No. 15-5176

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROTHE DEVELOPMENT, INC.,

Plaintiff-Appellant

v.

DEPARTMENT OF DEFENSE, *et al.*,

Defendants-Appellees

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

OPPOSITION OF THE DEPARTMENT OF DEFENSE AND SMALL BUSINESS ADMINISTRATION TO APPELLANT'S PETITION FOR REHEARING EN BANC

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Appellees Department of Defense and the Small Business Administration certify as follows:

(A) Parties and Amici

All parties and amici appearing before the district court are listed in the Appellant Rothe Development, Inc.'s Certificate as to Parties, Rulings, and Related Cases, attached in the Addendum to appellant's Petition for Rehearing En Banc. Pet. Add. 56-58.

(B) Rulings Under Review

Reference to the ruling at issue appears in the Appellant Rothe Development, Inc.'s Certificate as to Parties, Rulings, and Related Cases.

(C) Related Cases

Counsel is unaware of any currently pending related cases.

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Pursuant to this Court's order, dated October 21, 2016, the Department of Defense and Small Business Administration submit this opposition to appellant Rothe Development, Inc.'s (Rothe) petition for rehearing en banc.

INTRODUCTION

Rothe stated at oral argument that it was challenging only the provisions in Section 8(a) of the Small Business Act, 15 U.S.C. 637(a), relating to government contracting with socially disadvantaged individuals, and not Section 8(a)'s

implementing regulations. The panel majority correctly concluded that those statutory provisions are race-neutral and satisfy rational basis review. The statutory provisions identified in the petition for rehearing and in the dissent contain race-neutral terms that focus on an individual's experiences of disadvantage due to racial, ethnic, or cultural prejudice. They do not presume that anyone is socially disadvantaged solely based on his or her membership in a particular group. Nor do they assign any benefits or burdens based on membership in a racial group. The only racial presumption in the Section 8(a) program is found in Section 8(a)'s implementing regulation, 13 C.F.R. 124.103(b), which Rothe does not challenge.[1]

Rothe attempts to justify en banc review by misreading several decisions of the Supreme Court, this Court, and other circuit courts. But those decisions either involve government contracting programs based on provisions of the Small Business Act not at issue in this case, or challenges to government contracting

[1] The government argued in district court that the Section 8(a) statute is race-neutral and subject to rational basis review. See Doc. 65-1, at 22-23 (U.S. Br. In Support Of Cross-Motion For Summary Judgment And Opposition To Rothe's Summary Judgment Motion); Doc. 72, at 20-21 (U.S. Reply Br. To Cross-Motion For Summary Judgment). The case proceeded as a challenge to the 8(a) program, including the rebuttable presumption in 13 C.F.R. 124.103(b), however, until Rothe stated definitively at oral argument on appeal that it was challenging only the 8(a) statute, and not the program as a whole. The United States continues to be of the view that the entire 8(a) program, including the regulations, is proper and satisfies constitutional standards.

programs where the court must consider not only the 8(a) statute but also the implementation of a program under Section 8(a)'s regulatory provisions. By contrast, Rothe is not challenging the 8(a) program as a whole. Indeed, in cases involving both the 8(a) statute and regulations, courts determined that the race-based presumption is found in the regulation. Accordingly, the panel decision does not conflict with any decisions of this Court or any other court and en banc review is unwarranted.

STATEMENT

1. Congress enacted Section 8(a) of the Small Business Act, 15 U.S.C. 637(a), to encourage the participation of small businesses owned by socially and economically disadvantaged individuals in federal contracting. Congress was aware that many individual business owners were socially disadvantaged because they were deprived of opportunities to develop their businesses due to racial, ethnic, or culture biases. 15 U.S.C. 631(f)(1). Although Congress recognized that business owners of specific races have been subjected to race-based discrimination, it defined socially disadvantaged individuals in race-neutral terms. Section 637(a)(5) 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).

A rebuttable race-based presumption of social disadvantage is found in Section 8(a)'s implementing regulations, but not in the statute. Under 13 C.F.R. 124.103, individuals who are members of the racial groups specified are presumed to be socially disadvantaged.

