IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2008-1017

ROTHE DEVELOPMENT CORPORATION,

Plaintiff-Appellant

v.

DEPARTMENT OF DEFENSE and
DEPARTMENT OF THE AIR FORCE,

Defendants-Appellees

Appeal from the United States District Court for the Western District of Texas in Case No. 98-CV-1011, Judge Xavier Rodriguez

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BRIEF OF APPELLEES/DEFENDANTS DEPARTMENT OF DEFENSE AND DEPARTMENT OF THE AIR FORCE

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STATEMENT REGARDING ORAL ARGUMENT

The Department of Defense does not oppose appellant Rothe's request for oral argument.

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

STATUTES:

STATUTES (continued): **PAGE**

STATUTES (continued): **PAGE**

STATUTES (continued): **PAGE**

REGULATIONS:

LEGISLATIVE HISTORY:

LEGISLATIVE HISTORY (continued): **PAGE**

LEGISLATIVE HISTORY (continued): **PAGE**

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STATEMENT OF RELATED CASES

This case has been before this Court on appeal twice previously. The most recent appeal was *Rothe Development Corp.* v. *Department of Defense*, No. 04-1552, 413 F.3d 1327 (June 28, 2005) (Michel, Newman, and Gajarsa, JJ.).

The first appeal before this Court was *Rothe Development Corp*. v. *Department of Defense*, No. 00-1171, 262 F.3d 1306 (Aug. 20, 2001) (Michel,

Clevenger, and Gajarsa, JJ.).

This case was transferred to this Court from the United States Court of Appeals for the Fifth Circuit. *Rothe Dev. Corp.* v. *Department of Defense*, No. 99-50436, 194 F.3d 622 (5th Cir. 1999) (Jolly, Smith and Wiener, JJ.)..

STATEMENT OF JURISDICTION

The district court exercised subject matter jurisdiction pursuant to 28 U.S.C. 1331, 1343, and 1346. This Court has appellate jurisdiction pursuant to 28 U.S.C.1295(a)(2).

STATEMENT OF THE ISSUES

1. Whether the 2006 reauthorization of Section 1207 of the National Defense Authorization Act is facially constitutional.

2. Whether the district court correctly held that Rothe is not entitled to relief on its claims for prospective declaratory and injunctive relief from the expired 1999 and 2002 reauthorizations of Section 1207.

3. Whether the district court correctly held that Rothe is not entitled to attorneys fees.

STATEMENT OF THE CASE

1. This case arose from plaintiff-appellant Rothe Development Corporation's (Rothe) unsuccessful bid for an Air Force computer service's

contract awarded in 1998. That contract was subject to Section 1207 of the National Defense Authorization Act of 1987, 10 U.S.C. 2323 ("Section 1207" or "the Act"), as reauthorized in 1992. A0008-A0009.[1] Section 1207 permits the Department of Defense (DOD) preferentially to select bids from small businesses owned by socially and economically disadvantaged individuals (SDBs) so long as the contract price is not more than ten percent above the fair market cost. 10 U.S.C. 2323(e)(3)(A). To effectuate this preference, Section 1207 authorizes a program known as the "price evaluation adjustment" (PEA), which allows DOD to increase non-SDB bids by up to ten percent. A0010-A0011. Section 1207 incorporates the presumption of Section 8(d) of the Small Business Act, 15 U.S.C. 637(d), that Black Americans, Hispanic Americans, Native Americans, and Asian-Pacific Americans are socially and economically disadvantaged. 10 U.S.C. 2323(a)(1)(A), 15 U.S.C. 637(d). The contract on which Rothe bid was awarded to a minority-owned company as a result of the application of the PEA. A0011.

2. Rothe alleged that Section 1207's PEA program violated the Equal Protection component of the Fifth Amendment, on its face and as applied to

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[1] Citations to the Joint Appendix are denoted "A." Citations to the appellant's brief are denoted "Rothe Br." Citations to the Pacific Legal Foundation's brief as amicus curiae are denoted "PLF Br." Citations to the record in the district court are denoted "R."

Rothe's bid. Rothe sought a declaration that the 1992 reauthorization of Section 1207 was unconstitutional; an injunction enjoining DOD from complying with the program; monetary damages for its bid preparation costs under the Little Tucker Act, 28 U.S.C. 1346(a)(2); and attorneys fees and costs. A0031-A0033.

On April 27, 1999, the district court granted DOD summary judgment. A0033. Rothe appealed. In 2001, this Court ruled that the district court applied an incorrect standard of review and impermissibly relied on post-reauthorization evidence, and reversed and remanded. *Rothe Dev. Corp.* v. *Department of Def.*, 262 F.3d 1306, 1312 (Fed. Cir. 2001) (*Rothe III*). Before the district court issued its opinion and order on remand, Congress again reauthorized Section 1207. Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, § 816, 116 Stat. 2610 (Dec. 2, 2002) (2002 reauthorization).

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. A0051-A0052 (citing R. 98). The district court found the 1992 reauthorization unconstitutional as applied and granted Rothe declaratory relief on its constitutional challenge to the 1998 award. *Rothe Dev. Corp.* v. *Department of Def.*, 324 F. Supp. 2d 840, 854 (W. D. Tex. 2004) (*Rothe IV).* The district court denied Rothe's claims for declaratory and injunctive relief

on the 2002 reauthorization, holding that Congress's action was constitutional, *id.* at 860, and denied Rothe's request for attorneys fees and costs. *Ibid*.

Rothe again appealed. This Court held that the record was inadequate to decide the facial constitutionality of the 2002 reauthorization, vacated the district court's decision, and remanded to allow the parties to develop the evidentiary record for the "present reauthorization" of Section 1207. *Rothe Dev. Corp.* v. *Department of Def.*, 413 F.3d 1327, 1329, 1336-1337 & n.4 (Fed. Cir. 2005) (*Rothe V*). This Court instructed the district court to determine whether the evidence cited to support the "present reauthorization" of Section 1207 was before Congress prior to the date of that reauthorization and whether that evidence had become stale. *Id*. at 1338. This Court also reversed the district court's dismissal of Rothe's Little Tucker Act claim as moot, *id*. at 1331-1332, and ruled that Rothe had not preserved its challenge to the denial of attorneys fees, *id*. at 1339.

Before the district court completed its work on remand, Congress reauthorized Section 1207 once again. National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 842, 119 Stat. 3389 (Jan. 6, 2006) (2006 reauthorization).

3. On remand, the district court allowed further discovery, and, in 2007, granted DOD's motion for summary judgment. *Rothe Dev. Corp.* v. *Department*

of Def., 499 F. Supp. 2d 775 (W.D. Tex 2007) (*Rothe VI*); A0001. Applying strict scrutiny, the district court found that Congress sought to further a compelling interest supported by a "strong basis in the evidence" when it reauthorized Section 1207 in 2006, and that this reauthorization was narrowly tailored. A0001. The district court held that Rothe's claims concerning the 1999 and 2002 reauthorizations were moot, A0075-A0082, and outside the scope of the remand because they were not the "present" or current reauthorization, A0083-0084. The court also ordered DOD to deposit $10,000 in the court's registry to satisfy Rothe's Little Tucker Act claim and again dismissed that claim as moot. A0071-A0073. Finally, the district court ruled that Rothe was not entitled to attorneys fees because (1) it was not a prevailing party on its claim challenging the facial constitutionality of the 2006 reauthorization; (2) its Little Tucker Act claim would become moot; (3) DOD was substantially justified in defending this action; and (4) as this Court held in *Rothe V*, Rothe waived its attorneys fees objection on its earlier decided claims. A0186. Rothe appealed to this Court.

STATEMENT OF FACTS

1. Section 1207

The core issue in this appeal is Rothe's facial constitutional challenge to the 2006 reauthorization of Section 1207. Section 1207 sets a goal that, in each fiscal

year, five percent of the total dollar amount of prime and subcontracting expenditures of the DOD, Coast Guard, and NASA will be awarded to the seven kinds of entities defined in Section 2323(a)(1) of the statute. 10 U.S.C. 2323(a)(1). The seven (a)(1) entities are small business concerns owned and controlled by socially and economically disadvantaged individuals (SDBs) as defined in Section 8(d) of the Small Business Act, 15 U.S.C. 637(d); qualified historically under-utilized business zone (HUBZone) small business concerns, defined as small business concerns located in designated economically-distressed areas; historically Black colleges and universities; and minority, Hispanic, Native Hawaiian, and Alaska Native-serving higher educational institutions. 10 U.S.C. 2323(a)(1), (b).[2]

Congress authorized four types of programs to be used, if necessary, to achieve the five percent goal: (1) technical assistance, (2) advance payments, (3) incentives to increase subcontractor awards, and (4) "less than full and open competitive procedures." 10 U.S.C. 2323(c)(1), (e)(2), (e)(3)(A) & (e)(5)(A). Most relevant for this case, agencies may, "[t]o the extent practicable and when

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[2] Congress added Native Hawaiian and Alaska Native-serving higher educational institutions to the list of eligible entities in the National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, 122 Stat. 3, 270 (2008).

necessary to facilitate achievement of the five percent goal," "enter into contracts using less than full and open competitive procedures." 10 U.S.C. 2323(e)(3)(A). Under this provision, a contracting officer may limit competition on a contract or select a bid other than the lowest-priced qualified bid. See 10 U.S.C. 2323(e)(3)(A) (listing examples of such programs).

Section 1207 places three significant limits on the use of less than full and open competitive procedures. First, agencies may not pay a price that exceeds the fair market cost by more than ten percent. 10 U.S.C. 2323(e)(3)(A). Second, if use of these provisions denies non-disadvantaged business concerns in an industry "a reasonable opportunity to compete for contracts," the agency must adjust the percentage by which agencies may exceed fair market value in that industry, to alleviate the impact on non-disadvantaged business concerns. See 10 U.S.C. 2323(e)(3)(A).

