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

BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE APPELLEE

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICUS CURIAE	1
STATEMENT OF THE CASE	5
SUMMARY OF ARGUMENT	7
ARGUMENT	9
I. IN DECIDING THIS MATTER, THE COURT SHOULD EXERCISE CARE TO ENSURE THAT A DECISION IN THIS PUBLIC SECTOR CASE DOES NOT IMPINGE ON THE ABILITY OF PRIVATE EMPLOYERS UNDER CURRENT LAW TO UNDERTAKE REASONABLE AND VOLUNTARY AFFIRMATIVE ACTION	9
II. THE COURT BELOW PROPERLY HELD THAT THE THIRTY PERCENT MINORITY SET-ASIDE FIGURE WAS UNCONSTITUTIONAL BECAUSE IT HAD NOT BEEN SHOWN TO BE RELATED TO THE PRESENT AVAILABILITY OF QUALIFIED MINORITY SUBCONTRACTORS	11
A. To Be Constitutional, A Minority Business Set-aside Must Be Narrowly Tailored To Remedying Past Discrimination Against Minority Contractors By the Government Entity Adopting The Plan	11
B. A Minority Business Set-aside Percentage Must Be Related To The Availability of Qualified Minority Contractors And Not Based Upon Comparisons With Minority General Population Statistics	13
CONCLUSION	19

TABLE OF AUTHORITIES

Cases: Page

Associated General Contractors of California, Inc. v. City and County of San Francisco, 813 F.2d 922 (9th Cir. 1987) 13

Boston Firefighters Union, Local 718 v. Boston Chapter, NAACP, 461 U.S. 477 (1983) 3

County of Los Angeles v. Davis, 440 U.S. 625 (1979) 3

Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984) 3, 10

Fullilove v. Klutznick, 448 U.S. 448 (1980) 4, 12, 13, 14

Hazelwood School District v. United States, 433 U.S. 299 (1977) 14, 15, 16

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) 3, 15

J.A. Croson Company v. City of Richmond, 779 F.2d 181 (4th Cir. 1985) (Croson I), *cert. granted, judgment vacated, and remanded*, 106 S.Ct. 3327 (1986) 5, 6, 17, 18

J.A. Croson Company v. City of Richmond, 822 F.2d 1355 (4th Cir. 1987) (Croson II), *probable jurisdiction noted*, 56 U.S.L.W. 3568 (U.S. Feb. 22, 1988) (No. 87-998) 7, 12, 18

J. Edinger & Son, Inc. v. City of Louisville, Kentucky, 802 F.2d 213 (6th Cir. 1986) 13

Johnson v. Transportation Agency, Santa Clara County, California, 107 S.Ct. 1442 (1987) ..... *passim*

Local Number 93 v. City of Cleveland, 106 S.Ct. 3063 (1986) 3

Michigan Road Builders Association, Inc. v. Milliken, 834 F.2d 583 (6th Cir. 1988), *appeal filed* (No. 87-1860), 56 U.S.L.W. 3806 (U.S. May 11, 1988) 13

Minnick v. California Department of Corrections, 452 U.S. 105 (1981) 3

New York City Transit Authority v. Beazer, 440 U.S. 568 (1979) 15

Patterson v. McLean Credit Union, 805 F.2d 1143 (4th Cir. 1986), *reargument ordered*, 56 U.S.L.W. 3735 (U.S. April 25, 1988) (No. 87-107) 10

TABLE OF AUTHORITIES—Continued

	Page
Regents of the University of California v. Bakke, 438 U.S. 265 (1978)	3
Runyon v. McCrary, 427 U.S. 160 (1976)	10
South Florida Chapter of the Associated General Contractors of America, Inc. v. Metropolitan Dade County, Florida, 723 F.2d 846 (11th Cir. 1984), *cert. denied*, 469 U.S. 871 (1984)	19
United Steelworkers of America v. Weber, 443 U.S. 193 (1979)	3, 7, 8, 10
United States v. Paradise, 107 S. Ct. 1053 (1987)	11
Washington v. Davis, 426 U.S. 229	12
Wygant v. Jackson Board of Education, 106 S.Ct. 1842 (1986)	*passim*
Statutes:	
Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e *et seq.*	*passim*
42 U.S.C. § 1981	10
Federal Orders and Regulations:	
Executive Order 11246, 30 Fed. Reg. 12319 (1965), *as amended* by 32 Fed. Reg. 14303 (1967) and 43 Fed. Reg. 46501 (1978)	2

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE APPELLEE

The Equal Employment Advisory Council ("EEAC") respectfully submits this brief amicus curiae in support of the Appellee, J.A. Croson Company, pursuant to the written consents of the parties.

