ORAL ARGUMENT SCHEDULED FOR MARCH 10, 2016
No. 15-5176

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

ROTHE DEVELOPMENT, INC.,

Appellant

v.

DEPARTMENT OF DEFENSE, *et al.*,

Appellees

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

CORRECTED BRIEF FOR THE DEPARTMENT OF DEFENSE AND SMALL BUSINESS ADMINISTRATION AS APPELLEES

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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, filed July 2, 2015.

(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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GLOSSARY

DOD	United States Department of Defense
DOT	United States Department of Transportation
MBDA	Minority Business Development Agency, United States Department of Commerce
NAICS	North American Industry Classification System (standard used by federal agencies to classify businesses)
SBA	Small Business Administration
SDB	Small disadvantaged business (all Section 8(a) firms are SDBs but not all SDBs are certified 8(a) concerns)

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. 1331. The court entered judgment against plaintiff Rothe Development, Inc. (Rothe) on June 5, 2015 (1A67). Rothe timely filed its appeal June 10, 2015 (1A16).[1] This Court has jurisdiction under 28 U.S.C. 1291.

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[1] "__ A __" refers to the volume and page number of the Appendix filed by Rothe. "Br. __" indicates the page number of Rothe's opening brief. "Add. __" refers to the page number of the government's Addendum at the end this brief.

STATEMENT OF THE ISSUES

1. Whether the race-conscious provisions in Section 8(a) of the Small Business Act are constitutional on their face.

2. Whether the district court correctly held that Section 8(a) does not violate the nondelegation doctrine.

3. Whether the district court properly addressed the parties' expert witnesses.

STATUTES AND REGULATIONS

All applicable statutes and regulations are in the Addendum to Rothe's opening brief.

STATEMENT OF THE CASE

This case arises out of Congress's longstanding efforts through Section 8(a) of the Small Business Act, 15 U.S.C. 637(a), to ensure that government contracting neither reflects nor reinforces existing patterns of racial discrimination. Rothe challenges (Br. 2-3) multiple provisions in 8(a) as facially unconstitutional.

1. *The Section 8(a) Program*. Congress enacted the Section 8(a) program (8(a) or 8(a) program) as one of several nationwide programs to encourage the participation of small businesses, "service-disabled" veterans, small businesses owned by socially and economically disadvantaged individuals, and women in federal contracting. 15 U.S.C. 644. The 8(a) program provides for a wide array of

developmental assistance, including limiting competition for certain contracts to 8(a) participants. In the Small Business Act, Congress created the aspirational goal of the federal government spending at least 5% of contract dollars with businesses owned and controlled by socially and economically disadvantaged individuals, which include but are not limited to 8(a) participants. 15 U.S.C. 644(g)(1)(iv). Prime contracting through the 8(a) program is only one of the methods that the federal government uses to try to meet this goal.

Although the 8(a) program accounted for less than 4% of all federal prime contracting dollars spent in fiscal year 2012, see Small Business Goaling Report Fiscal Year 2012 (Mar. 19, 2013), http://go.usa.gov/cn5yP, the support and access to contracts that 8(a) provides are critical to its participants.

a. To participate in 8(a), small businesses owned and controlled by socially and economically disadvantaged individuals may apply to the Small Business Administration (SBA) to be certified as a small disadvantaged business (SDB). A business is "small" if it meets the conditions in 13 C.F.R. Pt. 121. See 15 U.S.C. 632(a)(1)-(3); 13 C.F.R. 124.102. A small business is "disadvantaged" if at least 51% of the firm is unconditionally owned and controlled by one or more socially and economically disadvantaged individuals. 15 U.S.C. 637(a)(4)(A)-(B); 13 C.F.R. 124.105. Congress established that "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." 15 U.S.C. 637(a)(5); 13 C.F.R. 124.103(a). "Economically disadvantaged" individuals are socially disadvantaged individuals whose economic potential "has been impaired due to diminished capital and credit opportunities." 15 U.S.C. 637(a)(6)(A); 13 C.F.R. 124.104(a).

Members of certain racial and ethnic groups – African Americans, Hispanics, Native Americans, Asian Pacific Americans, and Subcontinent Asian Americans – are presumed to be socially disadvantaged because Congress found that members of these groups "have suffered the effects of discriminatory practices or similar invidious circumstances." 15 U.S.C. 631(f)(1)(B)-(C); see also 15 U.S.C. 637(d)(3)(C). This presumption is rebuttable. 13 C.F.R. 124.103(b)(1). Anyone may provide information to the SBA disputing the eligibility of 8(a) participants. 13 C.F.R. 124.112(c), 124.517(e).

Representatives of an identifiable group who believe that the group has suffered similar bias may petition SBA to receive a similar presumption. 13 C.F.R. 124.103(d)(1). Asian Pacific Americans and Subcontinent Asian Americans received the presumption through this process. See 44 Fed. Reg. 31,055 (May 30, 1979); 44 Fed. Reg. 42,832 (July 20, 1979); 47 Fed. Reg. 36,743 (Aug. 23, 1982). Congress subsequently amended 8(a) to designate Asian Pacific Americans as a

socially disadvantaged group in 1980. Pub. L. No. 96-302, § 118, 94 Stat. 833 (1980).

Other individuals may be accepted into 8(a) by demonstrating individual social disadvantage, through evidence of personal experiences of social disadvantage and its impact on the person in business. 13 C.F.R. 124.103(c)(2). Between 9% to 15% of firms in the 8(a) program have provided evidence of individual social disadvantage. See, *e.g.*, SBA, 8(a) Program 2012 Report to Congress 18 (SBA 2012 Report), http://go.usa.gov/cn5VW; SBA, 8(a) Program 2010 Report to Congress 17 (SBA 2010 Report), http://go.usa.gov/cn5dw.

All applicants to the 8(a) program must submit a narrative describing economic disadvantage, and provide financial information, including income for the past three years, personal net worth, and the value of their assets. 13 C.F.R. 124.104(c). An individual's net worth must be less than $250,000 for Section 8(a) program eligibility and must remain less than $750,000. 13 C.F.R. 124.104(c)(2). The value of assets must not exceed $4 million for initial eligibility and must not exceed $6 million for continued eligibility. 13 C.F.R. 124.104(c)(4). Applicants must possess "good character," 13 C.F.R. 123.108, and demonstrate that their business has "reasonable prospects for success in competing in the private sector," 15 U.S.C. 637(a)(7)(A); 13 C.F.R. 124.107. In deciding whether such prospects exist, SBA considers the firm's access to credit and capital, the technical and

managerial experience of managers, the history of the business, and contract performance. 13 C.F.R. 124.107(c)-(e).

b. Congress has authorized SBA to permit federal agencies to limit certain contracts to 8(a) participants. 15 U.S.C. 637(a)(1); 13 C.F.R. 124.501(a). Such contracts may either be sole source awards to 8(a) participants or awards won through competition with other participants. 13 C.F.R. 124.501(b). In order to protect other small businesses, SBA will not accept a contract for 8(a) where it has made a written determination that doing so would adversely affect an individual small business, a group of small businesses, or other small business programs. 13 C.F.R. 124.504(c). For example, SBA would not request that an agency limit a contract to 8(a) firms if the procuring agency intends to offer the contract to small businesses owned by women or "service-disabled" veterans. 13 C.F.R. 124.504(a).

Because the 8(a) program's focus is specifically business development for those affected by discrimination, a participant must show improving ability to win contracts outside the 8(a) program. Participants must make substantial and sustained efforts to attain targeted dollar levels of non-8(a) revenue. 13 C.F.R. 124.509(a)(2). Failure results in ineligibility to receive sole-source 8(a) contracts. 13 C.F.R. 124.509(d)-(e).

SBA provides 8(a) participants financial and technological support, specialized business training, counseling, marketing assistance, and executive

development. See 13 C.F.R. 124.404, 124.704. Section 8(a) firms receive assistance in obtaining surplus government property, SBA-guaranteed loans, and bonding assistance. See 13 C.F.R. 124.405, 124.703.

SBA annually reviews participants to assess their progress in business development and to verify continued eligibility. Participants must develop comprehensive business plans setting forth business targets, objectives, and goals. 15 U.S.C. 636(j)(10)(D); 13 C.F.R. 124.402-124.403.

c. Participants must leave the program after nine years. 13 C.F.R. 124.2; see 15 U.S.C. 636(j)(10)(C)(i). Upon exit, neither the business nor the individual participant will be 8(a) eligible again. 15 U.S.C. 636(j)(11)(B)-(C); 13 C.F.R. 124.108(b). The SBA will graduate a participant early if the participant has substantially achieved the targets, objectives, and goals in its business plan, and may terminate a program participant for good cause, including submitting false information to the SBA. 13 C.F.R. 124.303(a).

d. SBA must submit to Congress an annual assessment of the 8(a) program, 15 U.S.C. 636(j)(16)(B), including the firms that entered and exited the program, the "benefits and costs that have accrued to the economy and the Government" through the program, and the total dollar value awarded under the program. 15 U.S.C. 636(j)(16)(B); see, *e.g.*, SBA 2012 Report 18, http://go.usa.gov/cn5VW. Congress requires the President to submit an annual Report on Small Business and

Competition, including information pertaining to small businesses owned and controlled by socially and economically disadvantaged individuals. 15 U.S.C. 631b(a), (e)(1).

2. *Procedural History*. Rothe, a woman-owned small business, provides computer services. 1A24-25. In 2012, Rothe sued the Department of Defense and SBA, alleging that the race-conscious component of the Section 8(a) program is facially unconstitutional. 1A68. The complaint claims that Section 8(a) prevents Rothe from bidding on 8(a) contracts because of race, violating equal protection under the Due Process Clause of the Fifth Amendment, and that the program unconstitutionally delegates authority to the SBA to make racial classifications. 1A68, 73.

a. Both parties filed motions for summary judgment, and motions to exclude the other party's expert witnesses pursuant to *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).

In support of its summary judgment motion, the government submitted a disc containing thousands of pages of legislative history for Section 8(a) and reports and studies conducted and submitted to Congress since enactment of Section 8(a). The government also proffered two expert witness reports to support the continuing need for 8(a) and the narrow tailoring of the program. Dr. Robert Rubinovitz, who holds a Ph.D. in economics and is the Deputy Chief Economist at

the Department of Commerce, analyzed on an industry-by-industry basis prime contracts the federal government awarded small businesses in 2012. Applying regression analyses to control for numerous factors such as size and age of businesses, Dr. Rubinovitz found that minority-owned firms were statistically significantly less likely than similar non-minority-owned firms to win an open competition federal government contract in the vast majority of industries where the government lets contracts and where most minority-owned businesses bid. 2A918, 944.

