Cross-Appeal, *DynaLantic v. Dep't of Defense*, 885 F.Supp.2d 237 (D.D.C.2012) (No. 95-cv-2301), ECF No. 254. On January 31, 2014, this Court stayed proceedings in the instant case pending resolution of the *DynaLantic* appeal. (*See* Order, Dec. 23, 2013, ECF No. 43, at 1.) However, on February 11, 2014, the parties in this matter notified this Court that the D.C. Circuit had dismissed *DynaLantic* after the parties in that case reached a settlement and withdrew their appeal. (*See* Joint Notice of Dismissal of *DynaLantic* & Status Report, ECF No. 47, at 1-2.)

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[5] The Court reached a different conclusion with respect to DynaLantic's as-applied challenge. Specifically, because "defendants concede[d] that they d[id] not have evidence of discrimination in [the military simulation and training] industry[,]" the Court concluded that "the government ha[d] not met its burden to show a compelling interest in remedying discrimination in [that] industry[.]" *DynaLantic*, 885 F.Supp.2d at 280, 283. Consequently, the Court granted summary judgment in DynaLantic's favor on its as-applied challenge. *See id.* at 282 ("The fact that Section 8(a) is constitutional on its face . . . does not give the [government] carte blanche to apply it without reference to the limits of strict scrutiny. Rather, agencies have a responsibility to decide if there has been a history of discrimination in the particular industry at issue[.]").

D. Procedural History

As noted, Rothe filed its action challenging the facial constitutionality of the Section 8(a) program on May 9, 2012, while the *DynaLantic* case was still pending in the district court – both actions were treated as related cases and assigned to the same district judge. That judge permitted discovery to proceed in the instant matter at the parties' urging (*see* Scheduling Order, Sept. 18, 2012, ECF No. 23, at 2; *see also* Pl.'s Suppl. Resp. to the Court's Minute Orders & Scheduling Recommendations, ECF No. 21, at 4; Defs.' Suppl. Resp. to the Court's Minute Orders & Scheduling Recommendations, ECF No. 22, at 5), and discovery continued even after the *DynaLantic* opinion upholding the facial constitutionality of the Section 8(a) program issued. The instant action was transferred to the undersigned on April 5, 2013, while discovery was still underway. (*See* Minute Entry, Apr. 5, 2013; *see also* Am. Scheduling Order, ECF No. 24, at 2; Minute Order, Dec. 18, 2012 (extending discovery period); Minute Order, Mar. 25, 2013 (same).)

During the discovery period, the parties prepared and exchanged expert reports regarding evidence of discrimination in government contracting. Defendants retained two experts, who testified, broadly speaking, that socially disadvantaged and minority-owned small businesses are significantly less likely, statistically, to win government contracts than their non-minority and non-SDB counterparts (*see* Report of Defs.' Expert Robert N. Rubinovitz ("Rubinovitz Report"), ECF No.

44-3, at 12; Additional Analysis by Dr. Robert Rubinovitz ("Rubinovitz Suppl. Report"), ECF No. 44-4, at 2), and that minority-owned businesses across the country are substantially underutilized in government contracting – a phenomenon that, according to these experts, cannot be explained by nondiscriminatory factors (*see* Report of Defs.' Expert Jon Wainwright ("Wainwright Report"), ECF No. 46-3, at 27, 97). Plaintiff also engaged two experts, and Plaintiff's experts maintained that Defendants' experts' conclusions were incorrect largely because their data and methods were flawed. (*See, e.g.*, Report of Pl.'s Expert Dale Patenaude ("Patenaude Report"), ECF No. 49-2, at 2; Report of Pl.'s Expert John Charles Sullivan ("Sullivan Report"), ECF No. 49-4, at 11-12, 23-37.)

A series of *Daubert* motions followed: specifically, Rothe filed a single motion to exclude or limit the testimony of Defendants' experts Robert Rubinovitz and Jon Wainwright (*see* Pl.'s Mot. to Exclude or Limit Test. of Defs.' Experts & Mem. in Supp. ("Pl.'s *Daubert* Br."), ECF No. 45) on the grounds that their testimony is both unreliable and irrelevant to the factual matters at hand. Defendants filed two separate motions to exclude the reports and testimony of Plaintiff's experts Dale Patenaude and John Charles Sullivan. (*See* Defs.' Mot. in Limine to Exclude the Expert Reports & Test. of Pl.'s Expert Dale Patenaude ("Defs.' Patenaude *Daubert* Mot."), ECF No. 44; Defs.' Mot. in Limine to Exclude the Testimony and Ops. of Pl.'s Expert John Charles Sullivan, Esq. ("Defs.' Sullivan *Daubert* Mot."), ECF No. 46.) In essence, Defendants contend that

Plaintiff's experts are not qualified to testify as experts and that their proffered testimony is unreliable. (*See* Defs.' Mem. in Supp. of Defs.' Patenaude *Daubert* Mot. ("Defs.' Patenaude *Daubert* Br."), ECF No. 44-1, at 9-19; Defs.' Mem. in Supp. of Defs.' Sullivan *Daubert* Mot. ("Defs.' Sullivan *Daubert* Br."), ECF No. 46-1, at 9-20.)

Rothe then filed a motion for summary judgment with respect to its claim that the definition of "socially disadvantaged individual" as it appears in the Act and is used in the context of administering the Section 8(a) program is unconstitutional on its face. (*See* Pl.'s Mot. for Summ. J., ECF No. 55.) Rothe's motion argues, first, that Section 8(a)'s definition of socially disadvantaged individuals "is unconstitutional racial balancing, for which there is no compelling interest, and for which narrow tailoring is impossible"; and second, that the definition violates the nondelegation doctrine insofar as it "lack[s] any intelligible principle to limit the Executive's discretion in deciding whether racial, ethnic or cultural bias has occurred or even what constitutes a racial, ethnic, or cultural group." (Pl.'s Mem. in Supp. of Pl.'s Mot. for Summ. J. ("Pl.'s MSJ Br."), ECF No. 56, at 7.)

Defendants responded by filing a cross-motion for summary judgment (Defs.' Cross-Mot. for Summ. J., ECF No. 64), in which Defendants maintain that "Rothe's facial challenge is identical to that brought and rejected in *DynaLantic* . . . and fails for the same reasons" (Defs.' Mem. in Supp. of Defs.' Cross-Mot. for Summ. J. & Resp. to Pl.'s Mot. for Summ. J. ("Defs.'

MSJ Br. & Resp."), ECF No. 64-1, at 13). Specifically, Defendants assert that (1) the government has a compelling "interest in 'breaking down barriers to minority business development created by discrimination and its lingering effects'" (*id.* (quoting *DynaLantic,* 885 F.Supp.2d at 251)); (2) there is "a 'strong basis in evidence to support [the government's] conclusion that remedial action was necessary'" to further that interest (*id.* (quoting *DynaLantic,* 885 F.Supp.2d at 279)); and (3) the statute is narrowly tailored and "designed to minimize the burden on non-minority firms" (*id.* at 14 (citing *DynaLantic,* 885 F.Supp.2d at 290)). Defendants also argue that the Section 8(a) program conforms to the nondelegation doctrine because the statute defines "socially disadvantaged individuals" and sets forth Congress' relevant findings, and it also articulates the policies underlying the program – all of which serve to guide the Small Business Administration in implementing the program. (*See id.* at 90.)

This Court held a hearing on the parties' *Daubert* and cross summary judgment motions on October 20, 2014.

II. DAUBERT MOTIONS

This Court will address the parties' *Daubert* arguments first, because "[i]f the Court finds [an expert's] opinions to be clearly unreliable, it may disregard his reports in deciding whether plaintiffs have created a genuine issue of material fact." *McReynolds v. Sodexho Marriott Servs., Inc.,* 349 F.Supp.2d 30, 35 (D.D.C.2004)

(citing *Munoz v. Orr,* 200 F.3d 291, 301 (5th Cir.2000)); *see also Lewis v. Booz-Allen & Hamilton, Inc.,* 150 F.Supp.2d 81, 84 (D.D.C.2001) (addressing evidentiary motions first, "[s]ince a motion for summary judgment requires an examination of the entire record, including all pleadings and all admissible evidence").

As concerns Defendants' experts, Rothe contends that Rubinovitz's and Wainwright's testimony is irrelevant because it has not been submitted to Congress (*see* Pl.'s *Daubert* Br. at 4), and that it contains both inadmissible legal conclusions – such as whether the strong basis in evidence requirement has been met (*see id.* at 10, 12) – and unreliable opinions regarding statistical facts (*see id.* at 16-17 (arguing that Defendants' experts have analyzed contracting data using fewer than all six-digits of only some NAICS codes such that not every industry and subsector is captured)). For their part, Defendants contend that neither Patenaude nor Sullivan qualifies as an expert in any field of scientific knowledge that is pertinent to the instant case (*see* Defs.' Patenaude *Daubert* Br. at 9-12; Defs.' Sullivan *Daubert* Br at 9-14), and that Patenaude's and Sullivan's testimony is unreliable because both experts rely on inaccurate data and employ methods in their critiques of Rubinovitz and Wainwright that are speculative and scientifically unproven (*see* Defs.' Patenaude *Daubert* Br. at 12-19; Defs.' Sullivan *Daubert* Br. at 14-20). Defendants further contend that Sullivan's testimony contains impermissible legal opinions, such as

whether the disparity studies at issue are legally sufficient to justify the Section 8(a) program. (*See* Defs.' Sullivan *Daubert* Br. at 20.)

