No. 99-50436

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ROTHE DEVELOPMENT CORPORATION,
A Texas Corporation,

Plaintiff-Appellant

v.

UNITED STATES DEPARTMENT OF DEFENSE;
UNITED STATES DEPARTMENT OF THE AIR FORCE,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR THE APPELLEES

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STATEMENT REGARDING ORAL ARGUMENT

Appellees believe that oral argument is necessary because this appeal involves significant constitutional issues affecting a program enacted by Congress.

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MISCELLANEOUS:

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JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. 1331 and the Little Tucker Act, 28 U.S.C. 1346(a)(2) (D38 at 2 ¶ 4).[1/] This Court has no jurisdiction over the appeal, for the reasons explained in our pending motion to dismiss filed July 12, 1999. Under 28 U.S.C. 1295(a)(2), the Federal Circuit has exclusive jurisdiction to hear an appeal from the final judgment in this case because the district court's jurisdiction was based, in part, on the Little Tucker Act. This Court should dismiss the appeal for lack of jurisdiction or, alternatively, transfer the case to the Federal Circuit.

[1/] "D__" indicates the entry number on the district court docket sheet. "Br." refers to Rothe's brief; "AGC Br." and "PLF Br." refer to the amicus briefs of the Associated General Contractors and the Pacific Legal Foundation.

In response to our motion to dismiss, Rothe argued that this Court would have jurisdiction if it struck Rothe's claim for bid preparation costs. That argument is incorrect for the reasons we explained in the reply we filed in support of our motion. Moreover, striking the claim for bid preparation costs may well moot the appeal because the disputed contract has expired. See p. 57 n.15, infra.

STATEMENT OF THE ISSUES

1. Whether Congress has a compelling interest in remedying the effects of racial discrimination on federal contracting.

2. Whether the 10% price-evaluation adjustment applied in this case was narrowly tailored.

3. Whether the district court's admission of the Department of Commerce's benchmark study was manifest error.

4. Whether a genuine issue of material fact exists as to the validity of the benchmark study.

5. Whether the district court abused its discretion in relying on amici's submissions.

STATEMENT OF THE CASE

This case involves a constitutional challenge to a Department of Defense (DOD) contract awarded pursuant to § 1207 of the National Defense Authorization Act of 1987 (1207 program), 10 U.S.C. 2323. On November 5, 1998, Rothe Development Corporation (Rothe) filed suit against DOD and the Air Force, alleging that the 1207 program violated the Fifth Amendment's equal protection component (D1).

On April 28, 1999, the district court granted summary judgment, concluding that the 1207 program satisfied strict scrutiny. The court held that the federal government had a compelling interest in remedying the effects of racial discrimination on federal contracting, and that the 1207 program was a narrowly tailored means of furthering that interest (D74).

On April 30, 1999, this Court issued a stay pending appeal, enjoining implementation of the disputed contract.

STATEMENT OF FACTS

1. In § 1207, Congress established an annual goal of awarding 5% of DOD contracting dollars to small businesses owned and controlled by "socially and economically disadvantaged individuals" (SDBs), to "HUBZone small business concerns," to historically black colleges and universities, and to certain "minority institutions." 10 U.S.C. 2323(a) & (b). Section 1207 refers to § 8(d) of the Small Business Act, 15 U.S.C. 637(d), to define which small businesses are "owned and controlled" by "socially and economically disadvantaged" individuals. 10 U.S.C. 2323(a)(1)(A).

Congress established a presumption in § 8(d) that members of certain groups — including "Black Americans, Hispanic Americans, Native Americans, [and] Asian Pacific Americans" — are socially and economically disadvantaged. 15 U.S.C. 637(d)(3)(C). The presumption is rebuttable. 13 C.F.R. 124.105(b), 124.106,

124.601-124.609 (1998).[2/] Challenges to an individual's status as socially or economically disadvantaged may be brought by a contracting officer, a disappointed bidder, or the Small Business Administration (SBA). 48 C.F.R. 219.302-70 (1997).

In addition, other individuals have qualified for disadvantaged status by demonstrating that they personally have suffered social disadvantage as a result of "color, ethnic origin, gender, physical handicap, long-term residence in an environment isolated from the mainstream of American society [e.g., rural Appalachia], or other similar cause not common to small business persons who are not socially disadvantaged," 13 C.F.R. 124.105(c)(1)(i) (1998) (D51, Ex. I-B at 136).

The program has other non-racial requirements. It is limited to small businesses that meet certain size limitations, 15 U.S.C. 632(a), 637(d), and to firms whose owners' net personal worth is under $750,000 (excluding the value of the business itself and the individual's residence). 13 C.F.R. 124.106(b)(2) (1998).

The 1207 program authorizes DOD to use a number of mechanisms to try to achieve the 5% goal, including race-neutral devices. 10 U.S.C. 2323(a), (c) & (e). In addition, DOD is authorized to "enter into contracts using less than full and open competitive procedures," but shall not pay a price to a contractor "exceeding fair market cost by more than 10 percent."

[2/] Citations to 13 C.F.R. Pt. 124 and 48 C.F.R. Pt. 219 are to the regulations in effect at the time of the contract award in this case.

10 U.S.C. 2323(e)(3). Pursuant to this provision, DOD has promulgated regulations permitting the use of a price-evaluation adjustment of 10% for SDBs in some types of procurements. 48 C.F.R. 219.7000-219.7003 (1997). If the price-evaluation adjustment is applicable, all businesses — regardless of their size or the disadvantaged status of their owners — may submit offers (D51, Ex. I-C ¶ 5). DOD applies the adjustment by increasing the bids of all non-SDBs by 10%, and determines the lowest bidder using the adjusted numbers. 48 C.F.R. 219.7002 (1997). DOD will award a contract to an SDB only if the firm is "technically acceptable" and has a "low performance risk rating" (D51, Ex. I-C ¶¶ 5, 9-10).

In 1998, Congress amended the 1207 program to require DOD to suspend use of the price-evaluation adjustment for one year after any fiscal year in which DOD awards more than 5% of its contracts to SDBs. 10 U.S.C. 2323(e)(3)(B)(ii). Accordingly, DOD has suspended use of the price-evaluation adjustment through February 24, 2000 (D51, Exs. I-F, I-G). Without congressional reauthorization, the 1207 program will expire at the end of fiscal year 2003. Pub. L. No. 106-65, § 808, 113 Stat. 512 (1999).

2. When this litigation began, Rothe (a non-SDB) was performing a DOD contract for the Switchboard Operations and Network Control Center (NCC) at Columbus Air Force Base, Mississippi. Another contractor was responsible for Base Telecommunications Services (BTS). The Air Force decided to

consolidate the NCC, BTS, and Switchboard Operations contracts into a single contract to improve contractor accountability and the quality of services (D51, Ex. I-C ¶ 2).

The solicitation and contract award were handled by an Air Force contracting office in Oklahoma that administers these types of contracts for Air Force installations nationwide. The Air Force issued the solicitation in March 1998, and announced that it would use the 10% price-evaluation adjustment in considering bids (D51, Ex. I-C ¶¶ 1, 2, 6).

Rothe and four other firms submitted bids. International Computers & Telecommunications, Inc. (ICT), an SDB, was deemed the low bidder after DOD applied the 10% price-evaluation adjustment (D51, Ex. I-C ¶¶ 7, 10). ICT is owned by two Asian-Pacific Americans, David and Kim Sohn (D51, Ex. I-Q ¶ 3). Rothe's bid would have been considered lower than ICT's if the government had not applied the 10% adjustment (D51, Ex. I-C ¶ 10).

The disputed contract, the bulk of which was never implemented because of this Court's stay order, expired September 30, 1999. The government has issued a new solicitation for the work covered by the expired contract but, because of the one-year suspension, cannot use a price-evaluation adjustment in awarding the new contract.

SUMMARY OF ARGUMENT

This Court should affirm the district court's judgment. The district court correctly held that the congressionally-enacted

1207 program satisfies strict scrutiny, properly recognizing that Congress enjoys broader authority than do state or local governments to adopt race-conscious remedies.

Federal race-based procurement programs are subject to strict scrutiny. Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995). But the Supreme Court sought to "dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact,'" id. at 237, noting that "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." Ibid.

As the district court found, Congress had a compelling interest in adopting the 1207 program. The voluminous evidence in this case — including the extensive legislative record, a "benchmark study" produced by the Department of Commerce, and other reports and studies — provides a strong basis in evidence for Congress's conclusion that the effects of racial discrimination continue to impede the ability of minority-owned firms to compete on an equal footing for federal contracts and that race-conscious measures are necessary to overcome these discriminatory effects.

The district court also properly held that the 1207 program is narrowly tailored. Congress did not adopt the program until it had determined that myriad other race-neutral devices had proved ineffective in overcoming the effects of discrimination on

public contracting opportunities for minorities. The program is flexible and avoids rigid reliance on race, is limited in duration, uses a 5% aspirational goal that is far below the minority business representation in the relevant labor pool, was used in an industry in which minority firms are demonstrably underutilized, and has only a minimal impact on non-minorities.

Rothe's remaining challenges to the district court's decision are meritless. The court did not manifestly err in admitting the benchmark study, despite Rothe's failure to obtain all the underlying raw data used in the study. Moreover, admission of the study did not violate Fed. R. Evid. 1006, and even if it did, the error was harmless. Nor did Rothe raise a genuine issue of material fact as to the validity of the study. Rothe failed to produce specific evidence contradicting the study's central finding that SDBs were significantly underutilized in federal contracting in the industry relevant to this case. Finally, the district court did not abuse its discretion in relying on amici's submissions.