The government also proffered expert evidence by Dr. Jon Wainwright, a consultant who holds a Ph.D. in economics. 1A714. Dr. Wainwright performed a meta-analysis by examining 107 disparity studies conducted since 2000, covering 142 public contracting entities in 35 States that encompass 89% of the national population. 1A723, 733.[2] The disparity studies compared the utilization of minority-owned businesses with their availability of minority-owned businesses (1A723-769), and overwhelmingly showed underutilization in government contracts of minority-owned businesses throughout the United States. 1A734, 737-748 (Table 5), 749-768. Moreover, Dr. Wainwright found under-utilization of

[2] Meta-analysis is a statistical technique for amalgamating, summarizing, and reviewing previous quantitative research to identify patterns, disagreements, or other types of relationships in the research. See Glass, G.V., *Primary, Secondary, and Meta-Analysis of Research*, Educational Researcher, Vol. 5, No. 10, 3-8 (1976).

minority-owned businesses in the industries where the federal government issues contracts. 2A872-874. Using regression analyses, Dr. Wainwright also examined business formation rates and found a statistically significant difference based on the owner's race even when other factors such as geographic location, industry affiliation, education, age, or balance sheets are held constant. 1A776-800.

Rothe proffered two expert witnesses. Dale Patenaude is the vice-president of Rothe and husband of Rothe's president (1A46), and was offered to rebut Dr. Rubinovitz's statistical analyses. Patenaude has a degree in electrical engineering but no formal education or training in statistics or economics. 1A30, 273. He had never worked with regression analyses or disparity studies, and could not explain the concept of statistical significance. 1A274, 276, 281. Patenaude purported to refute Dr. Rubinovitz's regression analyses "by using basic addition, subtraction, multiplication, and division[.]" 1A232.

John Sullivan, who has a law degree, similarly lacks any formal education or training in economics or statistics. 1A414-415. Sullivan has published articles on affirmative action and government contracting, worked on several disparity studies headed by his colleague George LaNoue, and once testified before Congress regarding a disparity study. 1A406, 409-410, 417. Sullivan attempted to rebut Dr. Wainwright's reports by criticizing the underlying disparity studies. 1A362-371.

b. On June 5, 2015, the district court granted the government's summary judgment motion and motion to exclude both of Rothe's experts, and denied Rothe's summary judgment and *Daubert* motions. 1A19-20.

i. Applying *Daubert*, the court found the government's expert evidence admissible under Federal Rule of Evidence 702, which allows a witness who is qualified as an expert based on "knowledge, skill, experience, training, or education," to testify if the proffered expert opinion is reliable and relevant. 1A34. Rothe conceded the governments' experts were qualified (1A38, 41). The court found the expert reports of Dr. Rubinovitz and Dr. Wainwright reliable and relevant and their methodologies scientifically sound. 1A39-40, 44. The court rejected Rothe's argument that the experts' evidence was irrelevant post-enactment evidence, holding that nearly every circuit that has addressed this issue has accepted post-enactment evidence in facial challenges. 1A41. The court stated that such evidence is particularly relevant here, where Section 8(a) requires SBA to report annually to Congress and thus "contemplates that Congress will review the 8(a) program on a continuing basis." 1A41.

The court rejected Rothe's proffered expert evidence under Rule 702. It held that Patenaude was not an expert because he lacked knowledge, skill, experience, training, or education in statistics or economics. 1A48, 277. The court further held that even assuming that Patenaude and Sullivan were qualified experts,

their testimony was unreliable (1A48-51), as their methodologies were untested and not generally accepted by social scientists. 1A50; 2A1444. The district court stated that Sullivan had acknowledged that portions of his proffered report were "based on either mistaken assumptions * * * or on speculation." 1A50.

ii. With respect to Rothe's facial challenge to Section 8(a), the court explained that Rothe's challenge was "nearly identical" to the facial challenge to the Section 8(a) program rejected in *DynaLantic Corp.* v. *United States Department of Defense*, 885 F. Supp. 2d 237 (D.D.C. 2012). 1A18-19. The court observed that the parties rely on much of the same evidence and arguments as in *DynaLantic* (1A19, 58), the major difference in the record being the government's expert evidence, which the court found "corroborates the *DynaLantic* evidence." 1A58. The district court "incorporate[d] by reference" *DynaLantic*'s reasoning and concluded Section 8(a)'s race-based provisions were supported by a compelling interest and were narrowly tailored. 1A57-59.

The court held that the legislative history supporting the enactment of Section 8(a) in 1978 provided Congress with a strong basis in evidence to enact 8(a)'s race-conscious component, and that more recent evidence shows that the federal government continues to have a compelling interest justifying the 8(a) program's consideration of race. 1A40-41, 61. The court concluded that the disparity studies before Congress show "large, statistically significant barriers to

business formation among minority groups that cannot be explained by factors other than race[.]" 1A60 (citation omitted). The court stated that the 8(a) program is narrowly tailored because the presumption of social disadvantage is rebuttable (1A61-62), and Congress may legislate with a nationwide scope. 1A62. The court found that even if, as Rothe asserted, 8(a) firms are over-utilized in the areas where Rothe bids, possibly placing an "undue burden" on Rothe, this argument is appropriately addressed in an as-applied challenge rather than in this facial challenge and does not invalidate Section 8(a) on its face. 1A62. The court held that Rothe "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." 1A66.

Lastly, the district court ruled that Section 8(a) does not violate the nondelegation doctrine because the statute contains guidance for SBA to determine social disadvantage. 1A62-65.

SUMMARY OF THE ARGUMENT

1. The Section 8(a) program is facially constitutional.

a. The 8(a) program promotes the "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." *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 492 (1989) (plurality opinion). Rothe does not dispute this *interest*, but

contends that the legislative record does not show that Congress intended Section 8(a) to further such an interest.

Congress enacted the 8(a) program with extensive evidence of public and private discrimination affecting government contracting. The legislative record shows that Congress had statistical and anecdotal evidence that racial discrimination had created barriers that (a) inhibited the formation and development of minority businesses that could bid on federal contracts, and (b) prevented minority firms from competing equally with non-minority firms for government contracts. Congress had ample evidence that, due to racial discrimination, minority business owners faced difficulties with accessing working capital and meeting bonding requirements, discrimination by suppliers, exclusionary business networks, and covert and overt discrimination in the business community. Congress was aware of disparities in business formation by minorities and non-minorities caused by discrimination, and how minority-owned businesses received a disproportionately small share of federal procurement opportunities.

Post-enactment evidence submitted to Congress – including the government's expert reports – supports the continuing need for the 8(a) program. Rothe erroneously argues that the Court must disregard post-enactment evidence. The majority of circuits that have addressed this question have considered such

evidence to determine if the federal government has a continuing strong basis in evidence to support race-conscious measures.

b. The district court correctly held that that the 8(a) program is narrowly tailored. First, Congress enacted Section 8(a)'s race-conscious remedy only after race-neutral measures failed to address the discriminatory barriers to minority businesses in government contracting. Second, the requirements for participation in 8(a) are neither over- nor under-inclusive. The presumption of social disadvantage for members of certain minority groups is rebuttable if credible evidence shows that a minority applicant is not socially disadvantaged; even if entitled to the presumption, an applicant still must establish individual economic disadvantage in order to the participate in the program. And non-minorities who demonstrate social and economic disadvantage can qualify – indeed, many have qualified – as 8(a) contractors. Third, the 8(a) program contains no quotas; on its face, it sets only an aspirational goal. Fourth, the government's un-rebutted evidence shows that minority-owned businesses are significantly less likely to win federal contracts than non-minority-owned businesses in nearly every industry. Lastly, 8(a) contains appropriate time restraints by limiting individual program participation to nine years, with an earlier cutoff for participants who no longer need this sort of assistance to withstand the discrimination targeted by the program.

2. Section 8(a) contains sufficient guidance for SBA's implementation of the statute and thus does not violate the rarely-imposed nondelegation doctrine.

3. The district court did not abuse its discretion by excluding Rothe's experts because their reports lacked the reliability required by Federal Rule of Evidence 702. Nor has Rothe raised any factual issues that require remand.

ARGUMENT

I

SECTION 8(a) IS FACIALLY CONSTITUTIONAL

A. Standard Of Review

This Court reviews the district court's grant of summary judgment de novo. *Burley* v. *National Passenger Rail Corp.*, 801 F.3d 290, 295 (D.C. Cir. 2015).

B. Strict Scrutiny

Strict scrutiny applies because Section 8(a) employs a race-conscious rebuttable presumption to define socially disadvantaged individuals. See *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 212-213 (1995). Racial classifications are constitutional, however, if they serve a compelling government purpose and are narrowly tailored to achieve that end. *Id*. at 227. That standard is demanding, but the Supreme Court has gone out of its way "to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'" *Id*. at 237 (citation omitted).

Here, the district court correctly applied strict scrutiny. It found a compelling interest for the 8(a) program based on a strong basis in evidence that furthering that interest required, and still requires, race-based remedial action, and that the program was narrowly tailored. 1A57-58. Rothe had the "ultimate burden of persuading" the court that Section 8(a) was unconstitutional, and it failed to meet that burden. See *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 293 (1986) (O'Connor, J., concurring).

Rothe objects (Br. 8) to the district court's requirement that under *United States* v. *Salerno*, 481 U.S. 739, 745 (1987), Rothe must "establish that no set of circumstances exists under which the racial classification would be valid to prevail." Yet Rothe fails to present *any* argument on this point in its brief. As this Court has long held, any issue that is not meaningfully argued in an appellant's opening brief is waived. See *World Wide Minerals, Ltd.* v. *Republic of Kazakhstan*, 296 F.3d 1154, 1160 (D.C. Cir. 2002), cert. denied, 537 U.S. 1187 (2003); see also *Democratic Cent. Comm.* v. *Washington Metro. Area Transit Comm'n*, 485 F.2d 786, 790 n.16 (D.C. Cir.1973), cert. denied, 415 U.S. 935 (1974).

Even if Rothe's objection were properly raised, this Court need not resolve that issue. In *Hodge* v. *Talkin*, this Court acknowledged that although the Supreme Court "often cautions that a facial challenge can succeed only if 'no set of

circumstances exists under which the [statute] would be valid,' * * * the [Supreme] Court has also indicated that the standard for facial invalidity may be less stringent in some situations, instead turning on whether the statute lacks any 'plainly legitimate sweep.'" 799 F.3d 1145, 1156 (D.C. Cir. 2015) (citing *Washington State Grange* v. *Washington State Republican Party*, 552 U.S. 442, 449 (2008)) (internal quotation marks omitted).

