No. 87-998

In The

Supreme Court of the United States

October Term, 1987

CITY OF RICHMOND, VIRGINIA,

Appellant,

v.

J. A. CROSON COMPANY,

Appellee.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLEE

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INTERESTS OF AMICUS

Pursuant to Supreme Court Rule No. 36, Pacific Legal Foundation respectfully submits this brief amicus curiae in support of appellee. Consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation, incorporated under the laws of California for the purpose of participating in litigation affecting public policy. Policy of the Foundation is set by a Board

of Trustees composed of concerned citizens, the majority of whom are attorneys. The Board of Trustees evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The Foundation's Board of Trustees has authorized the filing of a brief amicus curiae in this matter.

Pacific Legal Foundation has participated in cases which involved issues similar to that presented in this matter. The Foundation's public policy perspective and litigation experience in support of individual liberties will help provide this Court with additional argument in which to view the holding of the Fourth Circuit Court of Appeals in this matter.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 822 F.2d 1355 (4th Cir. 1987).

STATEMENT OF THE CASE

This case presents the issue whether a city may enact a plan in which minority contractors are guaranteed a fixed percentage of city funded construction contract awards to remedy alleged discrimination, in the absence of a showing by the city that it engaged in such prior discrimination.

In April, 1983, the City Council of Richmond, Virginia (City), enacted a minority business utilization plan which required that contractors on city construction projects subcontract at least 30% of the dollar value of the contract to minority-owned business enterprises (MBEs) unless the city waived the requirement. The plan was to terminate in 1988 at which time the City Council could renew it or allow it to lapse. Only nonminority prime contractors were required to comply with the plan's provisions. If a nonminority contractor failed to meet the MBE requirement the contract would be suspended or terminated unless a waiver was granted.

In September, 1983, the City invited bids for the installation of stainless steel urinals and water closets in the city jail. J. A. Croson Co., not itself an MBE, was the only bidder on the project. Contending it was unable to locate any minority subcontractors except one it considered unqualified, Croson requested a waiver of the MBE requirement. The City denied the waiver request. Croson informed the City that the cost of the project would increase by $7,663.16, if it were required to use the unqualified contractor. The City responded, stating the minority subcontractor was qualified and that Croson's fixed bid could not be increased.

Soon thereafter, the City rebid the project and invited Croson to submit a new bid. Croson sued in District Court, arguing the City's racial set-aside plan was contrary to Virginia law governing competitive bid procedures and that it violated the United States Constitution. The District Court held the City's plan was

consistent with both Virginia law and the federal Constitution. A divided panel of the Court of Appeals (Fourth Circuit) affirmed. This Court granted certiorari in the *Croson* case and remanded it back to the Court of Appeals for reconsideration in light of the United States Supreme Court's decision in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), decided by this Court after the Court of Appeals' affirmance. Following reconsideration, the Court of Appeals held the City's racial preference plan must be invalidated, and reversed the District Court's decision.

SUMMARY OF THE ARGUMENT

This case involves the issue of whether a government enacted affirmative action plan that grants racially-based preferences violates the Fourteenth Amendment of the United States Constitution.

Pacific Legal Foundation believes that the key to the validity of such affirmative action plans lies in the adequacy of the findings necessary to support the plan. Absent a clear showing of racial discrimination, a governmentally imposed racial preference is an arbitrary and capricious act and itself constitutes invidious discrimination.

The findings necessary to support an affirmative action plan must clearly demonstrate discrimination. A mere statistical disparity has never been held sufficient by this Court and, furthermore, such statistical evidence must be relevant and clearly define the nature of

the discrimination and the parties discriminated against.

The remedy afforded by an affirmative action plan must be narrowly tailored to correct the past discriminatory acts particularized in the findings. The Fourteenth Amendment protects individual rights and does not countenance group preference merely to obtain racial balance or attain other political as opposed to constitutional objectives.

