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.

UNITED STATES DEPARTMENT OF DEFENSE AND
UNITED STATES SMALL BUSINESS ADMINISTRATION, *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
THE HONORABLE KETANJI BROWN JACKSON, DISTRICT JUDGE

AMICUS BRIEF IN SUPPORT OF APPELLEES AND AFFIRMANCE OF NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., ASIAN AMERICANS ADVANCING JUSTICE | AAJC, AND THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS

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CERTIFICATE TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and *Amici*

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

(B) Rulings Under Review

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

(C) Related Cases

Counsel is unaware of any currently pending related cases.

STATEMENT REGARDING CONSENT TO FILE AND JUSTIFICATION FOR SEPARATE BRIEFING

All parties have consented to the NAACP Legal Defense & Educational, Fund, Inc., Asian Americans Advancing Justice | AAJC, and the Leadership Conference on Civil and Human Rights filing as *amicus curiae* in this case. *Amicus curiae* are organizations dedicated to promoting civil rights and equal justice in the United States. *Amicus curiae* are uniquely situated to provide context and perspective on why the Section 8(a) program is necessary to ensure all Americans have access to government procurement opportunities.[*]

[*] No counsel for either party authored this brief in whole or in part; neither party nor their counsel contributed money that was intended to fund the preparation or submission of this brief; and no person, other than the *amicus curiae*, its members, or its counsel, contributed money that was intended to fund this brief's preparation or submission. *See* Fed. R. App. P. 29(c).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and D.C. Circuit Rules 26.1 and 29(b), Amici Curiae are non-profit organizations that have not issued shares or debt securities to the public and that have no parents, subsidiaries, or affiliates that have issued shares or debt securities to the public.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

---

*Authorities upon which we chiefly rely are marked with asterisks.

Statutes

Rules

Regulations

Other Authorities

IDENTITY AND INTEREST OF *AMICI CURIAE*

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is a non-profit legal corporation that has worked for seventy-five years to assist African Americans and other people of color to secure their civil rights. LDF has appeared as counsel of record or *amicus curiae* in numerous cases before the United States Supreme Court and other federal courts, including litigation defending the constitutionality of appropriately tailored race-conscious government programs that redress patterns of racial inequality and exclusion in contracting, education, and other contexts.

Asian Americans Advancing Justice | AAJC ("Advancing Justice | AAJC") is a national non-profit, non-partisan organization working to advance the human and civil rights of Asian Americans and build and promote a fair and equitable society for all. Founded in 1991 and based in Washington, D.C., Advancing Justice | AAJC engages in litigation, public policy advocacy, and community education and outreach on a range of issues, including equal opportunity and economic development for Asian-American communities. Toward this end, Advancing Justice | AAJC has filed *amicus curiae* briefs in cases to address the necessity of appropriately tailored race-conscious government contracting programs. Between 2008 and 2012, Advancing Justice | AAJC produced several

publications illuminating the challenges Asian Americans face in government contracting.

The Leadership Conference on Civil and Human Rights is a diverse coalition of more than 200 national organizations charged with promoting and protecting the rights of all persons in the United States. The Leadership Conference was founded in 1950 by A. Philip Randolph, head of the Brotherhood of Sleeping Car Porters; Roy Wilkins of the NAACP; and Arnold Aronson, a leader of the National Jewish Community Relations Advisory Council. The Leadership Conference supports the use of appropriately tailored race-conscious government contracting programs.

INTRODUCTION AND SUMMARY OF ARGUMENT

For centuries, racial minorities in this country have been systematically deprived of economic opportunities and effective participation in our nation's social, political, and civic institutions. This is especially true in the context of business development, where minority entrepreneurs have been denied access to the opportunities that are necessary to create and develop business enterprises and compete for government contracts. While these exclusionary systems have been perpetuated by the practices of both private and public actors, many of the most enduring barriers to minority business development are the vestiges of discrimination that were sponsored or sanctioned by the federal government.

Against this backdrop, Congress enacted the Small Business Administration's ("SBA") Section 8(a) Program ("Section 8(a) Program" or "program") in 1978. The Section 8(a) Program is necessary to achieve the government's compelling interest in ensuring that socially and economically disadvantaged individuals—including racial minorities—who have been and continue to be unfairly discriminated against and excluded from federal contracting and procurement opportunities have a fair and meaningful opportunity to participate in the competitive enterprise system. *See* Pub. L. No. 95-507, 92 Stat. 1760 (1978). The program's intentional design—emphasizing flexibility and minimizing the burden on non-minorities—and the lack of alternative, race-neutral

remedies demonstrate that the program is narrowly tailored to achieve the government's compelling interest. Accordingly, this Court should affirm the district court's judgment.

ARGUMENT

I. THE SECTION 8(A) PROGRAM IS NECESSARY TO ACHIEVE THE GOVERNMENT'S COMPELLING INTEREST IN ELIMINATING DISCRIMINATORY BARRIERS FACED BY MINORITY-OWNED BUSINESSES

Through the Section 8(a) Program, the government seeks to redress the discriminatory barriers faced by minority entrepreneurs and foster business ownership by socially and economically disadvantaged individuals.[1] Remedying the effects of past or present racial discrimination has widely been recognized as a compelling interest justifying the government's use of race-conscious remedial action, so long as the government has a strong basis in evidence to conclude that the action is necessary. *See*, *e.g.*, *Shaw v. Hunt*, 517 U.S. 899, 909 (1996) (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498–506 (1989)); *DynaLantic v. U.S. Dep't of Def.*, 885 F. Supp. 2d. 237, 279 (D.D.C. 2012).

