

JS-44
(Rev. 2/11 DC)

I (a) PLAINTIFFS ROTHE DEVELOPMENT, INC. <hr/> (b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF (EXCEPT IN U.S. PLAINTIFF CASES) <u>BEXAR</u> <hr/> (c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER) David F. Barton Gardner Law 745 East Mulberry Avenue, Suite 500 San Antonio, TX 78212 (210) 733-8191	DEFENDANTS UNITED STATES DEPARTMENT OF DEFENSE UNITED STATES SMALL BUSINESS ADMINISTRATION <hr/> COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT (IN U.S. PLAINTIFF CASES ONLY) NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED <hr/> ATTORNEYS (IF KNOWN) United States Attorney for the District of Columbia United States Attorney General Department of Justice																												
II. BASIS OF JURISDICTION (PLACE AN x IN ONE BOX ONLY) <table style="width:100%;"> <tr> <td><input type="radio"/> 1 U.S. Government Plaintiff</td> <td><input type="radio"/> 3 Federal Question (U.S. Government Not a Party)</td> </tr> <tr> <td><input checked="" type="radio"/> 2 U.S. Government Defendant</td> <td><input type="radio"/> 4 Diversity (Indicate Citizenship of Parties in item III)</td> </tr> </table>	<input type="radio"/> 1 U.S. Government Plaintiff	<input type="radio"/> 3 Federal Question (U.S. Government Not a Party)	<input checked="" type="radio"/> 2 U.S. Government Defendant	<input type="radio"/> 4 Diversity (Indicate Citizenship of Parties in item III)	III CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN x IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT) FOR DIVERSITY CASES ONLY! <table style="width:100%;"> <thead> <tr> <th></th> <th>PTF</th> <th>DFT</th> <th></th> <th>PTF</th> <th>DFT</th> </tr> </thead> <tbody> <tr> <td>Citizen of this State</td> <td><input type="radio"/> 1</td> <td><input type="radio"/> 1</td> <td>Incorporated or Principal Place of Business in This State</td> <td><input type="radio"/> 4</td> <td><input type="radio"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td><input type="radio"/> 2</td> <td><input type="radio"/> 2</td> <td>Incorporated and Principal Place of Business in Another State</td> <td><input type="radio"/> 5</td> <td><input type="radio"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td><input type="radio"/> 3</td> <td><input type="radio"/> 3</td> <td>Foreign Nation</td> <td><input type="radio"/> 6</td> <td><input type="radio"/> 6</td> </tr> </tbody> </table>		PTF	DFT		PTF	DFT	Citizen of this State	<input type="radio"/> 1	<input type="radio"/> 1	Incorporated or Principal Place of Business in This State	<input type="radio"/> 4	<input type="radio"/> 4	Citizen of Another State	<input type="radio"/> 2	<input type="radio"/> 2	Incorporated and Principal Place of Business in Another State	<input type="radio"/> 5	<input type="radio"/> 5	Citizen or Subject of a Foreign Country	<input type="radio"/> 3	<input type="radio"/> 3	Foreign Nation	<input type="radio"/> 6	<input type="radio"/> 6
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IV. CASE ASSIGNMENT AND NATURE OF SUIT

(Place a X in one category, A-N, that best represents your cause of action and one in a corresponding Nature of Suit)

