No. 16-1239

In the
Supreme Court of the United States

ROTHE
DEVELOPMENT, INC.,
Petitioner,

v.

DEPARTMENT
OF DEFENSE, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND CENTER FOR EQUAL OPPORTUNITY IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does strict scrutiny apply to a Congressional grant of authority to the Small Business Administration to exercise broad discretion in classifying individuals by race?

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IDENTITY AND INTEREST OF AMICI CURIAE

Pacific Legal Foundation (PLF) and Center for Equal Opportunity (CEO) submit this brief amicus curiae in support of the Petitioner, Rothe Development.[1]

Since 1973, PLF has litigated for individuals' rights to be free from government discrimination. PLF has participated as amicus curiae in major Supreme Court cases involving racial classifications, including: *Schuette v. BAMN*, 134 S. Ct. 1623 (2014); *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411 (2013); *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); and *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

CEO is a nonprofit research, education, and advocacy organization. CEO studies racial, ethnic, and gender discrimination by the government and private entities. CEO advocates for the cessation of such discrimination. CEO has participated as amicus

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amici Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any 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, their members, or their counsel made a monetary contribution to its preparation or submission.

curiae in cases relevant to this petition. *See Schuette*, 134 S. Ct. 1623; *Fisher*, 133 S. Ct. 2411; *Parents Involved*, 551 U.S. 701; *Gratz*, 539 U.S. 244; *Grutter*, 539 U.S. 306; *Adarand*, 515 U.S. 200.

Amici support this petition because it raises core equal protection issues about whether Congress can imbue an agency with unbridled discretion to create and manage racially segregated markets for coveted federal contracts. Amici's policy perspectives and litigation experience offer an additional viewpoint that will assist the Court in reviewing this petition.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Congress has authorized the Small Business Administration (SBA) to wield vast discretion in employing race-conscious measures in federal contracting. The Small Business Act's 8(a) Program authorizes the SBA to enter into prime contracts for any variety of goods or services from any federal agency, department, or official. 15 U.S.C. § 637(a)(1)(A).

The SBA can then subcontract the work to small businesses owned by socially and economically disadvantaged individuals. 15 U.S.C. § 637(a)(1)(B). According to the Act, those who are socially disadvantaged "have been subjected to racial prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." 15 U.S.C. § 637(a)(5). Social disadvantage results from membership in "certain groups that have suffered the effects of discriminatory practices." 15 U.S.C. § 631(f)(1)(B). The Act creates an open-ended list of the minority groups whose

members face social disadvantage. 15 U.S.C. § 631(f)(1)(C). The SBA enjoys the express authority, under the Act, to determine "whether a group has been subjected to prejudice or bias." 15 U.S.C. § 637(a)(8).

Beyond a wide definition of social disadvantage and a nonexhaustive list of disadvantaged minority groups, the Act does not constrain or guide the SBA's use of race to designate individuals as socially disadvantaged. The SBA also enjoys broad authority to decide in which industries, government departments, and locations to employ racial classifications. *See* 15 U.S.C. § 637(a)(1).

The 8(a) Program authorizes the SBA to create racially segregated markets for contracts across the vast swath of the federal government. As such, it deserves the same heavy scrutiny applied to any other facially race-based legislation. *Adarand*, 515 U.S. at 220. Strict scrutiny is particularly appropriate here, where Congress has placed broad power to engage in racial classification in the hands of unelected bureaucrats. The Court should grant the petition to address the level of scrutiny that should apply to this major federal procurement program.

ARGUMENT

I
INNOCENT BUSINESSES THAT DO NOT QUALIFY FOR FAVORED STATUS IN GOVERNMENT CONTRACTING MUST LABOR IN A MARKET ARRAYED AGAINST THEM

Racial classifications in government procurement programs across the country undermine fair play and merit-based competition. At the local and federal

levels, such programs embody an idea antithetical to free enterprise and free society: government can choose to favor certain individuals over others based on static traits like race that bear no relationship to individual merit or worth. Given the size of the 8(a) Program and how many small businesses bear the burden of the SBA's racial classifications, this Court should grant review to decide how to assess its constitutionality.

