No. 15-5176

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROTHE DEVELOPMENT, INC.,

Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF DEFENSE and
UNITED STATES SMALL BUSINESS ADMINISTRATION

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia
Honorable Ketanji Brown Jackson, District Judge

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND CENTER FOR EQUAL OPPORTUNITY IN SUPPORT OF PLAINTIFF-APPELLANT AND SUPPORTING REVERSAL

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici. All parties, intervenors, and amici appearing in this Court are listed in the Certificate as to Parties, Rulings, and Related Cases filed by Plaintiff-Appellant on July 2, 2015.

Pacific Legal Foundation	Amicus Curiae
Center for Equal Opportunity	Amicus Curiae

(B) Rulings Under Review. Reference to the ruling at issue appears in the Certificate as to Parties, Rulings, and Related Cases filed by Plaintiff-Appellant on July 2, 2015.

(C) Related Cases. There are no related cases.

STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

All parties have consented to the filing of Pacific Legal Foundation's and Center for Equal Opportunity's brief amicus curiae. Counsel for Amici Curiae consulted with attorneys representing other interested parties planning to file amicus briefs in this case in support of Appellant Rothe Development, Inc. Amici are filing this brief separately because, to the best of counsel's knowledge, no other brief is covering the precise subject matter discussed in this brief.[1]

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[1] Under Fed. R. App. P. 29(c), Amici state no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae or its counsel made a monetary contribution to its preparation or submission.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, and District of Columbia Circuit, Rule 26.1, Amicus Curiae Pacific Legal Foundation, a nonprofit corporation organized under the laws of California, hereby states that it has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

The Center for Equal Opportunity (CEO) is a nonprofit corporation organized under the laws of Virginia. CEO has no parent companies, subsidiaries, or affiliates that have issued shares to the public.

TABLE OF CONTENTS

Page

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES i

STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING ii

CORPORATE DISCLOSURE STATEMENT iii

TABLE OF AUTHORITIES vi

IDENTITY AND INTEREST OF AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. STATISTICAL DISPARITY STUDIES CITED BY THE *DYNALANTIC* COURT DO NOT SATISFY *CROSON*'S STANDARDS 4

A. Government Cannot Infer Discrimination from Disparity Studies That Fail to Satisfy the Supreme Court's "Qualified," "Willing," and "Able" Standards for Statistical Proof 5

B. The Alaska Disparity Study Fails to Consider Firm Capacity or Bidding Practices 8

C. The Dayton Study Does Not Provide an Inference of Discriminatory Exclusion 10

D. The San Antonio Study Offers No Bid Analysis, and Most Minority Firms Denied Experiencing Discrimination 12

Page

E. The New Jersey Disparity Study Fails to Account for Firm Qualifications and *Rothe* Disapproved Its Method of Measuring Firm Capacity 15

F. The Nevada Disparity Study Shows That Minority Firms Are Likely to Win Contracts When They Submit Bids 19

II. SECTION 8(A) FAILS THE NARROW TAILORING PRONG OF STRICT SCRUTINY 22

A. Government Must Establish That Reasonable and Workable Race-Neutral Measures Failed to Eradicate the Effects of Discrimination 23

B. The District Court Erred By Failing to Apply the Proper Legal Standard With Respect to Government's Use of Reasonable and Workable Race-Neutral Measures 25

CONCLUSION 29

CERTIFICATE OF COMPLIANCE WITH RULE 32(a) 30

CERTIFICATE OF SERVICE 31

TABLE OF AUTHORITIES

Page

Cases

Adarand Constructors, Inc. v. Pena,
515 U.S. 200 (1995) 1, 6, 14, 22, 26, 28

Associated Gen. Contractors of Ohio, Inc. v. Drabik,
214 F.3d 730 (6th. Cir. 2000) 7

Builders Ass'n of Greater Chicago v. Cnty. of Cook,
123 F. Supp. 2d 1087 (N.D. Ill. 2000) 21

Bush v. Vera, 517 U.S. 952 (1996) 5

**City of Richmond v. J.A. Croson Co.*,
488 U.S. 469 (1989) 2-7, 14-16, 21, 23-24

Contractors Ass'n of E. Pa., Inc. v. City of Philadelphia,
893 F. Supp. 419 (E.D. Pa. 1995), *aff'd*, 91 F.3d 586 (3d Cir. 1996) 6

Coral Constr. Co. v. King Cnty., 941 F.2d 910 (9th Cir. 1991) 22

DynaLantic Corp. v. U.S. Dep't of Def., 885 F. Supp. 2d 237 (2012),
appeal dismissed, Nos. 12-5329 & 12-5330, 2013 WL 4711715
(D.C. Cir. July 16, 2013) 2-4, 8, 10, 12, 15, 19, 21, 26-27

Eng'g Contractors Ass'n of S. Fla. Inc. v. Metro. Dade Cnty.,
122 F.3d 895 (11th Cir. 1997) 8

Eng'g Contractors Ass'n of S. Fla., Inc. v. Metro. Dade Cnty.,
943 F. Supp. 1546 (S.D. Fla. 1996) 7

**Fisher v. Univ. of Tex. at Austin*,
133 S. Ct. 2411 (2013) 1, 3-4, 21-23, 25-28

*Authorities upon which we chiefly rely are marked with asterisks.

