No. 2009-1565

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ROTHE DEVELOPMENT CORPORATION,

Plaintiff-Appellant

v.

DEPARTMENT OF DEFENSE &
DEPARTMENT OF THE AIR FORCE,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF TEXAS IN
CASE NO. 98-CV-1011, JUDGE XAVIER RODRIGUEZ

BRIEF FOR THE DEPARTMENT OF DEFENSE AND DEPARTMENT OF THE AIR FORCE AS APPELLEES

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LEGISLATIVE HISTORY:

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STATEMENT OF RELATED CASES

This case has been before this Court three times previously. The first appeal before this Court was *Rothe Development Corp*. v. *Department of Defense*, No. 00-1171, 262 F.3d 1306 (2001), the second was *Rothe Development Corp.* v. *Department of Defense*, No. 04-1552, 413 F.3d 1327 (2005), and the most recent

appeal was *Rothe Development Corp.* v. *Department of Defense*, No. 2008-1017, 545 F.3d 1023 (2008).

This case was transferred to this Court from the United States Court of Appeals for the Fifth Circuit. *Rothe Dev. Corp.* v. *Department of Def.*, No. 99-50436, 194 F.3d 622 (1999).

STATEMENT OF JURISDICTION

The district court exercised subject matter jurisdiction pursuant to 28 U.S.C. 1331, 1343, and 1346. On August 11, 2008, the district court entered an order denying Rothe's application for attorney's fees under the Equal Access to Justice Act (EAJA), 28 U.S.C. 2412(b) and (d). R. 1.[1] Rothe filed a timely notice of appeal from that order on August 28, 2009. This Court has jurisdiction pursuant to 28 U.S.C. 1295(a)(2).

STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion when concluding that the government was substantially justified in defending the constitutionality of Section 1207 of the National Defense Authorization Act, 10 U.S.C. 2323.

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[1] "R. _" refers to page numbers of the Appendix filed with Rothe's Opening brief. "Doc. __ at __" refers to the docket items set out in the district court's docket sheet and the requisite page numbers of those documents. The docket sheet relates to *Rothe Development Corp.* v. *Department of Defense*, No. 98-1011 (W.D. Tex.). "Br. __" refers to pages in Rothe's opening brief.

2. Whether the district court abused its discretion in determining that the government did not act in bad faith in defending the constitutionality of Section 1207.

3. Whether law of the case doctrine precludes an award under EAJA for attorney's fees incurred by Rothe prior to August 31, 2004.

STATEMENT OF THE CASE

1. Statutory Framework Of Section 1207

In 1986, Congress enacted the National Defense Authorization Act of 1987, Pub. L. No. 99-661, 100 Stat. 3816, which provided that five percent of the amount of the Department of Defense's (DOD's) procurement contracting shall be entered into with small business concerns owned and controlled by socially and economically disadvantaged individuals (SDBs), as defined by Section 8(d) of the Small Business Act, 15 U.S.C. 637(d). Section 8(d) of the Small Business Act states that Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities are presumed to be socially and economically disadvantaged. 15 U.S.C. 637(d)(3)(C)(ii) (1990).

Section 1207(e) of the National Defense Authorization Act authorized DOD to take certain measures. One was "enter[ing] into contracts using less than full and open competitive procedures (including awards under section 8(a) of the

Small Business Act), but [DOD] shall pay a price not exceeding fair market cost by more than 10 percent in payment per contract to contractors or subcontractors." Pub. L. No. 99-661, 100 Stat. 3974. DOD implemented this directive by applying a price evaluation adjustment (PEA) to bids submitted by non-SDB bidders and increasing those bids by ten percent before comparing them to bids submitted by SDBs.

In 1989, Congress reauthorized Section 1207 for another three years. See National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, §831(b), 103 Stat. 1507 (Nov. 29, 1989). In 1992, Congress reauthorized Section 1207 for seven more years. See National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, § 801(a)(1)(B), 106 Stat. 2442 (Oct. 23, 1992).

In 1998, Congress amended the statute and directed DOD, at the beginning of each fiscal year, to review the data for the past fiscal year and determine whether the agency reached the five percent SDB goal. Where the five percent goal is reached, DOD would suspend use of the PEA for the next fiscal year. See Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, § 801, 112 Stat. 2080-2081 (Oct. 17, 1998). The five percent SDB goal was met in 1998, and the PEA was suspended in 1999 and has been

since that time. See *Suspension of the Price Evaluation Adjustment for Small Disadvantaged Businesses*, 64 Fed. Reg. 4847 (Feb. 1, 1999).

Congress reauthorized Section 1207 in 1999 (see National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 808, 113 Stat. 705 (Oct. 5, 1999)), and again in 2002 (see Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, § 816, 116 Stat. 2610 (Dec. 2, 2002)). The DOD determined that it met the five percent goal every fiscal year from 1998 to 2008, and, pursuant to the PEA suspension clause, DOD suspended the use of the PEA during those years. *Rothe Dev. Corp.* v. *Department of Def.*, 545 F.3d 1023, 1028 (Fed. Cir. 2008).

2. 2006 Reauthorization Of Section 1207

Congress amended Section 1207 in 2006. During the 2006 reauthorization, Senator Edward Kennedy of Massachusetts spoke on the Senate floor on November 10, 2005, in favor of the program's extension, stating that the Section 1207 program ensured that DOD's "[f]ederal contracting process in no way supports or subsidizes the discrimination that has long been a problem in the contracting business." 151 Cong. Rec. S12673 (daily ed. Nov. 10, 2005) (statement of Senator Kennedy). Senator Kennedy stated that problems stemming from discrimination in contracting "affect a wide variety of areas in which the

Department offers contracts, and the problems are detailed in many recent disparity studies." *Ibid.*[2] Representatives McKinney, Watt and Menendez spoke on the House floor in support of the 2006 reauthorization. 151 Cong. Rec. E2514-02 (daily ed. Dec 13, 2005), 151 Cong. Rec. H12208 (daily ed. Dec. 18, 2005), 151 Cong. Rec. H12211 (daily ed. Dec. 18, 2005).