For the reasons that follow, this Court finds that Rubinovitz's and Wainwright's expert reports are reliable and potentially helpful to the trier of fact, and thus properly admitted, while Patenaude's and Sullivan's testimony fails to conform with the applicable legal standards related to expert qualifications and reliability, and therefore must be excluded.

A. Legal Standard For Admitting Expert Evidence

Federal Rule of Evidence 702 governs the admissibility of expert evidence. It provides that:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> > **(a)** the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> >
> > **(b)** the testimony is based on sufficient facts or data;
> >
> > **(c)** the testimony is the product of reliable principles and methods; and

> **(d)** the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. Rule 702 "imposes a special obligation on a trial judge to 'ensure that any and all scientific testimony . . . is not only relevant, but reliable.'" *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 147, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999) (alteration in original) (quoting *Daubert,* 509 U.S. at 589, 113 S.Ct. 2786). Thus, federal courts have a "basic gatekeeping obligation" with respect to expert testimony. *Id.*

Rule 702 requires that an expert be qualified to testify on the basis of "knowledge, skill, experience, training, or education[,]" and thus encompasses "not only experts in the strictest sense of the word, e.g., physicians, physicists, and architects, but also the large group sometimes called 'skilled' witnesses, such as bankers or landowners testifying to land values." Fed. R. Evid. 702 advisory committee's note (1972) (internal quotation marks and citation omitted). While "a person who holds a graduate degree typically qualifies as an expert in his or her field[,]" *Khairkhwa v. Obama,* 793 F.Supp.2d 1, 11 (D.D.C.2011), such formal education is not required and "an expert may still be qualified on the basis of his or her practical experience or training[,]" *Robinson v. District of Columbia,* No. 09-cv-2294, 75 F.Supp.3d 190, 197, 2014 WL 6778330, at *4 (D.D.C. Dec. 2, 2014). However, "[i]f the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis

for the opinion, and how that experience is reliably applied to the facts." Fed. R. Evid. 702 advisory committee's note (2000). Regardless of the basis on which a witness purports to qualify as an expert, as part of its gatekeeping function the court must assess whether a proposed expert possesses "a reliable basis in the knowledge and experience of [the relevant] discipline." *Daubert,* 509 U.S. at 592, 113 S.Ct. 2786.

Once the court is satisfied that the witness is an expert within the meaning of Rule 702, "[u]nder *Daubert* the district court is required to address two questions, first whether the expert's testimony is based on 'scientific knowledge,' and second, whether the testimony 'will assist the trier of fact to understand or determine a fact in issue.'" *Meister v. Med. Eng'g Corp.,* 267 F.3d 1123, 1126 (D.C.Cir.2001) (quoting *Daubert,* 509 U.S. at 592, 113 S.Ct. 2786). With respect to the first prong, "the district court's focus is on the methodology or reasoning employed." *Ambrosini v. Labarraque,* 101 F.3d 129, 133 (D.C.Cir.1996). Specifically, the court must make "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert,* 509 U.S. at 592-93, 113 S.Ct. 2786; *see also Ambrosini,* 101 F.3d at 133 ("'In short, the requirement that an expert's testimony pertain to "scientific knowledge" establishes a standard of evidentiary reliability.'" (quoting *Daubert,* 509 U.S. at 590, 113 S.Ct. 2786)).

There are several factors that courts typically consider in making a scientific validity determination: "(1) whether the theory or technique can be and has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the method's known or potential rate of error; and (4) whether the theory or technique finds general acceptance in the relevant scientific community." *Ambrosini,* 101 F.3d at 134 (citing *Daubert,* 509 U.S. at 593-94, 113 S.Ct. 2786.) This "inquiry is a 'flexible one,' no one factor is dispositive, and the four-factor list is not exhaustive." *United States v. Machado-Erazo,* 950 F.Supp.2d 49, 52 (D.D.C.2013) (internal quotation marks and citation omitted). Moreover, whatever factors a court considers, "[t]he trial judge in all cases of proffered expert testimony must find that [the testimony] is properly grounded, well-reasoned, and not speculative before it can be admitted." Fed. R. Evid. 702 advisory committee's note (2000).

The second *Daubert* prong relates to relevance and is fairly straightforward. *See Ambrosini,* 101 F.3d at 134 (citing *Daubert,* 509 U.S. at 593-94, 113 S.Ct. 2786). "The district court must determine whether the proffered expert testimony 'is sufficiently tied to the facts of the case that it will aid the [factfinder] in resolving a factual dispute.'" *Id.* (quoting *Daubert,* 509 U.S. at 591, 113 S.Ct. 2786). Where, as here, a party moves to exclude expert testimony, "[t]he party seeking to introduce expert testimony must demonstrate its admissibility by a preponderance of the evidence." *Harris v. Koenig,* 815 F.Supp.2d 6, 8 (D.D.C.2011) (citing

Daubert, 509 U.S. at 592 n. 10, 113 S.Ct. 2786). "The presumption under the Rules is that expert testimony is admissible once a proponent makes the requisite threshold showing; further disputes go to weight, not admissibility." *Machado-Erazo,* 950 F.Supp.2d at 52.

B. The Proffered Expert Evidence In The Instant Case

1. *Rubinovitz's Testimony Is Reliable, Relevant, And Admissible*

Robert Rubinovitz holds a Ph.D. in economics from the Massachusetts Institute of Technology and currently serves as the Deputy Chief Economist at the United States Department of Commerce. (*See* Rubinovitz Report at 2.) Using regression analysis, Rubinovitz claims to have isolated the effect of minority ownership on the likelihood of a small business receiving government contracts. (*See id.* at 10-12; *see also* Rubinovitz Suppl. Report at 2.)[6] Specifically, Rubinovitz used a "logit model" (Rubinovitz Report at 10), to examine government contracting data for fiscal year 2012 that he collected from the General Services Administration's System for Award Management, the Federal Procurement Data System, the Small Business Administration, and other public and private sources (*see id.* at 4-9 (discussing sources)), in order to

[6] Regression analysis is a widely accepted statistical tool and a common evidentiary feature in federal courts, particularly in the context of discrimination cases. *See, e.g.*, *Bazemore v. Friday*, 478 U.S. 385, 400-01, 106 S.Ct. 3000, 92 L.Ed.2d 315 (1986) (discussing admissibility of regression analyses in Title VII cases).

determine "whether the data show any difference in the odds of contracts being won by minority-owned small businesses, particularly those identified as SDBs and those that are part of the 8(a) program, relative to other small businesses" (*id.* at 10). Rubinovitz controlled for other variables that could "influence the odds of whether or not a given firm wins a contract" (*id.* at 11) – such as business size, age, and level of security clearance (*see id.*) – and concluded that "the odds of minority-owned small firms and non-8(a) SDB firms winning contracts were lower than small non-minority and non-SDB firms" (*id.* at 12). In particular, "the odds of an SDB firm winning a contract is roughly 11 percent lower than other types of small businesses, while small minority-owned firms, regardless of whether they are SDBs or in the 8(a) program, had roughly 30 percent lower odds of winning a contract than other firms." (*Id.*) In addition, Rubinovitz found that "non-8(a) minority-owned SDBs are statistically significantly less likely to win a contract in industries accounting for 94.0% of contract actions, 93.0% of dollars awarded, and in which 92.2% of non-8(a) minority-owned SDBs are registered[,]" and that "[t]here is no industry where non-8(a) minority owned SDBs have a statistically significant advantage in terms of winning a contract from the federal government." (Rubinovitz Suppl. Report at 2.) This Court has considered Rothe's objections to Rubinovitz's testimony, and concludes that the testimony is fully admissible under Rule 702.

First of all, Rubinovitz's qualifications to testify as an expert are undisputed (*see* Hr'g Tr. at 17:18-18:1

(Plaintiff's counsel conceding that Defendants' experts are qualified)), and this Court finds that Rubinovitz is, indeed, qualified "by knowledge, skill, experience, training, [and] education[,]" Fed. R. Evid. 702. As for the reliability of Rubinovitz's testimony, this Court rejects Rothe's contention that Rubinovitz's expert opinion is based on insufficient data, *i.e.,* that his analysis of data related to a subset of the relevant industry codes is too narrow to support his scientific conclusions. (*See, e.g.*, Pl.'s *Daubert* Br. at 16-17.) It is well established that a court may not exclude an expert's otherwise reliable and relevant testimony simply because, without more, the testimony is insufficient to prove a proponent's *entire* case. *See, e.g.*, *McReynolds,* 349 F.Supp.2d at 35 ("'[T]he question before [the Court] is not whether the reports proffered by plaintiffs prove the entire case; it is whether they were prepared in a reliable and statistically sound way, such that they contained relevant evidence that a trier of fact would have been entitled to consider.'" (second alteration in original) (quoting *Adams v. Ameritech Servs., Inc.,* 231 F.3d 414, 425 (7th Cir.2000))).