Race-conscious policy—regardless of its motive—thrusts practical consequences onto thousands of small businesses. The story of Thomas Stewart, a small business owner in Spokane, Washington, demonstrates the challenges faced by those whom the government does not favor.[2] Each year, Tom and his forty employees at Frank Gurney, Inc., install about 25 miles of guardrails, concrete barriers, and signs on highways in Washington, Idaho, and Montana. All of Frank Gurney's work comes through subcontracts on government jobs.

Tom inherited Frank Gurney from his stepfather in 1989. Tom and his two sons now own the family business, and Tom at 76 still runs it alongside them. Tom and his sons, by no fault of their own, are white males.

Race-conscious government contracting has beleaguered Tom and his family for decades. For instance, the DBE program in Washington State, instituted in 1982, disrupted the bidding system that Frank Gurney had relied on since its inception in

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[2] Tom's story and quotations come from personal conversations with Tom and documents that he has shared with PLF, including letters and written testimonies.

1964. In Tom's experience, such racial preferences often "create a windfall for well-run, successful companies that are still here today and never needed any help in the first place." As he said in written testimony to the Washington Transportation Department, "My competitors Dirt and Aggregate, Pavement Surface Control and Pacific Rim along with others have enjoyed taking work from my firm at higher prices for many years. When does it end?" Tom estimates that the jobs Frank Gurney lost to DBE contractors despite being the low bidder have cost his small business from around five to ten million dollars.

In a file drawer at his office, Tom keeps rejection letters for contracts where he offered the lowest bid but lost the job due to racial preferences. He's tucked away fifty such letters over the years. He received the most recent letter on May 5. The letters tell a poignant story about the impact of well-intentioned programs on those deemed by government to be less worthy of its patronage.

One of these letters reveals how "benign" racial classifications must feel to people like Tom Stewart who bear their burden:

> Tom,
>
> Shamrock Paving Inc. deeply regrets not being able to employ Frank Gurney Inc. on the Swenson Road Project. Although we would prefer to hire and support local businesses, due to Steven County mandating a 7% DBE Goal on the project we were unable. Frank Gurney Inc. was low bidder on the project for that portion of the work, however Shamrock Paving

> Inc. was forced to employ Pacific Rim Service and Construction Co., Inc. from Portland, Oregon to attain the 7% DBE goal. In this already competitive business it is unfortunate we are having to bring companies from out of our area to meet the mandated goals and our local businesses are forced to suffer.

Letter from Scott Willms, General Manager, Shamrock Paving, to Thomas Stewart (Apr. 29, 2016) (on file with author).

This letter echoes the truth of Justice Stewart's impassioned dissent in *Fullilove v. Klutznick*: "From the perspective of a person detrimentally affected by a racially discriminatory law, the arbitrariness and unfairness is entirely the same, whatever his skin color and whatever the law's purpose, be it purportedly 'for the promotion of the public good' or otherwise." 448 U.S. 448, 526 (1980) (Stewart, J., dissenting). Tom's own words before Congress in 1995 reflect this view: "Like most other Americans, I want no more than the chance to succeed—or even fail—on my individual merits. It's really as simple as that. It's just not fair to punish my firm because neither minorities nor women own it."

Indeed, Tom's story reveals the selective nature of the word "benign": racial preferences are only benign when we assume what we seek to conclude—that harm to one race can be swept aside for the sake of another race's benefit. In Justice O'Connor's words, the term "benign" "reflects only acceptance of the current generation's conclusion that a politically acceptable burden, imposed on particular citizens on the basis of race, is reasonable." *Metro Broad., Inc. v.*

FCC, 497 U.S. 547, 610 (1990) (O'Connor, J., dissenting) (overruled by *Adarand*, 515 U.S. 200). Declaring racial discrimination to be benign adopts the very parochialism that equal protection forbids—looking only to the benefits that accrue to one race while discounting the injuries done to another.

In reviewing this petition, this Court should not "lose sight of the fact that even 'benign' racial quotas have individual victims, whose very real injustice we ignore whenever we deny them enforcement of their right not to be disadvantaged on the basis of race." *Croson*, 488 U.S. at 527 (Scalia, J., concurring). Thomas Stewart and thousands like him deserve this Court's careful review of one of the country's most extensive procurement programs.

