UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

ROTHE DEVELOPMENT, INC.,	)	Case No. 1:12-cv-00744-KBJ
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
DEPARTMENT OF DEFENSE, et al.,	)	
	)	
Defendants.	)	
	)	

MOTION BY PACIFIC LEGAL FOUNDATION FOR LEAVE TO PARTICIPATE AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF ROTHE DEVELOPMENT, INC.

The Pacific Legal Foundation (PLF) respectfully requests leave to file the attached proposed brief as amicus curiae in support of Plaintiff Rothe Development, Inc. The grounds for this motion, set forth more fully below, are that proposed amicus curiae has a perspective on and interest in this case that may be helpful to the Court as it analyzes the many disparity studies the government defendants rely upon to justify the racial preferences at issue.

District courts in this Circuit have held that it is solely within the courts' discretion to determine "the fact, extent, and manner" of participation by an amicus. *Hard Drive Prods., Inc. v. Does 1-1,495*, 892 F. Supp. 2d 334, 337 (D.D.C. 2012) (citing *United States v. Microsoft Corp.*, No. 98–1232, 2002 WL 319366, at *2 (D.D.C. Feb. 28, 2002). Amicus participation is normally appropriate "when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *Jin v. Ministry of State Sec.*, 557 F. Supp. 2d 131, 137 (D.D.C. 2008).

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF is submitting this brief because it believes its public policy perspective and litigation experience in the area of racial preferences in public contracting will provide an additional viewpoint with respect to the issues presented.

This case concerns a matter of national importance, which is the constitutionality of the suspect racial classifications set forth in Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a)(1) (Section 8(a)). PLF has extensive experience briefing legal issues raised when the government classifies individuals on the basis of race. Of particular relevance to this case, PLF participated as amicus curiae in the two seminal United States Supreme Court cases that involved government racial preferences in public contracting: *Adarand Constructors, Inc. v. Pena*, 515 U.S.

200 (1995); and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). PLF also participated as amicus curiae in *Rothe Dev. Corp. v. Dep't of Def.*, 545 F.3d 1023, 1026 (Fed. Cir. 2008), where the court invalidated another federal government race-conscious contracting program. PLF also filed an amicus brief in *DynaLantic Corp. v. U.S. Dep't of Def.*, 885 F. Supp. 2d 237, 243 (D.D.C. 2012), *appeal dismissed*, No. 12-5329, 2013 WL 4711715 (D.C. Cir. July 16, 2013), when that case was on appeal. PLF's *DynaLantic* brief focused on an issue germane to this case: whether certain government disparity studies justify the racial classifications in Section 8(a).

PLF believes 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. PLF's brief will show that certain evidence the government has used to justify the racial preferences provided by Section 8(a) of the Small Business Act fails strict scrutiny.

The district court in *DynaLantic* relied in part on several statistical disparity studies when it upheld the constitutionality of Section 8(a). The court's analysis did not receive appellate review because the parties settled before oral argument was heard. *DynaLantic Corp.*, 2013 WL 4711715. The government in this case relies on the same studies cited in *DynaLantic*. PLF's proposed brief explains that those studies do not imply the existence of discrimination, because they fail to satisfy the rigid standards for statistical proof set by the Supreme Court in *J.A. Croson Co.*, 488 U.S. at 493, or guidelines from the U.S. Commission on Civil Rights. U.S. Commission on Civil Rights, *Disparity Studies as Evidence of Discrimination in Federal Contracting*, 76-82 (May 2006).[1]

[1] *Available at* http://www.usccr.gov/pubs/DisparityStudies5-2006.pdf (last visited May 16, 2014).

Counsel for amicus notified attorneys for Plaintiff and Defendants of PLF's intent to submit an amicus brief on Tuesday, May 6, 2014, indicating that the brief would be filed in support of Plaintiff, setting forth PLF's identity and interest, and requesting counsel's consent to the filing of a brief by PLF. The Plaintiff's attorney provided his consent, but as of the submission of this Motion (and the accompanying Amicus Brief), counsel for Defendants have not responded. *Id.*

For these reasons, PLF respectfully requests leave to participate in this action as amicus curiae and to file the attached brief.