ARGUMENT

I

THE DISTRICT COURT PROPERLY HELD THAT THE 1207 PROGRAM SATISFIED STRICT SCRUTINY

A. Standard Of Review

While this Court generally reviews a grant of summary judgment de novo, U.S. Fidelity & Guar. Co. v. Planters Bank & Trust Co., 77 F.3d 863, 865-866 (5th Cir. 1996), it has suggested that a more deferential standard applies where, as here, summary

judgment has been granted by a district judge who otherwise would have decided the case after a bench trial. Ibid.; Phillips Oil Co. v. OKC Corp., 812 F.2d 265, 273-274 n.15 (5th Cir.), cert. denied, 484 U.S. 851 (1987). Under this standard, the district judge's findings at the summary judgment stage are reviewed for clear error. In re Placid Oil Co., 932 F.2d 394, 397-398 (5th Cir. 1991). The grant of summary judgment in this case withstands review under either standard.

B. Rothe Has The Burden Of Proof

Rothe incorrectly argues (Br. 47) that the district court erred in placing the burden on Rothe to prove that the use of the price-evaluation adjustment was unconstitutional. While "the party defending the remedial measure bears the burden of producing evidence that the remedial measure is constitutional," the "party challenging the remedial measure, of course, bears the ultimate burden of demonstrating that the racial classification is unconstitutional." Walker v. City of Mesquite, 169 F.3d 973, 982 (5th Cir. 1999), petition for cert. pending, No. 99-296. The district court required the federal government to produce evidence that the price-evaluation adjustment was constitutional, but correctly placed the ultimate burden of proof on Rothe (D74 at 10).

Rothe also incorrectly asserts (Br. 52) that the district court required proof that the 1207 program was "clearly unconstitutional beyond a reasonable doubt." Although one of the cases the court cited applied a "beyond a reasonable doubt"

standard, see Ritchey Produce Co. v. Ohio Dep't of Admin. Servs., 707 N.E.2d 871, 928 (Ohio 1999), the district judge in this case did not endorse such a standard.

C. Congress Has Broader Authority Than A State Or Local Government To Adopt Race-Based Remedial Measures

Rothe's supporting amici — the Pacific Legal Foundation (PLF) and the Associated General Contractors (AGC) — contend that the district court unduly deferred to Congress's findings of discrimination and its determination that race-conscious action in federal contracting was necessary (PLF Br. 4; AGC Br. 3-11, 13-24). PLF and AGC fail to recognize the significant distinctions between the remedial authority of Congress and that of a state legislature or city council.

It is well-established that Congress enjoys broader authority to adopt race-based remedies than do state or local governments. See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 504 (1989); id. at 488-492 (O'Connor, J.); id. at 521-523 (Scalia, J., concurring in judgment); Fullilove v. Klutznick, 448 U.S. 448, 472-478, 483 (1980) (plurality); id. at 500, 508-510, 515-516 & n.14 (Powell, J., concurring).[3/] While a state or

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[3/] This Court has assumed that the standard applied by the Fullilove plurality is consistent with strict scrutiny. See Police Ass'n v. City of New Orleans, 100 F.3d 1159, 1167 & nn.11, 14 (5th Cir. 1996). Although the plurality in Fullilove did not use the term "strict scrutiny" in upholding the race-based program, it conducted "a most searching examination," recognizing "the need for careful judicial evaluation to assure that any congressional program that employs racial or ethnic criteria to accomplish the objective of remedying the present effects of past discrimination is narrowly tailored to the achievement of that goal." Fullilove, 448 U.S. at 480, 491. The plurality stated

(continued...)

local government has only "the authority to eradicate the effects of private discrimination within its own legislative jurisdiction," Congress has the power to "identify and redress the effects of society-wide discrimination" through legislation with nationwide application. Croson, 488 U.S. at 490-492 (plurality). This Court recently recognized this distinction in Houston Contractors Ass'n v. Metropolitan Transit Auth., Nos. 97-20619, 98-20002, 98-20021 (5th Cir. June 28, 1999), slip op. 6:

> The judicial inquiry into compelling interest is different when a local entity, rather than Congress, utilizes a racial classification. While Congress has the authority to address problems of nationwide discrimination with legislation that is nationwide in application, * * * a state or local government has only "the authority to eradicate the effects of [] discrimination within its own legislative jurisdiction."

Although unpublished, the Houston Contractors decision is "persuasive" authority. 5th Cir. R. 47.5.4. Moreover, Congress need not make findings of discrimination with the same degree of specificity that federal courts require of states or localities. See Croson, 488 U.S. at 489, 504; Fullilove, 448 U.S. at 478 (plurality); id. at 502-503, 515-516 n.14 (Powell, J., concurring).

Nothing in Adarand calls this special deference into question. Adarand merely clarified the standard of review for

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[3/](...continued)
(id. at 492) that the program would survive review under any of the analyses articulated by the various opinions in Regents v. Bakke, 438 U.S. 265 (1978). Justice Powell, concurring, agreed that the plurality's analysis was consistent with his own adoption in Bakke of a strict scrutiny standard, and that the race-based program was "a necessary means of advancing a compelling governmental interest." Fullilove, 448 U.S. at 496.

federal racial classifications; it did not reduce Congress to the level of a city council. The majority in Adarand emphasized that its opinion should not be interpreted as repudiating the views previously expressed by various Justices on "the extent to which courts should defer to Congress' exercise" of its broad authority to adopt race-conscious remedies. 515 U.S. at 230-231. Justice Souter also explained that the majority's decision in Adarand did not disturb the views of the Fullilove plurality about the deference owed to Congress when it adopts race-conscious remedies. 515 U.S. at 268-269 (Souter, J., dissenting).

Judicial deference to Congress in this area flows from an "amalgam" of sources. Fullilove, 448 U.S. at 473 (plurality). Unlike States and localities, Congress is a co-equal branch of the federal government, and the judiciary is bound to give Congress's decisions "great weight," even in cases raising equal protection issues. Id. at 472 (plurality); Rostker v. Goldberg, 453 U.S. 57, 64 (1981); see also Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 319-320 (1985). Such "[r]espect for a coordinate branch of Government raises special concerns" not present when a court reviews actions of state or local governments. Department of Commerce v. Montana, 503 U.S. 442, 459 (1992).

Congress's role as the national legislature also justifies deference. Congress has special competence to gather information about discrimination and evaluate the need for nationwide remedial action. "In reviewing the constitutionality of a

statute, courts must accord substantial deference to the predictive judgments of Congress," because that institution "is far better equipped than the judiciary to amass and evaluate the vast amounts of data bearing upon legislative questions." Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 195 (1997) (citations and internal quotation marks omitted). Congress is also less likely than state or local governments to be captured by parochial and biased interests. Croson, 488 U.S. at 523 (Scalia, J., concurring in the judgment).

Congress also has unique remedial authority under § 5 of the Fourteenth Amendment and § 2 of the Thirteenth Amendment to adopt race-conscious measures to remedy the effects of discrimination. Id. at 488, 490 (plurality); id. at 521-522 (Scalia, J., concurring in the judgment); Fullilove, 448 U.S. at 477, 483 (plurality); id. at 500 & n.2, 508, 510 (Powell, J., concurring). See also Acquisition Issues: Hearings Before the Investigations Subcomm. of the House Armed Servs. Comm., 101st Cong., 2d Sess. 426-428 (1990) (Acquisition Hearings) (Rep. Dymally) (Congress enacted 1207 program pursuant to § 5 of Fourteenth Amendment). Congress has authority to act under these Amendments regardless of whether it expressly invoked them in enacting § 1207. See EEOC v. Wyoming, 460 U.S. 226, 243 n.18 (1983) (Congress need not "anywhere recite the words 'section 5' or 'Fourteenth Amendment' or 'equal protection.'"); Fullilove, 448 U.S. at 476-478 (plurality). The Civil War Amendments restricted state authority because the states' longstanding history of racial discrimination

had produced a "distrust of state legislative enactments based on race." Croson, 488 U.S. at 491 (O'Connor, J.); accord id. at 521-522 (Scalia, J., concurring in judgment). The federal government did not have the same history of discrimination, and thus the Civil War Amendments expanded Congress's "legislative powers concerning matters of race." Id. at 521.

AGC and PLF mistakenly contend that § 5 of the Fourteenth Amendment does not justify deference to Congress in this case because the contract award affected only private parties and not a state entity (AGC Br. 16-22; PLF Br. 15-16). Although the Equal Protection Clause of the Fourteenth Amendment itself regulates only state action, Congress has the authority under § 5 to regulate private conduct as a means of remedying discrimination that might involve state actors. District of Columbia v. Carter, 409 U.S. 418, 423, 424 n.8 (1973); see also City of Boerne v. Flores, 521 U.S. 507, 518 (1997) ("Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional"). The legacy of discrimination that Congress aimed to remedy through the 1207 program includes state-sponsored discrimination that has impeded minority-owned firms' ability to compete for public contracts.[4/] Moreover, Congress clearly has

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[4/] For examples of such discrimination by state and local governments, see Associated Gen. Contractors v. Coalition for Econ. Equity, 950 F.2d 1401, 1415 (9th Cir. 1991), cert. denied, 503 U.S. 985 (1992); D51, Ex. II-D at 40, 43-45; U.S. Comm'n on

(continued...)

power under the Thirteenth Amendment to adopt measures to combat purely private discrimination. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 437-444 (1968).

In addition, Congress certainly has authority under the Spending and Commerce Clauses to regulate purely private conduct and to ensure that the effects of private discrimination are not inadvertently extended into government procurement practices. Fullilove, 448 U.S. at 473-476 (plurality); id. at 499 (Powell, J., concurring). It is beyond dispute that the federal government "has a compelling interest in assuring that public dollars * * * do not serve to finance the evil of private prejudice." Croson, 488 U.S. at 492 (plurality).

Thus, although federal race-based programs are subject to strict scrutiny, the judicial inquiry into compelling interest requires deference to Congress's factfindings and to its determinations that race-conscious remedies are necessary. The district court properly adhered to this principle.