Page

Gratz v. Bollinger, 539 U.S. 244 (2003) 28

Grutter v. Bollinger, 539 U.S. 306 (2003) 1, 4, 23-28

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963 F.2d 420 (D.C. Cir. 1992) 7, 9

Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1,
551 U.S. 701 (2007) 28

Peightal v. Metro. Dade Cnty., 26 F.3d 1545 (11th Cir. 1994) 6, 24

**Rothe Dev. Corp. v. Dep't of Def.*, 545 F.3d 1023 (Fed. Cir. 2008) 1, 15-18

Rothe Dev., Inc. v. Dep't of Def., No. 12-cv-0744,
2015 WL 3536271 (D.D.C. June 5, 2015) 2, 4, 26-27

Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equality by Any Means Necessary (BAMN),
134 S. Ct. 1623 (2014) 24

Shaw v. Hunt, 517 U.S. 899 (1996) 5

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407 F.3d 983 (9th Cir. 2005) 7, 9

Miscellaneous

Clegg, Roger, *Unfinished Business: The Bush Administration and Racial Preferences*, 32 Harv. J.L. & Pub. Pol'y 971 (2009) 27

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Page

La Noue, George R., *Setting Goals in the Federal Disadvantaged Business Enterprise Programs*, 17 Geo. Mason U. Civ. Rts. L.J. 423 (2007) 6

La Noue, George R., *Who Counts?: Determining the Availability of Minority Businesses for Public Contracting After Croson*, 21 Harv. J.L. & Pub. Pol'y 793 (1998) 5

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MGT of America, Inc., *A Second-Generation Disparity Study for the City of Dayton, Ohio* (Aug. 8, 2008), http://www.cityofdayton.org/departments/hrc/Documents/disparitystudyreport.pdf 10-12, 14

Nevada Dep't of Transp., *Availability and Disparity Study* (June 15, 2007), https://zdi1.zd-cms.com/cms/res/files/313/NDOT_2007DisparityStudyReport.pdf 19-22

Park, William R., *Construction Bidding for Profit* (1979) 7

Pub. L. No. 95-507, 92 Stat. 1760 (1978) 3, 26

San Antonio Reg'l Consortium, *San Antonio Reg'l Bus. Disparity Causation Analysis Study* (Aug. 14, 2009), http://www.saws.org/business_center/SMWB/study/docs/SAWS_Disparity_Study_2009.pdf 12-14

IDENTITY AND INTEREST OF AMICI CURIAE

Pacific Legal Foundation (PLF) and Center for Equal Opportunity (CEO) respectfully submit this brief amicus curiae in support of Appellant Rothe Development, Inc. (Rothe).

PLF was founded in 1973 and is widely recognized as the most experienced nonprofit legal foundation of its kind. PLF litigates cases involving public contracting, public education, and public employment, arguing in favor of equal treatment of all individuals, regardless of race, ethnicity, or gender, and against programs that grant special preferences to a select few on the basis of race and sex.

Center for Equal Opportunity is a nonprofit research and educational organization devoted to issues of race and ethnicity, such as civil rights, bilingual education, immigration, and assimilation. CEO supports color-blind public policies and seeks to block the expansion of racial preferences, and to prevent their use in, for instance, employment, education, and public contracting.

PLF and CEO have extensive experience briefing legal issues raised when the government classifies individuals on the basis of race. Of particular relevance to this case, PLF and CEO participated as amici curiae in *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); and *Rothe Dev. Corp. v. Dep't of Def.*, 545 F.3d 1023, 1026 (Fed. Cir. 2008).

Amici believe that America's fundamental constitutional principles regarding race are based on individual rights, not group rights. Therefore, to the extent that any benefits or burdens created by the government are based on group identity, those benefits and burdens must be subject to the strictest possible scrutiny, whether the government actor is at the federal, state, or local level. For the reasons stated below, Amici urge this Court to reverse the decision of the district court and hold that the government's use of race in Section 8(a) of the Small Business Act is facially unconstitutional.

INTRODUCTION AND SUMMARY OF ARGUMENT

The court below erred by relying on the district court's analysis from *DynaLantic Corp. v. U.S. Dep't of Def.*, 885 F. Supp. 2d 237, 293 (2012), *appeal dismissed*, Nos. 12-5329 & 12-5330, 2013 WL 4711715 (D.C. Cir. July 16, 2013), to hold that Section 8(a) of the Small Business Act satisfies strict scrutiny and is facially constitutional under the Due Process Clause of the Fifth Amendment to the Constitution. *See Rothe Dev., Inc. v. Dep't of Def.*, No. 12-cv-0744, 2015 WL 3536271, at *18 (D.D.C. June 5, 2015) (court incorporating by reference *DynaLantic*'s strict scrutiny analysis of Section 8(a)), and "adopt[ing] it as its own"). The court in *DynaLantic* relied in part on several statistical disparity studies that fail to imply discriminatory exclusion under *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), and cannot support the government defendants' claims that

Section 8(a)'s racial preferences are constitutional. Even if the disparity studies do establish a strong basis in evidence of discrimination, neither the court below, nor the court in *DynaLantic*, applied the correct legal standard to determine whether Section 8(a) is narrowly tailored pursuant to the Supreme Court's holding in *Fisher*.

Croson held that statistics do not raise even an inference of discriminatory exclusion unless they show a significant disparity between the "number of qualified minority contractors willing and able to perform a particular service" and the number of such contractors actually hired. *Croson*, 488 U.S. at 509. The district court in *DynaLantic* relied on statistical studies from Alaska, Dayton, San Antonio, New Jersey, and Nevada to justify Section 8(a)'s racial preferences. 885 F. Supp. 2d at 268-70. These studies are flawed, because they did not analyze bids submitted by qualified firms that were "available," "willing," and "able" to perform the work. Thus, they fail to satisfy the rigid standards for statistical proof set by the Court and do not justify the government's use of race in Section 8(a).