DATED: May 21, 2014.

Respectfully submitted,

/s/ Joshua P. Thompson

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CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2014, I electronically filed the foregoing MOTION BY PACIFIC LEGAL FOUNDATION FOR LEAVE TO PARTICIPATE AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF ROTHE DEVELOPMENT, INC. with the Clerk of the Court for the United States District Court for the District of Columbia by using the CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Joshua P. Thompson
JOSHUA P. THOMPSON

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AMICUS CURIAE BRIEF OF
PACIFIC LEGAL FOUNDATION IN SUPPORT OF
PLAINTIFF ROTHE DEVELOPMENT, INC.

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INTRODUCTION

Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Plaintiff Rothe Development, Inc. Rothe Development facially challenges Section 8(a) of the Small Business Act, 15 U.S.C. § 637(a)(1) (Section 8(a)), which, in practice, requires the federal government to issue certain contracts on the basis of race. *See* 15 U.S.C. § 637(a)(4)(A) (program is reserved for socially and economically disadvantaged individuals classified by race). This Court should reject any claims by the government defendants that statistical disparity studies prove the existence of prior intentional racial discrimination that justify remedial racial preferences. The standard of proof demanded by strict scrutiny renders the cited statistical disparity studies useless to prove (even by inference) that racial discrimination exists. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). For the reasons stated below, Amicus PLF urges this Court to grant Plaintiff's motion for summary judgment, and hold that the government's use of race in Section 8(a) is facially unconstitutional.

SUMMARY OF THE ARGUMENT

The district court in *DynaLantic Corp. v. U.S. Dep't of Def.*, held that there was no evidence of discrimination in the military simulation and training industry and ruled in favor of a contractor's as-applied equal protection challenge to Section 8(a) of the Small Business Act. 885 F. Supp. 2d 237, 293, *appeal dismissed*, No. 12-5329, 2013 WL 4711715 (D.C. Cir. July 16, 2013). But the court relied in part on several statistical disparity studies when it held that the use of constitutionally suspect racial classifications in Section 8(a) satisfied strict scrutiny and was facially constitutional under the Due Process Clause of the Fifth Amendment to the Constitution. *Id.* at 268-70. The parties then settled while the appeal was pending. The government defendants in this case rely on the same statistical disparity studies cited by the *DynaLantic* court to prove that racial preferences

provided in Section 8(a) satisfy strict scrutiny. However, these studies do not imply the existence of discrimination, because they fail to satisfy the rigid standards for statistical proof set by the Supreme Court in *J.A. Croson Co.*, 488 U.S. at 493.

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. 488 U.S. at 509. The government may not cherry pick among various studies; the *Croson* test must be satisfied by every disparity study proffered by the federal government. *See Rothe Dev. Corp. v. Dep't of Def.*, 545 F.3d 1023, 1040 (Fed. Cir. 2008) (district court instructed to "undertake the same type of detailed, skeptical, non-deferential analysis undertaken by the *Croson* Court," concerning each of the disparity studies proffered by the government).

Disparity studies must use the terms "qualified," "willing," and "able" as specifically defined in public contracting statutes and case law. "Available" firms must possess the qualifications necessary to perform specific tasks required by the contracts. *See Croson*, 488 U.S. at 501-02 ("[W]here special qualifications are necessary, the relevant statistical pool for purposes of demonstrating discriminatory exclusion must be the number of minorities qualified to undertake the particular task."). "Willing" firms are those who actually expend the time, effort, and money to submit bids on a particular contract. *See 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). "Able" firms have the resources, such as personnel and equipment, necessary to accomplish the particular tasks as set forth in the contract. *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).