D. Congress Had A Compelling Interest In Remedying The Effects Of Discrimination On Government Contracting

Rothe's argument that Congress did not have a compelling interest justifying adoption of the 1207 program is meritless. Rothe and its supporting amici ignore the extensive legislative record that is more than sufficient to support Congress's conclusion that remedial action was necessary to combat the

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[4/](...continued)
Civil Rights, Minorities and Women as Government Contractors 127 (May 1975).

continuing effects discrimination has on federal contracting opportunities for minorities. Every federal court that has reviewed the constitutionality of federal race-conscious contracting programs following the Supreme Court's Adarand decision has held that Congress had a compelling interest supporting the enactment of affirmative action. In re Sherbrooke Sodding Co., 17 F. Supp. 2d 1026, 1034-1035 (D. Minn. 1998); Adarand Constructors, Inc. v. Peña, 965 F. Supp. 1556, 1570-1577 (D. Colo. 1997), vacated as moot, 169 F.3d 1292 (10th Cir. 1999); Cortez III Serv. Corp. v. NASA, 950 F. Supp. 357, 361 (D.D.C. 1996). See also Fullilove, 448 U.S. at 478 (plurality).

1. Appellees Produced Abundant Evidence That The Effects Of Discrimination Impede Government Contracting Opportunities For Minorities

a. Legislative Record

In reviewing the legislative record, this Court should bear in mind four important principles. First, Congress is entitled to significant deference in its determination that race-conscious remedies are necessary (pp. 10-15, supra). Second, strict scrutiny does not require Congress to make the kind of formal findings, or compile the detailed record, required in judicial or administrative proceedings. See Fullilove, 448 U.S. at 478 (plurality). Third, this Court has recognized that a governmental entity that seeks to justify a race-conscious program need not definitively prove that discrimination has occurred. Edwards v. City of Houston, 37 F.3d 1097, 1113 (5th Cir. 1994), overturned on other grounds, 78 F.3d 983 (5th Cir.

1996) (en banc). Congress is required only to have a "strong basis in evidence" for believing that the effects of discrimination are impeding opportunities for minorities. Croson, 488 U.S. at 500. Finally, this Court should not focus solely on the legislative history of the 1207 program, but also must take into account all the evidence of discrimination Congress compiled during consideration of other matters or legislation. See Fullilove, 448 U.S. at 502-503 (Powell, J., concurring).

For more than a decade preceding the enactment of the 1207 program, Congress amassed a voluminous record showing that the continuing effects of racial discrimination were impeding the ability of minority-owned firms to compete for government contracts. In 1980, the Supreme Court upheld a contracting program containing a 10% set-aside for minority-owned businesses, concluding that "Congress had abundant evidence from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination." Fullilove, 448 U.S. at 477-478 (plurality); accord id. at 458-467, 473; id. at 503, 505-506 (Powell, J., concurring); id. at 520 (Marshall, J., concurring in judgment). See also H.R. Rep. No. 468, 94th Cong., 1st Sess. 1-2, 11-12, 28-30, 32 (1975); U.S. Comm'n on Civil Rights, Minorities and Women as Government Contractors 20-22, 112, 126-127 (May 1975).

In 1978 and 1980, Congress amended the Small Business Act to include findings that certain minority groups, including Asian-Pacific Americans, had suffered discrimination that impeded their ability to compete in the free enterprise system. Pub. L. No. 95-507, § 201, 92 Stat. 1760 (1978); Pub. L. No. 96-302, § 118, 94 Stat. 840 (1980), codified at 15 U.S.C. 631(f). Those amendments sought to remedy the effects of such discrimination by increasing the opportunity of SDBs to participate in federal contracting. Ibid.; 15 U.S.C. 637(d)(1). The statute established a presumption that members of specified minority groups that Congress found to be victims of discrimination were socially and economically disadvantaged. 15 U.S.C. 637(d)(3)(C). Congress ultimately incorporated this presumption into the 1207 program. 10 U.S.C. 2323(a)(1)(A).

During a series of congressional hearings in the early and mid-1980s, Congress compiled additional evidence that the effects of racial discrimination were impeding contracting opportunities for minority-owned firms. One House committee heard extensive evidence of "covert and outright blatant discrimination directed at disadvantaged and minority business people by majority companies, financial institutions, and government at every level." Small and Minority Business in the Decade of the 1980's (Part 1): Hearings Before the House Comm. on Small Bus., 97th Cong., 1st Sess. 106 (1981) (Small and Minority Business Hearings); accord id. at 4, 26, 33-34, 221, 240-241, 277. Other hearings produced evidence of discrimination against minority

firms by procurement officers, prime contractors, lenders, bonding companies, suppliers, and customers — barriers which frequently hindered the ability of minority-owned firms to gain the expertise, capital, and business contacts necessary to compete effectively for government contracts. See, e.g., 61 Fed. Reg. 26,051-26,062 (citing hearings and summarizing legislative record); D51, Ex. II-BB at 8-9, 12.

In the mid-1980s, Congress began focusing on the impediments minority-owned firms faced in competing for DOD contracts. During hearings in 1985, the House Armed Services Committee heard testimony that the effects of racial discrimination were excluding minorities from DOD contracting opportunities. See Small and Disadvantaged Business Participation in Military Construction Programs: Hearing Before the Military Installations and Facilities Subcomm. of the House Armed Servs. Comm., 99th Cong., 1st Sess. 214-218, 232-234, 253, 256-258 (1985) (SDB Participation Hearing). In addition to this direct evidence of discrimination, Congress also was provided data showing that minority-owned firms were significantly underrepresented among the contractors receiving DOD procurement dollars. See H.R. Rep. No. 1086, 98th Cong., 2d Sess. 100-101 (1984); H.R. Rep. No. 332, 99th Cong., 1st Sess. 139-140 (1985).

It was against this backdrop that Congress enacted the 1207 program in 1986. During the floor debate, one supporter of the legislation noted the difficulties minority firms faced in obtaining loans to hire new employees and purchase the supplies

and equipment necessary for performance of government contracts. 132 Cong. Rec. 21,714 (1986) (Rep. Savage). Evidence before Congress also showed that minority small businesses won only 2.1% of DOD procurement dollars. Ibid. Although this percentage rose slightly to 2.5% in 1987 after the 1207 program took effect (Acquisition Hearings, supra, at 98), it was significantly less than the 8.9% of businesses owned by minorities in 1987 (D51, Ex. II-HH at 334).

During the late 1980s, Congress conducted a series of oversight hearings on the 1207 program. Implementation of Section 1207 — The 5 Percent Goal for Awards to Small and Disadvantaged Businesses: Hearings Before the Acquisition Policy Panel of the House Armed Servs. Comm., 100th Cong., 1st & 2d Sess. (1987 & 1988) (Implementation Hearings). The House Armed Services Committee heard testimony about prime contractors refusing to subcontract to minority firms even when they were the low bidders, of discriminatory denials of business loans, of discrimination by suppliers and subcontractors who quoted minorities higher prices than they offered to nonminority firms, and of bias by procurement officials. Id. at 70-71, 92, 284, 375-377, 426, 451, 459-461, 588-589, 606, 609, 647, 801, 829-830, 879, 884, 1015, 1035, 1105, 1107. Congress concluded that the 1207 program was still needed to combat the lingering effects discrimination has on federal contracting,[5/] and thus extended

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[5/] Implementation Hearings, supra, at 284, 459-460, 801, 829-830, 884 (Reps. Conyers, Martinez, Hayes, Leland); 135 Cong. Rec. (continued...)

the 1207 program through 1993. Pub. L. No. 101-189, § 831(a), 103 Stat. 1507 (1989).

Between 1990 and 1992, the House Armed Services Committee held additional oversight hearings that produced more evidence of discrimination affecting DOD contracting. Acquisition Hearings, supra, at 64, 420, 424-431, 438-439, 441-443; Small Disadvantaged Business Issues: Hearings Before the Investigations Subcomm. of the House Armed Servs. Comm., 102d Cong., 1st Sess. 11, 20-21, 39, 49-50, 164, 206 (1991) (SDB Issues Hearings); Small Disadvantaged Business Reauthorization: Hearing Before the Investigations Subcomm. of the House Armed Servs. Comm., 102d Cong., 2d Sess. 73-74, 79, 81 (1992) (Reauthorization Hearing). Congress again found that the program was needed to overcome the continuing effects of discrimination. See id. at 79 (Rep. Mavroules); SDB Issues Hearings, supra, at 11 (Rep. Collins); id. at 39 (Rep. Richardson); Acquisition Hearings, supra, at 420 (Rep. Collins); id. at 424-431 (Rep. Dymally). Congress reauthorized the 1207 program through fiscal year 2000. Pub. L. No. 102-484, § 801(a)(1)(B), 106 Stat. 2442 (1992).

Before and after the various reauthorizations of the 1207 program, Congress held other hearings that produced even more evidence of the effects of discrimination on government contracting. See 61 Fed. Reg. 26,051-26,054 (summarizing legislative record). In 1998, Congress relied heavily on this

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[5/](...continued)
16,499-16,504 (1989) (Reps. Espy, AuCoin, Dellums, Leland); H.R. Conf. Rep. No. 331, 101st Cong., 1st Sess. 614 (1989).

voluminous record to reauthorize a remedial contracting program operated by the Department of Transportation (DOT). See Pub. L. No. 105-178, 112 Stat. 107 (1998). During the floor debates, members of Congress repeatedly recognized that discrimination — in obtaining business loans and surety bonds, in winning subcontracts from white-owned prime contractors, and in obtaining fair quotes from suppliers — continued to impede the contracting opportunities of minority-owned firms, and that a race-conscious remedy was necessary. See 144 Cong. Rec. S1403-1430, 1482-1496 (1998); id. at H1906, 1913, 2006, 2010, 3957-3960. Congress was obviously aware of this evidence of discrimination when, only one year later, it extended the 1207 program through fiscal year 2003.

b. Benchmark Study

Although the voluminous legislative record amply demonstrates that Congress had a compelling interest in enacting and reauthorizing the 1207 program, the Commerce Department's benchmark study provides additional evidence confirming the continuing need for the 1207 program.