Because the district court held that Rothe failed to raise a genuine issue of material fact under either standard (1A66), this Court need not resolve whether *Salerno* applies. The district court correctly found that Rothe failed to raise a genuine issue of fact even under the more lenient "plainly legitimate sweep" standard.

C. The Race-Based Portion Of The Section 8(a) Program Is Facially Constitutional

The district court below, and the court in *DynaLantic Corp*. v. *United States Department of Defense*, 885 F. Supp. 2d 237, 252-256 (D.D.C. 2012), correctly held that Section 8(a) is narrowly tailored to serve a compelling interest. 1A59. The district court here incorporated *DynaLantic*'s exhaustive review of the legislative record in finding 8(a) facially constitutional. 1A59. While the evidence in both cases largely overlaps, the record in this case is substantially stronger because it includes the government's expert evidence and more recent congressional hearings, reports, and disparity studies.

1. Congress Has A Compelling Interest In Addressing The Effects Of Discrimination On Government Spending And Procurement

"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." *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 492 (1989) (plurality opinion). Congress may legitimately invoke its constitutional powers to ensure that its procurement system does not "cause federal funds to be distributed in a manner" which reflects and "reinforce[s] prior patterns of discrimination." *Id*. at 504. This Court has held that remedying private discrimination is a compelling government interest where the government would otherwise be a "passive participant" perpetuating the effects of discrimination. See *O'Donnell Constr. Co.* v. *District of Columbia*, 963 F.2d 420, 425 (D.C. Cir. 1992) (government entities "may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination * * * public or private") (quoting *Croson*, 488 U.S. at 504).

a. Congress Had A Strong Basis In Evidence When It Created The 8(a) Program

The vast body of evidence before Congress establishes the compelling nature of Congress's interest in first enacting Section 8(a) in 1978. Throughout the 1970s, a Permanent Select Committee of the House of Representatives conducted extensive hearings on the effects of discrimination on contracting opportunities.

See Add. 1. Based on these hearings and contemporaneous hearings of other congressional committees (summarized at 885 F. Supp. 2d at 252-256), the *DynaLantic* court found that Congress had ample evidence in 1978 that (1) minority business owners faced "almost insurmountable obstacles to business development," such as "lack of business experience and [access to] capital," due to "racial and ethnic prejudice," and (2) disparities in the ability of minority-owned firms to effectively participate in the marketplace was "not the result of random chance" and the "presumption must be made that past discriminatory systems have resulted in present economic inequities." *Id*. at 253-254 (citations omitted).

DynaLantic, 885 F. Supp. 2d at 254, also found that a 1975 report of the Subcommittee on SBA Oversight and Minority Enterprise of the House Committee on Small Business considered evidence of barriers minority-owned businesses encountered in government contracting. 4A2801. Among the evidence that the Subcommittee considered was a report by the U.S. Commission on Civil Rights that found, based on "a broad swath of federal and state" data, that "the major difficulties confronting minority businesses" included "deficiencies in working capital, inability to meet bonding requirements, disabilities caused by an inadequate 'track record,' lack of awareness of bidding opportunities, unfamiliarity with bidding procedures, preselection before the formal advertising process, and the exercise of discretion by government procurement officers to disfavor

minority-owned businesses." 885 F. Supp. 2d at 254. The report also revealed that firms owned by women and minorities received less than 0.7% of contracting dollars at the state and local level, and that "one reason for the disparity was discrimination." *Id*. at 254-255.

The Subcommittee, continuing to explore the challenges facing minority contractors issued a report in 1976 summarizing evidence that minority contractors were either forced to pay higher premium rates for or were precluded altogether from obtaining surety bonds necessary for contracts. 4A2838, 2840, 2852; see also 3A2208. Based on this evidence, the Subcommittee found that "there has developed a business system which has traditionally excluded measurable minority participation * * * [and] because of past overt social and economic discrimination is presently operating in effect to perpetuate these past inequities." 4A2851. As a result, "minority contractors are attempting to 'break-into' * * * a system, with which they are empirically unfamiliar and which is historically unfamiliar with them." 4A2852. The Senate heard similar testimony during hearings held in 1977-1978. See 7A5357-5358.

In 1977, the House Committee on Small Business summarized its activities over the previous two years and, reiterating the 1975 and 1976 findings of the Subcommittee on SBA Oversight and Minority Enterprise regarding the barriers minority contractors faced, concluded that discrimination seriously hindered

minority-owned businesses in federal procurement. 4A3003, 3061; see *DynaLantic*, 885 F. Supp. 2d at 255.

Congress responded by enacting the Public Works Employment Act of 1977, 42 U.S.C. 6705(f)(2) (upheld in *Fullilove* v. *Klutznick*, 448 U.S. 448, 491-492 (1980), overruled on other grounds, *Adarand*, 515 U.S. at 235), and Section 8(a) in 1978. See 3A2199-2248; 4A3244-3273. Because the legislative history for both statutes "overlap significantly," *DynaLantic*, 885 F. Supp. 2d at 271-272, *Fullilove*'s holding that "Congress had abundant evidence from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination," 448 U.S. at 477-478 (plurality), applies equally to 8(a).

In its report on the 8(a) legislation in 1978, the Senate Committee on Small Business incorporated findings from General Accounting Office Reports and from executive and legislative branch investigations that administrative efforts to help minority contractors had "fallen far short of its goal to develop strong and growing disadvantaged small businesses." 3A2212. The Senate Committee report also recognized that "social and economic discrimination" continued to deny minorities "the opportunity to participate fully in the free enterprise system." 3A2212, 2214. The purpose of the 8(a) legislation was to help remedy the impact of this

discrimination. As the Senate Report explained, the legislation was "designed to foster business ownership by socially and economically disadvantaged persons" – persons disadvantaged by discrimination and prejudice rather than circumstance – "and to promote the viability of businesses run by such persons by providing contract, financial, technical and management assistance." 3A2212.

The Conference Report, finding that discrimination affected minorities "regardless of the individual, personal qualities of that minority person" (4A3264), expressed the intention that the statutory authority given SBA would "be used solely for economic and business development" of those who are unjustly socially and economically disadvantaged. 4A3265-3266. Although it was expected that most 8(a) firms would be minority-owned, the program was to "be open to any business owned by persons who meet the socially and economically disadvantaged test." 3A2213; see also 4A3265.

b. Congressional Evidence Leading To The 1988 Amendment Of The 8(a) Program Showed The Continued Need For The Program

In the decade between the enactment of 8(a) and its amendment in 1988, Congress continued to examine the barriers faced by minority businesses as a result of discrimination. In 1981, the House Committee on Small Business heard extensive testimony about the effects of discrimination on minority small businesses, including "covert and outright blatant discrimination directed at

disadvantaged and minority business people by majority companies, financial institutions, and government at every level." See 7A5668. Testimony revealed that "racism and other barriers * * * have placed a heavier burden on the development and maturity of minority businesses" as compared to their majority-race counterparts, 7A5566 (statement of Rep. Mitchell), and described numerous obstacles for minority business owners, including discrimination by suppliers, lack of accessibility to adequate financing and capital, exclusionary business networks, racism in the business community, and discrimination preventing minority business owners from developing better management skills. 7A5588, 5595-5596; 8A5782, 5801-5802, 5838.

Similarly, in 1982, the House Committee on Small Business issued a report finding that "the unusually low business participation rate in the minority community, to a large extent, results from the lingering effects of racial discrimination * * * [which] have imbedded themselves as imperfections in the free market system." 5A3290 (quoting statement of Victor Rivera, Director, Minority Business Development Agency (MBDA), Department of Commerce). Accordingly, minority businesses often face a "low asset base * * * compared to their majority counterparts," a lack of information and expertise to allow them to operate on equal footing in the free market, and decisions "based on stereotype images rather than reality." 5A3290, 3314.

During the mid-1980s, Congress also examined the difficulties discrimination created for minority contractors with respect to Department of Defense procurements. In its 1984 report on the bill for DOD appropriations, the House Committee on Appropriations noted that "only about 1.9 percent of the Defense Department's procurements [were] awarded to small socially and economically disadvantaged businesses." 5A3459. The House Armed Services Committee heard similar testimony. See 8A5902. The testimony revealed difficulties minority architects faced seeking DOD contracts (8A6118-6122 (statement of Marshall Purnell, President, National Organization of Minority Architects)); the failure of prime contractors to subcontract with minority businesses (8A6136-6139 (statement of Ralph Thomas III, Executive Director, National Association of Minority Contractors)); and the difficulties minority contractors encountered gaining expertise to compete effectively for government contracts (8A6157 (statement of Rep. Dellums)). In 1985, the House Committee on Appropriations recognized that socially and economically disadvantaged businesses are excluded from "the 'early' development of major Defense systems." 5A3813.

Congress found statistical disparities that demonstrated discriminatory barriers to minority business formation, development, and success. *DynaLantic*, 885 F. Supp. 2d at 256-257. In 1987, the House Committee on Small Business

reported that only 6% of all firms were minority-owned, and the receipts per minority firm averaged less than 10% of the average receipts for all businesses. 6A4092. The Senate Committee on Small Business heard testimony that minorities were less likely than non-minorities to own a small business (1.8% of the minority population were business owners) and minority firms were smaller than non-minority firms. 8A6198.

Federal procurement data made available to Congress also established that businesses owned and controlled by socially and economically disadvantaged individuals "receive[d] a disproportionately small share of Federal purchases." 6A4092. While prime contracts in fiscal year 1986 totaled nearly $185 billion, minority businesses received only 2.7% of those dollars. 6A4092. As was the case prior to the enactment of the 8(a) program, the House Committee on Small Business report concluded that these disparities were "not the result of random chance." 6A4092; *DynaLantic*, 885 F. Supp. 2d at 254.

The Senate report on the 1988 amendments explained that the 8(a) program was designed to create "opportunities for minority-owned businesses to overcome their historic disadvantages." 3A2253. Similarly, the House report identified the 8(a) program as the "most significant effort to redress the effects of discrimination on entrepreneurial endeavors" with the goal of helping "a broad class of socially

and economically disadvantaged individuals to compete in the mainstream of the American economy." 6A4090.

c. More Recent Information Presented To Congress Provides A Strong Basis In Evidence For A Continuing Race-Conscious Remedy In Federal Government Procurement

The evidence more recently before Congress (some of which was not submitted in *DynaLantic*) demonstrates that minorities face discriminatory barriers to business formation and development to this day. See 6A4198-4199 (statement of Sen. Landrieu, Chairwoman, Subcomm. on Small Bus.) (compiling list of more than 40 congressional hearings between 2006-2013 addressing the problems of minority small businesses). See *DynaLantic*, 885 F. Supp. 2d at 258-269 (summary of post-enactment evidence before Congress). This evidence is relevant to show that there is a continuing need for Section 8(a). Through hearings, new disparity studies, academic research, and individual testimony, Congress has gathered more than sufficient evidence to determine that the limited race-conscious action of 8(a) remains necessary to ensure that the federal government is not a "passive participant" in reinforcing and perpetuating the effects of private sector discrimination.