On December 20, 2005, Senator Kennedy again spoke before the Senate in support of the Section 1207 program and referred to a 1996 report by the Urban Institute on racial disparities in government contract. 151 Cong. Rec. S14171 (daily ed. Dec. 20, 2005). The Urban Institute Report cited by Senator Kennedy analyzed 39 state and local disparity studies. 61 Fed. Reg. 26,061 (1996). The same day, then-Senator Barack Obama also spoke on the Senate floor to express his "strong support for the reauthorization of the Department of Defense, DOD, 1207 program." 151 Cong. Rec. S14248 (daily ed. Dec. 21, 2005). In considering the 2006 reauthorization, Congress also had before it a September 2005 study by

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[2] Senator Kennedy stated that the following disparity studies established the need for the Section 1207 program: City of Dallas Availability and Disparity Study, Mason Tillman Assoc., Ltd. (2002); City of Cincinnati Disparity Study, Griffin & Strong, P.C. (2002); Ohio Multi-Jurisdictional Disparity Studies, Mason Tillman Assoc., Ltd. (2003); Procurement Disparity Study of the Commonwealth of Virginia, MGT of America, Inc. (2004); Alameda County Availability Study, Mason Tillman Assoc. (2004); City of New York Disparity Study, Mason Tillman Assoc., Ltd (2005). 151 Cong. Rec. S12673.

the U.S. Commission on Civil Rights on "Federal Procurement after *Adarand*" (*Rothe Dev. Corp.* v. *Department of Def.*, 499 F. Supp. 2d 775, 835-878 (W.D. Tex. 2007) (*Rothe VI*)); testimony by small business owners from field hearings before the House Small Business Committee in 2001 and 2004 (*id*. at 869-871); and three reports from the Small Business Administration (SBA) (two from 2005 and one from 2000) regarding the ownership and success rates of small businesses (*id.* at 871-872).

Against this backdrop, Congress reenacted Section 1207 in 2006 with some amendments. In addition to the suspension clause requirement that had been added in 1998, *supra*, Congress amended the program so that when DOD utilizes the PEA, the size of the adjustment made to non-SDB bids need not be ten percent, and must be smaller if non-SDBs are being denied a reasonable opportunity to compete. 10 U.S.C. 2323(e)(3)(A). The amendments also directed that agency heads "ensure that no particular industry category bears a disproportionate share of the contracts awarded to attain the [five percent SDB] goal," 10 U.S.C. 2323(g)(1)(A), and that agency heads "take appropriate actions to limit the contracting activity's use of set asides in awarding contracts in that particular industry category," 10 U.S.C. 2323(g)(2).

3. Small Business Act

Section 1207 utilizes the definition for SDBs set out in 8(d) of the Small Business Act, 15 U.S.C. 637(d) (cited in 10 U.S.C. 2323(a)(1)(A)). Section 8(d) presumes that Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities are socially and economically disadvantaged. 15 U.S.C. 637(d)(3)(C)(ii). Individuals not in those designated groups may qualify as SDBs by demonstrating social disadvantage. See 13 C.F.R. 124.103(c)(2)(I); see also 13 C.F.R. 124.103(c)(2)(ii); 13 C.F.R. 124.201. All SDB applicants must prove they have a personal net worth under $250,000 to qualify initially and a net worth of less than $750,000 to remain in the program. 13 C.F.R. 124.104(c)(2).

STATEMENT OF FACTS

1. Prior Proceedings

A. This lawsuit arose from plaintiff-appellant Rothe Development Corporation's (Rothe) unsuccessful bid for an Air Force computer service's contract awarded in 1998. The contract was subject to Section 1207, 10 U.S.C. 2323, as reauthorized in 1992.

On March 6, 1998, the Air Force issued a solicitation for competitive bids on a combined contract to maintain, operate, and repair the Switchboard

Operations and Network Control Center and Base Telecommunications Services at Columbia Air Force base in Mississippi. Rothe bid $5.57 million. ICT, an SDB owned by a Korean American, bid $5.75 million. Through application of the PEA, Rothe's bid was increased to $6.1 million for the purposes of bid selection, and the contract was awarded to ICT. *Rothe Dev. Corp.* v. *Department of Def.*, 49 F. Supp. 2d 937, 941 (W.D. Tex. 1999) (*Rothe I*).

B. Rothe challenged the constitutionality of Section 1207, both facially and as applied. DOD defended the constitutionality of Section 1207. Suit was filed in the Western District of Texas.

On cross-motions for summary judgment, Rothe alleged that the application of the PEA under Section 1207 violated its right to equal protection. DOD argued that Section 1207 satisfied strict scrutiny. On April 27, 1999, the district court granted summary judgment in favor of DOD, and, after reviewing the extensive record of disadvantages minority-owned firms suffered when engaging in federal procurement, held that Congress had a compelling interest in establishing the Section 1207 contracting program and that the program was narrowly tailored. *Rothe I*, 49 F. Supp. 2d at 941. On appeal, the Fifth Circuit transferred the case to the Federal Circuit on motion of DOD based on a Little Tucker Act claim. *Rothe Dev. Corp.* v. *Department of Def.*, 194 F.3d 622 (5th Cir. 1999) (*Rothe II*).

On August 20, 2001, this Court held that the district court applied a too-deferential standard in reviewing Rothe's equal protection challenge. The Court stated that the reauthorization evidence before Congress that the district court relied on was "insufficient to satisfy the strong basis in evidence" requirement for "determining that there was a compelling interest for reauthorization of the [Section] 1207 program." This Court also held that the district court impermissibly relied on post reauthorization evidence. *Rothe Dev. Corp.* v. *Department of Def.*, 262 F.3d 1306, 1322-1324, 1328 (Fed. Cir. 2001) (internal quotation marks omitted) (*Rothe III*). This Court remanded the case to the district court for further proceedings. *Id.* at 1332. Before the district court issued a new opinion and order, Congress reauthorized Section 1207 in 2002. See p. 5, *supra*.

C. On remand, the district court granted DOD's motion to dismiss Rothe's Little Tucker Act claim as moot, and the case proceeded on Rothe's claims for declaratory and injunctive relief. The district court found the 1992 reauthorization of Section 1207, under which the contract was issued, unconstitutional because Congress failed to consider statistical evidence of racial discrimination in contracting, *Rothe Dev. Corp.* v. *Department of Def.*, 324 F. Supp. 2d 840, 854 (W.D. Tex. 2004) (*Rothe IV*), and granted Rothe declaratory relief on its constitutional challenge to the 1998 award. In addition, the original contract had

expired, and thus its legality was no longer at issue. The district court then held that Congress's 2002 reauthorization of Section 1207 was constitutional because Congress relied on sufficient statistical evidence to establish a compelling governmental interest for the program, and that, coupled with a documented history of anecdotal and private discrimination that impeded the ability of minority-owned firms to compete for federal contracts, established a strong basis in evidence on which Congress could rely to reauthorize the 1207 program. *Id.* at 854-860. The district court denied Rothe's claims for declaratory and injunctive relief regarding the 2002 reauthorization. *Id.* at 860. The district court further ordered that the parties cover their own attorney's fees and expenses because, under EAJA, DOD was "substantially justified" in defending Section 1207. *Ibid.*

Despite the district court's ruling that the parties cover their own attorney's fees, Rothe applied for an award of attorney's fees under EAJA. On August 31, 2004, the district court denied Rothe's application for attorney's fees. *Rothe Dev. Corp.* v. *Department of Def.*, No. Civ. A. SA-98-CA-1101, 2004 WL 1941290 (W.D. Tex. Aug. 31, 2004). The district court stated that the United States' position in the litigation was "essentially to justify a duly and properly enacted federal statute against an attack on its constitutionality." *Id.* at *2. The district court stated that while Section 1207 was "found unconstitutional as reauthorized

in 1992, that does not necessarily mean that the [DOD's] defense of the statute was not substantially justified." *Ibid*. The district court held:

> The [DOD's] position was justified on the basis that a reasonable argument could be made in defense of the constitutionality of the statute. This is evidenced by the struggle that this Court, as well as the Federal Circuit, has gone through in order to come to some resolution in this case. The Court is unwilling to say that the defense of the statute at issue here was not substantially justified. In fact, the Court holds, as it has before, that the United States' position was substantially justified.

