No. 87-998

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF RICHMOND,

Appellant,

v.

J. A. CROSON COMPANY,

Appellee.

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

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BRIEF OF THE STATE OF MARYLAND AS AMICUS CURIAE IN SUPPORT OF APPELLANT

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STATEMENT OF INTEREST OF AMICUS CURIAE

Through enactment of Minority Business Enterprise ("MBE") legislation, Maryland has made a strong commitment to redress longstanding discrimination against certain minority groups. See Md. State Fin. & Procure. Code Ann. § 11-148 (1985). The

Maryland MBE legislation is similar to, though less far-reaching than, the race-conscious legislation adopted by Richmond. Consequently, the decision by the Court of Appeals casts a shadow over Maryland's MBE law -- and over hundreds of other similar laws throughout the country.

SUMMARY OF ARGUMENT

Race-conscious legislation is constitutional if its purpose is to remediate prior racial discrimination and if the relief is reasonably designed to achieve that purpose. Wygant v. Jackson Board of Education, 476 U.S. 267, 106 S.Ct. 1842 (1986), does not compel rigid application of the strict scrutiny test to State affirmative action plans. Misinterpreting Wygant, the Court of Appeals in this case measured the Richmond statute against a Draconian strict scrutiny standard that permitted no leeway for legitimate legislative judgment. The

affirmative action jurisprudence of this Court indicates that a less rigid, "intermediate" standard of review should be applied to MBE legislation. A court should consider the totality of the circumstances justifying imposition of affirmative action legislation to determine whether the Equal Protection Clause is offended.

ARGUMENT

This case raises two fundamental issues: 1) Can or should a government's buying decisions be required to be "color-blind," or is race-conscious action appropriate if its purpose is remedial? 2) If race-conscious action for remedial purposes is appropriate, what standard should be used to determine its constitutionality?

The answer to the first question is clear: The affirmative action trilogy, Regents of the University of California v. Bakke, 438 U.S. 265 (1978); United

Steelworkers of America v. Weber, 443 U.S. 193 (1979); and Fullilove v. Klutznick, 448 U.S. 448 (1980), explicitly or implicitly has already upheld the propriety of race-conscious remedies. Under these and other decisions, some form of race-consciousness is permitted, if only for the purpose of monitoring and enforcing court judgments. 1/

The second question is more difficult. The majority in J.A. Croson Co. v. City of Richmond, 822 F.2d 1355 (4th Cir. 1987), relying on Wygant, chose to apply a rigid form of strict scrutiny. Wygant involved a constitutional challenge to a voluntary provision in a public sector contract that required the layoff of more senior white

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1/ Professor Days notes that the explicit use of race for purposes of student assignment was often unavoidable after Brown v. Board of Educ., 347 U.S. 483 (1954). Days, Fullilove, 96 Yale L.J. 453, 548 (1987) (citing Swann v. Charlotte-Mecklenburg Board of Educ., 402 U.S. 1 (1971)).

teachers in order to keep less senior black teachers. The articulated purpose of the plan was to remedy "societal discrimination" by providing minority "role models."

In the course of five separate opinions, the Court set aside the plan. Taken as a whole, however, Wygant does not require a rigid application of the strict scrutiny test to MBE or similar affirmative action programs. A majority of this Court disapproved the plan primarily because the layoffs were deemed to be too great an imposition on white teachers' vested seniority rights and secondarily because it found inadequate "societal discrimination" justification. 2/

2/ The plurality opinion of Justice Powell (joined by Chief Justice Burger and Justice Rehnquist) ruled against the plan because there was no evidentiary basis to conclude that there had been prior hiring discrimination and because they disapproved of the "role model" or "societal discrimination" theory. They also concluded (Continued)

The Croson majority's reflexive application of a wooden analysis -- with its virtually automatic condemnation of the plan in question -- is a misreading of Wygant. It is also at odds with Fullilove. Despite a diversity of views on several aspects of that case, a majority of the Court endorsed a standard more flexible than rigid "strict scrutiny." The Court approved the legislation at issue in that case despite the

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that layoffs were too harsh but that hiring goals would be permissible. Justice O'Connor's concurring opinion also disapproved the "role model" theory but stated that a contemporaneous finding of identified discrimination was not necessary to support an affirmative action plan. Justice White's concurring opinion disapproved of a layoff plan which involved "the discharge of white teachers to make room for blacks, none of whom has been shown to be a victim of discrimination. . . ." 476 U.S. at ____, 106 S.Ct. at 1857. The main dissent by Justice Marshall (joined by Justices Brennan and Blackmun) approved the layoff plan and would not require a prior finding of discrimination. Justice Stevens' dissent approved the "role model" theory, stating that it was not necessary to find discrimination to support the plan.

absence of the type of explicit legislative findings said by the panel in Croson to be required.