<input type="radio"/> A. Antitrust <input type="checkbox"/> 410 Antitrust	<input type="radio"/> B. Personal Injury/Malpractice <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Medical Malpractice <input type="checkbox"/> 365 Product Liability <input type="checkbox"/> 368 Asbestos Product Liability	<input checked="" type="radio"/> C. Administrative Agency Review <input type="checkbox"/> 151 Medicare Act <u>Social Security:</u> <input type="checkbox"/> 861 HIA ((1395M)) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <u>Other Statutes</u> <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input checked="" type="checkbox"/> 890 Other Statutory Actions (If Administrative Agency is Involved)	<input type="radio"/> D. Temporary Restraining Order/Preliminary Injunction Any nature of suit from any category may be selected for this category of case assignment. *(If Antitrust, then A governs)*
<input type="radio"/> E. General Civil (Other) OR <input type="radio"/> F. Pro Se General Civil			
<u>Real Property</u> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent, Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property <u>Personal Property</u> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<u>Bankruptcy</u> <input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <u>Prisoner Petitions</u> <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <u>Property Rights</u> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark <u>Federal Tax Suits</u> <input type="checkbox"/> 870 Taxes (US plaintiff or defendant) <input type="checkbox"/> 871 IRS-Third Party 26 USC 7609	<u>Forfeiture/Penalty</u> <input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 RR & Truck <input type="checkbox"/> 650 Airline Regs <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other <u>Other Statutes</u> <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 430 Banks & Banking <input type="checkbox"/> 450 Commerce/ICC Rates/etc. <input type="checkbox"/> 460 Deportation	<input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions <input type="checkbox"/> 470 Racketeer Influenced & Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Satellite TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 900 Appeal of fee determination under equal access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes <input type="checkbox"/> 890 Other Statutory Actions (if not administrative agency review or Privacy Act)

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<input type="radio"/> G. Habeas Corpus/ 2255 <input type="checkbox"/> 530 Habeas Corpus-General <input type="checkbox"/> 510 Motion/Vacate Sentence <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee	<input type="radio"/> H. Employment Discrimination <input type="checkbox"/> 442 Civil Rights-Employment (criteria: race, gender/sex, national origin, discrimination, disability age, religion, retaliation) *(If pro se, select this deck)*	<input type="radio"/> I. FOIA/PRIVACY ACT <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 890 Other Statutory Actions (if Privacy Act) *(If pro se, select this deck)*	<input type="radio"/> J. Student Loan <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (excluding veterans)
<input type="radio"/> K. Labor/ERISA (non-employment) <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Labor Railway Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="radio"/> L. Other Civil Rights (non-employment) <input type="checkbox"/> 441 Voting (if not Voting Rights Act) <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 445 American w/Disabilities-Employment <input type="checkbox"/> 446 Americans w/Disabilities-Other	<input type="radio"/> M. Contract <input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholder's Suits <input type="checkbox"/> 190 Other Contracts <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<input type="radio"/> N. Three-Judge Court <input type="checkbox"/> 441 Civil Rights-Voting (if Voting Rights Act)

V. ORIGIN

- ☒ 1 Original Proceeding
 ☐ 2 Removed from State Court
 ☐ 3 Remanded from Appellate Court
 ☐ 4 Reinstated or Reopened
 ☐ 5 Transferred from another district (specify)
 ☐ 6 Multi district Litigation
 ☐ 7 Appeal to District Judge from Mag. Judge

VI. CAUSE OF ACTION (CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE.)
 28 U.S.C. § 1331; U.S. Const. Amend. V & Art. I § 1; 5 U.S.C. § 702; Facial Constitutional challenge to a racial classification in the Small Business Act.

VII. REQUESTED IN COMPLAINT

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 ☐

DEMAND \$ 0 Check YES only if demanded in complaint
 JURY DEMAND: YES ☐ NO ☒

VIII. RELATED CASE(S) IF ANY

(See instruction)

YES ☒ NO ☐

If yes, please complete related case form.

DATE 05/07/2012

SIGNATURE OF ATTORNEY OF RECORD



INSTRUCTIONS FOR COMPLETING CIVIL COVER SHEET JS-44
 Authority for Civil Cover Sheet

The JS-44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. Listed below are tips for completing the civil cover sheet. These tips coincide with the Roman Numerals on the Cover Sheet.