First, since 8(a)'s enactment, Congress has repeatedly gathered evidence showing that minority-owned businesses continue to occupy a disproportionately small share of the U.S. economy as compared to white-owned businesses. See

6A4198 (statement of Sen. Landrieu). The evidence presented to Congress shows that minorities continue to form businesses at disproportionately low rates, and their businesses earn much less than similar businesses owned by whites, for reasons not readily explained by non-discriminatory factors.

In 2009, Congress heard evidence regarding the disproportionately low level of business receipts generated by minority-owned businesses, which "underscores the opportunity gap that still exists in the U.S. economy." 10A7340 (statement of David Hinson, National Director, MBDA, Department of Commerce). Statistics showed that while "[m]ore than 18 percent of all U.S. nonpublicly traded firms are minority-owned * * * these firms represent only 7.5 percent of the total gross receipts generated by all U.S. businesses." 10A7340. This was consistent with testimony before Congress in 2007 and 2008 that showed very large, adverse disparities for minority-owned businesses. 9A7233. For instance, African Americans "comprise 12.7 percent of the population, but they were only 5.3 percent of all U.S. businesses, and earned only 1 percent of business receipts." 9A7233 (statement of Jon Wainwright, Vice-President, NERA Economic Consulting); accord 9A6942-6943. Similarly, Hispanics and Latinos "comprise 13.4 percent of the population, but were only 7 percent of all businesses and earned only 2.5 percent of business receipts." 9A7233; accord 9A6942-6943. Even when "comparisons [were] made between similarly-situated business owners, the

disparities facing minorities * * * tend to remain adverse, large, and statistically significant" and as a result, these disparities are likely to "result primarily from discrimination." 9A7234, 7239-7240; accord 9A6943, 6947-6948.

Second, evidence submitted to Congress shows that minorities disproportionately lack access to capital, in significant part, because of discrimination. In 2010, Congress heard testimony from Dr. Robert Fairlie, Professor of Economics at University of California, Santa Cruz, who conducted a study regarding racial disparities in access to capital (11A8172-8173), and found a chronic lack of wealth in minority communities that has impeded the ability of minorities to open businesses. 11A8177. He concluded that "low levels of wealth among minorities translate into fewer startups and undercapitalized businesses because an entrepreneur's wealth is often invested directly in the business or used as collateral to obtain business loans." 10A8177.

In addition, Dr. Fairlie testified that the lower levels of home ownership among minorities, spurred by discrimination in the housing market, also denied minorities needed startup capital. 10A7936-7937. "Homes provide collateral and home equity loans provide relatively low-cost financing." 10A8027. As demonstrated in recent lending discrimination cases settled by the Department of Justice, minorities received higher cost or even sub-prime loans despite

qualifications similar to white applicants.[3] Such lending discrimination limits minorities' access to this common method of financing a business.

The disparities in access to loans, Dr. Fairlie found, do not disappear even after controlling for the age, experience, and education of the owner, and the creditworthiness, size, industry, age, and location of the firm, further proving "the existence of lending discrimination." 11A8178; see also 10A7937-7938. Dr. Fairlie found that the denial rate for business loans for minority-owned firms with less than $500,000 in annual revenues was 41.9%, compared to 16% for similar non-minority-owned firms. 10A8069-8070. Dr. Fairlie also showed that minority-owned businesses receive less than half the equity investments as non-minority-owned firms. 10A8070. Consequently, minority-owned businesses have "substantially lower levels of financial capital invested in their businesses." 10A8070; 11A8178.

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[3] See, *e.g.*, *United States* v. *Countrywide Fin. Corp.*, No. 2:11-CV-10540 (C.D. Cal. Dec. 28, 2011) (settlement providing $335 million in relief for discrimination victims); *United States* v. *Wells Fargo Bank*, No. 1:12-CV-01150 (D.D.C. Sept. 21, 2012) ($234.3 million); *United States* v. *Ally Fin. Inc.*, No: 2:13-CV-15180 (E.D. Mich. Dec. 23, 2013) ($80 million); *Consumer Fin. Prot. Bureau* v. *National City Bank*, No. 2:13-cv-01817 (W.D. Pa. Aug. 9, 2014) ($35 million); *United States* v. *American Honda Fin. Corp.*, No. 2:15-CV-05264 (C.D. Cal. July 16, 2015) ($24 million); *United States* v. *SunTrust Mortg., Inc.*, No. 3:12-CV-00397 (E.D. Va. Sept. 14, 2012) ($21 million); *United States* v. *Fifth Third Bank*, No. 1:15-CV-00626 (S.D. Ohio Oct. 1, 2015) ($18 million); *United States* v. *Provident Funding Assocs.*, No. 3:15-CV-02373 (N.D. Cal. June 18, 2015) ($9 million); *United States* v. *GFI Mortg. Bankers, Inc.*, No. 1:12-CV-02502 (S.D.N.Y. Aug. 27, 2012) ($3.5 million).

Third, Congress also considered numerous disparity studies showing minority-owned businesses are underutilized in public contracting. Disparity studies do not merely measure disparities. Instead, they measure the disparity in utilization for similarly-situated businesses, controlling for plausible neutral factors that might otherwise explain the differential. They therefore provide a strong basis in evidence for the conclusion that disparate utilization reflects discrimination.

Disparity studies before Congress demonstrate that, where minority businesses are available to compete, these businesses remain significantly underutilized for reasons unexplained by race-neutral factors. As explained to Congress in a hearing regarding the Department of Transportation's program for disadvantaged businesses, including small minority-owned businesses,

> Disparity studies * * * provid[e] important statistical evidence of the presence and effects of discrimination in the marketplace. These studies paint an indelible picture of a nationwide problem not limited to any particular minority group or any region of the Country.

10A7503 (statement of Joel Szabat, Acting Assistant Secretary for Transportation Policy, DOT). During the hearing, 24 disparity studies documenting evidence from different states were submitted. 10A7893-7894; see also 10A7357-7360 (statement of David Hinson, National Director, MDBA, Department of Commerce) (listing 49 state and local government disparity studies); 6A4199 (statement of Sen. Landrieu) (listing 25 disparity studies from 16 States and the District of Columbia).

These studies and others like them provided to Congress show that because of discrimination, minority-owned businesses nationwide "continue to face large disparities in almost every business enterprise activity that can be quantified." 10A7821 (statement of Jon Wainwright, Vice-President, NERA). Anthony Brown, a senior associate at MGT of America, whose company conducts disparity studies, testified that underutilization of minority firms occurs "across the [n]ation." 9A7299.

Similarly, the Airport Minority Advisory Council submitted 20 disparity studies to Congress "demonstrat[ing] the astounding pervasiveness of discrimination against * * * minorities in the aviation industry, as well as every industry sector (*e.g.*[,] professional services, heavy construction, etc.) with which airports and other transportation agencies conduct business." 10A7784-7785. A DOT official concluded that "the picture is one of consistent underutilization" of the minority-owned businesses, which is "powerful evidence of discrimination." 10A7785 (statement of Joel Szabat, Acting Assistant Secretary for Transportation Policy, DOT). Senator Landrieu, concurred: "As the studies show, minority- and women-owned businesses are routinely and disproportionately underutilized in public contracting." 6A4198.

Fourth, Congress considered a plethora of anecdotal accounts detailing discriminatory barriers minority business owners face. Congress heard extensive

testimony about the difficulties minorities face in obtaining surety bonds. See, *e.g.*, 9A7083 (statement of Wayne Frazier, Sr., President of Maryland-Washington Minority Contractors Association). Congressional testimony also included anecdotal evidence that prime contractors set unnecessarily high requirements for bonding, effectively excluding minority subcontractors. See, *e.g.*, 9A7276, 7281, 7306 (statement of Anthony Robinson, President, Minority Business Enterprise Legal Defense and Education Fund); 10A7806 (statement of Joel Szabat, Acting Assistant Secretary for Transportation Policy, DOT).

Congress heard repeated testimony regarding the exclusion of minorities from formal and informal business networks ("good old boy" networks), inhibiting their ability to obtain critical information regarding business opportunities and access to decision-makers (9A7276, 7281), and to enter the informal network of communications, relationships (10A7504, 7804), and business networks (9A6962).

Congress also heard testimony that discrimination by suppliers, including charging minority businesses higher prices than non-minority businesses, hindered the ability of minorities to compete equally. See 9A7276, 7282 (statement of Anthony Robinson, President, Minority Business Enterprise Legal Defense and Education Fund). Chuck Covington, the African-American president and CEO of a ground transportation business, testified that a supplier had quoted him a price on tires 50% higher than the price quoted to a similar white business owner.

10A7506-7507, 7712-7713. When he disguised his voice and called the supplier back, Covington said he was quoted the same price as the white business owner. 10A7506-7507, 7712-7713.

Minority business owners testified that they experienced overt racial animus and racial stereotyping from prime contractors and other business contacts. Anthony Robinson informed Congress of an African-American business owner who was told by a potential business partner that he "do[esn't] like doing business with you people" (9A6955), while Gilbert Aranza, CEO of a business that provides concession services at airports, testified that he was subjected to racist jokes at a professional club and also received dismissive treatment from a distributor. 10A7512, 7702-7705. Don O'Bannon, Chair of the Airport Minority Advisory Council, shared experiences from minority contractors encountering racial slurs, demeaning comments, and stereotypes. 10A7534, 7787-7789.

Synthesizing "surveys and in person interviews with hundreds" of minority and non-minority businesses, Dr. Wainwright testified before Congress that "the results are strikingly similar across the country":

> In general, minorities * * * reported that they still encounter significant barriers to doing business in the public and private sector market places, as both prime contracts and subcontractors. They often suffer from stereotypes about a suspected lack of competence and are subject to higher performance standards than similar white men. They also encounter discrimination in obtaining loans and surety bonds; receiving price quotes from suppliers; working with trade unions;

> obtaining public and private sector prime contracts and subcontracts; and being paid promptly.

9A7242; see also 10A7826. He stated there is "general agreement" that without programs like 8(a), minority-owned small businesses "receive few, if any, opportunities on Government contracts," rendering "continued operation of programs such as 8(a) * * * essential" to the "survival" of minority-owned businesses. 9A7234.