2. The panel majority decision affirmed summary judgment for the government, concluding that the Section 8(a) statute is race-neutral and satisfies rational basis review. Pet. Add. 1-55. The panel majority considered the specific statutory provisions challenged by Rothe and found none of those provisions contains a racial classification or mandates that the Small Business Administration employ one in implementing the 8(a) program. Pet. Add. 7-17. The panel majority emphasized that the statute speaks in terms of social disadvantage which may be due to race, but does not create a presumption for any specific race. Pet. Add. 22-23. It then held that the Section 8(a) statute satisfies rational basis review. Pet. Add. 26.[2]

The dissent disagreed with the majority's conclusion that the statute is race-neutral, arguing that the Section 8(a) statute contains group-based racial classifications. Pet. Add. 31-35. For example, the dissent found that Section

[2] The panel also rejected Rothe's argument that Section 8(a) is an unconstitutional delegation of legislative power, and declined to address Rothe's evidentiary arguments. Pet. Add. 26-28; see also Pet. Add. 31 n.6 (Henderson, J., concurring).

637(a)(5) creates a preference for some racial groups because it defines social disadvantage by referring to "*racial* or ethnic *prejudice*" due to the individual's "identity as a member of a [racial] group." Pet. Add. 32. Consequently, according to the dissent, Section 637(a)(5) "favors certain races in qualifying for participation in the [S]ection 8(a) program." Pet. Add. 32. Based on its reading of Section 637(a)(5) and other statutory provisions, the dissent asserted that the Section 8(a) statute is subject to strict scrutiny. The dissent did not address whether the district court, which applied strict scrutiny but also upheld the statute, erred in its application. Pet. Add. 31 n.6.

ARGUMENT

En banc review is warranted only when the panel decision conflicts with a decision of the United States Supreme Court or this Court or where "the proceeding involves a question of exceptional importance," such as "an issue on which the panel decision conflicts with the authoritative decisions of other" circuit courts. Fed. R. App. P. 35(a) and (b). Neither circumstance applies here.

A. The Panel Majority's Interpretation Of The Small Business Act Does Not Conflict With The Decisions Of The Supreme Court, This Court, Or Other Circuit Courts

Rothe relies on patently distinguishable cases in order to suggest a conflict where none exists.

1. Rothe contends that the panel majority's decision conflicts with *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200 (1995), and *Parents Involved in Community Schools* v. *Seattle School District No. 1*, 551 U.S. 701 (2007), because both decisions apply strict scrutiny to statutes that assign burdens and benefits on the basis of an individual's membership in certain racial groups. Pet. 1-2, 5-9. But the panel did not find that such racial classifications are subject to anything less than strict scrutiny. Rothe merely disagrees with the panel majority's decision to take Rothe at its word that it was challenging only the statute and its determination that 8(a)'s statutory language focuses on social disadvantage, rather than specific races. Pet. Add. 5-7. That is not the kind of "conflict" that supports en banc review.

Indeed, the panel's decision specifically addressed and rejected the points Rothe and the dissent raise about group classifications in the Section 8(a) statute. The panel acknowledged that although Congress recognized that "many individual business owners were socially disadvantaged" due to race, ethnic, or cultural biases, 15 U.S.C. 631(f)(1), it nonetheless defined socially disadvantaged individuals in race-neutral terms. Pet. Add. 7-9, 12; see also *Western States Paving Co.* v. *Washington State Dep't of Transp.*, 407 F.3d 983, 988 (9th Cir. 2005) (stating that the term socially disadvantaged is "race-[]neutral on its face") (O'Scannlain, J.) (citation omitted), cert. denied, 546 U.S. 1170 (2006). Thus,

Section 637(a)(5) 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). As the panel majority correctly concluded, Section 637(a)(5) on its face focuses on a person's individual experience rather than on membership in a certain group. Pet. Add. 7-8. Consequently, not all members of a minority group would be deemed socially disadvantaged, while non-minorities may qualify as socially disadvantaged individuals under the statute. Pet. Add. 8.