- I. COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF/DEFENDANT (b) County of residence: Use 11001 to indicate plaintiff is resident of Washington, D.C.; 88888 if plaintiff is resident of the United States but not of Washington, D.C., and 99999 if plaintiff is outside the United States.
- III. CITIZENSHIP OF PRINCIPAL PARTIES: This section is completed only if diversity of citizenship was selected as the Basis of Jurisdiction under Section II.
- IV. CASE ASSIGNMENT AND NATURE OF SUIT: The assignment of a judge to your case will depend on the category you select that best represents the primary cause of action found in your complaint. You may select only one category. You must also select one corresponding nature of suit found under the category of case.
- VI. CAUSE OF ACTION: Cite the US Civil Statute under which you are filing and write a brief statement of the primary cause.
- VIII. RELATED CASES, IF ANY: If you indicated that there is a related case, you must complete a related case form, which may be obtained from the Clerk's Office.

Because of the need for accurate and complete information, you should ensure the accuracy of the information provided prior to signing the form.

3. Therefore, as further relief, ROTHE also requests that the Court prospectively enjoin all uses of the racial classification of section 8(a) by Defendants that prevent ROTHE from bidding on Defendants' contracts on an equal footing.

4. ROTHE also requests its costs, attorneys fees, and expenses in this action under the Equal Access to Justice Act, 28 U.S.C. § 2412.

5. ROTHE is not required to and does not seek to enjoin any specific solicitation or contract or pursue any as-applied challenge. It brings solely a facial constitutional challenge in this action.

6. ROTHE seeks no money damages.

JURISDICTION AND VENUE

7. This Court has jurisdiction pursuant to 28 U.S.C. § 1331, because this action arises under the Constitution and the laws of the United States.

8. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e)(1)(A) & (B). The official residence of all defendants for venue purposes is the District of Columbia. In addition, a substantial part of the unconstitutionality of the challenged racial classification arises from omissions that occurred in the District of Columbia.

PARTIES

9. Plaintiff ROTHE DEVELOPMENT, INC., 4614 Sinclair Road, San Antonio, Texas 78222, is a Texas corporation.

10. Defendant DEPARTMENT OF DEFENSE, 1000 Defense Pentagon, Washington, DC 20301-1000, is an Executive department of the United States.

11. Defendant SMALL BUSINESS ADMINISTRATION, 409 3rd Street, SW, Washington, DC 20416 is an agency under the general direction and supervision of the President.

FACTS

Section 8(a)'s Racial Classification

12. SBA's 8(a) program was established through an amendment to the Small Business Act on October 24, 1978, Pub. L. No. 95-507, § 202, 92 Stat. 1757, 1761 (codified as amended at 15 U.S.C. § 637 (2006)).¹

13. The stated purposes of the 8(a) program include "promot[ing] the business development of small business concerns owned and controlled by socially and economically disadvantaged individuals" and "clarify[ing] and expand[ing] the program for the procurement by the United States of articles, supplies, services, materials, and construction work from small business concerns owned by socially and economically disadvantaged individuals." 15 U.S.C. § 631(f)(2) (2006).

14. The statute defines socially disadvantaged individuals as "those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." *Id.* § 637(a)(5).

15. "Economically disadvantaged individuals are those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities" and are thus a subset of the socially disadvantaged. *Id.* § 637(a)(6)(A).

16. According to the statute, "[t]he [g]overnment-wide goal for participation by small business concerns owned and controlled by socially and economically disadvantaged individuals shall be established at not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year." *Id.* § 644(g)(1).

¹ All citations to the United States Code are to the 2006 code edition.

17. The statute provides:

It shall be the duty of the [Small Business] Administration and it is hereby empowered, whenever it determines such action is necessary or appropriate—

(A) to enter into contracts with the United States Government and any department, agency, or officer thereof having procurement powers In any case in which the Administration certifies to any officer of the Government having procurement powers that the Administration is competent and responsible to perform any specific Government procurement contract to be let by any such officer, such officer shall be authorized in his discretion to let such procurement contract to the Administration upon such terms and conditions as may be agreed upon between the Administration and the procurement officer. . . . ;

(B) to arrange for the performance of such procurement contracts by negotiating or otherwise letting subcontracts to socially and economically disadvantaged small business concerns ;

(C) to make an award to a small business concern owned and controlled by socially and economically disadvantaged individuals

Id. § 637(a)(1)(A)-(C).