The U.S. Commission on Civil Rights issued instructions that researchers must follow to ensure their disparity studies conform to *Croson*'s standards for statistical proof. U.S. Comm'n on Civil Rights, *Disparity Studies as Evidence of Discrimination in Federal Contracting*, 76-82 (May 2006).[1] The instructions—called "Guidelines"—establish particular protocols for conducting constitutionally sound disparity studies. The district court in *DynaLantic* relied on studies from Alaska, Dayton, San Antonio, New Jersey, and Nevada to justify Section 8(a)'s racial preferences. None of these studies were conducted in accordance with the Commission's Guidelines, because none analyzed bids submitted by qualified firms that were "available," "willing" and "able" to perform the work. *DynaLantic*, 885 F. Supp. 2d at 268-70. Thus, the studies fail to imply discriminatory exclusion, and cannot support the government defendants' claims that Section 8(a)'s racial preferences are constitutional.

ARGUMENT

I

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."). The most common explanation for a statistical disparity is not systemic racial discrimination, but the study's failure to

[1] *Available at* http://www.usccr.gov/pubs/DisparityStudies5-2006.pdf (last visited May 19, 2014).

correctly assess the availability of minority-owned firms by casting a far wider net than is justified in the market. *See id.* at 798 ("Availability analysis is the Achilles heel of *Croson* disparity studies."). *Croson* acknowledged the difference between insidious, discriminatory acts that result in statistical disparities, and disparities that exist for more innocuous reasons. 488 U.S. at 503 (setting forth "numerous" nondiscriminatory reasons for statistical disparities). The Court established that a pattern of discriminatory exclusion could only arise where "there is 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 Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). 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. *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). Together, these criteria are used to determine a firm's "availability" for public contracts. Derek M. Alphran, *Proving Discrimination After Croson and Adarand: "If It Walks Like A Duck"*, 37 U.S.F. L. Rev. 887, 905 (2003).

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 often 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. Bidding on a public contract requires time and money. *See Builders Ass'n of Greater Chicago v. Cnty. of Cook*, 123 F. Supp. 2d 1087, 1102 (N.D. Ill. 2000), *aff'd*, 256 F.3d 642 (7th Cir. 2001) (contractor testified that to prepare a bid on a $10-million job, the contractor must spend 200-300 hours of staff time, and spend $20,000-25,000 duplicating documents and other materials). 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*, 943 F. Supp. at 1583 (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 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.*, 963 F.2d at 426 (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). Racial disparities identified by studies that do not take into account the relative size or ability of firms

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, disparities were better explained by firm size than by discrimination). They cannot justify an inference that government discriminated against smaller firms because they were minority-owned, as opposed to the fact that they were smaller.

II

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

To ensure that disparity studies meet the demands of strict scrutiny, the U.S. Commission on Civil Rights issued specific guidance on how disparity studies must be conducted. U.S. Comm'n on Civil Rights, *Disparity Studies*, *supra*, at 76-80. A disparity study that fails to follow these rigorous protocols cannot prove, by inference or otherwise, that the government discriminated against minority firms, the only possible justification for remedial racial preferences under the Equal Protection Clause.[2]

First and foremost, researchers must only count firms as available that are "qualified," "willing," and "able" to carry out the specific tasks required by government contracts. *Id.* at 77, Recommendation 3. An unlicensed and inexperienced firm, or one that only bids on private contracts, cannot be counted as available for government contracts when calculating disparity ratios. Additionally, studies must compare only those firms that bid to perform the same type of services. U.S. Comm'n on Civil Rights, *Disparity Studies*, *supra*, at 77, Recommendation 3. For example,

[2] While the Commission's recommendations are denominated as "guidelines," courts should view them as mandatory. If researchers fail to follow these recommendations, their disparity studies will not comply with the constitutional mandate of strict scrutiny. *See Croson*, 488 U.S. at 509 (a finding of discrimination only arises when all of the factors the Court described for analyzing statistical disparities are satisfied).

because a minority-owned drywall firm would not bid on a government contract calling for landscaping, data for drywall firms must not be mixed with data for landscaping firms.

Accordingly, researchers must perform detailed analyses that calculate disparity ratios within meaningful categories, such as specific industries, racial and ethnic groups, or contract amounts. *Id.*, Recommendation 5.