Taken altogether, the significant statistical findings of disparities and personal accounts of discrimination demonstrate that there currently is a strong basis in evidence to support the race-conscious provisions of 8(a).

d. The Government's Expert Reports Show The Continuing Need For The 8(a) Program

Expanding the record in *DynaLantic*, the record here includes two expert reports that further support the current use of 8(a).

1. Dr. Jon Wainwright[4] reviewed 107 disparity studies conducted since 2000 to determine patterns among the studies. All but 32 of these studies were

[4] Dr. Wainwright is the principal researcher on more than 30 studies regarding business discrimination. Dr. Wainwright's methodology for conducting disparity studies is well tested. See, *e.g.*, *Northern Contracting, Inc.* v. *Illinois*, 473 F.3d 715 (7th Cir. 2007); *Concrete Works of Colo., Inc.* v. *City & Cnty. of Denver*, 321 F.3d 950 (10th Cir.), cert. denied, 590 U.S. 1027 (2003). In *Concrete Works*, the court described Dr. Wainwright's methodology as "sophisticated." 321 F.3d at 966.

submitted to Congress at the time of his review.[5] The disparity studies cover 142 public contracting entities in 35 States encompassing 89% of the national population. 1A723-733. These studies compare utilization data from public contracting entities with the availability of minority-owned businesses. A properly done disparity study accounts for the geographic region, the industries involved, the amounts spent, and the availability of minority- and non-minority-owned businesses. 1A716-722. Different experts conducted the studies Dr. Wainwright reviewed; their methodologies varied but the results did not. Dr. Wainwright determined the studies overwhelmingly found that in public prime contracting, minority-owned businesses were underutilized compared to their availability in construction markets, construction-related professional services markets, and other professional services markets, including those in which Rothe operates. 1A734, 737-748 (Table 5), 749-767.

When Dr. Wainwright performed the same calculations using only studies that had been submitted to Congress at the time of his report, the pattern remained. The overwhelming majority of disparity indexes (comparing the availability and utilization of minority-owned businesses) fell at or below 80, where a disparity

[5] The government's expert reports and all 107 disparity studies in Dr. Wainwright's report were submitted to Congress in September 2013. See *Closing The Wealth Gap: Empowering Minority-Owned Businesses To Reach Their Full Potential For Growth And Job Creation*, 113th Cong., 1st Sess. 160-348 (2013).

index of 80 or lower is commonly taken as a strong indicator that discrimination is affecting minority business. 1A734, 749-768.

Dr. Wainwright also found a statistically significant correlation between the industries in which the federal government lets contracts and those at issue in the state and local disparity studies. 2A873-874. In other words, Dr. Wainwright determined that the most common industries used in federal prime contracting are the same industries involved in the disparity studies he reviewed. 2A872. Thus, the statistics from the disparity studies indicating discrimination against minority-owned businesses are relevant in the industries in which the federal government issues contracts. 2A873-874.

Applying regression analyses to business formation and earnings, Dr. Wainwright found minorities were substantially underrepresented among business owners and minority-owned firms earned less than similar non-minority-owned businesses. 1A769. Accounting for race-neutral factors, these disparities were "statistically significant, meaning they [were] unlikely to result from chance." 1A769. Dr. Wainwright also found statistically significant race-based differences in loan denial rates and business formation. 1A800-803.

2. Dr. Robert Rubinovitz conducted regression analyses comparing the likelihood of minority-owned small businesses winning federal prime contracts when compared to similar businesses in the same industry. Reviewing small

business data on federal government contracts for fiscal year 2012 across most industries, including industries where Rothe operates, he found consistent, statistically significant underutilization of small minority-owned businesses. 2A917-918, 944.

For his study, Dr. Rubinovitz took firms that had registered as federal contractors and created regression analyses that controlled for the industry in which the firm did business based on three-digit NAICS codes, business age, business size (in terms of both average number of employees and annual receipts), business form, and security clearance status. 2A918, 944. He then compared the likelihood of minority-owned businesses receiving a federal contract versus similar businesses. Dr. Rubinovitz expressed the outcome in odds ratios – the odds that a minority-owned business would receive a contract when compared to a non-minority-owned business – and determined if the ratio was statistically significant. 2A930-939, 946-955.

Dr. Rubinovitz conducted three calculations, each with a slightly different definition of what constitutes a minority-owned business. 2A918, 944. Regardless of the definition, the pattern of his results remained constant: in the vast majority of industries, otherwise similarly-situated minority-owned businesses were less likely to win a federal contract, usually to a statistically significant degree. 2A918-919, 944. In fact, there were no NAICS codes where minority-

owned businesses were statistically significantly more likely to win a federal government contract. 2A918.

For example, Dr. Rubinovitz evaluated the likelihood of businesses owned by minority individuals who qualify as both socially and economically disadvantaged but are not part of the 8(a) program winning a federal contract compared to similar other small businesses. According to Dr. Rubinovitz:

> [N]on-8(a) minority owned SDBs are statistically significantly less likely to win a contract in industries accounting for 94% of all contract actions, 93% of all dollars awarded, and in which 92.2% of non-minority owned SDBs are registered. There 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.

2A944. The regression analyses using the other definitions of "minority-owned businesses" showed very similar results. 2A918-919.

2. The Section 8(a) Program Is Narrowly Tailored

The narrow tailoring question goes to whether Congress has chosen appropriate means to avoid perpetuating discrimination in the contracting markets. A facial challenge to the tailoring of 8(a) depends at least on the existence of equally effective and more narrowly tailored means to achieve the government's compelling interest, and there is none in this record. Courts consider six factors in examining whether a government program satisfies strict scrutiny's narrow tailoring requirement: (1) the availability of race-neutral alternatives; (2)

flexibility; (3) over- or under-inclusiveness of the program; (4) burden on third parties; (5) duration; and (6) numerical proportionality. See *United States* v. *Paradise*, 480 U.S. 149, 171 (1987). Reviewing this factors, the district court below and the court in *DynaLantic*, 885 F. Supp. 2d at 283, correctly concluded that 8(a) is facially narrowly tailored. 1A58-59.

a. Congress Considered The Efficacy Of Race-Neutral Alternatives

Congress tried numerous race-neutral measures prior to enacting the 8(a) program and adopted the 8(a)'s race-conscious provisions "only after long experience showed that race-neutral alternatives were inadequate to combat the effects of racial discrimination against minority-owned businesses." *DynaLantic*, 885 F. Supp. 2d at 285.

These efforts began with the Small Business Act of 1953, which authorized various programs to "aid, counsel, assist, and protect * * * the interests of small-business concerns." Pub. L. No. 83-163, § 202, 67 Stat. 282. Between 1953 and 1978 (when 8(a) was enacted), Congress utilized numerous race-neutral measures including: (1) creation of a surety bond guarantee program, see Housing and Urban Development Act of 1970, Pub. L. No. 91-609, 84 Stat. 1813, codified at 15 U.S.C. 694a, 694b; (2) creation of small business investment companies to provide debt and equity capital to socially and economically disadvantaged individuals, see Small Business Investment Act Amendments of 1972, Pub. L. No. 92-595, 86 Stat.

1314; (3) increased authority for the SBA to assist small businesses, see Small Business Amendments of 1974, Pub. L. No. 93-386, 88 Stat. 742; and (4) additional financial assistance for small businesses, see Small Business Act and Small Business Investment Act of 1958 Amendments, Pub. L. No. 94-305, 90 Stat. 663 (1976). See *DynaLantic*, 885 F. Supp. 2d at 284.

But, as held in *DynaLantic*, 885 F. Supp. 2d at 284, the evidence before Congress in 1978 demonstrated "continuing discriminatory barriers to minority businesses notwithstanding all of the race-neutral measures it had already enacted." As the Tenth Circuit found in reviewing DOT's procurement program, "[t]he long history of discrimination in, and affecting the public construction procurement market – despite the efforts dating back at least to the enactment in 1958 of the [Small Business Act] to employ race-*neutral* measures – * * * justifies race-conscious action." *Adarand Constructors, Inc.* v. *Slater*, 228 F.3d 1147, 1178 (2000).

Significantly, in addition to the 8(a) program, Congress authorized multiple race-neutral measures aimed at assisting all small businesses. See, *e.g.*, 15 U.S.C. 631(a) (stating policy to aid small businesses). These efforts include mechanisms to increase access to capital and credit, and other forms of assistance, for *all* small businesses. 15 U.S.C. 636(a) (loans), 644(a), (i), and (j) (small business set-asides), 648(a) (small business development centers).

b. The 8(a) Program Is Flexible

The 8(a) program does not require the federal government or any agency to contract with a certain number of 8(a) firms. Unlike *Croson*'s "rigid racial quota system," 8(a) "contains no quota at all; it provides for aspirational goals and imposes no penalties for failing to meet them." *DynaLantic*, 885 F. Supp. 2d at 285. Moreover, courts have found that race-conscious presumptions, like the one in 8(a), are narrowly tailored when (1) the presumption of social disadvantage is rebuttable, and (2) participation in the program requires an individualized economic component. *Ibid*. (citing *Western States Paving Co.* v. *Washington State Dep't of Transp.*, 407 F.3d 983, 995 (9th Cir. 2005); *Sherbrooke Turf, Inc.* v. *Minnesota Dep't of Transp.*, 345 F.3d 964, 973 (8th Cir. 2003)). In addition, 8(a) regulations limit SBA's ability to accept a procurement for award as an 8(a) contract if that would adversely affect other certain small businesses. 13 C.F.R. 124.504; see also *DynaLantic*, 885 F. Supp. 2d at 286 (finding that this waiver adds to 8(a)'s flexibility).

c. The Requirements For Participation In The 8(a) Program Ensure That It Is Neither Over- Nor Under-Inclusive

Regulations limit the 8(a) program to those who are truly socially and economically disadvantaged, and create a mechanism for individuals who are not covered by the presumption to enter the program. These features further narrowly

tailor 8(a) by maintaining the program's focus on the *disadvantaged* status of program applicants and participants, and not merely their racial status.

To guard against over-inclusiveness, the presumption that a minority applicant is socially disadvantaged may be overcome if the SBA is presented with "credible evidence to the contrary." 13 C.F.R. 124.103(b)(3). Also, the race-conscious presumption does not guarantee participation in 8(a) – applicants must also establish individual economic disadvantage, *DynaLantic*, 885 F. Supp. 2d at 285-286; 13 C.F.R. 124.104(b).

