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 ALPHA KAPPA ALPHA SORORITY; COALITION FOR CIVIL RIGHTS; COALITION FOR ECONOMIC EQUITY; COUNCIL OF ASIAN-AMERICAN BUSINESS ASSOCIATION; GOLDEN GATE SECTION OF THE SOCIETY OF WOMEN ENGINEERS; HISPANIC CHAMBER OF COMMERCE, SAN FRANCISCO; KAPPA ALPHA PSI FRATERNITY; NATIONAL BAR ASSOCIATION; SAN FRANCISCO BLACK CHAMBER OF COMMERCE; WESTERN REGION-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP); AILEEN HERNANDEZ ASSOCIATES; AMERICAN PROPERTY EXCHANGE; CASA SANCHEZ; CORY GIN, ASSOCIATES; INTERSTATE PARKING COMPANY, INC.; JEAN PIERRE AND COMPANY; JEFFERSON AND ASSOCIATES; McCLAIN AND WOO; NAOMI GRAY ASSOCIATES, INC.; PEGASUS ENGINEERING, INC.; SELWYN WHITEHEAD ENTERPRISES AS AMICI CURIAE IN SUPPORT OF APPELLANT.

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CONSENT FOR FILING

This Amici Curiae brief is being filed with the consent of the parties. Their letters of consent have been filed with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

INTEREST OF THE AMICI

The common theme linking all Amici in this brief is a commitment to ensuring that the historical lock by white male contractors on receipt of contracts from municipalities throughout this nation be broken so that minority and women businesses can share in the economic benefits of these contracts which amount to billions of dollars annually.

The Amici from the San Francisco Bay Area have an especially critical concern for the outcome of this case. For the final analysis, the Court's decision here will probably announce principles which will determine the validity of a similar ordinance adopted by San Francisco which is currently pending before the Ninth Circuit Court of Appeals.

In 1984, the Board of Supervisors of San Francisco, by a 10 to 1 vote, enacted a comprehensive ordinance aimed at rectifying the discrimination and under-representation of minority business enterprises (MBE's) and women owned business enterprises (WBE's). San Francisco's ordinance was enacted after extensive testimony revealed that despite the fact that approximately 40% of the businesses in the Bay Area are owned by women and minorities, only 2.87% of the city's contracting dollars were awarded to MBE's and WBE's. As soon as San Francisco adopted its remedial ordinance, the Associated General Contractors sued to enjoin its implementation (*Associated General Contractors v. City and County of San Francisco*, 619 F. Supp. 334 (N.D. Cal.1985).)

The San Francisco ordinance, which is awaiting a decision on a motion for rehearing and suggestion for rehearing en banc, (*Associated General Contractors v. City and County of San Francisco*, 813 F. 2d 922 (9th Cir. 1987)) has been in litigation for the past 4 years and its fate in all likelihood will be determined by the

Court's decision in the instant action. Minority and female vendors, as the real parties in interest in any litigation involving race and gender conscious government contractings, have the unique vantage point possessed by MBE's and WBE's which should be taken into account when the Court decides these admittedly thorny issues of grave constitutional import. Since the primary legal support for race and gender conscious programs enacted to end discrimination will come from the very governmental agencies which have for years excluded people of color and women from contracting opportunities through overt and institutional discrimination, the Amici who have suffered years of discrimination and under-representation in receiving contracts from municipalities, believe it is critical that the Court consider their views in this matter.

Many of the Amici herein represent San Francisco's rich ethnic diversity. Women, Asians, Hispanics, Blacks and whites, who are committed to the full desegregation of society, join together to urge this Court to reverse the opinion of the Fourth Circuit.

