16-No 1239



In The
# Supreme Court of the United States

ROTHE DEVELOPMENT, INC.,

*Petitioner,*

v.

U.S. DEPARTMENT OF DEFENSE and the SMALL BUSINESS ADMINISTRATION,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

The Section 8(a) program of the Small Business Act ("Act"), 15 U.S.C. § 631 *et seq.*, grants the Small Business Administration the authority to, *inter alia*, set aside contracts for, and give other benefits to, "small business concerns" that are owned by "socially and economically disadvantaged individuals." *Id.* § 637(a)(1). Section 8(a)(5) of the Act 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). Although Section 8(a)(5) does not expressly define "socially disadvantaged individuals," Congress determined in Section 2(f) of the Act that many persons "are socially disadvantaged because of their identification as members of certain groups" and listed "such groups" as including "Black Americans, Hispanic Americans, Native Americans . . . , Asian Pacific Americans . . . , and other minorities. . . ." *Id.* § 631(f)(1)(B)-(C). Petitioner, Rothe Development, Inc., a non-minority-owned, federal contractor, facially challenged the statutory provisions of the Section 8(a) program under the equal protection component of the Due Process Clause of the Fifth Amendment. A majority of a three-judge panel of the U.S. Court of Appeals for the D.C. Circuit ruled that the statutory provisions are facially race neutral. Based upon that ruling, the panel majority eschewed strict scrutiny in favor of rational basis review and rejected Rothe's equal protection challenge.

## QUESTIONS PRESENTED – Continued

The questions presented are:

1. Whether a statutory program that requires an agency to distribute benefits to "socially disadvantaged individuals," and defines "socially disadvantaged" in terms of membership in certain racial minority groups, classifies on the basis of race and is thus subject to strict scrutiny.

2. Whether a statute that may not classify exclusively on the basis of race, but uses race as a factor in determining eligibility for benefits, is subject to strict scrutiny.

## PARTIES TO THE PROCEEDINGS

Petitioner, Rothe Development, Inc., was the plaintiff in the district court and the appellant before the D.C. Circuit.

Respondents, U.S. Department of Defense and the Small Business Administration, were defendants in the district court and appellees before the D.C. Circuit.

## CORPORATE DISCLOSURE STATEMENT

Petitioner, Rothe Development, Inc., certifies that it is privately held, has no parent corporation, has never issued any public stock, and no publicly held company owns 10 percent or more of its stock.

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## PETITION FOR WRIT OF CERTIORARI

Rothe Development, Inc. ("Rothe") respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the D.C. Circuit in this case.

## OPINIONS BELOW

The opinion of the D.C. Circuit is reported at 836 F.3d 57, and is reproduced at Petitioner's Appendix ("App.") 1a-64a. The opinion of the district court is reported at 107 F. Supp. 3d 183, and is reproduced at App. 67a-127a.

## STATEMENT OF JURISDICTION

The judgment of the D.C. Circuit was entered on September 9, 2016. App. 65a. Rothe filed a timely petition for panel rehearing and/or rehearing en banc, and that petition was denied on January 13, 2017. App. 128a-130a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment provides, "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law[.]" U.S.

Const. amend. V. This Clause contains an equal protection component applicable to the federal government. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

The statutory provisions at issue are in the Small Business Act ("Act"), 15 U.S.C. § 631 *et seq*. Section 8(a) of the Act authorizes the Small Business Administration ("SBA") to, *inter alia*, enter into contracts with federal agencies, which the SBA then lets to eligible "small business concerns" that compete for the contracts in a sheltered market. 15 U.S.C. § 637(a)(1)(A)-(D); App. 133a-134a. Only "small business concerns" that are owned by "socially and economically disadvantaged" individuals are eligible to participate in the 8(a) program. 15 U.S.C. § 637(a)(1)(B); App. 133a-134a. "[S]ocially disadvantaged individuals" are persons "who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." 15 U.S.C. § 637(a)(5); App. 134a. Section 2(f)(1) of the Act, in turn, provides:

> (A) that the opportunity for full participation in our free enterprise system by socially and economically disadvantaged persons is essential if we are to obtain social and economic equality for such persons and improve the functioning of our national economy;
>
> (B) that many such persons are socially disadvantaged because of their identification as members of certain groups that have suffered the effects of discriminatory practices or

> similar invidious circumstances over which they have no control; [and]
>
> (C) that such groups include, but are not limited to, Black Americans, Hispanic Americans, Native Americans, Indian tribes, Asian Pacific Americans, Native Hawaiian Organizations, and other minorities. . . .

15 U.S.C. § 631(f)(1); App. 131a-132a. The SBA may also add "group[s]" to those in 15 U.S.C. § 631(f)(1)(C) "after consultation with the Associate Administrator for Minority Small Business and Capital Ownership Development." *Id.* § 637(a)(8); App. 135a. Finally, Congress has set a "[g]overnment-wide goal" that "small business concerns owned and controlled by socially and economically disadvantaged individuals" receive "not less than 5 percent of the total value" of all government contracts awarded each year. 15 U.S.C. § 644(g)(1)(A)(iv); App. 136a.

## STATEMENT OF THE CASE

### I. LEGAL BACKGROUND.

In 1958, Congress created the Section 8(a) program to "aid, counsel, assist, and protect . . . the interests of small-business concerns" and to "insure that a fair proportion of the total purchases and contracts for property and services for the Government . . . be placed with small-business enterprises. . . ." Pub. L. No. 85-536, § 2, 72 Stat. 384 (1958). In furtherance of the Section 8(a) program, Congress delegated to the SBA the

authority to enter into contracts with federal agencies to furnish goods and services. *Id.* § 2, 72 Stat. at 389-90. The SBA is also authorized to let contracts to "small-businesses concerns" for the performance of such contracts. *Id.* § 2, 72 Stat. at 390.