II
THIS COURT SHOULD ADDRESS WHETHER STRICT SCRUTINY APPLIES TO A STATUTE THAT AUTHORIZES AN AGENCY TO ENGAGE IN RACE-CONSCIOUS PROCUREMENT PRACTICES

Even if the 8(a) Program does not directly impose racial classifications, it still authorizes the SBA to do so. It thereby raises an important and novel question of law: is a statute that expressly delegates the authority to discriminate based on race a race-neutral law? This Court should grant the petition and address this issue.

Any racial classification deserves "the strictest judicial scrutiny." *Adarand*, 515 U.S. at 224. Here, the D.C. Circuit held that the 8(a) Program escapes strict scrutiny because—as the panel majority interpreted it—any person of any race can qualify as socially

disadvantaged, and the Act "does not create a presumption that a member of a particular racial or ethnic group is necessarily socially disadvantaged, nor that a white person is not." *Rothe Dev., Inc. v. USDOD*, 836 F.3d 57, 67 (D.C. Cir. 2016). Although this reading defies the plain language of the Small Business Act, strict scrutiny could nonetheless apply because the Act at least authorizes the SBA to engage in widespread racial classification with near unlimited discretion.

The panel majority argued that only SBA regulations—not the statute itself—presume that certain minority races are socially disadvantaged. *Id.* at 70. But in so holding, the court failed to address the Act's express authorization allowing the SBA to engage in such a presumption.

The statute's delegation of power to exercise a racial presumption becomes clear from comparing three sections of the Act:

- The definition of "socially disadvantaged" in paragraph 5 of Section 637(a).
- The procedure for determining that a group has faced prejudice in paragraph 8 of Section 637(a); and
- The list of minority groups that Congress deems socially disadvantaged in Section 631(f).

Paragraph 5 defines "socially disadvantaged" individuals as those who "have been subjected to racial prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." 15 U.S.C. § 637(a)(5). This definition governs which small businesses the SBA

can certify to compete for subcontracts in a sheltered market.

Paragraph 8 establishes a specific procedure for SBA to identify particular groups as having suffered prejudice. It says: "All determinations made pursuant to paragraph (5) with respect to whether a group has been subjected to prejudice or bias shall be made by the Administrator after consultation with the Associate Administrator for Minority Small Business and Capital Ownership Development." 15 U.S.C. § 637(a)(8). Paragraph 8 makes clear that the SBA can establish—as a general matter—whether a "*group* has been subjected to prejudice or bias," not just an individual. *Id.* (emphasis added).

Indeed, paragraph 8's heightened procedural requirements indicate that it refers to a process independent of designating individual small businesses as "socially disadvantaged" under paragraph 5. "Group" determinations under paragraph 8 can only be made by the SBA Administrator after consulting with the Associate Administrator for Minority Small Business and Capital Ownership Development. *Id.* Individual designations under paragraph 5, however, can be made by the Assistant Administrator under the Administrator's supervision. *Id.* This separate process for paragraph 8 reflects the reality that a generalized decision that a minority group is presumptively disadvantaged is a weightier matter than designations for individual small businesses.

Paragraph 8 thus grants the SBA authority to wield a racial presumption on behalf of select groups. Once the SBA determines, for instance, that East Indians have been subjected to prejudice, any East

Indian business owner who seeks to certify for 8(a) contracts already enjoys an SBA determination that he is a member of a disadvantaged group.

In other words, the SBA determination regarding *groups* under paragraph 8 serves as a presumption that *individuals* of the designated race qualify as socially disadvantaged under paragraph 5. Otherwise, the SBA's authority under paragraph 8 to designate groups as disadvantaged would be meaningless. After all, if an East Indian and a white male must each prove that he personally has experienced prejudice because of his race, then the SBA's determination that the East Indian race has suffered prejudice would serve no purpose. Paragraph 8 clashes with the D.C. Circuit's holding that social disadvantage is based only "on an individual's experience of racial, ethnic, or cultural bias, rather than racial identity." *Rothe Dev.*, 836 F.3d at 72. Paragraph 8 says otherwise; it allows the SBA to presume that members of identified racial groups are socially disadvantaged.

