No. 16-1239

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

PETITIONER'S REPLY BRIEF

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QUESTIONS PRESENTED

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.

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INTRODUCTION

Section 8(a) of the Small Business Act ("Act"), 15 U.S.C. § 631 *et seq.*, 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. *Id.* § 637(a)(1)(A)-(D). Only "small business concerns" that are owned by "socially and economically disadvantaged" individuals are eligible to participate in the Section 8(a) program. *Id*. § 637(a)(1)(B). "[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." *Id*. § 637(a)(5). Section 2(f)(1) of the Act, in turn, lists certain racial minority groups that Congress deemed "socially disadvantaged." *Id*. § 631(f)(1)(B)-(C). Congress also authorized the SBA Administrator to designate additional groups. *Id*. § 637(a)(8). Because the Act adversely impacts the ability of non-minority owned small businesses to bid in a competitive, open market, Rothe challenged the statutory provisions of the Section 8(a) program.

Despite the government's attempt to mask the inescapable race-based classification, this Court's review is warranted because this Court's precedents require application of strict scrutiny whenever the government uses race as a factor in distributing benefits. The government sidesteps that central, straightforward issue by focusing instead on whether or not Section 8(a)(5)'s grant of benefits is individual- or group-based, and by

arguing that Section 2(f)(1) is not binding on the SBA. However, Section 8(a)(5) requires the SBA to distribute benefits on the basis of race or ethnicity. The related statutory provisions of the Section 8(a) program make Section 8(a)(5)'s racial classification crystal clear. Therefore, this Court should grant the Petition to address whether strict scrutiny applies to the statutory provisions of the Section 8(a) program.

ARGUMENT

I. SECTION 8(a)(5) CONTAINS A RACIAL CLASSIFICATION THAT TRIGGERS STRICT SCRUTINY.

To participate in the Section 8(a) program, a small business must be at least 51 percent owned by individuals who are "socially and economically disadvantaged[.]" 15 U.S.C. § 637(a)(4)(A). Section 8(a)(5) of the Act provides, "[s]ocially 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." *Id*. § 637(a)(5). Section 8(a)(5) therefore defines social disadvantage solely on the basis of one's racial, ethnic, or cultural background. As Judge Henderson explained in her dissent, Section 8(a)(5) is not race neutral because it "favors certain races in qualifying for participation in the Section 8(a) program." App. 37a; *see also Dynalantic Corp. v. Dep't of Defense*, 115 F.3d 1012, 1017 (D.C. Cir. 1997) ("[T]he 8(a) provisions are much like the program in [*Regents of the University*

of Cal. v. Bakke, 438 U.S. 265, 281 n.14 (1978)]: a minority enrollment program with a secondary disadvantage element." (quotation omitted)).

The government disputes this straightforward reading of Section 8(a)(5) and argues that, "standing alone[,]" Section 8(a)(5) requires only that the SBA "look[] to whether a specific *individual* has suffered prejudice or bias because of his membership in a particular racial or ethnic group."[1] Gov't Br. at 6-7 (emphasis added). The government also accuses Rothe of selectively quoting Section 8(a)(5) by "arguing that social disadvantage is based on membership in one of certain specified racial or ethnic groups." *Id.* at 7.

The government's preoccupation with whether a racial classification is applied in an individualized manner is beside the point, because that distinction goes to whether a race-conscious program is narrowly tailored, not to whether strict scrutiny applies. *See Gratz v. Bollinger*, 539 U.S. 244, 271 (2003) (explaining "the importance of considering each particular applicant as an individual" in order for a college admissions program to *survive* strict scrutiny); Petition at 17 n.7.

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[1] The government also relies on the fact that Section 8(a)(5) "does not limit participation in the Section 8(a) program to members of certain racial or ethnic groups." Gov't Br. at 7. A government program that excludes non-minorities almost certainly does not survive strict scrutiny, but it does not follow that a program that allows some non-minorities to participate is immune from strict scrutiny. Petition at 20-22; *Grutter v. Bollinger*, 539 U.S. 306, 334-35 (2003).