Finally, many of the Amici in this action are minority and women owned businesses who currently contract with the City and County of San Francisco, California. The other Amici are civil rights and service organizations which have a keen interest in the preservation and extension of race and gender conscious programs designed to remedy past discrimination and the under-representation of minorities and women in the award of government contracts. Specifically the Amici and their interests are as follows:

Membership Organizations

Alpha Kappa Alpha Sorority, Inc. is a national Greek-lettered organization which is comprised of over 100,000 members in more than 725 undergraduate and graduate chapters. In 1908, the Sorority became the country's first Greek-lettered organization which was established by and for Black women. Since its incorporation in 1913, the Sorority has developed into a vehicle by which Black college-trained women have improved and impacted upon the social and economic conditions in their respective cities and

states. This influence has stretched to molding policies of this nation and the world, thereby carrying out the Sorority's current theme of "Service with a Global Perspective". The affirmance of the opinion below would effect an erosion of the principles developed by *Fullilove* and would place a heavy burden upon, and effectively chill, a municipality from enacting voluntary affirmative action programs.

The Coalition for Civil Rights is a multi-racial organization based in San Francisco. Comprised of twenty-six (26) organizations representing women, Blacks, Hispanics, Asians, and whites, the Coalition fights to fully desegregate all areas of society including business and contracting.

The Coalition for Economic Equity is an organization comprised of whites, Blacks, Hispanics, Asians, men, and women who are committed to increasing the percentage of contracting dollars awarded to minority and women owned businesses in San Francisco, The Coalition was active in gaining passage of a minority and women enterprises ordinance in the City and County of San Francisco in 1984.

The Council of Asian American Business Association consists of four trade associations: Asian American Architects and Engineers, Asian Business Association, Association of Asian Certified Public Accountants and the United Asian Contractors Association totalling approximately 300 firms located in the San Francisco Bay Area. The goal of the Association is to promote business opportunities for Asian American entrepreneurs.

The Golden Gate Section of the Society of Women Engineers, founded in 1949, is the local chapter of the National Society of Women Engineers. The local chapter is 15 years old and has a membership of over 100 women. The purpose of the organization is to counsel and encourage women to enter the engineering profession.

The Hispanic Chamber of Commerce is a membership organization comprised of businesses located in San Francisco. The chamber reflects the make-up of the Hispanic community.

Kappa Alpha Psi Fraternity is an organization of some 80,000 Black men concerned with all aspects of minority affairs in this country. Long active in struggles aimed at improving the lot, economic and otherwise, of Black Americans, Kappa Alpha Psi believes that the future of minority contracting programs, which have been instituted by a number of municipalities around the nation, is directly imperiled by the decision of the Fourth Circuit Court of Appeals.

The National Bar Association, founded in 1925, is a professional membership organization which represents more than 12,000 Black attorneys, judges and law students in the United States. Its purposes include achieving equal opportunities for minorities in the legal profession and protecting the civil and political rights of all citizens. The Association has a particular interest in this case because of its belief in the importance of affirmative action as a means of solving America's racial problems.

The San Francisco Black Chamber of Commerce is an organization of over 100 businesses and individuals devoted to the development and advancement of Black entrepreneurs. It has sought to increase opportunities for minority-owned firms and supported the passage of the city ordinance to eliminate underrepresentation of minority firms in business contracting with the city.

The Western Region of the National Association for the Advancement of Colored People (NAACP), is the regional administrative headquarters of the NAACP. The NAACP, the oldest civil rights organization in the United States, believes that affirmative action programs are essential means of redressing discrimination against people of color by both private and public entities.

Private Businesses

Aileen Hernandez Associates is a consulting firm owned and operated by Black women. The types of services it provides to the City and County of San Francisco include research, training and

development techniques for public participation and public relations.

American Property Exchange is a real estate investment firm in San Francisco which is owned by a white woman.

Casa Sanchez is an Hispanic owned food manufacturing company located in San Francisco.

Cory Gin Associates is an Asian-owned architectural/design firm located in San Francisco.

Interstate Parking Company, Inc. is a Black-owned San Francisco business that has contracted with the city for parking concessions and is a registered Minority Business Enterprise.

Jean Pierre & Co. is a Black-owned certified public accountancy firm that has done business with the city and is a registered Minority Business Enterprise in San Francisco.

Jefferson Associates is a Black-owned development, planning and architectural firm which contracts with the city. It is a registered Minority Business Enterprise in San Francisco.

McClain and Woo, CPA, is an Asian auditing firm located in San Francisco.