The statute's list of "socially disadvantaged" groups in Section 631(f) confirms what paragraph 8 makes clear. The Act says "certain groups have suffered the effects of discriminatory practices" and "such groups include, but are not limited to, Black Americans, Hispanic Americans, Native Americans, Indian Tribes, Asian Pacific Americans, Native Hawaiian Organizations, and other minorities." 15 U.S.C. § 631(f)(1)(B)-(C). This clarifies that Congress had in mind particular minority groups when granting SBA the power to select disadvantaged groups under paragraph 8. The catch-all phrase "and other minorities" redoubles the clear meaning of paragraph 8, opening the door for SBA to decide which

"other minorities" to add through paragraph 8's procedure.

SBA has since acted on this authority. For instance, SBA regulations have extended a rebuttable presumption of social disadvantage to Subcontinent Asian Americans from a few select countries. 13 C.F.R. § 124.103(b)(1). If a business owner is not a member of a minority listed by SBA, then he carries the burden to prove social disadvantage by a preponderance of the evidence. 13 C.F.R. § 124.103(c)(1).

Congress may not govern based on race absent extraordinary circumstances. Even if the statute does not *mandate* the use of race by the SBA, it expressly authorizes the SBA to use race in virtually any federal contract that it chooses. In doing so, Congress has engaged in legislation based on race.

The fact that the statute leaves the details to an agency does not change the race-based nature of the legislative framework. Certainly, as this Court has held, "mere awareness of race" in crafting legislation does not condemn the legislation itself. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmties. Project, Inc.*, 135 S. Ct. 2507, 2525 (2015). But the statute was not just crafted with race in mind. It expressly empowers an agency to use race to filter access to certain markets for federal contracts. Indeed, as discussed in the next section, committing such authority into agency hands may be even greater cause for concern.

The D.C. Circuit acknowledged the argument that the Act is not race-neutral because it delegated power to classify by race. The panel majority, however, said

the constitutional avoidance doctrine saves the Act. *Rothe Dev.*, 836 F.3d at 68. This is a misuse of the avoidance canon. A court can avoid a constitutional question only where an alternative interpretation that would dodge the constitutional issue is available under normal canons of construction. *Pub. Citizen v. USDOJ*, 491 U.S. 440, 466 (1989). If the statute has only one reasonable reading, the constitutional avoidance doctrine does not apply. *Id.*

In citing constitutional avoidance, the D.C. Circuit did not even address what an alternative interpretation of paragraph 8—the procedure for designating disadvantaged groups—might be. The Court instead made this conclusory remark: "Even if the statute could be read to permit the agency to use a racial presumption, the canon of constitutional avoidance directs that we not construe the statute in a manner that renders it vulnerable to constitutional challenge on that ground." *Rothe Dev.*, 836 F.3d at 68. The court then launched into alternative reasonable interpretations regarding whether the statute *mandates* a racial presumption, never offering an alternative interpretation of paragraph 8 that would avoid the question of whether the statute *authorizes* a racial presumption. *See id.* As discussed above, to read paragraph 8 as anything but a power granted to the SBA to select particular groups as presumptively disadvantaged would defy its plain meaning and render it a nullity. Such an interpretation is not a reasonable exercise of the avoidance canon.

III
COURTS SHOULD ENFORCE CAREFUL LIMITS ON THE POWER OF ADMINISTRATIVE AGENCIES TO PICK WINNERS AND LOSERS BASED ON RACE

The SBA enjoys broad discretion in creating and administering racially segregated markets for precious government contracts. The congressional commitment of racial classification to an administrative agency raises serious equal protection concerns. This is more than an abstract nondelegation issue. The question of broad agency power over racial preferences runs to the core of the equal protection promise itself. Given the gravity of this administrative power, the Court should grant this petition to determine the proper standard of review.

A. By Delegating Broad Discretion to Unelected Officials to Engage in Racial Classifications, the Small Business Act Raises Serious Concerns About Equal Protection and the Separation of Powers

The Constitution vests all legislative power in Congress. U.S. Const. art. I, § 1. This structuring of power protects civil rights. As Justice Scalia noted, the separation of powers "exists not to look after the interests of the respective branches, but to protect individual liberty." *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2594 (2014) (Scalia, J., concurring). The delegation of legislative power to classify by race affirms the vital need to keep legislative power out of the hands of executive officers to preserve individual rights.