Similarly, the panel correctly found that even though Section 637(a)(8) refers to shared experiences of discrimination by members of some groups, that provision neither limits nor defines social disadvantage by membership in a particular racial group. Pet. Add. 14-17. Section 637(a)(8) simply provides that the Small Business Administration, in implementing Section 8(a), may identify the forms of discrimination that groups that have been subjected to prejudice or bias have faced and consider those forms of discrimination when evaluating claims of discrimination pursuant to Section 637(a)(5). 15 U.S.C. 637(a)(8); Pet. Add. 15. At bottom, the plain terms of Sections 637(a)(5) and (8) hinge participation in the Section 8(a) program on the individual's experience with discrimination, not on membership in a racial group.

Relying on the congressional findings in 15 U.S.C. 631(f)(1), which lists some racial groups that have been subjected to discrimination, Rothe incorrectly argues that the panel's reading of that section conflicts with *American Association of Railroads* v. *Costle*, 562 F.2d 1310 (D.C. Cir. 1977). Pet. 2, 11-12. In *Costle*, this Court held that congressional findings in a statute may contribute to "a general understanding" of the statute, but they are "not an operative part of the statute." 562 F.2d at 1316. That is exactly how the panel applied *Costle* here. The panel read Section 631(f)(1) as stating Congress's determination that many individual business owners may have been subjected to race-based discrimination, but concluded that the findings "do not * * * impose or necessarily contemplate any race-based classification in the statutory response." Pet. Add. 12. That is consistent with other parts of the statute, such as Section 637(a)(8), which refers to shared experiences of discrimination by members of some groups but does not alter the race-neutral consideration for determining the social disadvantage of any individual under Section 637(a)(5) or create a presumption of social disadvantage for any racial groups. Thus, the panel majority properly concluded that Section 631(f)(1) 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." Pet. Add. 13. Tellingly, the dissenting opinion does not assert that the panel majority's decision misapplied

Costle; instead, it only states that *Costle* should be read "with a grain of salt." Pet. Add. 42.

2. Nor does the panel decision conflict with *Lutheran Church-Missouri Synod* v. *FCC*, 154 F.3d 487 (D.C. Cir. 1998). Pet. 1, 7-9. *Lutheran Church* states that a regulation contains a racial classification not only when it "requires or obliges someone to exercise a racial preference," but also when it "pressure[s]" someone to do so. 154 F.3d at 491-492. In that case, the Court reviewed the regulations at issue under strict scrutiny because the regulations, according to the Court, pressured radio stations to engage in race-conscious hiring by requiring them to aspire to attain a workforce that "mirrors the racial breakdown" of their metropolitan service area. *Id.* at 492; see also *Lutheran Church-Missouri Synod* v. *FCC*, 141 F.3d 344, 352 (D.C. Cir. 1998). Any stations with an under-representation of women or minorities were required to take steps to remedy this shortfall. 141 F.3d at 352. This Court stated that strict scrutiny applied because the regulations "impose[d] numerical norms based on proportional representation." 154 F.3d at 492.

By contrast, nothing in the Section 8(a) statute "pressures" the Small Business Administration to find individuals in certain racial groups as socially disadvantaged over individuals in other groups. Unlike the regulations in *Lutheran Church*, the Section 8(a) statute does not give any preference to a particular racial

group in determining whether an individual is socially disadvantaged. See, *e.g.*, 15 U.S.C. 637(a)(5) (defining social disadvantage in race-neutral terms). In addition, the Small Business Administration suffers no consequences if members of a certain group do not qualify as socially disadvantaged. Indeed, the government-wide aspirational goal of awarding at least five percent of federal contracts annually to socially and economically disadvantaged small business concerns applies to the 8(a) and other contracting programs, and does not contain a racial preference or impose any consequences if that goal is not met. 15 U.S.C. 644(g)(1). Thus, even under *Lutheran Church*'s standard, the 8(a) statute would not be subject to strict scrutiny.