The legislative record leading to the enactment of the program shows that Congress had a strong basis in evidence—including government studies,[2] statistical

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[1] *See* Appellees' Br. at 23, 26-27.

[2] *See, e.g.*, U.S. Comm'n on Civil Rights, *Minorities and Women as Government Contractors* ("The Commission Report") 20-21 (1975). In addition, the 1967 Report of the National Advisory Commission on Civil Disorders, known as the

data,[3] and testimony[4]—from which it reasonably concluded that it had a compelling interest in ameliorating the effects of prior and ongoing discrimination against minority-owned businesses. *See DynaLantic*, 885 F. Supp. 2d. at 273. Based on these findings, Congress determined that a critical correlation between race and social and economic opportunity not only existed in the past but was an ongoing concern.[5]

"Kerner Commission," concluded that disadvantaged persons "did not play an integral role in America's free enterprise system because they enjoyed no appreciable ownership of small businesses and did not share in the community redevelopment process," *see* 124 Cong. Rec. 29,636 (1978), and therefore guided the SBA's use of administrative authority to direct contracts to socially and economically disadvantaged businesses.

[3] For example, in 1975, the Subcommittee on SBA Oversight and Minority Enterprise, part of the House Committee on Small Business, reviewed data that identified the difficulties faced by minority businesses, including evidence that these firms received less than one percent of government contracting dollars. Appellees' Br. at 20-21.

[4] Congress considered ample testimony about the importance of contracting opportunities for minorities. For example, one African-American businesswoman testified that government programs designed to enhance the social and economic mobility of disadvantaged minorities had fallen short. *See* 124 Cong. Rec., at 29,636 (1978) (addressing testimony by Ernesta Procope to Senate Select Committee on Small Business).

[5] New York Representative Patrick Addabbo summarized that the findings "clearly state that [such groups] have been and continue to be discriminated against and that this discrimination led to the social disadvantagement of persons identified by society as members of those groups." 124 Cong. Rec., at 34,097 (1978).

Prior to enacting the program, Congress repeatedly considered the challenges faced by socially or economically disadvantaged entrepreneurs.[6] Based on its review of history, Congress deemed certain minority groups—specifically, African Americans and Hispanic Americans—to be presumptively socially and economically disadvantaged for the purposes of the Section 8(a) Program.[7] The record on the 1978 legislation reveals that it received broad praise by lawmakers as a reasonable means of helping to level the playing field for small businesses.[8] Over the next decade, Congress considered the history of exclusion for other minorities and amended the law to include Asian Pacific Americans, Native American tribes, and Native Hawaiian organizations as presumptive socially disadvantaged groups.[9]

Given the breadth of evidence demonstrating that minority-owned businesses faced significant discriminatory barriers, Congress was undeniably

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[6] *See* Appellees' Br. at 19-23.

[7] H.R. Rep. No. 95-1714, at 20 (1978) (Conf. Rep.).

[8] Such an assessment is reflected in comments such as those by Representative Joseph McDade from Pennsylvania: "[T]he bill . . . strike[s] a balance between well-recognized needs of the business community and Government. The goals of increasing opportunities for small business and the requirement of Government purchasing flexibility have been equitably considered." 124 Cong. Rec., at 7534 (1978).

[9] Pub. L. No. 96-302, 94 Stat. 833 (1980) (Asian Pacific Americans); Pub. L. No. 99-272, § 18105, 100 Stat. 82 (1986) (Native American tribes); Pub. L. No. 101-656, § 207, 102 Stat. 3861 (1989), as amended by Pub. L. No. 101-37, § 6, 103 Stat. 70 (1989) (Native Hawaiian organizations).

justified in enacting the Section 8(a) Program. Further, the government's continued endorsement of the program is equally supported by research and data demonstrating that minority-owned businesses remain on unequal footing as compared to their non-minority counterparts.

A. Race-Based Remedial Action is Required to Remedy the Effects of Longstanding Racial Discrimination Against Minority Businesses

The disparities in the formation and growth of minority-owned businesses are the result of intentional discrimination and race-based barriers in private markets across industry lines at the federal, state, and local levels—discrimination that the federal government magnified and entrenched through its own policies and practices as well as its procurement and contracting expenditures.

1. Federal Policies and Programs Have Inhibited the Economic Development of Minority Communities and Businesses

The federal government played a significant role in perpetuating the structural inequities that systematically impeded business development among socially and economically disadvantaged minorities. All three branches of the government contributed to a system of racial exclusion and discrimination that impaired racial minorities' social, educational, and economic development over time.

From the nation's birth, the federal government enforced and affirmed the institution of slavery and the subjugation and dehumanization of African

Americans.[10] Likewise, the government's forced relocation and isolation of Native Americans deprived them of their lands and largely excluded them from participation in the American polity.[11] The federal government also thwarted opportunities for Asian Americans, from denying Asians the right to naturalization to preventing them from immigrating to the United States on the same terms as European immigrants.[12] These practices severely limited the economic development of these minority communities.

Systematic discrimination against racial minorities was not limited to the early years of the Republic. Following Reconstruction, the government betrayed the aspirations for equality voiced by African Americans and other minorities by embracing the doctrine of "separate but equal" and endorsing Jim Crow policies of

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[10] *See*, *e.g.*, *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) (holding that persons of African descent in America—free or enslaved—were not intended to be considered citizens under the United States Constitution, and thus lacked standing to sue in federal court); *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 540 (1842) (holding that the Fugitive Slave Law of 1793 precluded Pennsylvania state law banning the capture and removal of blacks from the state and into slavery).