Prior to 1978, the statutory provisions of the Section 8(a) program were race neutral. *See* Pub. L. No. 85-536, § 2, 72 Stat. at 384 (defining "small-business concern" as "one which is independently owned and operated and which is not dominant in its field"). In 1978, Congress amended the Section 8(a) program to make it an affirmative action program. *See* Pub. L. No. 95-507, §§ 201-233, 92 Stat. 1757, 1760-73 (1978); H.R. Conf. Rep. No. 95-1714, at 20-21 (1978) (explaining that the 1978 amendments are focused on introducing a race-based remedy to counter perceived discrimination in government contracting). In fact, the 1978 amendments were a legislative response to past administrative efforts "to increase the level of business ownership by minorities" and were intended to provide "a strong, clear legislative mandate for minority business development." 124 Cong. Rec. S8695-98 (daily ed. June 7, 1978) (statement of Sen. Nunn); *see* H.R. Rep. No. 94-468, at 1-2 (1975). Specifically, Congress declared that it is "the purpose of section 8(a) to . . . foster business ownership by individuals who are both socially and economically disadvantaged[.]" Pub. L. No. 95-507, § 201, 92 Stat. at 1760-61 (codified as amended at 15 U.S.C. § 631(f)(2)). Congress also determined that many "persons are socially disadvantaged because of their identification as members of certain

*groups* that have suffered the effects of discriminatory practices or similar invidious circumstances over which they have no control[,]" and "that such *groups* include, but are not limited to, Black Americans, Hispanic Americans, Native Americans, and other minorities[.]" Pub. L. No. 95-507, § 201, 92 Stat. at 1760-63 (all emphasis added) (codified as amended at 15 U.S.C. § 631(f)(1)(B)-(C)).[1] Finally, Congress mandated that the SBA give preference to "socially and economically disadvantaged small business concerns" in awarding contracts under the Section 8(a) program. Pub. L. No. 95-507, § 202(a) (codified at 15 U.S.C. § 637(a)(1)(A)-(C)); *id.* § 204 (codified at 15 U.S.C. § 636(j)(4)) (the SBA "*shall* give preference to . . . small businesses eligible to receive contracts pursuant to Section 8(a) of this Act." (emphasis added)).

Since the 1978 amendments, the statutory provisions of the Section 8(a) program have remained largely unchanged. In order for a "small business concern" to participate in the Section 8(a) program, the SBA must certify that the firm is a small disadvantaged business ("SDB"), defined as a business concern that is at least 51 percent "owned by one or more socially and economically disadvantaged individuals." 15 U.S.C. §§ 637(a)(4)(A)(i)(I), 636(j)(11)(E), (F); 13 C.F.R. § 124.1002 (2016). "Socially disadvantaged individuals are those who have been subjected to racial or ethnic

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[1] These provisions of Section 201 of Public Law 95-507 were originally designated as Section 2(e) of the Act, but are now designated, and are referred to herein, as Section 2(f). *See* Pub. L. No. 100-418, § 8002, 102 Stat. 1107, 1553 (1988); 15 U.S.C. § 631(f).

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) (emphasis added). "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 as compared to others in the same business area who are not socially disadvantaged. . . ." 15 U.S.C. § 637(a)(6)(A) (emphasis added). "Economically disadvantaged individuals" are therefore a subset of "socially disadvantaged individuals." *See Dynalantic Corp. v. Dep't of Defense*, 115 F.3d 1012, 1017 (D.C. Cir. 1997) ("*Dynalantic II*") ("[T]he statute treats the concept of economic disadvantage as a subset of social disadvantage, not vice versa."), *rev'g sub nom. Dynalantic Corp. v. U.S. Dep't of Defense*, 937 F. Supp. 1 (D.D.C. 1996) ("*Dynalantic I*").

## II. PARTIES AND PROCEEDINGS BELOW.

Rothe is a small business concern based in San Antonio, Texas, that provides computer services and regularly bids on Department of Defense ("DOD") contracts. App. 75a. Because Rothe is not an SDB, it is prohibited from participating in the Section 8(a) program. *Id.* 75a-76a. Rothe is thus barred from bidding on numerous DOD contracts within its area of expertise that have been and will be awarded to SDBs under the Section 8(a) program. *Id.* As Rothe cannot compete for DOD contracts on an equal footing with minority-owned businesses, Rothe filed suit against the DOD

and the SBA asserting a facial challenge to the statutory provisions of the Section 8(a) program. *Id.* 4a, 76a. Specifically, Rothe alleged that the statutory provisions of the Section 8(a) program contain a racial classification that denies Rothe equal protection of the law in violation of the equal protection component of the Due Process Clause of the Fifth Amendment. *Id.* 4a.

On cross-motions for summary judgment, the district court determined that the statutory provisions of the Section 8(a) program classify on the basis of race. App. 113a ("[T]he Section 8(a) program is specifically directed toward 'socially disadvantaged individuals' and that category of persons is presumptively determined by reference to race." (citing 15 U.S.C. §§ 637(a)(5), 631(f)(1)(B)-(C))). Accordingly, the district court subjected the statutory provisions of the Section 8(a) program to strict scrutiny. App. 113a-122a.

In holding that the provisions survived strict scrutiny, the district court first ruled that Congress had a "compelling interest" for the 8(a) program, *i.e.*, "remedying race-based discrimination and its effects." App. 116a (quotation and alteration omitted). Then, relying primarily on post-enactment evidence, the district court ruled that Congress had a strong basis in evidence that the identified compelling interest mandated "race-based remedial action."[2] App. 94a-96a, 116a. Finally,

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[2] *But see Shaw v. Hunt*, 517 U.S. 899, 910 (1996) (The government must have a "strong basis in evidence" to conclude that remedial action is necessary, "'*before* it embarks on an affirmative-action program[.]'" (emphasis in original) (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion))); *Rothe Dev.*

the district court ruled that the Section 8(a) program is narrowly tailored.[3] App. 117a-118a.

On appeal, both Rothe and the government agreed that strict scrutiny applied because the statutory provisions of Section 8(a) classify on the basis of race. *E.g.*, Gov't C.A. Br. at 2 (Reframing the issue as "[w]hether the race-conscious provisions in Section 8(a) of the [Act] are constitutional on their face."); *id.* at 4 ("Members of certain racial and ethnic groups . . . are presumed to be socially disadvantaged because Congress found that members of these groups 'have suffered the

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*Corp. v. Dep't of Defense*, 413 F.3d 1327, 1338 (Fed. Cir. 2005) ("[T]o be relevant in the strict scrutiny analysis, the evidence must be proven to have been before Congress prior to enactment of the racial classification.").

[3] Because the statutory race-based presumption of social disadvantage is effectively absolute, the district court's ruling that the statutory provisions of the Section 8(a) program are narrowly tailored was in error. *Compare* App. 117a-118a (district court asserting that the program is "neither over- nor under-inclusive"), *with Dynalantic II*, 115 F.3d at 1016-17 ("[O]ver 99% of the firms [in the 8(a) program] qualified as a result of race-based presumptions[.]"). Because eligibility for the benefits awarded under the statutory provisions of the Section 8(a) program are primarily based on one's membership in a racial minority group regardless of actual social disadvantage, the program is not narrowly tailored. *See Gratz v. Bollinger*, 539 U.S. 244, 270-76 (2003) (a program where "the factor of race" is effectively "decisive" in distributing benefits is not narrowly tailored (quotation omitted)); *see also* George R. La Noue, *Defining Social and Economic Disadvantage: Are Government Preferential Business Certification Programs Narrowly Tailored?*, 12 U. Md. L.J. Race, Religion, Gender & Class 274, 316-17 (2012) (concluding that the social disadvantage presumption is not narrowly tailored because it "eliminates individualized consideration").

effects of discriminatory practices or similar invidious circumstances.'" (quoting 15 U.S.C. § 631(f)(1)(B)-(C))). In fact, the government admitted that "[s]trict scrutiny applies because Section 8(a) employs a race-conscious rebuttable presumption to define socially disadvantaged individuals." *Id.* at 16 (citing *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 212-13 (1995)).