The benchmark study is a sophisticated statistical analysis that gauges the federal government's utilization of ready, willing, and able SDBs in contracting. D51, Ex. I-J; 63 Fed. Reg. 35,714-35,718. The study was based on extensive data collected from a random sample of over 16,000 procurements in fiscal year 1996. Id. at 35,716. The benchmark study calculated both the capacity of SDBs to perform federal contracts and the

utilization of SDBs in industry groups designated by 2-digit Standard Industrial Classification (SIC) codes. Id. at 35,716 n.1.

The benchmark study found that ready, willing, and able SDBs were underutilized in the business services industry (SIC code 73), the industry category in which the contract in this case fell. Id. at 35,715; D51, Ex. I-K at 4-5. The Department of Commerce found that although SDBs had the capacity to perform contracts totaling about 40% of federal contracting dollars in SIC code 73 in 1996, they won only 26.4% of those dollars (D51, Ex. I-K at 5-6, Exh. 5). This disparity is both substantial and statistically significant and gives rise to an inference of discrimination (D51, Ex. I-K at 4-7, 17-18).

Rothe argues (Br. 26-27, 29) that this statistical disparity is not evidence of discrimination because the government did not show why the disparity occurred and failed to examine some race-neutral factors that could influence a contract award. Rothe is mistaken in suggesting that the government must prove the exact cause of the disparity. The Supreme Court has recognized that an inference of discrimination supporting race-conscious relief can arise where, as here, there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform services and the number of such contractors actually used by a government entity. Croson, 488 U.S. at 501, 509. Once Appellees present statistical evidence raising an inference of discrimination, they need not also prove

that there are no race-neutral explanations for the statistical disparity. Contractors Ass'n v. City of Philadelphia, 6 F.3d 990, 1005-1007 (3d Cir. 1993). Instead, the burden rests with Rothe to prove that the government lacked a strong basis in evidence for believing that discrimination had occurred. See ibid.; Walker, 169 F.3d at 982.

At any rate, the benchmark analysis controlled for important race-neutral factors, such as size and age of firms (D51, Ex. I-K at 5), that might otherwise explain a statistical disparity, thus bolstering the inference that race accounted for the disparity. This inference is particularly strong in light of the voluminous evidence of racial discrimination in the legislative record.

Rothe erroneously argues (Br. 6, 26) that the district court erred in relying on the benchmark study because it was produced after the original enactment of the 1207 program. It is well-established that relevant studies and other information conducted after passage of legislation can support a legislature's determination that remedial action was warranted. Engineering Contractors Ass'n v. Metropolitan Dade County, 122 F.3d 895, 911 (11th Cir. 1997) (citing cases), cert. denied, 523 U.S. 1004 (1998); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 289 (1986) (O'Connor, J., concurring). That is particularly true here, where the study examined data for fiscal year 1996, shortly before the award of the contract in this case.

c. Additional Evidence

The federal government has compiled other evidence — including various studies of discrimination conducted by state and local governments throughout the United States — confirming that, in the absence of affirmative remedial efforts, federal contracting would perpetuate the continuing effects of racial discrimination. 61 Fed. Reg. 26,054-26,062. This evidence shows that various types of discrimination — by procurement officials, lenders, prime contractors, suppliers, customers, bonding companies, unions, and employers — have seriously impeded the ability of minorities to compete successfully for government contracts. Ibid.

Moreover, an analysis of 58 disparity studies from around the country found substantial and statistically significant underutilization of black, Hispanic, Asian, and Native-American-owned businesses based on their availability in every industry (D51, Ex. II-B at 11, 13, 19-20, 63). Minority-owned businesses received on average only 57 cents of each dollar of state and local contracting expenditures that they would have been expected to obtain based on the percentage of "ready, willing, and able" firms that were minority-owned (D51, Ex. II-B at v-vi, 1, 19).

This voluminous record refutes Rothe's contention (Br. 15-16, 22) that the 1207 program is based on nothing more than amorphous claims of societal discrimination.[6/] Congress and

[6/] Contrary to Rothe's assertion (Br. 16), a DOD representative did not testify that mere societal discrimination was the basis (continued...)

Appellees had before them specific evidence describing how the effects of racial and ethnic discrimination have impeded the ability of minority-owned firms to compete for federal contracts.

2. Congress Is Not Required To Make Local Or Industry-Specific Findings Of Discrimination

Rothe and PLF incorrectly argue (Rothe Br. 19; PLF Br. 9-17, 31) that the federal government must find discrimination in each local market or geographic region in the United States in which the 1207 program will be used. Congress has nationwide jurisdiction and thus may address a national problem with a nationwide remedy. The Supreme Court has established that when Congress acts to combat the effects of racial discrimination that it has found to exist on a nationwide scale, its legislation applies to every state and locality without the necessity of individual findings of discrimination in each locality. See Oregon v. Mitchell, 400 U.S. 112, 133-134 (1970) (Black, J.); id. at 144-147 (Douglas, J.); id. at 231-236 (Brennan, White, Marshall, JJ.); id. at 284 (Stewart, J.). That holding is consistent with Croson, which drew a distinction between the findings of nationwide discrimination that were sufficient to sustain the congressionally-enacted program in Fullilove and the jurisdiction-specific findings that would be necessary to support an affirmative action program adopted by a state or local government. Croson, 488 U.S. at 504; id. at 489-490 (O'Connor, J.). At any rate, requiring findings of discrimination for a

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[6/](...continued)
for the 1207 program (see D58, Ex. III-F at 100-102).

specific geographic area is illogical where, as here, the price-evaluation adjustment applies to nationwide competitions involving firms that do business nationwide.

Rothe also argues (Br. 13-14) that the 1207 program is unconstitutional absent findings that discrimination has occurred in the "computer maintenance and repair" sub-industry designated by SIC code 7378. The Supreme Court, however, has never suggested that Congress must make findings of discrimination for each sub-industry that might be affected by a race-conscious remedial program. Such a requirement would be unrealistic and infeasible where, as here, Congress has adopted a remedial program to counter the effects of discrimination that have nationwide impact cutting across industry and sub-industry lines. Rothe ignores the reality that many types of discrimination identified in the record — such as discrimination by lenders, suppliers, customers, and bonding providers — will affect the ability of minorities to compete for contracts in a wide variety of industries and sub-industries.

But even if some industry-specific evidence were necessary, Appellees more than satisfied their burden of production. The benchmark study provides evidence of discrimination affecting SIC code 73, the industry group covering the contract in this case (pp. 22-24, supra), and the voluminous legislative record shows the effects of discrimination on minorities' ability to compete equally for contracts in the defense industry (pp. 19-22, supra).

No greater specificity was required, given Congress's authority to provide nationwide remedies for nationwide problems.

3. The Record Contains Abundant Evidence Of Discrimination Against Asian-Pacific Americans

Rothe incorrectly asserts (Br. 8, 20, 51) that the record is devoid of evidence of discrimination against Asian-Pacific Americans. The legislative record shows that Congress had a strong basis in evidence for believing that Asian-Pacific Americans had suffered discrimination that impeded their ability to compete for federal contracts. Congress made specific findings that Asian-Pacific Americans had been victims of discrimination affecting their ability to compete in the free enterprise system. See 15 U.S.C. 631(f)(1), 637(d)(3)(C). Moreover, in upholding the minority set-aside in Fullilove, the Supreme Court concluded that Congress had "abundant evidence" of discrimination justifying a remedial contracting program that benefitted "Orientals," among other minority groups. 448 U.S. at 454, 477-478 (plurality). During recent congressional debates on DOT's contracting program, some members of Congress highlighted the adverse effects of discrimination on contracting opportunities for Asian Americans. See, e.g., 144 Cong. Rec. S1430 (1998) (Sen. Kennedy); id. at H3959 (Rep. Norton). Congressional hearings have produced additional evidence of the difficulties Asian American-owned firms face in government contracting (D58, Ex. III-N at 135-137, 145-147; D58, Ex. III-O at 72).

Appellees introduced other evidence, including a detailed report showing that the effects of discrimination continue to hinder the ability of Asian-Pacific Americans to compete for public contracts and that firms owned by Asian-Pacific Americans are substantially underutilized in local, state, and federal contracting (D51, Ex. II-D at ii, 6-18, 21-44). Other reports provided additional evidence of such discrimination against Asian-Pacific Americans, including Korean Americans (D51, Ex. II-B at vi, 18-20, 63; D48, Exs. 7, 8; D48, Ex. 14 at 1, 32-40, 130-136, 148-153, 197-201). And, indeed, the Sohns, who own the SDB that won the contract in this case, experienced discrimination on the basis of their Korean ancestry that impeded their ability to compete for public contracts (D51, Ex. I-Q at ¶¶ 4-9; D51, Ex. I-O at 23-27, 34, 50, 56-57, 77).

Rothe contends that the 1207 program is unconstitutional "as applied in this case" because of evidence that Korean Americans have a high rate of business formation (Br. 21). Such business formation rates do not disprove that Korean Americans have suffered discrimination impeding their participation in government contracting. Even if minorities manage to form businesses, they often face discrimination that hinders their ability to expand and compete for public procurement dollars. See 61 Fed. Reg. 26,057-26,061. Indeed, some minorities form their own small businesses because they have been discriminatorily denied other business opportunities (D51, Ex. I-O at 23-27, 34; D51, Ex. I-Q ¶¶ 4-9). That is precisely what

happened to ICT's owner, who went into business for himself because of employment discrimination but then encountered other forms of discrimination that hindered the ability of his company to grow and compete for contracts (ibid.).

4. Appellees Need Not Produce Evidence That The Federal Government Itself Has Discriminated

Rothe contends (Br. 8, 12-13) that strict scrutiny requires a showing that the federal government itself discriminated in awarding contracts. That is incorrect. The Court recognized in Croson that a governmental entity "has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction." 488 U.S. at 491-492 (O'Connor, J.); accord id. at 503 (majority); id. at 518 (Kennedy, J., concurring in part and in judgment); id. at 536-539 (Marshall, J., dissenting).