Further, nothing in Section 8(a)(5) hints at an individualized inquiry, and the plain language of that provision compels the opposite conclusion.[2] As Judge Henderson recognized, merely because a statute "does not classify *exclusively* on the basis of race" does not mean it is "facially race-neutral." App. 35a (emphasis in original) (quotation omitted). Social disadvantage is unavoidably dependent on membership in a racial group, and the government admits that an individual may qualify for the Section 8(a) program "only" on the basis of prejudice suffered as a result of "race or ethnicity." Gov't Br. at 7. By definition, racial classifications are not based on an individual's merits or experiences. *See Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) ("Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category.").

The government's focus on whether or not Section 8(a)(5) directs an individualized inquiry ignores that, whenever the government "distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny." *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 720 (2007) (citation omitted). Section 8(a)(5), even if interpreted "standing alone[,]" Gov't Br. at 6, still defines "social[ ] disadvantage[ ]" in

[2] Implementation of Section 8(a)(5) also compels the opposite conclusion. *See* 13 C.F.R. § 124.103(b); *Dynalantic Corp.*, 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[.]"). In fact, the government never disputes that race is the predominant factor in determining eligibility for the Section 8(a) program.

terms of "racial or ethnic prejudice or cultural bias" and group membership. 15 U.S.C. § 637(a)(5). Therefore, Section 8(a)(5) itself proves that the statutory provisions of the Section 8(a) program are subject to strict scrutiny because a statute cannot be race-neutral if it requires the government to consider race and ethnicity. *See Fisher v. University of Texas at Austin*, 133 S. Ct. 2411, 2419 (2013) ("[J]udicial review must begin from the position that any official action that treats a person differently on account of his race or ethnic origin is inherently suspect." (internal quotation omitted)); *Grutter*, 539 U.S. at 326 (whenever a government program uses "race-based measures," it is subject to strict scrutiny).

II. READING THE RELATED STATUTORY PROVISIONS OF THE SECTION 8(a) PROGRAM TOGETHER CONFIRMS THAT STRICT SCRUTINY IS WARRANTED.

Although the government tries to marginalize the other statutory provisions of the Section 8(a) program,[3] those provisions confirm that strict scrutiny is warranted. Section 2(f)(1) of the Act provides that individuals are "socially disadvantaged because of their identification as members of certain groups" and "that such groups include, but are not limited to, Black Americans, Hispanic Americans . . . , Asian Pacific

[3] That the government does not want this Court to look at the other provisions is evident from the narrow manner in which it attempted to reframe the Questions Presented. *See* Gov't Br. at I.

Americans . . . , and other minorities. . . ." 15 U.S.C. § 631(f)(1)(B), (C). Section 2(f)(1) is a duly enacted provision of the Act, and expressly applies to the SBA's "business development programs[,]" including the Section 8(a) program. *Id.* § 631(f)(1).

To its credit, the government gives Section 2(f)(1) a little more weight than the panel majority, which effectively read Section 2(f)(1) completely out of the Act. *Compare* Gov't Br. at 2 *with* App. 15a; *see also* Petition at 17-20. Indeed, the government recognizes that Section 2(f)(1) illuminates the related statutory provisions of the Section 8(a) program. Gov't Br. at 2 ("Through Section 8(a) of the [Act], 15 U.S.C. [§] 637(a), Congress sought to 'obtain social and economic equality' of 'socially and economically disadvantaged persons. . . .'" (quoting 15 U.S.C. § 631(f)(1)(A))). Curiously, however, the government suggests that the SBA may ignore Congress's listing of "socially disadvantaged" "groups" in Section 2(f)(1) because "Section 2(f)(1)(B) does not direct agency action or alter the statutory definition of social disadvantage set out in Section 8(a)(5)." Gov't Br. at 8-9.