Notwithstanding the government's admission, in a 2-1 decision the panel majority affirmed the district court's judgment on the basis that strict scrutiny did not even apply. App. 6a. According to the panel majority, the 8(a) program "do[es] not on [its] face classify individuals by race" because the statutory provisions use "facially race-neutral terms" to determine eligibility. App. 4a-5a. In reaching that conclusion, the majority ignored Congress's list of socially disadvantaged racial groups in Section 2(f) of the Act, 15 U.S.C. § 631(f)(1)(B)-(C), because "Section [2(f)] is located in the findings section of the statute, not in the operative provision that sets forth the program's terms and the criteria for participation." App. 14a-15a. The majority also suggested that the statutory provisions of the Section 8(a) program do not "expressly limit participation . . . to racial or ethnic minorities" and asserted that Section 8(a) "envisions an individual-based approach that focuses on experience rather than on a group characteristic." App. 5a, 9a. In the majority's view, the fact that Section 8(a)(5) uses the word "individual" distinguishes the Section 8(a) program from similar affirmative action programs that "provide for preferential treatment based on an applicant's race – a *group*

classification. . . ." App. 10a (alteration and quotation omitted) (emphasis in original). In short, by reading each of the relevant statutory provisions of the 8(a) program in a vacuum, the majority determined that Section 2(f)'s list of "socially disadvantaged" racial groups was irrelevant to Section 8(a)'s mandate that the SBA set aside contracts for "socially and economically disadvantaged" individuals who are deemed to have suffered discrimination based upon their membership in such a racial group. App. 14a-15a, 19a.

Judge Henderson authored a strong dissent, explaining that the statutory provisions of the Section 8(a) program contain a "paradigmatic racial classification." App. 36a-44a (Henderson, J., dissenting). She emphasized that Section 8(a)(5) defines social disadvantage by membership in a group, and, in Section 2(f), Congress lists socially disadvantaged groups, all of which are racial minorities. App. 36a-39a. The only reasonable way to read these provisions *in pari materia*, Judge Henderson explained, is to give effect to Congress's unambiguous intent to grant preferences to small businesses owned by racial minorities. App. 39a. In fact, that is precisely the way that the SBA interprets the statutory provisions of the Section 8(a) program, *i.e.*, as mandating that an individual's membership in a certain racial minority group constitutes social disadvantage. App. 43a (Judge Henderson quoting the government's counsel as arguing "[the] SBA is just carrying out what is in the statute, that Congress provided the standards in the statute, and SBA in the

regulations are [sic] just applying what's in the statute, the standards in the statute.").

Judge Henderson also pointed out that Congress not only statutorily listed racial groups as socially disadvantaged groups, but later granted the SBA authority to add to that list. App. 40a, 57a-59a. And, because "Congress plainly made the 'group' criterion preeminent[,]" it is "*group* membership – and the prejudice or bias the group has experienced – that triggers social disadvantage." App. 37a-38a (emphasis in original). Accordingly, Judge Henderson concluded that the statutory provisions of the Section 8(a) program are subject to strict scrutiny, regardless of the fact that non-minority individuals are not *per se* excluded from demonstrating eligibility for the program. App. 51a ("It makes little sense to say that the Section 8(a) program is race-neutral because it only demotes non-minority applicants rather than locking them out entirely.").

Rothe now seeks this Court's review to ensure that strict scrutiny applies to statutory provisions that bestow a presumption of eligibility for billions of dollars' worth of government contracts on members of certain racial minority groups. *See Adarand*, 515 U.S. at 227 ("[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.").

## REASONS FOR GRANTING THE PETITION

### I. THE PANEL MAJORITY'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS THAT HOLD STRICT SCRUTINY APPLIES TO ALL RACIAL CLASSIFICATIONS.

#### A. The Statutory Provisions Of The Section 8(a) Program Contain A Paradigmatic Racial Classification.

This Court's decisions have made clear that drawing distinctions between citizens based on their race or ancestry is "odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). Racial classifications "are simply too pernicious to permit any but the most exact connection between justification and classification[.]" *Gratz*, 539 U.S. at 270 (internal quotation omitted). Therefore, "[i]t is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny." *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007).

The current Section 8(a) program is "a congressionally mandated affirmative action program. . . ." Jess H. Drabkin, *Minority Enterprise Development and the Small Business Administration's Section 8(a) Program: Constitutional Basis and Regulatory Implementation*, 49 Brook. L. Rev. 433, 442 (1983); *see United States v. Harris*, 821 F.3d 589, 591 (5th Cir. 2016). In turning the Section 8(a) program into an affirmative

action program, Congress intended to benefit "[s]ocially disadvantaged individuals . . . who have been subjected to racial or ethnic prejudice . . . because of their identity as a member of a group without regard to their individual qualities." 15 U.S.C. § 637(a)(5). Congress also identified such individuals "as members of certain groups that have suffered the effects of discriminatory practices or similar invidious circumstances over which they have no control[,]" including such groups as "Black Americans, Hispanic Americans, Native Americans, Indian tribes, Asian Pacific Americans, Native Hawaiian Organizations, and other minorities."[4] 15 U.S.C. § 631(f)(1)(B)-(C). Until the panel majority decision in the instant case, it was recognized by Congress, the federal government, and the courts that the statutory provisions of the Section 8(a) program use race-conscious means to distribute burdens and benefits.[5] *See* App. 34a-35a, 64a (Henderson, J., dissenting) (noting the "chorus of voices" opining that the statutory

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[4] Rothe is not challenging any Section 8(a) preferences accorded to "Indian tribes" and "Native Hawaiian Organizations." *See* App. 4a n.1.

[5] Even commentators have agreed that the statutory provisions of the Section 8(a) program classify on the basis of race, regardless of whether they are critiquing or defending the program. *E.g.*, Drabkin, 49 Brook. L. Rev. at 441 ("Socially disadvantaged groups are defined as including but not limited to 'Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities.'" (quoting 15 U.S.C. § 631(f)(1))); Note, *Presumed Disadvantaged: Constitutional Incongruity in Federal Contract Procurement and Acquisition Regulations*, 115 W. Va. L. Rev. 847, 855 (2012) (The Act contains a "statutory presumption" "that certain racial minorities are socially disadvantaged.").

provisions of the Section 8(a) program contain a racial classification).