The court below further erred by failing to conduct a proper narrow tailoring analysis. The federal government has enforced the racial preferences in Section 8(a) continuously since 1978. *See* Pub. L. No. 95-507, 92 Stat. 1760 (1978). The Supreme Court held in *Fisher* that government has the "the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice." 133 S. Ct. at 2419-20. The government's burden to

search for race-neutral alternatives is ongoing, and requires the government to conduct "periodic reviews to determine whether racial preferences are still necessary." *Grutter*, 539 U.S. at 342. But the court below failed to apply—or even mention—the government's narrow tailoring burden under *Fisher*, or inquire into the government's use of race-neutral alternatives since 1978. The court therefore erred by holding that Section 8(a) is narrowly tailored to achieve a legitimate government interest.

The decision below should be reversed.

ARGUMENT

I

STATISTICAL DISPARITY STUDIES CITED BY THE *DYNALANTIC* COURT DO NOT SATISFY *CROSON*'S STANDARDS

The court below erred by relying on *DynaLantic*'s analysis of government disparity studies to reject Rothe's facial challenge to Section 8(a). *Rothe II*, 2015 WL 3536271, at *15.

The government in this case relies on the same statistical disparity studies cited by the *DynaLantic* court to argue that racial preferences provided in Section 8(a) satisfy strict scrutiny. *Id.* at *17. The *DynaLantic* court relied on disparity studies from Alaska, Dayton, San Antonio, New Jersey, and Nevada to justify Section 8(a)'s nationwide racial preferences. *DynaLantic*, 885 F. Supp. 2d at 268-70. Even if these

studies were relevant,[2] they provide no justification for the racial classifications in Section 8(a), because the studies do not comply with the constitutional requirements for analyzing statistical data delineated in *Croson*, 488 U.S. at 493.

A. Government Cannot Infer Discrimination from Disparity Studies That Fail to Satisfy the Supreme Court's "Qualified," "Willing," and "Able" Standards for Statistical Proof

Statistical disparities in contracting are not sufficient by themselves to prove that the government discriminated against minority firms. *See* George R. La Noue, *Who Counts?: Determining the Availability of Minority Businesses for Public Contracting After Croson*, 21 Harv. J.L. & Pub. Pol'y 793, 832 (1998) ("Claims of statistical underutilization abound, but examples of discrimination regarding particular contracts are virtually non-existent."). In *Croson*, the Supreme Court acknowledged the difference between insidious, discriminatory acts that result in statistical disparities, and disparities that exist for more innocuous reasons. *See* 488 U.S. at 503 (setting forth numerous nondiscriminatory reasons for statistical disparities). Government can only determine that *discriminatory* exclusion arises where "there is

[2] For the reasons discussed in Appellant Rothe's Opening Brief, Amici contend the court below erred in relying on post-enactment evidence to determine the constitutionality of Section 8(a). *See*, *e.g.*, *Shaw v. Hunt*, 517 U.S. 899, 908 (1996) (the government unit making the racial classification must have had a strong basis in evidence to conclude that remedial action was necessary *before* it embarks on an affirmative-action program); *Bush v. Vera*, 517 U.S. 952, 982 (1996) (legislature must have had a strong basis in evidence to conclude that remedial action was necessary *before* it embarks on an affirmative action program).

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." *Id.* at 509. The federal government must satisfy this test, a specific application of constitutional strict scrutiny, to justify the racial preferences authorized by Section 8(a). *Adarand*, 515 U.S. at 227; *see Contractors Ass'n of E. Pa., Inc. v. City of Philadelphia*, 893 F. Supp. 419, 432 (E.D. Pa. 1995), *aff'd*, 91 F.3d 586 (3d Cir. 1996) (studies satisfy strict scrutiny only when they are based on available minority-owned firms that are qualified, willing, and able to engage in public contracting).

A disparity study of "qualified" firms must establish "evidence identifying the basic qualifications" a firm must have to accomplish contract work, so that the court can "determin[e], based upon these qualifications, . . . the relevant statistical pool with which to make the appropriate [statistical] comparisons." *Peightal v. Metro. Dade Cnty.*, 26 F.3d 1545, 1553-54 (11th Cir. 1994) (citations omitted). "Qualified" construction firms have appropriate licenses, bonding, credit, work experience, and statutorily required prequalification. George R. La Noue, *Setting Goals in the Federal Disadvantaged Business Enterprise Programs*, 17 Geo. Mason U. Civ. Rts. L.J. 423, 434-35 (2007).

Next, a firm may be "qualified," but not "available" if it is unwilling to submit a bid. A reliable measure of a firm's "willingness" is whether it makes the effort to

bid for a public contract. *See* William R. Park, *Construction Bidding for Profit* 49 (1979) (explaining that firms lack the time and money to submit bids on every contract opportunity); *see also Eng'g Contractors Ass'n of S. Fla., Inc. v. Metro. Dade Cnty.*, 943 F. Supp. 1546, 1583 (S.D. Fla. 1996) (explaining the time and expense involved in submitting a bid). In other words, firms are unwilling to expend the time, money, and effort to bid on projects they are unwilling or unable to complete if selected. Robert W. Dorsey, *Project Delivery Systems for Building Construction* 64-65 (1997) (identifying at least eleven variables firms consider before submitting a bid).

