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

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MOTION TO AFFIRM

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QUESTIONS PRESENTED

1. Did the record fail to establish that the ordinance remedied past discrimination?

2. Does the Equal Protection Clause of the Fourteenth Amendment preclude a City from adopting a race-conscious legal remedy upon a general recognition of societal discrimination and reliance upon statistics pertaining to minority participation in relation to representation in the general population?

3. Is the ordinance carefully tailored to meet an identified remedial need?

4. Before a governing body may adopt a race-conscious legal remedy for prior discrimination is it necessary that there be a showing of prior discrimination by the governing body?

Note: J. A. Croson Company has no parent company, subsidiary, or affiliate.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	ii
Questions are Unsubstantial	1
I. The Record fails to Establish that The Ordinance Did Not Remedy Past Discrimination	1
II. The Equal Protection Clause of The Fourteenth Amendment Precludes A City from Adopting a Race-Conscious Legal Remedy Upon a General Recognition of Societal Discrimination and Reliance Upon Statistics Pertaining to Minority Participation in Relation to Representation in The General Population	4
III. The Ordinance is not Carefully Tailored to Meet an Identified Remedial Need	5
IV. Before a Governing Body May Adopt a Race-Conscious Legal Remedy for Prior Discrimination it is Necessary That There be a Showing of Prior Discrimination by the Governing Body	7
Conclusion	9

TABLE OF AUTHORITIES

Cases

Associated General Contractors v. City and County of San Francisco, 813 F.2d 922 (9th Cir. 1987)	2, 6
Firefighters v. Cleveland, 478 U.S. ____ , 106 S.Ct. 3063 (1986)	7

Fullilove v. Klutznick, 448 U.S. 448 (1980).... 6

General Building Contractors Association Inc. v. Pennsylvania, 458 U.S. 375 (1982).. 7

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

Janiowiak v. City of South Bend, No. 84-1321, (7th Cir., Dec. 16, 1987) 3

Johnson v. Transportation Agency, Santa Clara County, 107 S.Ct. 1442 (1986) 5, 7

Michigan Road Builders Association v. Milliken, No. 86-1239 (6th Cir., Nov. 25, 1987). 2, 5

Regents of the University of California v. Bakke, 438 U.S. 265 (1978)..... 8

Sheet Metal Workers v. EEOC, 478 U.S. _____ , 106 S.Ct. 3019..... 7

United States v. Paradise, 107 S.Ct. 1053 (1987) 6-8

Wygant v. Jackson Board of Education, 106 S.Ct. 1842 (1986) ..... *passim*

CONSTITUTIONAL PROVISION

U.S. Const. amend. XIV ..... *passim*

OTHER AUTHORITIES

Days, *Fullilove*, 96 Yale L.J. 453 (1987)..... 3

Neuborne, *Observations on Weber*, 54 N.Y.U.L. Rev. 546 (1979)..... 3

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Appellee, pursuant to Rule 16 of the Rules of the Supreme Court, moves that the decision of the Court of Appeals, reported in 822 F.2d 1355 (4th Cir. 1987), be affirmed on grounds that the questions are so unsubstantial as not to warrant further argument.

THE QUESTIONS ARE UNSUBSTANTIAL

I.

The Record Fails to Establish That the Ordinance Remedied Past Discrimination.

The questions presented in the Jurisdictional Statement are hypothetical because they are devoid of factual predicate which would enable the Court to answer the questions.

Appellants charge that the ordinance was enacted to remedy what Appellants term "the virtual absence of minority participation in City construction contracts . . . ." To justify this assumption, the City relies on the content of the hearing held prior to the adoption of the ordinance. But the fact is that the transcript of the hearing, which has been lodged with the court, fails to show any discrimination or any underutilization of minorities. The only reference to discrimination at the hearing was a reference to discrimination "in the construction industry in this area" by one of the patrons of the ordinance. The remark came as he introduced statistics on the participation of minority prime contractors, all produced after the close of testimony, and after the Clerk had called the question.[1]

Appellant further invites this Court to grant plenary review to consider such issues as whether the ruling of the Fourth Circuit "endangers" the programs of other cities (Brief of Appellant at 9, 10 n.25.) Decisions of three Courts of Appeals striking down racially discriminatory laws adopted upon improper use of general population statistics are cited as indications that the Circuits are "unguided." (Id. at 10.) The common thread of all of the decisions is that general population statistics are incompetent to establish the basis for a race-conscious legal remedy.[2] However, there is no evidence in this case

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[1] Transcript of Hearing, Richmond City Council, April 11, 1983, at 46. In *Associated General Contractors of California v. City and County of San Francisco*, 813 F.2d 922, 932-33 (9th Cir. 1987), the Court rejected the validity of a statistic offered to show "virtual exclusion of minority-owned and women-owned businesses from city contracts" where the statistics considered only the level of minority prime contractors rather than subcontractors.

