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 OF THE ASSOCIATED SPECIALTY CONTRACTORS, INC., AMICUS CURIAE

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Dated: June 8, 1988

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BRIEF OF THE ASSOCIATED SPECIALTY CONTRACTORS, INC., AMICUS CURIAE

This brief is being filed on behalf of the Associated Specialty Contractors, Inc., *amicus curiae*, in support of affirming the judgment of the Fourth Circuit Court of Appeals finding that the Richmond MBE Plan violated the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

The Interest Of The Amicus Curiae

The Associated Specialty Contractors, Inc. is a national umbrella organization consisting of eight construction trade associations involved in various specialty areas of construction. The constituent members of the Associated Specialty Contractors, Inc. are (1) Mason Contractors Association of America, (2) Mechanical Contractors Association of America, (3) National Association of Plumbing, Heating and Cooling Contractors, (4) National Electrical Contractors Association, (5) National Insulation Contractors Association, (6) National Roofing Contractors Association, (7) Painting and Decorating Contractors of America, and (8) Sheet Metal and Air Conditioning Contractors National Association.

Representatives of local chapters of the National Association of Plumbing, Heating and Cooling Contractors and the National Electrical Contractors Association appeared at the Richmond City Council hearing on April 11, 1983, and spoke in opposition to the proposed MBE Program (J.A. 31-31; 32-35; 37-40).

The purpose of Associated Specialty Contractors, Inc. is to advance the common interests of the members of the eight constituent trade associations.

The interest of Associated Specialty Contractors, Inc. in the present litigation is (1) to protect the members of the constituent associations from being excluded from government contract markets on the basis of race or nationality, and (2) to preserve a truly competitive environment in the construction industry in order to provide a quality product at the lowest competitive cost.

The problems posed by Minority Business Enterprise Programs are not limited to the City of Richmond. As detailed in the appendices to the brief *amicus curiae* of the National League of Cities, et al., the reach of these programs is national in scope with a proliferating number of both state and local plans that affect the construction industry on a regular and constant basis.

Statement

The briefs of the parties and other *amici curiae* have adequately described the Richmond MBE Program and its application to the mechanical contractor that commenced this litigation, and they will not be repeated in this brief.

ARGUMENT

This Court has historically and understandably been extremely suspicious of governmental action or decisions made wholly on race-based distinctions. This Court has "consistently repudiated '[d]istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality'". *Loving* v. *Virginia*, 388 U.S. 1, 11 (1967) (quoting from *Hirabayshi* v. *United States*, 320 U.S. 81, 100 (1943)). In *Regents of University of California* v. *Bakke*, 438 U.S. 265, 291 (1978), this Court has stated that "racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination".

The "exacting judicial examination" of race-based governmental distinctions has been held by this Court to involve two tests: "First any racial classification 'must be justified by a compelling governmental interest' [citations omitted]. Second, the means chosen by the State to effectuate its purpose must be 'narrowly tailored to the achievement of that goal'". *Wygant* v. *Jackson Board of Education*, 90 L.Ed.2d 260, 268 (1986) (quoting *Fullilove* v. *Klutznick*, 448 U.S. 448, 491 (1980)).

I. No Compelling Governmental Interest Justifies The Richmond MBE Program Because There Was No Evidence Of Unlawful Racial Discrimination Either By Contractors In The Local Construction Industry Or By The City Of Richmond Whose Effects The Program Sought To Remedy

The "evidence" allegedly justifying the "compelling governmental interest" in adopting the Richmond MBE Program consists of a 41-page transcript of a hearing before the Richmond City Council. Summarized, that "evidence" consisted of three points: (1) Between 1978 and 1983 .67% of the city's construction contracts were awarded to minorities, whereas the population of the city is 50% minority (J.A. 43); (2) an association of general contractors and certain specialty contractor associations in the Richmond area had few minority members (J.A. 27, 34, 36, 39-40); and (3) two speakers who made conclusory remarks that there was general racial discrimination in the construction industry in Richmond, in Virginia and other parts of the United States.[1]

There was no other statistical evaluation, anecdotal evidence or any evidence at all that the City of Richmond had ever excluded any particular minority contractors from city construction work.

Whether there must be a "particularized finding" of racial discrimination "by the governmental unit involved", as required by the plurality opinion in *Wygant*, 90 L.Ed.2d at 270, or merely whether the government agency "must have a firm basis for determining

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[1] Councilperson Marsh stated that:

> I have been practicing law in the community since 1961, and I am familiar with the practices in the construction industry in this area, in the State and around the nation. And I can say without equivocation, that the general conduct in the construction industry in this area, and the state and around the nation, is one in which racial discrimination and exclusion on the basis of race is widespread.