Id. at *3 (footnotes omitted).

The district court held further that Rothe was not a prevailing party within the meaning of EAJA. *Rothe*, 2004 WL 1941290, at *3. The district court stated that a prevailing party must "succeed on [a] significant issue in the litigation which achieves some of the benefit the parties sought in bringing suit." *Ibid*. (citation omitted). The district court determined that Rothe's only relief is the "'moral satisfaction' of knowing the statute at issue was, at the time applied to it, unconstitutional." *Ibid*. "The fact that the statute is now constitutional denies Rothe any prospective relief and essentially precludes it from claiming status [as] a prevailing party." *Ibid*. The district court concluded that Rothe was not entitled to attorney's fees because there was no final judgment in the case, given Rothe's

appeal of the district court's ruling as to the constitutionality of the 2002 reauthorization. *Id.* at *4.

Rothe appealed the merits of the decision regarding the 2002 reauthorization, arguing that the district court's findings and legal analysis did not support its holding that the 2002 reauthorization of Section 1207 was constitutional. *Rothe Dev. Corp.* v. *Department of Def.*, 413 F.3d 1327, 1330 (Fed. Cir. 2005) (*Rothe V*). The DOD argued that a remand was required so that the parties could develop the record and that the district court make the appropriate factual findings and legal determinations as to the constitutionality of Section 1207, as reauthorized in 2002. *Id*. at 1335. This Court agreed that the record was not adequate to decide the facial constitutionality of the 2002 reauthorization. *Id.* at 1329, 1335-1337 & n.4.

This Court vacated the district court's decision and remanded to allow the parties to develop the evidentiary record for the 2002 reauthorization of Section 1207. *Rothe V*, 413 F.3d at 1329. The Court instructed the district court to determine whether the evidence relied on to support the "present [2002] reauthorization" of Section 1207 was before Congress prior to the date of that reauthorization, and whether that evidence had become stale. *Id.* at 1338. The Court vacated the district court's dismissal of Rothe's Little Tucker Act claim as

moot, *id* at 1331-1332, and held that Rothe had not preserved its challenge to the denial of attorney's fees, *id.* at 1339.

D. In January 2006, before the district court completed the proceedings on remand, Congress again reauthorized Section 1207. See p. 5, *supra* (National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 842, 119 Stat. 3389 (Jan. 6, 2006) (2006 reauthorization)).

E. Following discovery rulings, the parties moved for summary judgment.[3] On August 10, 2007, the district court entered a lengthy decision granting DOD's motion for summary judgment. *Rothe Dev. Corp.* v. *Department of Def.*, 499 F. Supp. 2d 775 (W.D. Tex. 2007) (*Rothe VI*). The district court held that Rothe's claims regarding the constitutionality of the 1999 and 2002 reauthorizations were moot due to the subsequent reauthorization of Section 1207 in 2006. *Id*. at 820. The court stated that the "reviewing court must consider all evidence available to Congress pre-dating the most recent reauthorization of the statute at issue." *Id.* at

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[3] Rothe requested the following relief in its motion for summary judgment: "(1) a declaration that the 1207 Program is unconstitutional, as reauthorized in 1999, 2002, and 2006; (2) injunctive relief, as requested in its Original and First Amended Complaint; (3) a $10,000 money judgment in satisfaction of its claim for damages under the Little Tucker Act; * * * and (4) an award of attorney's fees and costs under" EAJA. *Rothe VI*, 499 F. Supp. 2d 775, 783 (W.D. Tex. 2007). As to a declaration that the 1999 and 2002 reauthorizations of the Section 1207 program was facially unconstitutional, the district court held that this requested relief was "outside the scope of the remand." *Ibid*.

821-822 (quoting *Rothe III*, 262 F.3d at 1322). The district court stated that if the present "2006 Reauthorization is constitutional under strict scrutiny, then Rothe cannot obtain injunctive relief relative to the prior reauthorizations." *Id.* at 821.

Before analyzing Section 1207 under strict scrutiny, the district court considered and rejected six legal arguments Rothe advanced regarding strict scrutiny review that the district court determined had been rejected by the courts of appeals. *Rothe VI,* 499 F. Supp. 2d at 825-826 nn.57 & 58.

Applying strict scrutiny, the district court found that Congress's reauthorization of Section 1207 in 2006 was supported by a "strong basis in evidence" satisfying the "compelling interest" standard of strict scrutiny. *Rothe VI*, 499 F. Supp. 2d at 835. The district court held that six local disparity studies from various parts of the country were before Congress prior to the 2006 reauthorization, and that evidence members of Congress cited in floor statements was sufficient to provide a strong basis in evidence for use of race in contracting. *Id.* at 835-839.

The district court held that the six state and local disparity studies analyzed evidence of discrimination from a "diverse cross-section of jurisdictions across the United States, and constitute prima facie evidence of a nation-wide pattern

or practice of discrimination in public and private contracting" (*Rothe VI*, 499 F. Supp. 2d at 838-839), and that the studies and reports were "not 'stale' for purposes of strict scrutiny review" as the information in the studies was "reasonably up-to-date" (*id.* at 839-840). The district court engaged in an exhaustive analysis of each of the six studies to determine the availability of minority and non-minority business enterprises willing and able to perform government contracts in the applicable region of each study, analyzed the disparity findings in each of the studies to determine the extent of contracts that each race and gender group would be expected to receive based on each groups' respective availability in the market area, and weighed the anecdotal evidence set out in the studies. *Id.* at 840-865.