[11] *See*, *e.g.*, *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

[12] *See* Naturalization Act, 1 Stat. 103 (1790) (limiting citizenship and naturalization to "free white persons"). These restrictions on citizenship directly impacted Asian Americans' economic opportunities; during the early twentieth century, several states passed laws preventing "aliens ineligible for citizenship" from owning or leasing agricultural land. *See, e.g.*, Chinese Exclusion Act, Law of May 6, 1882, Ch. 126, 22 Stat. 58 (repealed 1943) (banning Chinese immigration); Exec. Order No. 589 (1907) (banning Japanese and Korean immigration); Immigration Act of 1924, Ch. 190, 43 Stat. 153 (repealed 1952) (banning Japanese immigration).

racial separation.[13] And in the twentieth century, federal courts, legislators, and agencies contributed to maintaining a racially-tiered society that substantially undermined the ability of minorities to gain access to social, political, and economic capital.[14] For example, through the Servicemen's Readjustment Act, known as the GI Bill of Rights, the government spent more than $95 billion to aid veterans returning from World War II in the transition to civilian life.[15] Because, through the GI Bill, 16 million veterans were able to attend college, receive job training, start businesses, and purchase their first homes,[16] this legislation has been credited for "creating the middle class" in America, albeit one that was almost

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[13] *See*, *e.g.*, Morrill Act, ch. 841, § 1, 26 Stat. 417, 418 (1890) (funding segregated land-grant colleges); *The Civil Rights Cases*, 109 U.S. 3 (1883) (holding Congress lacked the authority, under either the Thirteenth or Fourteenth Amendments, to outlaw racial discrimination against Blacks by private individuals or organizations); *see also Gong Lum v. Rice*, 275 U.S. 78 (1927) (holding that a citizen of Chinese ancestry is not denied equal protection under the law by being restricted to a school for colored students separate from white students); *Plessy v. Ferguson*, 163 U.S. 537 (1896) (holding that Louisiana law separating blacks and whites in rail cars was not a violation of the Equal Protection Clause).

[14] *See, e.g.*, *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding exclusion order for Japanese Americans and indulging the government's racially-based "justification" that ancestry made Japanese Americans an espionage threat); Exec. Order No. 9066, 7 Fed. Reg. 1407 (1942); Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 Tex. L. Rev. 1335, 1347–53 (1987).

[15] Ira Katznelson, *When Affirmative Action Was White* 113, 139–40 (2005).

[16] *Id.*

exclusively white.[17] Thousands of African-American veterans were excluded from the benefits of the bill and were denied access to whites-only colleges, job training programs, and housing and business loans.[18] These policies limited minorities' ability to form, operate, and expand businesses that were able to compete for federal contracting opportunities and in the economy at large.

Federal policies also critically impeded minorities' access to credit. Until the 1970s, the Federal Housing Administration ("FHA") and other governmental agencies adopted discriminatory mortgage lending practices that were designed to limit, if not outright exclude, minorities from participating in programs that facilitated and subsidized homeownership—perhaps *the* most important asset that Americans of all backgrounds have relied upon for generations to build wealth and access credit.[19] It was the federal government's Home Owners Loan Corporation ("HOLC") that, in 1933, coined the term "redlining," to reference the practice of denying credit to entire neighborhoods due to the race, ethnicity, or income of their residents through the use of color-coded maps.[20] The FHA compounded these

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[17] *Id.* at 114.

[18] *Id.* at 129–40.

[19] *See* Kenneth T. Jackson, *Crabgrass Frontier: The Suburbanization of the United States*, 196–218 (1985); Melvin L. Oliver & Thomas M. Shapiro, *Black Wealth/White Wealth: A New Perspective on Racial Inequality*, 15-18 (1995).

[20] Douglas S. Massey & Nancy A. Denton, *American Apartheid: Segregation and the Making of the Underclass* 51 (1993).

practices by discriminating against minorities in the offering of mortgage insurance as well.[21] Indeed, Congress enacted the Fair Housing Act in 1968 after establishing a record replete with evidence of persistent discrimination by both public and private actors and their effect on housing and economic opportunities.[22] But until at least the 1980s, federal regulators largely allowed private banks to pattern their own lending policies on the discriminatory practices of the FHA, HOLC, and other governmental actors.[23] As a result of these policies, racial minorities have lagged behind their white counterparts in home ownership rates. And the efforts of minority entrepreneurs, who were systematically denied access to this critically important source of equity, were undermined. These discriminatory lending practices were compounded by the fact that government

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[21] Fed. Hous. Admin., *Underwriting Manual: Underwriting and Valuation Procedure Under Title II of the National Housing Act*, pt. II, at 208 (1936) (generalizing that "the central downtown core of the city . . . can usually be outlined and considered . . . ineligible" for mortgage insurance); *see also* Beth J. Life & Susan Goering, *The Implementation of the Federal Mandate for Fair Housing, in Divided Neighborhoods: Changing Patterns of Racial Segregation* 229 (Gary A. Tobin ed., 1987).

[22] *See*, *e.g.*, 114 Cong. Rec. 2277 (1968) (Sen. Mondale) ("An important factor contributing to exclusion of Negroes from [suburban communities and other exclusively white areas], moreover, has been the policies and practices of agencies of government at all levels.").

