No. 87-998

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1987

CITY OF RICHMOND,
Appellant,

VS.

J.A. CROSON COMPANY,
Appellee.

On Appeal from the United States Court of Appeals for the Fourth Circuit

BRIEF OF AMICUS CURIAE CITY AND COUNTY OF SAN FRANCISCO, CALIFORNIA

LOUISE H. RENNE*
City Attorney
DENNIS AFTERGUT
Chief Assistant City Attorney
BURK E. DELVENTHAL
MARA E. ROSALES-CORDOVA
Deputy City Attorneys
400 Van Ness Avenue
Room 206
San Francisco, CA 94102
(415) 554-4218
Attorneys for Amicus Curiae City and County of San Francisco
**Counsel of Record*

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BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

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THE INTEREST OF THE CITY AND COUNTY OF SAN FRANCISCO

On April 2, 1984, the City and County of San Francisco ("the City") enacted Chapter 12D of the San Francisco Administrative Code, known as the Minority/Women/Local Business Utilization Ordinance ("Chapter 12D"). Chapter 12D is an affirmative action ordinance that seeks to remedy identified past contracting practices of the City and County of San Francisco that were found to deny minority-owned and women-owned business enterprises ("MBEs" and WBEs" respectively)[1] effective participation in the City's contract award process.

[1] Chapter 12D also affords benefits to San Francisco based firms to offset economic disadvantages faced by local businesses that are not shared by nonlocal businesses.

The enactment of Chapter 12D was preceded by numerous investigations, studies and public hearings by the City's Human Rights Commission at the direction of San Francisco's legislative body, its Board of Supervisors ("the Board"). The Board also held public hearings and received written evidence before adopting Chapter 12D. Relying on the extensive evidence before it, the Board squarely and directly faced the conclusion that public and private discrimination had made it difficult if not impossible for MBE/WBEs to gain a foothold in the marketplace and compete for City contracts. Specifically, although MBEs constitute 33% and WBEs 25% of San Francisco's businesses, and although women constitute nearly 60% and minorities nearly 50% of the City's population, during two years studied, MBE and WBEs combined received less than 2.8% of the City's prime contracts. As to construction contracts, the evidence in the record before the Board was that MBEs had received only .034% of the City's prime contract dollars, although 30.59% of the prime construction contractors in San Francisco are minority. Other contracting practices such as insurance, bonding and fee requirements were also found to create effective obstacles to minority business participation in the City's contracts.

After closely examining the City's contracting procedures and policies, the Board concluded that the low levels of MBE/WBE participation in City contracting stemmed from procurement practices that perpetuate the present effects of past discrimination. Indeed, the Board admitted in its legislation that City procurement practices "have operated in the past, continue to exist and create an invidious form of discrimination against minorities and women who seek to operate businesses within the City and County of San Francisco." Chapter 12D, Section 12.D.2.7.(m).

Faced with a compelling need for affirmative action, the City embarked on a remedial business utilization program. In brief, Chapter 12D sets a goal of awarding 30% and 10% of City prime contract dollars to MBEs and WBEs respectively. MBEs and WBEs receive bidding preferences when competing for City contracts. Joint-ventures between MBEs and WBEs and nonminority/women businesses are also eligible to receive bidding

preferences. For certain construction contracts, Chapter 12D, like Richmond's Minority Business Utilization Plan, requires prime contractors to use good faith efforts to share a portion of their contract with MBE/WBE subcontractors.

Chapter 12D excludes no bidders from the City's prime contract business and does not guarantee that MBEs or WBEs will win contracts. The program is subject to continuing administrative review on a quarterly and annual basis, requires MBEs and WBEs to be certified, contains an expiration date and waiver provisions.

The Associated General Contractors of California and several general construction contractors challenged the provisions of Chapter 12D applicable to construction contracts. Their principal argument was that Chapter 12D violated the Equal Protection Clause of the United States Constitution by establishing a race and gender-conscious quota system in favor of MBEs and WBEs to the exclusion of nonMBE/WBEs. They contended that the bidding preferences precluded them from competing for City public construction projects on the same basis as MBE/WBEs.