(J.A. 41) City Manager Deese recounted his experience in Pittsburgh, Pennsylvania, where he observed "racial discrimination in the area of contracting" (J.A. 42). These conclusory comments are obviously entitled to no weight in determining whether the City of Richmond in fact discriminated against minority construction contractors and will not be further pursued in this brief.

that affirmative action is warranted", as required in the concurring opinion of Justice O'Connor in *Wygant*, 90 L.Ed.2d at 280, neither requirement is met by the meager evidence before the City Council in the late hours of April 11, 1983.

The .67% of city contracts awarded to minority construction contractors in the 1978-83 period reveals nothing about either racial discrimination in the construction industry in the Richmond area or racial discrimination practiced by the City of Richmond in excluding minority contractors from city construction projects. There are many nondiscriminatory barriers to successful entry into the specialty contractor industry. These include: specialized knowledge and experience in the trade; general knowledge in operating a successful business and in appropriate bidding methods and procedures; sufficient working capital and reserves; ability to meet bonding requirements; and establishment of a track record of successful execution of work to attract customers.

Many of these barriers do not exist in the context of employment discrimination cases where this Court on occasion has approved findings of discrimination based on a comparison between the percentage of unskilled minorities employed and the percentage of minorities in the general population of the appropriate standard metropolitan statistical area. See *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 339-40, n.20 (1977). But cf. *Hazelwood School District* v. *United States*, 433 U.S. 299, 308, n.13 (1977), where the Court, even in an employment case, cautioned that where the job requires special qualifications the appropriate comparison was not to general population statistics but to the smaller segment of the population possessing the special qualifications.

But in the case of construction entrepreneurs, as opposed to unskilled employees, the appropriate inquiry is a comparison between the minority contractors awarded city construction jobs and the number of qualified minority employers in the standard metropolitan statistical area. And here the record is silent, except for the showing that there were very few minority employers who

were members of the associations appearing at the city council hearing.[2]

The ultimate inquiry in the case does not yield a definitive answer on this record. Why do there appear to be so few qualified minority subcontractors in the Richmond area? There was surely no particularized finding of racial discrimination either in the construction industry generally or by the City of Richmond in particular.[3]

One possible answer is that the nondiscriminatory barriers to entry into the construction industry previously identified in this brief may adversely impact minorities because of general past societal discrimination against minorities.[4] But the explicit teaching of the *Wygant* case is that past societal discrimination against minorities will not support a racial classification program for the obvious reason that a finding of such discrimination would "uphold remedies that are ageless in their search into the past and timeless in their ability to affect the future". *Wygant* v. *Jackson Board of Education*, *supra* at 270.

The facile assumption that construction contractors and their associations practice racial discrimination in the Richmond con-

[2] Indeed, one of the opponents of the program noted at the City Council hearing that only 4.7% of construction firms in the United States were minority owned and that 41% of that number were located in California, Illinois, New York, Florida and Hawaii, leaving only 2.8% of all construction firms in the remaining 45 states being minority owned (J.A. 35).

[3] The City of Richmond and the *amici* supporting it make much over the lack of any argument by the opponents that there was no racial discrimination in the local construction industry. See, for example, App. Br., pp. 5-6, 15, 19, 23). The answer to this argument is that the City never made a *prima facie* case of racial discrimination in the local construction industry and there was, therefore, nothing to rebut. In addition, the representatives of the construction trade associations denied engaging in racial discrimination (J.A. 20, 38).

[4] By suggesting this possibility, the *amicus* does not embrace "societal discrimination" as the reason why there appear to be relatively few minority employers in the construction industry in Richmond in relation to the minority population. On the record of this case there is no proven explanation for the apparent phenomenon.

struction industry and in the construction industry generally, which lace the brief of Appellant and the *amici* supporting it, should not be accepted by the Court. The over decade-old Congressional findings of racial discrimination in the construction industry nationally supporting the set-aside program ultimately endorsed in *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980), say nothing about alleged racial discrimination in the construction industry in Richmond in 1983, and are woefully out of date on a national basis. Moreover, a recent decision by the United States Court of Appeals for the District of Columbia Circuit discloses that construction contractors and contractor associations may be totally innocent parties in a context where labor unions have been found liable for racial discrimination in the construction industry in the Washington, D.C. area. *Berger* v. *Iron Workers Reinforced Rodmen Local 201*, 843 F.2d 1395, 1435-1438 (1988).

Yet the target of the Richmond MBE Program is aimed squarely at nonminority construction contractors in the Richmond area based on outdated national data and the purest of assumptions of contractor liability for alleged racial discrimination in the construction industry in Richmond.

Unfortunately, the record in this case reeks of the "politics of race" and "political transfers" that the Court below condemned. *J.A. Croson* v. *City of Richmond*, 822 F.2d at 1358, 1360 (1987). Councilperson Richardson opened the hearing by stating that the purpose of the program was to "recycle" city dollars "back to minority businesses" (J.A. 12). One of the program's proponents spoke of an Oakland, California program that resulted in twenty-two million dollars "of investment and development within Oakland minority communities" (J.A. 19).