ARGUMENT

I

TO SHOW THAT A RACE PREFERENTIAL PLAN IS JUSTIFIED BY A COMPELLING GOVERNMENTAL INTEREST, THE STATE MUST FIRST MAKE A SHOWING OF PRIOR DISCRIMINATION BY THE GOVERNMENTAL UNIT INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." City ordinances are considered state action for the purposes of this amendment. *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938).

The Court has traditionally rejected distinctions between citizens solely because of their ancestry as being " 'odious to a free people whose institutions are founded upon the doctrine of equality.' " *Regents of the University of California v. Bakke*, 438 U.S. 265, 294 (1978) (quoting *Loving v. Virginia*, 388 U.S. 1, 11, 18

(1967), and *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). This principle is inherent in the Equal Protection Clause because the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948).

Therefore, any official action that treats a person differently on account of his race or ethnic origin is inherently suspect and presumptively invalid, *Fullilove v. Klutznick*, 448 U.S. 448, 496 n.l (1980) (Powell, J., concurring), and can be upheld only upon an extraordinary justification. *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979).

The sources of the justification must rest in the discrimination sought to be corrected by the classification. If no discrimination exists, amicus submits that a preferential affirmative action plan enacted by a governmental entity becomes racial discrimination outlawed by the Fourteenth Amendment.

This Court has held that government bodies may constitutionally employ racial classifications essential to remedy unlawful treatment of racial or ethnic groups subject to discrimination. *Wygant v. Jackson Board of Education*, 476 U.S. at 277, plurality opinion. "[R]emedying past or present racial discrimination . . . is a sufficiently weighty state interest to warrant the remedial use of a carefully constructed affirmative action program." *Wygant*, 476 U.S. at 286 (O'Connor, J., concurring in part and concurring in

judgment). *See also United States v. Paradise*, 480 U.S. ___, 94 L. Ed. 2d 203 (1987).

This Court has insisted, however, that there be some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications to remedy such discrimination. *Wygant*, 476 U.S. at 274, plurality opinion. "Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." *Id.* at 276.

A government unit wishing to employ racial preferences may not act on the grounds of amorphous assumptions of historical discrimination. To allow such acts on so tenuous a finding would grant local governments unfettered discretion to adopt sweeping racial preferences at their pleasure, irrespective of the need. It is to guard against such abuse that this Court in *Wygant* required the particularized findings of prior discrimination. *Id.*

Even if the City admitted to its own discrimination against minority contractors this would not suffice to meet the constitutional standard. Where the danger of discrimination against nonminorities exists it is crucial that there be evidence showing that the governmental entity now seeking remedial action engaged in the prior discriminatory acts. *J. Edinger & Sons, Inc. v. City of Louisville, Kentucky*, 802 F.2d 213, 216 (6th Cir. 1986) (citing *Wygant*, 476 U.S. at 276). *See also Michigan Road Builders Association, Inc. v. Milliken*, 834 F.2d 583, 589 (6th Cir. 1987):

> "Before a state may permissibly employ a racial or ethnic classification . . . it must make a finding

> based upon material factual evidence, that it has in the past discriminated against classes it now favors. If the state had not engaged in discrimination against racial and ethnic minorities in awarding contracts . . . in the past, then it cannot assert *in praesenti* that it has a compelling interest in preferring MBEs in the award of such contracts."

In *United States v. Paradise*, 94 L. Ed. 2d at 203, this Court reemphasized this need for a suitable basis. *Paradise* upheld race-conscious relief imposed by the District Court upon findings of discriminatory conduct. The record in *Paradise* established that for four decades the Alabama Department of Public Safety systematically excluded blacks from employment and promotion. This Court held that the race conscious relief imposed was amply justified.

In *Croson*, by contrast, the Richmond City Council's hearing failed to establish the basis for remedial action. The proceedings revealed no record of prior discrimination by the City in its award of public contracts. Only conclusory and highly general statements made by a member of the public (not in the construction business), a city council member who supported the plan, and the city manager were offered as a showing of past discrimination. As the Court of Appeals observed: "The plan was not supported by any impartial report, any meaningful statistical evidence, or even by anecdotal allegations of prior discrimination." *Croson*, 822 F.2d at 1360. There was "no showing that qualified minority contractors who submitted low bids were passed over or that qualified minority firms were excluded from the bidding pool." *Id.* at 1359.