In March 1987, a panel of the United States Court of Appeals for the Ninth Circuit rendered its decision on the contractors' claims. *Associated General Contractors v. City and County of San Francisco*, 813 F.2d 922 (9th Cir. 1987) [petition for rehearing and suggestion for rehearing *en banc* pending since April 6, 1987]. Using a modified version of the strict scrutiny standard, the panel concluded that the MBE preferences violated the Equal Protection Clause. Using a mid-level standard of review, the appeals court upheld the WBE preferences as constitutionally permissible.

The Fourth Circuit Court of Appeals in *Croson v. City of Richmond*, 822 F.2d 1355, 1359 (4th Cir. 1987) cites the San Francisco case as support for its holding. The Fourth Circuit holds that Richmond's Minority Business Utilization Plan, like Chapter 12D, lacked an adequate evidentiary foundation. *Id.*, at 1357; *Associated General Contractors v. City and County of San Francisco*, 813 F.2d at 932-934.

A decision striking down or upholding Richmond's Minority Business Utilization Plan would have a direct bearing on Chapter 12D. Like Richmond, San Francisco has a paramount interest in the local legislative authority to fashion limited and reasonable race-conscious remedial measures to ensure that its local public contracting practices not perpetuate the effects of past discrimination. Accordingly, this brief amicus curiae is respectfully submitted in support of the City of Richmond.

SUMMARY OF ARGUMENT

In the instant appeal, this Court has the opportunity to answer a very important question facing municipalities nationwide: What type and quantum of evidence must a municipality produce to justify embarking on a race-conscious remedial business utilization program? In responding to this inquiry, this Court should reject the proposition that particularized local legislative findings of official or intentional discrimination against the benefited classes is a constitutional prerequisite to such programs. A ruling of this nature would virtually eliminate affirmative action programs.

Instead, this Court should focus on evidence that speaks to whether the municipality has a factual premise from which to conclude that city procurement practices deny minority-owned businesses effective participation in city contracting opportunities.

Applying this test in the instant appeal, this Court should uphold the decision to adopt the Minority Business Utilization Plan since the testimonial and statistical evidence before the Richmond City Council warranted a conclusion by that body that remedial affirmative action measures were necessary.

ARGUMENT

SOCIETAL DISCRIMINATION PLUS EVIDENCE THAT MINORITY-OWNED BUSINESSES HAVE BEEN DENIED EFFECTIVE PARTICIPATION IN PUBLIC CONTRACTING OPPORTUNITIES SHOULD BE SUFFICIENT TO JUSTIFY VOLUNTARY RACE-CONSCIOUS REMEDIAL ACTION.

As political subdivisions of the States, municipalities are duty bound to guarantee equal protection of the laws to all of their citizens. *See Wygant v. Jackson Board of Education*, 476 U.S. 267, 291 (1986) (O'Connor, J., concurring). Hence, municipalities have a compelling and substantial interest in addressing through affirmative action past or present racial discrimination in public employment and contracting. *See United States v. Paradise*, ____ U.S. ____, 107 S.Ct. 1053, 1065 (1987) (plurality opinion); *Wygant v. Jackson Board of Education*, 476 U.S. at 277 (plurality opinion); *see* and *cf. Fullilove v. Klutznick* 448 U.S. 448, 498, 515-516 (1980) (Powell, J., concurring). What is not clear is the type and quantum of evidence that a municipality must produce to ensure that it is acting to remedy past discrimination rather than engaging in affirmative action simply as a matter of social policy.