In addition, the district court considered other evidence Congress cited during its consideration of the 2006 reauthorization, including evidence gathered by the House Committee on Small Business in field hearings held in 2001 and 2004. *Rothe VI*, 499 F. Supp. 2d at 865-872. The district court also considered other SBA statistical data that the district court determined were before Congress prior to the 2006 reauthorization: (1) "The Small Business Economy: A Report to the President (dated 2005); (2) "The State of Small Business: A Report to the President" (dated 2000) covering data from 1998-1999; and (3) a SBA Report by

Yin Lowrey, Ph.D., Office of Advocacy, on "Dynamics of Minority-Owned Employer Establishments, 1997-2001" (dated 2005). *Id.* at 871-872. The district court found that Congress had "sufficient evidence of discrimination throughout the United States to justify a nationwide program, as the evidence of discrimination was sufficiently pervasive across racial lines to justify granting a preference to all five purportedly disadvantaged racial groups," and that the "discriminatory conduct or its effects was felt in Rothe's relevant industry-professional services." *Id.* at 877-878.

Finally, the district court held that the 2006 reauthorization of the Section 1207 program and its implementing regulations were narrowly tailored. *Rothe VI*, 499 F. Supp. 2d at 878. The district court found that Congress examined the efficacy of race-neutral alternatives prior to enactment of Section 1207 in 1986, but that the program was unsuccessful. *Id.* at 878-880. The district court further found that the five percent goal set out in the Section 1207 program was proportionate to the number of qualified, willing, and able SDBs in the relevant industry group. The district court found that Congress has "repeatedly emphasized that achieving the goal was not mandatory" and Congress has "rebuffed attempts to amend the 1207 program to change the five percent goal to a mandate." *Id.* at 880-881. The district court also found that, for numerous reasons, the regulations

implementing the Section 1207 program were not over- or under-inclusive. *Id.* at 882-883.

The district court ruled that Rothe was not entitled to attorney's fees, holding that Rothe was not a prevailing party on its claim challenging the facial constitutionality of the 2006 reauthorization, and that DOD was "substantially justified in defending this action." *Rothe VI*, 499 F. Supp. 2d at 883. The district court stated that in *Rothe V*, the Federal Circuit held that Rothe waived its attorney's fees objection on its earlier claims, so this Court's prior ruling regarding attorney's fees is "law of the case." *Id.* at 883 (citing *Rothe V*, 413 F.3d at 1339). Rothe appealed.

F. On appeal, this Court reversed the district court's judgment in part, holding that the six studies "di[d] not provide a substantially probative and broad-based statistical foundation necessary for the 'strong basis in evidence' that must be the predicate for nationwide, race-conscious action." *Rothe Dev. Corp.* v. *Department of Def.*, 545 F.3d 1023, 1040 (Fed. Cir. 2008) (*Rothe VII*). This Court determined that the methodology of the studies rendered them insufficient, *id*. at 1040-1045, and that five of the six studies failed to consider the relative dollar capacity of minority and non-minority firms to bid and perform on contracts, and instead, estimated the relative capacity of minority firms based only on the

percentage of minority-owned firms in the market. *Id.* at 1040-1045. The Court held that the resulting diminished probative value of the studies, combined with their limited geographic scope, rendered the statistical evidence insufficient to support a nationwide race-conscious contracting program. *Id*. at 1040, 1045-1046.

This Court also denied Rothe's request for attorney's fees under EAJA, 28 U.S.C. 2412(d)(1)(A). *Rothe VII*, 545 F.3d at 1050. The Court held that Rothe's request was "premature" because EAJA requires that parties seeking an award of fees do so within 30 days of a final judgment. The Court stated that there was not yet a final judgment in the case. *Ibid*.

2. The Attorney's Fees Decision Now On Appeal

After briefing by both parties on the proper scope of the injunction, the district court declared all of Section 1207 unconstitutional. Rothe then filed an application in district court for attorney's fees under EAJA.

On August 11, 2008, the district court denied Rothe's application for attorney's fees, holding that DOD was substantially justified in its position in the case. R. 3-4. The district court held that DOD's defense of the constitutionality of Section 1207 had a reasonable basis in law due to the government's "string of successes throughout the litigation," Congress's attempts at curing the constitutionality concerns of Section 1207 by modifying the statute, and

subsequent regulations. R. 4-10. The district court observed that this Court rejected the six studies Congress relied on for the 2006 reauthorization. This Court recognized that there remained a "genuine dispute about the existence of discriminatory practices in government contracting." R. 11.[4]

SUMMARY OF ARGUMENT

The district court acted well within its discretion to deny attorney's fees to Rothe under EAJA, 28 U.S.C. 2412(d). In cases such as this, where the federal government defends the constitutionality of a congressional enactment, the government's actions are normally presumed to be substantially justified given the government's constitutional obligation to execute and defend federal laws, U.S. Const. Art. II, Sec. 3, which enjoy a presumption of constitutionality. See *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981). Notably, in *Grace* v. *Burger*, 763 F.2d 457 (D.C. Cir.), cert. denied, 474 U.S. 1026 (1985) and *Gonzales* v. *Free Speech Coalition*, 408 F.3d 613 (9th Cir. 2005), attorney's fees under EAJA were denied because the federal government was substantially justified in defending the statutes despite the Supreme Court finding the statutes to be unconstitutional.

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[4] On August 12, 2009, the district court entered an order granting Rothe's costs.

The DOD's defense of the constitutionality of Section 1207 was similarly substantially justified. This ten-year litigation involved issues pertaining to the constitutionality of race-based provisions of the National Defense Authorization Act, 10 U.S.C. 2323, Section 1207. Section 1207 was first enacted in 1986, and reauthorized five times, including in 2006 when changes to the statute were made and additional evidence added to the congressional record to bolster the statute's constitutional defensibility. Throughout the ten years of Rothe's challenge to the statute, the DOD won on legal issues before both the district court and this Court. Most significantly, in our view, is that the district court ruled in favor of Section 1207's constitutionality *three times*: in 1999 in *Rothe I*, in 2004 in *Rothe IV* as related to the 2002 reauthorization, and finally in *Rothe VI* as related to the 2006 reauthorization. Based on these facts, and a lengthy congressional record demonstrating disparities in public contracting, including defense contracting, DOD's defense of Section 1207's 2006 reauthorization was substantially justified despite this Court finding the record before Congress to be constitutionally insufficient.

Moreover, the district court was well within its discretion to deny attorney's fees under the "bad faith" exception of the American rule against fee shifting (EAJA, 28 U.S.C. 2412(b)). There is absolutely no evidence that the DOD

engaged in any "bad faith, vexatiously, wantonly, or * * * oppressive" actions in this litigation. *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 258-259 (1975). And, finally, if this Court takes the unusual step and reverses the district court's order on attorney's fees, Rothe argues that this Court should disregard a prior district court order of August 31, 2004, which denied Rothe attorney's fees. This Court held that Rothe failed to properly preserve that issue for appeal, thus the district court's holding is law of the case. There are no unusual circumstances that Rothe raises which would compel this Court to reopen that issue.