Of the three *Croson* factors, courts have been most concerned about "ability," which describes a firm's capacity to perform work. *See O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d 420, 426 (D.C. Cir. 1992) (statistical disparity did not account for the size and ability of minority firms to take on large projects). In *Western States Paving Co., Inc. v. Wash. State Dep't of Transp.*, the Ninth Circuit rejected a statistical disparity offered by the government as proof of discrimination because it did not account for factors that may affect the relative capacity of minority firms to undertake contracting work, such as their smaller size and relative lack of experience. 407 F.3d 983, 1000-01 (9th Cir. 2005); *see also Associated Gen. Contractors of Ohio, Inc. v. Drabik*, 214 F.3d 730, 736 (6th. Cir. 2000). Studies that do not take into account the relative size or ability of firms to perform the work reflect only the

unsurprising fact that larger firms are awarded more dollars than smaller firms. *See Eng'g Contractors Ass'n of S. Fla. Inc. v. Metro. Dade Cnty.*, 122 F.3d 895, 917 (11th Cir. 1997) (even after regression analysis, racial disparities were better explained by firm size than by discrimination). The studies cannot justify an inference that government discriminated against smaller firms because they were minority-owned, as opposed to the fact that they were smaller.

B. The Alaska Disparity Study Fails to Consider Firm Capacity or Bidding Practices

The *DynaLantic* court relied on a 2008 Alaska state-wide disparity study that was conducted to examine the hiring of minority firms by the Alaska Department of Transportation & Public Facilities, the Alaska Railroad Corporation, and the Municipality of Anchorage. D. Wilson Consulting Group, LLC, *Alaska Disadvantaged Business Enterprise Study* (June 6, 2008) (*Alaska Study*);[3] *DynaLantic*, 885 F. Supp. 2d at 268. The Alaska Study purported to present evidence that the Alaskan government discriminated against minority firms, such as firms owned by African Americans, in the transportation construction industry. *Alaska Study*, at 5-72. But the court failed to note that there are too few minority firms available to perform government contracts in Alaska to draw meaningful conclusions concerning industry-wide patterns of discrimination: only six African American-owned firms

[3] Http://www.dot.alaska.gov/cvlrts/forms/Ak-Disparity-Study-Final-pt1.pdf.

exist in the whole state! Meanwhile, there are 483 nonminority-owned firms available to perform transportation construction contracts. *Id.* at 4-9. Investigating the six African American-owned firms, the study ultimately concluded only four could perform subcontracting work, and none could serve as prime contractors on transportation construction contracts. *Id.* at 4-9 - 4-11.

The Alaska Study did not analyze firm bidding practices, and simply assumed that "able" firms were "willing." *Alaska Study*, at 2-12 ("[O]ne can *assume* that participants in a market with the ability to undertake specific work are "willing" to undertake such work.") (emphasis added); *id.* at 4-5 (willingness based on telephone survey asking a firm's line of business, revenue, and completeness of contact information). Using this false premise, the *Alaska Study* concluded that African American firms were underutilized on construction projects because from 2002-2006 those four African American firms received only 0.07% of contract dollars. *Alaska Study*, at 5-74, 5-75. Even if those four firms were qualified to perform the contracting work, constitutional strict scrutiny does not allow a court to assume that: (1) they were willing and able to bid on each and every contract across the state; (2) they did in fact submit bids on each contract; and (3) every bid they submitted was as competitive as each winning bid. *See O'Donnell Constr.*, 963 F.2d at 426 (rejecting disparities because minority firms may not have bid for numerous reasons); *Western States Paving*, 407 F.3d at 1000 ("[T]he fact that [minority-owned firms]

constitute 11.17% of the Washington market does not establish that they are able to perform 11.17% of the work.").

The *Alaska Study* does not provide information from which a court can infer discrimination, because it fails to show how many times the few available minority firms submitted bids, whether they had the capacity to perform work on every contract, whether their specialties were needed on every contract, and whether their bids were competitive if they did submit a bid.

C. The Dayton Study Does Not Provide an Inference of Discriminatory Exclusion

The Dayton study sought to determine whether the City of Dayton, Ohio, discriminated against minority-owned firms so as to justify racial preferences on city contracts. MGT of America, Inc., *A Second-Generation Disparity Study for the City of Dayton, Ohio* i (Aug. 8, 2008) (*Dayton Study*).[4] The *DynaLantic* court relied on the *Dayton Study* claiming it reported "significant disparities between availability and utilization of all minority contractors among all industries." *DynaLantic*, 885 F. Supp. 2d at 269. But like the *Alaska Study*, the *Dayton Study* found far fewer minority-owned firms that were available for contracts, as is shown below.

[4] Http://www.cityofdayton.org/departments/hrc/Documents/disparitystudyreport.pdf.

Dayton Available Construction Contractors by Race

Race	Available for Prime Contracts	Available for Subcontracts
African American	183	191
Hispanic	2	2
Asian	5	7
Native American	4	6
Nonminority	659	700

Source: *Dayton Study*, at 4-19, 4-20.

The *Dayton Study* counted firms as "available" prime contractors even if they never submitted a bid on a prime contract. *See Dayton Study* at 4-6 (describing criteria for determining availability). The study does not analyze firm qualifications, bid histories, or capabilities, and offers only a partial picture of actual bid practices. The study reports that in the five-year period from January, 2001, to December, 2006, the city put 925 construction contracts out to bid and African American prime contractors submitted 86 bids. *Dayton Study*, at 4-20, Exhibit 4-15(a). This means that only 86 of the 183 African American-owned firms the study deemed "available" were actually "qualified," "willing," and "able" to perform on all contracts. These 86 firms succeeded in receiving 36 contracts out of 86 bids, a success rate of 42%! *Id.* at 4-14. This is hardly evidence of deliberate exclusion.