INTEREST OF THE AMICUS CURIAE

EEAC is a voluntary, nonprofit association of employers organized to promote sound government policies on nondiscriminatory employment practices. Its

membership comprises a broad segment of the business community in the United States, including both individual employers and trade associations. Its governing body is a Board of Directors composed of experts in equal employment opportunity (EEO). Their combined experience gives the Council a unique understanding of the practical, as well as the legal aspects of EEO policies and requirements.

EEAC members are strongly committed to the goal of equal opportunity for women and minorities. As employers, they are subject to the provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, et seq.), as well as other equal employment statutes and regulations. In addition, nearly all of EEAC's members are federal contractors subject to the affirmative action requirements under Executive Order 11246, 30 Fed. Reg. 12319 (1965), as amended by 32 Fed. Reg. 14303 (1967), and 43 Fed. Reg. 46501 (1978), as well as the affirmative action requirements that many state and local governments place upon their private sector construction, supply and service contractors.

Many of EEAC's members are signatories to collective bargaining agreements, Title VII settlements, conciliation agreements, consent decrees and other voluntary plans or programs which provide varying forms of remedial relief or affirmative action benefiting persons or groups protected by these statutes and regulations.

EEAC's previous amicus curiae briefs have reflected the commitment of its members to broad flexibility in carrying out voluntary affirmative action programs, while at the same time recognizing that, absent a finding of discrimination, race or sex-based

preferential treatment cannot be required of employers who do not wish voluntarily to adopt such policies. EEAC's most recent brief supporting voluntary affirmative action was filed in *Johnson v. Transportation Agency, Santa Clara County, California*, 107 S.Ct. 1442 (1987).[1]

In addition to their involvement in voluntary employment-related affirmative action, many EEAC members are involved in voluntary affirmative action activities outside of the equal employment arena, including activities designed to promote minority purchasing. Examples of such activities include vendor and buying education programs, advertising for and identification of minority vendors, and the establishment of vendor information exchanges. Through these and similar programs, EEAC members have engaged in substantial and successful efforts to ensure that minority and women-owned businesses participate as their suppliers and contractors. EEAC's members recognize that they benefit directly from strong economies in all communities that they serve,

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[1] EEAC also filed briefs in several other Supreme Court affirmative action cases dealing with the nature and scope of the affirmative action obligations of employers. *See Local Number 93 v. City of Cleveland*, 106 S.Ct. 3063 (1986); *Wygant v. Jackson Board of Education*, 106 S.Ct. 1842 (1986); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *Boston Firefighters Union, Local 718 v. Boston Chapter, NAACP*, 461 U.S. 477 (1983); *Minnick v. California Department of Corrections*, 452 U.S. 105 (1981); *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979); *County of Los Angeles v. Davis*, 440 U.S. 625 (1979); *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

including the growth of minority and women-owned businesses.

As equal employment officers working in conjunction with their companies' purchasing departments, EEAC's member representatives are well aware of the importance of increasing the share of opportunities to businesses owned by minorities, women and economically disadvantaged persons. At the same time, they also are aware that these programs must be undertaken realistically, and with an eye toward the availability of qualified contractors and subcontractors. Thus, on occasion, EEAC has filed briefs expressing concern about minority business enterprise set-asides that, in our view, were not related to the availability of qualified subcontractors, or went beyond remedying past proven discrimination. See EEAC's brief in *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

Our concern with the decision of the court below is that is establishes a thirty-percent minority business set aside for all prime contracts with the City of Richmond without that figure having been related to the availability of qualified minority contractors in the particular business specialty involved. Thus, this brief is submitted with two purposes. First, to encourage the Court to continue to afford latitude for flexible voluntary affirmative action; and second, to urge the Court to reaffirm the principles it has applied in previous affirmative action cases by holding that government-imposed minority business contracting requirements must be related to the availability of qualified minority subcontractors.