3. In another attempt to manufacture a conflict within this circuit, Rothe argues that the panel decision "silently overrule[s]" this Court's decision in *DynaLantic Corp.* v. *Department of Defense*, 115 F.3d 1012 (D.C. Cir. 1997). Pet. 1, 8-9. This is incorrect. The Court in *DynaLantic* did not find that the 8(a) statute contains a racial classification. In asserting that DynaLantic lacked standing, the government had argued that the 8(a) statute is race-neutral and only the regulations are race-conscious, and therefore striking down the regulations would not provide DynaLantic any relief because it would not be able to compete for 8(a) contracts under the race-neutral criteria in the statute. *DynaLantic*, 115 F.3d at 1017. Although the Court was skeptical of the government's argument, it ultimately

decided the redressability issue without reaching the point raised by the government. *Ibid.*[3] Both the panel majority and dissent acknowledged that the Court in *DynaLantic* did not decide whether the 8(a) statute is race-conscious or race-neutral. Pet. Add. 21-22, 36, 55. Accordingly, this panel's determination is the sole decision on this point in this circuit.

4. Rothe's petition seeks to create the illusion that the panel majority's decision conflicts with decisions by other appellate courts that have applied strict scrutiny to constitutional challenges to government contracting programs. Pet. 1-3, 9, 12. But Rothe's reliance on those cases is misplaced. None of the cases considered whether the language in the 8(a) statute alone is race-conscious, thereby triggering strict scrutiny review. Rather, all the cases Rothe cites involve challenges to government contracting programs that incorporate the race-based presumption of social and economic disadvantage under the Section 8(d) program, 15 U.S.C. 637(d)(3)(C), or the rebuttable race-based presumption under 8(a)'s regulation, 13 C.F.R. 124.103(b), neither of which is at issue here.

Because those cases concerned challenges to programs employing the race-based presumption in either Section 8(d) or 13 C.F.R. 124.103(b), they cannot

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[3] In district court, the government agreed that strict scrutiny applied to the court's review of the Section 8(a) program because the program employs race-conscious criteria. *DynaLantic Corp*. v. *United States Dep't of Def.*, 885 F. Supp. 2d 237, 250 (D.D.C. 2012).

serve as a basis for finding a conflict with the panel's determination that the 8(a) statute does not contain a racial presumption. For example, *Rothe Development Corp.* v. *United States Department of Defense*, 262 F.3d 1306, 1313-1314 (Fed. Cir. 2001), involved a challenge to a Department of Defense contracting program that incorporated Section 8(d)'s race-based presumption of social and economic disadvantage. Similarly, *Northern Contracting, Inc.* v. *Illinois*, 473 F.3d 715, 717 (7th Cir. 2007), and *Sherbrooke Turf, Inc.* v. *Minnesota Department of Transportation*, 345 F.3d 964, 968 (8th Cir. 2003), cert. denied, 541 U.S. 1041 (2004), involved challenges to the Department of Transportation's contracting program that incorporated the presumptions in both Section 8(d) and 13 C.F.R. 124.103(b). The courts in those cases had no choice but to apply strict scrutiny because the challenged programs used the race-conscious presumptions in Section 8(d) or 13 C.F.R. 124.103(b). See *Adarand*, 515 U.S. at 207 (stating that the presumptions in Section 8(d) and the implementing regulation for Section 8(a), 13 C.F.R. 124.103(b), are race-based).

The panel decision is also fully consistent with the Ninth Circuit's decision in *Western States Paving Co.* Cf. Pet. 3 & n.1. In *Western States Paving*, another challenge to the Department of Transportation's contracting program, the court of appeals recognized that the term "socially and economically disadvantaged" is

race-neutral "on its face," while the regulations impose a race-based presumption of social and economic disadvantage. 407 F.3d at 988 (citation omitted).

In sum, contrary to Rothe's claims, the panel decision does not conflict with any decision by this or any other court.

B. Rothe's Remaining Arguments In Support Of En Banc Review Are Without Merit

Having failed to establish any conflict between the panel decision and the decisions of the Supreme Court, this Court, or other courts of appeals, Rothe asserts that errors in the panel decision alone support en banc review. Not so.