There is, of course, nothing wrong with the general sentiment that a particular group wants "a piece of the action". But when a locality having a 50% minority population seeks to achieve "a piece of the action" by mandating the exclusion of nonminority businesses from 30% of the locality's subcontractor construction business expressly to "recycle" city money to minority businesses, it has

erected a racial classification that is clearly condemned by the Equal Protection Clause of the Constitution.[5]

The decision of this Court in *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980), approving a federal law requiring a 10% set-aside to minority contractors on a particular spending program is clearly distinguishable from the present case.[6] In that case the Court stressed the special constitutional competence under the Spending Power and Section 5 of the Fourteenth Amendment of the Congress of the United States, "a co-equal branch" of the federal government, representing all districts and states of the country, to make findings of past discrimination against minorities, supported by congressional committees, the U.S. Civil Rights Commission and the General Accounting Office, resulting in narrowly tailored remedial relief based on racial classifications. 448 U.S. at 465-67; 472; 483; 499-502; 503-06).

Here, in contrast, the City of Richmond does not have the special authority and competence of the U.S. Congress and is obviously more capable of political manipulation to achieve "the bald dispensation of public funds and employment based on the politics of race". 822 F.2d at 1358.

II. The Richmond MBE Program Is Not Narrowly Tailored To Achieve A Remedial Goal

The City of Richmond also fails utterly to meet the second prong of the strict test for state and local programs mandating percentage set-asides for minority businesses based on racial classifications. It is not "narrowly tailored" to achieve the remedial goal. See *Wygant* v. *Jackson Board of Education*, 90 L.Ed.2d at 268.

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[5] The observations of Justices Rehnquist and Stewart in dissent in *Fullilove* v. *Klutznick*, 448 U.S. 448, 532 (1980), that approval of set-asides on the basis of race will lead to "notions of 'racial entitlement'" and the separate dissenting view of Justice Stevens in the same case that "members of the favored group will feel entitled to 'a piece of the action'" (448 U.S. at 536) have come to full fruition in this case.

[6] While *Fullilove* is distinguishable, the Associated Specialty Contractors, Inc. believes for many of the reasons expressed in this brief that *Fullilove* was fundamentally wrongly decided and invites the Court to reconsider that decision.

The basic flaw in the Richmond program, as well as many others throughout the United States, is that its framers simply took the criteria for "narrow tailoring" set out by Chief Justice Burger in the *Fullilove* case and attached them as "boilerplate" to the local program. As argued above, the Congressional set-aside approved in *Fullilove* was endorsed because it was Congressional action based on the Spending Powers and Section 5 of the Fourteenth Amendment and fortified by committee findings and other appropriate agencies of the federal government.

The automatic "tacking on" of the *Fullilove* "narrow tailoring" requirements to the Richmond MBE Program has ludicrous results. That Richmond, geographically situated in the southland of the United States, is protecting Eskimos and Aleuts from racial discrimination by giving them set-aside priorities is simply astounding. There was certainly no testimony at the City Council meeting about discrimination against Eskimos and Aleuts in the Richmond area for the obvious reason that they do not reside there. The only apparent reason for their inclusion is because they were included in the racial classifications approved in *Fullilove*. This Court in *Wygant*, however, expressly rejected a similar "undifferentiated" laundry list of racial classifications to be protected where it was not shown that the governmental entity had "engaged in prior, purposeful discrimination against *each* of these minority groups". 90 L.Ed.2d at 275, n.13 (emphasis added).

Similarly the waiver provision in the Richmond Program is wholly inadequate because it is expressly limited to "exceptional circumstances", and there is no administrative appeal mechanism to test the appropriateness of a denial of a waiver. The waiver is either granted or denied on the unreviewable fiat of the political administrator.

Finally,[7] the 30% set-aside figure is wholly arbitrary. None of the proponents of the measure gave any reasons why 30% was

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[7] In the interest of economy the *amicus* will not address other deficiencies in the "narrow tailoring" requirement inherent in the Richmond Program which have been adequately covered by other parties.

the appropriate number. As the Fourth Circuit held in this case, "The figure simply emerged from the mists". 822 F.2d at 1360.

The *post hoc* rationalization of the city and the *amici* supporting it is that the 30% figure is roughly half way between the percentage of minority contractors utilized by the City and the 50% minority population figure in Richmond, referring to a similar analysis by Justice Powell in the *Fullilove* case, 448 U.S. at 513-14. These *post hoc* rationalizations, however, miss the point that there must at least be a finding that 30% of the qualified Richmond contractors are minority owned. To the extent that number is less than 30% -- and all the evidence points to the fact that it is considerably less[8] -- the 30% set-aside is subject to abuse in that a small number of minority contractors will be sharing a comparatively large amount of city construction work, thereby reducing competition and increasing costs to the city and its taxpayers.

CONCLUSION

For all of the above reasons Associated Specialty Contractors, Inc., as *amicus curiae*, supports affirmance of the decision below.

Respectfully submitted,

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[8] See note 2, *supra*.