



**WHITE PAPER: Fight “Rothe”  
(Rothe Development, Inc. vs. US Department of Defense, et al)  
Case 15-5176, US Court of Appeals, DC Circuit  
Legal Action Attacking the 8(a) Program**

**NACA Policy:** NACA supports the SBA 8(a) Business Development Program as the essential, core program for all Native small businesses in government contracting. Rothe’s legal action challenged the use of racial classifications in administering the Small Business Administration’s (SBA’s) 8(a) Business Development program. If successful, these challenges risk the continued viability of 8(a) as an economic development tool for not only Native small businesses and communities, but all minority small businesses certified as 8(a). NACA opposes Rothe and will lead a coalition of similarly-purposed Tribal, Alaska Native, and Native Hawaiian nations, communities, and organizations.

**Ask:** Support NACA’s policy, educate other minority businesses, and sign on to future Amicus Briefings.

**Abstract:** In 1978, Congress enacted PL 95-597 establishing racial classifications under the Small Business Act. The SBA began to use set asides or preferences in awarding government contracts to 8(a) certified small businesses to motivate small business growth and business development through government contracting. The constitutionality of the 8(a) program has been challenged in the courts, most recently by Rothe. The courts continue to maintain there is no violation of constitutional law, and that the program only seeks to assuage historical trauma to certain racial classifications.

**Background:** The 8(a) program continues to successfully set aside contracting opportunities to small businesses who otherwise would likely not receive government contract awards. Small businesses, agency- and government-wide small business goals have been set prescribing the percent of an agency’s procurement budget that each class should receive [see 15 USC 644(g)]. These goals have bolstered overall small business awards in government contracting – to include 8(a) -- to where the government met the 23% goal in fiscal years 2015 and 2016.

Rothe began in 2012 when Rothe Development, Inc., a woman-owned, HUBZone small business, filed suit against the DOD and the SBA, alleging that the 8(a) program violates the Fifth Amendment due-process clause. Rothe argued that race-based laws are constitutional only when they’re narrowly tailored to address a historic wrong, and claimed there was a lack of evidence of historic discrimination in federal contracting. Rothe added that DOD and SBA do not have a compelling government interest justifying the racial classification of businesses. Rothe concluded that the impact of the 8(a) program remains unfounded, and that the 8(a) program, as constructed, cannot mitigate discrimination.

Rothe lost their argument in a lower court decision and subsequently appealed to the US Court of Appeals. At this point, NACA filed an Amicus Brief in support of DOD and SBA to make a point, to which Rothe agreed, that Native American was not a racial classification. Because it was not a racial classification, this *political and economic relationship* was subject to rational review by the judiciary, and not subject to the strict scrutiny argued by Rothe. NACA’s Amicus Brief, was joined by 10 *amici* to include 3 sovereign tribes. In a 2-1 decision, a 3-judge panel rejected Rothe’s challenge, ruling that the program was not unconstitutional based on racial classification. They found the 8(a) program was created to extend federal contracting opportunities to small businesses whose owners have been deprived of opportunities because of prejudgments made concerning their racial, ethnic, or cultural proclivity. However, the program does not inherently apply a “racial presumption” keeping intact the Fifth Amendment’s equal protection requirement.

**Update:** Rothe requested an en banc hearing of the US Court of Appeals, DC Circuit, which was subsequently denied. Rothe subsequently asked for a hearing before the US Supreme Court. In turn, NACA is prepared to marshal the continued support of the coalitions we have formed around our Amicus Brief, and submit an amicus to the Supreme Court.