There is another reason the *Dayton Study*'s disparities cannot infer discrimination against minority prime contractors. The Dayton City Code of Ordinances requires every public works contract in excess of $2,500 to be awarded to "the lowest and best bid." *Id.* at 3-3. City purchases over $50,000 are completed through a race-neutral sealed bid process. *Id.* As long as the city adheres to its own law—and the study provides no evidence that it does not—discrimination against prime contractors on the basis of race is impossible. Thus, any disparity resulting from the race-neutral low bid process is not due to discrimination. The findings of the *Dayton Study* do not stand up to strict scrutiny.

D. The San Antonio Study Offers No Bid Analysis, and Most Minority Firms Denied Experiencing Discrimination

The *Dynalantic* court concluded that a disparity study for the San Antonio area provides evidence of discrimination. *DynaLantic*, 885 F. Supp. 2d at 269-70. The study reported disparities for some racial groups in local government construction, architecture and engineering, professional services, and general services contracts. *See* San Antonio Reg'l Consortium, *San Antonio Reg'l Bus. Disparity Causation Analysis Study*, Chapter 4 (Aug. 14, 2009) (*San Antonio Study*).[5] But only a handful of available minority-owned firms even exist, as shown in the table below.

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[5] Http://www.saws.org/business_center/SMWB/study/docs/SAWS_Disparity_Study_2009.pdf.

San Antonio Available Firms by Race and Type of Prime Contract

Race	Construction	General Services Contracts	Professional Services	Architecture/ Engineering
African American	0	6	2	0
Hispanic	26	30	21	10
Asian	1	4	0	3
Native American	0	0	0	0
Nonminority	208	207	48	29

Source: *San Antonio Study*, at 3-12, 3-18, 3-24, 3-30.

Given the few minority firms reported to be available, it would be essential to know the number of times each firm actually bid for a public contract as a prime contractor, or subcontractor, and whether its bids were competitive. Only if the competitive bids of minority firms were rejected at a higher rate than bids submitted by nonminority-owned firms could an inference of discrimination arise. But the only analysis relating to bid history in the *San Antonio Study* is found in the study's anecdotal section. Out of 348 minority subcontractors who responded to a telephone survey question about bid submissions, 201 reported that they never submitted a bid during the study period. *Id.* at 5-22 - 5-23, Exhibit 5-16. Moreover, only eight out of 290 minority firms who responded to a survey question on discrimination claimed that they had experienced discriminatory behavior by local area governments against their company in the last five years, and only four of those claims related to race. *Id.*

at 5-57 - 5-58, Exhibit 5-28. In contrast, 206 minority firms reported that they had experienced no discriminatory behavior within the last five years. *Id.* The remaining firms reported either that they did not know if they had experienced discrimination, or had no experience with local government contracting. *Id.* These responses indicate that any disparities reported by the *San Antonio Study* are not the result of "extreme" instances of "discriminatory exclusion." *Croson*, 488 U.S. at 509. Where there is no discrimination, there is no need for a remedy and the Constitution flatly prohibits nonremedial discriminatory preferences. *See Adarand*, 515 U.S. at 227 (racial classifications "are constitutional only if they are narrowly tailored measures that further compelling governmental interests").

Like the *Dayton Study*, the *San Antonio Study* combined contracting data from firms that provide completely different services. *See San Antonio Study*, at 3-2 (combining heavy commercial building and transportation firms with light maintenance firms, plumbers, air-conditioning repair workers, roofers, and other related services firms). It is illogical to assume that a carpet installer will submit a bid for a bridge construction contract, or that a dry wall installer will bid on a dredging project. The *San Antonio Study* is based upon such flawed assumptions and this Court should therefore disregard it.

E. The New Jersey Disparity Study Fails to Account for Firm Qualifications and *Rothe* Disapproved Its Method of Measuring Firm Capacity

The *DynaLantic* court claims a 2006 study for New Jersey found "significant disparities in all forms of contracting." *DynaLantic*, 885 F. Supp. 2d at 268. Like the other studies discussed in this brief, the New Jersey Study fails to meet the standards set out in *Croson*. The New Jersey Study claims as follows: "According to *Croson*, availability is defined as firms in the jurisdiction's market area that are willing and able to provide goods or services the jurisdiction procures." Mason Tillman Associates, Ltd., *State of New Jersey Construction Services Disparity Study 2003-2004*, at 5-1 (June 2006) (*New Jersey Study*).[6] That statement is blatantly false, because it omits the key requirement that available firms must be "qualified." *Croson*, 488 U.S. at 509.

The *New Jersey Study*'s chapter on availability provides no clues as to how the authors determined which firms were qualified and which firms were not. *See New Jersey Study*, at 5-1 - 5-25 (no mention of firms' qualifications). Firms that merely "indicated a willingness" to bid on state contracts were considered available, without any analysis of their qualifications. *Id.* at 5-5. The *New Jersey Study*, like any other disparity study where conclusions are based on unqualified firms, provides

[6] Http://www.njleg.state.nj.us/OPI/Reports_to_the_Legislature/disparity_study_2003-2004.pdf.

no basis in evidence for this Court to imply discrimination. *See Rothe*, 545 F.3d at 1042 (criticizing disparity studies that did not "weed[]out unqualified businesses").

Not only does the *New Jersey Study* inflate the number of available firms by including unqualified businesses, it fails to isolate its disparity analysis to specific industries. The government must identify discrimination within "a particular service"—or industry—before it may provide race-conscious relief. *Croson*, 488 U.S. at 509 (availability defined as the number of qualified minority firms willing and able to perform "a particular service").