The 8(a) program guards against under-inclusiveness by permitting non-minority individuals who are socially and economically disadvantaged to participate. See 13 C.F.R. 124.103(c)(1), 124.104(a). Individuals can enter the 8(a) program by demonstrating individual social disadvantage. 13 C.F.R. 124.103(c)(1). Between 9% to 15% of firms participating in the 8(a) program have done so. See SBA 2012 Report 18, http://go.usa.gov/cn5VW; SBA 2010 Report 17, http://go.usa.gov/cn5dw. In 2012, 12.5% of 8(a) firms (927 of 7,390 firms) participated in the program by demonstrating individual social disadvantage. See SBA 2012 Report 18.

d. The Program Has Only A Limited Impact On Third Parties

The 8(a) program is designed "to mitigate the adverse impact on firms outside the program." *DynaLantic*, 885 F. Supp. 2d at 290. For example, SBA

will not put a contract into 8(a) if doing so "would have an adverse impact on small businesses operating outside the Section 8(a) program." *Id*. at 286; see also 13 C.F.R. 124.504(c). *DynaLantic* found this element of the 8(a) program particularly "noteworthy," given "the already non-mandatory nature" of the program. 885 F. Supp. 2d at 286.

Indeed, the 8(a) program has a very limited impact on non-minority-owned small businesses both generally and in the few NAICS codes in which Rothe competes. Federal contracts are generally and overwhelmingly open to bids by *all* small businesses. From 2009 to 2013, the federal government in all NAICS codes has obligated only 4% of contract dollars for small businesses to the 8(a) program. See 2A958 (declaration of Denise Hoban (Rows 1 & 5)). Given that 96% of government spending through contracts with small business is open to all, the 8(a) program does not cause an undue burden on third parties. Even in the NAICS codes in which Rothe claims to perform the majority of its contracting, 88% of all contract dollars obligated by DOD in 2008-2013 were open to Rothe. 2A959 (Rows 7 & 11). In 2013 alone, the federal government spent more than $45 billion in these NAICS codes, with less than $4 billion obligated to 8(a) companies. 2A959 (Rows 6 & 10). Thus, in 2013, it appears Rothe could have competed for more than $41 billion of the $45 billion spent in these NAICS codes. 2A959 (Rows 6 & 10).

Dr. Rubinovitz's review of minority-owned businesses further demonstrates that the 8(a) program does not create an undue burden on third parties. His report, discussed at pp. 37-39, *supra*, states that the odds of small minority-owned businesses winning a federal prime contract are statistically significantly lower than non-minority-owned businesses. 2A931-939 (Tables 4a & 5). While 8(a) provides access to contracts for certain groups of firms, it does not do so in a manner that creates an undue burden on non-minority-owned businesses, and has not created comparative advantages for minority-firms in open competition.

e. The 8(a) Program Has Appropriate Time Limits

The Tenth Circuit found that Section 8(a)'s "inherent time limit and graduation provisions ensure that it, like the program upheld in *Paradise*, is carefully designed" to end once the "'discriminatory impact' has been eliminated." *Adarand*, 228 F.3d at 1179 (quoting *Paradise*, 480 U.S. at 178).

Because the 8(a) program is a business development program, the time limit properly focuses on the participants. *DynaLantic*, 885 F. Supp. 2d at 287 (8(a) program focuses "on the specific social and economic circumstances of individual firms and their owners [and] not merely their minority status"). Firms in 8(a) have strict participation time limits. Participation is limited to nine years. 15 U.S.C. 636(j)(10)(C)(i); 13 C.F.R. 124.2. This limit gives an individual "a reasonable opportunity" to "overcome[] its disadvantaged status." 885 F. Supp. 2d at 287.

Moreover, "once a business or disadvantaged individual has participated in the 8(a) program, neither the business nor that individual will be eligible again." *Ibid.*; see also 13 C.F.R. 124.108(b); 15 U.S.C. 636(j)(11)(B)-(C).

Furthermore, an 8(a) participant's eligibility ends as soon as it "overcomes its disadvantaged status." *DynaLantic*, 885 F. Supp. 2d at 287. Program participants must demonstrate eligibility throughout the program term by annually submitting information to SBA satisfying the eligibility requirements, which enables the SBA to verify continued satisfaction of eligibility standards and to monitor its participants' "performance and progress in business development." *Ibid.*; see also 13 C.F.R. 124.112(b), 124.509(c), 124.601-602; 15 U.S.C. 637(a)(4)(C), (6)(B), (12)(A), and (20). If a program participant has achieved targets, objectives, and goals of its business plan and therefore can compete in the open market, SBA will graduate the participant from the program. 885 F. Supp. 2d at 287; 13 C.F.R. 124.302(a)(1).

In addition, through the SBA annual reports, required by statute, and its many congressional hearings on small disenfranchised businesses, Congress is regularly informed about the 8(a) program. When the program is obsolete, Congress will have ample information and opportunity to act. As discussed at pp. 37-39, *supra*, however, Dr. Rubinovitz's un-rebutted expert report shows that there is still a continuing need for the 8(a) program nationwide.

f. Numerical Proportionality Is Satisfied

Although the Small Business Act contains an overall goal of spending 5% of federal prime and subcontracting dollars annually with businesses owned by socially and economically disadvantaged individuals, 15 U.S.C. 644(g), this goal is aspirational only. See *DynaLantic*, 885 F. Supp. 2d at 288 (distinguishing the 8(a)'s aspirational goal from *Croson*'s 30% quota). Indeed, prime contracting through 8(a) is only one of the methods that the federal government uses to try to meet this goal. As the Tenth Circuit found in *Adarand*, an aspirational goal of 10% participation by minority-owned businesses in DOT contracting was "reasonably construed as narrowly tailored" because allocating "more than 90% federal transportation contracts to enterprises owned by non-minority males[] is in and of itself a form of passive participation in discrimination that Congress is entitled to seek to avoid." 228 F.3d at 1181 (citing *Croson*, 488 U.S. at 492).

D. Rothe's Objections To The Evidence Before Congress Are Meritless

Rothe argues that (1) post-enactment evidence is inadmissible and irrelevant (Br. 24-36); (2) the legislative history is insufficient to support finding a compelling interest (Br. 15-19); and (3) the government's evidence is flawed (Br. 22, 36-51). None of Rothe's objections has merit.

1. The Court May Consider Post-Enactment Evidence

Rothe misstates the government's use of post-enactment evidence in this case. Contrary to Rothe's argument (Br. 28-34), the government relies on post-enactment evidence only to show that there is a *continuing* need for Section 8(a), not to support what evidence was before Congress prior to enacting or amending 8(a). As explained at pp. 19-27, *supra*, Congress had ample evidence to support the use of a race-conscious remedy prior to 8(a)'s enactment and amendments.

The cases Rothe relies on to exclude post-enactment evidence are inapposite. Those cases hold that post-enactment evidence cannot be used to support finding that a legislative body had a compelling interest prior to enacting the legislation at issue. Br. 26-31. But that is not the purpose for considering post-enactment evidence here. For example, in *Shaw* v. *Hunt*, 517 U.S. 899, 909 (1996), the issue was whether the State's reapportionment scheme based on race was constitutionally supported at the time it was enacted. The State relied solely on two reports, prepared during litigation, to show past discrimination in the State. *Id.* at 910. The Court held that post-enactment evidence could not be used to show that the State had a compelling interest prior to enacting the apportionment plan. *Ibid*. Similarly, the Federal Circuit in *Rothe Development Corp.* v. *United States Department of Defense*, 262 F.3d 1306, 1327-1328 (Fed. Cir. 2001), simply stated

the rule in *Shaw* that evidence supporting the use of race must have been "before the legislature at the time of enactment."

Nothing bars the use of post-enactment evidence to demonstrate a *current* need for the use of a race-conscious remedy. Consideration of post-enactment evidence furthers this goal of strict scrutiny because it ensures that a race-conscious measure continues to be necessary. This is particularly important where, as here, the party challenging the statute is seeking prospective, injunctive relief. See *Concrete Works of Colo., Inc.* v. *City & Cnty. of Denver*, 36 F.3d 1513, 1521 (10th Cir. 1994), cert. denied, 514 U.S. 1004 (1995). As an injunction seeks prospective relief, all evidence preceding the decision on issuance of an injunction may be considered, including post-enactment evidence. *Ibid*. To be sure, absent *any* evidence of discrimination at the time 8(a) was enacted, it would be difficult for the government to satisfy *Croson*, 488 U.S. at 504, and *Adarand*, 515 U.S. at 229. But nothing in the evidentiary requirements in either case forecloses consideration of post-enactment evidence to determine if remedial action is still needed at the time of a lawsuit. Post-enactment evidence for 8(a) establishes that, even though enacted in 1978, its use of race continues to satisfy constitutional standards.

Rothe cites no rule or case precluding consideration of post-enactment evidence to prove a current need for the use of race. Requiring pre-enactment

evidence does not foreclose supplementation of the legislative record with post-enactment evidence to ensure a continuing need for race-based remedial measures. A majority of circuits that have addressed what evidence of discrimination supports a compelling interest to warrant an ongoing race-conscious remedy have permitted post-enactment evidence to show that the use of race is currently justified. See, *e.g.*, *Adarand*, 228 F.3d at 1166; *Engineering Contractors Ass'n of S. Fla., Inc.* v. *Metro Dade Cnty.*, 122 F.3d 895, 911 (11th Cir.), cert. denied, 523 U.S. 1004 (1998); *Contractors Ass'n of E. Pa., Inc.* v. *City of Phila.*, 6 F.3d 990, 1003 (3d Cir. 1993); *Harrison & Burrowes Bridge Constructors., Inc.* v. *Cuomo*, 981 F.2d 50, 60 (2d Cir. 1992); *Coral Constr. Co.* v. *King Cnty.*, 941 F.2d 910, 919-921 (9th Cir. 1991).

Post-enactment evidence is particularly relevant to assessing the constitutionality of the 8(a) program, because the statute specifically "contemplates that Congress will review the 8(a) program on a continuing basis." *DynaLantic*, 885 F. Supp. 2d at 258 (Congress required annual reports regarding the 8(a) program by the Small Business Administration and the President). See also *Adarand*, 228 F.3d at 1166 (considering post-enactment evidence submitted to Congress to support minority-owned business programs in response to the Supreme Court's decision in *Adarand*, 515 U.S. 200). In addition to these reports, the government routinely and consistently provides information to Congress,

including disparity reports, in response to inquiries from Congress or in conjunction with hearings on the 8(a) program or on other programs concerning minority-owned businesses. Since enacting Section 8(a), Congress has held 15 hearings to address 8(a) exclusively and another 74 hearings on the 8(a) program along with other programs. In the past 20 years, Congress, recognizing its obligation to review 8(a), conducted 24 hearings about the 8(a) program. See Add. 2-12 (listing hearings).