The State of Maryland urges the Court to adopt a balanced approach, one that allows legislatures some discretion to make important policy judgments in this area. If the customary equal protection typology were used, this standard would be labeled "intermediate scrutiny." But, however termed, the standard should result neither in virtually automatic rejection nor virtually automatic approval of an MBE program. Rather, as Justice O'Connor put it, concurring in Wygant:

> Ultimately, the Court is at least in accord in believing that a public employer, consistent with the Constitution, may undertake an affirmative action program which is designed to further a legitimate remedial purpose and which implements that purpose by means that do not impose disproportionate harm on the interests, or unnecessarily trammel the rights, of innocent individuals directly and

adversely affected by a plan's racial preference.

476 U.S. at ____, 106 S.Ct. at 1853-54.

This realistic approach to equal protection, which eschews a result predetermined by the standard of review, is also reflected in the statements of other justices in Fullilove. 3/

3/ As Justices Marshall, Brennan and Blackmun wrote: "In our view, then, the proper inquiry is whether racial classifications designed to further remedial purposes serve important governmental objectives and are substantially related to achievement of those objectives." 448 U.S. at 519. Justice Stevens wrote to the same effect, albeit in dissent: "Unless Congress clearly articulates the need and basis for a racial classification, and also tailors the classification to its justification, the Court should not uphold this kind of statute." 448 U.S. at 545. Justice Powell, in his separate concurrence, endorsed the use of a softened strict scrutiny analysis that, in cases involving the amelioration of "the disabling effects of identified discrimination," 448 U.S. at 497, permitted the compelling governmental interest requirement to be met if 1) the governmental body had authority to act in response to identified discrimination; 2) the governmental body made findings that showed prior discrimination; and 3) the racial (Continued)

The case law of affirmative action supports the use of several general criteria in assessing any MBE program. Used conjunctively, these analytical tools permit a court to make a reasoned analysis of all relevant circumstances to determine whether a program is a "moderate, flexible, case-by-case approach to effecting a gradual improvement in the representation of minorities...." Johnson v. Transportation Agency, Santa Clara County, ___ U.S. ___, 107 S.Ct. 1442, 1457 (1987).

In Weber, this Court relied upon several factors which later court decisions have used to analyze the validity of a racial preference:

> [T]he plan does not unnecessarily trammel the interest of the white employees. The plan does not require the discharge of white

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classification was equitable and reasonably necessary to redress the identified discrimination. 488 U.S. at 498, 510, 516-17.

> workers and their replacement with new black hirees. . . . Nor does the plan create an absolute bar to the advancement of white employees . . . . Moreover, the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance.

443 U.S. at 208 (citation omitted). 4/ Thus, the questions that must be asked regarding a state MBE program are:

1. Does the program create an absolute bar to the advancement of white businesses or otherwise trammel their interests?

2. Does the program take away any of

4/ We recognize that Weber addressed only the impact of Title VII on private sector affirmative action plans. The case did not involve the Equal Protection Clause. However, the Court's approach to key aspects of the Title VII analysis in Weber parallels its constitutional analysis in other cases. The two are not water-tight compartments, and guidance from the one setting may be adapted to the other. See Johnson v. Transportation Agency, 107 S.Ct. at 1462 (O'Connor, J., concurring in the judgment). See also, e.g., Ledoux v. District of Columbia, 820 F.2d 1293, 1301 (D.C. Cir. 1987); Hammon v. Barry, 813 F.2d 412, 430 (D.C. Cir. 1987).

the vested rights (or contractual obligations) of white business enterprises?