Third and most important, if an agency achieved the five percent goal during the preceding fiscal year, it must suspend the regulations authorized by 10 U.S.C. 2323(e)(3)(A) for the next fiscal year. 10 U.S.C. 2323(e)(3)(B)(ii). Because DOD has met the five percent goal every year since this provision was

added to Section 1207 in 1998, the regulations authorizing use of the PEA have been suspended each year since 1999, including the upcoming year. A0029; see Suspension of the PEA for SDBs, 73 Fed. Reg. 9304-01 (Feb. 20, 2008).

2. Small Disadvantaged Businesses And Rothe's Equal Protection/Due Process Challenge

Section 2323(a)(1)(A) defines the first of the seven (a)(1) entities, "small business concerns * * * owned and controlled by socially and economically disadvantaged individuals," by reference to Section 8(d) of the Small Business Act, 15 U.S.C. 637(d). 10 U.S.C. 2323(a)(1)(A). In Section 8(d), Congress has defined SDBs as "any small business concern" that is at least 51% owned by "one or more socially and economically disadvantaged individuals" and whose "management and daily business operations * * * are controlled by one or more [such individuals]."[3] 15 U.S.C. 637(a)(4)(A),(B).

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[3] The statute defines "socially disadvantaged individuals" as those "who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." 15 U.S.C. 637(a)(5). "Economically disadvantaged individuals are those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." 15 U.S.C. 637(a)(6)(A). In determining economic disadvantage, the SBA considers the assets and net worth of such socially disadvantaged individuals. See 15 U.S.C. 637(a)(6)(A).

Section 8(d) presumes that Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities are socially and economically disadvantaged. See 15 U.S.C. 637(d)(3)(C)(ii). Individuals not in these designated groups may qualify as SDBs by demonstrating social disadvantage.[4] *All* SDB applicants and participants, including individuals presumed to be socially and economically disadvantaged because of their race or ethnicity, must prove they have a net personal worth under $250,000 to qualify and a net worth of less than $750,000 to remain in the program. 13 C.F.R. 121.104(c)(2).[5]

3. Section 1207's Implementing Regulations

Congress directed DOD to promulgate regulations to implement Section 1207. 10 U.S.C. 2323(e)(5); see Federal Acquisition Regulation, 48 C.F.R. Pt. 19;

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[4] Groups may qualify as disadvantaged if they demonstrate "race, ethnic origin, gender, physical handicap, long-term residence in an environment isolated from the mainstream of American society, or other similar causes not common to individuals who are not socially disadvantaged." 13 C.F.R. 124.103(c)(2)(i). If the applicant also demonstrates that its entry into or advancement in the business world has been impaired because of specific factors personal to its owner, and its ability to compete has been impaired due to diminished capital and credit opportunities, the applicant may receive SDB status. See 13 C.F.R. 124.1008(e)(2); see also 13 C.F.R. 124.103(c)(2)(ii) & 124.201.

[5] Rothe has not challenged the constitutionality of the 8(d) program, which is run by the Small Business Administration.

Defense Federal Acquisition Regulation, 48 C.F.R. Pt. 252. These regulations place significant additional limitations on the use of less than full and open competitive procedures with respect to SDBs. The regulations restrict the use of non-competitive procedures to certain industries, geographic regions, and procurement mechanisms designated by the Department of Commerce (DOC). 48 C.F.R. 19.201(b), 52.219.11-12. DOC also determines the appropriate percentage for the PEA for each industry. 48 C.F.R. 19.201(b), 19.1101. Using a methodology designed to "ensure that the price adjustments authorized * * * are narrowly tailored to remedy discrimination," DOC made its first such designation in 1998. SDB Procurement: Reform of Affirmative Action in Federal Procurement, 63 Fed. Reg. 35,714, 35,716-35,718 (June 30, 1998). DOC recommended that the PEA be implemented only in those industry categories where the SDB share of industry utilization fell short of the existing SDB share of industry capacity. *Ibid*. DOC designated the same industries in 1999. SDB Procurement: Reform of Affirmative Action in Federal Procurement, 64 Fed. Reg. 52,806-01 (Sept. 30, 1999). Although DOC announced that it would update the designation every three years, *ibid*., DOD has suspended the regulations authorizing the PEA since 1999, and DOC has not modified its 1999 designation. A0029.

4. District Court Proceedings

On August 10, 2007, in a 188-page decision, the district court held Congress's 2006 reauthorization of Section 1207 facially constitutional. *Rothe VI*, 499 F. Supp. 2d 775 (W.D. Tex 2007), A0001-A0188. The district court, as this Court instructed, set forth detailed findings as to the scope and content of the evidence before Congress and excluded post-reauthorization evidence. See A0102-A0176.

1. The district court found that, in the lead-up to the 2006 reauthorization, Congress had before it at least six statistical studies on racial disparities in state and local contracting. A0106-A0107. These studies covered jurisdictions located in varying regions across the country.[6] A0107. Many of the studies also compiled detailed anecdotal accounts of discriminatory barriers in state and private contracting. See A0120-A0121 (citing Chapter 9 of New York Study); A0146-A0148 (summarizing anecdotal accounts in Cincinnati study)).

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[6] City of Dallas Availability and Disparity Study, Mason Tillman Associates, Ltd. (2002) (A1493-A1744); City of Cincinnati Disparity Study, Griffin & Strong, P.C. (2002) (A1745-A1853)); Ohio Multi-Jurisdictional Disparity Studies, Mason Tillman Associates, Ltd. (2003) (A1854-A2027); Procurement Disparity Study of the Commonwealth of Virginia, MGT of America, Inc. (2004) (A2028-A2513); Alameda County Availability Study, Mason Tillman Associates (2004) (A2514-A2882); City of New York Disparity Study, Mason Tillman Associates, Ltd. (A2883-A3176) (2005).

The district court also reviewed four Congressional hearings held between 2001 and 2004 on small businesses and federal procurement, including procurement at DOD.[7] The court found that the testimony Congress heard from business owners, bankers, and federal officials contributed to the evidence demonstrating the continuing effects of racial and ethnic discrimination in the public and private contracting markets. See A0162-A0164. The court also reviewed several reports delivered to Congress, including two reports from the Small Business Administration in 2000 and 2005, and a 2005 report from the United States Commission on Civil Rights.[8] A0164-A0165, A0153.[9]

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[7] Availability of Capital and Federal Procurement Opportunities to Minority-Owned Small Businesses, H.R. Rep. No. 53, 108th Cong., 2d Sess. (Feb. 17, 2004) ("Availability of Capital"); Pentagon's Procurement Policies and Programs with Respect to Small Business, Hearing before House Comm. on Small Businesses, H.R. Rep. No. 57, 107th Cong., 2d Sess. (May 15, 2002) ("Pentagon's Procurement"); Procurement Policies of the Department of Defense with Regard to Small Business, Hearing before the House Comm. on Small Businesses, H.R. Rep. No. 28, 107th Cong., 1st Sess. (Sept. 6, 2001) ("Procurement Policies"); Encouraging Growth of Minority Owned Small Businesses, Field Hearing before House Comm. on Small Businesses, H.R. Rep. No. 26, 107th Cong., 1st Sess. (Aug. 27, 2001) ("Encouraging Growth").

[8] The Small Business Economy: A Report to the President (2005); The State of Small Business: A Report to the President (2000); Federal Procurement After Adarand, United States Commission on Civil Rights (2005) ("After Adarand").

[9] The court determined that Congress considered three other reports in relation to the 2006 reauthorization: an "Appendix" prepared by the Department

(continued...)

In evaluating the evidence before Congress, the district court found that when Congress reauthorized Section 1207 in 2006, it had timely evidence that the effects of discrimination in public and private contracting continued for each of the racial and ethnic minorities that receive a presumption of social disadvantage under Section 8(d). The district court held that this record provided the "strong basis in evidence" required under strict scrutiny. A0176.

The district court rejected Rothe's argument that strict scrutiny requires a federal agency to prove that it discriminated against its own contractors before it can adopt a remedial program. A0085-A0088, A0093. The district court also rejected Rothe's argument that DOD must prove discrimination for every racial sub-group of the broader racial categories identified in the regulations. A0086.

Furthermore, the district court rejected Rothe's objections to the six disparity studies, holding that the studies, cited by title, jurisdiction, author, and date by two members of Congress in floor statements, were before Congress when it reauthorized Section 1207 in 2006. A0106-A0107. The court found that the

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[9](...continued)
of Justice; a report prepared by the Urban Institute; a "Benchmark Study" prepared by the Department of Commerce. The district court rejected those reports as outdated, as they were prepared between 1996 and 1998 and primarily analyzed data gathered between the late 1980s and 1996. See A0170-A0172.

data in the reports were not stale. A0110. The court also rejected Rothe's other objections to the studies, stating that Rothe did not submit any expert reports discrediting or even addressing any of the six studies. Rather, the court found, Rothe's expert reports criticized disparity studies in general. A0121-A0124.

2. The district court then held that Section 1207 was narrowly tailored. A0177. This Court had affirmed the district court's earlier finding that Section 1207 satisfied three of the six narrow tailoring criteria in that it was flexible, limited in duration, and did not impose an unduly severe burden on innocent parties. A0177 (citing *Rothe III*, 262 F.3d at 1331). Examining the three remaining factors, the district court concluded that Congress had made a serious and good faith attempt to consider race neutral alternatives, that the five percent goal was proportionate to the number of qualified, willing, and able SDBs identified in the six disparity studies before Congress, and that the program was not over or under-inclusive. A0177-A0186.

