UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DYNALANTIC CORP. *Plaintiff*, *vs.* UNITED STATES DEPARTMENT OF DEFENSE, et al., *Defendants*.	CIVIL ACTION NO. 95-2301 (EGS)

BRIEF OF *AMICUS CURIAE*
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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Interest of *Amicus*

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") was incorporated in 1939 under the laws of New York State to provide legal assistance to black persons in securing their constitutional rights. For over six decades, LDF has appeared as counsel of record or *amicus curiae* in numerous cases involving racial discrimination before the Supreme Court, the Courts of Appeals, and the federal District Courts, including significant litigation defending the constitutionality of appropriately tailored voluntary affirmative action programs that address patterns of racial inequality and exclusion in education, employment, and other contexts.

ARGUMENT

Introduction and Summary

For hundreds of years, African Americans and other minorities have been systematically deprived of economic opportunities and effective participation in our nation's social, political, and civic institutions. The American system of racial apartheid was perpetuated in the twentieth century by the policies and practices of private and public actors, including the federal government itself. Indeed, many of the most enduring barriers to minority business development are vestiges of discrimination sponsored or sanctioned by the federal government. The federal government's own complicity in this country's incontrovertible history of racial oppression bolsters its compelling interest in supporting programs that are aimed at eliminating such discriminatory barriers.

The Supreme Court's seminal decision in *Grutter v. Bollinger*, 539 U.S. 306 (2003), supports efforts by public institutions to eliminate discriminatory barriers to effective participation in the nation's civic, social, and economic life. *Grutter* reaffirmed the vision of a just and equitable society that was promulgated by the Fourteenth Amendment and confirmed by

Brown v. Board of Education, 347 U.S. 483 (1954). Similar to the admissions policies at issue in *Grutter*, the federal minority business development programs challenged by the DynaLantic Corporation in this case enhance the legitimacy and effectiveness of critical government institutions, provide training to future national leaders, and contribute to desegregating participation in a core realm of civic life.

In particular, DynaLantic challenges the Section 8(a) program – an educational and training initiative designed to support and increase the participation of individuals who, as a result of social and economic disadvantage, have been previously excluded from entrepreneurial and business opportunities. Each aspect of the program – including the technical and financial assistance given to participants and the contracting opportunities available once participants are fully qualified, willing, and able to perform the work – is central to this education and development process. DynaLantic's challenge focuses specifically upon the Department of Defense's ("DoD") targeted provision of contracts to qualified participants in the Section 8(a) program in order to expand access to military contracting for economically and socially disadvantaged small businesses.[1] While any business that qualifies as economically and socially disadvantaged is eligible for the Section 8(a) and DoD programs, this brief focuses on the distinctively compelling need for these programs for minority-owned, particularly African American, businesses, which continue to be substantially disadvantaged by America's history of racial apartheid.

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[1] *Amicus* incorporates by reference the Defendant's description of the DoD and Section 8(a) programs. *See* Defendant's Mem. of Points and Authorities in Support of Defendants' Motion for Summary Judgment [hereinafter Def's Mem. Supp. Summ. J.] at 10.

The limited and minimal burden imposed by Section 8(a) and DoD procurement programs on non-minority-owned firms, and the numerous steps Congress has taken to review and refine these programs, demonstrate that these programs are narrowly tailored to serve the government's compelling interest in eliminating discriminatory barriers. Thus, these programs are fully consistent with the Fourteenth Amendment. Indeed, such efforts are indispensable "if the dream of one Nation, indivisible, is to be realized." *Grutter*, 539 U.S. at 332.

I.
AN ARRAY OF FEDERAL POLICIES AND PROGRAMS HAVE INHIBITED THE ACQUISITION OF CAPITAL IN AND THE ECONOMIC DEVELOPMENT OF AFRICAN-AMERICAN COMMUNITIES, THEREBY PREVENTING THE FORMATION AND DEVELOPMENT OF AFRICAN-AMERICAN OWNED BUSINESSES THAT ARE POSITIONED TO COMPETE FOR GOVERNMENT CONTRACTS.

The United States supports its contention that eliminating discriminatory barriers to minority business development provides a compelling interest for the Section 8(a) and DoD procurement programs by introducing ample evidence of ongoing, vast disparities in the formation, operation, expansion, and utilization of African-American and other minority-owned businesses. Such evidence strongly supports the inference that these disparities are not due to chance but, rather, are the result of intentional discrimination and other racial barriers in the private market across industry lines at the federal, state, and local levels. *Cf. Hazelwood Sch. Dist. v. United States.*, 433 U.S. 299, 309 n.14 (1977). The DoD's passive participation in this discrimination through its substantial reliance on the private market for its military products provides a strong basis in evidence for the Section 8(a) and DoD programs. *See, e.g.*, Def's Mem. Supp. Summ. J. at 29-50; NAACP Legal Defense & Educational Fund, Brief of *Amicus Curiae* in Opposition to Plaintiff's Motion for a Preliminary Injunction, filed March 8, 1996 [hereinafter "LDF Brief"] at 28-34. "It is beyond dispute that any public entity, state or federal,

has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989); *see also Adarand Constr. Inc. v. Slater*, 228 F.3d 1147, 1165 (10th Cir. 2000) ("[W]e readily conclude that the federal government has a compelling interest in not perpetuating the effects of racial discrimination in its own distribution of federal funds *and* in remediating the effects of past discrimination in the government contracting markets created by its disbursements."); *accord Sherbrooke Turf, Inc. v. Minn. Dep't of Transp.*, 345 F.3d 964, 969 (8th Cir. 2003).