The *New Jersey Study* provides no list of industries by Standard Industrial Classification. Rather, it mixes all industries together under two broad categories labeled "construction services" and "construction related services." *New Jersey Study*, at 1-1. By combining the data from several industries, the *New Jersey Study* cannot identify discrimination "with [] specificity." *Croson*, 488 U.S. at 504. Under "Construction Services," the *New Jersey Study* includes firms who work in "[a]ll residential and non-residential building construction; heavy construction, such as streets, roads, and bridges; and special trade construction, such as fencing [heating, ventilation, and air conditioning (HVAC)], paving, and electrical." *Id.* In so doing, the study merges contracting data of firms specializing in home dry wall installation, firms that install industrial HVAC systems, and those that construct bridges. Because a firm would not bid on a job for which it is unqualified (*e.g.*, a highway guard rail

firm will not bid on a roof installation contract), the results of the *New Jersey Study* are constitutionally meaningless.

The *New Jersey Study* also relies on a particular methodology to measure firm capacity that was held to be fatally flawed by the Federal Circuit in *Rothe*, 545 F.3d 1023. In *Rothe*, the court rejected six disparity studies—including four by Mason Tillman Associates (MTA), 545 F.3d at 1041, the same firm that conducted the *New Jersey Study*. Among the studies' fatal defects were their failure "to account sufficiently for potential differences in size, or relative capacity, of the businesses included in those studies." *Id.* at 1042-43. The court explained that qualified firms may have substantially different capacities, and thus would conduct substantially different amounts of business even in the absence of discrimination. *Id.* at 1043.

In *Rothe*, the four defective MTA disparity studies tried to account for the relative sizes of contracts awarded to minority-owned firms by measuring the contract dollars directed to them. *Rothe*, 545 F.3d at 1043. But none of the studies took into account the relative sizes of the firms themselves. *Id.* Rather, the studies measured the availability of minority-owned firms by the percentage of firms in the market owned by minorities, instead of by the percentage of total marketplace capacity those firms could provide. *Id.* In other words, there was no way to know whether a disparity measured in dollars was due to discrimination, or because a small firm was

compared to a large one. The *New Jersey Study* is flawed because it measures availability the same way.

The *New Jersey Study* is based on the same assumption rejected in *Rothe*. The *New Jersey Study* asserts that "[u]nder a fair and equitable system of awarding contracts, the proportion of contract dollars awarded to Minority Business Enterprises . . . would be approximate to the proportion of available MBEs . . . in the relevant market area." *New Jersey Study*, at 6-1. *Rothe* rejected a New York City MTA study for failing to account for the relative sizes of businesses, as evidenced by the same quoted language. 545 F.3d at 1044.

Rothe rejected the *New Jersey Study*'s methodology of limiting its examination to smaller contracts. *New Jersey Study*, at 6-10; 545 F.3d at 1044 (rejecting as incomplete study's refusal to analyze contracts greater than $500,000). The court explained that the study's analysis failed to "account for the relative capacities of businesses to bid for *more than one contract at a time*." *Id.* *Rothe* noted that this defect might be corrected through a regression analysis, but the *New Jersey Study* does not contain *any* regression analysis, and therefore fails to account for the relative capacities of businesses to bid for more than one contract at a time.

F. The Nevada Disparity Study Shows That Minority Firms Are Likely to Win Contracts When They Submit Bids

Finally, the *DynaLantic* court relied on a disparity study performed for the Nevada Department of Transportation, because it found evidence of "significant disparities" for each racial/ethnic group in state and federally funded construction and engineering contract awards. *DynaLantic*, 885 F. Supp. 2d at 269. The Nevada Study does not justify race-conscious remedial action, because the study (1) shows that minority firms enjoy considerable success when they do bid on contracts, and (2) is based on inflated available figures. Thus, it fails strict scrutiny.

The Nevada Study's most revealing statistics are those showing the percentage rate of success or failure experienced by firms that actually submitted bids on Nevada state or local transportation projects. If the competitive bids of minority firms were rejected at a higher rate than bids submitted by nonminority-owned firms, one might infer that the state was engaging in discriminatory conduct. But the Nevada Study failed to include a bid analysis of each contract, so it is impossible to know whether all of the bids submitted by minority-owned firms were even competitive.

The study did report the success rates of those firms who submitted bids. Rather than finding discrimination, the Nevada Study reported that minority firms bidding on state engineering jobs enjoyed "a substantially higher rate of success" than those of nonminority-owned firms. Nevada Dep't of Transp., *Availability and*

Disparity Study F-57 (June 15, 2007) (*Nevada Study*).[7] The same was true when minority firms bid on local transportation engineering contracts. *Id.* For construction contracts, the study reported that minority firms had a 65.5% success rate when bidding on state construction projects, and a 63.3% success rate when bidding on local government construction work. *Nevada Study*, at F-55, 56.

Personal interviews of Nevada contractors confirm this favorable statistical data. The *Nevada Study* includes a summary of 38 personal interviews with contractors of all races. *Nevada Study*, Appendix I. The study reports that "[m]ost minority or female-owned business[es] do not feel that race, ethnicity, and/or gender negatively affected their ability to obtain or engage in business." *Id.* at I-69. Only four of the contractors interviewed said that race or gender may affect a business, but two of those were white males complaining of preferential treatment for minority contractors. *Id.* at I-69 - I-71. The study adds that "[m]ost interviewees stated that the work environment is good, fair and open for minorities and females in the Nevada transportation industry." *Id.* at I-71. In this one study, the data is actually clear: no discrimination![8]

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[7] Https://zdi1.zd-cms.com/cms/res/files/313/NDOT_2007DisparityStudyReport.pdf.