[2] See *Michigan Road Builders Association v. Milliken*, No. 86-1239 (6th Cir. November 25, 1987); *J. Edinger & Son v. City of Louisville*, 802 F.2d 213 (6th Cir. 1986). *Associated General Con-*

which would enable this Court to evaluate the efforts of local governments to encourage minority participation in public contracting.

Appellant merely invites this Court to provide a *post hoc* rationale for the City's action. The Court of Appeals declined that invitation.

> The able trial judge could not point to any evidence beyond that relied upon by the City Council—namely the spurious statistical comparison and the nearly weightless testimony. We cannot uphold the plan based on this evidence, nor would it be proper for us to develop a *post hoc* rationale for the City's racial preference. App. A at 8a.

It has been recognized that some race-conscious affirmative action plans have been adopted for benign purposes without sufficient justification. Days, *Fullilove*, 96 Yale L. J. 453, 458 (January, 1987).[3] Days deplores the tendency to defend such programs "in unqualified terms instead of helping the courts to develop criteria that separate permissible from impermissible programs . . . . " Id. at 459.

> "Although this attitude can be explained, it should not be condoned. Such an approach weakens, not strengthens, the general principle of affirmative action." Id. at 459.

Under the guise of defending affirmative action, Appellant invites this Court to adopt a test which would

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tractors v. City and County of San Francisco, 813 F.2d 922 (9th Cir. 1987). On remand from this Court, *Janiowiak v. City of South Bend*, Slp. op. n.9, No. 84-1321, (7th Cir., December 16, 1987), cited with approval the Fourth Circuit's decision in this case.

[3] See also Neuborne, *Observations on Weber*, 54 N.Y.U.L. Rev. 546 (1979).

permit governing bodies to adopt race-conscious legal remedies without an adequate showing of a compelling interest or without ascertaining that a particular plan is narrowly tailored to the achievement of that goal.

If all that a City needs to do to adopt racial preferences in public construction is to rely on broad brush assumptions of historical discrimination and an assumed disparity between white and minority participation in the market, there is no way to avoid the danger foreseen by the Fourth Circuit—that the difference between legitimate remedial measures and patronage based on race becomes indistinguishable. See App. A at 4a.

II.

The Equal Protection Clause of The Fourteenth Amendment Precludes A City from Adopting a Race Conscious Legal Remedy Upon a General Recognition of Societal Discrimination and Reliance Upon Statistics Pertaining to Minority Participation in Relation to Representation in the General Population.

The Fourth Circuit has interpreted this Court's decision in *Wygant v. Jackson Board of Education*, 106 S. Ct. 1842 (1986), to preclude a city from adopting an ordinance requiring white prime construction contractors to subcontract 30% of the value of construction contracts to minority businesses where the basis for adopting the ordinance is a recognition of societal discrimination plus reliance on non-probative statistics. App. A at 8a.

The statistics in question involved the number of minority firms that had been awarded construction contracts as prime contractors with the city. City Council had before it no evidence of discrimination other than the statistic. As the City Attorney advised,

> "In the term remedial, we're not just implying that the City was intentionally discriminatory in the past. What we're saying is that there are

statistics about the number of minorities that were awarded contracts in the past which would justify the remedial aspects of the legislation . . . ." (Id. at 8)

Similarly in *Michigan Road Builders Association, Inc. v. Milliken* the Court of Appeals rejected the significance of statistics that only four of Michigan's 8,112 minority businesses did business with the State. Slp. op. at 22, No. 86-1239 (6th Cir., November 25, 1987.)

The City's minority utilization plan violates the Equal Protection Clause because it is more than "taking race into account." In insisting on the award of public contracts on the basis of race, the ordinance has the same effect as denying a contract to a black because of his race, which is equally violative of the constitution. See, *Wygant*, 106 S. Ct. at 1858 (White, J., concurring.)

This is in contrast to the flexible, case by case, approach of taking race into account in *Johnson v. Transportation Agency, Santa Clara County*, 107 S. Ct. 1442 (1987) which rejected the "combination of an inadequate foundation for remedial action plus a reflexive adherence to a numerical standard" found in the Richmond plan. App. A at 13a, Citing 107 S. Ct. at 1455.

III.

The Ordinance is not Carefully Tailored to Meet an Identified Remedial Need.