Moreover, Rubinovitz specifically addresses Rothe's critique about his data set, explaining that, from a mathematical perspective, excluding certain NAICS codes and analyzing data at the three-digit level actually *increases* the reliability of his results. For example, because "NAICS is a hierarchical classification system" and "industry classifications become more narrowly defined – and more sparsely populated" as

"more digits are added to the code," Rubinovitz explains that he opted to "use codes at the three-digit level as a compromise[,] balancing the need to have sufficient data in each industry grouping and the recognition that many firms can switch production within the broader three-digit category." (Rubinovitz Report at 5.) Rubinovitz also excluded "[c]ertain NAICS industry groups" from his regression analyses "because of incomplete data, irrelevance, or because data issues in a given NAICS group prevented the regression model from producing reliable estimates[.]" (*Id.* at 7; *see also id.* at 8 (listing NAICS codes not included in analyses).) This Court finds that Rubinovitz's reasoning with respect to the exclusions and assumptions he makes in the analysis are fully explained and scientifically sound; thus, his exclusions are not a valid basis for concluding that his expert testimony is unreliable. *Cf. Daubert,* 509 U.S. at 590, 113 S.Ct. 2786 ("Proposed testimony must be supported by appropriate validation – *i.e.,* 'good grounds,' based on what is known.").

Rothe also contends that, even if Rubinovitz's testimony is reliable, it should be deemed irrelevant to this Court's assessment of Section 8(a)'s constitutionality because it is *new* evidence, in the sense that Rubinovitz's testimony was not before Congress at the time it enacted or reauthorized Section 8(a). (*See* Pl.'s *Daubert* Br. at 4 ("The law is now very clear that post-reauthorization evidence is precluded and that experts are neither required for, nor relevant to, the required causal relationships between the alleged data before Congress and the statutory racial classification that

Congress enacted." (citing *Rothe Dev. Corp. v. Dep't of Defense,* 545 F.3d 1023, 1031, 1040-41 (Fed.Cir.2008))).) The issue of the relevance of post-enactment evidence is one that has been raised repeatedly in the context of constitutional challenges to federal statutes, *see, e.g.*, *Adarand Constructors, Inc. v. Slater,* 228 F.3d 1147, 1166 (10th Cir.2000); *Eng'g Contractors Ass'n of S. Fla., Inc. v. Metro. Dade Cnty.,* 122 F.3d 895, 911-12 (11th Cir.1997); *Contractors Ass'n of E. Pa., Inc. v. City of Philadelphia,* 6 F.3d 990, 1003-04 (3d Cir.1993), and "nearly every circuit to consider this question has held that reviewing courts" need *not* limit themselves to the particular evidence that Congress relied upon when it enacted the statute at issue, *DynaLantic,* 885 F.Supp.2d at 257. Thus, although *Rothe* is correct to point out that, where Congress "makes [a] racial distinction [it] must have had a strong basis in evidence to conclude that remedial action was necessary *before* it embarks on an affirmative action program[,]" *Shaw v. Hunt,* 517 U.S. 899, 910, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996) (emphasis in original) (internal quotation marks and citation omitted); (see also Pl.'s MSJ Br. at 15), this statement of the Supreme Court does not mean that post-enactment evidence is irrelevant to constitutional review; indeed, as the DynaLantic court concluded, "[p]ost-enactment evidence is particularly relevant when, as here, the statute is over thirty years old and the evidence used to justify Section 8(a) is stale for purposes of determining a compelling interest in the present[,]" *DynaLantic,* 885 F.Supp.2d at 258. This Court agrees, and it too concludes that Rothe's post-enactment relevance argument is rendered even

less persuasive given the fact that the Act requires the Small Business Administration to "report annually to Congress on the status of small disadvantaged businesses generally and the Section 8(a) program in particular[,]" and "thus, the statute itself contemplates that Congress will review the 8(a) program on a continuing basis." *Id.*[7]

This Court also disagrees with Rothe's assertion that Rubinovitz's testimony should be excluded as irrelevant because it contains an inadmissible legal conclusion. (*See* Pl.'s *Daubert* Br. at 12.) Rothe points to an excerpt from Rubinovitz's deposition where Rubinovitz was asked if the results of his analyses are "consistent with a finding that SDBs face discrimination" (*id.* (citation omitted)), and Rubinovitz answered in the affirmative – "[i]t would be consistent with that finding, yes" (*id.* (citation omitted)). Rothe insists that such testimony "cannot properly assist the trier of fact" in understanding the evidence or determining facts in issue and thus is not relevant under *Daubert*. (*Id.* at 2); *see*

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[7] The Supreme Court's opinion in *Shelby County v. Holder*, ___ U.S. ___, 133 S.Ct. 2612, 186 L.Ed.2d 651 (2013), which struck down the Voting Rights Act's formula for selecting jurisdictions subject to preclearance procedures, is not to the contrary. In *Shelby County*, the Supreme Court found that Congress reverse-engineered the formula to cover particular jurisdictions rather than base the formula on compiled record evidence, *Shelby County*, 133 S.Ct. at 2629, and the Court did not even *discuss*, much less rule upon, the issue of the admissibility of post-enactment evidence. Consequently, Rothe's reliance on *Shelby County* in this context is misplaced. (*See, e.g.*, Pl.'s MSJ Br. at 16 ("The *Shelby County* case reversed and clearly rejected the approval of post-enactment evidence by the D.C. Circuit Court of Appeals.").)

also Burkhart v. Wash. Metro. Area Transit Auth., 112 F.3d 1207, 1212 (D.C.Cir.1997). But it is clear beyond cavil that an expert may give "his 'opinion as to facts that, if found, would support a conclusion that the legal standard at issue was satisfied[.]'" *Kapche v. Holder,* 677 F.3d 454, 464 (D.C.Cir.2012) (quoting *Burkhart,* 112 F.3d at 1212-13). And Rothe has not demonstrated that Rubinovitz did anything more than that here. That is, Rubinovitz was not asked directly to state his opinion on the legal issue – *i.e.,* whether SDBs face discrimination sufficient to justify race-based remedial action – but instead, the carefully-worded question asked Rubinovitz to opine as to whether *the results of his analysis* were "consistent" (or, presumably, inconsistent) with the presence of discrimination. (Pl.'s *Daubert* Br. at 12 (citation omitted).) In the absence of any binding precedents that cast doubt on the admissibility of Rubinovitz's answer, this Court finds that Rubinovitz's testimony is relevant insofar as it will assist the factfinder in determining whether the data presented shows that the applicable legal standards in this case have been met.

In sum, Rubinovitz qualifies as an expert, and his testimony is both reliable and relevant. Therefore, this Court will admit and consider Rubinovitz's expert testimony when evaluating the parties' cross-motions for summary judgment.

2. *Wainwright's Testimony Is Reliable, Relevant, And Admissible*

Defendants' second expert witness, Jon Wainwright, is a senior vice president at NERA Economic Consulting and holds a Ph.D. in economics from the University of Texas at Austin. (*See* Wainwright Report at 7.) Wainwright represents that he has "served as the project director and principal investigator for more than 30 studies of business discrimination" (*id.*), and he has also testified before Congress regarding business discrimination on several occasions (*see id.* at 8). Wainwright's report in the instant case primarily concerns disparity studies, which are studies designed to measure the availability and utilization of minority-owned businesses ("MBEs") in government contracting. (*See id.* at 13 ("A disparity analysis of public spending is simply a comparison of MBE utilization to MBE availability in various categories of contracting relevant to a given agency.").) Wainwright reviewed the results of 107 studies conducted since the year 2000, all but 32 of which were submitted to Congress. (*See id.* at 16.) Specifically, Wainwright examined the disparity indexes for these studies, which he calculated "by dividing the respective MBE utilization percentage by its associated MBE availability percentage, and multiplying the result by 100." (*Id.* at 28.) In his expert report, Wainwright explains that "[a] disparity index of 100 or more indicates that MBEs are being utilized at or above their estimated availability level[,]" while "[a] disparity index of less than 100 indicates that MBEs are being utilized below their estimated availability

level." (*Id.*) Significantly for present purposes, Wainwright states that "[a] disparity index of 80 or lower is commonly taken as a strong indicator that discrimination is adversely affecting MBEs." (*Id.* (citing 29 C.F.R. § 1607.4(d)).) In Wainwright's opinion, the disparity studies he examined share a "widespread finding of substantial underutilization of MBEs throughout the United States" across several industries. (*Id.* at 27.)

This Court has considered the proffered expert testimony and the relevant admissibility factors and finds that Wainwright's testimony is admissible. Rothe does not contest that Wainwright is qualified to testify as an expert (*see* Hr'g Tr. at 17:18-18:1), and Defendants have demonstrated that Wainwright's testimony is both reliable and relevant. In particular, Wainwright's clearly-explained methodology appears to be scientifically valid, and his testimony regarding such a large body of record evidence will assist the factfinder in determining whether the data shows that the applicable legal standards in this case have been satisfied. *See Ambrosini,* 101 F.3d at 134.