STATEMENT OF THE CASE

This case has produced two conflicting decisions by the Fourth Circuit on the constitutionality of a minority set-aside plan for public contracts adopted by the City of Richmond, Virginia. The plan was adopted in response to information presented at a public hearing which indicated that although minority groups made up 50% of the City's population, only 0.67% of the city's prime construction contracts from 1978-1983 were awarded to minority businesses. *See J.A. Croson Company v. City of Richmond*, 779 F.2d 181, 182 (4th Cir. 1985) (*Croson I*), *cert. granted, judgment vacated, and remanded*, 106 S.Ct. 3327 (1986). The plan requires all nonminority contractors awarded city construction contracts to subcontract at least 30% of the dollar amount of the contract to minority business enterprises unless the requirement is waived.

Appellee J.A. Croson Co. (Croson), a non-minority contractor, submitted a bid on a construction contract with the City of Richmond in September, 1983. As it turned out, Croson was the only bidder, and the requirements of the plan were applied to this contract. Croson filed a request with the City for a waiver of these requirements because of problems encountered in subcontracting with a qualified minority business enterprise (MBE). On two occasions the City denied Croson's request for a waiver, advising that its bid would be considered non-responsive if it failed to provide evidence of compliance with the MBE subcontracting provisions. The City decided to re-bid the project, inviting Croson to submit a new bid.

Croson then brought this lawsuit, claiming, among other things, that the plan violated its rights under

the equal protection clause of the Fourteenth Amendment to the United States Constitution. The district court rejected Croson's claims. The court of appeals, in a 2-1 decision affirmed the district court. It held that the plan was constitutional in that it was adopted to remedy the effects of past discrimination and was not overextensive in establishing a 30 percent set-aside figure. In dissent, Judge Wilkinson argued that the factual findings of the city council were inadequate to support a conclusion of past discrimination against minorities in the award of city contracts. 779 F.2d at 204-05. The dissent also urged that:

> . . . the 30% set-aside goal emerges from a vacuum. Rather than a goal narrowly tailored to meet a specific need, the 30% figure is arbitrary and unsupported. No consideration was given, for example, to the number of minority firms available to perform contracts under the set-aside, despite the testimony of several witnesses before the city council that the set-aside goal was unrealistic.

779 F.2d at 205. Thereafter, this Court granted appellee's petition for a writ of certiorari, vacated the judgment of the court of appeals and remanded the case for reconsideration in light of *Wygant v. Jackson Board of Education*, 106 S.Ct. 1842 (1986).

On remand, the same panel found the plan unconstitutional. With Judge Wilkinson now writing for the majority, the court held that under *Wygant*, findings of "societal" discrimination are not sufficient to support a racial preference. Rather, there must have been a firm basis for the City Council to have concluded that there had been prior discrimination against minority contractors and that the set-aside

was related to remedying that discrimination. *J.A. Croson Co. v. City of Richmond*, 822 F.2d 1355, 1358 (4th Cir. 1987) (*Croson II*), *probable jurisdiction noted*, 56 U.S.L.W. 3568 (U.S. Feb. 22, 1988) (No. 87-998). The court found that no such findings were made in this case. 822 F.2d at 1358-59.

The court also held that the statistical evidence that supports a minority business set-aside must relate to the "percentage of minorities in the local labor force or the construction business" and not be based upon a mere reference to the percentage of minorities in the community at large. 822 F.2d at 1358. The 30 percent figure was found to have no basis in the record and thus the majority found that it was "not narrowly tailored to [the] remedial goal" of remedying past discrimination. 822 F.2d at 1360. In dissent, Judge Sprouse would have held that the City Council had a firm basis for believing that the city engaged in past discrimination in the award of public contracts, and that the plan was narrowly tailored to achieve that end. 822 F.2d at 1362-68.