This Court has conveyed a clear message that valid remedial affirmative action programs may not be premised on "societal discrimination" *alone*.[2] *Wygant*, 476 U.S. at 274, 276 (plurality opinion; emphasis added); see also *id.*, at 288 (O'Connor, J. concurring); *Regents of University of California v. Bakke*, 438 U.S. 265, 307, 310 (1978) (opinion of Powell, J.); *see* and *cf. Fullilove*, 448 U.S. at 477-478 (opinion of Burger, C.J.). Beyond societal discrimination, what evidence a majority of this Court would accept as warranting race-conscious remedial action by a local actor is an open question. Resolution of this question is critical, since municipalities need guidance as to when and in what cases they may respond to charges that municipal con-

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[2] The term "societal discrimination" refers to "discrimination not traceable to [the local government's] own actions . . ." *Wygant*, 476 U.S. at 288 (O'Connor, J., concurring).

tracting procedures have prevented minority-owned businesses from effectively competing for public contracting opportunities.

At present, a plurality of this Court has announced one test for assessing whether a municipality's procurement procedures discriminate against minority-owned firms. Quoting *Hazelwood School District v. United States*, 433 U.S. 299, 308 (1977), four members of this Court in *Wygant* indicated that a proper basis for showing prior discrimination is a significant statistical disparity between "the racial composition of [the school's] teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market." 476 U.S. at 275. Applied to the public contracting area, this test means that cities may compare the number of minority-owned contractors in the local community and the number of city contracts awarded to minority firms. *See Croson*, 822 F.2d at 1358, 1359. This formula cannot and should not be the sole means available for a municipality to justify remedial action. The City of Richmond based its decision to enact a remedial affirmative action ordinance on a different factual predicate than that suggested by the *Wygant* plurality. *Id.*, at 1364 (Sprouse, J., dissenting). Accordingly, in the instant appeal, this Court has the opportunity to answer the important question of what type and quantum of evidence is needed to warrant affirmative action in favor of minority-owned businesses.

In *Croson*, the Fourth Circuit suggested that a municipality must have "particularized findings" that it has engaged in discrimination. *Id.*, at 1358. In the opinion of the Fourth Circuit, a finding of past discrimination by Richmond against each of the ethnic groups listed in the ordinance is a prerequisite to remedial affirmative action measures in favor of those groups. *Id.*, at 1361. However, the Fourth Circuit apparently would accept only substantial and convincing evidence in support of this finding since the court was not impressed with the evidence upon which the Richmond City Council relied to adopt the Minority Business Utilization Plan. *Id.*, at 1360. The Fourth Circuit characterized the evidence as a "spurious statistical comparison" and "nearly weightless testimony". *See id.*, at 1359.

This Court should reject the Fourth Circuit's proposition. If allowed to stand, the practical impact of this ruling would be to foreclose the enactment of remedial affirmative action measures. The logical consequence of the Fourth Circuit's "substantial and convincing evidence" test is that Richmond would need to produce either independent third party witnesses or substantial documentary evidence clearly probative of racially discriminatory contracting practices or policies adopted or applied by the City of Richmond.

As Judge Sprouse states in his dissenting opinion, this kind of evidence is "hard to come by". *Id.*, at 1365. In the world of public contracting, bid protests and legal challenges on a variety of procedural and substantive grounds are common. *See* e.g., *Baja Contractors, Inc. v. City of Chicago*, 830 F.2d 667 (7th Cir. 1987); *City of Inglewood L.A. County Civic Center Auth. v. Superior Court*, 7 Cal.3d 861 (1972); *Stanley-Taylor Co. v. Board of Supervisors*, 135 Cal. 486 (1902). Experienced public officers know that their decisions and actions as to the award of any contract are subject to scrutiny and possible legal action by contractors. Any such officer who seeks to discriminate is likely to do so in ways that are less obvious. Even those decisionmakers whose awards have been racially motivated are unlikely to admit alllegations of discrimination. Under the Fourth Circuit test a city would need to have documentary or testimonial evidence of discriminatory intent.

Even if such evidence were available—which it seldom if ever is—few local legislative bodies would be willing to name the responsible department or employee in a remedial ordinance. This kind of admission would raise a host of other questions any local legislative body would be inclined to avoid. Among those issues is the public liability such admissions would effectively establish. Even legislators interested in remedying past wrongs will be understandably reluctant to create evidence for the next class action against the city they represent. As Justice O'Connor states in her concurring opinion in *Wygant*, 476 U.S. at 290:

> The imposition of a requirement that public [entities] make findings that they have engaged in illegal discrimination before they engage in affirmative action programs would

> severely undermine public [entities'] incentive to meet voluntarily their civil rights obligations.