Naomi Gray Associates, Inc. is a consulting firm owned and operated by a Black woman. The services provided include management and health related issues.

Pegasus Engineering, Inc. is a structural engineering consulting firm owned and operated by a white woman.

Selwyn Whitehead Enterprises is a business owned by a Black woman which designs computer networks, training programs in telephony and sells date communications hardware.

SUMMARY OF ARGUMENT

The decision of the Fourth Circuit that Richmond's ordinance, "prefers some, and in so doing diminishes the rights of all" (*Croson v. City of Richmond*, 822 F.2d 1355, 1362 (4th Cir. 1987) decimates the endeavors of numerous cities across this nation to eradicate the present effects of prior discrimination.

Today, the inability of minorities to compete with white contractors for municipal contracts is the tragic, but inevitable result of years of their unequal treatment and actual exclusion from the contracting process. Not only have minorities been excluded by government officials, but also by white male firms who now seek to protect the huge benefits they have reaped as a result of that exclusion. Although the Fourth Circuit contends that the "record of prior discrimination supporting the Richmond plan is deficient" (822 F.2d at 1360), the inescapable fact is that until the middle of the 20th century, segregation of Blacks was enforced by law. (See, *Brown v. Board of Education*, 347 U.S. 483 (1954); see also, Bell, *And We Are Not Saved: The Elusive Quest for Racial Justice* (1987).)

While Blacks were prevented from participating in the economic prosperity of this nation, white contractors were given a virtual monopoly on government contracts. As Blacks fought desperately to emerge from legally sanctioned segregation (see, e.g., *Morgan v. Virginia*, 328 U.S. 373 (1946); *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950)), white contractors were steadily building their firms with government contracts thereby cementing their hold on those contracts. By the time legal segregation of Blacks ended, white contractors had firmly established their monopoly on government contracts.

This Court, as it struggles to fashion an analysis of affirmative action programs, under the Equal Protection Clause, should not, and indeed cannot, ignore "the sorry history of discrimination and its devastating impact on the lives of [Blacks]." (*University of California Regents v. Bakke*, 438 U.S. 265, 396 (1978), Marshall J., dissenting). Moreover, it must also remember "that the Fourteenth Amendment was not intended to prohibit measures designed to remedy the effects of the Nation's past treatment of [Blacks]." (*Id.* at 396-397).

The record below substantiates that the Richmond City Council had ample evidence of the virtual exclusion of Blacks and others from receiving city contracts. Moreover, not only was the City Council aware of the City's history of prior discrimination, but it was equally mindful of its responsibility to take affirmative

steps to remedy the devastating effects of that discrimination. Thus, contrary to the opinion of the Fourth Circuit, the Fourteenth Amendment commands, rather than condemns, Richmond's affirmative steps to remedy the exclusion of minorities and others from city contracting.

ARGUMENT

I

MUNICIPALITIES HAVE A COMPELLING INTEREST IN IMPLEMENTING AFFIRMATIVE ACTION PROGRAMS TO REMEDY THE PRESENT EFFECTS OF PAST DISCRIMINATION

A. Richmond had a compelling interest for enacting its ordinance

The existence of discrimination in Richmond's construction industry was carefully considered by the City Council. The City Council determined that the present effects of prior discrimination were so egregious and pervasive that remedial governmental action was necessary to reverse the virtual exclusion of minorities from receiving city contracts. Aware that traditional contracting procedures would not correct the problem, the City Council concluded, as this Court concluded in *Fullilove v. Klutznick*, 448 U.S. 448, 478 (1980), "That traditional procurement practices, when applied to minorities' businesses, could perpetuate the effects of prior discrimination." Accordingly, Richmond, acknowledging that continued reliance upon traditional procurement practices would not remedy the undisputed fact that white-owned firms receive 99 percent of the City's construction business, took affirmative measures to correct this unfair advantage enjoyed by white firms.