The district court denied Rothe's other claims. It ordered DOD to deposit $10,000 in the court's registry to cover Rothe's Little Tucker Act damages and dismissed that claim as moot. A0071-A0073. The court also held that Rothe's claims for declaratory relief with respect to the earlier reauthorizations of Section 1207 were moot, A0075-A0082, as well as outside of the scope of the remand

from this Court, because those reauthorizations were not the "present" reauthorization, A0083-A0084. Finally, the district court ruled that Rothe was not entitled to attorneys fees because it was not a prevailing party on its challenge to the constitutionality of the 2006 reauthorization, and because DOD was substantially justified in defending this action. A0186.

SUMMARY OF ARGUMENT

The core issue in this appeal whether the 2006 reauthorization of Section 1207 is facially constitutional. Carefully following this Court's instructions on remand in a thorough and detailed 188-page opinion, the district court applied strict scrutiny and correctly concluded that Section 1207 is facially constitutional.

1. The district court carefully evaluated the legislative record before Congress and, applying strict scrutiny, found the "strong basis in evidence" sufficient to support Congress's conclusion that DOD, in some circumstances, is a "passive participant" in a system of racial exclusion practiced by elements of the state, local and private contracting sectors. A0088, A0176. As this Court instructed, the district court set forth detailed findings as to the scope and content of the evidence before Congress, excluded any post-reauthorization evidence, and closely examined the evidence for staleness.

The district court correctly held that when Congress reauthorized Section

1207 in 2006, it had timely, probative evidence that the past effects of racial and ethnic discrimination in public and private contracting continue to hinder contracting opportunities for the groups that Congress has presumed to be "socially and economically disadvantaged." The body of evidence before Congress was substantial, including (1) floor statements by members of Congress; (2) disparity studies showing the continuing effects of discrimination in state, local, and private contracting in jurisdictions around the country; (3) recent hearings before the House Small Business Committee; and (4) reports on federal contracting by two federal agencies.

This record established that Congress had a compelling interest in remedying DOD's role as a passive participant in a contracting system still suffering the lingering effects of past and present discrimination. The disparity studies demonstrated statistically significant under-utilization by every minority group covered in Section 1207 in four broad industry categories: construction, architecture and engineering, goods and supplies, and professional services. In determining whether minority-owned firms were under-utilized, the studies appropriately compared the percentage of contracting dollars awarded to minority-owned firms with the percentage of such firms with availability and capacity, not the percentage of minorities in the general population. The legislative record also

showed ongoing racial and ethnic discrimination and lingering effects of past discrimination by providers of business loans and surety bonds, as well as the continuing adverse consequences of an "old-boy" network that effectively excludes minorities and impedes fair competition for SDBs. These findings are consistent with the 30 years of hearings, investigations, and other evidence detailing the effects of continuing discrimination against racial and ethnic minorities in state, local, and private contracting.

Rothe's contention that the district court applied the wrong standard of law is without merit. No court has held that strict scrutiny requires a federal agency to prove that the agency itself discriminated against its own contractors before it can adopt a remedial program. Nor is there any legal support for Rothe's argument that Congress must have evidence of discrimination in every state and jurisdiction where its program is authorized before it may take nationwide remedial action. Indeed, this Court recognized in 2001, and other circuits have stated explicitly, that Congress need not have evidence of discrimination in each sub-jurisdiction in order to enact a national remedial program. *Rothe III,* 262 F.3d at 1329.

The district court properly rejected Rothe's attempts to discredit the disparity studies before Congress. Rothe's expert reports did not address any of the six disparity studies, but merely made general observations about problems in

"many" existing studies. And the statistical studies were not stale. Statistical research is not instantaneous. Data first must be collected, and researchers then need time to analyze those data. The studies Congress considered in 2005 analyzed data from contracts as recent as 2000-2003, and were clearly reasonably up to date and appropriate for Congress's consideration.

2. This Court also should also affirm the district court's finding that Section 1207 is narrowly tailored. Of particular importance, DOD cannot use race-conscious price-adjustments if it reaches five percent utilization of SDBs and other covered entities in the preceding fiscal year. In fact, DOD has suspended the regulations authorizing race-conscious price adjustments every year since 1999.

The district court carefully examined the three remaining narrow tailoring factors that this Court directed it to review on remand. The district court concluded that Congress made a serious and good faith attempt to consider race neutral alternatives, that the five percent goal was proportionate to the number of qualified, willing, and able SDBs identified in the six disparity studies before Congress in the relevant industries, and that the program was not over or under-inclusive.

Significantly, Congress used only race-neutral small business measures for some 25 years before adding any race-conscious provisions to the Small Business

Act in 1978. Even after enacting Section 1207 in 1986, Congress continued to employ the pre-existing race-neutral provisions and to authorize other race-neutral assistance for small businesses. That the disparities in the record before Congress continue to exist shows that race-neutral programs alone are insufficient to combat present discrimination and the lingering effects of past discrimination.

3. The district court correctly dismissed as moot Rothe's claims for declaratory and injunctive relief regarding the 1999 and 2002 reauthorizations of Section 1207, and this Court's 2003 remand order explicitly limited the scope of the remand to the facial constitutionality of "the present reauthorization of Section 1207" in six instances. This Court did not indicate any need to reexamine any prior reauthorization, including the 1999 reauthorization.

4. Finally, the district court properly denied Rothe's request for attorneys fees. This Court has already held that Rothe failed to preserve its claim for attorneys fees on its earlier decided claims. *Rothe V*, 413 F.3d at 1339. Rothe's claim for attorneys fees on claims that have not yet been finally decided is premature.

STANDARD OF REVIEW

A district court's grant of summary judgment is reviewed *de novo*. *Rothe III*, 262 F.3d at 1316. Summary judgment is appropriate if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); see also *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322-323 (1986). As this Court stated in *Rothe III,* "the issues [here] are ones of law based on underlying facts that are essentially undisputed. What is sharply disputed are the inferences and conclusions that may properly be drawn from those underlying facts." 262 F.3d at 1316.

ARGUMENT

I

THE DISTRICT COURT CORRECTLY HELD THAT CONGRESS HAD THE STRONG BASIS IN EVIDENCE REQUIRED TO SUPPORT A LIMITED RACE-CONSCIOUS PROGRAM, AND THAT SECTION 1207 IS NARROWLY TAILORED

A. Strict Scrutiny

Eliminating racial discrimination and its effects remains one of this nation's great challenges. "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." *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 237 (1995). Governmental jurisdictions have authority to address both any current practice of racial discrimination and any "lingering effects" of discrimination. *Ibid;* see *Rothe III*, 262 F.3d at 1323; *Dean* v. *City of Shreveport*, 438 F.3d 448, 456-457 (5th Cir. 2006). Congress enacted Section 1207 to ensure that neither present discrimination nor the lingering effects of past discrimination "cause federal funds to be distributed in a manner which reinforce[s] prior patterns of discrimination." *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 504 (1989).

Where Section 1207's SDB provisions rely on race-conscious criteria, they are subject to strict scrutiny. Racial classifications "must serve a compelling governmental interest, and must be narrowly tailored to further that interest." *Adarand*, 515 U.S. at 235. The compelling interest inquiry is a question of law. *Rothe III*, 262 F.3d at 1323. Under strict scrutiny, when a government uses race voluntarily, "the court must review the government's evidentiary support to determine whether the legislative body had a 'strong basis in evidence' to believe that remedial action based on race was necessary." *Id.*at 1317 (citing *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality, Powell, J.)); see *Croson*, 488 U.S. at 500.

Although the strong basis in evidence inquiry depends on the facts and

circumstances of the remedial program at issue, some general principles have emerged. As this Court has noted, "[s]tatistical evidence is particularly important to justify race-based legislation." *Rothe III*, 262 F.3d at 1323 (citing *Croson*, 488 U.S. at 509 (plurality, O'Connor, J.)). "Indeed, nearly every court of appeals upholding the constitutionality of a race-based classification has relied in whole or in part on statistical evidence." *Id.* at 1323-1324. "[A] significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors" can give rise to an inference of discrimination. *Croson*, 488 U.S. at 509 (plurality, O'Connor, J.). Other relevant evidence includes testimony and reports presented at legislative hearings and anecdotal accounts of discrimination. See *Rothe V*, 413 F.3d 1327, 1337 (Fed. Cir. 2005) (court could find evidence "in Congressional Committee reports and hearing records"); *Adarand Constructors, Inc.* v. *Slater*, 228 F.3d 1147, 1166 (10th Cir. 2000) (*Adarand VII)*; *Concrete Works of Colo., Inc,* v. *City & County of Denver*, 36 F.3d 1513, 1520-1521 (10th Cir. 1994); *Contractors Ass'n of E. Pa.* v. *City of Phila.*, 6 F.3d 990, 1003 (3d Cir. 1993).

This Court has made clear that "Congress ha[s] a broader brush than municipalities for remedying discrimination." *Rothe III*, 262 F.3d at 1329. While

a few instances of discrimination would be insufficient to uphold a national program, Congress did not need to have evidence before it of discrimination in all 50 states in order to justify a nationwide Section 1207 program. *Ibid.* (citing *Adarand VII*, 228 F.3d at 1165); see also *Oregon* v. *Mitchell*, 400 U.S. 112, 294 (Stewart, J., concurring in part). On the other hand, Congress must have evidence that discrimination is "sufficiently pervasive across racial lines to justify granting a preference to all [of the] purportedly disadvantaged racial groups included under the 1207 program." *Rothe III*, 262 F.3d at 1330.