3. Is the plan temporary?

In addition, a number of other questions (drawn from the various opinions in the cases and from commentators) would illumine the purposes and effects of any MBE program:

4. Does the program have an articulated purpose and is it reasonably designed to achieve that purpose? Fullilove, 448 U.S. at 519 (Marshall, J., concurring).

5. What is the relationship between the decisionmaker and the burdened and the preferred groups? Wright, Color-Blind Theories and Color-Conscious Remedies, 47 U. Chi. L. Rev. 213, 233 (1980). 5/

5/ Chief Judge Wright has pointed out:
One consequence of this approach to affirmative action programs is that the courts must scrutinize somewhat more carefully those programs instituted by decisionmakers of the minority race. When black decisionmakers, for example, choose to disadvantage white persons,
(Continued)

6. Which "minorities" are relevant? Wygant, 476 U.S. at ____, 106 S.Ct. at 1852 n.13.

7. Is there a waiver provision in the plan and is the waiver provision flexible? 6/

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there is no a priori reason to assume that they are not acting out of prejudice or hostility. This does not mean, however, that all minority-instituted affirmative action programs must be struck down: such programs should merely be denied the presumptive validity granted programs instituted by the groups disadvantaged by them. We may no more assume that minority preference programs are "invidious" when members of a minority are in control than we may assume that policies disadvantaging members of minorities are necessarily benign on account of such control.

Wright, 47 U. Chi. L. Rev. at 236 (emphasis in original).

6/ A waiver provision avoids the semantic battle that has been waged over whether plans may have "goals" or "quotas." In the case of MBE programs, no matter if they are called "set-asides" or "sheltered markets" or "goals," the requisite flexibility has been reached if a flexible waiver has been provided.

8. Have alternatives short of explicit reliance on race been discussed? 7/

9. Has the relevant statistical finding been made?

This last criterion requires some elaboration. Wygant struck down sole reliance upon generalized findings of "societal discrimination." 476 U.S. at ____, 106 S.Ct. at 1847. We agree with the panel majority in Croson that such findings would

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7/ Professor Days puts it:

> I can see no good reason to require government agencies in this position to experiment with remedies that do not involve explicit racial classifications if these remedies offer no likelihood of success. Agencies should, however, demonstrate that these lesser alternatives were systematically and thoroughly explored prior to being rejected. This exploration may take many forms, including evaluation of relevant literature, consultation with experts, and assessment of the extent to which similarly-situated government agencies have found the alternatives effective.

Days, Fullilove, 96 Yale L.J. 453, 483 (1987).

not support a racial classification if they are the sole basis on which a governmental body relies. [8/] We further acknowledge the Croson majority's view that one of the many relevant statistical correlations is the one between the number of minority contractors who are eligible to handle government contracts and the number of minorities actually awarded contracts. 822 F.2d at 1359.

However, MBE plans properly serve two purposes: 1) to open a market for existing MBE's; and 2) to encourage MBE's to form and participate in previously "chilled" markets. For the first purpose, the kind of particularized local statistical showing required by Croson may be useful. However,

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8/ "National findings do not alone establish the need for action in a particular locality." J.A. Croson Co. v. City of Richmond, 822 F.2d 1355, 1359 (4th Cir. 1987) (emphasis added).

as Professor Days points out, the use of statistics should not be allowed to disserve the second purpose: "These percentages might then be increased, if findings of discrimination support it, to reflect the number of minority entrepreneurs who were deterred in the past from entering the [subject] business because of racial barriers, but who are likely to take advantage of the remedial program." Because this "chilling effect" is hard to quantify, some allowance should be made for legislative bodies to consider state or local population percentages or other national data which can shed light on the potential problem. Days, Fullilove, 96 Yale L.J. 453, 484 (1987).

These criteria are not meant as some kind of arithmetical exercise. They should be considered together in order to weigh realistically the totality of circumstances surrounding an MBE plan.

In sum, we urge that the standard of review and the criteria for its application be framed, as Justice O'Connor wrote in her concurrence in Wygant, so that a legislature should only be required to have a "firm basis for determining that affirmative action is warranted." 106 S.Ct. at 1856.

CONCLUSION

The decision of the Court of Appeals should be reversed and the case remanded for application of the intermediate scrutiny standard set forth.

Respectfully submitted,

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