SUMMARY OF ARGUMENT

In deciding the issues in this constitutional case, the Court should exercise care in dealing with Title VII and employment cases cited in several of the briefs. *See, e.g., Wygant v. Jackson Board of Education*, 106 S.Ct. 1842 (1986); *Johnson v. Transportation Agency, Santa Clara County, California*, 107 S.Ct. 1442 (1987); and *United Steelworkers v. Weber*, 443 U.S. 193 (1976).

EEAC is particularly concerned that in resolving this case, the Court not reconsider or disturb its affirmative action decisions allowing substantial flex-

ibility for voluntary action by employers. For example, in *Johnson* and *Weber*, the Court held that Title VII permits (but does not require) employers to use race or sex as a factor in employment decisions pursuant to affirmative action plans designed to remedy a manifest workforce imbalance, as long as the rights of nonminority and male employees are not unnecessarily trammeled.

On numerous occasions, the Court has taken pains to assure that Title VII and constitutional cases are governed by their respective, separate standards. Therefore, we strongly urge the Court to recognize that this case would not be an appropriate vehicle to reconsider its Title VII employment decisions.

On the merits of the instant case, the decision below properly held that the thirty percent minority contractor set-aside figure was not rationally related to remedying past discrimination because the figure was not related to the availability of minority contractors qualified to perform subcontracting work on contracts let by the City.

This Court's previous decisions have stressed that where special skills are involved, the appropriate statistical analysis is between the utilization and availability of minorities with such skills. Relying on general, minority population statistics is insufficient to support race-based numerical requirements for contractors where special requirements exist.

ARGUMENT

I. IN DECIDING THIS MATTER, THE COURT SHOULD EXERCISE CARE TO ENSURE THAT A DECISION IN THIS PUBLIC SECTOR CASE DOES NOT IMPINGE ON THE ABILITY OF PRIVATE EMPLOYERS UNDER CURRENT LAW TO UNDERTAKE REASONABLE AND VOLUNTARY AFFIRMATIVE ACTION.

As noted in the Statement of Interest of the Amicus Curiae, EEAC's members have a long-standing interest in preserving the flexibility of private employers to undertake voluntary affirmative action, while at the same time, not being required to do so by court order or other government requirements. We recognize, of course, that this public sector case does not directly involve either employment issues or the limitations which Title VII places on the affirmative action efforts of private employers.

Nevertheless, there is a strong possibility that, in addressing the issues presented by the parties and the various amici, the Court will discuss the implications of Title VII and employment cases. Indeed, this case was remanded for reconsideration in light of an employment case—*Wygant v. Jackson Board of Education*, 106 S.Ct. 1842 (1986).

Moreover, in addressing the degree of flexibility that Richmond should have enjoyed in adopting its minority set-aside, many of the briefs before the Court rely upon the Title VII decision in *Johnson v. Transportation Agency, Santa Clara County, California*, 107 S.Ct. 1442 (1987), where the Court upheld the use of sex or race as "one factor" in an employment decision as long as the plan was intended to remedy a manifest workforce imbalance and the

rights of nonminority or male employees were not unnecessarily trammeled—the basic position urged in EEAC's brief in that case.

We are well aware that many of the Court's holdings in *Johnson* were by a close vote and that the Court recently has decided to hear argument on whether one of its major civil rights decisions under 42 U.S.C. § 1981 should be reconsidered. *See Patterson v. McLean Credit Union*, 805 F.2d 1143 (4th Cir. 1986), *reargument ordered*, 56 U.S.L.W. 3735 (U.S. April 25, 1988) (No. 87-107) (an employment discrimination case), ordering argument on whether *Runyon v. McCrary*, 427 U.S. 160 (1976) (a private sector school discrimination case), should be reconsidered. We strongly urge that the *Johnson* decision not be reconsidered, and certainly not in the context of this case.