This Court has instructed that when making the strong basis in evidence determination, a court must consider "all evidence available to the appropriate legislative body prior to reauthorization," *id.* at 1328, and must assure itself that the evidence was before Congress prior to the reauthorization, *Rothe V*, 413 F.3d 1327, 1338, and that the evidence before it was sufficiently timely and sufficiently substantive. *Rothe III*, 262 F.3d at 1330. These are "factual question[s] for the district court to resolve." *Id*. at 1331. Although the government bears the burden of producing evidence of a compelling interest to defend its consideration of race, the challengers continue to bear the ultimate burden of persuading the court that the evidence does not show a compelling interest or that the program is not narrowly tailored. *Id.* at 1317.

B. Before the 2006 Reauthorization, Congress Had Timely, Probative Evidence That Remedial Action Was Required Due To Continuing Discrimination In Public And Private Contracting Around The Country

The district court held that there was a strong basis in evidence to support Congress's conclusion that DOD is, in some circumstances, "a 'passive participant' in a system of racial exclusion practiced by elements of various state and local contracting sectors." A0088, A0176. The district court found that Congress received reports and compiled evidence of marketplace discrimination, and altered federal spending practices to prevent federal participation in that discrimination. A0088.

1. Congress Has A Compelling Interest In Preventing Federal Dollars From Reinforcing Private, State, And Local Discrimination

The courts consistently have recognized the compelling nature of Congress's interest in ensuring that federal funds are not "distributed in a manner which reinforce[s] prior patterns of discrimination." *Croson*, 488 U.S. at 504. As the *Croson* Court stated, Congress may take steps to insure that the government does not "become a 'passive participant' in a system of racial exclusion practiced by elements of the [relevant] industry." *Id.* at 492-493 (plurality, O'Connor, J.). This Court's sister circuits similarly have acknowledged Congress's compelling interest in this regard. See, *e.g.*, *Western States*, 407 F.3d at 991; *Adarand VII*,

228 F.3d at 1176. Thus, there can be no question that Congress has a compelling interest in preventing federal contracting dollars from reinforcing present or past discrimination.

Nonetheless, the government must point to a strong basis in evidence for the conclusion that Section 1207 was enacted in response to systematic discrimination or the lingering effects thereof. *Rothe III*, 262 F.3d at 1323. "[E]vidence of either public or private discrimination could be used to satisfy the municipality's burden of producing strong evidence." *Concrete Works of Colo., Inc.* v. *City & County of Denver*, 321 F.3d 950, 975-976 (10th Cir. 2003) (*Concrete Works IV*) (citing *Shaw* v. *Hunt*, 517 U.S. 899, 909 (1996)). Congress thus may rely on evidence of discriminatory barriers to the formation of SDBs due to private discrimination, barriers to fair competition for public construction contracts, and local disparity studies to establish a compelling interest supporting the limited use of race in federal contracting. *Adarand VII*, 228 F.3d at 1168.

There is no merit to Rothe's claim (Rothe Br. 13, PLF Br. 14) that the district court applied the wrong standard of law. No court has held that strict scrutiny requires a federal agency to prove that the agency itself discriminated against its own contractors before it can implement a Congressionally enacted remedial program. This would be inconsistent with *Croson,* as well as decisions

in this court and other circuits, that state 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." *Croson*, 488 U.S. at 492 (plurality, O'Connor, J.); *id*. at 504 (stating that "states and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination"). Accordingly, this Court should reject Rothe's invitation to reverse the district court on the ground that DOD failed to show that it had discriminated against its own contractors.

2. Congress Had Substantial Probative And Timely Evidence of Continuing Discrimination In State And Local Contracting

The district court correctly concluded that Congress gathered significant evidence regarding the status of SDBs and the continuing effects of racial discrimination in the contracting industry as it considered the 2006 reauthorization. As the court found, the Congressional record demonstrates that Congress considered at least six statistical studies demonstrating racial disparities in state and local contracting in several jurisdictions. These jurisdictions are significant in size and located in varying regions across the country. In addition, the studies detailed individual accounts of discriminatory barriers in state and

private contracting. The court also stated that Congress held hearings on small businesses and federal procurement, including procurement at DOD, between 2001 and 2004, at which Congress heard testimony from business owners, bankers, and federal officials that there were continuing effects of discrimination in the public and private contracting markets. Congress also received relevant reports from the Small Business Administration and the United States Commission on Civil Rights. The district court, as instructed by this Court, set forth some 70 pages of detailed findings as to the scope and content of this evidence. See A0102-A0176.

a. The Record Included Recent Statistical Evidence Demonstrating Statistically Significant Under-utilization Of SDBs

The disparity studies before Congress examined public contracting in six large jurisdictions located in different regions of the country: New York City, New York; Alameda County, California; Dallas, Texas; Cuyahoga County, Ohio; the Commonwealth of Virginia; and Cincinnati, Ohio. These studies demonstrated that minority business owners are still significantly under-utilized by state and local governments relative to their availability as compared to the percentage of all firms in the local marketplace.

The district court correctly held that these studies were before Congress

prior to the 2006 reauthorization. The court found that "[a]lthough the full text of these six disparity studies was not printed in the Congressional record, the * * * repeated reference to these studies in Congressional hearings and floor debates indicates that these studies were before Congress." A0107 n.83. Two members of Congress, Senator Edward Kennedy and Representative Cynthia McKinney, specifically cited these six studies in statements on the floor supporting reauthorization of Section 1207, just weeks before the legislation passed on January 6, 2006. See A0102-A0103 (citing Statement of Sen. Kennedy, 151 Cong. Rec. S12668-01 (daily ed. Nov. 10, 2005) (stating that years of Congressional hearings demonstrated "minorities historically have been excluded from both public and private construction contracts in general, and from Federal defense contracts in particular," that these "problems affect a wide variety of areas in which the Department offers contracts, and the problems are detailed in many recent disparity studies, including [these six studies]"); Statement of Rep. McKinney, 151 Cong. Rec. E2514-02, (daily ed. Dec. 13, 2005)) (same)). On December 20, 2005, Senator Kennedy again spoke in support of reauthorizing Section 1207 and summarized the findings of the studies from Dallas, Cincinnati, Cuyahoga County, Ohio, and Alameda County, California. See A0104-A0105 (citing 151 Cong. Rec. S14170-01 (daily ed. Dec. 20, 2005)).

Rothe cites no authority for its contention (Rothe Br. 25, 27) that strict scrutiny requires Congress to hold formal hearings to accept evidence regarding legislation, or that only evidence that is fully printed in the Congressional Record or a Congressional report may be considered by a court examining that legislation.[10] In fact, other circuits have relied on statistical studies referenced in reports presented to Congress even where the underlying studies were not separately presented to Congress. See *Western States*, 407 F.3d at 992 (relying on the "Appendix to the Compelling Interest" and the Urban Institute report to find a strong basis in evidence to support the Department of Transportation's Disadvantaged Business Enterprise (DBE) program where the reports summarized findings in statistical studies that were not themselves published in the congressional record); *Sherbrooke Turf, Inc.* v. *Minnesota Dep't of Transp.*, 345 F.3d 964, 969-970 (8th Cir. 2003) (same); *Adarand VII,* 228 F.3d at 1167-1169 (same). Similarly, here, the district court relied on statements by members of Congress summarizing statistical studies to find that those studies constituted part of the legislative record before Congress.

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[10] Rothe's citation to *E.F. Hutton* v. *Pearce*, 653 F. Supp. 810, 814-816 (D.D.C. 1987), is not helpful. *Hutton* involved the admissibility of testimony from a Congressional hearing under the hearsay exception to Federal Rule of Evidence 803(c) in a civil trial on a libel action, rather than in a constitutional challenge to a statute.

This is in keeping with longstanding precedent that the fact-finding proceedings of Congress are entitled to a presumption of regularity and deferential review. *Rothe III*, 262 F.3d at 1321 n.14 (citing *Croson*, 488 U.S. at 500). "The Constitution grants Congress discretion to regulate its internal proceedings. Article I, § 5, cl. 2, for example, empowers it to determine the rules of its proceedings." *American Fed'n of Gov't Employees* v. *United States*, 330 F.3d 513, 522 (D.C. Cir. 2003). "Congress has the authority to decide whether to conduct investigations and hold hearings to gather information. See *Watkins* v. *United States*, 354 U.S. 178, 193 (1957); *McGrain* v. *Daugherty*, 273 U.S. 135, 174-175 (1927). Under the Constitution, Congress has broad discretion in determining what must be published in the official record. See *Field* v. *Clark*, 143 U.S. 649, 671 (1892)." *American Fed'n*, 330 F.3d at 522. When applying strict scrutiny, courts may evaluate the weight and probative value of the legislative record, but may not prescribe procedures for Congress's legislative process.

2. As this Court required, the district court made detailed findings regarding the studies' conclusions. See A0102-A0153. Five of the six studies (all except Cincinnati) examined disparities in at least four broad industry categories: construction, architectural and engineering services, goods, and professional services. Although Rothe attempts to minimize these findings (Rothe Br. 14-15),

the district court correctly concluded that the studies demonstrated statistically significant under-utilization of every minority group covered in Section 1207 (Black Americans, Hispanic Americans, Native Americans, and Asian Pacific Americans) in each industry category.[11] The district court also found that the studies used appropriate measures of availability and capacity and did not rely on measures of the general population. See p. 39, *infra*.