Rothe's arguments to the contrary largely mirror the arguments Rothe makes in attacking Rubinovitz's testimony, and are similarly unpersuasive. For instance, Rothe once again contends that post-enactment evidence is inadmissible *per se*. (*See, e.g.*, Pl.'s *Daubert* Br. at 4 ("The reports – and thus the testimony – of Defendants' experts were never placed before or considered by Congress, which renders them irrelevant as a matter of United States Constitutional law, and therefore inadmissible under [the] Federal Rules of

Evidence[.]" (citations omitted)).) As explained above, this Court rejects Rothe's argument against post-enactment evidence and adopts instead the *DynaLantic* court's holding that such evidence is not only admissible but also particularly relevant in the circumstances presented here. *See DynaLantic,* 885 F.Supp.2d at 258. Consequently, this Court also rejects Rothe's argument that, to the extent that Wainwright's expert "report mixes disparity studies that were allegedly before Congress with ones that were not[,]" Wainwright's testimony is unreliable and inadmissible. (Pl.'s *Daubert* Br. at 15.)

Rothe further maintains that Wainwright's testimony is inadmissible because "the final paragraph of Mr. Wainwright's report is a legal conclusion." (*Id.* at 10; *see also id.* ("The Wainwright report, at best, is ultimately the same legal conclusion the *Dynalantic* court drew[.]").) In that paragraph, Wainwright concludes that (1) "the studies submitted to Congress, taken as a whole, provide strong evidence of large, adverse, and often statistically significant disparities between minority participation in business enterprise activity and the availability of those businesses"; (2) "these disparities are not explained solely, or even largely, by differences in factors other than race and sex that are untainted by discrimination"; and (3) "these disparities therefore are consistent with the presence [of] discrimination in the business market." (Wainwright Report at 97.) Contrary to Rothe's assertion, Wainwright is not testifying that Section 8(a) survives strict scrutiny; instead, he is offering his expert

opinion about what, if anything, the studies he examined demonstrate. (*See, e.g.*, *id.* at 7 (explaining that the studies "contain significant evidence of large and adverse disparities facing minority business enterprises" and that such disparities "are consistent with the presence of discrimination and its lingering effects in the small business contracting environment").) Even setting aside the fact that the appropriate remedy for an alleged statement of legal opinion is to exclude only that particular portion of testimony, *see, e.g.*, *Halcomb v. Wash. Metro. Area Transit Auth.,* 526 F.Supp.2d 24, 27 (D.D.C.2007) (excluding expert's opinions only "to the extent that they are phrased in terms of inadequately explored legal criteria or otherwise tell the [trier of fact] what result to reach" (internal quotation marks and citation omitted)), Wainwright's "opinion[s] as to facts that, if found, would support a conclusion that the legal standard at issue [has been] satisfied" may be admitted as expert testimony when all other requirements for admissibility are met, as explained above, *Kapche,* 677 F.3d at 464 (internal quotation marks and citation omitted).

Finally, Rothe argues that Wainwright's testimony is unreliable because of alleged flaws in the disparity studies that form the basis of Wainwright's expert report. (*See* Pl.'s *Daubert* Br. at 13-14.) Specifically, Rothe asserts that "the disparity studies do not all classify the same industries in the same way" (*id.* at 13), and that "[n]o collective inference can be drawn when the same industries are placed in different industry groups in different studies" (*id.* at 14). But even if

Rothe's contentions are correct, an attack on the underlying disparity studies does not necessitate the remedy of exclusion; rather, it is clear that "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible [scientific] evidence." *Daubert,* 509 U.S. at 596, 113 S.Ct. 2786; *see also Boyar v. Korean Air Lines Co.,* 954 F.Supp. 4, 7 (D.D.C.1996) ("[I]t is not proper for the Court to exclude expert testimony merely because the factual bases for an expert's opinion are weak." (internal quotation marks and citation omitted)). In its gatekeeping function, this Court must be focused solely on the reliability and relevance of the testimony that an expert witness proffers, and it is up to the factfinder "to determine whether [an expert's] opinions are suspect because facts upon which he relied were shown to be inaccurate or unproven." *SEC v. Johnson,* 525 F.Supp.2d 70, 76 (D.D.C.2007) (footnote omitted).

Accordingly, this Court concludes that Wainwright's expert testimony is admissible evidence, and the Court will consider it when assessing the pending cross-motions for summary judgment.

3. *Patenaude Is Not Qualified To Testify As A Rebuttal Expert Here*

Rothe's first expert witness, Dale Patenaude, is the vice president of Rothe and the husband of Rothe's president, Suzanne Patenaude. (*See* Patenaude Report

at 2; Patenaude Aff. at 2.) Patenaude holds an undergraduate degree in electrical engineering from the University of Texas at Austin and has worked in government contracting – at Rothe – since 1972. (*See* Patenaude Report at 2.) "During that time[,]" Patenaude states, "it has been [his] job, avocation and passion to review and analyze . . . data on small and small disadvantaged businesses for the purpose of knowing where contracts were being distributed in order to better understand the bid process for federal government contracts[.]" (*Id.*) Patenaude also states that he "operate[s] [his] own consulting business that provides this same type of econometric analysis consulting to other businesses to improve their business and bidding efficiencies." (*Id.*)

Rothe offers Patenaude's testimony "as a response to the errors and omissions in the reports served by Defendants[.]" (Pl.'s Resp. to Defs.' *Daubert* Mots. ("Pl.'s *Daubert* Resp."), ECF No. 49, at 1.) However, it is undisputed that Patenaude does not have any formal education or training in statistical or econometric analysis (*see* Dep. of Dale Patenaude ("Patenaude Dep."), ECF No. 44-9, at 34:3-11), and he has never worked with regression models prior to this case (*id.* at 45:12-14). Thus, Patenaude purports to refute Rubinovitz's testimony "by using basic addition, subtraction, multiplication, and division[.]" (Pl.'s *Daubert* Resp. at 2.) Moreover, Patenaude's report does not address the statistical significance of any of his calculations. (*See* Patenaude Dep. at 50:3-7 ("I didn't do any statistics that required computation of statistical

significance. Mine were 100 percent significant because they weren't statistics."); *see also id.* at 16:4-6 (conceding that Patenaude "can't really explain" "how statistical significance is computed").)

Based on Patenaude's own admissions regarding his lack of training, education, knowledge, skill, and experience in any statistical or econometric methodology, Patenaude is plainly unqualified to testify as an expert with respect to Rubinovitz's or Wainwright's reports. *See, e.g.*, *Arias v. DynCorp,* 928 F.Supp.2d 10, 17 (D.D.C.2013) (finding expert was not qualified under Rule 702, notwithstanding expert's "impressive credentials," because "plaintiffs [did] not demonstrate[ ] how [expert's] academic and professional experiences ma[d]e him qualified to testify" about the particular factual questions at issue); *Sykes v. Napolitano,* 634 F.Supp.2d 1, 8 (D.D.C.2009) (finding purported expert was not qualified under Rule 702 where expert did "not offer 'expert' testimony based on his years of experience" but "[i]nstead . . . decide[d] credibility on an incomplete written record, offer[ed] conclusions that have no basis in fact revealed from his report, and advocate[d] for the Plaintiff rather than providing expertise to the fact-finder"). It is also apparent that, even if Patenaude did have the required skill and training to testify as an expert, Rothe has not shown that Patenaude's testimony here employs "the same level of intellectual rigor that characterizes the practice of an expert in the relevant field[,]" *Kumho Tire Co.,* 526 U.S. at 152, 119 S.Ct. 1167, and thus his testimony is also

unreliable. Consequently, Patenaude's expert testimony in the instant case is inadmissible, and this Court will exclude his expert report in its entirety.[8]

4. *Sullivan's Testimony Is Unreliable And Inadmissible*

Rothe's second expert witness, John Sullivan, holds a J.D. from the University of Maryland Law School and an undergraduate degree in English and writing from Loyola College in Baltimore, Maryland. (*See* Sullivan Report at 50; Dep. of John Charles Sullivan ("Sullivan Dep."), ECF No. 46-9, at 10:8-21.) Sullivan has published various articles on affirmative action and government contracting (*see* Sullivan Report at 51), has worked on several disparity studies with his colleague George LaNoue (*see id.*; *see also* Sullivan Dep. at 15:21-16:1 (explaining that Sullivan and LaNoue "worked in tandem")), and has also testified before Congress regarding a particular disparity study that the Commerce Department conducted in 1998 (*see* Sullivan Report at 53). Sullivan acknowledges that he is neither an economist nor a statistician, and that he does not hold a degree in either field. (*See* Sullivan Dep. at 9:16-10:1.)

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[8] This does not mean, of course, that Patenaude is disqualified from testifying to facts within his personal knowledge and experience, as a lay witness. *See* Fed. R. Evid. 602. Thus, this Court has considered and relied upon the representations of fact regarding such matters as the scope of Rothe's business that are included in the Patenaude affidavit that Plaintiff submitted in conjunction with its Complaint.