Analysts should account for a firm's capacity to perform the required work in a given contract. By examining disparity ratios by size of business depending on firm revenue, number of employees, or the firm's payroll. *Id.*, Recommendation 6. Small minority firms that can only perform one contract at a time are comparable only to other small firms—not larger firms that bid on more contracts, perform multiple contracts at a time, and take on larger projects.

Firms do not submit bids for every contract, because of the time, money, and effort required. *See also Eng'g Contractors Ass'n*, 943 F. Supp. at 1583 (explaining the time and expense involved in submitting a bid). Disparity studies should present bid success rates for each racial, ethnic, and gender group, to determine disparities in frequency of competing for contracts and success in winning them. U.S. Comm'n on Civil Rights, *Disparity Studies*, *supra*, at 78, Recommendation 12. Otherwise, a disparity will be blamed on discrimination, when it may only reflect the fact that all firms are not bidding for each and every contract.

Finally, before concluding that disparities result from bias, researchers must test for nondiscriminatory explanations for the differences and identify specific instances or possible sources of group differences. *Id.*, Recommendation 13. This includes factoring in the experience of firms; whether a company owns its own equipment, has necessary licenses, bonding, a line of credit, and past bidding experience; the education of the owner; and the percent of work a company has performed as a prime contractor. *Id.*

The district court in *DynaLantic* justified the government's program of nationwide discrimination without any location-specific evidence of past discrimination. In the context of public contracting, the Constitution permits government racial discrimination only in the very limited circumstance of remedying past discrimination. *Croson*, 488 U.S. at 504. But the government may not extrapolate discrimination in one jurisdiction from the experience of another to justify its race-conscious programs. *Croson*, 488 U.S. at 505 (citing *Milliken v. Bradley*, 418 U.S. 717, 746 (1974)). Because Section 8(a) is remedial, it needs to be location-specific. That is, offering jobs in Anchorage to remedy discrimination in Charleston makes no sense, and cannot be justified under the Constitution.

The *DynaLantic* court relied in part 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, 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*, as reflected in the above guidance from the U.S. Civil Rights Commission.

A. The Alaska Disparity Study Fails To Consider Firm Capacity or Bidding Practices

The Alaska state-wide disparity study was conducted to determine the hiring of disadvantaged business enterprises 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* i (June 6, 2008) (*Alaska Study*).[3] The Alaska Study purported to present evidence that the Alaskan government discriminated against minority

[3] *Available at* http://dot.alaska.gov/cvlrts/data.shtml (last visited May 19, 2014).

firms, such as firms owned by African Americans, in the transportation construction industry. *Alaska Study*, at 5-72. But 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 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 did submit 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 because they were small companies incapable of taking on large projects; or they may have been fully occupied on other projects; or the contracts may not have been as lucrative as others; or they may not have had the expertise needed to perform the contracts; or they may have bid but were rejected because others came in with a lower price);

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.

B. The Dayton Study Shows That Minority-Owned Firms Cannot Be Considered "Willing" Firms on Every Contract, Because They Do Not Bid on Every Contract

The Dayton study sought to determine whether the City of Dayton, Ohio, discriminated against minority- and female-business enterprises so as to justify race- and sex-based 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 Dayton Study 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. Of the 853 total prime contracting firms eligible for city contracts, nonminority firms were 77% of the total (659) while African American firms were 21% (183); Hispanic, Asian, and Native American firms combined for less than 2% of the total. *Dayton Study* at 4-19.

The Dayton Study relied on several sources to determine subcontractor availability, *id.* at 4-9, and does not describe the method by which it determined whether subcontractors were "qualified," "willing," or "able" to perform particular work on city contracts. Because the City of

[4] *Available at* http://www.cityofdayton.org/departments/hrc/Documents/disparitystudyreport.pdf (last visited May 19, 2014).

Dayton does not track subcontractor participation, the study was based on a self-selected sample of prime contractors responding to a mailed survey. *Id.* at 4-6, 4-8 (148 of 763 firms responded). The Dayton Study further violated the *Croson* requirements by mixing contracting data from firms that perform different services. *See id.* at 4-1 - 4-2 (combining heavy commercial building and transportation construction firms with light maintenance firms, plumbers, air-conditioning repair workers, roofers, and other related services firms). The subcontractor analysis, therefore, is unreliable and fails strict scrutiny.