It is axiomatic that the Act must be read as a whole, and that Section 2(f)(1) must be read together with Section 8(a). Petition at 18-20; App. 46a-49a (Judge Henderson explaining that the Act must be read as a "harmonious whole" and Section 2(f)(1) should be given effect); *United States v. Atlantic Research Corp.*, 551 U.S. 128, 135 (2007) ("Statutes must be read as a whole." (internal quotation omitted)); *United States v. Morton*, 467 U.S. 822, 828 (1984)

("We do not . . . construe statutory phrases in isolation; we read statutes as a whole." (collecting cases)). Section 2(f)(1) explains that the Section 8(a) program applies to those that are "socially disadvantaged *because of their identification as members of certain groups*. . . ." 15 U.S.C. § 631(f)(1)(B) (emphasis added). Such "groups," as determined by Congress, include "Black Americans, Hispanic Americans, Native Americans . . . , Asian Pacific Americans . . . , and other minorities[.]" *Id.* § 631(f)(1)(C). Contrary to the government's argument, Rothe does not suggest that Section 2(f)(1) "alter[s]" the meaning of Section 8(a)(5); instead, Section 2(f)(1) provides further meaning and clarification to that provision. *Compare* Gov't Br. at 8-9 *with* App. 38(a) (Judge Henderson explaining that Section 8(a)(5)'s use of "group" is made "abundantly clear" when considered "in light of section 2(f) of the Act."). Indeed, by deeming certain "groups" as "socially disadvantaged" in Section 2(f)(1), Congress decreed that Section 8(a)(5) be interpreted to include members of those "groups." *See* 1A Norman Singer & Shambie Singer, *Sutherland Statutory Construction* § 20.8 (7th ed. 2016) ("When a legislature defines the language it uses, its definition is binding. . . ."); *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000) ("When a statute includes an explicit definition, we must follow that definition. . . .").

This point is driven home by Section 8(a)(8), which authorizes the Administrator to determine whether "a group has been subjected to prejudice or bias[,]" 15 U.S.C. § 637(a)(8), and, if so, add that "group" to the list

created by Congress in Section 2(f)(1)(C). App. 40a (Judge Henderson explaining that, in listing the "groups" in Section 2(f)(1)(C), Congress "set a floor for participation in the [S]ection 8(a) program."). Notably, the government does not suggest that the Administrator could remove any of Congress's "groups" from the list. *See* App. 40a-42a (Judge Henderson explaining that the SBA could not, for example, remove black Americans from the list of presumed socially disadvantaged groups because such action would conflict with Section 2(f)(1)). Instead, the government merely asserts that Section 8(a)(8) "does not place any limits on the Administrator's ability to determine which racial or ethnic groups have been the targets of discrimination." Gov't Br. at 10. That is a "red herring." Whether Congress delegated the authority to the Administrator to add racial minority groups to the list does not change the fact that Congress provided a binding list of socially disadvantaged racial minority groups in the first place. *See* 15 U.S.C. § 631(f)(1)(B), (C). By expressly tying membership in such groups to social disadvantage, Section 8(a)(8) *requires* the SBA to classify on the basis of race. Further, Section 8(a)(8) confirms that the social disadvantage inquiry is based on group membership by delegating the authority to the Administrator to determine whether specific *groups* in addition to those listed in Section 2(f)(1) have been subject to racial prejudice or bias. *See* App. 37a-38a (Judge Henderson noting that, through Sections 8(a)(5) and 8(a)(8), "Congress made the 'group' criterion preeminent."). If Section 2(f)(1) does not "direct agency action[,]" *see* Gov't Br. at 8-9, then Section 8(a)(8)'s

delegation of authority to the Administrator to designate additional groups is superfluous. *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[.]" (internal quotation omitted)). Both Section 2(f)(1) and Section 8(a)(8) confirm that strict scrutiny applies.

Although the government would prefer that Sections 8(a)(5), 2(f)(1), and 8(a)(8) each be read in isolation, *see* Gov't Br. at 6, 8-10, the importance of reading these related provisions of the Section 8(a) program together is apparent: Congress should not be able to evade strict scrutiny review merely by placing a race-based definition in one section, and listing certain racial minority groups that satisfy that definition in a separate section. The statutory provisions of the Section 8(a) program direct the SBA to grant benefits and burdens on the basis of "social[] disadvantage[]," which hinges on membership in a racial minority group. 15 U.S.C. §§ 637(a)(5), 631(f)(1). Without both the "racial or ethnic prejudice" component of Section 8(a)(5) and Section 2(f)(1), "social disadvantage" becomes virtually meaningless. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("[W]e must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency."). The power granted to an administrative agency is "the power to . . . carry into effect the will of Congress as expressed by the statute."