[23] *See* Glenda G. Sloane, *Creative Financing and Discrimination: Discrimination in Home Mortgage Financing*, A Sheltered Crisis: The State of Fair Housing in the Eighties 85-87 (U.S. Civil Rights Commission ed., 1983); Melvin L. Oliver & Thomas M. Shapiro, *Wealth and Racial Stratification*, 2 America Becoming 241 (Neil J. Smelser et al. eds., 2001).

programs offering loans to small businesses, such as the SBA, also systematically discriminated against minority business owners.[24]

Federal policies also blocked minorities from developing the skills, experience, and networks necessary to create and grow businesses capable of meaningfully competing for federal procurements. In the twentieth century, the government adopted a series of policies that effectively sanctioned the racially exclusionary practices of labor unions, thereby preventing non-white workers from acquiring the skills necessary to become entrepreneurs. For example, labor unions lobbied for, and Congress enacted, legislation such as the Railway Labor Act of 1926 and the Davis-Bacon Act of 1931, which restricted competition for non-white workers and resulted in white monopoly markets.[25] Moreover, government programs inhibited business development opportunities for racial minorities by "replicat[ing] the segregated race relations tolerated in [f]ederal government

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[24] *See*, *e.g.*, Timothy Bates, *Government as Financial Intermediary for Minority Entrepreneurs: An Evaluation*, 48 J. BUS. 541, 543 (1975) (estimating that over the course of ten years, the SBA made a total of 13 loans to black-owned businesses in Philadelphia and Washington, D.C.).

[25] *See* David Bernstein, *The Davis-Bacon Act: Vestige of Jim Crow*, 13 Nat'l Black L.J. 276, 281–87 (1994); Joshua B. Freeman, *Hardhats: Construction Workers, Manliness and the 1970 Pro-War Demonstrations*, 26 J. Soc. Hist. 737 (1993) (chronicling how federal officials "choreographed resistance to the desegregation of the construction industry" in the 1970s).

departments."[26] A study conducted in the 1970s by the United States Commission on Civil Rights found that government contracting specialists often had "negative and sometimes hostile attitudes" toward firms owned by minorities.[27]

The federal government's complicity in this nation's history of racial oppression impacting minority business opportunity reinforces the conclusion that Congress was well within its remedial powers in authoring the race-conscious remedies of the Section 8(a) Program.

2. The Federal Government Perpetuated Private Discrimination through its Procurement Spending Patterns

Evidence of direct discrimination by the government is not required to justify its use of race-conscious criteria in a federal program. Instead, the government may rely on evidence that it has served as a "passive participant" in private sector discrimination to demonstrate that its own spending practices exacerbate a pattern of prior discrimination. *See O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 425 (D.C. Cir. 1992) (citing *Croson*, 488 U.S. at 504). Indeed, the Supreme Court has recognized that "[i]t is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public

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[26] Desmond King, *Separate and Unequal: Black Americans and the U.S. Federal Government* 108, 172-89, 199–201 (1995).

[27] The Commission Report, at 20–21.

dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." *Croson*, 488 U.S. at 492.

Importantly, the government is ***not*** required to establish a causal link between its practices and the disparities disfavoring minority-owned businesses in order to establish a compelling interest for the Section 8(a) Program. Appellant misconstrues the Supreme Court's decision in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015), to support this assertion.[28] The *Inclusive Communities* decision authorized disparate impact claims under the Fair Housing Act and has no bearing on the government's ability to procure evidence of its "passive participation" in discrimination to support a race-conscious contracting program.

Evidence shows that at the time Congress enacted and amended the Section 8(a) Program, the effects of both past and ongoing discrimination in the private market had significantly undermined minority entrepreneurs' ability to compete for government procurements. For example, minority business owners faced significant obstacles in their access to credit, a critical component to business formation and development. Historically, both personal and commercial lenders have been less willing to extend credit to minorities; those that extended such credit did so on far less favorable terms than those offered to white borrowers with

[28] Appellant's Br. at 37.

similar qualifications.[29] Without reliable access to credit, minority businesses were stymied in their ability to develop businesses capable of competing for government contracts. Moreover, minority entrepreneurs have regularly received less favorable treatment than their white counterparts when seeking business loans and venture capital support, even when controlling for factors such as individual wealth and educational background.[30]

Racial minorities also suffered pervasive discrimination in employment, limiting their ability to form and sustain firms capable of competing for federal

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[29] *See* Timothy Bates, *Commercial Bank Financing of White- and Black-owned Small Business Start-ups*, Q. Rev. Econ. Bus. 31:1, at 64-65 (1991) (analyzing a nationwide survey of 7,000 white- and black-owned businesses from 1976 to 1982 and concluding that black-owned businesses received less favorable loan terms). Another analysis of American construction firms from 1982 to 1986 found that commercial banks were less likely to extend loans to African American-owned firms, and even when they did obtain loans, "they receive[d] significantly smaller amounts than nonminority borrowers who possess[ed] otherwise identical characteristics." Caren Grown & Timothy Bates, *Commercial Bank Lending Practices and the Development of Black Owned Construction Companies*, 14 J. Urb. Aff. 25, 26 (1992); *see also* Faith Ando, *Capital Issues and the Minority-Owned Business*, 16 Rev. Black Pol. Econ. 77, 100 (1988) (analyzing surveys from 1982 to 1985 that reveal "discrimination against black business owners of established firms" by banks in commercial lending).

[30] *See* Anthony D. Taibi, *Banking, Finance, and Community Economic Empowerment: Structural Economic Theory, Procedural Civil Rights, and Substantive Racial Justice*, 107 Harv. L. Rev. 1463, 1475–76 (1994) (finding that African-American business owners "with identical predictive traits" to white business owners still receive less favorable treatment from lenders); Charles Gerena, *Opening the Vault*, Region Focus 46, 47 (Spring 2007) (noting that in the years following Reconstruction, "banks imposed higher interest rates on black borrowers, or simply rejected them").

contracting opportunities. This discrimination was particularly prevalent in defense contracting, where a revolving door was often spun between public service and federal contracting opportunities[31] and "old boys' clubs" severely limited the opportunities for minority entrepreneurs.[32]

The racist history of American labor unions also demonstrates the systemic employment barriers facing minority workers. From the turn of the century, minorities were either completely excluded from the rapidly-growing, white-dominated labor unions or were otherwise relegated to segregated "Jim Crow" locals.[33] One survey showed that the sheet metal workers' union had no African Americans among its 25,000 members, the plasterers' union had only 100 out of 30,000 members, and the plumbers' and steam fitters' unions had long been

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[31] *See Project on Government Oversight, The Politics of Contracting* (2004), *available at* http://www.pogo.org/our-work/reports/2004/gc-rd-20040629.html (documenting revolving door between government and defense contractors).