For example, in passing the 1978 amendments to the Act, Congress established race-based eligibility criteria for the Section 8(a) program and "provide[d] the SBA with the necessary guidance to assure proper administration of this important program." 124 Cong. Rec. S17908-09 (daily ed. Oct. 10, 1978) (statement of Sen. Weicker); 124 Cong. Rec. H11818-19 (daily ed. Oct. 6, 1978) ("Our criteria for eligibility are 'social and economic disadvantage' and the social disadvantage criterion not only takes into account race and ethnic status, but in many cases recognizes that such status is the sole cause of social disadvantagement." (statement of Rep. Addabbo)); S. Rep. No. 95-1070, at 16 (1978) (Tying Section 2(f) to Section 8(a)(5) and asserting that "the procurement authority under section 8(a) . . . should be used only for developing minority and other socially and economically disadvantaged businesses."). In short, Congress viewed Section 2(f) as providing the definition of "socially and economically disadvantaged" groups eligible for the Section 8(a) program. S. Rep. No. 95-1070, at 3 ("The purpose of this chapter is to clarify which groups and persons may be eligible to receive assistance under 8(a).").

Similarly, following *Adarand*, the Department of Justice explained:

> Through its initial authorization of the use of section 8(a) of the Small Business Act to expand opportunities for minority-owned firms

> and through reenactments of this and other programs designed to assist such businesses, *Congress has repeatedly made the judgment that race-conscious federal procurement programs are needed to remedy the effects of discrimination* that have raised artificial barriers to the formation, development and utilization of businesses owned by minorities and other socially disadvantaged individuals.

61 Fed. Reg. 26,042, 26,042 (May 23, 1996) (emphasis added). The SBA's understanding of the statutory provisions of the Section 8(a) program mirrors that of the Department of Justice. *See, e.g.*, 45 Fed. Reg. 79,413, 79,414 (Dec. 1, 1980) (With the 1978 amendments, "[Congress] sought to single out for special treatment those persons who have had greatest difficulty, through no fault of their own, in achieving a competitive position in the business world. *Hence, its designation of members of certain minority groups as socially disadvantaged.*" (emphasis added)).

In addition, prior to the panel majority's decision in the instant case, the D.C. Circuit had ruled that a federal contractor had standing to bring an equal protection challenge to the Section 8(a) program. *Dynalantic II*, 115 F.3d. at 1015-20. Although the court did not expressly rule that the statutory provisions of the program contained a racial classification, it labeled the government's argument that the "8(a) statute is not itself race-conscious" as "rather dubious." *Id.* at 117; *see id.* at 117 n.3 (noting that "[t]he statute itself actually might *require* race-conscious regulations"

(emphasis in original)). Importantly, on remand, the district court agreed with the parties that the statutory provisions of the 8(a) program contain a racial classification. *Dynalantic Corp. v. U.S. Dep't of Defense*, 885 F. Supp. 2d 237, 250 (D.D.C. 2012) ("*Dynalantic III*"); *see* App. 113a-114a (district court in the instant case relying on *Dynalantic III* in concluding that the statutory provisions of the Section 8(a) program utilize race-based criteria).

In breaking from the consensus that the statutory provisions of the Section 8(a) program contain a racial classification, the panel majority reasoned that Section 8(a) "uses facially race-neutral terms of eligibility to identify individual victims of discrimination, prejudice, or bias," App. 4a-5a, and "envisions an individual-based approach that focuses on experience rather than on a group characteristic." *Id.* 9a-11a. The panel majority also ignored the significance of Section 2(f) of the Act based on its conclusion that Section 2(f) "is located in the findings section of the statute, not in the operative provision that sets forth the program's terms and the criteria for participation." *Id.* 14a. Although the flaws in the panel majority's reasoning are numerous, two are particularly egregious.[6]

First, the panel majority's assertion that Section 8(a) "uses facially race-neutral terms" ignores the plain

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[6] As set forth in Section II, *infra*, the panel majority compounded these errors by violating this Court's principles of statutory construction in concluding that the statutory provisions at issue are facially race neutral.

language of Section 8(a)(5), which defines "[s]ocially disadvantaged individuals" based upon "their identity as a member of a group without regard to their individual qualities."[7] 15 U.S.C. § 637(a)(5). Section 2(f), in turn, describes the characteristics of socially disadvantaged groups, *id.* § 631(f)(1)(B), and lists racial minority groups as examples of such groups. *Id.* § 631(f)(1)(C). In addition to the racial groups listed by Congress in Section 2(f), Section 8(a)(8) authorizes the SBA to add additional racial groups to the list when it makes a finding that "a group has been subjected to prejudice or bias. . . ." *Id.* § 637(a)(8); *see* 13 C.F.R.

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[7] By focusing on the word "individuals" within the term "socially disadvantaged individuals" in Section 8(a)(5) and ignoring the rest of the language of that provision, as well as the other statutory provisions, the panel erroneously interpreted Section 8(a)(5) as employing an "individual-based approach. . . ." App. 9a. Section 8(a)(5) and the other statutory provisions, however, demonstrate that an "individual-based approach" is used primarily in determining economic disadvantage, not social disadvantage. *See* 15 U.S.C. § 637(a)(6). Only if the presumption of social disadvantage in Sections 8(a)(5) and 2(f) is not invoked would an "individual-based approach" ever be utilized for determining social disadvantage. *See Dynalantic III*, 885 F. Supp. 2d at 244, 285-86; 13 C.F.R. § 124.103(c) (2016). In any event, under this Court's precedents, whether a government classifies on the basis of race as an individual characteristic goes to whether the race-conscious program is narrowly tailored, not to whether strict scrutiny applies in the first place. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (opinion of Powell, J.) (distinguishing between a racial quota system and an admissions system that considers race as an individual factor, but assuming that both are subject to strict scrutiny); *Grutter v. Bollinger*, 539 U.S. 306, 326, 337 (2003) (Even the "highly individualized, holistic review" of "applicants of all races" " 'must be analyzed by a reviewing court under strict scrutiny.' " (quoting *Adarand*, 515 U.S. at 227)).

§ 124.103(b)(1) (2016) (indicating that the SBA has added "Subcontinent Asian Americans" to Congress's list). Thus, in statutorily designating certain racial groups as "socially disadvantaged," 15 U.S.C. § 631(f)(1)(B)-(C), and granting the SBA the authority to do the same, Congress created a presumption of eligibility and, thus, "distributed . . . benefits on the basis of individual racial classifications[.]" *Parents Involved*, 551 U.S. at 720. In fact, the only way to read the statutory provisions of the Section 8(a) program *in pari materia* is to give effect to the plain language of the provisions in the context of the program's "race-conscious theme. . . ." *Dynalantic II*, 115 F.3d at 1017. As Judge Henderson recognized in her dissent: "The message is clear – groups suffer discrimination and therefore persons who are members of those groups are socially disadvantaged."[8] App. 39a.

