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 ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH IN SUPPORT OF APPELLEE

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QUESTION PRESENTED

In 1983, the City Council of Richmond, Virginia adopted a set-aside plan for minority business enterprises ("MBEs") which required the City's prime construction contractors to reserve at least thirty percent of the total dollar value of each contract for MBE subcontractors. In October 1983, acting pursuant to the set-aside plan, the City terminated a construction contract with Appellee J. A. Croson Company ("Croson") on the ground that Croson had failed to comply with the plan. In the decision now on appeal, the Fourth Circuit Court of Appeals held that the set-aside plan constituted an unlawful racial preference and therefore the City's decision to terminate Croson's contract violated its rights to equal protection under the Fourteenth Amendment.

The question presented for decision is whether the City may adopt and enforce a racially preferential set-aside for MBE subcontractors when

a) the record is devoid of any evidence that there had been racial discrimination in the award of City contracts at any time in the relevant past; and

b) the sole justification offered for the set-aside is the City's desire to remedy the present effects of past societal discrimination against minorities in the construction trades.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

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CONSENT OF THE PARTIES

Both the appellant and the appellee have consented to the filing of this brief and their letters of consent have been filed with the Clerk of the Court.

INTEREST OF THE *AMICUS CURIAE*

The Anti-Defamation League of B'nai B'rith was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial and religious prejudice in the United States. The Anti-Defamation League is vitally interested in protecting the civil rights of all persons, be they members of a minority or the majority, and in assuring that every individual receives equal treatment under the law regardless of his or her race or religion.

Among its many activities directed to these ends, the Anti-Defamation League has in the past filed *amicus* briefs in this Court urging the unconstitutionality or illegality of racially discriminatory laws or practices in cases such as *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Brown v. Board of Education*, 347 U.S. 483 (1954); *Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc.*, 372 U.S. 714 (1963); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973); *DeFunis v. Odegaard*, 416 U.S. 312 (1974); *Runyon v. McCrary*, 427 U.S. 160 (1976); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976); *Regents of University of California v. Bakke*, 438 U.S. 265 (1978); *County of Los Angeles v. Davis*, 440 U.S. 625 (1979); *United Steelworkers v. Weber*, 443 U.S. 193 (1979); *Fullilove v. Klutznick*, 448 U.S. 448 (1980); *Boston Police Patrolmen's Ass'n, Inc. v. Castro*, 461 U.S. 477 (1983); *Palmore v. Sidoti*, 466 U.S. 429 (1984); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); and *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986).

The Anti-Defamation League has long opposed the use of racial preferences in a variety of contexts, taking the position that each person has a constitutional right to be judged on his or her individual merits, rather than as part of a particular racial or ethnic group. The minority set-aside plan adopted by the City of Richmond does not fall within any legitimate exception to this fundamental and constitutionally-mandated principle. The statistical evidence presented below indicates that the relatively small number of minority business enterprises in the Richmond area may be the direct result of a long history of racial discrimination in the construction trades. There is no evidence, however, to suggest that the City of Richmond itself contributed to the situation by engaging in discrimination in the awarding of contracts. Furthermore, the racial preference enacted by the City is not narrowly tailored to remedy the discriminatory practices employed by others.

As this Court has repeatedly held, a racial preference that is not narrowly designed to remedy identifiable discrimination is necessarily unlawful. Such a preference is wholly at odds with the basic

constitutional principles that all persons are entitled to be free from discrimination on grounds of race, religion, creed, sex, or national origin, and that each person has a right to be judged on the basis of his or her own individual merit—not on the basis of the group to which he or she happens to belong. For these reasons, the decision below declaring the plan unconstitutional should be affirmed.

STATEMENT OF THE CASE

A. The Richmond Set-Aside Plan

In 1983 the City of Richmond, Virginia enacted a set-aside plan under which construction contractors receiving prime construction contracts from the City of Richmond were required to subcontract at least thirty percent of the dollar value of their contracts to minority business enterprises ("MBEs") unless the prime contractor was itself an MBE or the City waived the requirement. "Minority business enterprise" was defined as a business at least fifty-one percent owned and controlled by minority group members. Minority group members were defined as citizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts.

