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LEGAL MEMORANDUM

TO: Amici Parties

FROM: Christine V. Williams

SUBJECT: Summary of the Decision in Rothe

DATE; September 10, 2016

I. Executive Summary

On September 9, 2016, the DC Circuit Court of Appeals issued a decision finding that the Small Business Administration's ("SBA") Section 8(a) Program was facially Constitutionally valid. In so doing, the Court found that the Small Business Act ("Act") was a race-neutral statute subject to rational review by the Court, which it readily passed. The minority opinion, disagreed, finding that race necessarily played a part in evaluating the social disadvantage threshold qualification to participate in the 8(a) Program. Regardless of this minority position, the Court found that the 8(a) Program survived the Constitutional challenge with the application of rational review.

As one might surmise, the standard of review to be applied to the 8(a) Program was the most contentious issue between the majority and the minority opinions because rational review is such a deferential standard of review to any act of Congress. In contrast, strict scrutiny review is the highest and hardest standard of review to pass for any statute, whether the statute is examined for facial validity, as was done here, or in the application of the statute.

II. Background

Rothe Development, Inc. ("Rothe"), a Women Owned Small business HUBZone firm, brought a facial Constitutional challenge to the 8(a) Program under the Due Process Clause of the Fifth Amendment. Rothe alleged that the Small Business Act, on its face, created impermissible racial classifications for participation in that Program that did not survive a strict scrutiny review by the judiciary. Accordingly, Rothe sued the Department of Defense ("DOD") and the SBA to invalidate the 8(a) Program.

The Department of Justice ("DOJ") defended and countered that the racial classification was permissible and justified. The DOJ backed is position with qualified experts and strong disparity studies in the lower court. The appellate division of DOJ would rely upon this data to justify its position under strict scrutiny in front of this Court.

We, as the Native American *amici* parties, said that even if it is a racial classification, Native Americans, defined as Tribes, Alaska Native Corporations ("ANCs"), and Native Hawaiians Organizations ("NHOs") are not considered racial classifications. That is, the relationship of the Native American *amici* and the United States is political and economic one and, thus, subject to rational review by the judiciary. This unique relationship with the Native American *amici* parties "furthers the federal policy of Indian self-determination, the United States' trust responsibility, and the promotion of economic self-sufficiency among Native American communities."[1]

III. Brief Summary and Analysis

The three judge panel at the DC Circuit Court of Appeals issued a decision finding that the 8(a) Program was not a racial classification subject to strict scrutiny at all, but, according to the Act, the participation in the 8(a) Program was defined by race-neutral criterion of social disadvantage. The Court held that social disadvantage was defined as an individual having suffered racial, ethnic, or cultural bias-not racial-classifications presumed by groups. Accordingly, the Court found that the plain terms of the Act allow *any individual* to demonstrate social disadvantage who has suffered racial, ethnic, or cultural bias.[2] The focus on individuals who have experienced discrimination, the Court found, is distinguished from the racial classifications found in other cases where an explicit factor for determination of disadvantage status was based on race, and excluded non-minorities.[3] Thus, the 8(a) Program was subject not to strict scrutiny review because it did not use racial classifications, but rational review, "which the statute readily survives."[4]

The Court issued this opinion while both DOJ and Rothe took the position that the appropriate standard of review was strict scrutiny. In deviating from the briefing of DOJ and Rothe, the Court limited its review to the Act, not the regulations, because Rothe had done so and confirmed that position in oral argument.[5] Additionally, as Rothe failed to brief it, the Court declined to consider whether or not Congress enacted the statue with a discriminatory purpose because Congress foresaw the "primary beneficiaries of this Program to be minorities." Nonetheless, the Court went on to note that policymakers may act with an awareness of race without discriminatory purpose.[6]

Further, the Court stated, that even though Congress, in the Findings section of the Act, may have specified racial and ethnic groups, that specification was not in the operative provisions of

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[1] *AFGE v. United States*, 195 F. Supp. 2d 4, 18 (D.D.C. 2002); *affirmed* 330 F. 3d 513 (D.C. Cir. 2003).
[2] In contrast, the minority opinion found that the 8(a) Program should be subject to strict scrutiny because it specifically includes races as a necessary party of the social disadvantaged inquiry. Minority opinion at 17.
[3] *Id*.
[4] Decision at 5.
[5] Decision at 5.
[6] Decision at 23.

the Act, and were used as examples to give a general understanding of the Act.[7] That preamble language "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."[8] Moreover, the Court found support for the position that the 8(a) Program was race-neutral because other parts of the Act were specific in using the word "presumption" as applied to certain races, which had been challenged in Court because of that presumption.[9] The Court found Congress chose to authorize a more nuanced implementation by the agency of the 8(a) Program and could have authorized a race based classification had it wanted to do so.[10]

When the Court found that rational review applied, it did not necessarily need to reach the question or make the distinction that the Native American *amici* made in their briefing because that was the very standard of review the Native American *amici* urged as their standard of review and demonstrated how the Program passed that standard for the Native American *amici*. While the Court did not need to distinguish the Native American *amici* position because everyone passed, there lies within the Court's decision, even in the minority opinion, subtle references to and very similar citations to the Native American *amici*'s briefing. This is likely due to the fact that the Native American *amici* were the only party to brief rational review (only in relation to the Native American *amici*).

III. Conclusion

The 8(a) Program survived this Constitutional challenge to the facial validity of that provision of the Act. It is unknown whether or not Rothe will appeal this decision, continuing to argue that strict scrutiny applies, that there was a discriminatory intent, or that the Court made an error in not reviewing the regulations and limiting itself to the Act. Immediately after oral argument, and then again later when waiting for a decision, Rothe's attorney reached out to all the amici parties, including the NAACP and the Asian-American Justice Fund, to settle the case, informing this counsel that his clients were running short of funds (because of the impact of the 8(a) Program). All parties declined to settle. In what would otherwise seem a likely appealable decision, in no small part to Rothe litigating issues for 18 years, the funding issue may come into play and this may be the end of this round. If this situation changes, you will be immediately notified.

[7] Decision at 13.
[8] Decision at 13.
[9] Decision at 18.
[10] Decision at 19.