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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BRIEF ON BEHALF OF THE APELLEE

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QUESTIONS PRESENTED

I. Does the equal protection clause require a governing body to show that it bears the responsibility for racial discrimination before it imposes a racial classification in the award of public contracts?

   A. The Appellant's Argument Assumes Facts which are not in the Record.
   B. The Record Should establish The Responsibility of The Governing Body For The Discrimination Being Remedied.
   C. Societal Discrimination Is Too Unrevealing To Permit A Governing Body To Adopt A Remedial Racial Classification.
   D. The Court Should Require That The Governing Body Has A Compelling Interest in Adopting The Racial Classification.

II. Must the record provide positive assurance that the racial classifications were necessary as a narrowly tailored remedy for discrimination for which the governing body is responsible?

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STATEMENT OF THE CASE

A.

DETAILS OF THE PLAN AND ORDINANCE

The City Minority Utilization Plan requires non-minority race contractors who are awarded construction contracts by the City to subcontract at least 30% of the dollar value of the contract to Minority Business Enterprises (MBEs). J. S. Supp. App. H at 247.[1] If the prime contractor is a minority business enterprise, the requirement that 30% be subcontracted to MBEs is inapplicable. *Id.*

The City's Plan was the product of two ordinances. The second ordinance, providing most of the Plan as it now stands, was adopted by the Council on April 11, 1983. J. S. Supp. App. H at 233, 249. It was an amendment to the City's general procurement procedures for purchasing the City's materials and services, which had been first adopted five months earlier. *See* Richmond, Va., Ordinance No. 82-294-270 (December 20, 1982), Code Ch. 24.1.

The expressly stated purpose of the Plan was:

> "This article is remedial and is enacted for the purpose of promoting wider participation by minority business enterprises in the construction of public projects, either as general con-

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[1] References to the Appendices will follow the form used by Appellant. The Joint Appendix, which contains the transcript of the hearing before City Council prior to adoption of the Ordinance at issue, is cited J. A. at . . . . The Appendix to the Jurisdictional Statement, which contains the Opinion of the Court of Appeals, is cited J. S. App. A at . . . a. The Supplemental Appendix to the Jurisdictional Statement, which contains lower court opinions and the Ordinance, is cited J. S. Supp. App. . . . at . . . . References to the record will be cited by Exhibit number Ex. . . . .

tractors or subcontractors." J. S. Supp. App. H at 248.

The Plan defines an MBE as "a business at least fifty-one percent minority-owned and operated by minority group members or, in the case of a stock corporation, at least fifty-one percent of the stock of which is owned and controlled by minority group members." J. S. Supp. App. H at 248. The Plan defines "minority group members" as "citizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts." Richmond, Va. Code ch. 24-1, art. I(F) (Part B) Paragraph 27.20, and VIII-A (1983); J. S. Supp. App. H at 241. A bidder, who is not otherwise a minority, has ten days after notification that he is the low bidder to submit a completed form designating the minority contractor whose work will constitute 30% of the contract. Ex. 14.

The Plan lacks a number of features which others use to avoid imposing rigid numerical quotas. (1) By administrative policy, waivers of the 30% utilization requirement are to be granted only when every feasible effort has been made to comply *and* qualified MBEs are unavailable or unwilling to participate. Ex. 14. (2) There is no requirement that the minority contractor or subcontractor perform any useful service on the contract, just that he receive 30% of the contract amount. (3) Nothing in the Plan precludes a minority from subcontracting its share back to a non-minority firm. (4) The plan includes racial minorities without regard to their economic or social status—there are no limitations on net worth or gross sales. (5) There is no "graduation requirement" for any firm which becomes able to compete without the protection of preferences. (6) There is no limitation on residency, which would focus the remedial effort on the Richmond area.

B.

The Bidding Process and Waiver Application.

This appeal presents challenges to the adequacy of the required factual predicate for adopting the ordinance and the failure to adapt its provisions to remedy an identified problem. But the facts bearing on the administration of the ordinance remain important because they show how inflexibly civil servants administer such a law once it is enacted. The difficulty imposed on a bidder who is not a member of one of the races selected for inclusion in the law is also illustrated.

There is no issue as to the good faith of either party.