The Dayton Study's prime contractor analysis is no better. The 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 deems "available" were actually "qualified," "willing," and "able" to perform on all contracts.

There was no evidence that minority firms were prevented from submitting bids, or that their bids were viewed unfavorably. To the contrary, the African American 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.

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

A disparity study for the San Antonio area examined whether minority-owned firms encountered barriers to successful bidding, identified the availability and utilization of minority-owned firms, determined whether disparities existed in contracting, and recommended remedies. *See* San Antonio Reg'l Consortium, *San Antonio Reg'l Bus. Disparity Causation Analysis Study* 5-22 (Aug. 14, 2009) (*San Antonio Study*).[5] The Study reported disparities for some racial groups in local government construction, architecture and engineering, professional services, and general services contracts. *San Antonio Study*, Chapter 4. But only a handful of minority-owned construction firms even exist: twenty-six Hispanic-, one Asian-, zero African American-, and zero Native American-owned available firms (and 208 nonminority-owned firms). *San Antonio Study* at 3-12. The study counted ten Hispanic-, three Asian-, zero African American-, and zero Native American- owned available architecture and engineering firms, and twenty-nine nonminority-owned available firms. *San Antonio Study* at 3-18. For professional services contracts, the study found only two African American- and twenty-one Hispanic-owned, zero Asian- and Native American-owned available firms, as opposed to forty-eight nonminority-owned available firms. *San Antonio Study* at 3-24. For general services contracts, the study found only six African

[5] *Available at* http://www.saws.org/business_center/smwb/study/docs/SAWS_Disparity_Study_2009.pdf (last visited May 19, 2014).

American-, thirty Hispanic-, four Asian-, and zero Native American-owned available firms, as opposed to 207 nonminority-owned available firms. *San Antonio Study* at 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 San Antonio 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. *See* U.S. Comm'n on Civil Rights, *Disparity Studies*, *supra*, at 77, Recommendation 3 (analysts should remove from the pool of available firms any companies offering services that a government does not purchase or that are distinctively different); *id.* at 73 (testimony of Roger Clegg) (disparities could be caused by minority companies submitting high bids, or by failing to meet other objective qualifications).

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 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 any disparities reported by the

San Antonio Study are not the result of "extreme" instances of discriminatory exclusion. *See Croson*, 488 U.S. at 509 ("In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion."). Where there is no discrimination, there is no need for a remedy and the Constitution flatly prohibits nonremedial discriminatory preferences.

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. And the San Antonio Study is based upon such flawed assumptions.

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

The government also relies on a 2006 disparity study performed at the behest of the State of New Jersey. Mason Tillman Associates, Ltd., *State of New Jersey Construction Services Disparity Study 2003-2004* (June 2006) (*New Jersey Study*).[6] 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." *New Jersey Study* at 5-1. That statement is blatantly false, because it omits the key requirement that available firms must be "qualified." *Croson*, 488 U.S. at 509 (An inference of discriminatory exclusion could only arise when there was a significant statistical disparity between the "number of qualified minority

[6] *Available at* http://www.njleg.state.nj.us/OPI/Reports_to_the_Legislature/disparity_study_2003-2004.pdf (last visited May 19, 2014).

contractors willing and able to perform a particular service" and the number of such contractors actually hired.).

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 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"); *Associated Gen. Contractors of Cal., Inc. v. Coal. for Econ. Equity*, 950 F.2d 1401, 1417 (9th Cir. 1991) (approving city's bid preferences which remedied discrimination against certain minority groups in specific industry categories).

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. Courts have found that minorities may be well represented in specifically identifiable segments of broadly defined industries. *See Coal. for Econ. Equity*, 950 F.2d at 1417 (Black-owned medical services firms were not eligible for bid preferences on medical services contracts, because evidence did not show they were disadvantaged).