Before the set-aside was enacted, the City Council held a 1½-hour-long hearing on the issue. At that meeting, the Council heard evidence that black construction contractors had received approximately 0.67 percent of the City's construction contracts in the preceding five years. The Council also heard evidence that black construction contractors comprised an even smaller percentage of the construction contractors in the relevant market. The Associated General Contractors of Virginia, the American Subcontractors Association in the Richmond area, the Richmond chapter of the Professional Contractors Estimators Association, the Central Virginia Electrical Contractors Association, and the Virginia Chapter of the National Electrical Contractors Association had a total of 866 members of whom only 4, or approximately 0.46 percent, were black.

According to U.S. Census figures, the City's population was approximately 51 percent black and 47 percent white in 1980. In 1983, when the set-aside plan was adopted, Richmond had a black mayor and a black majority in its City Council.

B. Termination Of The Croson Contract

In September of 1983, four months after the adoption of the set-aside program, the City of Richmond advertised for bids to install plumbing fixtures in the City jail. In anticipation of submitting a bid, Croson asked for subcontracting bids on plumbing fixtures from both an MBE supplier and a non-MBE supplier. The non-MBE submitted a timely bid, but the MBE did not. Consequently, Croson used the bid provided by the non-MBE in calculating its bid to the City.

Croson won the contract and then asked the City for a waiver of the MBE requirement. Croson explained that the cost of plumbing fixtures amounted to seventy-five percent of the total contract, that it could find only one MBE plumbing fixture supplier, and that it did not consider that supplier to be qualified. The MBE, who still had not submitted a bid, learned of the waiver request and contacted a City official to oppose it. The City then rejected Croson's request and gave Croson ten more days to comply with the MBE requirement. During that interval, the MBE submitted to Croson a bid which was several thousand dollars higher than the competing bid that Croson had used in figuring its own bid to the City.

Croson again requested a waiver or, alternatively, an increase in the contract price to cover the increased cost of doing business with the MBE. The City rejected both requests, explaining that the MBE was qualified and that the bid price could not be increased. When Croson declined to agree to the MBE's terms, the City terminated its contract with Croson on the ground that Croson had not complied with the MBE requirement.

C. Proceedings Below

After the City told Croson that it had decided to re-bid the contract, Croson filed suit in federal court to challenge the minority set-aside plan. The district court rejected the challenge and a divided panel of the Fourth Circuit affirmed. *J. A. Croson Co. v. City of Richmond*, 779 F.2d 181 (4th Cir. 1985). This Court then granted *certiorari*, vacated, and remanded for consideration in light of *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), which

had been decided after the court of appeals decision. Following remand, a divided panel of the Fourth Circuit held the plan violative of the equal protection clause of the Fourteenth Amendment. *J. A. Croson Co. v. City of Richmond*, 822 F.2d 1355 (4th Cir. 1987). This appeal followed.

SUMMARY OF ARGUMENT

When it enacted the set-aside program at issue here, the Richmond City Council apparently assumed that any program purportedly patterned after the federal set-aside approved in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), would be permissible under the Fourteenth Amendment. *Fullilove*, however, did not give blanket approval to all MBE set-asides at all times and places and under all circumstances. On the contrary, *Fullilove* emphasized the need for a close examination of any program that allocates government contracts on the basis of race. *Amicus* believes that the appropriate test to employ in conducting such an examination is that set forth by the plurality opinion in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), which requires a demonstration that the racial preference in question is narrowly tailored to serve a compelling state interest.

The set-aside program at issue here does not meet this test. There is no evidence of past discrimination by the City of Richmond against MBEs in the award of public contracts that could be used to justify the preference as a remedial measure. Indeed, there is not even a statistical disparity between the percentage of MBEs in the relevant market and the percentage of City business awarded to MBEs.

The necessary "compelling state interest" cannot be found, as the City argues before this Court, in the City's desire to remedy the effects of societal discrimination against minorities in the construction industry. We assume that it is true, as the City contends, that the exclusion of blacks from entry-level jobs as craft workers has prevented the formation of a base of skilled workers from which minority-owned construction businesses would naturally develop. But *Wygant* properly holds that this type of societal discrimination is simply too amorphous to justify the government's use of racial preferences which discriminate against innocent third parties, while

at the same time benefiting individuals who were not themselves victims of discrimination.