[8] One troubling trend is the finding that "[m]any interviewees stated they were not aware of or did not participate in race, ethnic, and gender neutral programs or measures." *Id.* at I-74 (emphasis added). That suggests that the state and local governments in Nevada should be doing more to promote race-neutral measures, not (continued...)

The district court in *DynaLantic* noted that the *Nevada Study* looked only at firms with a past history of performing the relevant work in the public sector, or firms that had bid on such work, were qualified to perform the tasks, and had the capacity to perform prime contracts (or, alternatively, subcontracts). 885 F. Supp. 2d at 269. If this were true, it would satisfy the standards articulated in *Croson*. But the Nevada Study's availability figures were based on firms that rarely bid on transportation projects. The study identified 73 minority firms "available" for state transportation projects. However, in the 5 years studied, only 5 of those firms bid for prime contractor jobs, while 20 firms bid solely for subcontracting jobs. An additional 6 firms reported the capacity to work either as a prime contractor or a subcontractor. *Nevada Study*, at F-49. For smaller contracts at the local government level, 5 minority firms bid as prime contractors, 21 bid as subcontractors, and 4 firms bid to work in either capacity. *Id.* A firm that does not submit a bid cannot reasonably be regarded as "willing." *Builders Ass'n of Greater Chicago v. Cnty. of Cook*, 123 F. Supp. 2d 1087, 1102 (N.D. Ill. 2000). The *Nevada Study*'s availability figures are therefore flawed, as well as the study's disparity figures relied on by the *DynaLantic* court, and

[8] (...continued)
race-conscious ones. *See Fisher*, 133 S. Ct. at 2420 (the government has the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice).

the Court below. *See Nevada Study*, at A-2 (indicating the study's disparity analysis depends on its availability figures).

A state has successfully eradicated discrimination when it is more likely to award a contract to a minority firm than to a white male-owned firm. No remedial measures are necessary when the government achieves equal treatment of all contractors.

II

SECTION 8(A) FAILS THE NARROW TAILORING PRONG OF STRICT SCRUTINY

In *Fisher*, the Court reiterated that, even if the government can establish that its implementation of racial preferences is justified by a compelling interest, there must still be a judicial determination that the race-conscious measures "meet[] strict scrutiny in [their] implementation." 133 S. Ct. at 2419-20. The most fundamental element of narrow tailoring is the consideration of race-neutral means to prevent or remedy any remaining discrimination. *See Coral Constr. Co. v. King Cnty.*, 941 F.2d 910, 922 (9th Cir. 1991) ("Among the various narrow tailoring requirements, there is no doubt that consideration of race-neutral alternatives is among the most important."); *Adarand*, 515 U.S. at 237-38 (remanding because lower court failed to determine whether there was "any consideration of the use of race-neutral means to increase minority business participation" in government contracting). Race-neutral

alternatives are policies which can benefit all small businesses, regardless of race, ethnicity, or gender. The court below failed to analyze the government's consideration of race-neutral alternatives under the proper legal standard, therefore it erred by holding that Section 8(a) is narrowly tailored to achieve a legitimate government interest.

A. Government Must Establish That Reasonable and Workable Race-Neutral Measures Failed to Eradicate the Effects of Discrimination

The importance of race-neutral alternatives to race-based public contracting programs such as Section 8(a) have been largely established by three cases: *City of Richmond v. Croson*, *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Fisher v. Univ. of Tex. at Austin*. These cases illustrate the Supreme Court's requirement that, before turning to racial preferences, government must prove that the effects of discrimination cannot be eradicated by race-neutral measures.

In *Croson*, the City of Richmond's minority business enterprise program was not narrowly tailored, in part, because the city failed to consider any race-neutral alternatives before imposing race-conscious goals on Richmond's public construction contracts. *See* 488 U.S. at 507. For this reason, the Court did not discuss in detail the kind of consideration that government must give to race-neutral measures before turning to race-conscious ones. George R. La Noue & Kenneth L. Marcus, *"Serious Consideration" of Race-Neutral Alternatives in Higher Education*, 57 Cath. U. L.

Rev. 991, 999 (2008). Some courts interpreted *Croson* to require that local governments merely "consider" race-neutral alternatives—but not exhaust them—before implementing race-conscious remedies. *See Peightal*, 26 F.3d at 1557 (An initial narrow tailoring inquiry is whether the government "considered the use of race-neutral means.").

In *Grutter v. Bollinger*, the Court signaled its increasing disapproval of racial preferences and provided clearer guidance to both courts and the government. First, the Court held that narrow tailoring requires "serious, good faith consideration of workable race-neutral alternatives." 539 U.S. at 339. In other words, the government must rigorously evaluate appropriate race-neutral policies to determine the extent to which they would remedy the effects of past discrimination. Second, the Court announced its expectation that racial classifications will not be necessary in the near future. *See id.* at 343 ("We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."); *see also Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equality by Any Means Necessary (BAMN)*, 134 S. Ct. 1623, 1639 (2014) (Scalia, J., concurring) (warning that "*Grutter*'s bell may soon toll"). Although *Grutter* mapped out a transition from race-conscious to race-neutral policies holding that public universities "can and should draw on the most promising aspects of . . . race-neutral alternatives" 539 U.S. at 342, its formulation still gave latitude to the

government to explain why particular race-neutral alternatives were rejected. *See id.* at 343 (taking the law school "at its word that it would 'like nothing better'" than to switch to a race-neutral plan).