In committing legislative power to a representative body, the Constitution sought to facilitate the constrained and accountable exercise of power. Congress faces many such constraints, including bicameralism, presentment, and elections. Further practical constraints also play a role in curtailing abuse, such as the fixed size of Congress and the infrequency of their sessions. Philip Hamburger, *Is Administrative Law Unlawful?* 367-69 (2014). Agencies, vast organizations run by unelected bureaucrats, face no parallel constraints.

The delegation of legislative power to bureaucrats jeopardizes equal protection by undermining the rule of law. The rule of law favors pre-established, generally applicable rules that thwart government partiality. F.A. Hayek, *The Road to Serfdom* 117 (Bruce Caldwell ed., 2007). It thereby "safeguards that equality before the law which is the opposite of arbitrary government." *Id.* The rule of law suffers when legislative power migrates to agencies, where it is wielded through bureaucratic discretion. *Id.* at 119. Thus, the exercise of delegated authority erodes the rule of law if such authority allows the officer to act arbitrarily or fails to set clear boundaries. *Id.* There are few acts as arbitrary as the classification of individuals by their race. *United States v. Armstrong*, 517 U.S. 456, 464 (1996). Indeed, a blow to the rule of law justified by racial equity rings with special irony, since the rule of law is "the true opposite of the rule of status." Hayek, *supra*, at 117.

Early English and American reformers saw government as a fiduciary that cannot subdelegate a power already delegated by its principals, the people. Hamburger, *supra*, at 386-88. In John Locke's words,

the people's consent to legislative rule granted only the power "to make laws, and not to make legislators." John Locke, *Two Treatises of Government* 362-63 (Peter Laslett ed., Cambridge University Press 1988). As such, the lawmaker "cannot commit the sword of his justice, or the oil of his mercy" to other hands. Hamburger, *supra*, at 381 (quoting Lord Edward Coke).

As with any principal-agent relationship, the rule against subdelegation promotes accountability and loyalty to the principal. Hamburger, *supra*, at 386-88. Elected representatives face direct accountability to the people. *Id.* at 364. When lawmaking migrates into the hands of unelected bureaucrats, that accountability grows ever more indirect. *Id.* at 364-66. This results in increased agency costs, "the costs arising from the disparity of interest between those who enjoy power and those whose interests are entrusted to them." *Id.* When officials insulated from elections and the public eye exercise legislative power, accountability suffers.

Agency costs are especially pernicious in the realm of equal protection and racial classifications. Advocates of "benign" racial classification have argued that the majoritarian political process validates the racial preferences because the dominant race has agreed to be subject to handicaps that will benefit minorities. *Croson*, 488 U.S. at 722-23; John Hart Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. Chi. L. Rev. 723, 727 (1974). That premise crumbles when unelected bureaucrats without democratic accountability wield the power to decide when, where, and how racial preferences will be allotted and to which races. Robbing people like

Tom Stewart of a democratic say over the use of racial preferences defeats a core rationale for allowing "benign" discrimination in the first instance.

Given Congress's already strictly limited role in racial classifications, the delegation of that power is especially worrisome. Where Congress itself faces strict limits in discriminating based on race, its power to delegate that already restricted power should be likewise circumspect. This Court has said that the amount of discretion that Congress may permissibly grant to an agency depends on the limits of the authority being delegated: "[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 475 (2001). Here, the authority to discriminate must be handled with the utmost care, for unless it is "strictly reserved for remedial settings, [it] may in fact promote notions of racial inferiority and lead to a politics of racial hostility." *Croson*, 488 U.S. at 493. Given the gravity of racial classifications, the degree of discretion that Congress can commit to agencies to decide when, where, and how to discriminate should be carefully policed.

The 8(a) Program also raises constitutional concerns by transferring discretion to SBA to weigh and respond to evidence of discrimination without congressional guidance. Under this Court's precedent, only a strong basis in evidence of specific discrimination can justify racial classifications. *Id.* at 500. "Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." *Adarand*, 515 U.S. at 220 (quoting *Wygant v. Jackson Bd. of Educ.*, 467 U.S. 267, 276 (1986)).