In addition, however, the federal government's own significant contributions to perpetuating the structural inequities that have systematically impeded business development among socially and economically disadvantaged minorities – especially African Americans – substantially bolsters the government's constitutional analysis.[2] From the founding of this country, all branches of the federal government worked aggressively to entrench the institution of slavery and to perpetuate the subjugation and dehumanization of African Americans,

[2]It is not surprising that the government does not discuss its own complicity in creating and maintaining discriminatory barriers that impede minority business development and economic opportunities. *Cf. Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 290 (1986) (O'Connor, J., concurring) ("The imposition of a requirement that public employers make findings that they have engaged in illegal discrimination before they engage in affirmative action programs would severely undermine public employers' incentive to meet voluntarily their civil rights obligations."). Any failure on the part of the government to present such evidence does not preclude a finding that discrimination in fact occurred. Contemporaneous findings of past governmental discrimination before or at the time of the institution of the programs at issue in this case are not a precondition to the constitutional validity of the government's affirmative action efforts. *See id.* ("A violation of federal statutory or constitutional requirements does not arise with the making of a finding; it arises when the wrong is committed.").

including free blacks.[3] After a brief period of Reconstruction following the Civil War, the federal government betrayed African Americans' aspirations for equality by endorsing Jim Crow policies of racial apartheid.[4] In the twentieth century – both before and after *Brown* and the other seminal civil rights victories of the 1950s and 1960s – federal courts, legislators, and administrative agencies all contributed to maintaining a racially tiered society that continues to deprive African Americans of social, political, and economic capital.[5]

Of particular significance in this case are federal policies that contributed to the systemic denial of access to capital, a critical barrier to minority business development.[6] Through the

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[3]*See, e.g., Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857); *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 540 (1842); *see generally* AFRICAN AMERICANS AND THE LIVING CONSTITUTION (John Hope Franklin & Genna Rae McNeil eds., 1995); DON H. FEHRENBACHER, THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENT'S RELATIONS TO SLAVERY (2001).

[4]*See, e.g.*, Morrill Act, ch. 841, § 1, 26 Stat. 417, 418 (1890) (funding segregated land-grant colleges); Hill-Burton Hospital Survey and Construction Act, Pub. L. No. 79-725, § 622(f)(1), 60 Stat. 1040, 1043 (1946) (funding segregated hospitals); *The Civil Rights Cases*, 109 U.S. 3 (1883); *Plessy v. Ferguson*, 163 U.S. 537 (1896); *see generally* A. LEON HIGGINBOTHAM, SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS 81-151 (1996).

[5]For instance, New Deal legislation, at the insistence of Southern congressmen, excluded domestic servants and agricultural workers – who, at the time, were disproportionately African American – from old age pension coverage and employment benefits. For decades thereafter, the federal government administered these and other federal welfare programs in racially discriminatory ways. *See generally* ROBERT C. LIEBERMAN, SHIFTING THE COLOR LINE 24-25, 39, 44, 59-60 (1998); JILL QUADAGNO, THE COLOR OF WELFARE (1994); Jill Elaine Hasday, *Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations*, 90 GEO. L.J. 299 (2002); Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1347-53 (1987).

[6]*See, e.g., Croson*, 488 U.S. at 499 ("[T]here is no doubt that the sorry history of both private and public discrimination in this country has contributed to a lack of opportunities for black entrepreneurs."); LDF Brief at 30-32; Def's Mem. Supp. Summ. J. at 41-42; THE COMPELLING INTEREST FOR AFFIRMATIVE ACTION IN FEDERAL PROCUREMENT: A PRELIMINARY SURVEY, 61 FED. REG. 26042 (May 25, 1996).

1970s, the Federal Housing Administration ("FHA") and other government agencies severely limited black home-ownership – one of the most important routes to obtaining equity in American society – by institutionalizing overtly discriminatory mortgage lending practices and effectively excluding African Americans from every major federal housing support program.[7] The reach of these discriminatory federal housing policies extended far into the private sector. Through at least the 1980s, federal regulators largely acquiesced as private banks patterned their individual and commercial lending policies on the discriminatory practices of the FHA.[8]

Discriminatory lending practices also significantly undermined African American business development in the agricultural context. Throughout much of the twentieth century, "[m]inority farmers have lost significant amounts of land and potential farm income as a result of discrimination" by the U.S. Department of Agriculture ("USDA") in the processing and allocation of loans and other federal farm support programs. *See* U.S. DEPARTMENT OF

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[7]*See* KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 196-218 (1985); MELVIN L. OLIVER & THOMAS M. SHAPIRO, BLACK WEALTH/ WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 15-18 (1995) [hereinafter BLACK WEALTH/WHITE WEALTH]; *see also Gautreaux v. Romney*, 448 F.2d 731 (7th Cir. 1971) (holding that HUD was complicit in the Chicago Housing Authority's discriminatory housing programs), *rev'd on other grounds sub nom*. *Hills v. Gautreau*x, 425 U.S. 284 (1976); *Thompson v. U.S. Dep't of Housing & Urban Development*, No. CIV.A.MJG-95-309, 2005 WL 27533, at *4, *36 (D.Md. Jan. 6, 2005) (finding that HUD and other federal government defendants violated the Fair Housing Act because they "failed to take adequate action to disestablish the vestiges of the discrimination they had participated in imposing" upon African-American public housing residents). Opportunities for African-American entrepreneurs were further constrained by federal "urban renewal" policies that devastated black urban neighborhoods and reinforced patterns of segregation. *See* ARNOLD R. HIRSCH, MAKING THE SECOND GHETTO: RACE AND HOUSING IN CHICAGO 1940-1960, at 254-55 (2d ed. 1998).

[8]*See* Glenda G. Sloane, *Creative Financing and Discrimination: Discrimination in Home Mortgage Financing*, *in* A SHELTERED CRISIS: THE STATE OF FAIR HOUSING IN THE EIGHTIES 85-87 (U.S. Civil Rights Commission ed., 1983); Melvin L. Oliver & Thomas M. Shapiro*, Wealth and Racial Stratification, in* 2 AMERICA BECOMING 241 (Neil J. Smelser *et al.* eds., 2001).

AGRICULTURE, CIVIL RIGHTS AT THE UNITED STATES DEPARTMENT OF AGRICULTURE: A REPORT BY THE CIVIL RIGHTS ACTION TEAM 30-31 (Feb. 1997)*, cited in Pigford v. Glickman*, 185 F.R.D. 82, 88 (D.D.C. 1999), *aff'd*, 206 F.3d 1212 (D.C. Cir. 2000) (approving a settlement between the USDA and a large class of African-American farmers who alleged that they had been subjected to such discrimination as recently as the 1990s).