This Court has properly recognized that "Croson does not require a city to incriminate itself by proving its own participation in past discrimination." Police Ass'n v. City of New Orleans, 100 F.3d 1159, 1167-1168 (5th Cir. 1996). To be sure, this Court, in the context of a challenge to a state program, also has stated that "[t]he Supreme Court has 'insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination." Hopwood v. Texas, 78 F.3d 932, 949 (5th Cir.), cert. denied, 518 U.S. 1033 (1996),[7/] quoting Wygant, 476 U.S. at 274 (Powell, J.). But

[7/] Because Hopwood involved a state program, it is of limited (continued...)

in the same opinion, this Court acknowledged that "a specific state actor can act to prevent the state from being used as a 'passive participant' in private discrimination." Hopwood, 78 F.3d at 955 n.49, citing Croson, 488 U.S. at 491-492 (O'Connor, J.). The federal government has adopted the 1207 program to ensure that its method of awarding contracts does not passively perpetuate the effects of discrimination committed by others.

But even if a state or local government were required to produce evidence that it has discriminated, no such evidence is required for a program Congress enacted. Unlike state legislatures or city councils, Congress has authority to remedy the effects that "society-wide discrimination" has on federal contracting opportunities for minorities. Croson, 488 U.S. at 490 (plurality). This necessarily includes the power to redress discrimination committed by others that affects the federal process.[8/]

[7/] (...continued)
applicability to this case, which concerns a congressionally-enacted program.

[8/] At any rate, the evidence before Congress contained allegations that federal employees had discriminated against minority-owned firms in federal contracting. See Minorities and Women as Government Contractors, supra, at 20-22, 112; Small and Minority Business Hearings, supra, at 241; SDB Participation Hearing, supra, at 215-217; Implementation Hearings, supra, at 70-71, 92, 284, 375, 426; Acquisition Hearings, supra, at 441; Reauthorization Hearing, supra, at 73-74; D51, Ex. II-BB at 12; D51, Ex. II-M at 20-21; see also D51, Ex. I-Q ¶¶ 4-9.

5. Congress Did Not "Randomly Include" Minority Groups In The 1207 Program

Rothe contends (Br. 19, 40) that the 1207 program randomly includes minority groups without regard to whether they have suffered discrimination. That contention is meritless. Congress specifically found, based on an extensive legislative record, that various minority groups covered by the 1207 program — including Asian-Pacific Americans — had suffered discrimination affecting public contracting opportunities. 15 U.S.C. 631(f)(1), 637(d)(3)(C).[9/] Rothe draws an improper parallel between the 1207 program's coverage of certain minority groups and the inclusion of similar groups in the plan invalidated in Croson. The Court in Croson objected to Richmond's "random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond," since members of some of those groups may never have lived in Richmond. 488 U.S. at 506 (emphasis added). There is no doubt that members of all the minority groups covered by the 1207 program, including Asian-Pacific Americans, live within the United States — the territorial jurisdiction affected by the program.

E. The 1207 Program Is Narrowly Tailored To Achieve The Government's Remedial Goals

The Supreme Court weighs the following factors in determining whether a program is narrowly tailored: the

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[9/] Rothe thus errs in asserting (Br. 21-22, 41) that it was SBA, not Congress, that determined most of the minority groups that were entitled to relief under the 1207 program.

necessity for the relief and the efficacy of alternative remedies, including race-neutral options; flexibility of the relief, including the availability of waiver provisions; duration of the program; relationship of the numerical goals to the relevant labor pool; and impact of the relief on non-minorities. United States v. Paradise, 480 U.S. 149, 171 (1987) (plurality); id. at 187 (Powell, J., concurring). Each of these factors strongly supports a finding that the 1207 program is narrowly tailored.

1. Necessity For Relief And Efficacy Of Race-Neutral Alternatives

The district court properly found (D74 at 11-14 n.10) that race-conscious action was necessary to achieve Congress's remedial goal. The discrimination identified in the record — especially discrimination by lenders and suppliers — raises the cost of doing business for minority-owned firms and thereby hinders their ability to compete on a level playing field. The 10% adjustment is a modest attempt to offset, in some cases, a portion of a minority firm's increased costs attributable to the effects of discrimination.

Congress did not adopt the 1207 program until it determined that myriad race-neutral means of combating racial discrimination in government procurement and the private sector had been largely ineffective. In Croson, the Supreme Court found that the City of Richmond had failed to consider the use of race-neutral means to increase minority business participation in city contracting before it adopted a rigid quota — a failure the Court contrasted

with its finding in Fullilove that "Congress had carefully examined and rejected race-neutral alternatives before enacting" a program to help minority contractors. Croson, 488 U.S. at 507, citing Fullilove, 448 U.S. at 463-467 (Burger, C.J.); id. at 511 (Powell, J., concurring). Congress and the executive branch have repeatedly found that, despite these race-neutral efforts, the effects of past discrimination are still impeding the ability of minority firms to compete on an equal footing for public contracts. See Fullilove, 448 U.S. at 467 (plurality); id. at 511 (Powell, J., concurring).

Some of the race-neutral options Congress tried are discussed at length in Fullilove. 448 U.S. at 463-467 (plurality); id. at 511 (Powell, J.). For decades, Congress assisted small businesses through the Small Business Act, 15 U.S.C. 631 et seq., which provides a host of bonding, lending, contracting, and technical assistance programs open to all small businesses. See Fullilove, 448 U.S. at 463; 61 Fed. Reg. 26,053 n.28. Congress also established a special program to help small businesses obtain surety bonds. Pub. L. No. 91-609, 84 Stat. 1813 (1970). Even before enactment of the 1207 program, SBA and DOD had race-neutral outreach and technical assistance programs for small businesses and other potential contractors. 15 U.S.C. 648; 10 U.S.C. 2411-2419. Since enactment of the 1207 program, DOD and other government agencies have continued to engage in significant race-neutral efforts, including outreach, training, and technical assistance, to help firms compete for defense

contracts. See 10 U.S.C. 2323(c) & (e); 48 C.F.R. 219.201(a) & (d)(iv) (1997); D60, Ex. 19 at 16-20; D58, Ex. III-F at 152.

Congress also tried to combat discrimination against minority-owned businesses by enacting anti-discrimination legislation. Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin, in "any program or activity receiving Federal financial assistance," 42 U.S.C. 2000d, and thus forbids federal grant recipients, including states and localities, from discriminating in awarding contracts. Congress also enacted the Equal Credit Opportunity Act, 15 U.S.C. 1691 et seq., to combat racial discrimination in lending, a major impediment for minority contractors.

But Congress received evidence that anti-discrimination laws and other race-neutral efforts alone would not eradicate the lingering effects of discrimination on government contracting. See, e.g., City of Richmond v. J.A. Croson: Impact and Response: Hearing Before the Subcomm. on Urban and Minority-Owned Bus. Dev. of the Senate Comm. on Small Bus., 101st Cong., 2d Sess. 47-48, 58-59, 61 (1990) (inadequacies of race-neutral alternatives). The evidence available to Congress also showed that minority participation in government procurement tends to fall dramatically if affirmative action programs are abolished. The Meaning and Significance for Minority Businesses of the Supreme Court Decision in City of Richmond v. J.A. Croson Co.: Hearing Before the Legislation and Nat'l Sec. Subcomm. of the House Comm.

on Gov't Operations, 101st Cong., 2d Sess. 57, 62-90 (1990). Indeed, contract awards to minority-owned firms fell by more than 90% in a number of localities after they suspended their affirmative action programs. 61 Fed. Reg. 26,062. During a 1992 reauthorization hearing for the 1207 program, a DOD official estimated that, without the program, minority contractors would have received no more than 1% of the total DOD contracting budget (D51, Ex. II-K at 53), even though at the time minorities owned 9% of all businesses. State of Small Business: A Report of the President 362 (1994) (1992 figures).

2. Flexibility

In Croson, the Supreme Court found that Richmond's 30% minority set-aside constituted a "rigid numerical quota" that had no relationship to remedying past discrimination, granted an "absolute" preference based on race alone, and lacked any provision for administrative waiver. 488 U.S. at 507-508. The 1207 program, by contrast, has several flexible features that avoid the rigid reliance on race that characterized the Croson quota.

First, the 1207 program does not benefit only minorities. Individual non-minority firms can qualify as SDBs and participate in the program by demonstrating that the owners have suffered social and economic disadvantage. The ability of non-minorities to participate refutes Rothe's assertion (Br. 39-42) that the program is under-inclusive. By focusing on disadvantage, rather than race alone, the 1207 program is more narrowly tailored than

the program upheld as constitutional in Fullilove, which involved a 10% set-aside for minority-owned businesses. 448 U.S. at 485-486 (plurality). It is also more narrowly tailored than most other affirmative action programs that have been upheld under strict scrutiny. See, e.g., Edwards, 37 F.3d at 1102, 1112-1115 (plan benefitting only blacks and Hispanics); Peightal v. Metropolitan Dade County, 26 F.3d 1545, 1549, 1562 (11th Cir. 1994) (same); Vogel v. City of Cincinnati, 959 F.2d 594, 596, 599-601 (6th Cir.) (benefitting only black and female candidates), cert. denied, 506 U.S. 827 (1992); Stuart v. Roache, 951 F.2d 446, 448, 455 (1st Cir. 1991) (black candidates), cert. denied, 504 U.S. 913 (1992).

Second, unlike the programs in Croson and Fullilove, the price-evaluation adjustment does not set contracts aside for minorities or even SDBs. Rather, qualified businesses, regardless of the race or disadvantaged status of their owners, are eligible to compete for the contract — a fact weighing strongly in favor of the program's constitutionality. See Edwards, 37 F.3d at 1114. The 10% price-evaluation adjustment was simply one of several factors affecting the contract award in this case; it did not guarantee that an SDB would win the contract. For that reason, another circuit has recognized that price-evaluation adjustments are flexible mechanisms that do not pose the same concerns as the rigid quota in Croson. See Associated Gen. Contractors v. Coalition for Econ. Equity, 950 F.2d 1401, 1404, 1417 (9th Cir. 1991), cert. denied, 503 U.S. 985

(1992). Nor does the 10% adjustment have the practical effect of barring non-SDBs from winning contracts. In this case, Rothe's bid was lower, even after the 10% adjustment, than a bid submitted by an SDB other than ICT (D51 Ex. I-C ¶¶ 7, 10). Moreover, one of Rothe's experts testified that it was not unusual for the competitive range for bids in government procurements to vary by 40% — four times the size of the price-evaluation adjustment (D58 Ex. III-J at 49-51).