Manhattan Gen. Equip. Co. v. Comm'r of Internal Revenue, 297 U.S. 129, 134 (1936). Here, the SBA must consider Section 8(a)(5)'s race-based definition of "social disadvantage" and the list of groups provided in Section 2(f)(1) in effectuating the will of Congress, or "[any] regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity." *Id.*

Moreover, reading the related statutory provisions of the Section 8(a) program together, as a whole, drives home Congress's overall purpose, which was to benefit minorities by enacting an affirmative action program. *See* H.R. Conf. Rep. No. 95-1714, at 21-22 (1978) (Explaining that the Section 8(a) program was intended to address the fact that, "because of present and past discrimination[,] many minorities have suffered social disadvantagement[.]"); *see Brown & Williamson*, 529 U.S. at 133 (Viewing the statute "as a whole" to determine Congress's "core objectives" and interpreting provisions of the statute consistent with its "essential purpose[.]"). In expounding a statute, courts "must not be guided by a single sentence or ember of a sentence, but look to the provisions of the whole law, and to its object and policy." *United States v. Heirs of Boisdore*, 49 U.S. 113, 122 (1850). The other statutory provisions of the Section 8(a) program make inescapable what Section 8(a)(5) already makes clear, that the Act directs the SBA to implement a race-conscious program for letting government contracts to small businesses.

Additionally, the SBA's subsequent interpretations of the Act contradict the government's conclusion

that Section 2(f)(1) does not mandate a race-based presumption and that "Section 8(a)'s original implementing regulations did not contain such a presumption." Gov't Br. at 10. The 1979 regulation expressly recognizes that the statute designates minority groups as socially disadvantaged, while also creating a procedure "which allows minority groups not designated in the statute as socially disadvantaged to establish the group's status as socially disadvantaged for the purposes of the section 8(a) program." 44 Fed. Reg. 30,672 (May 29, 1979). Then, perhaps recognizing that the 1979 regulation did not go far enough to effectuate Congress's mandate, the 1980 interim rule expressly cited Section 2(f)(1) as the basis for adopting a presumption of social disadvantage for racial groups: "Since Congress has found that Black Americans, Hispanic Americans, Native Americans, and, with the enactment of Pub. L. No. 96-302 on July 2, 1980, Asian Pacific Americans, are socially disadvantaged, members of these groups need not, as a general rule, present an individualized case of social disadvantage." 45 Fed. Reg. 79,413, 79,414-15 (Dec. 1, 1980).[4] Congress amended Section 2(f)(1) to include Asian Pacific Americans as a disadvantaged racial group – a complete waste of Congress's resources if Section 2(f)(1) were merely nonbinding background information. *Compare* Pub. L. No. 96-302, § 118, 94 Stat. 833, 840 *with* Gov't Br. at 8 (asserting that Section 2(f)(1) merely describes

[4] The interim rule was in place until a final rule was adopted in 1986. *See* 51 Fed. Reg. 36,132 (Oct. 8, 1986). The final rule left unchanged the presumption of social disadvantage for members of designated groups. *Id.* at 36,135-36.

"some of the reasons Congress chose to enact the [Act]").

Finally, contrary to the government's argument, Gov't Br. at 6, whether the statutory provisions of the Section 8(a) program are subject to strict scrutiny *does* merit this Court's review. The Section 8(a) program funnels billions of dollars in government contracts to participating firms, and the term "social disadvantage" has been used as a proxy for race in numerous other federal statutes. Petition at 35-37; *see also* Amicus Curiae Brief of Pacific Legal Foundation *et al.* at 3-7. Further, the level of scrutiny applicable when the government discriminates on the basis of race is of the utmost importance, because it is only through application of strict scrutiny that the courts are able to "'smoke out' illegitimate uses of race." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

CONCLUSION

The government's argument that the statutory provisions of the Section 8(a) program are facially race-neutral and therefore subject to only rational basis review cannot be squared with the plain meaning of Section 8(a)(5), a reading of the related statutory provisions of the Section 8(a) program, or its own arguments below. *See* Petition at 8-9. Accordingly, this

Court should grant the Petition to reaffirm that all racial classifications must be analyzed under strict scrutiny.

Respectfully submitted,

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