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 held that six disparity studies—including four by Mason Tillman Associates (MTA), 545 F.3d at 1041, the same firm that conducted the New Jersey Study—failed to provide the government with a strong basis in evidence to justify racial preferences in contracting. 545 F.3d at 1045. 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 might be expected to bring in substantially different amounts of business even in the absence of discrimination." *Id.* at 1043. *Rothe* suggested another way of understanding firm capacity was by comparing a small micro-brewery with Budweiser. Both might be qualified to sell beer, but they are not equally available to sell beer because Budweiser can produce more. *Id.*

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 measures availability the same way.

First, 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. The same quoted language was rejected in *Rothe*. *See* 545 F.3d at 1044 (rejecting New York City study for not accounting for relative sizes of businesses as evidenced by study's assertion that: "Under a fair and equitable system of awarding contracts, the proportion of *contract dollars* awarded to M/WBEs would be approximate to the proportion of *available M/WBEs* in the relevant market area.").

Second, *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

> while these parameters may have ensured that each minority-owned business in the stud[y] met a capacity threshold—i.e., had the capacity to bid for and to complete any one contract—these parameters simply fail 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 only if that analysis "determine[d] whether there was a statistically significant correlation between the *size of a firm* and the *share of contract-dollars awarded to it*." *Id.* (emphasis added). 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. *Rothe*, 545 F.3d at 1044.

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

Lastly, the government relies on a disparity study performed for the Nevada Department of Transportation. Nevada Dep't of Transp., *Availability and Disparity Study* F-49 (June 15, 2007) (*Nevada Study*).[7] That study claimed to have discovered significant disparities for minorities. 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 most revealing statistics the Nevada Study could report would be those showing the percentage rate of success or failure experienced by firms that did submit 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. *Id.* at F-57. 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

[7] *Available at* https://zdi1.zd-cms.com/cms/res/files/313/NDOT_2007DisparityStudyReport.pdf (last visited May 19, 2014).

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 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 reverse discrimination. *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]

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 may have satisfied the standards articulated in *Croson*. But the Nevada Study's availability figures were based on firms that rarely bid on transportation projects: of 73 minority firms, only 8.2%—6 firms—had submitted bids as a prime and subcontractor on state transportation projects in the past five years. *Nevada Study* at F-49. Five had bid only as prime contractors, and twenty bid only as subcontractors. *Id.*

[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 race-conscious ones. *See Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420 (2013) (the government has the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice).

For smaller contracts at the local government level, only 5.5% of seventy-three minority firms—four firms—had bid as prime and subcontractors, with five firms bidding only as a prime contractors, and only twenty-one bidding solely as subcontractors. A firm that does not submit a bid cannot reasonably be regarded as "willing." *Builders Ass'n of Greater Chicago*, 123 F. Supp. 2d at 1102. The Nevada Study's availability figures are therefore flawed, as well as the study's disparity figures relied on by the *DynaLantic* court. *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.

CONCLUSION

For these reasons, Amicus Curiae Pacific Legal Foundation respectfully requests that this Court grant the motion for summary judgment by Plaintiff Rothe Development, Inc., and hold that the government's use of race in Section 8(a) of the Small Business Act is facially unconstitutional.

DATED: May 21, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2014, I electronically filed the foregoing AMICUS CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PLAINTIFF ROTHE DEVELOPMENT, INC. with the Clerk of the Court for the United States District Court for the District of Columbia by using the CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Joshua P. Thompson
JOSHUA P. THOMPSON

LCvR 7.1

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTERESTS

No. 1:12-cv-00744-KBJ

Rothe Development, Inc. v. Department of Defense, et al.

Certificate required by LCvR 7.1 of the Local Rules of the United States District Court for the District of Columbia:

I, the undersigned, counsel of record for Amicus Curiae Pacific Legal Foundation, certify that to the best of my knowledge and belief, the following are parent companies, subsidiaries or affiliates of Pacific Legal Foundation which have any outstanding securities in the hands of the public:

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These representations are made in order that judges of this court may determine the need for recusal.

DATED: May 21, 2014.

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