[32] *See*, *e.g.*, 131 Cong. Rec. 17,447 (1985) (statement by Rep. John Conyers) (race-conscious remedies were necessary to break down "buddy-buddy contracting" at the Department of Defense); *id*. (statement of Rep. Patsy Schroeder) (an "old boy's club" in Department of Defense contracting excludes many minorities from business opportunities).

[33] *See* David E. Bernstein, *Roots of the "Underclass": The Decline of Laissez-Faire Jurisprudence and the Rise of Racist Labor Legislation*, 43 Am. U. L. Rev. 85, 91-92 (1993); *see also Local 28 of the Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 427 n.2 (1986) (discussing the union's methods and attempts to exclude black workers from their ranks and apprenticeship programs); *Woods v. Graphic Commc'ns*, 925 F.2d 1195, 1198 (9th Cir. 1991) (describing how the union opposed disciplinary action against white members who were guilty of racial harassment).

successful in "maneuvering to avoid Negro membership" altogether.[34] Even after formally removing racial restrictions from its constitution in 1945, Local 28 of the sheet metal workers' union still had never had an African-American member or apprentice until 1969.[35]

Taken together, there is a strong body of evidence establishing a long history of discrimination that hindered the economic development of minority communities and inhibited the ability of minority entrepreneurs to participate in government contracting opportunities. The billions of dollars invested in private markets through the federal government's procurement patterns have only exacerbated the inequities suffered by minority entrepreneurs. Accordingly, Congress was justified in enacting the Section 8(a) Program as a remedy to this past discrimination against minority-owned businesses.

B. Ongoing Discrimination Against Minority Entrepreneurs Justifies the Continued Existence of the Section 8(a) Program

1. Historical Barriers Continue to Impede the Growth of Minority Businesses

While the number of businesses owned by minorities has increased in recent years,[36] discrimination in contracting remains an ongoing and stubbornly persistent

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[34] David Bernstein, *The Davis-Bacon Act: Vestige of Jim Crow*, at 281.

[35] *Local 28*, 478 U.S. at 427 n.2.

[36] Robert W. Fairlie & Alicia M. Robb, Minority Bus. Dev. Agency, *Disparities in Capital Access between Minority and Non-Minority-Owned Businesses: The*

practice. Minorities continue to be excluded from opportunities to build skills and break into industries that rely on "old boys' clubs," like construction.[37] Minority businesses continue to underperform compared to their non-minority counterparts[38] and remain on unequal footing with regard to access to capital.[39] This is particularly apparent in public contracting, where minority firms secure less public

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Troubling Reality of Capital Limitations Faced by MBEs 11 (2010) (noting that "the number of minority businesses grew rapidly over the past two decades"); Press Release, U.S. Census Bureau, *Census Bureau Reports Number of Minority-Owned Firms Increased at More Than Double the Rate of All U.S. Businesses From 2002 to 2007* (June 7, 2011), *available at* http://www.census.gov/newsroom/releases/archives/business_ownership/cb11-103.html (finding minority-owned firms increased at a rate of 45.5 percent between 2002 and 2007, more than double the 17.9 percent increase for all businesses).

[37] *See, e.g.*, 144 Cong. Rec. 2791 (1998) (statement of Sen. Lautenberg).

[38] *See* U.S. Census Bureau, *2007 Survey of Business Owners Summaries of Findings* (2010), *available at* http://www.census.gov/econ/sbo/getsof.html?07consum (reporting average gross receipts for minority-owned firms to be 36.5 percent of average gross receipts of non-minority-owned firms); Fairlie & Robb, *Disparities in Capital Access between Minority and Non-Minority-Owned Businesses: The Troubling Reality of Capital Limitations Faced by MBEs*, at 11, 14 (citing "ethnic and racial disparities" which indicate that "trends in average gross receipts do not indicate recent improvements").

[39] *See* Timothy Bates & Alicia Robb, Minority-Owned Businesses Come Up Short in Access to Capital: It's Time to Change the Equation for the MBEs, June 30, 2012, available at http://www.forbes.com/sites/kauffman/2012/07/30-minority-owned-businesses-come-up-short-in-access-to-capital-its-time-to-change-the-equation-for-mbes/; Christine Kymn, *Access to Capital for Women- and Minority-Owned Businesses: Revisiting Key Variables*, Office of Advocacy Issue Brief Number 3 (Jan. 29, 2014), *available at* https://www.sba.gov/sites/default/files/Issue%20Brief%203%20Access%20to%20Capital.pdf.

contracting financing than non-minority firms[40] and exclusionary networks remain predominant.[41]

Discriminatory lending practices continue to pose substantial obstacles to minority businesses, which are less likely to have loan applications approved as compared to non-minority businesses, even after controlling for industry, credit score, legal form, and human capital.[42] This is particularly problematic for

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[40] Maria E. Enchautegui et al., *Do Minority-Owned Businesses Get a Fair Share of Government Contracts?,* Urban Inst. 10 (1997) (finding that African American-, Latino-, Asian-, and Native American-owned businesses take in only 49, 44, 39, and 18 percent, respectively, of public contracting dollars that would be expected given their availability); Montgomery County Minority Owned and Local Small Business Task Force, *Report of the Minority Owned and Local Small Business Task Force*, 1, 29 (Sep. 15, 2015), *available at* http://www.montgomerycountymd.gov/council/Resources/Files/REPORTS/Procurement/MOLSBFinalReport.pdf "the Montgomery County Report") (finding that the number of utilized firms showed that African American-, Asian American-, Hispanic- and Native American-owned businesses were utilized 4.14, 5.27, 6.87, and 0.85 percent, respectively, while non-minority businesses accounted for 78.15 percent in construction prime contracts).