Moreover, even if a desire to remedy societal discrimination could be deemed a compelling state interest, the set-aside at issue here would fail because it is not narrowly tailored to serve that interest. Under the City's own rationale, the set-aside would be lawful only if it were designed to correct the racial imbalance that currently exists in the ranks of qualified contractors by increasing the number of MBEs. Reserving thirty percent of the dollar value of City subcontracts for existing MBEs can hardly be considered narrowly tailored to the achievement of such a goal. Because the set-aside is not limited to new MBEs and does not provide any assistance for the formation of new enterprises, it is more likely to provide a preference to existing firms whose owners have managed to enter the market despite societal discrimination. Inasmuch as there is no evidence that existing MBEs have been discriminated against by the City of Richmond, the owners of such companies who are granted a preference by the set-aside cannot be considered victims. To give these owners a substantial preference in government contracting over other owners, solely on the basis of the color of their skin, is fundamentally at odds with the guarantee of equal protection set forth in the Fourteenth Amendment.

ARGUMENT

I. THE RICHMOND PLAN MUST BE CLOSELY SCRUTINIZED

The Richmond plan discriminates on the basis of race in at least two respects. First, white prime contractors such as Croson are subject to the MBE requirement, while minority prime contractors are not. Second, white subcontractors such as Croson's non-MBE supplier are denied equal access to City business while minority contractors are given preferential access.

The City must carry a heavy burden to justify the use of racial classifications in its set-aside program. "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." *Wygant*, 476 U.S. at 273 (opinion of Powell, J.) (internal quotations omitted), quoting in part from *Loving v. Virginia*, 388 U.S. 1, 11 (1967).

While racial classifications are not *per se* illegal, this Court has consistently held that "'[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.'" *Wygant*, 476 U.S. at 273, quoting *Regents of University of California v. Bakke*, 438 U.S. 2o5, 291 (1978) (opinion of Powell, J., joined by White, J.) "'Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure it does not conflict with constitutional guarantees.'" *Wygant*, 476 U.S. at 273-274, quoting *Fullilove v. Klutznick*, 448 U.S. 448, 491 (1980) (opinion of Burger, C.J.).

In *Wygant*, the plurality spelled out the two prongs of this examination. "First, any racial classification 'must be justified by a compelling governmental interest.'" 476 U.S. at 274, quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984). "Second, the means chosen by the State to effectuate its purpose must be 'narrowly tailored to the achievement of that goal.'" *Wygant*, at 274, quoting *Fullilove*, 448 U.S. at 480.

In its brief on appeal, the City urges the Court to reject the *Wygant* formulation, arguing that an intermediate level of scrutiny should be applied to any racial preference that was enacted out of a desire to remedy the effects of past discrimination. Although the precise formulation employed by the Court is not likely to affect the outcome of the decision in this case, *Amicus* believes it is critical that the Court emphasize once again that racial preferences cannot be allowed absent a clear and compelling justification. No matter how laudable the intentions of those who enacted it, a racial preference is still an extraordinary exception to the concept of equal protection embodied in the Fourteenth Amendment. Accordingly, such a preference should not be upheld absent a showing that it is narrowly tailored to further a compelling state interest.[1]

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[1] The City's suggestion that the Court should not apply strict scrutiny to the preference at issue here is particularly inappropriate in light of the racial composition of the Richmond City Council at the time the set-aside was enacted. As Judge J. Skelly Wright noted in a 1980 law review article, where a majority of the decisionmakers are members of the racial group benefited by the preference "there is no *a priori* reason to assume that they are not acting out of prejudice or hostility... such programs should... be denied the presumptive validity granted programs instituted by the groups disadvantaged by them." Wright, *Color-Blind Theories and Color-Conscious Remedies*, 47 U. Chi. L. Rev. 213, 236 (1980). *See also* Ely, *The Constitutionality of Reverse Discrimination*, 41 U. Chi. L. Rev. 723, 739 n. 58 (1974).