18. The statute then provides that “[a] contract opportunity offered for award pursuant to this subsection shall be awarded on the basis of competition restricted to eligible [p]rogram [p]articipants” if certain criteria are met. *Id.* § 637(a)(1)(D).

19. “Eligible program participants” are those eligible to receive contracts under § 637(a). *Id.* § 636(j)(10).

20. The only “small business concerns” eligible to receive 8(a) contracts are:

- (1) those small business concerns that are “socially and economically disadvantaged,” *id.* § 637(a)(1)(B), meaning those more than “51% owned by one or more socially and economically disadvantaged individuals,” *id.* § 637(a)(4)(i)(I); or
- (2) those outright “owned and controlled by socially and economically disadvantaged individuals.” *Id.* § 637(a)(1)(C).

21. The definition of the term “socially disadvantaged” contains a racial classification. *Id.* § 637(a)(5) (defining socially disadvantaged individuals as “those who have been subjected to

racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities.”).

22. The statute also contains an additional racial classification in a presumption that all individuals who are members of certain racial groups are socially disadvantaged. *Id.* § 631(f) (“such groups include, but are not limited to, Black Americans, Hispanic Americans, Native Americans . . . Asian Pacific Americans . . . and other minorities”).²

23. In addition to the racial groups presumed socially disadvantaged under the statutory presumption, the Small Business Administration has purported to designate additional racial groups as socially disadvantaged. 13 C.F.R. § 124.103(b).

24. Under the statute, benefits flow from the status conferred by the definition and presumption, through a statutory goal to award a certain percentage of prime- and sub-contracts to socially disadvantaged small business concerns. *Id.* §§ § 637(a)(1)(D) & 644(g)(1).

Denial of Equal Protection

25. The definition, the presumption, and the goal, taken together, comprise the “racial classification of section 8(a)” (“section 8(a)’s racial classification” or the “statutory racial

² Congressional amendments in 1986 (Pub. L. No. 99-272, § 18015, 100 Stat. 370) and 1988 (Pub. L. No. 100-656, § 207, 102 Stat. 3861, as amended by Pub. L. No. 101-37, § 6, 103 Stat. 72) also added “Indian tribes” and “Native Hawaiian Organizations” to the races deemed presumptively socially disadvantaged by 15 U.S.C. § 631(f)(1). However, ROTHE does not challenge the classifications “Indian tribes” and “Native Hawaiian Organizations” in this action. ROTHE understands the distinction in law drawn between “Native American” as a racial classification, on one hand, and an entity the United States has treaty or trust obligations towards, such as an “Indian tribe” or a “Native Hawaiian Organization” on the other. *Cf. Morton v. Mancari*, 417 U.S. 535 (1974) (legislation that singles out federally recognized Indian tribes is Constitutional “where the preference is reasonable and rationally designed to further Indian self-government”). ROTHE is only challenging the *racial* classification of section 8(a), which by definition includes only those groups currently classified by law as being “racial” groups: Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities to be determined by the SBA (to date, Subcontinent Asian Americans).

classification”) which denies ROTHE an equal footing to bid on Defendants’ contracts and which ROTHE challenges as facially unconstitutional in this action.

26. Defendants did not, and do not, have a compelling governmental interest that justifies section 8(a)’s racial classification.

27. Assuming *arguendo* that Defendants had a legitimate compelling interest, the statutory racial classification is not narrowly tailored to meet any such compelling interest.

28. The Defendants cannot produce evidence that shows “the most exact connection between justification and classification,” required by strict scrutiny; i.e., Defendants cannot show a relevant causal relationship between their alleged evidence and the racial classification of section 8(a), whether in terms of a “compelling interest” to enact the racial classification or “narrow tailoring” of its scope. Moreover, there is no causal relationship between the racial classification and any remedy for alleged discrimination.