STANDARD OF REVIEW

The district court's denial of attorney's fees under EAJA is reviewed for abuse of discretion. *Pierce* v. *Underwood*, 487 U.S. 552, 562 (1988); *Chiu* v. *United States*, 948 F.2d 711, 713 (Fed. Cir. 1991).

Courts review the question of bad faith in the context of the common law exception to the American rule on counsel fees for clear error. See *Association of American Physicians & Surgeons*, *Inc.* v. *Clinton*, 187 F.3d 655, 660 (D.C. Cir. 1999). The substantive standard for a finding of bad faith is stringent, and attorney's fees will be awarded "only when extraordinary circumstances or dominating reasons of fairness so demand." *Nepera Chem., Inc.* v. *Sea-Land*

Serv., Inc., 794 F.2d 688, 702 (D.C. Cir. 1986). The finding of bad faith must be supported by clear and convincing evidence. See *Shepherd* v. *American Broad. Cos.,* 62 F.3d 1469, 1476-1478 (D.C. Cir. 1995).

ARGUMENT

I

THE GOVERNMENT WAS SUBSTANTIALLY JUSTIFIED IN DEFENDING THE CONSTITUTIONALITY OF THE SECTION 1207 PROGRAM

A. Standards Under The Equal Access To Justice Act, 42 U.S.C. 2412(d)

In enacting the Equal Access to Justice Act, Congress sought to remove economic disincentives for individuals and small businesses to challenge abuse by the federal government because the cost of litigation may far exceed the cost of acquiescence. See *Scarborough* v. *Principi*, 541 U.S. 401, 406 (2004). In providing a mechanism for private parties to recover attorney's fees against the federal government in certain limited circumstances, however, Congress did not intend to chill vigorous government advocacy in complex or unsettled areas of law where the government's prospects for success on the merits are uncertain. Nor is there any basis in the text or legislative history of EAJA to suggest that Congress intended to make attorney's fees regularly available to private parties in cases

where the government is merely fulfilling its solemn obligation to defend the constitutionality of an Act of Congress.

EAJA provides as follows:

> a court shall award to a prevailing party other than the United States fees and other expenses * * * incurred by that party in any civil action * * * brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. 2412(d)(1)(A).

EAJA does not define the term "substantially justified." In *Pierce* v. *Underwood*, the Supreme Court explained that to be "substantially justified," the government's position need not be "correct," or even "justified to a high degree." 487 U.S. 552, 565-566 & n.2 (1988). Rather, a position can be substantially justified where it is "'justified in substance or in the main' – that is, justified to a degree that could satisfy a reasonable person," *id*. at 565, with a "reasonable basis in law and fact," *id.* at 566; *White* v. *Nicholson*, 412 F.3d 1314, 1319 (Fed. Cir. 2005), cert. denied, 547 U.S. 1018 (2006).

When determining whether the government's position was substantially justified, courts should "treat[] a case as an inclusive whole, rather than as atomized line-items." *Commissioner, INS* v. *Jean*, 496 U.S. 154, 161-162 (1990).

Indeed, courts "look beyond the issue on which the petitioner prevailed to determine, from the totality of circumstances, whether the government acted reasonably in causing the litigation or in taking a stance during the litigation." *Roanoke River Basin Ass'n* v. *Hudson*, 991 F.2d 132, 139 (4th Cir.), cert. denied, 510 U.S. 864 (1993); *United States* v. *Rubin*, 97 F.3d 373, 375 (9th Cir. 1996). As this Court stated in *Ramcor Services Group* v. *United States*, determining the government's substantial justification "obligat[es] the trial court to 'look at the entirety of the government's conduct and make a judgment call whether the government's overall position had a reasonable basis in both law and fact.'" 185 F.3d 1286, 1290 (Fed. Cir. 1999) (quoting *Chiu* v. *United States*, 948 F.2d 711, 715 (Fed. Cir. 1991)).

A government loss on the merits does not raise a presumption that its position was not substantially justified. See H.R. Rep. No. 1418, 96th Cong., 2d Sess. 11 (1980). "Congress did not * * * want the 'substantially justified' standard to 'be read to raise a presumption that the Government position was not substantially justified simply because it lost the case." *Scarborough*, 541 U.S. at 415 (quoting H.R. Rep. No. 1005, 96th Cong., 2d Sess. 10 (1980)). The Supreme Court in *Pierce* recognized that the government "could take a position that is

substantially justified, yet lose." 487 U.S. at 569. See also *Taucher* v. *Brown-Hruska*, 396 F.3d 1168, 1174 (D.C. Cir. 2005).

Again, looking to *Ramcor Services*, this Court affirmed a district court decision that the government was substantially justified under EAJA even though the Immigration and Naturalization Service (INS) lost the case on the merits. *Ramcor*, 185 F.3d at 1287. The district court granted a preliminary injunction in favor of Ramcor Services, an incumbent contractor, to prevent the INS from awarding a contract to a new contractor. *Id*. at 1287-1288. Ramcor then applied under EAJA for attorney's fees based on Ramcor's success, and the INS' loss, on the merits of the preliminary injunction motion. *Id*. at 1288. This Court affirmed the district court's decision denying attorney's fees under EAJA, holding that "[a]lthough INS had lost the underlying action, that outcome does not alone show that its position had no substantial justification." *Id.* at 1290.

B. The Government's Litigation Positions Are Presumed To Be Substantially Justified In Defending The Constitutionality Of An Act Of Congress

1. In circumstances, such as here, where the government is called upon to defend the constitutionality of a congressional enactment, a finding that the government's position defending the statute is not substantially justified is clearly the exception. In *League of Women Voters* v. *FCC*, the Ninth Circuit stated that

"the defense of a congressional statute from constitutional challenge will usually be substantially justified." 798 F.2d 1255, 1259 (D.C. Cir. 1986); accord. *Grace* v. *Burger*, 763 F.2d 457, 459 n.5 (D.C. Cir.) (stating that "situations in which the government's defense of the constitutionality of a federal statute fails the 'substantially justified' test should be exceptional"), cert. denied, 474 U.S. 1026 (1985).

The presumption that the government is substantially justified when it defends the constitutionality of a federal statute is a necessary product of two constitutional norms: (1) the United States has an obligation to "take Care that the Laws be faithfully executed," see U.S. Const. Art. II, § 3; and (2) those laws enjoy a presumption of constitutionality in court, see, *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) ("Whenever called upon to judge the constitutionality of an Act of Congress – the gravest and most delicate duty that this Court is called upon to perform – the Court accords great weight to the decisions of Congress.") (internal quotations and citation omitted). Indeed, Congress has enacted a statute that requires the Attorney General to submit a report to both the Senate and the House of Representatives if he decides to *refrain* from defending the constitutionality of any federal statute or regulation. 28 U.S.C. 530D(a)(1)(B)(ii).