Fisher continued the trajectory away from race-based governmental decisionmaking, by emphasizing that the government's "consideration" of race-neutral alternatives "is of course necessary, but it is *not sufficient* to satisfy strict scrutiny." *Fisher*, 133 S. Ct. at 2420 (emphasis added). *Fisher* held that strict scrutiny now imposes on government "the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice." *Id.* Here, government must prove that its prolonged use of racial preferences in Section 8(a) is necessary to remedy discrimination in public contracting, and this Court owes it no deference on this matter. *See id.* (government may not consider race if a nonracial approach could promote the substantial interest about as well and at tolerable administrative expense as racial preferences).

B. The District Court Erred By Failing to Apply the Proper Legal Standard With Respect to Government's Use of Reasonable and Workable Race-Neutral Measures

Under *Fisher*, courts must conduct "a careful judicial inquiry" into whether government can further its compelling interest "without using racial classifications." *Id.* The court below did not undertake this analysis. In fact, it omitted any mention of *Fisher*. The court's analysis of race-neutral alternatives is a mere citation to

DynaLantic. *Rothe II*, 2015 WL 3536271, at *18. But *DynaLantic* was decided in 2012, one year before *Fisher*, and *DynaLantic*'s analysis of race-neutral alternatives does not satisfy *Fisher*.

DynaLantic relied on the Court's pre-*Fisher* interpretation of narrow tailoring, allowing the government to satisfy its burden by showing that it merely "considered" race-neutral alternatives. *See DynaLantic*, 885 F. Supp. 2d at 283 (quoting the narrow tailoring standard from *Adarand*). *DynaLantic* held that Section 8(a) was narrowly tailored based on the government's argument that Congress attempted race-neutral measures for twenty-five years prior to incorporating a race-conscious element into Section 8(a). *Id.* at 283-84. While this argument may sound impressive, further examination reveals it is woefully inadequate under *Grutter* and *Fisher*.

Congress codified the Section 8(a) program in 1978. *See* Pub. L. No. 95-507, 92 Stat. 1760 (1978); *DynaLantic*, 885 F. Supp. 2d at 255. Even if Congress implemented race-neutral measures from 1953-1978, that does not permit the government to abandon race-neutral alternatives and subsequently grant racial preferences in perpetuity. Narrow tailoring imposes a continuous duty on government to attempt and evaluate race-neutral measures. *See Grutter*, 539 U.S. at 342 (explaining a "durational requirement" can be met by sunset provisions and "periodic reviews to determine whether racial preferences are still necessary"). If this were not the case, then government would be free to impose racial preferences indefinitely. But

that is plainly untrue. In *Grutter*, the Court made clear that *all* race-conscious programs must be limited in time, and have "a logical end point." 539 U.S. at 342.

Thus, Section 8(a)'s use of race must be limited in time. Government may review its need for race-conscious relief and, if it still identifies discrimination, it must prove that racial preferences are a "necessary" remedy. *Fisher*, 133 S. Ct. at 2420. This requires the government to determine if a nonracial approach could remedy identified discrimination as well and at tolerable administrative expense as racial preferences. *Id.* This requirement is ongoing, and did not end upon Section 8(a)'s enactment in 1978 as the district court in *DynaLantic* concluded. Thus, the lower court should have examined the government's use of race-neutral measures *since* 1978. But it did not.[9]

Judicial inquiry into the government's continuing duty to find, implement, and evaluate race-neutral alternatives is particularly critical here, because the court below allowed government to rely upon post-enactment evidence to demonstrate a strong basis in evidence of discrimination. *Rothe II*, 2015 WL 3536271, at *10. If Section 8(a) is justified based on evidence from, say 2006, because there was a lack

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[9] In public contracting, race-neutral measures should always be sufficient to remedy discrimination. For instance, nondiscrimination can be assured through greater transparency—that is, by widely publicizing bidding opportunities and the terms of awarded contracts. *See* Roger Clegg, *Unfinished Business: The Bush Administration and Racial Preferences*, 32 Harv. J.L. & Pub. Pol'y 971, 975-77 (2009) (discussing how transparency in contracting would allow for the detection and elimination of discrimination).

of such evidence in 1978, then Section 8(a) satisfies strict scrutiny only if it is narrowly tailored to the 2006 evidence of discrimination. *See Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720 (2007) ("'[R]acial classifications are simply too pernicious to permit any but the most *exact* connection between justification and classification.'" (quoting *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (emphasis added)); *Adarand*, 515 U.S. at 236 (only the most *exact* connection between justification and classification will suffice). It follows, then, that race-neutral measures are not "available, workable race-neutral alternatives" unless they have been implemented to address discrimination that is the factual predicate for race-conscious relief. *Fisher*, 133 S. Ct. at 2420.

Justice Kennedy, who wrote the majority decision in *Fisher*, previously warned that the Court's "abdicat[ion of its] constitutional duty" to apply "meaningful strict scrutiny" to racial preferences provides a perverse incentive to public institutions to abandon the search for race-neutral programs that would be "more effective in bringing about the harmony and mutual respect among all citizens that our constitutional tradition has always sought." *Grutter*, 539 U.S. at 393-95 (Kennedy, J., dissenting). The Court's holding in *Fisher* is consistent with these views. The district court's narrow tailoring analysis is not.

CONCLUSION

For these reasons, Amici Curiae respectfully request that this Court reverse the ruling of court below, and hold that the use of race in Section 8(a) of the Small Business Act does not satisfy strict scrutiny, and is therefore facially unconstitutional.

DATED: October 27, 2015.

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