29. Defendants cannot produce “a strong basis in evidence” to demonstrate the racial classification of section 8(a) is supported by a compelling interest, i.e., that it is supported by probative evidence that satisfies strict scrutiny.

Violation of Non-Delegation Doctrine

30. The racial classification of section 8(a), whether with the definition alone or with the definition and the presumption together or otherwise, is a facially unconstitutional delegation of Congressional power to SBA, to the extent it purports to delegate the authority to make or enact racial classifications for “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” (definition, 15 U.S.C. § 637(a)) or “other minorities” (presumption, 15 U.S.C. § 631(f)).

Injury to Rothe

31. The facts that establish Rothe's standing are those set forth in the Affidavit of ROTHE Vice President and corporate representative Dale Patenaude and attachments 1-5 thereto, attached to this Original Complaint and cited and incorporated herein by reference.

32. Section 8(a)'s racial classification denies ROTHE the equal protection of the laws to the extent it prevents ROTHE from competing for Defendants contracts on an equal footing with members of racial groups that receive benefits under the racial classification. Aff. of Patenaude at 2.

33. The denial of equal protection includes the exclusion of ROTHE from contracting opportunities that ROTHE would otherwise, but is not permitted to compete for, because it cannot participate in and has no desire to participate in the section 8(a) program and thus is not a beneficiary of section 8(a)'s racial classification. *Id.* at 2 & 5.

34. The denial of equal protection includes the purported designation of additional racial groups as socially disadvantaged by the SBA, which prevents ROTHE from bidding on an equal footing with members of those designated racial group(s). *Id.* at 2.

35. The unconstitutional delegation of authority to SBA to designate additional racial groups as socially disadvantaged is also an independent injury to ROTHE, insofar as it confers *any* competitive benefits on the racial groups designated by SBA—regardless of whether those benefits, conferred through section 8(a)'s racial classification, are themselves unconstitutional as a denial of equal protection. *Id.* at 2.

36. ROTHE is a small business concern that satisfies the applicable SBA size requirements for its industry with respect to net worth and number of employees. *Id.* at 3.

37. ROTHE bids on small business contracts in its area of expertise, nationwide, including contracts with DoD. *Id.* at 3-4.

38. In terms of bid frequency, ROTHE has historically and will continue to bid annually on approximately \$100 million of contracts in its area of expertise, in order to yield approximately \$10 million of annual gross income. *Id.* at 3.

39. Approximately 85-90% of ROTHE's annual gross income is derived from contracts with DoD. *Id.* at 4.

40. Defendants have let numerous contracts in ROTHE's area of expertise that have been set aside under section 8(a) using the racial classification, and the number and dollar value of those contracts is increasing relative to similar contracts not set aside under section 8(a). *Id.* at 4-5.

41. Data from the federal government's own procurement data system cited in the Affidavit of Dale Patenaude demonstrates that section 8(a)'s racial classification has foreclosed a not insignificant portion of ROTHE's potential business opportunities. *Id.* at 5-6.

42. Defendants have not stopped letting and are likely to continue to let contracts involving ROTHE's area of expertise that are set aside under section 8(a) using the racial classification. *Id.* at 4 & 6.

43. Thus, sometime in the near future ROTHE will want to bid on another government contract that pertains to its area of expertise that Defendants will have set aside under section 8(a) using the racial classification. *Id.* at 4 & 6.

44. ROTHE is able and ready to bid on contracts and a discriminatory statutory racial classification prevents it from doing so on an equal basis. *Id.* at 6.

45. ROTHE would otherwise, but is not permitted to compete for such contracts against small businesses that benefit from the section 8(a)'s racial classification when the contracts are set aside. *Id.* at 5.

46. If Defendants are not enjoined, they will continue to violate ROTHE's Constitutional rights.

Identification of Causes of Action and Sources of Relief

47. The Constitution itself provides a cause of action for equal protection claims. *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Davis v. Passman*, 442 U.S. 228 (1979); U.S. Const. Amend. V. The Court may order the relief in 28 U.S.C. § 2201 and 2202.