Second, the panel majority relied on the location of Section 2(f) in the "findings" section of the Act and analogized it to a preamble of a statute in order to read Section 2(f) out of the Act and out of the Section 8(a) program. App. 14a-15a. But Congress voted on and passed Section 2(f), and therefore Section 2(f) is not a "preamble," but a critical component of both the Act

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[8] This reading is reinforced by 15 U.S.C. § 644(g)(1)(A)(iv), which sets a government-wide goal of awarding at least 5 percent of the total value of government contracts to "small business concerns owned and controlled by socially and economically disadvantaged individuals[.]" Even if 15 U.S.C. § 644(g)(1)(A)(iv) merely sets a goal, "it is a line drawn on the basis of race and ethnic status." *See Bakke*, 438 U.S. at 289 (opinion of Powell, J.).

and the statutory Section 8(a) program.[9] *See* Pub. L. No. 95-507, § 201, 92 Stat. at 1760 (Section 2(f) language located after the enactment clause); *cf. Yazoo & M.V.R. Co. v. Thomas*, 132 U.S. 174, 188 (1889) (Where "the preamble is no part of the act, [it] cannot enlarge or confer powers, nor control the words of the act, unless they are doubtful or ambiguous. . . ."). In fact, analogizing Section 2(f) – a statutory provision that provides further clarity to the very term at issue – to a preamble requires a leap of logic not explained by the panel majority. This is especially true considering that Section 2(f)'s language is materially different from the "general language of a preamble[.]"[10] *See* App. 47a-48a (Henderson, J., dissenting) ("Traditionally, a 'preamble' to a statute is a prefatory explanation or statement that customarily precedes the enacting clause in the

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[9] Contrary to the panel majority's reasoning, all sections of a duly enacted statute are "operative." *See Corley v. United States*, 556 U.S. 303, 314 (2009) ("a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant" (quotations and alteration omitted)).

[10] Even if the panel majority were correct in analogizing a duly enacted statutory provision to an unenacted preamble, this Court has long considered the preamble "a key to open the understanding of a statute[.]" *Coosaw Mining Co. v. South Carolina*, 144 U.S. 550, 562-63 (1892). As Section 2(f) illuminates the meaning of "group" in Section 8(a)(5), the panel majority erred in not considering it. Joseph Story, *Commentaries on the Constitution of the United States*, § 218, at 163 (abridged ed. 1833) ("[T]he preamble of a statute is a key to open the mind of the makers, as to the mischiefs, which are to be remedied, and the objects, which are to be accomplished by the provisions of the statute.").

text of a bill, and consequently is frequently understood not to be part of the law." (quotation and footnote omitted)). In fact, Section 2(f) reads like a definitional section. 15 U.S.C. § 631(f)(1)(B)-(C). Further, a court should always review the entirety of a statute, in construing a provision thereof, regardless of whether the provision is ambiguous, and that includes reviewing Congress's findings. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); *Gonzales v. Raich*, 545 U.S. 1, 20-21, 33 (2005) (relying on congressional findings to hold that the Controlled Substances Act was constitutional).

In sum, the statutory provisions of the Section 8(a) program contain a paradigmatic racial classification because they distribute burdens and benefits on the basis of race. *See* App. 44a (Henderson, J., dissenting). Because the panel majority's contrary conclusion and failure to apply strict scrutiny are irreconcilable with the plain language of the provisions and this Court's precedents, review is warranted.

### B. The Panel Majority's Determination That Strict Scrutiny Does Not Apply Because Race Is Not The Sole Factor In Distributing Burdens And Benefits Conflicts With This Court's Precedents.

In ruling that the statutory provisions of the Section 8(a) program do not classify on the basis of race, the panel majority placed great emphasis on its belief that "individuals of any race" could "be considered

'socially disadvantaged.'" App. 11a. Although the panel majority did not think "such inclusiveness *alone* renders the statute race neutral[,]" it considered it to be a substantial factor. *Id.* (emphasis added).

The panel majority's ruling directly conflicts with this Court's precedents. Whether a statute entirely bars non-minorities goes to whether the statute is narrowly tailored, not to whether strict scrutiny applies. *See Grutter*, 539 U.S. at 334-35. In contrast, whether a racial classification exists so as to trigger strict scrutiny requires only a determination that non-minorities are disadvantaged. *See Gratz*, 539 U.S. at 271-72 (admissions program that "automatically distributes" an advantage to applicants that are members of minority groups, but does not shut out non-minorities entirely, is subject to strict scrutiny); *Grutter*, 539 U.S. at 334 (Whether a government program considers race or ethnicity "only as a plus" "without insulating the individual from comparison with all other candidates" goes to whether the program is narrowly tailored under a strict scrutiny inquiry (quotations and alteration omitted)); *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 508 (1989) (giving applicants "an absolute preference over other citizens based solely on their race[]" is not only subject to strict scrutiny; it fails the test). In short, this Court applies strict scrutiny whenever the government uses race as a factor in distributing burdens and benefits, regardless of whether race

is the sole factor.[11] *See Adarand*, 515 U.S. at 208-10 (non-mandatory racial preferences are subject to strict scrutiny); *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411, 2416 (2013) ("*Fisher I*") (applying strict scrutiny even where race was "not assigned an explicit numerical value" because "it is undisputed that race is a meaningful factor"). In fact, whether race is the deciding factor or "but a factor of a factor of a factor" – strict scrutiny still applies. *Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198, 2207 (2016) ("*Fisher II*") (internal quotation omitted).

Here, the statutory provisions of the Section 8(a) program are basically indistinguishable from the racial classifications that were subjected to strict scrutiny in *Gratz*. As Judge Henderson recognized, "Congress has ordered that certain contracts be set aside for 'socially disadvantaged' individuals . . . , and has declared that members of certain *racial* groups are presumed to be socially disadvantaged. It cannot get more explicit than that." App. 51a (citing 15 U.S.C. §§ 637(a), 631(f)(1)(C)) (quotation omitted) (emphasis in original). Thus, the statutory provisions of the Section 8(a) program do exactly the same thing that the admissions policy in *Gratz* did – they "tak[e] into account diversity within and among all racial and ethnic groups" but "automatically" distribute a benefit to members of

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[11] By way of contrast, when "consideration of race is not directly related to the allocation of burdens or benefits[,]" for example, "gathering racial data for research purposes[,]" strict scrutiny is not triggered. Angelo N. Ancheta, *Contextual Strict Scrutiny and Race-Conscious Policy Making*, 36 Loy. U. Chi. L.J. 21, 27 (2004).

certain minority groups. 539 U.S. at 277 (O'Connor, J., concurring). Like the admissions policy in *Gratz*, the availability of a preference for individuals who suffer "socioeconomic disadvantage" independent of minority status does not save the statutory provisions of the Section 8(a) program from strict scrutiny.[12] *See id.* at 255. The inescapable result of Congress's designation of certain racial minority groups as "socially disadvantaged" is that members of those groups receive an advantage over non-minorities based on their race.[13] Accordingly, this Court's review is warranted because the panel majority's decision conflicts with this Court's decisions that hold that strict scrutiny applies whenever race is a factor.