II. THE SET-ASIDE PLAN CANNOT BE SUPPORTED BY THE CITY'S DESIRE TO REMEDY THE EFFECTS OF PAST SOCIETAL DISCRIMINATION

When the test set forth in *Wygant* is applied to the present case, it is clear that the Fourth Circuit was correct in holding that the set-aside violated the Fourteenth Amendment. At the outset it is important to emphasize that the City does not contend that the set-aside was designed to remedy past discrimination against MBEs in government contracting. Nor could it do so. The record in this case indicates that when the plan was enacted, approximately 0.46 percent of the contractors in the relevant market were black; nevertheless, these contractors as a group were receiving 0.67 percent of the City's construction business.[2] These numbers may not be statistically significant. But to the extent they show anything, they demonstrate that the City was awarding contracts to MBEs at a rate which exceeded their proportionate representation in the construction industry.

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[2] It is clear that the proper comparison for purposes of determining whether a *prima facie* case of discrimination has been made is the percentage of minority contractors in the relevant market—not the percentage of minorities in the local population as a whole. See, *e.g.*, *J. Edinger & Son, Inc. v. The City of Louisville*, 802 F.2d 213 (6th Cir. 1986), where the Sixth Circuit relied on the absence of any proof of discrimination when such a comparison was made to strike down a set-aside plan similar to the one at issue here. The court in *Edinger* relied on this Court's opinions in *Hazelwood School District v. United States*, 433 U.S. 299, 308 (1977), and *Wygant*, 476 U.S. at 275, which held that "the proper comparison for determining the existence of actual discrimination by the school board [in hiring teachers] was 'between the racial composition of [the school's] teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market.'" *See also* the article recently published by Drew S. Days III, professor at Yale Law School and former Assistant Attorney General for Civil Rights in the Carter Administration, who argued *Fullilove* on behalf of the United States, where he explained that "[a]lthough statistics play a necessary role in the inquiry, significant disparities between the percentage of minority members among all contractors as compared with the general minority population in a state or municipality, standing alone, would not provide a sufficient basis for the implementation of a set-aside program. . . . The relevant question is whether there is a significant disparity between the percentage of minority contractors eligible to handle government contracts and their percentage representation among those actually bidding for or awarded such contracts." Days, *Fullilove*, 96 Yale L.J. 453, 481 (1987).

What the City does argue is that the set-aside was an appropriate way of remedying the present effects of past discrimination throughout the construction trades. Craft unions, the City explains, traditionally excluded blacks from entry-level positions in the construction trades and failed to advance those few who were admitted. As a result, there have been relatively few blacks holding skilled jobs in the construction industry and even fewer who were able to rise through the ranks to become construction contractors. The City argues that because the set-aside plan encourages the formation of more MBEs, it is a legitimate way of eliminating the racial imbalance in the ranks of those who own contracting businesses created by this long-standing pattern of discrimination. In support of this argument, the City relies heavily on this Court's approval of a federal MBE set-aside program in *Fullilove v. Klutznick*, 448 U.S. 448 (1980). The analysis set forth in *Fullilove*, however, simply does not support the wide-ranging theory espoused by the City in this case.

Although the Court in *Fullilove* referred to the well-known history of racial discrimination in the construction trades, it did not approve the ten percent set-aside at issue there on the ground that government could use racial preferences in government contracting to remedy the effects of societal discrimination. On the contrary, the Court emphasized that Congress had enacted the set-aside in response to evidence of direct and continuing intentional discrimination against minority contractors in the award of public contracts. As the Chief Justice stated, Congress believed that the inordinately low percentage of federal contracts awarded to minority business enterprises resulted "*not* from any lack of capable and qualified minority businesses, but from the existence and maintenance of barriers to competitive access which had their roots in racial and ethnic discrimination. . . ." *Fullilove*, 448 U.S. at 478 (opinion of Burger, C.J.) (emphasis supplied). Thus, the federal program approved in *Fullilove* was designed to remedy purposeful and "identified discrimination against minority contractors," *id.* at 507 (Powell,

J., concurring), and was based on adequate evidence of such discrimination.[3]

In this case, as described above, the City concedes that there is no evidence that "capable and qualified minority businesses" were excluded from government contracting opportunities by intentional discrimination or by the effects of past discrimination. Instead, the City's claim is that discrimination within the industry has been so pervasive that relatively few capable and qualified minority businesses have been able to emerge in the Richmond area. While this may be true, it cannot be the basis of a government preference for existing MBEs.