In 1983, one-half of the population of Richmond was Black, but in the five years prior to 1983 less than one percent of the City's $124 million in construction contracts was awarded to minority-owned businesses. These facts, *inter alia*, convinced both the City Council and the district court that the exclusion of minorities from city construction contracts was due to racial

discrimination in the construction industry. Thus, race conscious affirmative action programs are appropriate to eradicate the effects of such discrimination. As Justice Powell astutely observed in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 280-281 (1986) "in order to remedy the effects of prior discrimination, it may be necessary to take race into account. As part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy." *Wygant*, a plurality opinion, involved a challenge to a preferential layoff provision in a collective bargaining agreement for school teachers.

The remedy selected by Richmond, similar to that selected by other cities, is designed only to eliminate the present effects of practices that have developed over many years of awarding contracts which have excluded minority firms, while favoring white firms. Using race conscious efforts to remedy such prior discriminatory practices, does not violate the Equal Protection Clause. For this Court, in *United States v. Paradise*, ____ U.S. ____, 107 S.Ct. 1053, 1064 (1987), which upheld race conscious relief where there was a history of discrimination, recognized that: "It is now well established that government bodies . . . . may constitutionally employ racial classifications essential to remedy unlawful treatment of racial or ethnic groups subject to discrimination". This is precisely what Richmond did to correct past racial discrimination which allowed white firms to receive 99 percent of Richmond's construction contracts. Richmond's interest in remedying this injustice was not only compelling, but essential in order to maintain the integrity of the City's contracting process.

B. San Francisco, as well as other cities around the nation, has a compelling interest in implementing voluntary affirmative action programs

1. San Francisco's ordinance which requires affirmative action in city contracting will be severely impaired unless the decision below is reversed

On April 2, 1984, San Francisco enacted the Minority/Women/Local Business Utilization ordinance. This ordinance

was the culmination of a long effort to increase the participation of minority and women business enterprises in municipal contracting. It was indeed a voluntary effort by San Francisco to remedy the present effects of past discrimination against such businesses.

The ordinance was enacted after months of public hearings where numerous people testified and presented written evidence regarding their inability to secure city contracts. After the public hearings, San Francisco, in enacting the ordinance, made the following findings:

> 1. "That historic discrimination against minorities and women, often officially sanctioned and enforced by government from the inception of our Republic to the present had a serious, negative impact on their ability to participate fully and adequately in our society; and
>
> 2. That because of centuries of limited access to the marketplace—as workers and as entrepreneurs—and because of the failure of local governmental agencies to take affirmative steps to remedy *overt* and subtle *discrimination*, women and minorities have suffered severe economic harm;" (S.F. Ord. 139-84, Ch. 12D, § 12 D2.)

Immediately, after the enactment of said ordinance, white contractors who, just as in the case at bar, had been the recipients of substantially all of San Francisco's contracts, challenged the validity of the ordinance. (See, *Associated General Contractors v. City and County of San Francisco*, 619 F. Supp. 334 (N.D. Cal. 1985).) The trial court upheld the ordinance, but on appeal a three-judge panel of the Ninth Circuit reversed, in part, holding that the race conscious aspects of the ordinance were violative of the Equal Protection Clause. (See, *Associated General Contractors v. City and County of San Francisco*, 813 F. 2d 922 (9th Cir. 1987).) A petition for rehearing with suggestion that it be en banc has been pending in the Ninth Circuit since June 1987, and the ordinance has remained in effect pending the outcome of said petition.

The Ninth Circuit, similar to the Fourth Circuit in the instant case, incorrectly relied upon *Wygant v. Jackson Board of Educa-*

tion, supra, 476 U.S. 267 to invalidate the race conscious aspects of the ordinance. As will be discussed later, *Wygant* does not support the conclusions of either the Fourth or the Ninth Circuit Courts of Appeals. But, prior to discussing *Wygant*, it is important to discuss the effectiveness of, and necessity for, affirmative action programs such as the ones adopted by Richmond and San Francisco.