Congress likely did not intend, in enacting EAJA, to expose the government to fee liability for defending the constitutionality of Congress's own enactments. For example, in *Grace* v. *Burger*, the plaintiffs sought attorney's fees after the Supreme Court unanimously held unconstitutional the application of 40 U.S.C. 6135, which prohibited expressive displays on Supreme Court grounds, to individuals who carried signs, banners, or devices on public sidewalks surrounding the Supreme Court building. 763 F.2d at 458 (D.C. Cir.); see *United States* v. *Grace*, 461 U.S. 171 (1983). Notwithstanding the Supreme Court's unanimous disposition of the merits of the case, the court of appeals affirmed the district court's denial of attorney's fees under EAJA because there was "support in precedent for the government's defense of the statute." *Grace* v. *Burger*, 763 F.2d at 459.

Similarly, in *Gonzales* v. *Free Speech Coalition*, plaintiffs sought attorney's fees under EAJA after the Supreme Court held unconstitutional certain provisions of the Child Pornography Prevention Act of 1996, 18 U.S.C. 2252A *et seq*. 408 F.3d 613 (9th Cir. 2005); see also *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234 (2002). The court of appeals reversed a district court grant of attorney's fees, holding that "[t]he defense of a congressional statute from constitutional challenge will usually be substantially justified." *Id.* at 618. The court of appeals in *Free*

Speech Coalition concluded that the government's position was substantially justified given the "government's appropriate arguments in defense of the [statute], the 'string of successes' in four circuit courts and the district court below, a split panel decision, and numerous other objective indicia of reasonableness, the district court's conclusion that the government's position was not substantially justified was not supported by the record." *Id.* at 620; see also *Bay Area Peace Navy* v. *United States*, 914 F.2d 1224, 1230-1231 (9th Cir. 1990) (court of appeals holds that the district court had abused its discretion in awarding attorney's fees under EAJA because, although the Coast Guard's 75-yard security zone violated the First Amendment, "it was * * * not unreasonable for the government to try to uphold [that policy] when confronted with litigation").

2. There is nothing that presents Section 1207 as anything but a statute deserving of defense by the government. Congress spent decades compiling evidence on the existence and effects of racial discrimination in public contracting. *Rothe IV*, 324 F. Supp. 2d 840, 854-859 (W.D. Tex. 2004); *Rothe VI*, 499 F. Supp. 2d 775, 835-878 (W.D. Tex. 2007); see also *Sherbrooke Turf, Inc*. v. *Minnesota Dept. of Transp.*, 345 F.3d 964, 970 (8th Cir. 2003), cert. denied, 541 U.S. 1041 (2004) (citing *Adarand Constructors, Inc.* v. *Slater*, 228 F.3d 1147, 1167 (10th Cir. 2000)). As the Supreme Court in *Croson* explained: "It is beyond

dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." *City of Richmond* v. *Croson Co.*, 488 U.S. 469, 492 (1989). With regard to federal contracting, this Court in *Adarand Constructors, Inc*. v. *Pena*, 515 U.S. 200, 237 (1995) stated the "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." Given the numerous hearings and evidence before Congress documenting evidence of discrimination in public contracting, Congress reauthorized Section 1207 five times – in 1989, 1992, 1999, 2002, and 2006 – following its initial enactment in 1986. *Rothe VI*, 499 F. Supp. 2d at 783-784. Leading up to Section 1207's most recent reauthorization in 2006, Congress, through its oversight of defense contracting and small business programs, heard evidence from field hearings and SBA reports that SDBs face systemic barriers showing the lingering effects of discrimination in public contracting. See *id*. at 869-872; see also pp. 5-7, *supra*.

The reauthorization in 2006, for which this Court held the record before Congress to be insufficient, nonetheless had a record of support justifying defense by the government. As stated pp. 5-7, *supra*, there were six disparity studies from

around the country, as well as citations to other evidence that had been used in past reauthorizations that continued to demonstrate disadvantages tied to race in federal contracting. In addition, as the district court observed, *Rothe VI*, 499 F. Supp. 2d at 880, Congress in 2006 made adjustments to the Section 1207 program to further limit any burden on non-SDBs, providing additional support for the program, see p. 7, *supra*. These changes to the statute by Congress in an effort to ensure compliance with constitutional standards easily gave DOD a reasonable basis for defending the 2006 reauthorization of the Section 1207 program from constitutional challenge.

C. The Government's "String Of Successes" In This And Other Litigation Gave The Government Reasonable Basis In Law To Defend The Constitutionality Of Section 1207

The district court correctly held that the "DoD's string of successes throughout the litigation" supports the government's "reasonable basis in law for its position." R. 4-7. The government's successful defense of similar legislation in other courts of appeals further supports the government's reasonable basis in law for its position in this case. Courts recognize that the government's success in the litigation, even if overturned on appeal, is evidence of "substantial justification" which the court should factor into EAJA analysis. See, *e.g.*, *Porter* v. *Heckler*, 780 F.2d 920, 922 (11th Cir. 1986); *Sigmon Fuel Co.* v. *Tennessee*

Valley Auth., 754 F.2d 162, 167 (6th Cir. 1985); *Cinciarelli* v. *Reagan,* 729 F.2d 801, 806 (D.C. Cir. 1984).

The United States was successful in its legal argument at every stage of this litigation, until the final appeal in 2008 which addressed only the 2006 reauthorization of Section 1207. In 1999, the district court granted summary judgment in favor of DOD (*Rothe I*, 49 F. Supp. 2d 937 (W.D. Tex. 1999)), upholding the government's argument that Section 1207, as enacted in 1992, satisfied strict scrutiny, a ruling that this Court did disturb on appeal (see *Rothe III*, 262 F.3d 1306 (Fed. Cir. 2001)). On remand (*Rothe IV*, 324 F. Supp. 840), the district court agreed with DOD for a second time that Rothe's Little Tucker Act claim and its requests to enjoin further work on the disputed 1998 contract, and for an equitable award of the contract, were moot (*id*. at 845). The district court stated that while the court "held that [Rothe] could continue to maintain its claims for declaratory judgment that Section 1207 was unconstitutional on its face and as applied * * * this ruling was not necessarily in favor of [Rothe] and provided further justification for the DOD to maintain its position in the litigation." R. 5. In *Rothe IV*, the district court held that Section 1207 was unconstitutional as applied to Rothe in 1998, but that the subsequent 2002 reauthorization was

constitutional, again rejecting Rothe's constitutional challenge. R. 6 & n.23 (citing *Rothe IV*, 324 F. Supp. 2d at 860).