In *Wygant*, the plurality specifically rejected the notion that a desire to remedy societal discrimination is sufficient to support a state's adoption of a racial preference, noting that the Court has always "insisted upon some showing of prior discrimination *by the governmental unit involved* before allowing limited use of racial classifications in order to remedy such discrimination." *Wygant*, 476 U.S. at 274 (emphasis added). As the plurality further observed: "Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." *Wygant*, 476 U.S. at 276. "No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is insufficient and overexpansive." *Id.* (emphasis in original).

The City asks the Court to repudiate this reasoning and to hold that government contracts can be allocated on the basis of race whenever there is a showing that a particular group has been prevented by societal discrimination from competing for those contracts. The difficulty with the City's argument, as the plurality observed in *Wygant*, is that it could be used to justify virtually any type of racial preference. "In the absence of particularized findings,

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[3] *See also* Justice Marshall's concurring opinion, where he observed that "Congress had a sound basis for concluding that minority-owned construction enterprises, though capable, qualified, and ready and willing to work, have received a disproportionately small amount of public contracting business because of the continuing effects of past discrimination." *Fullilove*, 448 U.S. at 520.

a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future." *Wygant*, 476 U.S. at 276.

This Court has long held that the Constitution requires the government to allocate burdens and benefits without reference to the racial make-up of its citizens. Racial preferences that are narrowly tailored to remedy identifiable discrimination have been recognized as an exception to this rule. If the City's position were adopted, the exception would grow so large that it would obliterate the fundamental constitutional principle of even-handed treatment. The City has not offered any reason why this Court should make such a revolutionary change in the law.

III. THE SET-ASIDE PLAN IS NOT NARROWLY TAILORED

Even if this Court were to reject the plurality opinion in *Wygant* and accept the City's argument that its desire to remedy the effects of societal discrimination is a compelling state interest, the City's thirty percent set-aside for MBEs would still be invalid. "Under strict scrutiny the means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose." *Wygant*, 476 U.S. at 280. There is no such fit here between the asserted purpose of the racial classification and the means chosen to effectuate it.

Again, a comparison with the set-aside approved in *Fullilove* is instructive. As described above, Congress enacted the program at issue in *Fullilove* in response to evidence of intentional discrimination against capable minority contractors in the awarding of public contracts. The ten percent set-aside enacted by Congress was designed to end that discrimination and perhaps to compensate the victims as well. The Court found the remedy to be sufficiently tailored to fall within the ambit of congressional discretion.

In making this determination, the Court emphasized both the temporary nature of the plan and the breadth of congressional power. The ten percent set-aside program was part of an emergency public works program in which the funds were to be spent within a year. As Justice Powell emphasized in his concurring opinion, the "set-aside is not a permanent part of federal contracting requirements. As

soon as the PWEA program concludes, this set-aside program ends. The temporary nature of this remedy ensures that a race-conscious program will not last longer than the discriminatory effects it is designed to eliminate." 448 U.S. at 513. The Court also gave great weight to the fact that the set-aside had been enacted by Congress, "a co-equal branch" accorded special powers under Section 5 of the Fourteenth Amendment. *Id.* at 472, 477, 487.

In this case, by contrast, there is no claim that minority contractors in the Richmond area were discriminated against in the award of City contracts between 1978 and 1983. Rather, the City argues that the set-aside was justified in order to cure the effects of societal discrimination on minorities who were prevented from entering the contracting business altogether.

The difficulty with the City's argument is that a remedy that gives existing minority contractors a substantial preference in the award of government subcontracts is hardly "narrowly tailored" to remedy entry-level discrimination against minority construction workers. The City apparently contends that providing existing MBEs with a guaranteed portion of municipal business would indirectly encourage an increase in minority employment and the formation of minority enterprises.[4] This assumes that MBEs are more likely to hire and promote minority workers than are firms owned by whites. It also assumes that the barriers that have heretofore prevented the successful formation of a significant number of MBEs would dissolve if a guaranteed market were provided.