Twentieth-century federal government policies further prevented African Americans from developing the technical skills, social networks, and work experience necessary to launch businesses that would be positioned to take advantage of federal procurement opportunities.[9] Contracting and government-funded training programs "replicated the segregated race relations

[9]For example, the development of business experience and skills was inhibited by federal policies that effectively sanctioned the racially exclusionary practices of labor unions, such as Congress's rejection of efforts to include anti-discrimination provisions in the National Labor Relations Act, *see* Stephen Plass, *Dualism and Overlooked Class Consciousness in American Labor Laws*, 37 HOUS. L. REV. 823, 851-52 (2000), and its intervention to protect white union members against wage competition from black workers through the Davis-Bacon Act. *See* David Bernstein, *The Davis-Bacon Act: Vestige of Jim Crow*, 13 NAT'L BLACK L.J. 276, 281-87 (1994); *see also United Steelworkers of America v. Weber*, 443 U.S. 193, 198 n.1 (1979); Joshua B. Freeman, *Hardhats: Construction Workers, Manliness and the 1970 Pro-War Demonstrations*, 26 J. OF SOC. HIST. 737 (1993) (chronicling how federal officials "choreographed resistance to the desegregation of the construction industry" in the 1970s). Federally-funded state employment agencies provide another example of overt government support for employment discrimination. Into the 1970s, these agencies were still channeling blacks into less desirable positions and accommodating employers' discriminatory hiring practices. DESMOND KING, SEPARATE AND UNEQUAL: BLACK AMERICANS AND THE U.S. FEDERAL GOVERNMENT 108, 172-89, 199-201 (1995) [hereinafter KING, SEPARATE AND UNEQUAL]; *see also NAACP v. Brennan*, 360 F. Supp. 1006 (D.D.C. 1973) (finding federal liability for discrimination by state-owned employment services funded by the Department of Labor).

tolerated in Federal government departments."[10] Such discrimination has been particularly entrenched in DoD contracting.[11]

Until the 1960s, the federal civilian workforce was almost entirely segregated and "[b]lack American workers infrequently advanced beyond the lower grade or the more unattractive clerical and custodial bureaucratic positions."[12] Through the 1970s, discriminatory policies continued to prevent African Americans from making substantial inroads into the senior grades of federal government employment.[13] Although the military was officially desegregated

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[10]KING, SEPARATE AND UNEQUAL, at 76; *see also id.* at 96-108 (detailing discrimination in government contracts and apprenticeships in the 1930s -1960s); U.S. COMM'N ON CIVIL RIGHTS, MINORITIES AND WOMEN AS GOVERNMENT CONTRACTORS 20-21 (1975) (reporting "negative and sometimes hostile attitudes of government contracting specialists" towards minority firms); *Fullilove v. Klutznick*, 448 U.S. 448, 467 (1980) (summarizing evidence that government procurement officers at all levels use their discretion to disfavor minority businesses).

[11]*See, e.g.*, *Small Disadvantaged Business Issues: Hearing before the House Comm. on Armed Servs.*, 102nd Cong. 20 (1981) (statement by former Rep. Parren Mitchell) ("[T]he Department of Defense in the long years that I was in Congress, and since then, was and has been hostile to minority businesses."); 131 Cong. Rec. 17,447 (1985) (statement by Rep. John Conyers) (affirmative action needed to break down "buddy-buddy contracting" at the DoD); *id.* (statement of Rep. Patsy Schroeder) (an "old boy's club" in DoD contracting excludes many minorities from business opportunities); *Department of Defense: Federal Programs to Promote Minority Business Development: Hearing Before the Subcomm. on Minority Enter., Fin.& Urban Dev. of the House Comm. on Small Bus.*, 103d Cong. 49 (1993) (statement of Rep. Lucille Roybal-Allard) ("Old attitudes and habits die hard . . . . Defense contracting has, traditionally, been a closed shop. Only a select few need apply.").

[12]KING, SEPARATE AND UNEQUAL, at 108; *see also Chisholm v. U.S. Postal Service*, 665 F.2d 482 (4th Cir. 1981) (upholding finding that the postal service had employed a discriminatory promotional system in its Mecklenburg County, North Carolina facility that relegated black employees to lower level craft jobs).

[13]KING, SEPARATE AND UNEQUAL, at 207; *see also Luevano v. Campbell*, 93 F.R.D. 68 (D.D.C. 1981) (approving consent decree in which the U.S. Office of Personnel Management agreed to phase out an examination, used to identify candidates for entry-level federal professional and administrative jobs, which had a disparate impact upon Hispanics and African Americans).

by President Truman's Executive Order in 1949, African Americans also progressed slowly into leadership ranks and met with substantial resistence.[14] The military and civilian workforces have become increasingly diverse in the past decade but prior discrimination still lingers, especially at the higher echelons, and depresses minority business opportunities in federal contracting due to the revolving door between public service and federal contracting jobs.[15]

The continuing effects of these government-sanctioned or -sponsored discriminatory policies are evident in the structural inequalities that limit the employment and asset-building opportunities of African Americans even today.[16] Accordingly, the federal government's complicity in this country's history of racial oppression reinforces the conclusion that Congress acted well within its remedial powers in authorizing race-conscious remedies in the Section 8(a)

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[14]Exec. Order No. 9981, 13 Fed. Reg 4313 (July 26, 1948); *see also* KING, SEPARATE AND UNEQUAL, at 112-41; Brief of Amici Curiae Julius W. Becton et al. at 11, 15-16, *Grutter* (No. 02-241) [hereinafter Military Brief] (describing how the "Army [and the other branches of the Armed Services] initially resisted President Truman's command to integrate" and that throughout the 1960s and 1970s, the military continued to be plagued with "racial tension and unrest" and "experienced a demoralizing and destabilizing period of internal racial strife").

[15]PROJECT ON GOVERNMENT OVERSIGHT, THE POLITICS OF CONTRACTING (2004), *available at* http://www.pogo.org/p/contracts/c/co-040101-contractor.html (documenting revolving door between government and defense contractors); *see also* Leslie Wayne, *Pentagon Brass and Military Contractors' Gold*, N.Y. TIMES, June 20, 2004, at C1.

[16]*See, e.g.*, Timothy Bates, *Commercial Bank Financing of White- and Black-Owned Small Business Start-ups*, 31 Q. REV. OF ECON. & BUS., No. 1, 64, 79 (1991) ("[T]he findings indicate that black businesses are receiving smaller loans than whites - not because they are riskier, but, rather, because they are black-owned businesses."); BLACK WEALTH/WHITE WEALTH at 45, 48 (African Americans "have faced levels of hardship in their pursuit of self-employment that have never been experienced as fully by or applied as consistently to other ethnic groups," which have resulted in "low levels of black business development and has kept black businesses small"); JOSEPH LUPTON & FRANK STAFFORD, INSTITUTE FOR SOCIAL RESEARCH, HOUSEHOLD FINANCIAL WEALTH: PANEL STUDY OF INCOME DYNAMICS (Jan. 2000), *at* http://psidonline.isr.umich.edu/Publications/Papers/wealthcomp.pdf (for every dollar of wealth the median white household held in 1999, the median black household held 9 cents); *see also* LDF Brief at 29-34.

and DoD procurement programs to help individual, disadvantaged businesses overcome such exclusionary barriers and participate fully in the free enterprise system and, thus, provides an additional and alternative basis for summary judgment in favor of defendants.