Third, unlike the program in Croson, the 1207 program does not impose a "rigid numerical quota." The program's 5% goal is aspirational, not mandatory. During debates and oversight hearings, members of Congress repeatedly emphasized that achieving the goal was not mandatory. See 132 Cong. Rec. 21,716-21,717 (1986) (Rep. Mitchell); id. at 21,717 (Rep. Savage); ibid. (Rep. Gray); Reauthorization Hearing, supra, at 1, 75 (Rep. Mavroules). Indeed, Congress has rebuffed attempts to amend the 1207 program to change the 5% goal to a mandate. See SDB Issues Hearing, supra, at 13 (Rep. Richardson). Moreover, Appellees have treated the goal as aspirational, not mandatory, in implementing the program (D58, Ex. III-F at 151-153, 156-158; D58, Ex. III-H at 19-21). The contention that the 5% goal is mandatory is belied by DOD's failure to achieve the goal for the first five years of the program (D51, Ex. I-H at Chart 7).[10/]

[10/] Rothe distorts the record in this regard. Although Rothe quotes a DOD official as saying that "[c]ommanders that don't make goals don't make the next promotion" (Br. 38), that official clarified that he simply meant that "commanders who can't do

(continued...)

Fourth, an unqualified SDB cannot win the contract even if DOD uses the price-evaluation adjustment. DOD awards contracts only to technically acceptable bidders with low performance risk ratings.

Fifth, the 1207 program contains important safeguards against over-inclusion. Unlike the set-aside program in Croson, the 1207 program includes waiver provisions that preclude minorities from benefitting from the presumption if their individual circumstances indicate they are not socially or economically disadvantaged. The presumption is rebuttable, and disappointed bidders have successfully challenged the disadvantaged status of firms claiming to be SDBs.[11/] See, e.g., SRS Techs. v. United States, 894 F. Supp. 8 (D.D.C. 1995). The rebuttable nature of the presumption weighs heavily in favor of a finding that the program is narrowly tailored. Fullilove, 448 U.S. at 489 (plurality); see also Croson, 488 U.S. at 504. Moreover, no business, regardless of the race of its owner, can participate in the program if the owner exceeds the personal

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[10/](...continued)
their job don't get promoted" (D58, Ex. III-F at 157) and emphasized that the 5% goal was merely aspirational (id. at 151-153, 156-158). Although an Air Force memorandum cited by Rothe (Br. 3 n.10) states that "compliance with this publication is mandatory" (D66, Ex. I at 989), it never suggests that the 5% goal itself is mandatory and, indeed, acknowledges that the Air Force might not meet the goal (id. at 994).

[11/] Rothe's brief erroneously states (Br. 45) that "one of appellees' counsel" questioned the constitutionality of the presumption and numerical goal. The quotation that Rothe includes in its brief (Br. 45) is a statement about contracting programs from a law review article by a law professor at the Air Force Academy (D60, Ex. A at *75 n.a1, *98).

wealth limit or if the firm exceeds the size restrictions of the Small Business Act, minimizing the possibility that an extremely wealthy firm or individual would benefit from the program. Congress has imposed criminal penalties for persons or businesses that misrepresent their minority status or the minority ownership of their firms to take improper advantage of the program. 10 U.S.C. 2323(f). The plurality in Fullilove found such a safeguard significant. 448 U.S. at 482, 487-488.

Rothe contends that DOD impermissibly applies the 10% price-evaluation adjustment without regard to whether it is needed by a particular contractor or in a particular industry (Br. 37-38, 45). Rothe is mistaken. The suggestion that race-based programs must provide benefits only to actual victims of discrimination is contrary to Supreme Court precedent. See Wygant, 476 U.S. at 287 (O'Connor, J., concurring) (noting Court's unanimous view "that a plan need not be limited to the remedying of specific instances of identified discrimination for it to be deemed sufficiently 'narrowly tailored'"); accord Coalition for Econ. Equality, 950 F.2d at 1417 n.12.[12/] Such a requirement would essentially

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[12/] Croson is not to the contrary. Although Croson noted that Richmond's set-aside program failed to inquire "into whether or not the particular MBE seeking a racial preference has suffered from the effects of past discrimination," 488 U.S. at 508, that statement must be viewed in the context of Richmond's failure to link its minority set-aside program "in any way" to "identified discrimination" within its borders against the minority groups benefitted by the set-aside. 488 U.S. at 507. Where, as here, Congress had a strong basis in evidence for believing that discrimination against Asian-Pacific Americans in the United States had impeded their ability to compete for public contracts, no individualized showing is required.

invalidate all affirmative action, thus contradicting Adarand's admonition that strict scrutiny is not "fatal in fact." 515 U.S. at 237. In any event, the beneficiary of the 10% price-evaluation adjustment in this case has suffered discrimination impeding contracting opportunities (pp. 29-30, supra).

Contrary to Rothe's argument, the 1207 program contains safeguards to ensure that the price-evaluation credit is available only in those industries in which minorities suffer competitive disadvantages. The adjustment may now be applied only in those industries in which the Department of Commerce determines SDBs are underutilized in relation to their capacity in the industry. See 48 C.F.R. 19.201(b); 63 Fed. Reg. 35,714. The Department of Commerce's benchmark study reveals a substantial under-representation of SDBs in the industry at issue in this case (D51, Ex. I-J), thus showing that price credits are narrowly tailored.

Finally, Rothe argues (Br. 38) that the 1207 program does not allow waiver of the 10% price credit where the SDB's higher price is not attributable to the effects of past discrimination. In fact, the federal government provides such a waiver by making the presumption of disadvantage rebuttable. Congress also precluded DOD from using the price credit when it would cause the price of the contract to exceed "fair market cost by more than 10 percent," 10 U.S.C. 2323(e)(3)(A); see also 48 C.F.R. 219.7002(c) (1997), ensuring that SDBs will not benefit from the adjustment where their price is so high that it is doubtful that it is

attributable to the effects of discrimination. See Fullilove, 448 U.S. at 470-471, 488 (plurality).

3. Duration Of The Relief

The 1207 program and the price-evaluation adjustment are limited in duration. The 1207 program is authorized only through fiscal year 2003, Pub. L. No. 106-65, § 808, 113 Stat. 512 (1999), and expires automatically unless Congress determines that it is still needed. Moreover, Congress requires suspension of the price-evaluation adjustment for the year after any fiscal year in which DOD awards more than 5% of its contracts to SDBs. 10 U.S.C. 2323(e)(3)(B)(ii). DOD has suspended use of price-evaluation adjustments through February 24, 2000.

The 1207 program also is subject to regular congressional oversight to determine whether it is still necessary to eliminate the effects of discrimination. DOD must annually report to Congress concerning attempts to meet the program's 5% goal, and must analyze the impact the goal has on non-SDBs. 10 U.S.C. 2323(i)(3)(B). Congress repeatedly has held hearings on the operation of the 1207 program (see pp. 20-21, supra), and Congress and the DOD have amended the program several times to limit its impact on non-SDBs. See, e.g., Pub. L. No. 105-261, 112 Stat. 1920 (1998); Pub. L. No. 101-189, § 831(b), 103 Stat. 1507 (1989), codified at 10 U.S.C. 2323(e)(3); 60 Fed. Reg. 43,563, codified at 48 C.F.R. 219.7001(b)(5) (1997).

Rothe argues, however, that the 1207 program is not narrowly tailored because DOD continued using the price-evaluation

adjustment for a number of years after exceeding the 5% goal (Br. 39, 43). But the Department of Commerce's benchmark study shows that even though DOD has exceeded the overall agency goal of 5% in recent years, SDBs are still underutilized in the specific industry in which the contract here fell. That fact justified continued use of the price-evaluation adjustment for this contract. Although Congress now mandates temporary suspension of the 10% adjustment when DOD meets its 5% goal, that suspension was a policy choice by legislators, not a constitutional requirement.

4. Relationship Of The Goal To The Relevant Labor Pool

The district court properly concluded that the 5% goal is justified in relation to the percentage of minorities able to bid on federal contracts (D74 at 24-25). That goal in fact is substantially below the pool of ready, willing, and able minority contractors in the relevant industry.[13/] The 5% goal is also significantly less than the percentage of minority businesses in the United States. See The State of Small Business, supra, at 362 (minorities owned 9% of all businesses in 1992). Rothe has offered no evidence that the 5% goal is unfairly large.

5. Impact Of Relief On Non-Minorities

Non-minorities may be required to share the burden of remedying the effects of past discrimination, so long as that burden is not unduly harsh. Fullilove, 448 U.S. at 484

[13/] Although SDBs had the capacity to win about 40% of federal contracting dollars in fiscal year 1996 in the relevant industry, SDBs were awarded only 26.4% of those dollars (p. 23, supra).

(plurality); Wygant, 476 U.S. at 280-281 (plurality). The district court correctly found that the 1207 program does not unduly burden third parties such as Rothe (D74 at 27).

Even when it was in effect, the price-evaluation adjustment had only a minimal effect on non-SDBs. In each of the past three fiscal years for which data are available, SDBs received no more than one-fifth of 1% of the dollar value of DOD's prime contracts as a result of the price-evaluation adjustment (D51, Ex. I-H at Chart 7; D51, Ex. I-B at 115-116). In SIC code 73, the price-evaluation adjustment was determinative in less than one-tenth of 1% of the total contract awards, and the benchmark study shows that non-SDBs in SIC code 73 are significantly overrepresented in relation to their availability, indicating their overall success in securing federal contracts (D51, Ex. I-K at 5, 15-17).