The Court of Appeals has identified a number of factors in its conclusion that the ordinance is not narrowly tailored to remedy past discrimination: the 30% quota was chosen arbitrarily; minority prime contractors are exempt from the minority utilization requirement, and the definition of minorities is overinclusive. App. 11a–12a.

The City made no effort to narrowly tailor the provision of the ordinance. The City merely adopted as

boiler plate the statute which had passed muster in *Fullilove v. Klutznick*, 448 U.S. 448 (1980). The City made no effort to tailor the statute to any identified local need, despite Justice Powell's admonition in *Fullilove* that the decision was not an authorization to localities to adopt similar remedies. See 448 U.S. at 515–16, n.14. (Powell, J., concurring.)

The 30% set-aside was derived by arbitrarily reducing the percentage of blacks in the general population by forty percent. All of the cases discussed herein condemn the use of general population statistics in fashioning race-conscious remedies.

The City also failed to consider the lack of administrative mechanisms to prevent or ameliorate undue adverse impact on contractors in industries heavily dependent on public contracts. The Ninth Circuit held such mechanisms to be required. See *Associated General Contractors*, 813 F. 2d at 936.

In *United States v. Paradise*, 107 S.Ct. 1053, 1064 (1987) the Court noted that there are several factors, none of which were considered in this case, involved in determining whether race-conscious remedies are appropriate, including:

> "the necessity for relief and the efficacy of alternative remedies, the flexibility and duration of the relief, including the availability of waiver provisions, the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of third parties."

The instant case offers no attention to any of these matters.

IV.

Before a Governing Body May Adopt A Race-Conscious Legal Remedy For Prior Discrimination It Is Necessary That There Be A Showing Of Prior Discrimination By The Governing Body.

The interest asserted by the City for the adoption of its minority utilization plan is that it is to remedy prior discrimination against black contractors.

Accordingly, this Court should decline the Appellant's invitation to inquire whether there are other interests, which do not require a showing of prior discrimination, which the City might have asserted as a basis for taking race-conscious actions which merely take race into consideration.

Where the asserted interest in adopting a race-conscious legal remedy is to remedy past discrimination there must be a showing that prior discrimination is being remedied. *Johnson, supra*, 107 S.Ct. 1453, 107 S.Ct. at 1461 (O'Connor, J., concurring). Prior decisions of this Court have all turned on whether there was discrimination by the entity which sought to take remedial action. See, e.g., *Sheet Metal Workers v. EEOC*, 478 U.S. ___, 106 S.Ct. 3019, (1986); *Firefighters v. Cleveland*, 478 U.S. 106 S.Ct. 3063 (1986); *United States* v. *Paradise*, 107 S.Ct. 1053, 1064-66 (plurality opinion), 107 S.Ct. at 1076 (Powell, J., concurring), 107 S.Ct. at 1076 (Stevens, J., concurring), 107 S.Ct. at 1080 (O'Connor, J., dissenting.)

As was noted in *Paradise* government bodies may employ racial classifications "to remedy unlawful treatment of racial or ethnic groups subject to discrimination. 107 S.Ct. at 1064.

In *General Building Contractors Association, Inc.* v. *Pennsylvania*, 458 U.S. 375 (1982), the Court held that minority hiring quotas could not be imposed upon a party who has not been guilty of discrimination.

No prior decision of this Court has held that racial balance for its own sake constitutes a compelling governmental interest. *Wygant*, 106 S.Ct. 1847 (plurality opinion), 106 S.Ct. at 1854 (O'Connor, J., concurring.) In *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), Justice Powell found the interest of a University under the First Amendment in promoting "the robust exchange of ideas by encouraging racial diversity to justify consideration of race as a factor in the admission process, but not as a legal remedy for prior discrimination. In *Johnson*,[4] an affirmative action plan was allowed to consider race as a factor in promotion decisions, but even then a manifest imbalance was established by competent evidence.

Wygant and *Paradise*, both being cases which involve race-conscious legal remedies, do hold that the discrimination being remedied must be committed by the governing body itself. In this case, there was no particularized finding of discrimination of any kind. So this appeal presents no issue regarding the nature of any finding of discrimination by a local governing body which proposes to enact a race-conscious program.

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[4]*Johnson* was a Title VII case and lends itself to a further distinction based on the assumption that the standard of review is different than in a case in which race-conscious action is reviewed under standards mandated by the Equal Protection clause. See 107 S.Ct. at 1442.

CONCLUSION

Appellant presents no substantial question for the decision of this Court. The decision of the Court of Appeals should be affirmed.

J. A. CROSON COMPANY,
Appellee

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