In *Rothe V*, 413 F. 3d 1327 (Fed. Cir. 2005), this Court vacated the district court's summary judgment and remanded to give DOD an opportunity to present evidence on the facial constitutionality of Section 1207. Based on this record, the district court stated: "Given that the DoD had a prior judgment in its favor regarding the facial constitutionality of Section 1207, and that the Federal Circuit remanded the case to provide the DoD with an opportunity to defend the statute, the DoD continued to be reaffirmed that its position was substantially justified." R. 6.

In 2006, following this Court's remand, the district court *denied* Rothe's motion for a preliminary injunction to prevent DOD's use of any race-based program, *Rothe Development Corp.* v. *Department of Defense*, No. SA-98-CA-1101, 2006 WL 2052944, at *10-11 (W.D. Tex. July 24, 2006), "then agreed with the DoD's position a fifth time in denying [Rothe's] motion for reconsideration on the same issue." R. 6-7. Following Section 1207's amendments in 2006, the district court agreed with DOD again, and granted DOD's motion for summary judgment, holding that Section 1207, as reenacted in 2006, was constitutional in a lengthy 114 page decision basically setting out the government's litigating

positions (*Rothe VI*, 499 F. Supp. 2d 775). While this Court reversed that holding, it did so not based on an erroneous interpretation of the law on strict scrutiny (*e.g.*, *Croson Co.*, 488 U.S. 469 or *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200), but on its view that the six disparity studies contained in the Congressional record were insufficient to support a nationwide program. See *Rothe VII*, 545 F.3d 1023 (Fed. Cir. 2008).

The Ninth Circuit has recognized that "extraneous circumstances bearing upon the reasonableness of the government's decision to take a case to trial" include "the existence of precedents construing similar statutes." *Kali* v. *Bowen*, 854 F.2d 329, 332 (9th Cir. 1988) (citing *Pierce*, 487 U.S. at 567-570). That is clearly the case here.

The heart of the government's argument in this case has always been the "passive participant" theory that finds substantial support in Supreme Court precedent. See *Croson*, 488 U.S. at 492 (stating that "if the city could show that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system").

The government has successfully defended the constitutionality of statutes similar to Section 1207 implemented by other agencies, with the same arguments

the government advanced in this litigation concerning the constitutional predicate for a race-based Congressionally-enacted contracting program. In *Adarand Constructors, Inc.* v. *Slater*, 228 F.3d 1147, the Tenth Circuit upheld the then-current iterations of several Department of Transportation programs which were designed to provide competitive advantages to disadvantaged business enterprises; disadvantaged business enterprises, like SDBs, are certified, in part, based on the race of the owner. Similarly, the Eighth Circuit in *Sherbrooke*, 345 F.3d 964, upheld these programs, as did the Ninth Circuit in *Western States Paving Co.* v. *Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005), cert. denied, 546 U.S. 1170 (2006). The government's position in this case can hardly be considered without substantial justification where, in addition to its string of successes in this very case, numerous courts of appeals have upheld the constitutionality of similar programs based on the very arguments advanced here.

Under any standard, let alone the extremely deferential abuse of discretion standard, the district court did not err when it found that the government's position was substantially justified.[5]

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[5] The appellants make much of the government's decision not to petition for a writ of certiorari in this case. Br. 28, 43 n.6. There is nothing surprising in this litigation decision given that Section 1207 was set to expire months after this Court rendered its decision in *Rothe VII*.

II

THE DISTRICT COURT WAS WELL WITHIN ITS DISCRETION TO DENY ROTHE ATTORNEY'S FEES UNDER SECTION 2412(b) OF EAJA BECAUSE THE GOVERNMENT DID NOT ACT IN BAD FAITH

A separate provision under EAJA, 28 U.S.C. 2412(b), makes the United States liable for such fees and expenses "to the same extent that any other party would be liable under the common law." This provision of EAJA makes the government liable under the "bad faith" exception to the American rule against fee shifting. *Centex Corp.* v. *United States*, 486 F.3d 1369, 1375 (Fed. Cir. 2007) An award of fees under Section 2412(b) is discretionary. *Ibid*. The district court denied Rothe's request for attorney's fees under 28 U.S.C. 2412(b), without explanation, apparently based on its holding that under Section 2412(d) of EAJA, the DOD was substantially justified in defending Section 1207. R. 3.

The bad faith theory allows an award where a party has willfully disobeyed a court order, or has acted in "bad faith, vexatiously, wantonly, or for oppressive reasons." *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 258-259 (1975); *Schuenemeyer* v. *United States*, 776 F.2d 329, 333 (Fed. Cir. 1985) (internal quotation marks and citations omitted); *Chambers* v. *NASCO, Inc.*, 501 U.S. 32, 45-46 (1991) (internal quotation marks and citations omitted). Courts

have found that a finding of bad faith for purposes of Section 2412(b) calls for a determination that the government both pursued claims that were "entirely without color," and that the government was motived by an "improper purpose," such as harassment or delay, in making the claims. *Wells* v. *Bowen*, 855 F.2d 37, 46 (2d Cir. 1988); see also *American Hosp. Ass'n* v. *Sullivan*, 938 F.2d 216, 220 (D.C. Cir. 1991) (stating examples of bad faith to include "the filing of a frivolous complaint," "a meritless motion," or "discovery-related misconduct"). An award of attorney's fees under this section is a punitive measure and can be imposed "only in exceptional cases and for dominating reasons of justice." *United States* v. *Standard Oil Co. of California*, 603 F.2d 100, 103 (9th Cir. 1979); see also *Cordeco Dev. Co.* v. *Santiago Vasquez*, 539 F.2d 256, 263 (1st Cir.), cert. denied, 429 U.S. 978 (1976).

Rothe argues (Br. 16) that it should be awarded fees under Section 2412(b) because all three branches of government – Congress, the DOD, and the district court – acted in bad faith by allegedly failing to follow the dictates of strict scrutiny. The Supreme Court has made clear that a "request for attorney's fees should not result in a second major litigation." *Hensley* v. *Eckerhart*, 461 U.S. 424, 437 (1983). Rothe's overblown claim of bad faith not only lacks a basis in

the law, but there is also absolutely no evidence in this case that DOD acted in bad faith in defending the constitutionality of Section 1207.

A. Congress's Enactment Of Section 1207 Is Not A "Position Of The United States" That May Properly Be A Predicate For An Award of Attorney's Fees Under EAJA

In support of its claim for attorney's fees under Section 2412(b), Rothe argues (Br. 22-24, 26-27) that Congress was recalcitrant in enacting and reauthorizing Section 1207, and that DOD acted in bad faith by not "press[ing] Congress to bolster the defensibility of its enactments."