[41] *See* BBC Research & Consulting, *A Study to Determine DBE Availability and Analyze Disparity in the* Transportation *Contracting Industry in Idaho* § 5, at 4 (2007) (describing a "good old boy network" in Idaho among white prime contractors preferring white subcontractors); Joe R. Feagin & Nikitah Imani, *Racial Barriers to African American Entrepreneurship: An Exploratory Study*, 41 Soc. Probs. 562, 565 (1994) (outlining the "buddy-buddy" network in construction whereby white contractors use their network to beat bids made by "non-buddies").

[42] Alicia Robb, *Access to Capital Among Young Firms, Minority-Owned Firms, Women-Owned Firms, and High-Tech Firms* (Apr. 2013), at 31, *available at* https://www.sba.gov/sites/default/files/files/rs403tot%282%29.pdf; Kymn, *Access to Capital for Women- and Minority-Owned Businesses: Revisiting Key Variables*, at 1.

minority entrepreneurs, who face ongoing difficulties in their ability to acquire the assets needed as collateral for low-cost start-up financing and thus often "will not be able to start businesses" without access to credit.[43]

Furthermore, commercial banks, venture capitalists, and capital markets continue to engage in overtly discriminatory lending practices that have hampered the ability of minorities to obtain business capital.[44] This is especially troubling given that the largest single factor explaining racial disparities in business-creation rates is the difference in asset levels.[45] As a result, minority businesses rely

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[43] *See* Fairlie & Robb, *Disparities in Capital Access between Minority and Non-Minority-Owned Businesses: The Troubling Reality of Capital Limitations Faced by MBEs*, at 18.

[44] *Availability of Credit to Minority-Owned Small Businesses: Hearing Before the Subcomm. On Fin. Insts. Supervision, Regulation & Deposit Ins. of the H. Comm. On Banking, Fin. & Urb. Affs.,* 103d Cong. 19-20 (1994) (statement of M. Harrison Boyd, President/CEO, HBA Management Services Group, Inc.) (stating that white bank employees "have been and are continually, programmed to perceive minority business loans as bad business, and/or at a minimum, risky and less desirable"); *see also The Disadvantaged Business Enterprise Program of the Federal-Aid Highway Act: Hearing Before the Subcomm. on Transp. of the S. Comm. on Env't & Pub. Works*, 99th Cong. 363 (1985) (statement of James K. Laducer, Director, North Dakota Minority Business Enterprise Programs, United Tribes Educational Technical Center) (stating that North Dakota banks "refuse to lend money to minority businesses from nearby Indian communities"); Nat'l Asian Pacific Am. Legal Consortium, *Asian Pacific Americans and Public Contracting*, at 43-44 (1997) (finding that one-fifth of Asian-American venders and just under one-fifth of Asian-American professional services firm owners reported that they experience discrimination in financial transactions such as applying for commercial loans).

[45] Robert W. Fairlie, *Entrepreneurship Among Disadvantaged Groups: An Analysis of the Dynamics of Self-Employment by Gender, Race, and Education*,

disproportionately on owner equity investments and less on debt from outside sources, such as banks, as compared to non-minority businesses.[46]

2. National and State Disparity Studies Confirm the Continued Need for the Section 8(a) Program

Dr. Jon Wainwright, who served as Defendants' unchallenged expert at the summary judgment proceedings in this case, presented overwhelming evidence of ongoing disparities in business formation, utilization, and earning rates between minority-owned and non-minority-owned businesses.[47] Dr. Wainwright's study showed that minority-owned businesses competing for public contracts and procurement continue to face pervasive discrimination throughout the nation.[48]

More recently, in September 2015, the Montgomery County Minority Owned and Local Small Business Task Force released a study analyzing Montgomery County's (Maryland) procurement policies and practices between July 1, 2007 and June 30, 2012. The Task Force found a statistically significant

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The Life Cycle of Entrepreneurial Ventures, International Handbook Series on Entrepreneurship 437 (Simon Parker ed. 2006); David G. Blachflower, *Report on the City of Chicago's MWBE Program*, June 10, 2009, at 35, *available at* http://www.dartmouth.edu/~blnchflr/papers/chicago%20sunset%20final%20report%20june%2010th%202009-0.pdf (finding that "black/ white disparity in startup capital is the largest single factor contributing to racial disparities in closure rates, profits, employment, and sales").

[46] Alicia Robb, *Access to Capital Among Young Firms, Minority-Owned Firms, Women-Owned Firms, and High-Tech Firms*, at 31.

[47] *See* Appellees' Brief at 35-37.

[48] *Id.*

disparity between the number of minority- (African American, Asian American, Hispanic, and Native American), female-, and disabled-owned (collectively "MFD-") contracting and subcontracting businesses in the county marketplace and the number that received contract awards.[49] The study concluded that a MFD-business owner's race, ethnicity, gender, and disability status had a statistically significant impact on the success of a new business as well as on securing public contracting and subcontracting opportunities, as compared to non-MFD-business owners.