The Court continually has taken pains to draw a line between the standards governing affirmative action under Title VII and the Constitution. *See, e.g., United Steelworkers v. Weber*, 443 U.S. 193, 200, 204, 208, 210 (1976); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 583 (1984); and *Wygant*, 106 S.Ct. at 1851 n.9 (opinion of Justice Powell) ("Since *Weber* involved a private company, its reasoning concerning the validity of the hiring plan at issue there is not directly relevant to this case, which involves a state-imposed plan. No equal protection claim was presented in *Weber*"). Again, in *Johnson*, the majority opinion pointed out that:

> No constitutional issue was either raised or addressed in the litigation below. . . . We therefore decide in this case only the issue of the prohibitory scope of Title VII. Of course, where the issue is properly raised, public employers must

> justify the adoption and implementation of a voluntary affirmative action plan under the Equal Protection Clause. *See Wygant v. Jackson Board of Education*, —— U.S. ——, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986).

107 S.Ct. at 1446 n. 2.

Applying this same principle here, this is a constitutional, not a statutory case, and the parties have not argued that it would be appropriate in this case for the Court to reconsider its previous employment decisions. Therefore this case would not be an appropriate vehicle for reconsideration of the protections afforded to affirmative action under the *Johnson* decision.

II. THE COURT BELOW PROPERLY HELD THAT THE THIRTY PERCENT MINORITY SET-ASIDE FIGURE WAS UNCONSTITUTIONAL BECAUSE IT HAD NOT BEEN SHOWN TO BE RELATED TO THE PRESENT AVAILABILITY OF QUALIFIED MINORITY SUBCONTRACTORS.

A. To Be Constitutional, A Minority Business Set-aside Must Be Narrowly Tailored To Remedying Past Discrimination Against Minority Contractors By The Governmental Entity Adopting The Plan.

While this Court has "yet to reach consensus on the appropriate constitutional analysis" relating to the use of race-based preferences (*United States v. Paradise*, 107 S.Ct. 1053, 1064 (1987)), "[i]t is now well established that government bodies, including courts, may constitutionally employ racial classifications essential to remedy unlawful treatment of racial or ethnic groups subject to discrimination." *Id.*, at 1064. However, to pass constitutional analysis, there must be evidence from which to conclude

that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination. *Fullilove v. Klutznick*, 448 U.S. 448, 478 (1980).

In fashioning the remedies for such discrimination, there must be "careful judicial evaluation" to assure that a program "that employs racial or ethnic criteria to accomplish the objective of remedying the present effects of past discrimination is narrowly tailored to the achievement of that goal." *Id.* at 480. The government unit involved must make a sufficient showing of past dicrimination before the remedial use of racial classifications will be constitutional. *Wygant*, 106 S.Ct. at 1847.

In the instant case, the court below found that there was not enough evidence in the record to satisfy these standards. 822 F.2d at 1358. Indeed, the court below found that there was no showing that qualified minority contractors who submitted bids were passed over, or that minority firms had been excluded from the bidding pool. 822 F.2d at 1359.

EEAC concurs that generalized statistics based upon a comparison between the minority population and the percent of contracts awarded to minorities is not necessarily probative of discrimination. In the constitutional context, a showing of adverse impact is not sufficient to show a violation of law, or to permit the assumption that the statistical disparity is the result of discrimination. *Washington v. Davis*, 426 U.S. 229, 245 (1976). Thus, "[t]here are a host of social, economic, personal, and demographic factors which may account for the statistical disparity." *J. Edinger & Son, Inc. v. City of Louisville, Ken-*

tucky, 802 F.2d 213, 216 (6th Cir. 1986) (Large discrepancy between percentage of minority residents in county and percentage of business conducted with minority-owned businesses by the city was not sufficient to support minority vendors preference).[2]

B. A Minority Business Set-aside Percentage Must Be Related To The Availability of Qualified Minority Contractors And Not Based Upon Comparisons With Minority General Population Statistics.

Even if the allegations of discrimination in this case are adequate to support some remedy, EEAC is particularly concerned about preserving the principle underlying the holding below that the thirty percent set-aside figure should be struck down because it was not related to the availability of minority contractors qualified to perform the subcontracting work under contracts let by the City.