The 2005 New York City study, examining contracts awarded between 1997 and 2002, found statistically significant under-utilization of businesses owned by Black Americans and Hispanic Americans in all four industries, and for businesses owned by Asian Americans in construction and in architectural and engineering services. A0114-A0120. The 2004 Alameda County study examined contracts issued between 2000 and 2003, and found statistically significant under-utilization of businesses owned by Black Americans, Asian Americans, and minority business enterprises collectively (MBEs) in all four industries; and for Hispanic Americans in all industries except construction. See A0125-A0129.

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[11] There were not enough data for Native American owned or controlled businesses to make a statistically significant determination in many of the jurisdictions. The Virginia Study found significant under-utilization in all four industries for Native Americans. See A0152-A0153 (citing Virginia Study pp.4-6 to 4-7, A2122-A2123).

The 2004 Virginia study, examining contracts awarded between 1997 and 2002, found statistically significant under-utilization of businesses owned by Native Americans in all four industries, and by Black Americans, Asian Americans, and Hispanic Americans in three of the four industries. See A0150-0153 (Black Americans, all but professional services; Asian Americans, all but goods; Hispanic Americans, all but construction). The 2003 Cuyahoga County study examined contracts awarded between 1998 and 2000, and found statistically significant under-utilization of businesses owned by Black Americans and MBEs in three industries, by Hispanic Americans in goods and professional services, and by Asian Americans in architectural and engineering services. A0129-A0135 (Black Americans all but architectural and engineering; MBEs all but goods).

The 2002 Dallas study, covering contracts awarded between 1997 and 2000, found statistically significant under-utilization of businesses owned by Black Americans and MBEs in all four industries, by Asian Americans in all industries except goods, and by Hispanic Americans in all industries except architecture. A0135-A0143.

The 2002 Cincinnati study differed from the other five studies in several respects. Cincinnati used only three industry groups: professional services, construction, and supplies/services. The Cincinnati study also used a more

conservative methodology to determine availability for the construction and supplies/goods industries, including only those firms that had actually bid on city contracts. Additionally, Cincinnati was the only jurisdiction that had a race-conscious contracting program in place during a portion of the period studied, which ran from 1995-2002. A1849-A1851, A0148-A0150. The Cincinnati study found significant under-utilization of SDBs in two of the three industry groups in 2000, when it had only a race-neutral program in effect. Cincinnati found no under-utilization and some over-utilization of SDBs in those years when it had an SDB program. A1849-A1851.

The court also considered anecdotal evidence included in the studies demonstrating that the effects of discrimination continued to restrict opportunities for minority businesses in state, local, and private contracting. For example, the court stated that in New York City, a black owner of a professional services firm testified that majority-owned firms with similar qualifications to his company received larger fees for larger jobs doing the same kind of work. A0120-A0121. The court stated that in Cincinnati, the city's own purchasing agents and other employees described a "good old boy" system where purchasing agents preferred to do business with those they knew without permitting fair competition or equal access to opportunities, A0146, a senior buyer expressed personal reservations

about the reliability of minority owned businesses, and one buyer reported that minority businesses had complained to him about price discrimination by suppliers, impeding their ability to bid competitively on contracts. A0147. Finally, the court relied on testimony from three minority business enterprises (MBEs) that reported situations where non-MBEs conspired to lowball a bid to prevent MBEs from receiving a contract. A0148.

As this Court required, the district court considered whether this evidence was stale, and correctly concluded that it was not. A0108-A0109. Whether evidence is sufficiently timely is a question of fact. *Rothe III*, 262 F.3d at 1331. The data that Congress considered in 2005 concerned contracts awarded as recently as 2000-2003, and was the most current available at the time. A0108-A0109. The district court properly rejected Rothe's argument (Rothe Br. 29) that it should follow the recommendation of the United States Commission on Civil Rights against relying on data more than five years old. A0109 n.5. As the court noted, that recommendation is inconsistent with precedent in other circuits relying on much older data. A0109 (citing *Western States*, 407 F.3d at 992 (relying in 2005 on the government's 1996 Appendix to uphold a federal DBE program); *Sherbrooke Turf*, 345 F.3d at 969-970 (relying on same in 2003)). The five-year rule also is impracticable given the realities of data analysis. A0109 (noting that

the Census Bureau did not issue its 1997 Survey of Minority-Owned Business Enterprises until 2001, and stating that a five-year rule would make those data stale almost as soon as they were released). The district court's finding that the six disparity studies were reasonably up to date should be affirmed.

b. Rothe Failed To Challenge The Accuracy Of The Studies

Rothe did not raise a genuine issue of material fact regarding these studies in the district court or in its brief to this Court (Rothe Br. 32-33). This Court has held that a "court may not simply accept a party's statement that a fact is challenged . * * * The party opposing [summary judgment] must point to an evidentiary conflict created on the record at least by a counter statement of a fact or facts set forth in detail in an affidavit by a knowledgeable [person]. Mere denials or conclusory statements are insufficient." *Barmag Barmer Maschinenfabrik AG* v. *Murata Mach., Ltd.*, 731 F.2d 831, 836 (Fed. Cir. 1984).

The district court correctly found that Rothe's objections to the six studies failed on both counts. Rothe's objections were "not supported by an expert report or other competent summary judgment evidence," A0123, as Rothe relied on non-evidentiary and conclusory assertions by its own counsel. As the district court noted, Rothe's objections to each study were brief, averaging just one or two

paragraphs per study, contained few specifics,[12] and were largely "generalized, conclusory objections" stating that all disparity studies were "bad" or "unreliable." A0123-A0124.

The district court's findings are consistent with the holdings of other circuits that, in this context, a proper rebuttal contains "particular evidence undermining the reliability of the particular study" at issue. A0123. A plaintiff must introduce "credible, particularized" evidence to rebut a government's initial showing of a compelling interest. *Concrete Works IV*, 321 F.3d at 979. As the Tenth Circuit explained in *Adarand VII*,

> Certainly, the conclusions of virtually all social scientific studies may be cast into question by criticisms of the choice of assumptions and methodologies. The very need to make assumptions and select data sets and relevant variables precludes perfection in empirical sciences. However, general criticism of disparity studies, as opposed to particular evidence undermining the reliability of the particular disparity studies relied on by the government, is of little persuasive value.

228 F.3d at n.14.

The insufficiency of Rothe's general observations is especially striking in light of the fact that Rothe submitted expert reports questioning the reliability of

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[12] See A0121-A0123 (summarizing two paragraph objection to New York study); A0125 (Alameda County: one paragraph, conclusory); A0129 (Cuyahoga County, Ohio: two paragraph, general and conclusory); A0135-A0136 (Dallas: same); A0144 (Cincinnati: one paragraph); A0150 (Virginia: one paragraph).

the three post-*Adarand* studies that the district court excluded. See A0171-A0175. Clearly, despite its protestations to the contrary (Rothe Br. 23), Rothe had an opportunity to develop similar expert testimony concerning the six disparity studies before Congress, but failed to do so.

Rothe's belated attempt to correct this failing by promising to "summariz[e] how the six municipal disparity studies fail to satisfy the findings and recommendations of the two [United States Commission on Civil Rights] Reports" *for the first time in its reply brief* (Rothe Br. 34, 46) must be rejected. These facts should have been presented to the district court. See *Sage Prods., Inc.* v. *Devon Indus., Inc.,* 126 F.3d 1420, 1426 (Fed. Cir. 1997) ("[T]his court does not 'review' that which was not presented to the district court.") At the very least, Rothe should have set forth its objections in its opening brief. "[A]n appellant cannot preserve an issue for appeal simply by incorporating arguments from the appendix" because "incorporation would undermine both the rule requiring appellants to include their arguments in their principal brief and the rule limiting the length of the briefs." *Rothe V*, 413 F.3d at 1339. Not only are Rothe's criticisms of the six disparity studies far too conclusory to create a genuine issue of material fact, they simply come too late.

In addition, the factual attacks Rothe has made are insufficient. Rothe complains that the studies did not limit the capacity analysis to firms ready, willing, and able to perform public contracts. (Rothe Br. 38). But, as the district court recognized, each study was designed to account for these factors to the extent possible. For example, to qualify for the New York study, a company had to be categorized as "willing." Willing companies were identified from City and other governmental agency sources and "had either bid on City projects, sought government contracts, secured government certification, or responded to the outreach campaign conducted in conjunction with the New York Study." A0111. The study also used four approaches to determine if these willing firms were "able" to do the work, including analyzing the size of the city's awarded prime contracts to determine the capacity required to perform an average city contract. A0111-A0113; see also A0136 (Dallas study used records from the City, agencies, trade associations, certification organizations, and outreach efforts). Many of the other studies used similar analysis in their determinations of firm capacity. See A0112-A0113 (New York); A0125 (Alameda County); A0129 (Cuyahoga County, analyzed only prime contracts under $500K); A0136 (Dallas).

Rothe also attempts (Rothe Br. 36-37) to rebut the six statistical studies by asserting that disparity studies are not valid unless they include a regression

analysis, and that only the Virginia study satisfied this requirement. The Ninth Circuit's decision in *Western States,* Rothe's only authority for this assertion, is easily distinguished. *Western States* upheld the Department of Transportation program (which is quite similar to the Section 1207 program in many respects) as constitutional on its face. 407 F.3d at 995. Furthermore, the district court noted that in *Western States*, the Ninth Circuit relied almost exclusively on the Appendix, and the studies included therein, for its compelling interest holding. A0089. The language Rothe quotes comes from the section of the opinion analyzing the plaintiff's *as applied* challenge to the state of Washington's implementation of the federal program, in which Washington conceded that it had not completed any valid statistical studies to try to establish the existence of discrimination in its highway contracting industry. *Id*. at 1000. Unlike the six statistical studies presented in this case, Washington State did not attempt to control for capacity, and there was no indication that the relatively small two percent disparity found in its program had been analyzed for statistical significance. Citing *Croson*, the Ninth Circuit expressly stated that this small disparity, standing alone, was insufficient to support the use of race. *Id*. at 1000-1001. Here, in contrast, all six statistical studies found statistically significant under-representation.

c. Additional Evidence Before Congress

The district court cited other evidence before Congress that also helped demonstrate that small disadvantaged businesses continue to suffer from the lingering effects of systemic racial and ethnic discrimination. This evidence included member statements on Section 1207 and on other bills considering federal SDB programs during 2005, and four recent hearings before the House Small Business Committee, including one that dealt specifically with DOD's small business procurement policies and programs. Congress also considered two reports from the Small Business Administration and a report from the United States Commission on Civil Rights.