Hence, the evidence for race-conscious contracting must point to specific discrimination in the particular industry or contracting entity. *See Id.* at 223-25; *Croson*, 488 U.S. at 505. For such evidence to be relevant, however, Congress itself must weigh that evidence in order to ensure democratic accountability and strict adherence to constitutional limitations. *See Rothe Dev. Corp. v. USDOD*, 545 F.3d 1023, 1039 (Fed. Cir. 2008) ("[F]or evidence to be relevant in the strict scrutiny analysis, it must be proven to have been before Congress prior to enactment of the racial classification." (quotation marks omitted)).

The Small Business Act allows the SBA to rely on evidence of societal discrimination that has not received congressional scrutiny. The definition of social disadvantage does not require the SBA to tie past discrimination to the particular industry or government agency at issue. Rather, the SBA can grant privileges based on amorphous societal discrimination for those who "have been subjected to racial prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." 15 U.S.C. § 637(a)(5). Indeed, the statute is clear that the SBA may employ such classifications in any industry with any federal contracting entity as SBA deems "necessary or appropriate." 15 U.S.C. § 637(a)(1), (5). Small business owners need only have suffered racial prejudice at some point in some setting. This grant of power defies the Supreme Court's warning in *Croson*: "To accept Richmond's claim that past societal discrimination alone can serve as the basis for rigid racial preferences would be to open the door to competing claims for 'remedial relief' for every disadvantaged group." *Croson*, 488 U.S. at 505. The

Small Business Act opens this door and then leaves it ajar, inviting the SBA to smuggle in claims of discrimination that have "no logical stopping point." *Id.* at 498 (quoting *Wygant*, 476 U.S. at 275).

These concerns should not await piecemeal adjudication of SBA's individual contracts or regulations. Rather, the legislative framework deserves this Court's careful scrutiny now. Even if Congress left details to the SBA, the legislation itself must offer "a reasonable assurance" that racial preferences will be narrowly tailored to Congress's remedial objectives and that careful oversight will correct abuses. *Fullilove*, 448 U.S. at 451. The extraordinarily broad grant of authority to SBA here offers little assurance of sparing and prudent use of racial classification.

People like Tom Stewart suffer poignant injury when they are shut out from competing for a certain contract solely because of their race. That injury is compounded when their ability to influence the policies that target them for disfavor wilts because their representatives have committed such decisions to an unrepresentative body. Tom's testimony to the Washington Department of Transportation warned of "a whole bureaucratic society of professional victim advocacy that simply will never abate the idea of taking from one and giving to another in the name of 'remedy.'" This Court should grant review to weigh whether this broad delegation of power to an unelected bureaucracy should face the strict scrutiny that demands assurance that legislation in federal contracting cleaves to the narrow road of equal protection.

B. The Failure of the SBA to Make Modest Use of the 8(a) Program Validates Concerns About Leaving Racial Classifications to Agency Discretion

The SBA's practices have corroborated concerns about broad delegations of legislative power. The aggressive implementation of the 8(a) Program underscores the importance of this petition.

Race-based measures can only serve as a last resort. *Croson*, 488 U.S. at 519 (Kennedy, J., concurring). Government must therefore first explore race-neutral alternatives and test their adequacy. *Id.* at 507; *Fisher*, 133 S. Ct. at 2420. Only after government has sought to avoid the ugly heuristic of race as a tool for measuring disadvantage may it employ race-conscious procurement.

Unfortunately, the Small Business Act does not impose any guidelines or requirements on the SBA or other agencies about the testing or consideration of race-based alternatives as a precondition to entering into SBA prime contracts. Nor have the agencies exercised such prudence of their own accord. The U.S. Commission on Civil Rights has found that agencies involved in race-based contracting do not seriously consider race-neutral alternatives. U.S. Commission on Civil Rights, *Federal Procurement After Adarand* 23 (2005).[3] Rather, they tend to turn to SBA's race-conscious contracts as a default rather than as a last resort. *Id.* at 70. The Small Business Act could have curtailed this problem by requiring specific consideration of race-neutral alternatives. Instead,

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[3] http://www.usccr.gov/pubs/080505_fedprocadarand.pdf

basic questions remain unresolved by the statute, such as whether the SBA or the contracting agency carries the responsibility to ensure that race-neutral alternatives receive careful attention.