II.
THE SUPREME COURT'S RECENT LANDMARK DECISION IN *GRUTTER V. BOLLINGER* PROVIDES FURTHER SUPPORT FOR THE CONCLUSION THAT THE FEDERAL GOVERNMENT HAS A COMPELLING INTEREST IN USING THE SECTION 8(a) PROGRAM TO ELIMINATE DISCRIMINATORY BARRIERS THAT IMPEDE MINORITY BUSINESS DEVELOPMENT.

Grutter v. Bollinger marks the first time in recent years that the Supreme Court has specifically endorsed the constitutionality of a public institution's affirmative action program.[17] Although *Grutter* dealt specifically with the University of Michigan Law School's use of race-conscious admissions policies to obtain the educational benefits that flow from a diverse student body, its teachings extend beyond the context of higher education.[18] The *Grutter* decision bolsters the conclusion that the federal government's asserted interest in this case – breaking down discriminatory barriers which it fostered and perpetuated that impede minority business development – is compelling for purposes of constitutional strict scrutiny analysis.

While the University of Michigan did not advance an explicitly remedial interest as its stated purpose for engaging in affirmative action, the Court clearly linked its analysis of the

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[17] *Gratz v. Bollinger*, 539 U.S. 244 (2003), the companion case to *Grutter*, does not qualify *Grutter*'s analysis of the compelling interest prong of strict scrutiny analysis. In *Gratz,* the Supreme Court held only that the University of Michigan's undergraduate admissions process was not narrowly tailored to its asserted compelling interest. *See Gratz,* 539 U.S. at 268.

[18] Although *amicus* recognizes that the Court in *Grutter* did not specifically address the constitutionality of minority business enterprise programs such as those at issue here, the subtext of the Court's decision – that our public institutions should be representative of our pluralistic society in order to promote civic participation and to ensure the broader legitimacy of those institutions – applies with equal force.

university's compelling interest in its race-conscious admissions policies to the legacy of racial discrimination in this country and the need for equal opportunity, inclusion, and full citizenship. The Court's citation of its previous decisions in *Brown* and *Sweatt v. Painter,* 339 U.S. 629 (1950), confirms the connection between affirmative action and the broader constitutional mandate to eliminate the discriminatory barriers to equality of opportunity that are the legacy of this nation's long history of racial apartheid. *See Grutter*, 539 U.S. at 331-33; *see also id.* at 345 (Ginsburg, J., concurring) ("It is well documented that conscious and unconscious race bias, even rank discrimination based on race, remain alive in our land, impeding realization of our highest values and ideas."). Thus, *Grutter* suggests that the federal government has a compelling interest in implementing programs that ensure its continuing legitimacy in a heterogeneous society and promote effective participation in civic life.[19]

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[19] Courts and scholars have recognized the extent to which *Grutter* has impacted the affirmative action landscape beyond the context of higher education. *See, e.g.*, *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 606 (9th Cir. 2004); *Petit v. City of Chicago*, 352 F.3d 1111, 1114-1115 (7th Cir. 2003); *Rothe Development Corp. v. U.S. Dep't of Defense*, 324 F. Supp. 2d 840, 857 n.12 (W.D. Tex. 2004); *Builders Ass'n of Greater Chicago v. City of Chicago*, 298 F. Supp. 2d 725, 742 (N.D.Ill. 2003); *see also* Linda S. Greene, *The Constitution and Racial Equality After* Gratz *and* Grutter, 43 WASHBURN L.J. 253, 258 (2004) ("*Gratz* and *Grutter* provide a foundation for a broader, more inclusive vision of equality and citizenship under the Fourteenth Amendment, a fitting tribute to *Brown* on its fiftieth anniversary."); Douglas Laycock, *The Broader Case for Affirmative Action: Desegregation, Academic Excellence, and Future Leadership*, 78 TUL. L. REV. 1767, 1770 (2004) (*Grutter* expanded the justification for affirmative action to include "promoting racial tolerance and understanding; developing workers, citizens, and leaders for a racially diverse society; and preserving the legitimacy of American government") [hereinafter Laycock, *Future Leadership*]; Kenneth Karst, *The Revival of Forward-Looking Affirmative Action*, 104 COLUM. L. REV. 60, 66 (2004) (*Grutter* highlighted the "compelling importance" of "racial and ethnic integration in the leadership of American institutions in both the public and private sectors"); Elizabeth S. Anderson, *Racial Integration as a Compelling Interest*, 21 CONST. COMMENTARY 15, 40 (2004) (*Grutter* upholds "the power to use racial means to integrate the institutions of civil society . . . as a means to promote equal opportunity and democratic ideals"); Cynthia Estlund, *Taking* Grutter *to Work*, 7 GREEN BAG 2d 215, 218 (2004) ("*Grutter* both broke the stranglehold of the conventional remedial paradigm, in which history was reduced to a parsimonious reckoning of institutional debts owed, and cured

A. By Breaking Down Longstanding Discriminatory Barriers to Business Development, the Section 8(a) and DoD Programs Provide Critical Opportunities for Disadvantaged Minority Entrepreneurs to Develop Skills Needed to Contribute to the Nation's Economic Vitality and Civic Life.

In *Grutter*, the Supreme Court emphasized that "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized." 539 U.S. at 332. The entrepreneurial skills that the Section 8(a) and DoD programs seek to develop are no less important to the vitality of this country's civic life than the legal training that the University of Michigan Law School provides. If the University of Michigan Law School has a compelling interest in ensuring that "[a]ccess to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America," *id.* at 332-33, then surely the federal government has an equally compelling interest in breaking down discriminatory barriers that prevent equal access to business development – and thus entrepreneurial opportunity more generally.

Congress has explicitly recognized that promoting the ability of small businesses to compete in the global economy is critical to the nation's fundamental interests:

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the historical amnesia of the conventional diversity argument."); Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 60 (2003) (the Supreme Court's analysis of the law school's compelling interest in using diversity to facilitate the "achievement of extrinsic social goods like professionalism, citizenship, or leadership" makes sense "only if there is an independently compelling interest in the actual attainment of these goods"); Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 122 (2003) (*Grutter* "change[d] the scale of what we are confronting. . . [and] allowed us to take advantage of what has emerged as a national consensus among university, business, and military leaders on the value of racial inclusiveness").

> Only though full and free competition can free markets, free entry into business, and opportunities for the expression and growth of personal initiative and individual judgment be assured. The preservation and expansion of such competition is basic not only to the economic well-being but to the security of this Nation. Such security and well-being cannot be realized unless the actual and potential capacity of small businesses is encouraged and developed.