The district court also reviewed Congressional testimony concerning continuing under-utilization of SDBs in States and jurisdictions around the country. Two representatives gave floor statements in support of the 2006 reauthorization citing disparity studies in their home jurisdictions. Representative Melvin Watt referenced a 2004 disparity study conducted in North Carolina finding that "North Carolina continues to underutilize businesses owned by minorities or women in nearly all categories of transportation contracts" and under-utilized African American and Hispanic businesses in every category. A0161 (citing 151 Cong. Rec. H12200, H12208 (daily ed. Dec. 18, 2005)).

Representative Robert Menendez referred to a disparity study conducted in New Jersey that found "many business owners and representatives stated that their opportunities to perform work as subcontractors on state contracts decreased after the suspension of New Jersey's [MWBE] program." A0161 (citing 151 Cong. Rec. H12200, H12208 (daily ed. Dec. 18, 2005)).

The legislative record included testimony that SDB utilization decreased markedly when state and local jurisdictions abandoned minority procurement goals and assistance programs. The court considered a letter submitted by Senator Barack Obama, written by a Hispanic business owner in Washington State, noting that Washington's preference for awarding contracts to large companies with an established track record presented a barrier to well-qualified minority candidates. A0156. The writer also asserted that the "State's procurement awards to minority companies had drastically decreased to less tha[n] 1 percent" since implementation of an initiative that eliminated minority procurement goals from state contracting. A0156-A0157 (citing 151 Cong. Rec. S14241-03, S14249 (daily ed. Dec. 21, 2005)); see also A0160 (citing July 2005 Statement of Sen. Kennedy that MBE participation in Minnesota's transportation department contracts fell from ten percent to two percent after a court enjoined the previous federal program). The court also considered testimony before the House Small Business Committee

during a 2001 hearing in New Mexico. A0164; see Encouraging Growth, H.R. Rep. No. 26, 107th Cong., 1st Sess. at 8-10 (2001) (testimony that while Hispanics account for 22% of New Mexico's businesses, they accounted for only five percent of the state's business receipts).

The court considered other Congressional testimony concerning discrimination against SDBs seeking capital and financing. For example, in a 2004 Field Hearing before the House Small Business Subcommittee, a minority business owner described how banks in a Chicago suburb rejected his application for a $50,000 SBA loan, despite his excellent credit record, and told him to go to a bank in Chicago. When his partner, a former banker, sent a letter to the bank complaining that this was redlining, they received their loan. Availability of Capital, H.R. Rep. No. 53, 108th Cong. 2d Sess. at at 37-38 (2004); see also *id*. at 48 (statement of Hon. Danny Davis noting that in Illinois, less than two percent of federal contracts went to minorities in 2002 and that traditional lending institutions are less likely to provide capital to minority-owned businesses); Encouraging Growth at 17-18, 20 (testimony of African American business owner and banker in charge of SBA loans for Matrix Bank noting African American and other minority businesses in New Mexico have difficulty getting SBA loans from participating banks); see also A0159 (citing July 2005 statement by Sen. Kennedy

that "[a] bank denied a minority-owned business a loan to bid on a contract worth $3 million, but offered a loan for the same purpose to a nonminority-owned firm with an affiliate in bankruptcy. An Asian-Indian American businessman in the San Francisco Bay area testified at a public hearing that he was unable to obtain a line of unsecured credit from mainstream banks until he found a loan officer who shared his heritage.").

The district court also reviewed evidence of lingering effects of discrimination against minority-owned small businesses in federal procurement. The court noted Senator Kennedy's statement in 2005 noting a 2001 Government Accountability Office study showing that contracting under that Federal program had dramatically declined when similar local programs were terminated in the jurisdictions examined. A0160. Congress also heard testimony that DOD's bundling of contracts into larger awards excluded SDBs from competitive bid opportunities. See Procurement Policies, H.R. Rep. No. 28, 107th Cong., 1st Sess. at 13 (2000) (statement of Evaristo Bonano); *id*. at 45-46 (statement of Robert Spencer, Grand Prairie, Texas, noting bundling excluding SDBs from competitive bid opportunities and impact of Lockheed Martin contract using just one subcontractor).

In addition, the district court reviewed Congressional reports noting the disparity in government contracting between minority-owned and non-minority-owned businesses. The lack of minority-owned business participation in government procurement contracting was highlighted by the House of Representatives Small Business Report Scorecard IV, issued in 2005, noting that while minority-owned firms made up 15% of all United States firms, the Federal government procurement rate for small and disadvantaged businesses was 4.4%. See A0164 (citing Scorecard IV; Federal Agencies Closed to Small Business at 3, 5); see also A0164 (citing 108th Congress, Report by the House Small Business Committee – 2004 Year End Report, Small Business Record at 9,11 & 28 (noting Federal government's failure to meet its goals for minority business contracting in the last four years and complaints about contract bundling)). Senator Kennedy submitted a letter from an Asian business owner in California alleging that two local prime contractors used minority subcontractors on their public contracts because of minority business requirements of local government but would not use minority subcontractors on their private contracts. A0158 (citing 151 Cong. Rec. S14256-01, S14269 (daily ed. Dec. 21, 2005)). Considering the evidence gathered in its hearings, the House Small Business Committee concluded in 2004 that "while much progress has been made in increasing access to capital and federal

procurement markets for minority entrepreneurs, much work remains to be done." H.R. Rep. No. 800, 108th Cong., 2d Sess. at 152 (2004).

Evaluating this evidence, the district court correctly determined that when Congress reauthorized Section 1207 in 2006, it had timely, probative evidence of a pattern or practice of discrimination in both public and private contracting. A0107, A0176-A0177. The court found that the statistical evidence supported the conclusion that all of the covered racial and ethnic groups are currently and have been subject to discrimination in state and local contracting throughout the United States. A0176. The district court concluded that in general, "the federal government does business in the same contracting markets as state and local governments. Therefore, the evidence in state and local studies of the impact of discriminatory barriers to minority opportunity in contracting markets throughout the country is relevant to * * * whether the federal government has a compelling interest to take remedial action in its own procurement activities." A0108 (quoting Appendix, 61 Fed. Reg. 26,062).

The district court noted that in 2005, "DOD procured approximately $268 billion of goods and services." A0088. Because "the federal government has a compelling interest in ensuring that its funding is not distributed in a manner that perpetuates the effects of either public or private discrimination," A0097 (quoting

Western States, 407 F.3d at 991), the court found that Congress had sufficient evidence of discrimination throughout the United States to justify a nationwide remedial program including each of the racial and ethnic minorities that receive a presumption of social disadvantage under Section 8(d) and Section 1207. A0176.

The evidence compiled by Congress and cited by the district court is not mere evidence of generalized societal discrimination. This is evidence of *specific discriminatory barriers* to market entry and to fair competition for minority-owned businesses across the country in a range of industries. Given the government's enormous spending on public contracts, Congress recognized that relying solely on race-neutral contract award processes might continue or even exacerbate prior patterns of private, state, and local discrimination, making the federal government a passive participant in a system of racial exclusion. See A0091 (citing *Concrete Works IV*, 321 F.3d at 976 (stating that government "can demonstrate that it is a 'passive participant' in a system of racial exclusion * * * by compiling evidence of marketplace discrimination and then linking its spending practices to the private discrimination")); *Western States*, 407 F.3d at 983; *Adarand VII*, 228 F.3d at 1167; *Sherbrooke Turf*, 345 F.3d at 970.

These findings, moreover, are consistent with the 30 years of hearings, investigations, and other evidence detailing the effects of continuing

discrimination against racial and ethnic minorities in state, local and private contracting that provide the backdrop to the enactment and continuing reauthorization of Section 1207, and Congress's attempt to address those problems. See generally, *e.g.*, Public Works Employment Act of 1977, Pub. L. No. 95-28, 91 Stat. 116 (1977); Small Business Act, Pub. L. No. 96-302, § 118, 94 Stat. 833, 840 (1980), codified at 15 U.S.C. 631(f); Business Opportunity Development Reform Act of 1988, Pub. L. No. 100-656, § 502, 102 Stat. 3853, 3887 (1988), codified at 15 U.S.C. 644(g)(1); Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, 112 Stat. 232 (1998), codified at 23 U.S.C. 1101(b)(1). During those years, Congress concluded, based on the evidence that it heard, that: minorities faced barriers based on their race impeding their access to needed capital and ability to secure surety bonds; non-minority-owned contractors have engaged in discriminatory bid-shopping; closed business networks continue to exist in the contracting industry; and other barriers to minority businesses' gaining adequate information about government contracting opportunities and competing in the federal market place continue to exist. See, *e.g.*, *Adarand VII*, 228 F.3d at 1170-1172 ("[T]he government presents evidence tending to show that discrimination by prime contractors, private sector customers, business networks, suppliers, and bonding companies fosters a decidedly uneven playing field for

minority subcontracting enterprises seeking to compete in the area of federal construction subcontracts."); *Associated Gen. Contractors* v. *Coalition for Econ. Equity*, 950 F.2d 1401, 1415 (9th Cir. 1991) (citing reports that minority firms were "denied contracts despite being the low bidder," and were "refused work even after they were awarded the contracts as low bidder"). Congress further compiled evidence, including numerous statistical studies, that these barriers, including some attributable to private discrimination, accounted for the numerical disparities in the federal government's spending. See, *e.g.,* Appendix, 61 Fed. Reg. 26,051-26,052 nn. 12-21 (citing approximately 30 Congressional hearings since 1980 concerning minority-owned businesses).[13]