See also *id.*, at 304-305 (Marshall, J., dissenting).

In short, imposing upon municipalities a requirement that they admit wrongdoing before seeking to remedy discriminatory procurement practices will virtually eliminate affirmative action programs. The most probable result of this requirement is that municipalities will decline to engage in the type of extensive factual inquiry the Fourth Circuit supports. Consequently, municipalities will avoid correcting discriminatory contracting practices inherent in their procurement procedures.

We respectfully submit that the applicable test should be as follows: a municipality may embark on a remedial business affirmative action program in favor of minority-owned businesses after the municipality has studied racial discrimination in society and found a causal relationship between past discrimination and a present paucity of minority business participation in its contracts. This test would ensure that the local government has "sufficient evidence to justify the conclusion that there has been prior discrimination." *Wygant,* 476 U.S. at 277 (plurality opinion); *see* also *id.,* at 286 (O'Connor, J., concurring) "[A] remedial purpose need not be accompanied by contemporaneous findings of actual discrimination to be accepted as legitimate as long as the public actor has a firm basis for believing that affirmative action is required." *Id.*

Under this test, relevant factors would include comparing the number of contracts or contract dollars awarded to minority-owned businesses and the number of minority contractors in the local community. *See id.*, at 275 (plurality opinion). However, statistical proof of this nature should not be a prerequisite to affirmative action measures. In some cases there may be valid reasons why these numbers are unavailable. This point is best illustrated by the facts of the instant case. Richmond cannot show discrimination by meeting the "contract vs. contractors" test because racial discrimination in the industry in question is precisely the cause of a small minority contractor pool. *Croson*, 822 F.2d at 1363, 1365 fn. 11 (Sprouse, J., dissenting).

Regardless of whether a municipality can rely on statistical data, remedial action should be permitted when based on other forms of reliable evidence such as investigations of city procurement practices and policies or testimony of contractors and city administrators as to the conditions in the industry affected. Moreover, local legislators must be able to draw from their own relevant personal experience and knowledge as to contracting opportunities within the city and the relevant business field. *See Fullilove*, 448 U.S. at 467, 477-478 (opinion of Burger, C.J.).

The Richmond City Council easily meets this test. As the dissenting opinion notes:

> The Council was satisfied that the pervasive discrimination existing in the nation's craft unions and construction businesses also existed in Richmond. Minority contractors had received only two-thirds of one percent of city construction contracts between 1978 and 1983, although the minority population of Richmond during this period was approximately fifty percent. *The Council was convinced that this disparity resulted from purposeful discrimination against minority contractors.*

Croson, 822 F.2d at 1364, emphasis added; see also *id.*, 1363, fn. 6 & 7. Hence, Richmond did not adopt remedial measures because it was fashionable or a good idea. Rather, the city first considered facts that minority-owned businesses had been "denied effective participation in public contracting opportunities" in Richmond. *See Fullilove*, 448 U.S. at 477-478. Only after hearing testimony and weighing the facts, did the Richmond City Council vote to adopt the Minority Business Utilization Plan.

CONCLUSION

Richmond's legislators had "a firm basis for believing that affirmative action is required." *See Wygant*, 476 U.S. at 286 (O'Connor, J., concurring). Accordingly, this Court should uphold the City Council's decision to enact Richmond's Minority Business Utilization Plan.

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Respectfully submitted,

LOUISE H. RENNE*
City Attorney
DENNIS AFTERGUT
Chief Assistant City Attorney
BURK E. DELVENTHAL
MARA E. ROSALES-CORDOVA
Deputy City Attorneys
400 Van Ness Avenue
Room 206
San Francisco, CA 94102
(415) 554-4218
Attorneys for Amicus Curiae
City and County of San Francisco
**Counsel of Record*