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[12] Indeed, the admissions program in *Gratz* considered race as only one of several factors, but still failed strict scrutiny. 539 U.S. at 275.

[13] Assuming the panel majority was correct in erasing Section 2(f) from the statute, the statutory provisions of the Section 8(a) program would *still* be subject to strict scrutiny because Section 8(a)(5) directs the SBA to make determinations of social disadvantage on the basis of "racial or ethnic prejudice or cultural bias. . . ." 15 U.S.C. § 637(a)(5); *see*, 15 U.S.C. § 637(a)(8); *see also Adarand*, 515 U.S. at 223 ("[a]ny preference based on racial or ethnic criteria" is subject to strict scrutiny (quotation omitted)). In fact, even the panel majority does not dispute that race is a factor in Section 8(a)(5) – it simply deemed this factor neutral because Section 8(a)(5) does not expressly identify specific races. App. 3a, 10a-11a.

### C. In Eschewing Strict Scrutiny, The Panel Majority Misread The Legislative History, Which Demonstrates That Congress Created A Racial Classification.

The "cardinal canon" of statutory construction is that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992); *Aldridge v. Williams*, 44 U.S. 9, 24 (1845) ("The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself. . . ."). A corollary to this canon is that only in the rarest of circumstances should a court ever resort to the legislative history in an effort to determine the meaning of a statute. *See Blanchard v. Bergeron*, 489 U.S. 87, 99 (1989) (Scalia, J., concurring). Here, the panel majority erroneously relied on a snippet from the legislative history to conclude that the statutory provisions of the Section 8(a) program do not contain a racial preference because Congress allegedly "jettison[ed] an express racial presumption that appeared in an earlier version of the bill." App. 20a-21a. Even if the panel majority were correct in looking at the legislative history, it misinterpreted its cherry-picked portion of that history. *See* App. 53a-59a (Judge Henderson explaining that the panel majority's reading of the legislative history ignores significant portions of that history that demonstrate a clear intent to enact a racial preference, as well as Congress's own explanations for the evolution in the bill's language.).

In 1972, the House Select Committee on Small Business issued a report discussing the "unique dilemma[s]" faced by minority business owners. H.R. Rep. No. 92-1615, at 18-19 (1972). Subsequent reports continued to cite statistical disparities regarding small business ownership and contracting opportunities, and concluded that "remedial action must be considered. . . ." H.R. Rep. No. 94-468, at 1-2; *see* H.R. Rep. No. 94-1791, at 182 (1977). In fact, the SBA had previously promulgated an inconsistently applied regulation in response to executive orders and reports recommending that "steps be taken to increase the level of business ownership by minorities. . . ."[14] 124 Cong. Rec. S8695-98 (daily ed. June 7, 1978) (statement of Sen. Nunn). Thus, in passing the 1978 amendments, Congress intended to provide a strong statutory basis for the SBA's existing, and perhaps *ultra vires*, race-based program. *See id.* (indicating that Congress sought to provide "a strong, clear legislative mandate for minority business development").

As noted above, through the 1978 amendments to the Act, Congress laid out the statutory provisions of the current Section 8(a) program. Pub. L. No. 95-507, 92 Stat. at 1760. From the beginning, Congress's intent was to remedy "the pattern of social and economic discrimination that continues to deprive racial and ethnic minorities, and others, of the opportunity to participate fully in the free enterprise system." S. Rep. No.

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[14] The regulation considered race as a possible "contributing factor in establishing social or economic disadvantage" but did not treat it as conclusive. 13 C.F.R. § 124.8-1(c) (1977).

95-1070, at 14. Consistent with this focus, the House bill included a rebuttable presumption of social disadvantage for Black Americans and Hispanic Americans. H.R. Rep. No. 95-949, at 24-25 (1978). The conference committee removed that language in favor of the Senate's broader "socially and economically disadvantaged" language to account for both group-based and individual-based showings of prejudice or bias. H.R. Conf. Rep. No. 95-1714, at 21-22. The reason given for "replac[ing] the rebuttable presumption language" in Section 8(a) was that "Americans [other than minorities] may also suffer from social disadvantagement. . . ." *Id.* Yet, the conference committee still intended "that the primary beneficiaries of th[e] program w[ould] be minorities. . . ." *Id.* More importantly, the conference committee retained the language from the House bill that members of certain racial groups are socially disadvantaged, *i.e.*, Black Americans and Hispanic Americans, and added "Native Americans" to the list of racial groups. *Id.* at 20-21. In other words, the conference committee broadened the scope of the Section 8(a) program so that more racial groups would be presumed socially disadvantaged, but that non-minorities would not be completely barred from participating in the program. *Id.*

This conclusion is supported by the 1980 amendments to the Section 8(a) program. Through the 1980 amendments, Congress added "Asian Pacific Americans" to the list of socially disadvantaged groups in Section 2(f) and made this addition retroactive to 1978. Pub. L. No. 96-302, § 118, 94 Stat. 833, 840

(1980). The House Report explained that adding Asian-Pacific Americans to Congress's list of socially disadvantaged groups would allow "Asian-Pacific Americans [to] be afforded the same *presumption* of 'social disadvantage' as extended under present law to 'black Americans', 'Hispanic Americans', and 'native Americans'."[15] H.R. Rep. No. 96-998, at 3 (1980) (emphasis added). Later that year, Congress amended Section 8(a)(8) to clarify the SBA's authority to make determinations with respect to whether other groups have been "subjected to prejudice or bias[,]" and whether those groups should be added to the list going forward. Pub. L. No. 96-481, § 105, 94 Stat. 2321, 2322 (1980).

It goes without saying that, if Section 2(f) were mere prefatory policy language, as suggested by the panel majority, *see* App. 15a, Congress would have neither amended its list of socially disadvantaged groups in Section 2(f), nor clarified the SBA's authority to add to that list going forward. In any event, because the panel majority eschewed strict scrutiny based on an obvious misreading of the legislative history, this Court's review is warranted.