Anecdotal evidence from these studies further demonstrates that minority-owned businesses continue to face discriminatory barriers. Minority business owners from across the country report that they cannot break into tight-knit networks of businesses, resulting in these owners not being awarded contracts.[50]

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[49] Montgomery County Report, at 28-30; *see also* Cedric Herring & Loren Henderson, *Don't Bank on It: Chicago's Minority and Women's Business Enterprise Program and Discrimination in Business Credit Markets*, Institute of Government & Public Affairs Policy Forum, Vol 24 Issue 1, Nov. 2011, *available at* https://igpa.uillinois.edu/sites/igpa.uillinois.edu/files/Policy%20Forum%2024_1.pdf (finding that if Minority and Women Business Enterprise (MWBE) participation program is removed or the level of participation is lowered, the utilization of MWBEs would likely decrease tremendously because only half of MWBEs that serve as subcontractors in public projects were asked to do so on private projects).

[50] For example, an African-American professional services firm owner in North Carolina reported that there is a circle of businesses in the City of Greensboro that is "extremely hard to break into." MGT of America, Inc., Final Report, *Disparity Study for the Minority/Women Business Enterprise Program* at 7–16 (June 14,

Minority business owners detail disturbing instances of outright racism and discrimination. In Colorado, an African-American contractor reported that he had "received by accident a fax with pricing from a manufacturer that was meant for their nonminority competitor and the price was substantially lower than what they received from the same manufacturer."[51] In Arizona, a Latino business owner reported being called "Wetback, brown like s**t, dumb Mexican, little Mexican, my little Mexican friend" by other business owners in the state.[52] Within the government contract bidding process, studies have found that prime contractors solicit bids from minority-owned firms with extremely limited turnaround times, making it impossible for these subcontractors to respond.[53] These stories illustrate

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2012), *available at* http://www.greensboro-nc.gov/modules/showdocument.aspx?documentid=15419. Similarly, an Asian-American owner of a construction management firm in California stated that he had been closed out of a contracting opportunity due to difficulties in breaking into the "good ol' boy" network. BBC Research & Consulting, *Metro Disparity Study Final Report, Los Angeles County Metropolitan Transportation Authority* at Appx. B, at 234 (Jan. 22, 2010).

[51] MGT of America Inc., *City and County of Denver, Minority/Women Owned/Disadvantaged Business Enterprise Disparity Study* at 7–14 (Jul. 29, 2013), *available at* https://www.denvergov.org/Portals/690/documents/DSBO/Disparity%20Study%202013.pdf.

[52] MGT of America, Inc., *The City of Phoenix Minority-, Women-Owned, and Small Business Enterprise Program Update Study* at 6-26 (Apr. 21, 2005).

[53] For example, in California, an Asian-American business owner reported that he is notified of opportunities to submit a quote if a prime contractor sends a request for proposals notifying the subcontractor that it is going after a particular project, but that most of the time, the notification is too late. BBC Research & Consulting,

the ongoing discriminatory barriers faced by many minority-owned business owners and demonstrate the continued need for the Section 8(a) Program.

II. THE SECTION 8(a) PROGRAM IS NARROWLY TAILORED TO REMEDY THE EFFECTS OF DISCRIMINATION ON MINORITY BUSINESS DEVELOPMENT

To determine whether a race-conscious remedial program is narrowly tailored, courts evaluate: (1) the efficacy of alternative remedies; (2) flexibility; (3) whether the racial classification is over- or under- inclusive; (4) the impact of the relief on the rights of third parties; (5) duration; and (6) the relationship between numerical goals and the relevant labor market. *DynaLantic*, 885 F. Supp. 2d at 283 (citing *United States v. Paradise*, 480 U.S. 149, 171 (1987)); *see also Croson*, 488 U.S. at 508. Application of these factors demonstrates that the Section 8(a) Program is narrowly tailored to remediate the effects of discrimination on small business formation.

A. Race-Neutral Alternatives Failed to Remedy the Effects of Discrimination

Congress adopted Section 8(a) after the failure of 25 years of race-neutral attempts to promote minority small business development. Those efforts began with the Small Business Development Act of 1953, which was intended to "aid, counsel, assist, and protect . . . the interests of small-business concerns." Pub. L.

Metro Disparity Study Final Report, Los Angeles County Metropolitan Transportation Authority at Appx. B at 121.

No. 83-163, § 202, 67 Stat. 282 (1953). Congress authorized programs intended to benefit small business development at-large, including "a surety bond guarantee program, . . . a new class of small business investment companies to provide debt and equity capital, improve[d] . . . disaster assistance, loans to small businesses, small business development centers, and, notably, race-neutral small business set-asides." *DynaLantic*, 885 F. Supp. 2d at 284. Congress also enacted anti-discrimination legislation which sought, in part, to place all individuals pursuing government contracts on equal footing. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, tit. xi, 78 Stat. 252 (1964) (codified at 42 U.S.C. § 2000d).

By the mid-1970s, however, Congress concluded that these efforts had failed to remedy the effects of discrimination on small business formation. In particular, Congress found that "the effects of past inequities stemming from racial prejudice" persisted despite enactment of race-neutral legislation and executive actions taken by the President. H.R. Rep. No. 468, at 1-2 (1975). According to the Government Accountability Office, "SBA's success in helping disadvantaged firms to become self-sufficient and competitive has been minimal,"[54] and the U.S. Commission on Civil Rights reported that minority businesses remained unsuccessful in their attempts to pursue government contracts because of "deficiencies in working

[54] U.S. Gov't Accountability Office, *The Small Business Administration's 8(a) Procurement Program*, 1 (1977), *available at* http://gao.gov/assets/100/98522.pdf.

capital, [the] inability to meet bonding requirements," and a general lack of resources.[55] Accordingly, Congress's failed attempts at promoting minority businesses through race-neutral means justified the adoption of race-conscious measures.