2. The Legislative Record Supports Finding A Strong Basis In Evidence Of A Compelling Interest

Rothe's argument (Br. 12-23) that Section 8(a)'s purpose was simply "to increase business ownership by minorities * * * which is not a compelling interest" is belied by the legislative record.

As discussed above, pp. 19-23, *supra*, Congress conducted hearings on the effects of racial discrimination on government contracting opportunities throughout the 1970s. See *Fullilove*, 448 U.S. at 463. Prior to enacting Section 8(a) in 1978 and amending the statute in 1988, Congress had both statistical and anecdotal evidence that racial discrimination had created not only barriers to the formation of minority businesses, but also barriers that prevented existing minority firms from competing for government contracts, including discrimination in access to working capital, bonding requirements, discrimination by suppliers,

exclusionary business networks, and covert and outright discrimination in the business community. See pp. 19-27, *supra*.

This evidence is not mere evidence of generalized societal discrimination. It is evidence of specific discriminatory barriers to market entry and to fair competition for minority-owned businesses. See *Concrete Works of Colo., Inc.* v. *City & Cnty. of Denver*, 321 F.3d 950, 976 (10th Cir. 2003) (government "can demonstrate that it is a 'passive participant' in a system of racial exclusion * * * by compiling evidence of marketplace discrimination and then linking its spending practices to the private discrimination"); accord *Sherbrooke Turf*, 345 F.3d at 970; *Adarand*, 228 F.3d at 1167. Indeed, the Supreme Court, examining the legislative history for the Public Works Employment Act of 1977 that sought to provide minority businesses with 10% of contracting dollars, stated that "Congress had abundant evidence from which it could conclude that minority businesses have been denied effective participation in public *contracting* opportunities by procurement practices that *perpetuated the effects of prior discrimination*." *Fullilove*, 448 U.S. at 477-478 (emphasis added); accord *id*. at 458-467, 473; *id*. at 503, 505-506 (Powell, J., concurring); *id*. at 520 (Marshall, J., concurring).

To avoid having the federal government passively perpetuate the effects of discrimination against minority businesses, Congress designed Section 8(a) to help those businesses overcome barriers to fair competition. Section 8(a)'s race-

conscious provisions, and especially the provision providing a sheltered market for 8(a) firms to compete against only other 8(a) firms (15 U.S.C. 637(a)(1)(D)), have an "exact connection" to addressing these barriers, *Adarand*, 515 U.S. at 236, and are obviously intended to address the problem of perpetuating the effects of racial discrimination in government contracting.

And, as stated above (pp. 27-39), more recent evidence before Congress, including the government's expert reports, further support the need to continue using the 8(a) program to help overcome the effects of discrimination against minority contractors.

3. Rothe's Objections To The Evidence Before Congress Are Unsubstantiated And Insubstantial

Rothe also claims that the government needs to prove a "causal connection" between federal procurement practices and the effects of racial discrimination that the 8(a) program seeks to address. Br. 36-52.

a. Rothe argues (Br. 36-43) that the government does not have a compelling interest because the government is not a passive participant in discrimination simply by participating in the economy. *Croson* provides that a government entity has a compelling interest in ensuring that public funds are not used to perpetuate private discrimination if it can show that it "ha[s] essentially become a 'passive participant' in a system of racial exclusion." 488 U.S. at 492. The legislative evidence here is similar to the evidence that private discrimination affected

minorities bidding on DOT-supported contracts in *Adarand*, 228 F.3d at 1167-1175. There, the Tenth Circuit found that evidence of specific discriminatory barriers to market formation and fair competition facing potential and actual minority business owners established a "strong link" between the federal government's contracting practices and effects of discrimination on the awarding of those funds. *Id*. at 1166-1167.

This Court adopted *Croson*'s standard, stating that governmental entities "may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination." *O'Donnell Constr. Co.* v. *District of Columbia*, 963 F.2d 420, 425 (D.C. Cir. 1992) (quoting *Croson*, 488 U.S. at 504). In *DynaLantic*, 885 F. Supp. 2d at 276, the district court properly interpreted *O'Donnell* to hold that a government entity is a passive participant "when it fails to adjust its procurement practices to account for the effects of identified private discrimination on the availability and utilization of minority-owned businesses in government contracting."

The government's evidence satisfies *O'Donnell*'s justification for enacting race-conscious legislation. The record, described at pp. 19-23, *supra*, shows that Congress had voluminous statistical and anecdotal evidence that racial discrimination created barriers to business formation of minority businesses and barriers that prevented minority firms from competing equally for government

contracts, and that minority-owned firms receive a disproportionately small share of federal procurement opportunities. See also pp. 23-27, *supra*. This evidence supported an inference that the government's procurement practices were perpetuating the effects of this private discrimination. More recent evidence before Congress shows that the 8(a) program continues to be necessary. See pp. 27-39, *supra*. Thus, Congress has a compelling interest in remediating the effects of discrimination that race-neutral spending practices have perpetuated. See *Sherbrooke Turf*, 345 F.3d at 969; *Concrete Works*, 321 F.2d at 976; *Adarand*, 228 F.3d at 1165.

Rothe erroneously cites *Texas Department of Housing and Community Affairs* v. *Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2523 (2015), to argue that the government must show that its procurement practices *caused* the disparities in the contracting market. In *Inclusive Communities*, the Court held that disparate impact claims are cognizable under the Fair Housing Act, but stated that defendant's policies or practices must have caused the statistical disparity. *Ibid*. *Inclusive Communities*, however, involves a statutory interpretation of the Fair Housing Act, which imposes liability for tortious harm; causation principles are familiar in that context. *Inclusive Communities* does not alter the "passive participant" standard in *Croson* or *O'Donnell*.

b. Rothe's remaining objections are similarly unavailing. Br. 43-51. First, Rothe argues (Br. 38), without support, that all legislative material older than ten years should not be considered. This argument is meritless. That material is relevant to deciding if there has been a continuing need for the program, and provides useful context when viewed in conjunction with more recent evidence in determining if there is a current need for race-conscious relief.

Second, Rothe contends (Br. 45-46) that Dr. Rubinovitz's report should be "given no weight" because it lacks accompanying anecdotal evidence to "bridge the gap to [the government's] local and state data." Upon reviewing federal prime contracts awarded to small businesses, Dr. Rubinovitz concluded that minority-owned businesses are less likely to win federal contracts than similar non-minority firms in every industry that the federal government lets contracts to small businesses, and that this disparity is statistically significant. 2A918, 944. Dr. Rubinovitz's un-rebutted conclusions stand alone and need not be tied to local and state data.

Third, Rothe misstates (Br. 47) the purpose of Dr. Rubinovitz's study. His findings show a continuing need for the 8(a) program nationwide, not that discrimination exists everywhere. Indeed, the federal government need not show discrimination in every market or State to legislate nationwide. See *Rothe Dev. Corp.*, 262 F.3d at 1329 (Congress need not have evidence in all 50 States to

legislate); *Adarand*, 228 F.3d at 1165 ("The fact that Congress's enactments must serve a compelling interest does not necessitate the conclusion that the scope of that interest must be as geographically limited as that of a local government."); *Oregon* v. *Mitchell*, 400 U.S. 112 (1970).

To the extent that Rothe argues (Br. 47-48) that the Court cannot infer nationwide discrimination from state and local disparity studies, it is well-established the federal government may rely on state and local disparity data to support nationwide legislation. See, *e.g.*, *Adarand*, 228 F.3d at 1172-1174. Here, in addition to the disparity studies submitted to Congress over the years, Dr. Wainwright not only reviewed 107 state and local disparity studies and determined that minority-owned firms are overwhelmingly under-utilized but also that the federal government lets contracts in the same industries that were the subject of the disparity studies he reviewed. As with Dr. Rubinovitz, Dr. Wainwright's conclusions are un-rebutted.

Lastly, Rothe contends (Br. 49-51) that 8(a) is not narrowly tailored because 8(a) lacks (1) findings showing whether the presumption of social disadvantage should apply equally to all individuals subject to the presumption; (2) benchmarks showing the "share of contracts [that] minorities would receive" absent discrimination; and (3) a statutory mechanism to limit the operation of 8(a) to "actual marketplace conditions." The crux of Rothe's arguments is that 8(a) relief

may not be closely linked to the discrimination to be remedied in particular industries or locations. Br. 49. In this facial challenge, however, the government need not provide the particular findings or benchmarks Rothe requests. As discussed at pp. 39-47, *supra*, 8(a) satisfies the six *Paradise* factors for narrow tailoring and clearly has a "plainly legitimate sweep." Dr. Rubinovitz's study further supports finding 8(a) has a "plainly legitimate sweep" by showing that minority-owned firms are significantly less likely to win federal contracts in nearly every industry that the federal government lets contracts. 2A918, 944.

II

SECTION 8(a) DOES NOT VIOLATE THE NONDELEGATION DOCTRINE

Under the nondelegation doctrine, when Congress directs an agency to exercise its discretion or judgment, Congress must "clearly delineate[] the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta* v. *United States*, 488 U.S. 361, 372-373 (1989) (citation omitted). A statute that provides an "intelligible principle" to guide the agency's decisions does not violate the nondelegation doctrine; a violation is found only if the statute provides "literally no guidance." *Id*. at 372; see *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 474 (2001). As this Court recognized in *Humphrey* v. *Baker*, 848 F.2d 211, 217 (D.C. Cir.), cert. denied, 488 U.S. 966 (1988), "[o]nly the most extravagant delegations of authority, those providing no standards to

constrain administrative discretion, have been condemned by the Supreme Court as unconstitutional." Indeed, the Supreme Court has "found the requisite 'intelligible principle' lacking in only two statutes." *Whitman*, 531 U.S. at 474-475.

This case hardly presents that rare occurrence. Rothe contends (Br. 54-55, 58-59) that the SBA's authority to enforce the rebuttable presumption affords the agency the authority to make "racial classifications." Rothe misstates the role SBA plays in implementing 8(a). With regard to individual participants, the statute delegates to SBA the authority to make a determination whether an individual is "socially disadvantaged" because he or she, as Congress directs, has been "subject[] 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). With regard to "groups," the SBA makes an assessment similarly guided by Congress's terms.