15 U.S.C. § 631(a) (2000).

Section 8(a) and the DoD procurement programs focus particularly on capturing the vast untapped potential of businesses owned by socially and economically disadvantaged individuals. Promoting the development of small businesses among disadvantaged minorities is particularly important given current demographic trends. Currently, minorities constitute 31 percent of the general population;[20] by 2050 that number will have increased to approximately 50 percent.[21] Minorities constitute 56 percent of workforce growth; within the next 20 years that figure will increase to between 64 and 70 percent.[22] Recognizing the import of these demographic trends, the Minority Business Development Agency (MBDA) recently stated:

> [T]he economic imperative is clear; given the changing demographics and increasing importance of job creation, U.S. economic growth will be stymied by the failure to mobilize all of its business resources. To maximize the Nation's growth, including in consumption, Gross National Product, and tax base, U.S. policies must ensure that

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[20]U.S. DEP'T OF COMMERCE, CENSUS BUREAU, U.S. SUMMARY: 2000, at 2 (July 2002), *available at* http://www.census.gov/prod/2002pubs/c2kprof00-us.pdf.

[21]U.S. DEP'T OF COMMERCE, CENSUS BUREAU, U.S. INTERIM PROJECTIONS BY AGE, SEX, RACE, AND HISPANIC ORIGIN (Mar. 18, 2004), *available at* http://www.census.gov/ipc/www/usinterimproj. Chicago, Los Angeles, and New York already have majority-minority populations. U.S. DEP'T OF COMMERCE, CENSUS BUREAU, USA QUICK FACTS (Apr. 1, 2000), *at* http://quickfacts.census.gov/qfd/index.html.

[22]GLENN YAGO & AARON PANKRANTZ, U.S. DEP'T OF COMMERCE, MINORITY BUSINESS DEVELOPMENT AGENCY, DEMOCRATIZING CAPITAL FOR EMERGING DOMESTIC MARKETS 5 (2000), *available at* http://www.mbda.gov/documents/democratizing.pdf [hereinafter DEMOCRATIZING CAPITAL].

businesses owned by minority entrepreneurs are brought into the economic mainstream.[23]

The United States' prosperity cannot be sustained without mobilization of all its human capital, particularly the burgeoning minority population. Despite their critical importance to economic vitality, disadvantaged minority businesses would, in the absence of affirmative action, be effectively shut out of the government contracting procurement process altogether due to the lingering effects of pervasive discrimination by private and public actors. The rate at which minorities participate in business remains lower, and for certain minority groups significantly lower, than that of the majority population.[24] Minority-owned firms constitute only 15 percent of all businesses, and employ only 4 percent of U.S. employees.[25] Even among those minority entrepreneurs who manage to start their own firms, there is still a significant disparity between their limited representation in the economy and their ability to compete for contracts.[26] Action taken to reduce these disparities does not exemplify "simple racial politics" or a

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[23]U.S. DEP'T OF COMMERCE, MINORITY BUSINESS DEVELOPMENT AGENCY, ACCELERATING JOB CREATION AND ECONOMIC PRODUCTIVITY: EXPANDING FINANCING OPPORTUNITIES FOR MINORITY BUSINESSES 2 (2004), *available at* http://www.mbda.gov/documents/Report_Cover.pdf [hereinafter EXPANDING FINANCING OPPORTUNITIES]; *see also* DEMOCRATIZING CAPITAL at iv (noting demographic trends which "point to a disproportionately white retired population, directly or indirectly dependent upon an economic base whose contributors are younger members of diverse racial and ethnic makeup").

[24]EXPANDING FINANCING OPPORTUNITIES at 10 (the business participation rate (number of business owners per 1,000 persons in a particular ethnic or racial group) for minority groups is lower than that of the non-minority population).

[25]*Id.* at 2.

[26]*See* U.S. DEP'T OF COMMERCE, CENSUS BUREAU, 1997 ECONOMIC CENSUS: SURVEY OF MINORITY-OWNED BUSINESS ENTERPRISES, at 9 (2001) *available at* http://www.census.gov/prod/ec97/e97cs-7.pdf (minority firms receive only 3.2 percent of the total sales and receipts by U.S. businesses); *see also Rothe*, 324 F. Supp. 2d at 853.

preoccupation with "racial balancing." *Croson*, 488 U.S. at 493, 507. Rather, such efforts demonstrate an appreciation that breaking down barriers to minority business development is imperative to the nation's economic vitality. Furthermore, government contracting opportunities provide a critical realm for encouraging entrepreneurial activity in view of the significant resources that the federal government invests in research and development.[27]

Specifically, the Section 8(a) program demonstrably contributes to the development of the core business competencies of minority-owned businesses and in turn expands the number of viable firms in the supplier and contractor chain that can compete for work. The Small Business Association found that of the socially disadvantaged businesses ("SDB") surveyed in 2003, 86.2 percent were independently operational at graduation from the program. Moreover, ten years after entry in the Section 8(a) program, SDBs had lower failure rates than new businesses overall.[28]

Capital infusion in minority businesses can also create a beneficial cycle of wealth creation, promote job and skills development, and encourage other minority entrepreneurs to

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[27]*See* AMERICAN ASSOCIATION FOR THE ADVANCEMENT OF SCIENCE, RESEARCH AND DEVELOPMENT FY 2005, at ch. 1 & tabl. I-13 (2004), *available at* http://www.aaas.org/spp/rd/05pch1.htm (federal government funds constituted approximately 30 percent of the total U.S. investment in research and development in 2003); *see also* Elizabeth Olson, *Uncle Sam Wants You (to Apply for a Grant)*, N.Y. TIMES, Nov. 4, 2004, at C6 (describing federal agencies' efforts to spur technology innovation by small businesses).

[28]U.S. SMALL BUSINESS ADMINISTRATION, REPORT TO THE U.S. CONGRESS ON MINORITY SMALL BUSINESS AND CAPITAL OWNERSHIP DEVELOPMENT FISCAL YEAR 2003, at 5,14, *available at* http://www.sba.gov/8abd/408-2003-version-011.pdf [hereinafter SBA REPORT]. The Section 8(a) program is evaluated annually to assess the extent to which the program has assisted in the development of firms owned and controlled by socially and economically disadvantaged individuals, and the benefits and costs that have accrued to the economy and the Government as a result of the program. *See* 15 U.S.C. §§ 636(j)16(A) & (B); 15 U.S.C. §§ 636(j)(16)(B)(ii).

start and grow businesses. Investment in minority-owned businesses, which typically hire minorities in greater numbers than majority-owned businesses, promotes investment in minority neighborhoods, and allows these communities to contribute back to the economy through purchase of goods and services and increased tax revenue.[29] Thus, the Section 8(a) program encourages greater economic participation of minority communities in the economic life of the nation overall.