II

MERE STATISTICAL EVIDENCE OF SOCIETAL DISCRIMINATION IS NOT SUFFICIENT TO SUSTAIN A RACIALLY CONSCIOUS AFFIRMATIVE ACTION PLAN

The principal evidence cited by the City in support of its racial preference program was statistical data comparing the percentage of minority contracts granted by the City with the total number of minority residents in the community. The statistics, introduced to show a discriminatory practice, indicated that while minorities comprised 50% of Richmond's population, minority-owned firms had received only 0.67% of the dollar value of Richmond's prime contracts. *Id.* at 1358.

Such use of general population statistics is insufficient to justify the type of preferential affirmative action plan set forth by the City of Richmond. As this Court held in *Hazelwood School District v. United States*, 433 U.S. 299, 308 (1977):

> "There can be no doubt . . . that the District Court's comparison of Hazelwood's teacher work force to its student population fundamentally misconceived the role of statistics in employment discrimination cases. The Court of Appeals was correct in the view that a proper comparison was between the racial composition of Hazelwood's teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market."

In *Croson* the appropriate comparison should be between the number of minority contracts awarded and the number of qualified minority contractors available in Richmond. Showing that a small number of city

contracts went to minority firms does not demonstrate discrimination when, as both sides agreed, the number of minority-owned contractors in Richmond was also quite small. 822 F.2d at 1359.

While this Court has stated that statistics are competent in proving employment discrimination their usefulness depends on all of the surrounding facts and circumstances. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 340 (1977). In *Teamsters*, the comparison between the percentage of blacks on the employer's work force and the percentage of blacks in the general areawide population was highly probative because the job skill involved there–the ability to drive a truck–is one that many persons possess or can fairly readily acquire.

When special qualifications are required to fill particular jobs, however, comparisons to the general population may have little probative value. *Hazelwood School District v. United States*, 433 U.S. at 308. *See also Johnson v. Transportation Agency*, 480 U.S. ___, 94 L. Ed. 2d 615, 631 (1987). Here the city was put on notice that under state law it was unlawful to engage in, or offer to engage in, general contracting or subcontracting in the state on a job of $40,000 or more without being duly licensed under Title 54, Chapter 7 of the Code of Virginia, a class A license contractor requirement. Joint Appendix at 32.

Other circuits have similarly rejected the use of general population statistics to establish discrimination patterns. *See Associated General Contractors of California, Inc. v. City and County of San Francisco,*

813 F.2d 922, 930 (9th Cir. 1987), and *J. Edinger and Son, Inc. v. City of Louisville, Kentucky*, 802 F.2d 213. In *Edinger*, the court held that a large discrepancy between the percentage of minority residents in the county and the percentage of business conducted with minority-owned businesses by the city was insufficient to support a minority vendors' ordinance according preference in bidding on supply and service contracts with the city to minority-owned businesses. The fundamental flaw in the comparison is that the general public does not bid on city contracts, only contractors do. *Id.* at 215-16. As the court noted, "reliance upon general population statistics is especially troubling given that bid systems, by definition, are inherently nondiscriminatory." *Id.* at 216. Thus, the City should be required to present evidence of invidious discrimination against minority-owned businesses in order to justify the preferential treatment afforded minority vendors. *Id.*

Having failed to adduce evidence of its own discrimination sufficient to justify its race based program, City attempts to compensate by an attack on the program's victims. Thus City claims that its council "was aware that there has been pervasive racial discrimination in the nation's construction industry." Brief of appellant at 6. For this proposition City cites *Fullilove*, 448 U.S. at 477-78, as "finding that Congress had 'abundant evidence' of racial discrimination in the construction industry to support its remedial action." Brief of appellant at 6-7.