Rothe erroneously argues (Br. 55-57) that the definition, 15 U.S.C. 637(a)(5), and presumption for socially disadvantaged individuals, 15 U.S.C. 631(f)(1), provide no "intelligible principle" to guide SBA's decisions regarding who is entitled to that presumption. Far from providing "literally no guidance," Section 637(a)(5) actually defines "socially disadvantaged individuals," while Section 631(f)(1) states the findings Congress made in enacting the 8(a) program and expresses the policy behind the program. Both guide SBA in its

implementation of the 8(a) program. 15 U.S.C. 631(f)(1)(A)-(B). Indeed, the statute lists specific examples of such groups, including "Black Americans, Hispanic Americans, Native Americans, Indian tribes, Asian Pacific Americans, [and] Native Hawaiian Organizations," who face the prejudice the statute is intended to address. 15 U.S.C. 631(f)(1)(C). These standards provide far more guidance to SBA than principles the Supreme Court has found adequate in statutes that merely authorize "regulation in the public interest" or "in a way that is 'fair and equitable.'" *Michigan Gambling Opposition* v. *Kempthorne*, 525 F.3d 23, 31 (D.C. Cir. 2008) (citations omitted); see also *Whitman*, 531 U.S. at 473-474 ("requisite to protect the public health" did not violate the nondelegation doctrine).

Because Section 8(a) cannot be described as providing "no standards" to guide SBA's actions, it does not violate the nondelegation doctrine.

III

THE DISTRICT COURT PROPERLY ADDRESSED THE PARTIES' EXPERTS AND REMAND IS UNNECESSARY

A. Rothe Has Not Raised Any Factual Issues That Require Remand

Rothe argues (Br. 60-61) in the alternative the Court should remand for the district court to address eight factual arguments relating to Dr. Wainwright's expert reports that Rothe raised below and that it believes the court failed to address. Citing *Icicle Seafoods, Inc.* v. *Worthington*, 475 U.S. 709, 714 (1986), Rothe claims (Br. 60) that the Court must remand for the district court to make the proper

evidentiary findings. The Supreme Court held in *Worthington* that the court of appeals improperly engaged in factfinding. 475 U.S. at 714.

Here, no additional factfinding is needed to determine whether Section 8(a) is facially constitutional. The district court ruled on the parties' cross-motions for summary judgment and specifically found "that there are no genuine issues of material fact regarding the facial constitutionality of the Section 8(a) program." 1A57. If Rothe believed any of these factual assertions constitute genuine issues of material fact, it could have argued that on appeal. But Rothe did not.

B. The District Court Did Not Abuse Its Discretion In Excluding Rothe's Witnesses From Offering Evidence To Rebut The Government's Experts

Expert evidence admitted under Federal Rule of Evidence 702 must be (1) offered by a witness who is qualified, and must both (2) "rest[] on a reliable foundation" and (3) be "relevant to the task at hand." *SeaWorld of Fla., LLC* v. *Perez*, 748 F.3d 1202, 1214 (D.C. Cir. 2014) (quoting *Daubert* v. *Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993)). Rothe proffered two expert reports to rebut the government's experts: Dale Patenaude sought to rebut the statistical analyses of federal government prime contracting by Dr. Rubinovitz, while John Sullivan sought to rebut Dr. Wainwright's meta-analysis of 107 disparity studies. 1A46-51. The district court did not abuse its discretion in excluding both Patenaude's and Sullivan's expert reports under Rule 702. See *United States* v.

Hite, 769 F.3d 1154, 1167-1168 (D.C. Cir. 2014) (reviewing exclusion of expert testimony for abuse of discretion).

1. A witness qualifies as an expert on a particular topic "by knowledge, skill, experience, training, or education." Fed. R. Evid. 702. Courts exclude expert testimony where a witness cannot demonstrate qualifications on any of these five bases. See *Exum* v. *General Elec. Co.*, 819 F.2d 1158, 1163 (D.C. Cir. 1987). A witness qualified to offer expert testimony on some matters may not be qualified to testify on others. See *Wheeling Pittsburgh Steel Corp.* v. *Beelman River Terminals, Inc.*, 254 F.3d 706, 715 (8th Cir. 2001).

In his expert reports, Dr. Rubinovitz conducted regression analyses on data on federal government contracting to control for factors other than race, in order to determine the "relationship between contracting outcome for small businesses and the type of ownership of the businesses." 2A917-918, 925. As the court held, Patenaude did not possess the knowledge, skill, experience, training, or education to rebut Dr. Rubinovitz's statistical analyses. 1A46-48. Patenaude has an undergraduate degree in electrical engineering, not in statistics or economics (1A273), and never took undergraduate, let alone graduate courses, on either topic (1A279). He has had no training on statistical or economic analysis (1A279); has never previously worked with regression analysis (1A281); could not explain the concept of statistical significance (1A274); and had no prior exposure to disparity

studies (1A276). Patenaude's main area of expertise is small business management, which he has performed for more than 40 years for Rothe. 1A277. These credentials do not qualify him to rebut Dr. Rubinovitz's econometric analysis.

2. The district court did not abuse its discretion by concluding that, even if Patenaude and Sullivan qualified as experts, their reports lacked a foundation of reliability required by Rule 702. 1A31. This Court has made clear that courts have "'broad latitude' to determine the 'reliability' of expert testimony." *United States* v. *Day*, 524 F.3d 1361, 1367 (D.C. Cir.) (citation omitted), cert. denied, 555 U.S. 887 (2008).

Rule 702 tasks trial judges with a "gatekeeping role" geared towards keeping "invalid evidence" away from the fact finder. *Daubert*, 509 U.S. at 596-597. *Daubert*'s reliability inquiry focuses "on the methodology or reasoning employed." *Ambrosini* v. *Labarraque*, 101 F.3d 129, 133 (D.C. Cir. 1996), cert. denied, 520 U.S. 1205 (1997). The inquiry is a "flexible" one guided by four non-exhaustive factors: "(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." *United*

States v. *Law*, 528 F.3d 888, 912 (D.C. Cir. 2008) (quoting *Ambrosini*, 101 F.3d at 134), cert. denied, 555 U.S. 1147 (2009).

a. Patenaude's methodology does not satisfy any of the *Daubert* factors or exhibit other indicia of reliability. Patenaude did not subject his calculation of average firm awards to peer review and did not provide error estimates for his findings. By Patenaude's own admission, measuring contracting disparities between minority and non-minority small business requires controlling for independent variables other than race that could explain differential outcomes. 2A1441. Yet his "simplistic look" at the data did not "consider[] any weight for age, firm size or number of employees" and lacks acceptance in the relevant social science community. 2A1444. Furthermore, Patenaude's calculations based on anecdotal evidence during his "40 plus years of Government contract experience" cannot be reproduced, verified, or tested. 2A1442.

b. Sullivan's proffered expert report is similarly unreliable. 1A49-51. As the district court found, Sullivan's methodology "appears to be well outside of the mainstream." 1A50. To rebut Dr. Wainwright's report, Sullivan simply rejects without evidence or explanation virtually all of the disparity studies Dr. Wainwright reviewed. Sullivan criticized the disparity studies for not assessing firm availability for a contract based upon bidder lists, but could not identify an example of a study that determined availability according to this method. 1A428,

436. He also categorically rejected the use of regression analysis, on which disparity studies rely, because he believes that regression analyses do not conclusively demonstrate causation. 1A433. Despite Sullivan's objections, regression analysis is "[p]erhaps the leading tool" used "to isolate the effects of multiple variables and determine how they influence one dependent variable" and is "used extensively by all social sciences" and in litigation. *Zenith Elecs. Corp.*v. *WH-TV Broad. Corp.*, 395 F.3d 416, 419 (7th Cir.), cert. denied, 545 U.S. 1140 (2005).

In addition, Sullivan did not conduct his own study or submit studies by others using his methodology. As the Seventh Circuit noted in rejecting expert testimony that neglected to employ regression analysis as a means of controlling for independent variables, the method of "'expert intuition' is neither normal among social scientists nor testable – and conclusions that are not falsifiable aren't worth much to either science or the judiciary." *Zenith*, 395 F.3d at 419. The district court did not abuse its discretion in excluding Sullivan's report.

3. Nor did the district court abuse its discretion by not admitting the two reports as evidence by a lay witness pursuant to Federal Rule of Evidence 701. Rule 701 prevents parties from submitting expert evidence "in lay witness clothing." Fed. R. Evid. 701 advisory committee's note (2000). Lay testimony is "based on the witness's perception," Fed. R. Evid. 701(a), and testimony that is

"outside the scope of a typical lay person's knowledge and experience" must satisfy the requirements for expert testimony under Rule 702 to be admissible. See *United States* v. *Wilson*, 605 F.3d 985, 1026 (D.C. Cir.), cert. denied, 526 U.S. 1116 (2010). Here, because a typical lay person would lack the detailed knowledge of government contracting and 8(a) necessary to interpret the significance of the mathematical operations performed by the government's experts, any rebuttal of Dr. Rubinovitz's and Dr. Wainwright's reports is not admissible as lay evidence. The district court did not abuse its discretion in excluding Patenaude's and Sullivan's reports.[6]

[6] The court allowed Patenaude, who is Vice-President of Rothe, to testify as a lay witness as to matters within the scope of Rothe's business. 1A48.

CONCLUSION

This Court should affirm.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a), that this CORRECTED BRIEF FOR THE DEPARTMENT OF DEFENSE AND SMALL BUISNESS ADMINISTRATION AS APPELLEES was prepared using Word 2007 and Times New Roman, 14-point font. This brief contains 13,977 words of proportionately spaced text.

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

s/ Teresa Kwong
TERESA KWONG
Attorney

Dated: January 28, 2016

CERTIFICATE OF SERVICE

I certify that on January 28, 2016, I electronically filed this CORRECTED BRIEF FOR THE DEPARTMENT OF DEFENSE AND SMALL BUSINESS ADMINISTRATION AS APPELLEES with the Clerk of this Court by means of the appellate CM/ECF system, and that eight 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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ADDENDUM

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2. *Government Minority Enterprise Programs – Fiscal Year 1974 (Volume I): Hearings Before the Subcomm. on Minority Small Business Enterprise and Franchising of the House Permanent Select Comm. on Small Business*, 93d Cong., 1st Sess. (1973).

3. *Government Minority Enterprise Programs – Fiscal Year 1974 (Volume II): Hearings Before the Subcomm. on Minority Small Business Enterprise and Franchising of the House Permanent Select Comm. on Small Business*, 93d Cong., 2d Sess. (1974).

4. *Minority Enterprise and Allied Problems of Small Business: A Report of the Subcomm. on SBA Oversight and Minority Enterprise of the House Comm. on Small Business*, H.R. Rep. No. 468, 94th Cong., 1st Sess. (1975).

5. *Summary of Activities: A Report of the House Comm. on Small Business*, H.R. Rep. No. 1791, 94th Cong., 2d Sess. (1977).

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