In the proffered expert report, Sullivan purports to "apply [his] extensive experience and research in the field of disparity studies to examine the record offered by the government to support its 8(a) program." (Sullivan Report at 5.) Specifically, Sullivan criticizes the vast majority of disparity studies analyzed in Wainwright's report for, *inter alia,* examining state and local – as opposed to federal – contracting (*see id.* at 3), for utilizing census data (*see id.* at 7, 11-13), and for relying on otherwise "stale" information (*id.* at 13). Sullivan also repeats Rothe's arguments against post-enactment evidence and against analyzing NAICS codes at anything less than the 6-digit level. (*See id.* at 6 ("Studies that are not before Congress cannot be used to justify a Congressional program."); *id.* at 4 ("The proper level of analysis should be the precise six digit NAICS level[.]").) Ultimately, Sullivan concludes that the record in the instant case "while hefty, is not sufficient. It does not justify the racial preferences of the [Small Business Administration]'s 8(a) program." (*Id.* at 48.)

This Court finds that, even assuming that Sullivan is qualified to testify as an expert on disparity studies based on his experience, Rothe has failed to demonstrate by a preponderance of the evidence that Sullivan's testimony is reliable. *See Heller v. District of Columbia,* 952 F.Supp.2d 133, 141 (D.D.C.2013) (" '[T]he unremarkable observation that an expert may be qualified by experience does not mean that experience, standing alone, is a sufficient foundation rendering reliable any conceivable opinion the expert may

express[.]' " (quoting *United States v. Frazier*, 387 F.3d 1244, 1261 (11th Cir.2004) (emphasis in original))). Sullivan's preferred methodology for conducting disparity studies – including his assertion that the only proper way to determine the availability of minority-owned businesses is to count those contractors and subcontractors that actually perform or bid on contracts (see Sullivan Report at 33) – appears to be well outside of the mainstream in this particular field. (See, e.g., Sullivan Dep. at 94:22-95:9 (Sullivan recalls only one disparity study he has ever encountered that he "felt was done properly")); *see also Groobert v. President & Dirs. of Georgetown Coll.*, 219 F.Supp.2d 1, 9 (D.D.C.2002) (explaining that expert testimony may be "unreliable when an expert chooses to utilize her own unique methodology rather than the proper analysis which is well-known and respected" (citations omitted)). Moreover, Sullivan acknowledged during his deposition that portions of his report were based either on mistaken assumptions (see Sullivan Dep. at 38:20-39:13 (retracting certain opinions because Sullivan "misunderstood" Wainwright's testimony)) or on speculation (*see id.* at 42:21-43:11 (admitting that he "did not do any math" and was "speculating" when he concluded that the availability percentages in certain disparity studies were " 'likely overstated' ")). And Rothe has not shown that Sullivan's critique of Wainwright's testimony is otherwise reliable. *See Romero v. ITW Food Equip. Grp., LLC,* 987 F.Supp.2d 93, 105-06 (D.D.C.2013) (excluding expert testimony based on speculation as unreliable).

Therefore, this Court cannot find that Sullivan's proffered testimony "is properly grounded, well-reasoned, and not speculative[.]" Fed. R. Evid. 702 advisory committee's note (2000); *see also Heller,* 952 F.Supp.2d at 140 ("The trial judge has 'considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable.'" (quoting *Kumho Tire Co.,* 526 U.S. at 152, 119 S.Ct. 1167)); *Groobert,* 219 F.Supp.2d at 8 ("General acceptance in the community is an important factor in evaluating an expert's methodology and courts particularly emphasize this *Daubert* factor when reliability focuses on experience." (citing *Kumho Tire Co.,* 526 U.S. at 158, 119 S.Ct. 1167)); *Ambrosini,* 101 F.3d at 134 ("[T]he *Daubert* analysis . . . focuses on the court's 'gatekeeper' role as a check on 'subjective belief' and 'unsupported speculation.'" (quoting *Daubert,* 509 U.S. at 590, 113 S.Ct. 2786)).

Consequently, this Court will exclude Sullivan's testimony from its consideration of the parties' cross-motions for summary judgment.

III. CROSS-MOTIONS FOR SUMMARY JUDGMENT

The plaintiff in *DynaLantic* asserted (as Rothe does here) that the race conscious provisions of Section 8(a) rendered the statute unconstitutional on its face, and the *DynaLantic* court fully and thoroughly analyzed the plaintiff's legal position. *See DynaLantic,* 885 F.Supp.2d at 251-80, 283-91. Although not binding on

this Court, *DynaLantic* is persuasive recent precedent from this district, and inasmuch as Rothe seeks to relitigate the legal issues presented in that case, this Court declines Rothe's invitation to depart from the *DynaLantic* court's conclusion that Section 8(a) is constitutional on its face. This Court also finds that Rothe has failed to show that there is any genuine issue of material fact with respect to whether the Section 8(a) program violates the nondelegation doctrine, as explained below; thus, this Court concludes that Defendants are entitled to summary judgment as a matter of law.

A. Applicable Legal Standard For Summary Judgment

Federal Rule of Civil Procedure 56 makes clear that summary judgment is appropriate only if there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The court's role in deciding a summary judgment motion is not to "determine the truth of the matter, but instead [to] decide only whether there is a genuine issue for trial." *Barnett v. PA Consulting Grp., Inc.,* 715 F.3d 354, 358 (D.C.Cir.2013) (internal quotation marks and citation omitted). "A fact is material if it 'might affect the outcome of the suit under the governing law,' and a dispute about a material fact is genuine 'if the evidence is such that a reasonable jury could return a verdict for the non-moving party.'" *Steele v. Schafer,* 535 F.3d 689, 692 (D.C.Cir.2008)

(quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)).

In determining whether there is a genuine dispute about material facts, the court must view the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in that party's favor. *See, e.g.*, *Grosdidier v. Broad. Bd. of Governors, Chairman,* 709 F.3d 19, 23-24 (D.C.Cir.2013); *see also Wiley v. Glassman,* 511 F.3d 151, 155 (D.C.Cir.2007). The moving party may successfully support its motion by identifying those portions of the record that it believes demonstrate the absence of a genuine dispute of material fact. Fed. R. Civ. P. 56(c)(1)(A). The non-moving party, for its part, must show more than "[t]he mere existence of a scintilla of evidence in support of" its position; rather, "there must be evidence on which the jury could reasonably find for the [non-moving party]." *Anderson,* 477 U.S. at 252, 106 S.Ct. 2505. Further, the non-moving party "may not rest upon mere allegations or denials of his pleading but must present affirmative evidence showing a genuine issue for trial." *Laningham v. U.S. Navy,* 813 F.2d 1236, 1241 (D.C.Cir.1987) (internal quotation marks omitted).

"The rule governing cross-motions for summary judgment . . . is that neither party waives the right to a full trial on the merits by filing its own motion; each side concedes that no material facts are at issue only for the purposes of its own motion." *Sherwood v. Wash. Post,* 871 F.2d 1144, 1148 n. 4 (D.C.Cir.1989) (alteration in original) (internal quotation marks and citation

omitted). "In assessing each party's motion, all underlying facts and inferences are analyzed in the light most favorable to the non-moving party." *Vaughan v. Amtrak,* 892 F.Supp.2d 84, 91-92 (D.D.C.2012) (internal quotation marks and citation omitted).

B. The Section 8(a) Program Is Constitutional On Its Face

The Supreme Court repeatedly has noted that "[f]acial challenges are disfavored for several reasons[,]" not the least of which is that such challenges "run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Wash. State Grange v. Wash. State Republican Party,* 552 U.S. 442, 450, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008) (internal quotation marks and citation omitted); *see also Gen. Elec. Co. v. Jackson,* 610 F.3d 110, 117 (D.C.Cir.2010) ("'A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully.'" (quoting *Salerno,* 481 U.S. at 745, 107 S.Ct. 2095)). Accordingly, it is clear that plaintiffs advancing facial constitutional challenges must satisfy certain heightened standards in order to prevail, even though "the precise standard for facial challenges remains 'a matter of dispute[.]'" *Gen. Elec. Co.,* 610 F.3d at 117 (quoting *United States v. Stevens,* 559 U.S. 460, 472, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010)).

The parties in the instant case, like the parties in *DynaLantic,* disagree about which legal standard applies to this particular facial challenge. (*See* Pl.'s MSJ Br. at 11-12; Defs.' MSJ Br. & Resp. at 27-29); *see also DynaLantic,* 885 F.Supp.2d at 249. Specifically, Defendants insist that the Supreme Court's decision in *United States v. Salerno* requires Rothe to show that "no set of circumstances exists under which [Section 8(a)] would be valid[,]" *Salerno,* 481 U.S. at 745, 107 S.Ct. 2095, in order to prevail (*see* Defs.' MSJ Br. & Resp. at 27), while Rothe relies on the Federal Circuit's decision in *Rothe Development Corp. v. Department of Defense,* 545 F.3d at 1032, for the proposition that *Salerno's* so-called "no-set-of-circumstances" test is inapplicable here (*see* Pl.'s MSJ Br. at 11-12; *see also* Mountain States Legal Found.'s Br. as Amici Curiae in Supp. of Pl., ECF No. 62, at 12 (arguing that "this Court is not obligated to follow the 'no-set-of-circumstances' test" because "the D.C. Circuit has not truly reexamined [its] applicability" in light of subsequent Supreme Court precedent)).