The Section 8(a) program's development of successful minority-owned businesses also allows those employed by the government, from top-level decision makers to troops and civilian employees, to have the opportunity to interact and work with diverse groups of people in business leadership roles. Minority firms that are given the opportunity to establish a successful track record through the Section 8(a) program help break the "cycle of negativity," in which perceptions of minority-owned firms as inherently high-risk and prone to failure lead to lack of access to capital, thereby further increasing the risk of failure for those businesses. *See* Def.'s Mem. Supp. Summ. J. at 42-44. By combating these negative perceptions of the competency of minority-owned firms, the Section 8(a) program thus leads to increased access to contracting opportunities for all minority-owned businesses.[30]

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[29]SBA REPORT, at 13-14 (For fiscal year 2003, Section 8(a) program firms provided over 180,000 jobs and were involved in all areas of community development and volunteer work).

[30]*See* Brief of *Amicus Curiae* National Education Association *et. al.* at 12-13, *Grutter* (No. 02-241) (citing empirical research which "repeatedly and consistently confirmed the common-sense understanding that interracial contact can combat stereotypes and prejudice, and make individuals more comfortable relating to members of other racial groups."); *see generally,* Stephen C. Wright, et. al, *The Extended Contact Effect: Knowledge of Cross-Group Friendships and Prejudice*, 74 J. PERSONALITY & SOC. PSYCHOL. 73 (1997).

According to the fundamental economic principle that artificial barriers to competition inhibit economic efficiency, the cost of continued exclusion of minorities from equality of opportunity in the economic sphere will be borne not only by minorities, but by society as a whole.[31] Andrew Brimmer, former member of the Federal Reserve Board of Governors and former Assistant Secretary of Commerce, estimated that the disparate treatment of African Americans cost the U.S. economy approximately $241 billion in 1993, 3.8 percent of gross domestic product. Brimmer's calculations include the loss to the economy resulting from African Americans not being employed to their full capacity, and not receiving education and training equivalent to that received by their white counterparts.[32] Accordingly, by increasing the number of firms that are ready, willing, and able to compete for both public and private sector work, the Section 8(a) program benefits U.S. society as a whole by ensuring the effective functioning of a free market economy.[33]

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[31]*See, e.g.,* Neal R. Peirce, *The Economic Drag of Discrimination*, 24 NAT'L J. 770 (1992) ("[N]ew research suggests that by tolerating racial discrimination in and around their communities, Americans have been paying a far higher price for their prejudices than they ever would have dreamed."); Florence Wagman Roisman, *Sustainable Development in Suburbs and Their Cities: The Environmental and Financial Imperatives of Racial, Ethnic, and Economic Inclusion*, 3 WIDENER L. SYMP. J. 87, 97 (1998) ("[R]acial, ethnic, and economic segregation imposes staggering economic and environmental costs.").

[32]Andrew Brimmer, *Economic Cost of Discrimination Against Black Americans*, *in* ECONOMIC PERSPECTIVES ON AFFIRMATIVE ACTION 11 (Margaret Simms ed., 1995).

[33]U.S. society will also benefit by the gains in productivity that the government can realize from greater diversity in teams that work on DoD projects. Of influence to the Court in *Grutter*, American business *amici* illustrated that benefits from "cross cultural competence" achieved in diverse settings are not limited to academic institutions, but are also realized in the employment context. *See* Brief of *Amicus Curiae* General Motors Corp. at 12, *Grutter* (No. 02-241) [hereinafter "GM Brief"]; Brief of Amicus Curiae 65 Leading American Businesses at 7, *Grutter* (No. 02-241) (noting that employees who can work well with people of other races, and can view problems from multiple perspectives create more cohesive, and productive work forces

Developing talented entrepreneurs from socially and economically disadvantaged backgrounds is critical not only to the nation's economic vitality. Entrepreneurs are also a bulwark of American civic life. In *Grutter*, the Supreme Court emphasized the strong representation of lawyers in the nation's political leadership. 539 U.S. at 332 ("[L]aw school[s] represent the training ground for a large number of our Nation's leaders"). American business leaders similarly fill the nation's legislative halls.[34] Furthermore, the nation's charitable and social welfare organizations depend on critical contributions from American corporations as well as the foundations that legendary entrepreneurs have created.[35] More fundamentally, access to economic opportunity is a necessary prerequisite to meaningful democratic participation.[36]

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better able to respond to the needs of diverse customers and business partners). *See also* CYNTHIA ESTLUND, WORKING TOGETHER (2003) (stating that cooperation among diverse workers and firms increases workplace productivity by facilitating unique and creative approaches to problem-solving, combats stereotypes, and promotes cross-racial understanding); Poppy Lauretta McLeod *et al.*, *Ethnic Diversity and Creativity in Small Groups*, 27 SMALL GROUP RES. No.2, May 1996, at 248-264 (providing empirical support for the conclusion that heterogeneous groups generate more creative solutions than homogenous groups).

[34]In the 109th Congress,160 Representatives and 58 Senators list their occupation as law, while 163 Representatives and 30 Senators list business. MILDRED L. AMER, CONGRESSIONAL RESEARCH SERVICE, MEMBERSHIP OF THE 109TH CONGRESS: A PROFILE 3 & n.6 (2004), *available at* www.senate.gov/reference/resources/pdf/RS22007.pdf.

[35]*See* AMERICAN ASSOCIATION OF FUNDRAISING COUNSEL, TRUST FOR PHILANTHROPY, GIVING USA 2004, *available at* http://www.aafrc.org/about_aafrc/bysourceof66.html (corporations and corporate foundations contributed $13.46 billion dollars to charity in 2003).

[36]Kenneth L. Karst, *Participation and Hope*, 45 UCLA L. REV. 1761, 1775 (1998) ("No remedy for democracy's deficit can possibly succeed unless it includes strong doses of policy aimed at economic growth and increased equality of economic opportunity."); MICHAEL B. KATZ, THE PRICE OF CITIZENSHIP 357 (2001) ("Civic engagement, or the active practice of political citizenship, depends ... on freedom from want and the fear of impoverishment."); *see generally* SIDNEY VERBA ET AL., VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS 187-196 (1995) (describing correlation between family income and civic participation); JOSEPH STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 214-252 (2002) (arguing, inter alia, that a sound economic development strategy would aim at ensuring broad-based economic

For the foregoing reasons, *Grutter* indicates that removing discriminatory barriers that clog the pipelines into federal contracting is a compelling government interest because it contributes to the vitality of the nation's economy and civil society.