The program contains a number of safeguards designed to protect non-SDBs. Pursuant to congressional mandate, DOD monitors the use of price credits to ensure that they do not deny non-SDBs "a reasonable opportunity to compete for contracts" in particular industries. 10 U.S.C. 2323(e)(3); see also 10 U.S.C. 2323(g)(A); D51, Ex. I-B at 147-149. Moreover, price credits do not apply to certain types of procurements, including small-business set-asides — the type of contracts on which Rothe usually bids. 48 C.F.R. 219.7001(b) (1997); D51, Ex. I-M at 41-42.

Nor did Rothe suffer undue harm as a result of this program. Aside from the procurement at issue in this case, Rothe has not

lost a single contract as a result of the 1207 program (D51, Ex. I-M at 72), even though federal contracts have made up 95% of Rothe's business over the past 30 years (D38 ¶ 51). And Rothe is a thriving company that has grown considerably in recent years (D51, Ex. I-M at 58, 63-64).

II

THE DISTRICT COURT DID NOT COMMIT MANIFEST ERROR IN ADMITTING THE DEPARTMENT OF COMMERCE'S BENCHMARK STUDY

Rothe erroneously contends (Br. 52) that admission of the benchmark study violated Fed. R. Evid. 1006 because Rothe was not provided all the underlying raw data on which the study's statistical analysis was based. "The district court is given wide discretion regarding evidentiary rulings," Guillory v. Domtar Indus. Inc., 95 F.3d 1320, 1329 (5th Cir. 1996), and such rulings during summary judgment proceedings are reviewed for "manifest error." Hart v. O'Brien, 127 F.3d 424, 437 (5th Cir. 1997), cert. denied, 119 S. Ct. 868 (1999). No manifest error occurred here.

A. Rule 1006 Does Not Require Exclusion Of The Study

Rothe did not argue in the district court that the benchmark study was a summary exhibit subject to the requirements of Rule 1006. Rothe is thus precluded from raising the issue on appeal. See Shanks v. AlliedSignal, Inc., 169 F.3d 988, 993 n.6 (5th Cir. 1999).

At any rate, the benchmark study is not a "summary" exhibit under Rule 1006 because it was not prepared for trial. See

United States v. Draiman, 784 F.2d 248, 256 n.6 (7th Cir. 1986); see also United States v. Shyres, 898 F.2d 647, 657 & n.5 (8th Cir.), cert. denied, 498 U.S. 821 (1990). The Department of Commerce, a non-party, published the benchmark study in June 1998 (63 Fed. Reg. 35,714), more than four months before Rothe filed suit and even before the award of the disputed contract.

In addition, if a study qualifies for admission under the public records or business records exceptions to the hearsay rule, it is considered an original record — not a summary — and thus is not subject to the requirements of Rule 1006. Hughes v. United States, 953 F.2d 531, 539-540 (9th Cir. 1992); Draiman, 784 F.2d at 256 n.6. The benchmark study is admissible under the public records exception as a "report[]" or "data compilation[]" of a "public * * * agenc[y]." Fed. R. Evid. 803(8). The findings of the benchmark study were made by the Commerce Department pursuant to authority granted by law. 48 C.F.R. 19.201(b). See Fed. R. Evid. 803(8)(C). Data compilations or statistical analyses are admissible under Rule 803(8) even if the data are drawn from underlying information that is not admitted in evidence or otherwise made available to opposing counsel. See Givens v. Lederle, 556 F.2d 1341, 1346 (5th Cir. 1977); Hughes, 953 F.2d at 539-540; Kehm v. Procter & Gamble Mfg. Co., 724 F.2d 613, 617-619 (8th Cir. 1983); Ellis v. International Playtex, Inc., 745 F.2d 292, 299-304 (4th Cir. 1984).

But even if the district court erred in admitting the benchmark study, the error was harmless. See Hackett v. Housing

Auth., 750 F.2d 1308, 1312-1314 (5th Cir.), cert. denied, 474 U.S. 850 (1985) (harmless error analysis in case involving Rule 1006 violation). Appellees' other evidence amply shows that the 1207 program is narrowly tailored to achieve the government's compelling interest in combatting the effects of discrimination on contracting opportunities for minorities. See pp. 16-22, 25-26, 32-45, supra. Moreover, even if the study itself were inadmissible, the core evidence the Department of Commerce compiled in preparing the study was admissible under Fed. R. Evid. 703 through the reports and deposition testimony of Dr. Ian Ayres to explain his expert opinion. See Air Safety, Inc. v. Roman Catholic Archbishop, 94 F.3d 1, 8 (1st Cir. 1996) (although district court excluded summaries under Rule 1006, it allowed expert to testify about information in summaries). Rothe itself relies heavily on the expert report of Dr. George LaNoue, who based his opinion on statistical studies whose underlying raw data are not in the record (D60, Ex. 13 at 42-44, 60-61). If Dr. LaNoue is permitted to rely on statistical studies without providing the raw data, surely Dr. Ayres should be allowed to render an opinion on the validity of the benchmark analysis under Rule 703.

Rothe has not shown that it was prejudiced by its failure to obtain all the underlying raw data. Rothe received all the data that were provided to Appellees' expert (D68, Ex. IV-C at 98-102, 213; D44, Att. E at 112; D74 at 15). Rothe also obtained abundant information necessary to understand and assess the

benchmark study, including summaries of the raw data (D66, Ex. 22, Table 3; D44, Att. A at 22-23, 59, 62, 65, 67; D68, Ex. IV-C at 98-99), as well as detailed explanations of the study's methodology and procedures provided in the reports and deposition of Dr. Ayres, the deposition of two high-level Commerce Department officials, and the Federal Register (D60, Ex. 10; D51, Ex. I-K; D68, Exs. IV-C, IV-E, IV-H).

B. Appellees Did Not Withhold The Underlying Data

Appellees turned over to Rothe all the materials pertaining to the study that were in their custody, control, or possession (D44 at 3; D44, Att. A at 21-23, Att. E at 116; D45 at 1-4). To the extent that any additional materials Rothe sought existed, they were in the possession of a non-party, the Department of Commerce, which claimed that some of the information was census material exempt from disclosure under 13 U.S.C. 8 & 9 (D44, Att. E at 87, 89, 111-113; D66, Ex. 23 at 1).

Although Rothe served a subpoena duces tecum on the Department of Commerce, the subpoena was invalid under Fed. R. Civ. P. 45(a)(2) because it was incorrectly issued from the Western District of Texas rather than the District of Columbia, where the production of documents was to take place (D44 at 3 n.2; D44, Att. C, Att. E at 105; D45 at 2). See Natural Gas Pipeline Co. v. Energy Gathering, Inc., 2 F.3d 1397, 1406 (5th Cir. 1993) ("a federal court sitting in one district cannot issue a subpoena duces tecum to a non-party for the production of documents located in another district"), cert. denied, 510 U.S.

1073 (1994). Furthermore, Rothe's subpoena failed to request any documents in the Commerce Department's custody, control, or possession that had not already been turned over to Rothe's counsel (D44 at 3-4 & n.2, 6; D44, Att. C, Att. E at 87-89, 94; D66, Ex. 23).

Despite these deficiencies in the subpoena, Appellees' trial attorney offered to work with Rothe's counsel to help him obtain additional material from the Department of Commerce (D68, Ex. IV-D; D44 at 6-7; D44, Att. E at 92-95, 120-121). But, as the district court found, Rothe's counsel failed to respond in "good faith" and rejected the offer "out of hand" (D45 at 3).

Instead of properly using the Federal Rules of Civil Procedure to compel the Department of Commerce to produce the disputed material, Rothe waited until two days before the close of discovery to file a motion to compel against Appellees (D41; D44, Att. E at 109). The district court properly denied the motion, concluding that it could not require Appellees to force a non-party to turn over the requested information (D45 at 2-3). See United States v. International Union of Petroleum & Indus. Workers, 870 F.2d 1450, 1452-1454 (9th Cir. 1989) (international union could not be compelled to turn over documents in possession of non-party local affiliates); Chaveriat v. Williams Pipe Line Co., 11 F.3d 1420, 1426-1427 (7th Cir. 1993) (plaintiffs could not be compelled to produce documents in the control of non-party). Rothe filed suit against only two agencies of the government — DOD and the Air Force — and the district court

correctly recognized that the Department of Commerce is not a party to this litigation. The Department of Commerce is a separate entity and must be sued individually if it is to be treated as a party. See Hughes v. United States, 701 F.2d 56, 58 (7th Cir. 1982) ("Government agencies do not merge into a monolith").

A district court's refusal to grant a continuance to allow a party to conduct additional discovery "is reviewable for abuse of discretion only." Haynsworth v. The Corporation, 121 F.3d 956, 970 (5th Cir. 1997), cert. denied, 523 U.S. 1072 (1998). In light of the timing of Rothe's motion (two days before the close of already lengthy discovery) and Rothe's failure properly to use the Federal Rules of Civil Procedure, the district court did not abuse its discretion in declining to prolong discovery to allow Rothe to proceed against the Department of Commerce (D45 at 2). The court earlier had extended discovery to accommodate Rothe's needs and had consulted Rothe prior to setting the original discovery schedule (D45 at 2; D36 at 2-3; D18 at 2), to which Rothe had expressly agreed (D15 ¶ 5; D14 ¶ 9; D25 at 108-111). Where, as here, a party agrees to a discovery schedule, the district court does not abuse its discretion in enforcing the discovery deadline. Salter v. Upjohn Co., 593 F.2d 649, 652 (5th Cir. 1979). Moreover, although Appellees offered to extend discovery, Rothe would not agree unless Appellees postponed implementation of those portions of the contract that ICT was scheduled to begin performing on May 1, 1999 (D68 at 9; D34, App.

Exh. 3 ¶¶ 8-9; id., Exh. 5 at 2; id., Exh. 7; id., Exh. 9 at 2). Therefore, to the extent the discovery deadline impeded Rothe's attempts to obtain the data it wanted from the Department of Commerce, that was a problem of Rothe's own making.