The City's set-aside program was based primarily on statistics that minorities comprised 50 percent of

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[2] *Accord, Associated General Contractors of California, Inc. v. City and County of San Francisco*, 813 F.2d 922 (9th Cir. 1987); and *Michigan Road Builders Association, Inc. v. Milliken*, 834 F.2d 583 (6th Cir. 1988), *appeal filed*, 56 U.S.L.W. 3806 (U.S. May 11, 1988) (No. 87-1860). As Chief Justice Burger pointed out in *Fullilove*, there are other impediments not necessarily related to discrimination, 448 U.S. at 467:

> Among the major difficulties confronting minority businesses were deficiencies in working capital, inability to meet bonding requirements, disabilities caused by an inadequate "track record," lack of awareness of bidding opportunities, unfamiliarity with bidding procedures, pre-selection before the formal advertising process, and the exercise of discretion by government procurement officers to disfavor minority businesses.

Richmond's population, but that minority-owned firms had received only 0.67 percent of the dollar value of City contracts. The City now contends to this Court that the thirty percent set-aside figure was based on a split-the-difference theory, that is: "the thirty percent figure is approximately midway between one percent—the percentage of city contracts awarded to minorities—and fifty percent—the percentage of minorities in Richmond." Br. of Appellant at 46. This argument implicitly admits that there is no relationship between the thirty percent figure and the availability of qualified construction contractors.

As legal support for this theory, the City relies on an observation in Justice Powell's concurring opinion in *Fullilove* that the much smaller ten percent set-aside in that case "falls roughly halfway between the present percentage of minority contractors and the percentage of minority group members in the Nation." 448 U.S. at 513-14. This formulation—which apparently was not adopted by any other of the other Justices in *Fullilove*—has no other support in this Court's opinions and, indeed, seems to be directly at odds with other decisions.

For example, a majority of the Court in *Wygant* made it clear that alleged "societal discrimination" is "too amorphous" a basis for imposing a racially classified remedy. 106 S.Ct. at 1848. Instead, the *Wygant* discussion reveals that the relevant inquiry is a comparison between the minority utilization figure and the availability of *qualified* minorities, as explained in the *Hazelwood* decision.[3] In *Hazelwood*, the United States sued the school district under Title

[3] *Hazelwood School District v. United States*, 433 U.S. 299 (1977).

VII alleging a pattern or practice of race discrimination in teacher hiring. The district court based its finding that there was no discrimination on a comparison between the black teachers and black students in the school district. The court of appeals, however, did not rely on the student-teacher ratio, and instead found a prima facie case of race discrimination by comparing the black teachers in the school district with the percentage of black teachers in the relevant labor market area.

This Court in *Hazelwood* also rejected the district court's comparison between Hazelwood's teacher workforce and its student population as a proper basis for comparison. The Court stated that:

> There can be no doubt in light of the *Teamsters* case, 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.[4]

Relying on *Hazlewood*, the opinions of Justices Powell and O'Connor in *Wygant* rejected the "role model" theory, under which the number of black

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[4] 433 U.S. at 308. *See also New York City Transit Authority v. Beazer*, 440 U.S. 568, 584-85 (1979); and *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339 n.20 (1977), both of which required that comparisons be made between the percentage of minorities in an employer's workforce and the percentage of minorities (or women) with the requisite skills in the relevant labor market.

teachers was compared with the number of black students in an attempt to justify a race-based layoff preference in teachers layoffs. *See* 106 S.Ct. at 1847 (Powell), and 1854 (O'Connor). As Justice Powell stated:

> Unlike the analysis in *Hazelwood*, the role model theory employed by the District Court has no logical stopping point. The role model theory allows the Board to engage in discriminatory hiring and layoff practices long past the point required by any legitimate remedial purpose.

This principle was reaffirmed in *Johnson* when Justice Brennan's majority opinion stated that:

> Where a job requires special training, however, the comparison should be with those in the labor force who possess the relevant qualifications. [Citing *Hazelwood*] (must compare percentage of blacks in employer's work ranks with percentage of qualified black teachers in area labor force . . .).