Faced with these same conflicting positions, the *DynaLantic* court held that the *Salerno* test applies to facial challenges to the Section 8(a) program because "the *Salerno* test has been adopted by this Circuit and [continually] cited with approval[.]" *DynaLantic,* 885 F.Supp.2d at 249-50. This Court, too, is persuaded that, in order to justify invalidating all applications of the broad statutory program at issue, Plaintiff must satisfy *Salerno* 's no-set-of-circumstances test, or show that Section 8(a) lacks "any plainly legitimate sweep"

because there are not "many circumstances" in which "the statute's application would be constitutional[.]" *Gen. Elec. Co.,* 610 F.3d at 117 (internal quotation marks and citation omitted); *see also Edwards v. District of Columbia,* 755 F.3d 996, 1001 (D.C.Cir.2014) ("To succeed in a typical facial attack, [a plaintiff] must establish 'that no set of circumstances exists under which [the challenged statutory provisions] would be valid or that the statute lacks any plainly legitimate sweep.'" (quoting *Stevens,* 559 U.S. at 472, 130 S.Ct. 1577)).

This Court also agrees with the *DynaLantic* court (and the parties) that, "to the extent that the Section 8(a) program relies on race-conscious criteria," this Court must employ "strict scrutiny" to determine whether its application is constitutional in a particular circumstance. *DynaLantic,* 885 F.Supp.2d at 250. As explained above, the Section 8(a) program is specifically directed toward "socially disadvantaged individuals" and that category of persons is presumptively determined by reference to race. 15 U.S.C. §§ 637(a)(5); *see also id.* §§ 631(f)(B), 631(f)(1)(C); 13 C.F.R. § 124.103(b)(1). There is no question that "'[r]acial classifications'" such as the ones at issue here "'are constitutional only if they are narrowly tailored measures that further compelling governmental interests.'" *DynaLantic,* 885 F.Supp.2d at 250 (quoting *Adarand Constructors, Inc. v. Peña,* 515 U.S. 200, 227, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995)). (*See also* Defs.' MSJ Br. & Resp. at 26 ("[T]he presumption of social

disadvantage in the Small Business Act is race-conscious and is subject to strict scrutiny."); Pl.'s MSJ Br. at 9 ("It is undisputed that the section 8(a) statute contains [a] racial classification . . . and therefore that statutory racial classification is subject to judicial review under strict scrutiny.").)

The requirements for satisfying strict scrutiny – *i.e.,* a compelling government interest and narrow tailoring – are well established. To demonstrate a compelling interest, Defendants must make two showings: "[f]irst, the government must 'articulate a legislative goal that is properly considered a compelling government interest.'" *DynaLantic,* 885 F.Supp.2d at 250 (quoting *Sherbrooke Turf, Inc. v. Minn. Dep't of Transp.,* 345 F.3d 964, 969 (8th Cir.2003)). Previously recognized compelling government interests include "'remedying the effects of past or present racial discrimination[.]'" *Id.* (quoting *Shaw,* 517 U.S. at 909, 116 S.Ct. 1894). Second, the government must "demonstrate a strong basis in evidence supporting its conclusion that race-based remedial action was necessary to further that interest." *Id.* (internal quotation marks and citation omitted). In so doing, the government need not "conclusively prov[e] the existence of racial discrimination in the past or present[,]" *id.* (citing *Wygant,* 476 U.S. at 292, 106 S.Ct. 1842 (O'Connor, J., concurring)), and "[t]he government may rely on both statistical and anecdotal evidence, although anecdotal evidence alone cannot establish a strong basis in evidence for the purposes of strict scrutiny[,]" *id.* at 250-51 (citing *Concrete Works of Colo., Inc. v. City & Cnty.*

of Denver, 321 F.3d 950, 977 (10th Cir.2003)). If the government makes both showings, the burden shifts to the plaintiff "to present 'credible, particularized evidence' to rebut the government's 'initial showing of a compelling interest.'" *Id.* at 251 (quoting *Concrete Works,* 321 F.3d at 959); *see also id.* ("Notwithstanding the initial burden of initial production that rests with the government, the ultimate burden of proof remains with the challenging party to demonstrate the unconstitutionality of an affirmative-action program." (internal quotation marks, alterations, and citation omitted)).

Once a compelling interest is established, the government must further "show that 'the means chosen to accomplish the government's asserted purpose [are] specifically and narrowly framed to accomplish that purpose.'" *Id.* at 283 (alteration in original) (quoting *Grutter v. Bollinger,* 539 U.S. 306, 333, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003)). Courts consider several factors to determine whether challenged race-conscious remedial measures are narrowly tailored, including: "(1) the efficacy of alternative, race-neutral remedies, (2) flexibility, (3) over- or under-inclusiveness of the program, (4) duration, (5) the relationship between numerical goals and the relevant labor market, and (6) the impact of the remedy on third parties." *Id.* (citing *United States v. Paradise,* 480 U.S. 149, 171, 107 S.Ct. 1053, 94 L.Ed.2d 203 (1987) (plurality and concurring opinions)).

With the relevant legal standards in mind and consistent with the *DynaLantic* court's reasoning and conclusion, this Court finds that there are no genuine

issues of material fact regarding the facial constitutionality of the Section 8(a) program for several reasons. First, the government has articulated an established compelling interest for the program – namely, remedying "race-based discrimination and its effects[.]" (Defs.' MSJ Br. & Resp. at 35); *see also DynaLantic,* 885 F.Supp.2d at 279 (concluding that "Congress has a compelling interest in eliminating the roots of racial discrimination in federal contracting, funded by federal money"). Defendants have also shown a strong basis in evidence that furthering this interest requires race-based remedial action – specifically, evidence regarding discrimination in government contracting, which, as the *DynaLantic* court found, consisted of "extensive evidence of discriminatory barriers to minority business formation, . . . [and] forceful evidence of discriminatory barriers to minority business development," *DynaLantic,* 885 F.Supp.2d at 279. In *DynaLantic,* the Court further found that the government had "provided significant evidence that, even when minority businesses are qualified and eligible to perform contracts in both the public and private sectors, they are awarded these contracts far less often than their similarly situated non-minority counterparts." *Id.* Defendants have relied upon that same evidence in the instant case, and they have also presented expert testimony that corroborates the *DynaLantic* evidence – *i.e.,* Wainwright and Rubinovitz have testified that minority-owned small businesses have faced, and continue to face, significant disadvantages in government contracting that cannot be explained by nondiscriminatory factors (*see, e.g.*, Rubinovitz Report at 12;

Wainwright Report at 27, 97) – and Rothe has failed to rebut this evidence with credible and particularized evidence of its own, *see Wygant,* 476 U.S. at 293, 106 S.Ct. 1842 (O'Connor, J., concurring).

Furthermore, Defendants have established that the Section 8(a) program is narrowly tailored to achieve the established compelling interest. As the *DynaLantic* court discussed at great length, the Section 8(a) program satisfies all six dimensions of narrow tailoring. First, alternative race-neutral remedies have proved unsuccessful in addressing the discrimination targeted here. *See DynaLantic,* 885 F.Supp.2d at 283-84 ("Congress attempted to use race-neutral measures to foster and assist minority owned businesses for at least twenty-five years prior to incorporating a race-conscious component in Section 8(a), and these race-neutral measures failed to remedy the effects of discrimination on minority small business owners."). Second, the Section 8(a) program is appropriately flexible. *See id.* at 285-86 (finding that Section 8(a) "imposes no quotas at all[,] . . . provides for aspirational goals and imposes no penalties for failing to meet them[,]" contains a rebuttable presumption of social disadvantage based on race, and thus makes race a "relevant" but not "determinative factor" in program participation). Third, Section 8(a) is neither over – nor under-inclusive. *See id.* at 286 ("Section 8(a) does not provide that every member of a minority group is disadvantaged. Admittance . . . is based not only on social disadvantage, but also on an individualized inquiry into economic disadvantage. . . . [And] a firm

owned by a non-minority may qualify as socially and economically disadvantaged." (citation omitted)). Fourth, the Section 8(a) program "impose[s] temporal limits on every individual's participation that fulfill the [durational] aspect of narrow tailoring." *Id.* at 287 (discussing the program's "strict durational limits" on participation, and the Small Business Administration's "continual[] reassess[ment]" of participants' eligibility). Fifth, the relevant aspirational goals for SDB contracting participation are numerically proportionate, in part because "[t]he evidence presented established that minority firms are ready, willing, and able to perform work equal to two to five percent of government contracts in industries including but not limited to construction." *Id.* at 289. And sixth, the fact that the Section 8(a) program reserves certain contracts for program participants "does not, on its face, create an impermissible burden on non-participating firms." *Id.* at 290; *see also id.* (discussing various "provisions [in Section 8(a)] designed to minimize the burden on non-minority firms").

Accordingly, this Court concurs with the *Dyna-Lantic* court's conclusion that the strict scrutiny standard has been met, and that the Section 8(a) program is facially constitutional despite its reliance on race-conscious criteria. *See id.* at 293. In so holding, this Court incorporates by reference the reasoning in Parts III.A through III.D.1.(c) and Part III.E of the *Dyna-Lantic* memorandum opinion, and adopts it as its own. *See id.* at 251-80, 283-91.