1. Rothe argues that, in light of the group-based language in 15 U.S.C. 631(f)(1) and 15 U.S.C. 637(a)(5) and (8), and its assertion that courts have subjected those provisions "to strict scrutiny *for decades*," the panel majority erred in invoking the canon of constitutional avoidance to find that Section 637(a)(5) is race-neutral. Pet. 11-12. As discussed above, however, no court has ever held that the statutory language in 8(a) alone triggers strict scrutiny. See pp. 11-13, *supra*.

Moreover, Rothe misunderstands the role of the canon of constitutional avoidance in statutory interpretation. Rothe contends that invoking constitutional avoidance is inconsistent with, in Rothe's view, congressional intent to create a racial classification in the 8(a) statute. Pet. 11-12. But it is undeniable, as the panel majority found, that the plain text of 15 U.S.C. 637(a)(5) defines socially disadvantaged individuals in race-neutral terms, focusing on the individual's own

experience with discrimination. Nothing in the statute, including in the congressional findings, assigns benefits or burdens based on racial groups. Pet. Add. 7-9. Even if the statute is susceptible to more than one construction, this is exactly the kind of situation where the canon applies to provide a means of choosing between the two plausible competing interpretations to avoid constitutional doubt. See *Almendarez-Torres* v. *United States*, 523 U.S. 224, 238 (1998) (stating that constitutional avoidance applies where a statute is "genuinely susceptible to two constructions").

2. Rothe's arguments about perceived difficulties in challenging 8(a)'s implementing regulations are similarly unavailing. Pet. 13-14. Contrary to Rothe's claim, *Independent Community Bankers of America* v. *Board of Governors of the Federal Reserve System*, 195 F.3d 28, 34 (D.C. Cir. 1999), did not hold that regulations are immune from a facial challenge. It simply stated that "a party against whom a rule is applies may * * * pursue substantive objections to the rule." *Ibid*. Thus, any party who has standing may facially challenge the constitutionality of the regulations. Rothe simply chose not to do so.[4]

[4] Rothe also argues that this Court's denial of its motion to strike portions of the Addendum to the government's appellees' brief creates a conflict with *Roth* v. *United States Department of Justice*, 642 F.3d 1161 (D.C. Cir. 2011). Pet. Add. 15. *Roth*, however, has no application to this case. It involved the disclosure of information in connection with a criminal prosecution, 642 F.3d at 1179-1180, while the government's Addendum here contained a list of congressional hearings

(continued…)

CONCLUSION

Rothe's petition for rehearing en banc should be denied.

Respectfully submitted,

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(…continued)
to show only that the hearings occurred. Rothe cannot argue that it was not aware of the public hearings conducted by Congress on the Section 8(a) program.

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 35, that this OPPOSITION OF THE DEPARTMENT OF DEFENSE AND SMALL BUSINESS ADMINISTRATION TO APPELLANT'S PETITION FOR REHEARING EN BANC complies with the applicable page limitation of 15 pages, excluding the parts exempted by Federal Rule of Appellate Procedure 32. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Word 2007 and Times New Roman, 14-point font.

I also certify that the copy of this brief that has been electronically filed is an exact copy of what has been submitted to this Court in hard copy. I further certify that the electronic copy has been scanned with the most recent version of Symantec Endpoint Protection (version 12.1.6) and is virus-free.

s/ Teresa Kwong
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Dated: November 8, 2016

CERTIFICATE OF SERVICE

I certify that on November 8, 2016, I electronically filed this OPPOSITION OF THE DEPARTMENT OF DEFENSE AND SMALL BUSINESS ADMINISTRATION TO APPELLANT'S PETITION FOR REHEARING EN BANC with the Clerk of this Court by means of the appellate CM/ECF system, and that four paper copies of this brief will be hand delivered to the Clerk of the Court within two business days of this filing.

I also certify that all counsel of record are registered CM/ECF users and will be served by the appellate CM/ECF system.

s/ Teresa Kwong
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