107 S.Ct. at 1452.

Indeed, the Court went even further in *Johnson* in distancing itself from rigid goals or quotas based on general population statistics. It approved the plan in part because it was flexible and did not always use the ultimate goal of 36% female participation in each job. Instead, the Agency in *Johnson* "acknowledged that such a figure could not by itself necessarily justify taking into account the sex of applicants for positions in all job categories." 107 S.Ct. at 1454. The Court noted that for jobs with special qualifications, the Plan "directed that annual short-term goals be formulated that would provide a more realistic indication of the degree to which sex should be taken into account in filling particular positions." 107 S.Ct.

at 1454. Factors such as turnover, layoffs, transfers, and new openings were to be considered along with the "availability of minorities, women and handicapped persons in the area work force who possess the desired qualifications or potential for placement." *Id.*

Justice Brennan then stressed that had the plan simply calculated imbalances "in all categories according to the proportion of women in the area labor pool and then directed that hiring be governed solely by those figures, *its validity fairly could be called into question.*" 107 S.Ct. at 1454 (emphasis added). In fact, if a plan failed to take distinctions in qualications into account in providing guidance for decisionmaking, "it would dictate mere blind hiring by the numbers"—which would then violate Title VII. 107 S.Ct. at 1454.

Thus, assuming that the standards governing governmental action under the Constitution are at least as strict as the standards governing voluntary racial preferences under Title VII, it follows that minority business set asides that set absolute numbers without considering, *ab initio*, the availability of qualified minority contractors cannot pass constitutional muster.

In *Croson I*, Judge Wilkinson, in dissent, found that the Council considered "absolutely no evidence on the minority subcontractor market." 779 F.2d at 204. He also stated that "the 30% set-aside goal [emerged] from a vacuum." Rather than being a goal narrowly tailored to meet a specific need, the 30% figure was seen as "arbitrary and unsupported." 779 F.2d at 205.

In *Croson II*, the court concluded that the appropriate comparison is "between the number of minority contracts and the number of minority *contractors*, taking into account other relevant variables such as experience and specialities." 822 F.2d at 1359 (emphasis in original). EEAC agrees that this reliance upon realistic availability statistics is a reasonable approach in order to avoid the use of inflated statistics that force the prime contractor to promise to attempt to achieve a minority participation rate that, in many cases, simply will be out of reach.

We recognize that the Richmond plan contains a waiver provision providing that "in exceptional circumstances," the contractor is exempted from the 30 percent requirement if it can demonstrate that "every feasible attempt has been made to comply," and also can show that sufficient, relevant, qualified minority contractors are unavailable or unwilling to participate in the contract. *Croson I*, Appendix B, paragraph D, 779 F.2d 181, 197.

It is, however, difficult to perceive how this procedure saves a constitutionally-infirm set-aside percentage when the contractor bears the burden of making "every feasible" attempt to find nonexistent contractors, only to be confronted with the fact that the waiver is a matter of administrative discretion granted only in "exceptional cases"—a prescription for administrative inflexibility if there ever was one.

Other alternatives were available. For example a much more rational approach would have been to take into account the "availability and capability of Black contractors and subcontractors to do such work" when minority participation goals are set for each contract. *See South Florida Chapter of the Associ-*

ated General Contractors of America, Inc. v. Metropolitan Dade County, Florida, 723 F.2d 846, 853, 858 (11th Cir. 1984), *cert. denied*, 469 U.S. 871 (1984). In that manner, realistic percentage goals for minority contractors with certain specialities (such as plumbing, sheet metal work, carpentry, electrical, lathing, painting, drywall, etc.) could be matched with specific projects, rather than establishing an inflated figure that must be recognized as clearly unrealistic, as well as constitutionally-infirm. While EEAC does not take a position in the validity of this less-intrusive approach, it is clear that Richmond's plan went too far in setting a thirty percent quota unrelated to the availability of qualified minority contractors.[5]

CONCLUSION

For the foregoing reasons, EEAC respectfully submits that this Court should affirm the decision below setting aside as unconstitutional Richmond's mandatory, government-imposed minority business set aside program. In doing so, however the Court also should take care not to disturb its previous decisions which afford employers latitude to engage in voluntary, flexible affirmative action efforts to increase their utilization of minorities, women and other protected

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[5] Even if it should uphold the 30 percent figure in this case, this Court should take care not to disturb the employment-related cases, cited above, pp. 14-17, which establish that where liability is sought to be based on statistical comparisons, such comparisons must be to those persons in the relevant labor market possessing the requisite skills required by the job.

groups in their workforces and in their procurement and contracting practices.

Respectfully submitted,

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