EAJA is a limited waiver of sovereign immunity making the "United States * * * liable for such fees and expenses to the same extent that any other party would be liable under the common law." 28 U.S.C. 2412(b). EAJA defines the United States as including "any agency and any official of the United States acting in his or her official capacity." 28 U.S.C. 2412(d)(2)(C). The United States Congress may not reasonably be regarded as an "agency" or "official" of the United States within the meaning of EAJA. Indeed, the Administrative Procedure Act makes plain that the term "agency" refers solely to the Executive Branch and does not include Congress. See 5 U.S.C. 551(1)(A) ("'agency means each authority of the Government of the United States * * * but does not include – the Congress"). Particularly in light of well-established principles that waivers of

sovereign immunity must be strictly construed in favor of the government, there is no basis for concluding that Congress, in enacting EAJA, intended to authorize a free-standing judicial inquiry into the wisdom of its own, as opposed to the Executive Branch's, actions. Accordingly, the only "position of the United States" that could properly be examined under EAJA is the DOD's decision to defend the constitutionality of Section 1207 – a decision that the district court nowhere found unreasonable, inappropriate, or in bad faith.

B. There Is No Evidence That DOD Acted In Bad Faith In Defending The Constitutionality Of Section 1207

The DOD's defense of the constitutionality of the program also lacks any evidence of bad faith. As explained, pp. 30-34, *supra*, the DOD had a string of successful decisions within the litigation, and there is no evidence that DOD was either motivated by an improper purpose or otherwise acted improperly through the course of the litigation.

Rothe argues (Br. 28) that when the parties were reviewing the congressional evidence supporting the 2006 reauthorization of Section 1207, DOD opposed Rothe's discovery requests in bad faith. This claim lacks merit and serves as no basis for an award of attorney's fees.

On September 21, 2005, the district court entered an order setting forth various discovery rulings outlining documents that Rothe could seek from representatives of the Commerce, Justice and Defense Departments, the Air Force, and the SBA for the limited purpose of discovering what, if any, documents these agencies sent to Congress as part of the 2002 and 2006 reauthorization processes. Doc. 199. The district court also allowed Rothe to redepose a representative of the Urban Institute as to documents sent to Congress. Doc. 199. Rothe subsequently moved, on April 26, 2006, for clarification as to whether it could conduct additional discovery. In this clarification motion, Rothe sought to have representatives for DOD and Air Force each separately produce documents responsive to 178 different requests for production. Doc. 262 at 3. In its motion, Rothe admitted that its request for production of documents was "lengthy." Doc. 261 at 4.

DOD opposed the motion on the basis that Rothe had received all documents necessary for a facial challenge to the statute, and that the discovery requests were overly broad and irrelevant, and asked the district court to quash the deposition subpoenas and accompanying duces tecum. Doc. 262, 273. Following further proceedings on discovery (see *e.g.*, Doc. 279, 281, 282, 285), on July 24, 2006, the district court entered an order granting Rothe leave to engage in the

further discovery related to deposing representatives of the Urban Institute, and on a limited basis representatives of the DOD and Department of the Air Force pertaining to, *inter alia*, the number of contracts and amount of dollars awarded to SDBs, based on race, from 1998 to the present. *Rothe Dev. Corp.* v. *Department of Def.*, No. SA-98-CA-1101, 2006 WL 2052944, at *10-11 (W.D. Tex. July 24, 2006). There is nothing in the record, nor at any time in the litigation did Rothe suggest, that DOD's opposition to Rothe's inordinately lengthy discovery request was motivated by bad faith. Accordingly, the district court was well within its discretion to deny Rothe attorney's fees under Section 2412(b) of EAJA.

III

LAW OF THE CASE PRECLUDES AN AWARD UNDER EAJA FOR ATTORNEY'S FEES INCURRED BY ROTHE PRIOR TO AUGUST 31, 2004

Contrary to Rothe's argument (Br. 51), if this Court takes the unusual step and reverses the district court's order denying Rothe attorney's fees under EAJA in this case, the law of the case would preclude any award for fees incurred prior to August 31, 2004, which is when this Court denied Rothe's prior motion for attorney's fees. The law of the case doctrine seeks to prevent relitigating prior holdings and settled issues in a case absent some compelling circumstance that requires issues be reopened. *Messinger* v. *Anderson*, 225 U.S. 436, 444 (1912);

Jones v. *United States*, 255 F.3d 507, 510 (8th Cir. 2001) (law of the case doctrine extends to holdings and issues implicitly settled in prior holdings). The law of the case applies here.

On July 2, 2004, the district court granted summary judgment in part to Rothe, holding that the 1992 reauthorization of Section 1207 was unconstitutional because there was insufficient statistical evidence before Congress to support the program. *Rothe IV*, 324 F. Supp. 2d 840, 850 (W.D. Tex. 2004) (stating that the "Government provide[d] limited statistical evidence from this time period but relie[d] instead on completely valid and persuasive anecdotal evidence" while also recognizing that the program was enacted prior to the Supreme Courts's decision in *Adarand*). The district court held, however, that Congress's subsequent 2002 reauthorization of Section 1207 was constitutional because statistical evidence before Congress provided a "strong basis in evidence" for the program. *Id.* at 856. In that decision, the district court held that the parties would bear their own costs because under EAJA, the position of the DOD was substantially justified. *Id.* at 860. Despite the district court's order, Rothe filed an application for attorney's fees under EAJA which, on August 31, 2004, the district court denied. *Rothe Dev. Corp.* v. *Department of Def.*, No. Civ. A. SA-98-CA-1101, 2004 WL 1941290 (W.D. Tex. Aug. 31, 2004). While Rothe appealed the district court's July 2,

2004, decision, this Court held that Rothe failed to properly "preserve the attorney fees issue for appeal." *Rothe V*, 413 F.3d 1327, 1339 (Fed. Cir. 2005). The district court's denial of attorney's fees to Rothe through to August 31, 2004, due to the substantial justification of DOD's defense of Section 1207, is law of the case and there is no unusual circumstance that compels reopening that issue. Accordingly, under EAJA, Rothe cannot recover any attorney's fees incurred through August 31, 2004.

CONCLUSION

For the foregoing reasons, the district court's order denying attorney's fees to Rothe under EAJA should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 5, 2010, two copies of the Brief for the Department of Defense and Department of the Air Force as Appellees, were served by first class mail, postage prepaid, on the following counsel of record:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Federal Rule of Appellate Procedure 32(a)(7)(B). The brief was prepared using WordPerfect X4 and contains 9286 words of proportionally spaced text. The typeface is Times New Roman, 14-point font.

_____
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Dated: February 5, 2010