2. The operation of the San Francisco ordinance has demonstrated that affirmative action programs can and do, remedy the effects of past discrimination

Affirmative action programs, like that embodied in the San Francisco ordinance, are not only necessary to remedy past discrimination, but if implemented correctly can actually decrease discrimination and increase the participation of minorities and women in the economic dream of this Nation. For example, when San Francisco commenced implementing its ordinance in 1984, minorities were receiving only 2.87 percent of the total contract dollars awarded by San Francisco. As a result of the ordinance, by 1986, that participation had climbed to 25.4 percent of the total contract dollars.[1]

Prior to implementing the ordinance, only 130 firms which qualified in 1983 as minority or women-owned businesses, were doing business with San Francisco. Because of the affirmative action endeavors of San Francisco, by 1986, 1562 such firms were receiving contracts from the city.[2] These firms are now gaining the necessary experience and capital to compete successfully with white firms for city contracts when the ordinance expires in 1989.

One fear commonly held by those who either oppose affirmative action or who are uncomfortable with its implications and implementation is that unqualified members of protected classes will be foisted upon entities which enforce affirmative action

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[1] See, *Contracting Participation Report FY 1984-1985 And FY 1985-1986*, Human Rights Commission of San Francisco (1987). Copies have been forwarded by Amici to the Clerk of the United States Supreme Court.

[2] *Id* at p.4.

programs. Another fear that exists is that affirmative action programs, particularly in the contracting area, will result in increased costs to municipalities which are already strapped for working capital. Nothing could be farther from the truth.

In San Francisco, during the 4 years that the ordinance has been in effect, these fears have failed to materialize. When no qualified MBE's nor WBE's exist to fulfill a contract, the San Francisco Human Rights Commission has granted a waiver. Between 1984 and 1986, waivers were granted 78 times. With regard to the fear of increased costs, ordinances such as that of San Francisco have actually resulted in savings of millions of dollars to municipalities. These savings result from the increased competitiveness which follows the presence of additional contractors doing business with the City. White male contractors now underbid their own historically acceptable bid levels as their way of factoring in the presence of MBE's and WBE's. Even when waivers are granted due to the lack of qualified MBE's and WBE's, contract bids are lower simply due to the presence and potential bids of MBE's and WBE's. Finally, it should be specifically noted that contrary to the fears of white contractors, they have not been impacted substantially by the enforcement of the San Francisco ordinance. In fiscal year 1985-86, they were awarded 74.6 percent of the contracting dollars expended by San Francisco.

In practice, the ordinance has provided a remedial shield for minorities giving them an opportunity to compete with white firms, while at the same time protecting the rights of white firms to continue to receive substantial contracting dollars from San Francisco. Accordingly, the reasonable expectations of white contractors have not been frustrated. (See e.g., *Johnson v. Transportation Agency, Santa Clara County*, ____ U.S. ____, 107 S. Ct. 1442, 1455 (1987). It is thus clear, as shown by the San Francisco experience, that affirmative action ordinances can, and do, remedy past discrimination while not unduly trammeling the rights of innocent white male firms. Hence, they do not offend the Equal Protection Clause. (See, *United States v. Paradise*, ____ U.S. ____, 107 S.Ct. 1053, 1064 (1987).

C. Affirmative action programs are designed to reduce the unfair advantage nonminority firms enjoy because of the exclusion of minority firms from contracting opportunities

The clear objective of government affirmative action programs is to provide an opportunity for minority firms to compete with white firms on an equal footing. To achieve this equality, it is, of course, necessary to institute programs which may occasionally require white firms to share their monopoly on public contracting with heretofore excluded minorities. Municipalities, such as Richmond and San Francisco, recognize, as has this Court, that "in the past some nonminority businesses may have reaped competitive benefit over the years from the virtual exclusion of minority firms from these contracting opportunities." (*Fullilove v. Klutznick, supra*, 448 U.S. at 485). This Court, in *Fullilove,* correctly observed:

> It must be conceded that by its objective of remedying the historical impairment of access, the MBE provision can have the effect of awarding some contracts to MBE's which otherwise might be awarded to other businesses, who may themselves be innocent of any prior discriminatory actions. Failure of nonminority firms to receive certain contracts is, of course, an incidental consequence of the program, not part of its objective; similarly, past impairment of minority-firm access to public contracting opportunities may have been an incidental consequence of 'business as usual' by public contracting agencies and among prime contractors." (*Id.* at 484.)