The mere hope that the set-aside might indirectly increase minority participation in the construction industry is too indirect a link between the set-aside and the governmental interest offered in its support to overcome the constitutional objections to the use of a racial preference. If the City is truly concerned with increasing minority access to entry-level construction jobs, there are a number of more direct approaches it could have employed. In addition to

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[4] In its brief on appeal, the City does not offer any justification for its selection of a thirty percent set-aside except to argue that this represents only a small fraction of constructing opportunities in the Richmond area. The fact that the thirty percent figure was selected arbitrarily or, as the Circuit Court said "simply emerged out of the mists," 822 F.2d at 1360, is, in and of itself, strong evidence that the plan is not properly tailored.

policing the hiring practices of City contractors, the City could require those contractors to conduct or to participate in apprenticeship programs geared to minorities and to institute recruiting programs in minority communities. In addition, the City could create seed capital or other programs designed to aid minorities and other disadvantaged workers in starting up new businesses. Programs such as these would directly help those who have been the victims of prior discrimination and would also create the base from which more minority contractors could rise.

As it stands now, the set-aside program not only fails to provide anything more than the hope of an indirect remedy to those who have been victimized by discrimination, it also confers a windfall on construction contractors who happen to be members of certain minority groups. These individuals are not identified victims of discrimination by the City in particular or by society in general. Nevertheless, the set-aside program grants them a very substantial preference in bidding on government subcontracts.

Assuming, as the City Council apparently did, that the percentage of minority contractors is comparable to the percentage of blacks in the major local contractor associations, MBEs constitute approximately 0.46 percent of the available subcontractors. Under the set-aside, these contractors are entitled to thirty percent of the dollar value of every prime contract let by the City. Assuming that the thirty percent rule is observed in every case, this means that an MBE in Richmond is sixty-five times as likely to receive a municipal subcontract as is a white contractor.[5]

The substantial nature of the preference in this case is important in looking at the final factor that this Court has traditionally consid-

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[5] The fact that the set-aside gives a preference to MBEs for thirty percent of the dollar value of the prime contract (rather than thirty percent of the work that is subcontracted) means that in any particular case MBEs may have an even greater advantage. For example, if a prime contractor subcontracts only thirty percent of the work, all of that work must go to an MBE. Similarly, if, as in the case at bar, the subcontract cannot be easily split and constitutes more than thirty percent of the value of the prime contract, the entire contract again must go to an MBE.

ered with respect to racial preferences—the effect of the set-aside on innocent contractors who are not members of the minority group preferred by the ordinance. While non-minority contractors were disadvantaged to a certain extent by the ten percent set-aside in *Fullilove*, the Court found that disadvantage to be too small and indirect to outweigh the remedial benefits of the plan. In this case, by contrast, there are no direct remedial benefits from the plan. Furthermore, the thirty percent set-aside in this case imposes a far greater burden on non-minority contractors in the Richmond area than did the temporary ten percent set-aside at issue in *Fullilove*. Under these circumstances, *Amicus* submits that the Fourth Circuit was correct in holding that the racial preference at issue here is unconstitutional.

CONCLUSION

The Richmond set-aside program exceeds the constitutional and legal boundaries set by this Court. Striking down the City's scheme would still leave ample room for appropriate remedial efforts. But to uphold it would foster racial preferences under which individual rights would disappear in favor of theoretical "fairness" to racial or ethnic groups. The notion that each racial group is entitled to its "share" of public jobs and contracts is fundamentally at odds with the concept of individual rights embodied in the Constitution. Moreover, endorsement of a concept of group rights is bound to increase the level of political polarization in our society, as politicians and voters divide along racial lines based on the perception that political patronage is the only way to ensure fairness in the governmental process. This is not the type of legacy this Court should leave. As Justice Harlan observed almost a century ago in dissent in *Plessy v. Ferguson*, 163 U.S. 537, 560 (1896), "The destinies of the two races, in this country, are indissolubly linked together, and the interests of both require that the common government of all shall not permit the seeds of race hate to be planted under the sanction of law."

For the foregoing reasons, the judgment of the court below should be affirmed.

Respectfully submitted,

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Dated: June 8, 1988