B. Public Institutions Must Be Open And Accessible To Support Democratic Legitimacy In A Multicultural Society.

As the Supreme Court noted with approval in *Grutter*, the United States' brief reaffirmed that "ensuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective." *Id.* at 331-32 (quoting Brief of *Amicus Curiae* United States at 13, *Grutter* (No. 02-241)). In a diverse society, institutions which are not inclusive cannot be fully accountable to constituents, clients, or other stakeholders. Over time, such institutions lose the moral and political authority required to be effective in the spheres in which they operate.[37] It is precisely such concerns that led the Court in *Grutter* to conclude that "[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity." *Id.* at 332.

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opportunity rather than concentration of power in the hands of an economic elite).

[37] *See e.g.,* Military Brief at 12, 28-29 (describing how the military's failure in the Vietnam war era to achieve more than token inclusion of minorities in leadership positions created racial divisiveness which jeopardized order, combat readiness, and military effectiveness. The threat "was so dangerous and unacceptable that it resulted in immediate and dramatic changes intended to restore minority enlisted ranks' confidence in the fairness and integrity of the institution."); *Grutter*, 539 U.S. at 331 (concluding, based on the experience of the military, that an integrated officer corps is essential to the institutions' ability to fulfill its principal mission of providing national security); *see also* GM Brief at 23-24 ("A stratified work force, in which whites dominate the highest levels of the managerial corps and minorities dominate the labor corps, may foment racial divisiveness.").

The Section 8(a) program bears significant similarities to the University of Michigan Law School's affirmative action programs because both enhance the legitimacy of core national institutions by ensuring that their future leadership does not replicate patterns of racial apartheid. *See id.* at 332. Public institutions that are responsible for allocating scarce resources – whether federal contracts or admission to law school – lose their legitimacy if minorities are substantially excluded. Indeed, democratic government cannot be sustainable over the long term if it unfairly restricts access to political or economic benefits to particular segments of society. *See* THE FEDERALIST NO. 39, at 251 (James Madison) (Jacob E. Cooke ed., 1961) ("It is *essential* to [a republican] government that it be derived from the great body of society, not from . . . a favored class of it. . ."); *Romer v. Evans,* 517 U.S. 620, 633 (1996) (the legitimacy of public institutions depends on public confidence that the "government and each of its parts remain open on impartial terms to all who seek its assistance").[38]

Whatever one's views on the merits of privatization, it is evident that the federal government depends on contractors for a large and increasing portion of its service provision at home and abroad.[39] As a result, the perception of the accessibility of government contracts is

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[38]*See, e.g.,* KENNETH KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 2-10 (1989) (explaining the importance of meaningful equality to citizenship and, by implication, democracy); Laycock, *Future Leadership*, at 1800 ("Failure to educate a leadership class among disadvantaged minority populations would be a permanent threat to equality and social stability. In some states, this threat is imminent and large."). *Cf.* Jared Diamond, *The Ends of the World As We Know Them*, N.Y. TIMES, Jan. 1, 2005, at A13 ("A society contains a built-in blueprint for failure if the elite insulates itself from the consequences of its actions.").

[39]PAUL C. LIGHT, THE BROOKINGS INSTITUTION, FACT SHEET ON THE NEW TRUE SIZE OF GOVERNMENT 3-4 (2003), *available at* http://www.brookings.edu/gs/cps/light20030905.pdf (employment generated by federal contracts increased from 4,441,000 to 5,168,000 jobs between 1999 and 2002 whereas civil service, uniformed military, and postal service employment combined fell from 4,087,000 to 4,060,000 during the same period); Amelia Gruber, *Growth*

crucial to maintaining the public's confidence in the disbursement of taxpayer dollars. Thus, ensuring that federal contracting does not perpetuate discrimination serves to preserve the legitimacy of the federal government in "an increasingly diverse workforce and society." *Grutter*, 529 U.S. at 330. Moreover, the Section 8(a) program, by breaking down discriminatory barriers and helping bring minority businesses into the economic mainstream, leads to the sense of opportunity and inclusion which is a necessary condition for democratic legitimacy.[40]

An integrated contracting force also shapes global perceptions of the United States as a nation committed to the ideal of a pluralistic society in which individuals are afforded equality of opportunity in economic and political life.[41] As private contractors are increasingly deployed to

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Industry, 36 GOV'T EXEC. No.14 (Aug. 15, 2004), *available at* http://www.govexec.com/features/0804-15/0804-15s1.htm (federal agencies' prime contract awards totaled $290 billion in fiscal 2003, an 18 percent increase from fiscal 2002); *see also* LARRY MAKINSON, CENTER FOR PUBLIC INTEGRITY, OUTSOURCING THE PENTAGON: WHO BENEFITS FROM THE POLITICS AND ECONOMICS OF NATIONAL SECURITY? (2004), *available at* http://www.publicintegrity.org/pns/report.aspx?aid=385 (half of the DoD's budget is outsourced to private contractors).

[40]*See* Allen Greenspan, *Economic Challenges in the New Century* (Mar. 22, 2000) (speech before the Annual Conference of the National Community Reinvestment Coalition), *available at* http://www.federalreserve.gov/boarddocs/speeches/2000/20000322.htm ("I have no illusions that the task of breaking down barriers that have produced disparities in income and wealth will be simple. It remains an important goal because societies cannot thrive if significant segments perceive their functioning as unjust.").