III

ROTHE HAS NOT RAISED A GENUINE ISSUE OF MATERIAL FACT AS TO THE VALIDITY OF THE BENCHMARK STUDY

Rothe argues (Br. 25) that the district court erred in relying on the benchmark study to grant summary judgment. Although Rothe claims that the study's methodology is flawed, Rothe failed to produce specific evidence contradicting the central finding of the study — i.e., that SDBs were significantly underutilized in federal contracting in SIC code 73 in relation to their capacity to perform federal contracts. The district court thus properly concluded that no genuine issues of material fact remained for trial.[14/]

Contrary to Rothe's argument, the reports of Dr. LaNoue do not raise a genuine issue as to the reliability of the benchmark study. As this Court has emphasized, a party "must do more than raise theoretical objections to the data or statistical approach taken; instead, [the party] should demonstrate how the [alleged] errors affect the results." Capaci v. Katz & Besthoff, Inc., 711

[14/] Even if there were a genuine issue of material fact, the district judge's finding that the benchmark study was valid should be upheld because it was not clearly erroneous. This standard of review is appropriate because the same judge would have decided the issue in a bench trial if summary judgment had not been granted. See pp. 8-9, supra.

F.2d 647, 654 (5th Cir. 1983), cert. denied, 466 U.S. 927 (1984). Moreover, an expert's opinion will not preclude summary judgment if it is conclusory or consists of unsubstantiated assertions. Ross v. University of Tex., 139 F.3d 521, 525-527 (5th Cir. 1998); Baker v. Putnal, 75 F.3d 190, 199 (5th Cir. 1996). These are precisely the flaws in Dr. LaNoue's reports. He mounts conclusory attacks based on theoretical speculation, but fails to present specific evidence undermining the defense of the benchmark study by Appellees' expert, Dr. Ayres. And on some points, Dr. LaNoue neglects even to respond to Dr. Ayres' analysis.

Rothe's criticisms of the benchmark study's methodology are unfounded, for the reasons explained in detail in Dr. Ayres' expert reports (D51, Ex. I-K; D68, Ex. IV-H). Dr. Ayres concluded that the methodology is a valid approach to calculating the government's utilization of SDBs in federal contracts. He further found that the study was based on a number of conservative assumptions that are likely to underestimate the capacity of SDBs, and if the Commerce Department had made even more conservative assumptions, the benchmark study still would have shown an underutilization of SDBs in SIC code 73 (D51, Ex. I-K at 4-18; D68, Ex. IV-H). Rothe presents no specific evidence undermining these conclusions.

Rothe mistakenly argues that the benchmark study is flawed because it analyzes SDB underutilization by 2-digit, rather than 4-digit, SIC codes (Br. 27-28). The only court of appeals that

has addressed the issue in this context has used 2-digit SIC codes in analyzing possible underutilization of minority firms. See Engineering Contractors Ass'n, 122 F.3d at 912-918. Dr. Ayres defended the use of 2-digit codes, explaining that analysis of the data by 4-digit codes would have reduced the sample sizes, making it more difficult to obtain statistically significant results (D68, Ex. IV-H at 1, 6-9). Dr. LaNoue offered no evidence to dispute those concerns about sample size (see D66, Ex. 22 at 10-13). See Capaci, 711 F.2d at 654 (criticizing party's "unfair and obvious attempt to disaggregate [the] data to the point where it was difficult to demonstrate statistical significance").

Next, Rothe argues (Br. 23) that the benchmark study should have analyzed underrepresentation by separate racial or ethnic groups. But the undisputed evidence showed that the Department of Commerce did not do such an analysis because (1) it did not have data that identified all SDBs by the race of their owners, and (2) even if such data were available, breaking down the analysis by racial or ethnic groups would have produced such small sample sizes that it would have been impossible to perform a meaningful statistical calculation (D58, Ex. III-P at 171-172; D68, Ex. IV-H at 9-10). In addition, in enacting the 1207 program, Congress applied the presumption of disadvantage equally to affected minority groups.

Rothe also argues (Br. 30-31) that the benchmark study is flawed because it "did not calculate how often a firm bid or the

size of contracts on which the firm bid" — factors that Rothe contends could affect disparities in the contract dollars awarded to SDBs. But, as Dr. Ayres explained, it is "far from obvious" that a firm that bids several times is more willing and capable than a firm that bids once. "Less capable firms that lose initial bidding competition may be forced to bid repeatedly, while the success of more capable firms in winning initial bidding competitions may mean that they do not [] need to bid on subsequent competitions" (D68, Ex. IV-H at 4 n.3). Nothing in Dr. LaNoue's reports undermines Dr. Ayres' common-sense assessment. Moreover, the benchmark study controlled for the size and age of firms (D51, Ex. I-K at 5, 11-12), factors that are most likely to correlate with the size of the contracts on which the firms bid.

Finally, Rothe asserts (Br. 29-30) that the benchmark study overstated the availability of SDBs by including 8(a) firms that may not have bid on government contracts. But Dr. Ayres defended the inclusion of these 8(a) certified firms in the benchmark analysis (D68, Ex. IV-H at 2-4; D51, Ex. I-K at 10), explaining that the SBA's certification requirements for 8(a) firms provide assurances that those businesses are qualified to compete for government contracts and interested in doing so (D68, Ex. IV-H at 3-4). He also stated that the benchmark study's methodology contains a "self-correcting feature to mitigate the impact of any overinclusion" that might otherwise result from including 8(a) firms in the initial definition of the qualified pool (D68, Ex.

IV-H at 3-4; D51, Ex. I-K at 10-11, 18). Dr. LaNoue's critique of the benchmark study ignores these safeguards (see D68, Ex. IV-H at 4).

IV

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN APPOINTING AMICI CURIAE OR RELYING ON THEIR MATERIALS

The decision whether to allow amicus participation is committed to the district court's broad discretion. Newark Branch, NAACP v. Town of Harrison, 940 F.2d 792, 808 (3d Cir. 1991); cf. Alabama-Tennessee Natural Gas Co. v. Federal Power Comm'n, 359 F.2d 318, 343 & n.53 (5th Cir.) (same in administrative proceeding), cert. denied, 385 U.S. 847 (1966). The district court did not abuse its discretion in appointing amici or relying on the documents they submitted.

Rothe contends (Br. 53) that it was prejudiced because the amici filed their motion to participate in the case on the last day of discovery. Rothe suffered no prejudice. The amici's motion and brief were filed on February 26, 1999 (D46, D47, D48), the same day as Appellees' summary judgment motion, and 13 days before Rothe filed a response to our motion (D66). Rothe thus had sufficient time to respond to amici's arguments.

Nor did the district court abuse its discretion in relying on materials the amici submitted. Contrary to Rothe's argument (Br. 53), the court's reliance on those materials did not contradict its earlier ruling on the amici's participation. The court emphasized in its summary judgment ruling that it had "not

relied on any statistical evidence presented by the amici" (D74 at 13 n.8) — a position consistent with its previous order (D65 at 3-4). Rothe has not shown that it was prejudiced, as many of the amici's documents were either identical to, or summarized in, Appellees' exhibits (compare D48, Exs. 3-4, 6-8 with D51, Exs. II-B, II-D and II-C at 26,057-26,060). Several other amici exhibits were statutes, executive orders, government reports, and census data (D48, Exs. 4, 9, 13-16), of which the court could have taken judicial notice. See United States v. Texas Educ. Agency, 467 F.2d 848, 879 (5th Cir. 1972); Knox v. Butler, 884 F.2d 849, 852 n.7 (5th Cir. 1989), cert. denied, 494 U.S. 1088 (1990).

CONCLUSION

This Court should dismiss the appeal for lack of jurisdiction or transfer the case to the Federal Circuit. Alternatively, the Court should affirm the district court's judgment.[15/]

Respectfully submitted,

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[15/] Even were this Court to reverse the judgment, the proper disposition would be a remand for trial — not the relief requested in Rothe's brief (Br. 55). Rothe would not be entitled to much of its requested relief even if it ultimately prevailed in this litigation (D51 at 2-4; D58 at 19-20). Rothe's request is overbroad to the extent it seeks a declaration that 10 U.S.C. 2323 and 15 U.S.C. 637(d) are facially invalid (see Br. 1-2, 32-33, 55). Rothe cannot show that there are no circumstances in which those two statutes could be constitutionally applied. Moreover, both statutes contain a number of provisions, including race-neutral mechanisms, that did not affect this contract award.

Nor is Rothe entitled to an award of the disputed contract, which has expired. The only potentially appropriate relief available to Rothe would be an award of bid preparation costs. See Delta Data Systems Corp. v. Webster, 755 F.2d 938, 940 (D.C. Cir. 1985). Rothe cannot show that it would have won the contract "but for" the use of the price-evaluation adjustment. See Delta Data Systems Corp. v. Webster, 744 F.2d 197, 204 (D.C. Cir. 1984). If the Air Force had not announced that it would use the price-evaluation adjustment, additional firms may have entered the competition and the competitors may have submitted different bids (D51, Ex. I-M at 67-68, 71-73; D58, Ex. III-J at 37).

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. Civ. P. 32(a)(7)(C), I hereby certify that this brief complies with the type-volume limitations of Fed. R. Civ. P. 32(a)(7)(B).

1. Exclusive of the exempted portions in Fed. R. Civ. P. 32(a)(7)(B)(iii), the brief contains 13,687 words.

2. The brief has been prepared in monospaced typeface using Wordperfect 7.0, with Courier typeface at 10 characters per inch (12-point font).

3. I am providing a disk containing an electronic version of the brief, exclusive of the exempted portions in Fed. R. Civ. P. 32(a)(7)(B)(iii).

4. I understand that a material misrepresentation in this certificate may result in the Court striking the brief and imposing sanctions against the person signing the brief.

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CERTIFICATE OF SERVICE

I hereby certify that on October 20, 1999, I served two copies of the foregoing BRIEF FOR THE APPELLEES and one disk containing the brief's text by Federal Express, next business day delivery, on the following counsel of record:

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