This is a disingenuous reading of the *Fullilove* holding. That statement came in the context of a discussion of state action that had a discriminatory impact in perpetuating the effects of past discrimination. Indeed, the fuller and more accurate quotation is: "Congress had abundant evidence from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination." *Fullilove*, 448 U.S. at 477-78. The context makes clear that the Court was referring to discrimination by state and local government through their procurement practices. If City did not discriminate in its procurement practices it has no compelling governmental interest in enacting a race-based "remedy."

The referenced paragraph in *Fullilove* also holds that Congress "may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings." *Id.* at 478. It is plain that the Court was extending exceptional deference to the unique powers of Congress. "It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." *Id.* at 483.

Yet it is apparent that the Court was not altogether comfortable with a race preference program, even one adopted under the special powers reposed by the Constitution in the Congress. Nonetheless, the Court stated: "That the program may press the outer limits of

congressional authority affords no basis for striking it down." *Id.* at 490.

If a program adopted by Congress under the Spending, Commerce, and Fourteenth Amendment enforcement powers may press the outer limits of authority in adopting a 10% set-aside, surely these limits have been shattered by the City's adoption of a 30% quota based solely on its police powers. *Truax v. Raich*, 239 U.S. 33, 41 (1915), specifically rejected the adequacy of the police power as authority to enact race-based quotas.

Unable to present evidence of past discrimination in Richmond, City attempts to use *Fullilove* as a crutch to bolster that burden. City reads *Fullilove* as finding discrimination nationwide in construction contracting, thereby authorizing every hamlet in the land to adopt its own race preference program without further proof. This key tenet of City's dogma was rejected by this Court in *General Building Contractors Association, Inc. v. Pennsylvania*, 458 U.S. 375 (1982). There a state, together with a class of minority group members, citing a pattern and practice of racial discrimination, sought and obtained an order from the District Court directing nonminority contractors to meet detailed minority utilization goals. This Court reversed, holding that minority hiring goals may not be imposed upon contractors absent a supportable finding of liability. *Id.* at 400. Read together, *Wygant* and *General Building Contractors* require a city that imposes a race-based subcontracting requirement on its public contracts to make two showings. First, the City must prove that it discriminated against each of the now preferred groups.

Second, the City must prove that the impacted non-minority contractors discriminated against each of the preferred groups.

General Building Contractors further rejected the racially disproportionate impact theory that forms the sole basis here for City's program. 458 U.S. at 390. That case makes clear that if a state or local governmental entity seeks to enact a race preference program, it must go beyond numerical disparity and find intentional discrimination on the part of those upon whom it intends to thrust the burden of the program. In its narrow reliance on a disparity between the percentage of minority population and the percentage of prime contracts awarded to minorities, the City of Richmond has failed to meet the *General Building Contractors* standards.

III

A RACIAL CLASSIFICATION PLAN DESIGNED TO REMEDY PAST ACTS OF DISCRIMINATION MUST BE NARROWLY TAILORED TO ACHIEVE THAT GOAL

Even if this Court were to find there existed sufficient evidence to establish a finding of prior discrimination, the City's racial preference program fails on the grounds it is not narrowly tailored to address findings of past discrimination. "Race-conscious distinctions must be narrowly tailored to eliminate the consequences of past discrimination." *Associated General Contractors of California, Inc. v. City and County of San Francisco,* 813 F.2d at 934 (citing *Bakke*, 438 U.S. at 299 (opinion of Powell, J.)); *Paradise*, 94 L. Ed. 2d

at 203 (plurality opinion) and at 220 (O'Connor, J., dissenting); *Wygant,* 476 U.S. at 274 (plurality opinion); *Fullilove*, 448 U.S. at 484 (opinion of Burger, C. J.). This means that the classification adopted must " 'fit' with greater precision than any alternative means." *Associated General Contractors of California, Inc. v. City and County of San Francisco*, 813 F.2d at 935 (quoting *Wygant*, 476 U.S. at 280 n.6 (plurality opinion)) (citing Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. Chi. L. Rev. 723, 727 n.26 (1974)).