This means that Rothe's insistence that "[S]ection 8(a)'s racial classification is unconstitutional racial balancing, for which there is no compelling interest, and for which narrow tailoring is impossible" (Pl.'s MSJ Br. at 7) is unavailing, and for good reason. With respect to the compelling interest factor, Rothe does not appear to dispute that the government has a compelling interest in eliminating discrimination in federal contracting; instead, Rothe maintains that Defendants have failed to show a strong basis in evidence that race-based remedial action is necessary to achieve that interest largely because – as Rothe repeatedly has argued – post-enactment evidence is irrelevant, and the disparity studies on which Defendants rely are flawed. (*See id.* at 37-43, 48-60.) This Court has already rejected Rothe's argument against post-enactment evidence and adopted instead the *DynaLantic* court's holding that such evidence is not only admissible but also particularly relevant in the circumstances presented here. *See supra*, Part II.B.2. And this Court also finds that "[o]n balance," the disparity studies on which Defendants and their experts rely "reveal large, statistically significant barriers to business formation among minority groups that cannot be explained by factors other than race[,]" *DynaLantic,* 885 F.Supp.2d at 261, and "demonstrat[e] that discrimination by prime contractors, private sector customers, suppliers and bonding companies continues to limit minority business development[,]" *id.* at 263; *see also id.* ("While the studies are not uniform in nature, methodology, or results, they contain powerful evidence that discrimination fosters a decidedly uneven playing field for

minority business entities seeking to compete in federal contracting." (internal quotation marks and citation omitted)).

Moreover, the record evidence clearly shows "that qualified, eligible minority-owned firms are excluded from contracting markets, and accordingly provide[s] powerful evidence from which an 'inference of discriminatory exclusion could arise.'" *Id.* at 268 (quoting *City of Richmond v. J.A. Croson Co.,* 488 U.S. 469, 503, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989)). To the extent that Rothe argues that the relevant legislative history does not support the conclusion that Congress had a strong basis in evidence to enact the race-conscious provisions of Section 8(a) (*see* Pl.'s MSJ Resp. & Reply at 19-37), this Court disagrees, and instead concurs with the *DynaLantic* court's conclusion that, "[b]ased on the evidence before Congress with respect to both the Public Works Employment Act of 1977, and, a year later, the heavily overlapping legislative history of Section 8(a), . . . Congress had a strong basis in evidence to conclude the use of race-conscious measures was necessary in, at least, some circumstances." *DynaLantic,* 885 F.Supp.2d at 274.

With respect to narrow tailoring, Rothe is both factually and legally misguided when it argues that Section 8(a)'s race-conscious provisions cannot be narrowly tailored because they "appl[y] across the board in equal measure, for all preferred races, in all markets and sectors." (Pl.'s MSJ Br. at 11; *see also* Pl.'s MSJ Resp. & Reply at 66-68.) This assertion is factually incorrect because, as the *DynaLantic* court noted, "[t]he

presumption that a minority applicant is socially disadvantaged may be rebutted if [the Small Business Administration] is presented with credible evidence to the contrary[,]" *DynaLantic,* 885 F.Supp.2d at 285, and, indeed, "[a]ny person may present 'credible evidence' challenging an individual's status as socially or economically disadvantaged[,]" *id.* at 286 (quoting 13 C.F.R. § 124.103(c)). Rothe has also failed to cite any legal precedent that holds that Congress is categorically prohibited from fashioning a race-conscious remedial statute that is unlimited in industrial or geographic scope. In this regard, Rothe appears to be proceeding under the misconception that "narrow" tailoring necessarily means a remedy that is laser-focused on a single segment of a particular industry or area, rather than the common understanding that the "narrowness" of the narrow-tailoring mandate relates to *the relationship* between the government's interest and the remedy it prescribes. *See Grutter,* 539 U.S. at 333, 123 S.Ct. 2325.

Rothe is also mistaken when it argues that the Section 8(a) program should be struck down as not narrowly tailored because purported "overutilization of 8(a) firms in Rothe's primary NAICS codes imposes an undue burden on Rothe[.]" (Pl.'s MSJ Resp. & Reply at 15.) With this argument, Rothe invites the Court to compare the "percentage of total small business dollars in federal procurement that 8(a) firms in Rothe's NAICS codes are being awarded . . . to the overall availability of 8(a) firms in Rothe's NAICS codes" and argues that this comparison demonstrates that, far

from being underutilized, Section 8(a) program participants in those NAICS codes actually receive a disproportionate share of federal contracting dollars. (*Id.* at 13.) Even if this is true – and this Court has significant doubts about the accuracy of Rothe's calculations – Rothe's allegations pertain to a mere five NAICS codes and at best give rise to an as-applied critique; they are manifestly insufficient to warrant invalidation of Section 8(a) *on its face* and in its entirety.

C. Section 8(a) Does Not Violate The Nondelegation Doctrine

Undaunted, Rothe also contends that, by enacting the Section 8(a) program, Congress has unconstitutionally delegated legislative authority to the executive branch – *i.e.,* that Section 8(a) violates the nondelegation doctrine. (*See* Pl.'s MSJ Br. at 40-44.) Rooted in the principle of separation of powers and derived from Article I of the Constitution, "[t]he nondelegation doctrine prohibits Congress from making unbridled delegations of authority" to other branches. *Mich. Gambling Opp'n v. Kempthorne,* 525 F.3d 23, 34 (D.C.Cir.2008); *see also Mistretta v. United States,* 488 U.S. 361, 371-72, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989). Indeed, the Supreme Court has explained repeatedly that Congress may only "confer[ ] decisionmaking authority upon agencies[,]" *Whitman v. Am. Trucking Ass'ns,* 531 U.S. 457, 472, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001), if it also provides "'an intelligible principle to which the person or body authorized to [act] is directed to conform[,]'" *id.* (first alteration in original) (quoting

J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409, 48 S.Ct. 348, 72 L.Ed. 624 (1928)).

Here, Rothe maintains that Section 8(a) contains insufficient guidance "to limit the [Small Business Administration's] discretion in deciding whether racial, ethnic or cultural bias has occurred or even what constitutes a racial, ethnic, or cultural group." (Pl.'s MSJ Br. at 7.) Rothe is wrong for at least two reasons. First, Congress has specifically defined "[s]ocially disadvantaged individuals" as "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)(5), and it has further explained 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[,]" *id.* § 631(f)(1)(B). The statute pertaining to the Section 8(a) program also supplies examples of "such groups includ[ing], but [ ] not limited to, Black Americans, Hispanic Americans, Native Americans, Indian tribes, Asian Pacific Americans, [and] Native Hawaiian Organizations[.]" *Id.* § 631(f)(1)(C). Thus, Congress has provided clear, intelligible direction regarding who can be deemed "socially disadvantaged" for the purpose of the statute. What is more, Congress has provided additional context by explaining that one purpose of the Section 8(a) program is to "promote the business development of small business concerns owned and controlled by socially and economically disadvantaged

individuals so that such concerns can compete on an equal basis in the American economy[.]" *Id.* § 631(f)(2)(A); *see also Mich. Gambling Opp'n,* 525 F.3d at 30 (noting that "a delegation need not be tested in isolation" and that courts may examine "the purpose of the Act, its factual background and the statutory context" in addition to "the statutory language" itself (internal quotation marks and citation omitted)). Thus Rothe's assertion that the statute "confers *unlimited* discretion to decide whether racial or ethnic prejudice or cultural bias has occurred with respect to a given group" (Pl.'s MSJ Br. at 42 (emphasis added)) is simply incorrect.

Second, the circumstances under which the non-delegation doctrine applies to invalidate a statute are exceedingly limited. This Court notes that the Supreme Court has "found the requisite 'intelligible principle' lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'" *Whitman,* 531 U.S. at 474, 121 S.Ct. 903 (citing *Panama Refining Co. v. Ryan,* 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446 (1935); *A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570 (1935)). Indeed, "[c]ourts 'have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.'" *Mich. Gambling Opp'n,* 525 F.3d at

30 (quoting *Whitman,* 531 U.S. at 474-75, 121 S.Ct. 903).

In sum, because the statute that Congress enacted to establish the Section 8(a) program contains specific definitions and a statement of purpose, and because it is also well settled in this jurisdiction that "[o]nly the most extravagant delegations of authority, [such as] those providing no standards to constrain administrative discretion," are to be "condemned . . . as unconstitutional[,]" *Humphrey v. Baker,* 848 F.2d 211, 217 (D.C.Cir.1988), this Court concludes that Rothe has failed to show a genuine issue of material fact as to whether Section 8(a) violates the nondelegation doctrine.[9]

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[9] Rothe's reliance on *Schuette v. Coalition to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equality By Any Means Necessary*, ___ U.S. ___, 134 S.Ct. 1623, 188 L.Ed.2d 613 (2014), to support its nondelegation argument is misplaced. (*See* Pl.'s MSJ Resp. & Reply at 45.) *Schuette* concerned an Equal Protection Clause challenge to a popularly enacted amendment to Michigan's state constitution, not a nondelegation challenge. *See Schuette*, 134 S.Ct. at 1629. Moreover, the plurality opinion in *Schuette* expressed concern about (and noted the Court's prior rejection of) "the assumption that 'members of the same racial group – regardless of their age, education, economic status, or the community in which they live – think alike, share the same political interests, and will prefer the same candidates at the polls.'" *Id.* at 1634 (quoting *Shaw v. Reno*, 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993)). Section 8(a) makes no such assumption.