48. The Constitution itself provides a cause of action for nondelegation claims. U.S. Const. Art. 1 § 1. The Court may order the relief in 28 U.S.C. § 2201 and 2202.

49. The Administrative Procedure Act provides a second cause of action for the same relief on the nondelegation claim. ROTHE has suffered legal wrong to the extent SBA has purported to exercise what power Congress has unconstitutionally delegated, and thus has a cause of action under 5 U.S.C. § 702, for the relief available pursuant to 5 U.S.C. § 706(2)(B) ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . contrary to constitutional right, power, privilege, or immunity.")

50. All conditions precedent to the filing of this action have occurred.

FIRST CLAIM FOR RELIEF
(Declaratory Judgment)

51. ROTHE hereby incorporates all preceding paragraphs.

52. The racial classification of section 8(a) prevents ROTHE from bidding on Defendants' contracts on an equal footing, in violation of the equal protection component of the Due Process Clause of the Fifth Amendment of the Constitution.

53. The racial classification of section 8(a) is also an unconstitutional delegation of legislative authority to Defendant SBA in violation of Article I section 1 of the Constitution, not only because it prevents ROTHE from bidding on Defendants' contracts on an equal footing, but because the mere act of racially classifying (and thus extending the benefits of the racial classification to the designated racial groups) is a legislative power that cannot be and was not lawfully delegated under Article I, section 1 of the Constitution.

54. Pursuant to 28 U.S.C. § 2201 and 5 U.S.C. § 706(2), the Court is requested to adjudge, decree, declare, and hold the same unlawful and facially unconstitutional.

SECOND CLAIM FOR RELIEF
(Injunctive Relief)

55. ROTHE hereby incorporates all preceding paragraphs.

56. ROTHE is directly injured by the unconstitutional racial classification of section 8(a), and will suffer additional irreparable harm if the racial classification of section 8(a) remains in effect.

57. ROTHE has no adequate remedy at law.

58. The balance of hardships and the public interest favor injunction of the unconstitutional racial classification of section 8(a).

59. Pursuant to 28 U.S.C. § 2202 and 5 U.S.C. § 706(2), the Court is requested to permanently enjoin Defendants' use of section 8(a)'s racial classification to the extent it prevents ROTHE from competing for Defendants' contracts on an equal footing, and set it aside as facially unconstitutional.

THIRD CLAIM FOR RELIEF
(Costs, Attorneys Fees, and Expenses Pursuant to 28 U.S.C. § 2412)

60. ROTHE hereby incorporates all preceding paragraphs.

61. ROTHE has been forced to retain attorneys to vindicate its constitutional rights and interests, and to vindicate its interests on a level playing field before Defendants generally.

62. ROTHE satisfies all party eligibility requirements under 28 U.S.C. § 2412. Affidavit of Dale Patenaude at 3.

63. The position of Defendants is not substantially justified. Any defense of this action by Defendants is vexatious, litigation-multiplying, in bad faith, for purposes of delay, and unconscionable.

64. Pursuant to 28 U.S.C. § 2412, the Court is requested to award costs and reasonable attorneys' fees and expenses in its discretion or as mandated by statute.

PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, PLAINTIFF ROTHE DEVELOPMENT, INC.

RESPECTFULLY REQUESTS THAT THIS COURT ISSUE A JUDGMENT TO:

1. Declare that section 8(a)'s racial classification is facially unconstitutional.
2. Permanently enjoin Defendants' use of section 8(a)'s racial classification to the extent it prevents ROTHE from competing for Defendants' contracts on an equal footing, and set it aside as facially unconstitutional.
3. Award Plaintiff its costs of this action and attorneys' fees and expenses; and
4. Grant such other relief as the Court deems just and proper.

Dated May 9, 2012.

Respectfully submitted,

/s/ David F. Barton

David F. Barton

District Court Bar No. TX0096

Texas Bar No. 01853300

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