Thus, reviewing the evidence Congress considered during the most recent reauthorizations of Section 1207, and referencing the data and evidence that has been compiled throughout the extensive Congressional record related to Section 1207, it is clear that Congress's conclusion that the effects of past discrimination still linger in the area of federal contracting is easily supported. The fact that these

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[13] As noted p. 13 n.9 *supra*, the district court excluded the Appendix from its consideration of the evidence supporting the 2006 reauthorization because the data and studies it discussed were stale. DOD does not challenge that finding and does not rely on the Appendix to support the 2006 reauthorization in this appeal. We cite it only to note the consistency of Congress's findings as an indicia of reliability for the findings of the more recent evidence regarding lingering effects of discrimination.

effects continue, even after the implementation of Section 1207 and other programs addressing discrimination in contracting, established a strong basis in evidence for Congress's conclusion in 2006 that DOD remained a passive participant in a system suffering the effects of past and present discrimination.

C. Rothe Has Not Rebutted This Evidence

There is no support for Rothe's suggestion (Rothe Br. 18) that Congress must have evidence of discrimination in every state or jurisdiction where its program is authorized before it may enact a remedial program. As this Court has explained in this very case, "[w]hereas municipalities must necessarily identify discrimination in the immediate locality to justify a race based program, we do not think that Congress needs to have had evidence before it of discrimination in all fifty states in order to justify" a race-conscious remedy. *Rothe III*, 262 F.3d at 1329; see also *Sherbrooke Turf*, 345 F.3d at 970-971; *Adarand VII*, 228 F.3d at 1165, 1175-1176. In fact, Congress has the power to ensure federal spending does not reinforce racial discrimination and its effects in any location where federal dollars are spent. *Croson*, 488 U.S. at 491-492; accord *Western States,* 407 F.3d at 992.

Rothe also argues (Rothe Br. 25-26, 41) that the Federal Rules of Evidence barred Congress or the district court from considering the anecdotal evidence of

discrimination related in the statistical studies, member statements, and testimony from Congressional hearings as support for Section 1207. The legislative process, however, is not a trial, and the rules of evidence do not apply to Congressional proceedings. See Fed. R. Evid. 101. A court reviewing legislation for compliance with the Constitution cannot effectively impose such rules on Congress by refusing to consider any evidence that a court would not admit in a civil trial. See *American Fed'n*, 330 F.3d at 522; pp. 32-33, *supra*. Rather, the court's role is to evaluate and weigh the evidence that was before Congress, pursuant to strict scrutiny. The district court properly rejected Rothe's objections and applied the correct judicial standard to its review of the legislation.

Rothe's remaining contentions might be relevant to an as-applied challenge but are misplaced with respect to this facial challenge. Rothe argues (Rothe Br. 38, 40) that the evidence before Congress did not establish past discrimination in Rothe's sub-industry of computer services and repair, and that the evidence before Congress does not justify a program that applies to all areas of DOD procurement. This case, however, is a *facial* challenge. In reauthorizing Section 1207, Congress designed a flexible program to remedy the continuing effects of discrimination in private and public contracting given DOD's role as a passive participant. The statistical studies, testimony from recent Congressional hearings, and other

evidence before Congress demonstrated lingering effects of discrimination across a wide range of industry categories against each of the covered ethnic groups. As discussed pages 10-11 *infra*, the implementing regulations restrict the use of race to those industries and regions designated by DOC. And, Section 1207 requires DOD to suspend the most burdensome of those provisions if DOD meets the five percent goal during the previous year. Accordingly, on its face, Section 1207 will not necessarily apply to all DOD contracts.

Rothe's argument (Rothe Br. 16) that the evidence before Congress did not justify a program that covers all of DOD procurement, just a program in industries with evidence of discrimination, fails for the same reason. Requiring such industry-specific data to enact a national program would also be inconsistent with the approach of the Supreme Court in *Croson*, and of other circuits, to facial challenges. After all, to survive a facial challenge, the statute must be shown only to be capable of constitutional implementation. In *Croson* and *Adarand*, for example, the Supreme Court focused on evidence regarding the larger construction industry implicated by the challenged programs, not just on the specific plumbing (*Croson*) or guardrail (*Adarand*) supplier sectors in which the plaintiffs worked. Cf. *Croson*, 488 U.S. at 505. Other circuits have taken the same approach. See, *e.g., Sherbrooke Turf*, 345 F.3d at 969-974 (rejecting facial challenge after

focusing on discrimination in the highway and building construction industry, not just among sodding subcontractors).

D. *Section 1207 Is Narrowly Tailored To The Compelling Interest*

The district court correctly ruled that Section 1207 is narrowly tailored. Indeed, the measures Congress and DOD have taken to limit the use of race in the Section 1207 program are very similar to those in the Department of Transportation's DBE program, and each court to review that latter program has found it to be narrowly tailored. See *Adarand VII,* 228 F.3d at 1178-1187; *Sherbrooke Turf,* 345 F.3d at 971-973; *Western States,* 407 F.3d at 993-995.

This Court has already held that Section 1207 satisfies three of the six criteria of narrow tailoring: flexibility, limited duration, and severity of burden on innocent third parties. *Rothe III*, 262 F.3d at 1331. In *Rothe I*, the district court held that Section 1207 was flexible because the five percent goal was aspirational and not a mandatory quota; because the statute required DOD to report to Congress annually on its progress; and because the program was available to non-minority businesses who proved social and economic disadvantage. 49 F. Supp. 2d at 951-953. The district court also held that Section 1207 was limited in duration and not unduly burdensome to third parties because it required DOD to report annually on its progress and expired after three years, and expressly allowed for

relief if there was a showing that a particular industry or sector is burdened by the program. *Ibid*.

In its latest opinion, the district court carefully evaluated the remaining three criteria: efficacy of race-neutral alternatives, proportionality of the goal, and over and under-inclusiveness.

1. Congress Considered The Efficacy Of Race-Neutral Measures And Concluded The Continuing Effects Of Discrimination Merit The Flexible Race-Conscious Provisions In Section 1207

Congress is not required to exhaust all possible race-neutral alternatives before acting to remedy the continuing effects of discrimination. See *Sherbrooke Turf*, 345 F.3d at 972. Rather, narrow tailoring requires "serious, good faith consideration of workable race-neutral alternatives." *Grutter* v. *Bollinger*, 539 U.S. 306, 339 (2003). This Court held that examining the efficacy of race-neutral alternatives includes determining "whether Congress found * * * race-neutral alternatives ineffective," "inquiring into any attempts at the application or success of race-neutral alternatives," and considering whether a "legislative body ma[d]e findings that pre-existing antidiscrimination provisions have been enforced but unsuccessfully." *Rothe III*, 262 F.3d at 1331.

The district court correctly ruled that Congress gave race-neutral alternatives serious good faith consideration before reauthorizing Section 1207 in

2006. A0178, A0181. As the court found, Congress had used only race-neutral measures to help small businesses for some 25 years and concluded that these measures were not successful before it passed the first race-conscious provisions of the Small Business Act in 1978. See A0178-A0181. Even after enacting Section 1207 in 1986, Congress retained the existing race-neutral provisions and added new forms of race-neutral assistance for small businesses. The record shows that Congress carefully considered race-neutral alternatives, and reasonably concluded that they would not be fully effective, before reauthorizing the flexible, limited race-conscious provisions.

Beginning with the Small Business Act of 1953, Congress authorized various programs to "aid, counsel, assist, and protect * * * the interests of small-business concerns" and "insure that a fair proportion of the total purchases and contracts . . . for the government be placed with small-business enterprises." Pub. L. No. 163, § 202, 67 Stat. 230, 232 (1953). The Small Business Act did not include race-conscious provisions until the 1978 amendments. See Pub. L. No. 95-507, §§ 201, 211, 92 Stat. 1757, 1760, 1767 (1978). Congress added a race-conscious component to the Section 8(a) program after determining that alternative means of combating racial discrimination were insufficient.

Congress has attempted to address many of the barriers that obstruct SDB

formation and fair competition through race-neutral measures. In 1970, to help small businesses obtain surety bonds, Congress authorized the SBA to establish the Surety Bond Guarantee Program, which covers surety companies for up to 90 percent of their losses on bonds. Housing and Urban Development Act of 1970, Pub. L. No. 91-609 § 410, 84 Stat. 1770, 1813 (1970), codified at 15 U.S.C. 694a & b. In 1972, Congress created a new class of small business investment companies to provide capital to small businesses owned by socially and economically disadvantaged individuals. See Pub. L. No. 92-595, 86 Stat. 1314 (1972). And, before adding race-conscious provisions to the Section 8(a) program in 1978, Congress reviewed and strengthened other programs assisting all small businesses through the Small Business Act. See, *e.g.*, Pub. L. No. 95-89, 91 Stat. 553 (1977) (increasing SBA's loan and surety bond guarantee authority and improving disaster assistance, certificate of competency and small business set-aside programs); Pub. L. No. 94-305, 90 Stat. 663 (1976) (creating pollution control financing program and providing additional financial assistance for small businesses); Pub. L. No. 93-386, 88 Stat. 742 (1974) (clarifying and increasing SBA authority to assist small businesses, with special emphasis on firms owned by low-income individuals or located in areas with high unemployment). Congress also has authorized contracting set-asides for small businesses generally –

minority and non-minority alike – as well as other forms of assistance that are available to all small businesses. See, *e.g.*, 15 U.S.C. 631(a) (declaration of policy to aid small businesses); 636(a) (loans to small businesses); 644(a), (i) & (j) (small business set-asides); 648(a) (small business development centers).