The relentless growth of the 8(a) Program also speaks to a truth of bureaucratic power: agencies rarely face strong incentives to limit the expansion of their imperatives. In 2009, the percentage of federal prime contracts awarded to disadvantaged businesses under 8(a) stood at 7.6%. U.S. Small Bus. Admin., *FY 2016 Congressional Budget Justification* 49[4] (hereinafter *CBJ 2016*). That percentage has grown each year since, until 2014—the year with the most recent data—when the percentage had risen to 9.46%. U.S. Small Bus. Admin., *FY 2017 Congressional Budget Justification* 47[5] (hereinafter *CBJ 2017*). In all those years, the statutory goal remained steady at 5%. *CBJ 2016* at 49; *CBJ 2017* at 47. In the meantime, the variance between the statutory goal for 8(a) contracting and the actual outcome grew from 51% to 89%. *CBJ 2016* at 49; *CBJ 2017* at 47. This growth is substantial when compared to the government-wide goal of awarding 23% of federal contracts to small businesses. *See* 15 U.S.C. § 644(g)(1)(A)(i). Of the 92 billion contracting dollars issued by the federal government to small businesses in 2014, a large helping was allotted based on racial preferences. *CBJ 2017* at 46.

SBA has failed to even engage in periodic review to assess the need for these race-conscious measures. *Id.*

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[4] https://www.sba.gov/sites/default/files/files/1-FY_2016_CBJ_FY_2014_APR_508.pdf

[5] https://www.sba.gov/sites/default/files/FY17-CBJ_FY15-APR.pdf

at 29. The program's growth, therefore, has not been monitored for narrow tailoring. When the 8(a) Program was created, Congress intended to phase it out as the program remedied the evils of past discrimination. *Id.* at 7. Congress, however, has failed to impose constraints on the SBA that could prevent the expanding use of racial classification. The 8(a) Program's unquestioning growth is a poor omen for the equal protection promise that the sun would someday set on racial preferences. For Tom Stewart and the many small business owners who lose opportunities because of their race, this arc does not bend toward justice.

The SBA has also failed to keep any data that might show how many firms certified under the 8(a) Program are not minority-owned. In theory, a non-minority business owner could participate in the program by proving social disadvantage. SBA's failure to track the ratio of minority and non-minority 8(a) participants demonstrates a sloppiness at odds with the government's burden to prove narrow tailoring. Even in the unlikely scenario that a substantial number of 8(a) businesses are not minority-owned, the SBA has still nonetheless expanded the use of a process that is candidly race-conscious.

Ironically, the SBA blames Congress for its failure to seriously examine the extent of and need for its racial classifications. *Id.* SBA has argued that Congress is the institution that decides whether there's a continuing need for the 8(a) procurement program. *Id.* This excuse for failing to satisfy narrow tailoring points to one of the problems with the broad delegation of race-conscious decision-making: it fractures accountability, making it unclear who is

ultimately responsible for constitutional compliance and allowing government bodies to shift blame. Of course, the SBA is correct that Congress must decide regarding any continuing need for race-conscious measures. But that accountability also means that Congress cannot delegate such wide discretion to the SBA to classify by race.

The broad discretion that Congress endowed on the SBA to discriminate based on race underscores the need for this Court's review. The statute's threat to the separation of powers highlights the gravity of this petition and the importance of this Court's input to ensure that such influential agency discretion arises under a lawful act of Congress.

CONCLUSION

When Alexis de Tocqueville traveled the United States in the 1830's, he observed a self-reliant people skeptical of paternalistic government:

> The citizen of the United States is taught from his earliest infancy to rely upon his own exertions in order to resist the evils and the difficulties of life; he looks upon social authority with an eye of mistrust and anxiety, and he only claims its assistance when he is quite unable to shift without it.

Alexis de Tocqueville, *Democracy in America* 148 (1831). Tocqueville's insights reflect Tom Stewart's own wish, "no more than the chance to succeed—or even fail—on my individual merits. It's really as simple as that." Agency authority to disrupt that

independent spirit does not come without cost. When an authority like the SBA wields broad power to decide which Americans receive governmental boons based on their race, it deserves an independent people's skepticism. This Court should grant review to consider whether Congress's decision to allow a large agency to sort citizens by race should be subject to strict scrutiny.

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Respectfully submitted,

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