IV. CONCLUSION

For the reasons discussed above, this Court concludes that the testimony of Defendants' expert witnesses is relevant and reliable, and the Court has considered that testimony in its review of the parties' cross-motions for summary judgment. By contrast, this Court has found that one of Plaintiff's proffered experts is not qualified to render an expert opinion with respect to the statistical and economic analyses at issue in this case, and the Plaintiff's other expert witness has proffered testimony that is unreliable and thus not admissible for purposes of this Court's evaluation of whether there is a genuine issue of material fact with respect to Plaintiff's underlying constitutional claim. Accordingly, Plaintiff's *Daubert* motion is **DENIED**, and Defendants' *Daubert* motions are **GRANTED**.

The Court also concludes that, in light of the record and the legal arguments presented in this case, and in reliance on the reasoning and holding of *DynaLantic* (which this Court has adopted in relevant part), Plaintiff's facial constitutional challenge to the Section 8(a) program fails. Defendants have demonstrated a compelling interest for the government's racial classification, and the purported need for remedial action is supported by strong and unrebutted evidence, and Defendants have also shown that the Section 8(a) program is narrowly tailored to further its compelling interest. Moreover, Plaintiff has failed to show either that no set of circumstances exists in which the Section

8(a) program would be constitutional or that the statutory program lacks any plainly legitimate sweep; therefore, there is no genuine issue that the Section 8(a) program's race-conscious provisions are constitutional on their face. Thus, as set forth in the accompanying order, Plaintiff's motion for summary judgment is **DENIED**, and Defendants' cross-motion for summary judgment is **GRANTED**.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-5176 **September Term, 2016**

1:12-cv-00744-KBJ

Filed On: January 13, 2017

Rothe Development, Inc.,

Appellant

v.

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

Appellees

BEFORE: Henderson, Griffith, and Pillard, Circuit Judges

ORDER

Upon consideration of appellant's petition for panel rehearing, it is **ORDERED** that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

United States Court of Appeals
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No. 15-5176 **September Term, 2016**

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Rothe Development, Inc.,

Appellant

v.

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

Appellees

BEFORE: Garland*, Chief Judge, and Henderson**, Rogers, Tatel, Brown**, Griffith, Kavanaugh**, Srinivasan, Millett, Pillard, and Wilkins, Circuit Judges

ORDER

Appellant's petition for rehearing en banc and the response thereto were circulated to the full court, and a vote was requested. Thereafter, a majority of the judges eligible to participate did not vote in favor of the

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* Chief Judge Garland did not participate in this matter.

** Circuit Judges Henderson, Brown, and Kavanaugh would grant the petition.

petition. Upon consideration of the foregoing, appellant's unopposed motion for leave to file Rule 28(j) supplemental authorities, and the lodged document, it is

ORDERED that the motion for leave to file be granted. The Clerk is directed to file the lodged document. It is

FURTHER ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Ken Meadows
Deputy Clerk

15 U.S.C. § 631

§ 631. Declaration of policy

* * *

(f) Findings; purpose

(1) [W]ith respect to the Administration's business development programs the Congress finds –

(A) that the opportunity for full participation in our free enterprise system by socially and economically disadvantaged persons is essential if we are to obtain social and economic equality for such persons and improve the functioning of our national economy;

(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;

(D) that it is in the national interest to expeditiously ameliorate the conditions of socially and economically disadvantaged groups;

(E) that such conditions can be improved by providing the maximum practicable opportunity for the development of small business concerns owned by members of socially and economically disadvantaged groups;

(F) that such development can be materially advanced through the procurement by the United States of articles, equipment, supplies, services, materials, and construction work from such concerns; and

(G) that such procurements also benefit the United States by encouraging the expansion of suppliers for such procurements, thereby encouraging competition among such suppliers and promoting economy in such procurements.

(2) It is therefore the purpose of section 637(a) of this title to –

(A) promote the business development of small business concerns owned and controlled by socially and economically disadvantaged individuals so that such concerns can compete on an equal basis in the American economy;

(B) promote the competitive viability of such concerns in the marketplace by providing such available contract, financial, technical, and man[a]gement assistance as may be necessary; and

(C) clarify and expand the program for the procurement by the United States of articles, supplies, services, materials, and construction work from small business concerns owned by socially and economically disadvantaged individuals.

* * *

15 U.S.C. § 637

§ 637. Additional powers

(a) Procurement contracts; subcontracts to disadvantaged small business concerns; performance bonds; contract negotiations; definitions; eligibility; determinations; publication; recruitment; construction subcontracts; annual estimates; Indian tribes

(1) It shall be the duty of the Administration and it is hereby empowered, whenever it determines such action is necessary or appropriate –

> **(A)** to enter into contracts with the United States Government and any department, agency, or officer thereof having procurement powers obligating the Administration to furnish articles, equipment, supplies, services, or materials to the Government or to perform construction work for the Government. In any case in which the Administration certifies to any officer of the Government having procurement powers that the Administration is competent and responsible to perform any specific Government procurement contract to be let by any such officer, such officer shall be authorized in his discretion to let such procurement contract to the Administration upon such terms and conditions as may be agreed upon between the Administration and the procurement officer. . . . ;
>
> **(B)** to arrange for the performance of such procurement contracts by negotiating or otherwise letting subcontracts to socially and economically

disadvantaged small business concerns for construction work, services, or the manufacture, supply, assembly of such articles, equipment, supplies, materials, or parts thereof, or servicing or processing in connection therewith, or such management services as may be necessary to enable the Administration to perform such contracts;

* * *

(D)(i) A contract opportunity offered for award pursuant to this subsection shall be awarded on the basis of competition restricted to eligible Program Participants if –

(I) there is a reasonable expectation that at least two eligible Program Participants will submit offers and that award can be made at a fair market price[;] and

(II) the anticipated award price of the contract (including options) will exceed $5,000,000 in the case of a contract opportunity assigned a standard industrial classification code for manufacturing and $3,000,000 (including options) in the case of all other contract opportunities.

* * *

(5) 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 their individual qualities.

(6)(A) 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. In determining the degree of diminished credit and capital opportunities the Administration shall consider, but not be limited to, the assets and net worth of such socially disadvantaged individual. . . .

* * *

(8) All determinations made pursuant to paragraph (5) with respect to whether a group has been subjected to prejudice or bias shall be made by the Administrator after consultation with the Associate Administrator for Minority Small Business and Capital Ownership Development. All other determinations made pursuant to paragraphs (4), (5), (6), and (7) shall be made by the Associate Administrator for Minority Small Business and Capital Ownership Development under the supervision of, and responsible to, the Administrator.

* * *

15 U.S.C. § 644

§ 644. Awards or contracts

* * *

(g) Goals for participation of small business concerns in procurement contracts

(1) Government-wide goals

(A) Establishment

The President shall annually establish Government-wide goals for procurement contracts awarded to small business concerns, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women in accordance with the following:

* * *

(iv) The Government-wide goal for participation by small business concerns owned and controlled by socially and economically disadvantaged individuals shall be established at not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year.

* * *

13 C.F.R. § 124.103

§ 124.103. Who is socially disadvantaged?

(a) General. Socially 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.

(b) Members of designated groups.

(1) There is a rebuttable presumption that the following individuals are socially disadvantaged: Black Americans; Hispanic Americans; Native Americans (Alaska Natives, Native Hawaiians, or enrolled members of a Federally or State recognized Indian Tribe); 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 designated from time to time by SBA according to procedures set forth at paragraph (d) of this section. Being born in a country does not, by itself, suffice to make the

birth country an individual's country of origin for purposes of being included within a designated group.

(2) An individual must demonstrate that he or she has held himself or herself out, and is currently identified by others, as a member of a designated group if SBA requires it.

(3) The presumption of social disadvantage may be overcome with credible evidence to the contrary. Individuals possessing or knowing of such evidence should submit the information in writing to the Associate Administrator for Business Development (AA/BD) for consideration.

(c) Individuals not members of designated groups.

(1) An individual who is not a member of one of the groups presumed to be socially disadvantaged in paragraph (b)(1) of this section must establish individual social disadvantage by a preponderance of the evidence. Such individual should present corroborating evidence to support his or her claim(s) of social disadvantage where readily available.

* * *

(d) Socially disadvantaged group inclusion –

(1) General. Representatives of an identifiable group whose members believe that the group has suffered chronic racial or ethnic prejudice or cultural bias may petition SBA to be included as a presumptively socially disadvantaged group under paragraph (b)(1) of this section. Upon presentation of substantial evidence

that members of the group have been subjected to racial or ethnic prejudice or cultural bias because of their identity as group members and without regard to their individual qualities, SBA will publish a notice in the Federal Register that it has received and is considering such a request, and that it will consider public comments.

(2) Standards to be applied. In determining whether a group has made an adequate showing that it has suffered chronic racial or ethnic prejudice or cultural bias for the purposes of this section, SBA must determine that:

(i) The group has suffered prejudice, bias, or discriminatory practices;

(ii) Those conditions have resulted in economic deprivation for the group of the type which Congress has found exists for the groups named in the Small Business Act; and

(iii) Those conditions have produced impediments in the business world for members of the group over which they have no control and which are not common to small business owners generally.

* * *