To begin with, the definition of minority owned businesses is not narrowly tailored to the remedying of the alleged past discrimination. The Richmond plan defines minority group members as citizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts. *Croson*, 822 F.2d at 1361. Yet the City has made no showing of past discrimination against each of those particular minority groups. In the words of *Wygant*: " 'There is no explanation of why the Board chose to favor these particular minorities or how in fact members of some of the categories can be identified.' " *Quoted in Croson*, 822 F.2d at 1361.

The lack of narrow tailoring is further emphasized by the fact that the plan makes no attempt to limit its benefits to those specific individual members of minority groups that have in fact been injured by past discrimination. *See Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 578-79 (1984). The favored classes of minorities are defined here not in terms of past

injury but rather as those businesses owned and controlled by one or more minority persons.

Stotts notes that *International Brotherhood of Teamsters v. United States*, 431 U.S. at 367-71, makes clear "that mere membership in the disadvantaged class is insufficient to warrant a seniority [here contract preference] award; each individual must prove that the discriminatory practice had an impact on him." *Stotts*, 467 U.S. at 579. This was also the holding of the lead opinion in *Fullilove* which declared that any plan of this type must prevent unjust participation in the program by those minority firms whose access to public contracting is not impaired by the effects of prior discrimination. 448 U.S. at 482 (opinion of Burger, C. J.). The lack of such safeguards here indicates that the program at issue is not designed to remedy past discrimination, but rather to promote the economic interests of certain classes.

This suspicion is reinforced by the fact that the 30% "goal" has no relation to the number of qualified minority contractors in the Richmond area. One of the more troubling aspects of this case is that apparently the City made no effort to determine the number of licensed minority contractors before adopting its program. It merely selected an arbitrary figure it now claims was approximately midway between the 1% of city contracts awarded to minorities and the 50% of minorities in Richmond. Brief of appellant at 45.

As the Court of Appeals observed: "General population statistics suggest, if anything, more of a political than a remedial basis for the racial preference."

Croson, 822 F.2d at 1358-59. The court sounded the compelling warning that "[i]f this plan is held to be valid, then local governments will be free to adopt sweeping racial preferences at their pleasure, whether those preferences are legitimate remedial measures or bald dispensations of public funds and employment based on the politics of race." *Id.* at 1357-58.

It is precisely to avoid the award of public contracts on a political basis that most states have adopted statutes mandating competitive bidding. Such statutes are designed to protect the public by preventing public officials from awarding contracts uneconomically on the basis of "special friendship," thereby protecting taxpayers from corruption and waste of public funds. *Associated General Contractors of California v. San Francisco Unified School District*, 616 F.2d 1381, 1391 (9th Cir. 1980).

Setting the goal of awarding 30% of City contract dollars to a preferred class of contractors, far out of proportion to their presence in the contracting community, carries "special friendship" in the name of politics to an impermissible extreme. Because the Richmond plan is not tailored to remedy past discrimination, it is itself discrimination on the basis of race and violates the Equal Protection Clause of the Fourteenth Amendment.

CONCLUSION

In finding that the Richmond plan violated the Equal Protection Clause of the Fourteenth Amendment, the Court of Appeals upheld the principles of *Wygant* which firmly established that a government-enacted racial preference program is not to be tolerated in the absence of evidence of actual discrimination.

Eradicating vestiges of racial discrimination is a legitimate and substantial interest of the state. But, this Court has never approved of a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations. *Regents of the University of California v. Bakke*, 438 U.S. at 307 (opinion of Powell, J.).

A particularized finding of discrimination must be made so that the interests of innocent nonminorities will not be invaded without valid justification. "The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal." *Id.* at 289.

Because the ordinance operates to discriminate against nonminority contractors under the unfounded guise of remedying discrimination against minorities and is not narrowly drawn to remedy the perceived problem, amicus urges that this Court affirm the decision of the Court of Appeals finding that the Richmond

ordinance violates the Equal Protection Clause of the Fourteenth Amendment.

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Respectfully submitted,

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