Congress tried other remedies – including anti-discrimination legislation, executive action to remedy employment discrimination, and federal aid to minority businesses – but determined that these had failed to eradicate the effects of discrimination in federal contracting. See *Croson*, 488 U.S. at 507 (observing that "principal opinion in *Fullilove* found that Congress had carefully examined and rejected race-neutral alternatives before enacting the [minority] set-aside" in the Public Works Employment Act of 1977); *Fullilove* v. *Klutznick*, 448 U.S. 448, 511 (1980) (Powell, J., concurring); *Adarand VII*, 228 F.3d at 1178 ("[t]he long history of discrimination in, and affecting the public construction procurement market-despite the efforts dating back at least to the enactment in 1958 of the SBA to employ race-neutral measures * * * justifies race conscious action").

Additionally, recent evidence indicates that minority business development is still significantly hampered by the same kinds of discriminatory barriers that prompted the enactment of Section 1207. Congress heard evidence that minority-owned businesses are still under-represented both in terms of total

receipts as compared to all businesses in the national economy, and as a percentage of government contracting as compared to their availability. See pp. 31-36 *supra*; see also *Adarand VII*, 228 F.3d at 1173-1174. Thus, it was reasonable for Congress to infer that these discriminatory barriers have contributed, at least in part, to this disparity.

It is also notable that Congress and DOD have further restricted the race-conscious provisions of Section 1207, so that the use of race will be discontinued where there is evidence that its use is unnecessary. In 1995, DOD suspended its "Rule of Two," pursuant to which DOD contracts could be set aside exclusively for SDBs, see Memorandum for Secretaries of the Military Departments re: Small Disadvantaged Business Utilization Program by Under Secretary of Defense Paul G. Kaminski, (Oct. 23, 1995), and SDB set-asides are not included in the authorized SDB procurement mechanism in the implementing regulations, see 48 C.F.R. 19.201(b). The permissible SDB procurement mechanisms are available on an industry-by-industry and regional basis, expressly contemplating leaving some industry sectors and regions without race-conscious provisions. *Ibid*. Importantly, to the extent that the barriers facing SDBs may be similar to barriers facing small businesses generally, Congress has continued its race-neutral efforts to promote small business utilization and eliminate these obstacles. These continuing race-

neutral measures include small business set-asides, set-asides for HUBZone businesses located in economically distressed areas, anti-bundling programs, and assistance with surety bonds. See, *e.g.*, After Adarand, Dissent App. B (A0951-A0952) (citing 48 C.F.R. 19.5)).

That the disparities and lingering effects of discrimination evident from the record before Congress in 2005 continue to exist, even as Congress has implemented Section 1207 and continued its race-neutral programs for small businesses, demonstrates that continuing the limited, flexible race-conscious provisions of Section 1207 is consistent with a good faith consideration and implementation of race-neutral alternatives.

2. The Five Percent Goal Is Proportional To The Relevant Market

The district court correctly found that the five percent goal is proportionate to the number of qualified, willing, and able SDBs in the relevant industry group. A0181-A0183 (citing *Rothe III*, 262 F.3d at 1331). The court noted that "the availability analysis contained in all six disparity studies indicates that on average, Minority Business Enterprises in the United States who are ready, willing, and able to bid on DOD contracts far exceeds the five percent aspirational goal set by

the program." A0183. Moreover, as the district court noted, the five percent goal is *aspirational*, not mandatory. See A0182 (noting Congress has rebutted attempts to make the goal mandatory).

Other factors support the district court's conclusion. The five percent goal covers awards to all seven kinds of (a)(1) entities, not just SDBs, and all awards to SDBs, even those made through other, non-race-conscious programs, count towards the goal. 10 U.S.C. 2323(a)(1). The five percent goal also is reasonable compared to the overall number of minority owned businesses in the country. In 1987, when Congress first set Section 1207's five percent goal, minority-owned businesses were 8.9 percent of the businesses covered by the Census Bureau's Economic Census. See U.S. Census Bureau, 1987 Survey of Minority-Owned Business Enterprises, 1991, at 2. In 2005, when Congress reauthorized Section 1207, the most recent Census data from 1997 showed an increase to approximately 15 percent. See After Adarand at 68, A0885 (citing U.S. Census Bureau, 1997 Survey of Minority-Owned Business Enterprises at 9). Considering these factors, this Court should affirm the district court's finding that the five percent goal is proportionate to the relevant market.

3. Section 1207 Provides Targeted Relief That Is Neither Over- Nor Under-Inclusive

The district court correctly found that Section 1207 is neither over- nor under-inclusive. A0183-A0186. Section 1207 is not over-inclusive. The six disparity studies and the testimony before Congress demonstrated recent, statistically significant under-utilization of SDBs for every ethnic and racial group covered by Section 1207 in all four industry categories described pp. 31-34 *supra*, and Section 1207's presumption will aid only those SDBs whose owners make the *individualized* showing of economic disadvantage required by Section 8(d)'s implementing regulations. An SDB's qualification as disadvantaged may be challenged by an interested party. A0186 (citing 13 C.F.R. 124.1015(c)). Furthermore, the implementing regulations limit use of the SDB procurement mechanisms to industries designated by DOC. See 48 C.F.R. 19.201(b). Thus, only SDBs whose owners are actually and demonstrably economically disadvantaged benefit from Section 1207's race-conscious provisions.

Nor is Section 1207 under-inclusive. Individual small business owners in racial and ethnic groups not granted a presumption may qualify by demonstrating social disadvantage by a preponderance of the evidence. A0185 (citing 13 C.F.R. 124.103(c)). In addition, "representatives of an identifiable group whose members

believe that the group has suffered chronic racial or ethnic prejudice or cultural bias may petition the SBA to be included as a presumptively disadvantaged social group." A0184 (citing 13 C.F.R. 124.103(d)(1)). The courts in *Sherbrooke Turf* and *Western States* cited similar regulatory provisions in DOT's DBE program in holding that program was narrowly tailored. See *Sherbrooke Turf*, 345 F.3d at 973; *Western States*, 407 F.3d at 995.

II

ROTHE IS NOT ENTITLED TO RELIEF ON ITS CLAIMS FOR PROSPECTIVE RELIEF FROM THE EXPIRED 1999 AND 2002 REAUTHORIZATIONS

The district court correctly dismissed Rothe's claims for declaratory relief that the 1999 and 2002 reauthorizations of Section 1207 were unconstitutional on their face, holding that those claims were moot or alternatively were outside of the scope of the remand from this Court because they were not the "present" reauthorization. A0075-A0085. Rothe's only live claims for relief related to the expired reauthorizations were for prospective declaratory and injunctive relief. As the district court and the Tenth Circuit have held, "[a] declaratory judgment on the validity of [the] repealed ordinance is a textbook example of advising what the law would be upon a hypothetical state of facts." A0076 (citing *Concrete Works IV*, 321 F.3d 950, 954 n.1 (10th Cir. 2003)). Accordingly, Rothe's requests regarding

the lapsed reauthorizations are moot.

These claims are also outside of the scope of this Court's 2003 remand order. The 2003 remand order explicitly limited the scope of the remand to the facial constitutionality of "the *present* reauthorization of section 1207" in six instances. A074 (citing *Rothe V*, 413 F.3d at 1335, 1337 & n.4, 1339) (emphasis added). This Court did not indicate any need to reexamine any prior reauthorization, including the 1999 reauthorization. Accordingly, under the law of the case doctrine, the jurisdiction of this case is limited to the present reauthorization, and the district court thus correctly denied Rothe's request to consider the facial constitutionality of the expired 1999 and 2002 reauthorizations of section 1207.

III

ROTHE IS NOT ENTITLED TO ATTORNEYS FEES UNDER THE EQUAL ACCESS TO JUSTICE ACT

Lastly, Rothe is not entitled to attorneys fees under the Equal Access to Justice Act, 28 U.S.C. 2412 (EAJA). This Court already has held that Rothe failed to preserve its claim for attorneys fees on its earlier decided claims. *Rothe V*, 413 F.3d at 1339. That leaves only Rothe's challenge to the 2006 reauthorization, but a claim for attorneys fees on that action is premature. Rothe did not prevail in the

district court. In addition, there is no "final decision" in the case as that term is defined by EAJA, because the district court's judgment is appealable. See 28 U.S.C. 2412(d)(2)(G); *Melkonyan* v. *Sullivan*, 501 U.S. 89, 97 (1991). Were Rothe to file a timely application in the district court, DOD would argue that Rothe is not a prevailing party and that DOD's defense was substantially justified under 28 U.S.C. 2412(d)(1)(A).

CONCLUSION

This Court should affirm the judgment of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Fed. R. App. 32(a)(7)(B). The brief was prepared using WordPerfect 12.0 and contains 13,681 words of proportionally spaced text. The typeface is Times New Roman, 14-point font.

DATE: March 17, 2008

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CERTIFICATE OF SERVICE

I certify that on March 17, 2008, two copies of the above BRIEF FOR THE DEPARTMENT OF DEFENSE AND DEPARTMENT OF THE AIR FORCE AS APPELLEES, were served by regular mail on the following counsels of record:

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