[41]During the Cold War, U.S. policymakers recognized the link between U.S. anti-discriminatory policy at home and America's moral authority in the emerging area of human rights and the struggle against communism abroad. *See generally* MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS 254 (2000) (describing impact of international perceptions of domestic race relations on U.S. civil rights policy during the Cold War: "[J]ustice at home will have an impact on the nation's moral standing in a diverse and divided world."); PHILIP A. KLINKNER & ROGERS M. SMITH, THE UNSTEADY MARCH 205 (1999) ("If America's leaders hoped to win the hearts and minds of the world, it could not ignore what discrimination was doing to the hearts and minds of black Americans at home."); *see also* Brief of *Amicus Curiae* United States at 6, *Brown v. Board of Education*, 347 U.S. 483 (1954) (No. 1) ("It is in the context of the present world struggle between freedom and tyranny that the problem of racial discrimination must be viewed.

provide critical services in international missions,[42] integrated work teams enhance the perception of the United States' commitment to this ideal, and contribute to the legitimacy of American efforts to aid nations in the creation of their own democratic pluralistic societies.[43] To the extent that a diverse and integrated DoD contracting force fosters culturally sensitive interaction with diverse peoples around the globe, the ability of the United States to achieve its foreign policy goals is indeed enhanced.[44]

The United States is trying to prove to the people of the world, of every nationality, race, and color, that a free democracy is the most civilized and most secure form of government yet devised by man. We must set an example for others by showing a firm determination to remove existing flaws in our democracy. The existence of discrimination against minority groups in the United States has an adverse effect upon our relations with other countries. Racial discrimination furnishes grist for the Communist propaganda mills, and it raises doubts even among friendly nations as to the intensity of our devotion to the democratic faith.").

[42]*See* Renae Merle, *More Civilians Accompanying U.S. Military; Pentagon is Giving More Duties to Contractors*, WASH. POST, Jan 22, 2003, at A10; Kenneth Bredemeier, *Thousands of Private Contractors Support U.S. Forces in Persian Gulf*, WASH. POST, Mar. 3, 2002, at E1.

[43]*See*, *e.g.*, Walter Pincus, *More Private Forces Eyed for Iraq; Green Zone Contractor Would Free U.S. Troops for Other Duties*, WASH. POST., Mar. 18, 2004, at A25; Esther Schrader, *U.S. Companies Hired to Train Foreign Armies*, L.A. TIMES, Apr. 14, 2002, at A1; *cf.* Tam Cummings, *Military Couple Relives POW Experience from Both Sides*, *in* DEFEND AMERICA, U.S. DEPARTMENT OF DEFENSE NEWS ABOUT THE WAR ON TERRORISM (Apr. 23, 2004), *available at* http://www.defendamerica.mil/articles/apr2004/a042304a.html (describing puzzlement of Iraqi captors at the diversity of a group of U.S. soldiers held captive, leading one captor to ask, "You are American and your friends [are from different ethnic groups]. You are all in the same army and yet you do not fight each other. How can that be so?").

[44]*See supra* notes 30, 33. By contrast, the absence of cross-cultural competence can lead to foreign policy crises. *See e.g., Tavis Smiley: Issue of Racism Missing From the Conversation about Abuse of Iraqi Prisoners at Abu Ghraib* (NPR Broadcast, May 12, 2004); Hamida Ghafour, *Afghans are Fed Up with Security Firm,* L.A. TIMES, Sept. 27, 2004, at A3.

These compelling goals cannot be achieved unless Congress is allowed to utilize approaches, such as the Section 8(a) program, which seek to remedy past wrongs and integrate the paths of opportunity to full civic, social, and economic participation for all races.

III.
THE BURDEN IMPOSED BY THE SECTION 8(A) AND DoD PROCUREMENT PROGRAMS IS MINIMAL AND DIFFUSE.

"[C]ontext matters when reviewing race-based governmental action under the Equal Protection Clause. . . . Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it." *Grutter*, 539 U.S. at 326-27. As described by the government, *see, e.g.,* Def's Mem. Supp. Summ. J. at 50-61, the Section 8(a) program is narrowly tailored to achieve the compelling interest of remedying a long history of racial exclusion and discrimination by eliminating barriers to minority business development. We focus here on one "particularly important" prong of the narrow tailoring inquiry: the limited and minimal extent to which the remedial scheme impairs the rights of third parties. *See U.S. v. Paradise*, 480 U.S. 149, 189 (1987) (Powell, J., concurring).

The burden placed on non-participants by the Section 8(a) and the DoD procurement program is minimal and diffuse. While Congress has not specified any numerical goal for procurement from Section 8(a) participants, the DoD procurement program sets an aspirational goal that 5 percent of contracts be awarded to socially and economically disadvantaged businesses. The DoD procurement program does not contain, however, provisions deemed constitutionally troublesome: it does not award procurements to participants that had previously been awarded to non-participants, *see* §13 C.F.R. 124.309; it does not serve as an "absolute bar" to non-participants from receipt of defense contracts, *Weber,* 443 U.S. at 208; and it does not

reserve a certain percentage of defense contracts for participants using any "rigid numerical quota." *Croson*, 488 U.S. at 508.

Indeed, the DoD program is better likened to a hiring goal which, as the Court explained in *Wygant*, "is not as intrusive as loss of an existing [contract]." 476 U.S. at 282-83. The DoD and the Small Business Administration provide no sanction when, as here, an agency fails to meet a procurement goal: in fact, no more than 3 percent of DoD contract dollars are set aside for the Section 8(a) program. Def's Mem. Supp. Summ. J. at 58. Moreover, given that multiple firms bid for any given contract, DynaLantic does not have a "legitimate firmly rooted expectation" of receipt of any DoD contract. *See Johnson v. Transportation Agency*, 480 U.S. 616, 638 (1987) (holding that where seven applicants sought one promotion, the "denial of the promotion unsettled no legitimate, firmly rooted expectation on the part of" unsuccessful candidates). Indeed, over the last ten years, DynaLantic has had the opportunity to bid for, and has received, numerous DoD contracts accounting for 68 percent of its total revenues, *see* Pl.'s Statement of Undisputed Material Facts ¶2. DynaLantic's claim then is simply that over that same period, it was denied the opportunity to bid for at most two (of numerous) contracts that it might have been awarded.

Lastly, it is clear that Congress has carefully modified both the provisions of and the requirements to participate in the Section 8(a) program over time to ensure that it program benefits socially and economically disadvantaged businesses while minimizing the burden on third parties. Beyond tightening controls on the program and imposing increasingly stringent requirements for participation, Congress has taken repeated steps to keep the program open to and inclusive of all individuals – including nonminorities – who have been socially and economically disadvantaged. These steps reflect Congress's ongoing commitment to enabling

businesses long hampered by discriminatory barriers to fully participate in the global marketplace and to ensuring that the Section 8(a) program is narrowly tailored to effectuate this goal.

CONCLUSION

For the foregoing reasons, *amicus* respectfully suggests that Defendant's motion for summary judgment be granted, and Plaintiff's motion for summary judgment be denied.

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of January, 2005, I served a copy of the foregoing Brief of *Amicus Curiae* upon counsel for other potential amici who may not be enrolled for electronic notice by the Court in this matter, by depositing a copy of the same in the United States mail, first-class postage prepaid, addressed as follows:

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