B. The Small Business Act's Non-Mandatory Goal for Minority Participation is Sufficiently Flexible

Unlike other disfavored race-conscious programs, the Small Business Act sets a non-mandatory, aspirational goal for disadvantaged-minority involvement in federal contracting, rather than a rigid quota. *DynaLantic*, 885 F. Supp. 2d at 285. There is no penalty if the government fails to meet its modest goal of spending 5 percent of federal prime and subcontracting dollars with disadvantaged businesses. *See* 15 U.S.C. § 644(g). For this reason, other circuits have concluded that nonbinding goals promoting minority business development are permissible. *See W. States Paving Co., Inc. v. Wash. State Dep't of Transp.*, 407 F.3d 983, 994-95 (9th Cir. 2005); *Sherbrooke Turf, Inc. v. Minn. Dep't of Transp.*, 345 F.3d 964, 972 (8th Cir. 2003); *Adarand Constructors v. Slater*, 228 F.3d 1147, 1181 (10th Cir. 2000).

[55] The Commission Report, at 16.

C. Only Socially and Economically Disadvantaged Individuals Are Eligible for the Section 8(a) Program

Section 8(a) is neither over- nor under-inclusive. Section 8(a)'s two-part, particularized analysis of each applicant ensures that only those who can demonstrate that they are both socially and economically disadvantaged, regardless of race, can participate in the program.

An individual is only economically disadvantaged if his or her "ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." 15 U.S.C. § 637(a)(6)(A). Applicants must provide both financial information and a personal statement describing their economic disadvantage. 13 C.F.R. § 124.104(b). There is no presumption that socially-disadvantaged individuals are also economically disadvantaged; this is a standalone requirement that must be satisfied by all applicants. Socially-disadvantaged individuals, on the other hand, are those "who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." 15 U.S.C. § 637(a)(5). While individuals of certain races and ethnicities are presumed to be socially disadvantaged, this presumption can be rebutted by "credible evidence to the contrary." 13 C.F.R. § 124.103(b)(3). Non-minorities can demonstrate social disadvantage by a preponderance of the evidence. *Id.* § 124.105(c)(1).

Accordingly, an individual's race, in and of itself, is insufficient to establish eligibility, or ineligibility, for the Section 8(a) program. Instead, applicants must demonstrate that ***they personally*** "suffer[] from the effects of prior discrimination," *Croson*, 488 U.S. at 508, such that ***they personally*** have diminished capacity to access "capital and credit opportunities," 15 U.S.C. § 637(a)(6)(A). This ensures that the program remediates only the established harm.

D. Section 8(a) Proscribes Contracts that have a Deleterious Effect on Third-Parties

The limited effect of the Section 8(a) Program on third-parties is evident from the data: in 2012, for instance, less than 4 percent of federal prime contracting dollars went to participants in the Section 8(a) program.[56] Moreover, individuals are only eligible to initially participate in the program if they have a net worth of less than $250,000. 13 C.F.R. § 124.104(c)(3). The requirements and implementation of the Section 8(a) program minimize any potential detrimental impact on third parties.

E. Section 8(a) Ensures that Participants Only Remain in the Program as Long as Necessary to Eliminate the Discriminatory Impact the Law Seeks to Remedy

The Section 8(a) Program ensures that participants remain in the program only as long as the discriminatory impact—*i.e.*, their economic and social disadvantage—exists. For instance, the program is limited to nine years, 13 C.F.R.

[56] *See Appellees' Br. at* 3.

§ 124.2, and participants can only enroll once, *id.* § 124.108(b). Participation in the program is terminated if: (1) a participant is no longer economically disadvantaged or the company achieves its business development objectives, *id.* § 124.302(a); (2) the SBA determines that a participant "has demonstrated the ability to compete in the marketplace without assistance under the 8(a) . . . program," *id.* § 124.302(a)(1); or (3) the SBA is apprised that a participant no longer meets the program's eligibility requirements, *id.* § 124.112(c). To ensure continued eligibility, participants must satisfy stringent reporting requirements annually. *See id.* § 124.112 (b)(1)-(10). Accordingly, the law "tailor[s] remedial relief to those who truly have suffered the effects of prior discrimination." *Croson*, 488 U.S. at 508.

F. Section 8(a)'s Non-Binding Goal is Appropriate

Moreover, the SBA's non-binding 5 percent goal does not reflect a "completely unrealistic assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population." *Id.* at 507 (internal quotation marks and citation omitted). While racial balancing is disfavored, nothing prevents Congress from setting an objective that is far below the percentage of minority persons in the population. *See Adarand*, 228 F.3d at 1181 ("*Croson* does not prohibit setting an aspirational goal above the current

percentage of minority-owned businesses that is substantially below the percentage of minority persons in the population as a whole.").

Congress enacted the Section 8(a) program in the face of overwhelming data that (1) discrimination undermined minority small business development; (2) the government's traditional procurement programs not only reinforced systemic discrimination against minority businesses, but proactively exacerbated those harms; and (3) Congress's race-neutral attempts at remediation failed. Consistent with Supreme Court precedent, the Section 8(a) program is narrowly tailored to remedy that harm because each applicant must demonstrate that he or she suffers from the deleterious effects of discrimination and is economically disadvantaged.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's decision granting summary judgment to the government.

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(c) and Circuit Rule 32, this brief is proportionately spaced, has a typeface of 14 points or more, and contains 6,982 words, as calculated by the Microsoft Word software.

DATED this 28th day of January 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on January 28, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. I also certify that I am sending eight hard copies of the foregoing to this Court via overnight delivery.

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