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[15] Because the SBA had not yet promulgated any regulatory presumption of social disadvantage, the House Report was clearly referencing the Act. *See* 44 Fed. Reg. 30,672, 30,674 (May 29, 1979).

## II. THE PANEL MAJORITY VIOLATED THIS COURT'S PRINCIPLES OF STATUTORY CONSTRUCTION IN CONCLUDING THAT THE STATUTORY PROVISIONS AT ISSUE ARE FACIALLY RACE NEUTRAL.

### A. The Panel Majority Ignored The Canon Of Construction That A Statute Should Be Construed As A Whole.

Few principles are more "'fundamental'" than the "'canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Brown & Williamson Tobacco Corp.*, 529 U.S. at 133 (quoting *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989)); *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988) ("[V]iewed in the isolated context of [the statutory provision], the phrase could reasonably be given the meaning petitioner asserts. Statutory construction, however, is a holistic endeavor."). In concluding that the statutory provisions of the Section 8(a) program do not contain a racial classification, App. 19a, the panel majority violated this fundamental canon of construction by reading each of the challenged provisions in isolation and ignoring the overall context of the Section 8(a) program. App. 9a-10a. Specifically, the panel majority reasoned that Section 8(a)(5)'s definition of the term "socially disadvantaged individuals" is focused solely on "individuals," not "groups," and could include persons of any racial or ethnic background. App. 10a. In doing so, the panel majority ignored that Section

8(a)(5) defines "[s]ocially disadvantaged individuals" as "those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group *without regard to their individual qualities*." 15 U.S.C. § 637(a)(5) (emphasis added). The panel majority also disregarded Congress's list of racial groups in Section 2(f)(1) of the Act as being unrelated to the Section 8(a) program. App. 13a-15a.

Yet, by divorcing the so-called "operative provision that sets forth the program's terms and the criteria for participation" from Congress's statutory determination that membership in certain racial minority groups partially satisfies those criteria, *see* App. 14a, the panel majority failed to construe the statute as a whole. *Util. Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2442 (2014) (A "reasonable statutory interpretation must account for both 'the specific context in which . . . language is used' and 'the broader context of the statute as a whole.'" (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997))); *see Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995) (A court must interpret a statute "as a symmetrical and coherent regulatory scheme[.]"). Reading the statutory provisions in isolation caused the panel majority to ignore the purpose and intent of the statutory provisions of the Section 8(a) program. *See Kelly v. Robinson*, 479 U.S. 36, 43 (1986) (A court must discern congressional intent by looking "to the provisions of the whole law, and to its object and policy." (internal quotation omitted)). In fact, the overall context of the Section 8(a) program is undisputedly race-based, as the primary evil Congress sought to

remedy was racial discrimination. *See* S. Rep. No. 95-1070, at 14-15.

The panel majority's interpretation is especially flawed because Section 2(f) of the Act provides the necessary context for the definition of "socially disadvantaged individuals" contained in Section 8(a)(5). *See Reno v. Koray*, 515 U.S. 50, 56 (1995) ("[I]t is a fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." (internal quotation omitted)). By determining that the phrase "socially disadvantaged individuals" does not, standing alone, constitute a racial classification, the panel majority ignored this Court's admonition that "a reviewing court should not confine itself to examining a particular statutory provision in isolation." *Brown & Williamson Tobacco Corp.*, 529 U.S. at 132. As demonstrated above, Sections 2(f) and 8(a)(5), read together, create a presumption of social disadvantage for members of the identified racial minority groups. *See Dynalantic II*, 115 F.3d at 1017 (Reading the Section 8(a) program in context of "[o]ther sections of the Act [that] are likewise race-conscious" to conclude the statutory provisions of the Section 8(a) program are "much like the program in *Bakke*: 'a minority enrollment program with a secondary disadvantage element.'" (quoting *Bakke*, 438 U.S. at 281 n.14 (opinion of Powell, J.))).

Contrary to the panel majority's decision, *see* App. 21a-22a, reading Section 8(a) in context alongside Section 8(d) further reinforces that the statutory

provisions of the Section 8(a) program contain a racial classification.[16] In holding that Section 8(d) was subject to strict scrutiny, this Court viewed Section 8(a) and Section 8(d) as congruent parts of the whole.[17] *Adarand*, 515 U.S. at 206-08. Specifically, this Court interpreted Section 8(a) as providing the definitions of social and economic disadvantage and Section 8(d) as implementing those statutory definitions in its subcontracting provisions. *Id.* at 207 ("The 8(a) program confers a wide range of benefits on participating businesses . . . , one of which is automatic eligibility for subcontractor compensation provisions of the kind at issue in this case."). In this Court's view, the only difference between Section 8(a) and Section 8(d) was that 8(a) program participants are presumptively socially disadvantaged if they belong to a racial minority group, but still must demonstrate economic disadvantage. *Id.* On the other hand, it was unclear whether "members of minority groups wishing to participate in the 8(d) subcontracting program are entitled to a race-based presumption of social *and* economic disadvantage." *Id.* at 207-08 (emphasis in original). In

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[16] Section 8(d) directs private contractors to use race-based criteria in sub-contracting by providing specific language to be used in prime contracts with the contracting agency. 15 U.S.C. § 637(d)(3)(C)(ii).

[17] Because this Court looked at Sections 8(a) and 8(d) in context of the overall statutory scheme, it also viewed 15 U.S.C. § 644(g)(1)(A)(iv)'s goal of granting 5 percent of the total value of government contracts to SDBs as a "statutory directive[]" furthered by Sections 8(a) and 8(d). *Compare Adarand*, 515 U.S. at 206, *with* App. 12a (panel majority asserting that 15 U.S.C. § 644(g)(1)(A)(iv)'s goal is unrelated to Section 8(a)).

reading Section 8(a) in isolation, the panel majority ignored both the canon of construction that a statute should be construed as a whole and this Court's contextual interpretation of the Section 8(a) program in *Adarand*. Both of these errors merit this Court's review.

### B. The Panel Majority Misapplied The Canon Of Constitutional Avoidance.

"Federal statutes are to be so construed as to avoid serious doubt of their constitutionality." *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 749 (1961). However, this canon of constitutional avoidance "does not supplant traditional modes of statutory interpretation." *Boumediene v. Bush*, 553 U.S. 723, 787 (2008). Instead, "[t]he canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions as *a means of choosing between them.*" *Clark v. Martinez*, 543 U.S. 371, 385 (2005) (emphasis in original).