Thus, Richmond and San Francisco, as well as other cities who are concerned with divesting white firms of the "competitive benefits" of years of "virtual exclusion of minority firms from . . . contracting opportunities" (*Fullilove v. Klutznick, supra*, 448 U.S. at 485), have a compelling interest in instituting remedial programs to place heretofore excluded minorities "on a more equitable footing with respect to public contracting opportunities." (*Id.* at 484.) Hence, the underlying principles announced in *Fullilove* are still sound today, and they should indeed apply equally to this case. This is especially true where local govern-

ments, following the example set by Congress, try to remedy years of exclusion of minorities from participating in lucrative contracts awarded by such governmental entities.

II

THE FOURTH CIRCUIT'S DECISION WOULD FORCE MUNICIPALITIES TO PERPETUATE RATHER THAN REMEDY THE PRESENT EFFECTS OF PAST DISCRIMINATION

A. *Wygant v. Jackson* does not require a city to perpetuate the present effects of past discrimination

By holding that Richmond was required to demonstrate or admit its own prior discrimination, the Fourth Circuit embarked upon a journey which inevitably leads to a freezing of the status quo. (*Croson v. City of Richmond*, 822 F.2d 1355 (4th Cir. 1987). By freezing the status quo, as done by the Fourth Circuit, the present effects of past discrimination will remain permanently embedded in the contracting process of not only Richmond, but also in countless other municipalities throughout the nation. The Fourth Circuit's reliance upon *Wygant v. Jackson, supra*, for this proposition is wholly misplaced. *Wygant* requires no such conclusion. At most, *Wygant* says, that: "Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." (*Id.* at 276.) But, *Wygant* explained that:

> In particular, a public employer . . . must ensure that before it embarks on an affirmative action program, it has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination." (*Id.* at 277.)

Richmond had before it statistics showing that 99 percent of its $124 million construction contract awards were going to white-owned firms. There was ample other evidence to convince the City Council that these white owned firms were receiving this "competitive benefit" because of years of "virtual exclusion of minority firms from . . . contracting opportunities." (*Fullilove v. Klutznick supra*, 448 U.S. 485.) Thus, the *Wygant* test was met

and the evidence was not only convincing, but clearly supported the need for Richmond to take remedial action.

B. Public policy is not served by forcing municipalities to either prove or admit past discrimination before voluntarily instituting an affirmative action program

The Fourth Circuit puts cities such as Richmond in the dilemma that Justice O'Connor discussed in her concurring opinion in *Wygant*. Recognizing that no municipality, which has legal counsel, is likely to admit prior discrimination, Justice O'Connor explained how the Fourth Circuit's decision can frustrate sound public policy which favors the voluntary adoption of affirmative action programs:

> 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. (*Wygant v. Jackson, supra,* 476 U.S. at 290, (O'Connor, J., concurring).)

Remedying, not pertpetuating the present effects of past discrimination, as would be required if the Fourth Circuit's decision is upheld, is the ultimate goal of affirmative action programs such as those voluntarily instituted by Richmond, San Francisco and other cities. This point is critical because, as Justice O'Connor notes in her concurring opinion in *Wygant*:

> The value of voluntary compliance is doubly important when it is a public employer that acts, both because of the example its voluntary assumption of responsibility sets and because the remediation of governmental discrimination is of unique importance. (*Id.*)

Thus, the Fourth Circuit's decision militates against voluntary affirmative action. Unless reversed, the decision below will encourage municipalities to protect themselves against exposure to litigation by refusing to voluntarily remedy past discrimination for fear of having to admit prior discrimination. Such a result is not only undesirable, but would virtually assure the continued exclusion of minorities and women from effective participation in

government contracting opportunities. In the final analysis such a result would promote "ignorance of minority problems in [the] community, [and would] create[ ] mistrust, alienation, and all too often hostility toward the entire process of government." (*Id.* at 290 quoting) S. Rep. No. 92-415, p. 10 (1971).)

CONCLUSION

For the above reasons, Amici Curiae respectfully urge this Court to reverse the decision of the United States Court of Appeals for the Fourth Circuit.

Dated: April 21, 1988

Respectfully submitted,

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