The panel majority, however, employed the canon of constitutional avoidance to read the statutory racial classification out of a congressionally mandated affirmative action program. App. 19a-20a. Although the majority asserted that it was "declin[ing] to read the statute to create a constitutional difficulty[,]" it employed a myopic reading of the statutory provisions of the Section 8(a) program to get there. App. 19a. The canon of constitutional avoidance, however, applies

only where statutory language has been found to be ambiguous. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009) ("The so-called canon of constitutional avoidance is an interpretive tool, counseling that ambiguous statutory language be construed to avoid serious constitutional doubts."). But a plain, contextual reading of the statutory provisions of the Section 8(a) program demonstrates an unambiguous racial preference based on group membership. For example, Section 8(a)(8) directs the SBA to focus on "groups" – not individuals – in determining whether additional "groups" should be added to Congress's list of socially disadvantaged groups in Section 2(f). 15 U.S.C. § 637(a)(8). Similarly, in Section 2(f), Congress provided a list of racial minority groups that have experienced discrimination. *Id.* § 631(f)(1)(B)-(C). If these provisions are not clear enough, any ambiguity is unmistakably laid to rest by the legislative history, which demonstrates Congress's intent to create a racial classification. *See* Section I.C., *supra*. In addition, the D.C. Circuit previously recognized that it was doubtful that Congress would have created the Section 8(a) program without a racial classification. *See Dynalantic II*, 115 F.3d at 1017 ("[W]e [cannot] assume that Congress would have enacted 8(a) without its race-conscious theme. . . ."). By finding an ambiguity where one does not exist, the panel majority misapplied the canon of constitutional avoidance, in contravention of this Court's precedents. *See, e.g.*, *McFadden v. United States*, 135 S. Ct. 2298, 2307 (2015) (the canon of constitutional avoidance "has no application in the

interpretation of an unambiguous statute" (internal quotation omitted)).

This is especially true considering that the canon of constitutional avoidance does not "give a court the prerogative to ignore the legislative will in order to avoid constitutional adjudication[.]" *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 841 (1986) ("'Although this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute . . . or judicially rewriting it.'" (quoting *Aptheker v. Secretary of State*, 378 U.S. 500, 515 (1964)); *see* App. 44 n.8 (Henderson, J., dissenting) ("[W]here there *is* only one well-founded way to read a statute, it is emphatically not our responsibility to avoid constitutional difficulties." (emphasis in original)). The "legislative will" in enacting the statutory provisions of the Section 8(a) program could not be clearer. Congress sought to, and did, create an affirmative action program to award government contracts to minority-owned businesses. *See* Section I.C., *supra*. Rather than sidestepping the Act's racial classification, the panel majority should have applied strict scrutiny to "smoke out" any illegitimate uses of race. *Croson*, 488 U.S. at 493.

In short, if the panel majority's decision is allowed to stand, federal statutes would be immune from strict scrutiny so long as the statutory provision conferring benefits and the statutory provision identifying the racial groups to receive those benefits are in separate sections of the act. Accordingly, this Court's review is

warranted to reaffirm that all race-based classifications – no matter how "cleverly" drafted – are subject to strict scrutiny. *See Adarand*, 515 U.S. at 235 ("Federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest.").

## III. WHETHER THE STATUTORY PROVISIONS OF THE SECTION 8(a) PROGRAM CONTAIN A RACIAL CLASSIFICATION IS AN ISSUE OF NATIONWIDE IMPORTANCE.

There can be little doubt that government contracting is big business, even for small businesses. Indeed, the total amount of federal prime contracts awarded through the Section 8(a) program in 2015 was $16.6 billion. U.S. Gov't Accountability Office, GAO-16-557, *DOD Small Business Contracting: Use of Sole-Source 8(a) Contracts Over $20 Million Continues to Decline* 1 (2016). Because "the [SBA's] 8(a) program is one of the federal government's primary vehicles for developing small businesses[,]" *id.* at 1, the program leaves small, non-minority-owned business concerns like Rothe out in the cold. Moreover, when billions of dollars in government contracts are at stake, any preferential treatment has a nationwide, economic impact.

Additionally, "one of the primary mechanisms agencies use to justify race-conscious programs is reliance on Section 8(a) of the Small Business Act." Zachary C. Ewing, *Feeble in Fact: How Underenforcement,*

*Deference, and Independence Shape the Supreme Court's Affirmative Action Doctrine*, 17 U. Pa. J. Const. L. 1463, 1477 (2015). This reliance "on SBA-run programs" has resulted in "agencies [that] have largely failed to apply the Supreme Court's requirements, or DOJ's guidelines, to their contracting programs." U.S. Comm'n on Civil Rights, *Federal Procurement After Adarand* 70 (2005). The U.S. Code is replete with statutes that have copied or adopted Section 8(a)(5)'s "socially and economically disadvantaged" language.[18] *See* 51 U.S.C. § 30304 (adopting Section 8(a)'s definition of "socially and economically disadvantaged" in enacting a goal for awarding NASA contracts to SDBs); 42 U.S.C. § 4370d (setting a goal that at least 8 percent of federal funding for grants and contracts from the EPA go to "socially and economically disadvantaged individuals (within the meaning of section 637(a)(5) and (6) of Title 15). . . ."); 7 U.S.C. §§ 1632a, 1935, 1936, 2003(e)(1), 2279, 3319f (programs for socially disadvantaged farmers and ranchers). If the panel majority's decision stands, the pervasiveness of discrimination in government contracting – and in distributing burdens and benefits based on race in other contexts – will continue. Further, Congress will have a roadmap for enacting

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[18] Moreover, several states have relied on Section 8(a)(5) in enacting their own affirmative action programs. *See, e.g.*, R.I. Gen. Laws § 37-14.1-3(e)(6) (including in its definition of "Minority" a list of racial groups and "[m]embers of other groups . . . found to be economically and socially disadvantaged . . . under § 8(a) of the Small Business Act"); N.C. Stat. § 143-128.2(g)(3) (North Carolina statute expressly adopting the definition of "socially and economically disadvantaged individual" in Section 8(a)); Miss. Code § 57-69-3(k) (same).

strict-scrutiny-immune racial preferences in the future. This kind of group-based, preferential treatment is exactly the kind of odious discrimination that our Constitution's "single guarantee of equal protection" protects against. *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 610 (1990) (O'Connor, J., dissenting) ("We are a Nation not of black and white alone, but one teeming with divergent communities knitted together by various traditions and carried forth, above all, by individuals."). Thus, the applicability of strict scrutiny to the statutory provisions of the Section 8(a) program is not a mere "lawyers' quibble over words[.]" *Id.* In fact, strict scrutiny "establishes whether and when the Court and Constitution allow the Government to employ racial classifications." *Id.* Because the panel majority's decision "signals that the Government may resort to racial distinctions more readily[,]" *id.*, this Court's review is imperative.

## CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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