Appellee J. A. Croson Company ("Croson"), an Ohio corporation, is a contractor which submitted the low bid on a project to install stainless steel plumbing fixtures in the Richmond City Jail. Croson had not done business with the City before. Deposition of Eugene Bonn, Ex. 17c at 4. Croson was awarded the contract contingent on complying with the minority utilization requirement.

The fixtures were especially designed for use in a penal institution, so that only two manufacturers met the required specifications. The cost of the fixtures represented approximately 75% of the cost of the project. Croson's regional manager, Eugene Bonn, determined that the only way in which to satisfy the City's requirement that 30% of the contract be awarded to a minority owned firm was to obtain a minority supplier for the fixtures. J. S. Supp. App. G at 121. Bonn had prior knowledge that there were no minority suppliers. The project had been out for bid previously, and although Croson had not submitted a bid, Bonn testified that he had then contacted minority suppliers in Pittsburgh and North Dakota in an unsuccessful attempt to secure minority participation by minority suppliers. Deposition

of Eugene Bonn, Ex. 17c at 14-15.

On September 30, the day he received the bid documents, Bonn contacted a number of minority businesses listed as plumbing suppliers with the Virginia Office of Minority Business Enterprise, the Richmond Human Relations Commission, and the Richmond Redevelopment and Housing Authority. He informed the firms about the project and how to obtain the specifications necessary to quote a price on the fixtures. Deposition of Eugene Bonn, Ex. 17c at 21; J. S. Supp. App. G at 121. Bonn contacted the referrals again on October 12, the last day on which bids could be submitted, to inquire whether any would be quoting him a price. No minority firm quoted a price, so Bonn submitted his bid of $126,530.00 using a quote from a non-minority firm which regularly supplied such items. Bonn had received quotes directly from three non-minority suppliers. Bonn Dep. at 7. Testimony showed that none of the minority firms contacted by Bonn were suppliers of plumbing equipment made by the two manufacturers of the specified product. Deposition of Curtis Johnson, Ex. 17d at 11-12; Deposition of Wallace Green, Ex. 17f at 4, 6; Deposition of Donald Sparrow, Ex. 17a at 22, 34. None testified that they knew that they could have arranged to supply the product.

Melvin Brown, a principal in a Richmond business called Continental Metal Hose, Inc., was contacted by Croson on October 12. There was a conflict in testimony as to whether Continental had been contacted on September 30 to quote a price. Bonn produced telephone toll records to show that he had contacted the other firms on his list on September 30 and had notes (Ex. 11) showing that Continental Metal Hose was on his list. At least one of the firms contacted returned calls to Bonn. Deposition of Wallace Green, Ex. 17 at 10. Bonn testified

as to the content of his conversations with Brown. Since Continental Metal Hose was a local firm, there was no toll record.

The District court found it unnecessary to resolve the conflict in testimony. J. S. Sup. App. G at 190.[2]

On October 12, Bonn gave Brown the name of a distributor from whom Brown could obtain prices. The distributor refused because Brown had not established credit and the purchase price was in excess of $80,000. Deposition of Melvin Brown, Ex. 17(b) at 15, 22. Brown also requested prices from a supplier who had already quoted a price to Bonn and was refused. J. S. Supp. App. G at 125. Brown attended the bid opening on October 13 and advised Bonn that he would attempt to supply the fixtures. Brown gave Bonn literature which described Continental Metal Hose as a dealer in metal pipes and hoses. Transcript of hearing, United States District Court, February 20, 1984, at 11. Bonn advised Brown of the names of two manufacturers of approved products. *Id.* at 13. In order to be able to supply the fixtures, Brown would have to be approved as a supplier by one of the two manufacturers of the approved products. *Id.* at 19.

On October 19, Bonn requested that the City waive its 30% minority utilization requirement on grounds that no qualified minority supplier was available. Waivers were required to be obtained within 10 days of the bid opening, or the contractor would be deemed to be in noncompliance; the City has three days to act on a

[2] The District Court also stated that under *Fullilove* it would not be unconstitutional if, after every feasible effort to obtain minority participation had been made, the ordinance permitted a minority to appear after bids were opened and force the contractor to rework his bid. J. S. Supp. App. G at 229, n. 14, citing *Fullilove*, 448 U.S. at 492-93.

request for waiver. Ex. 14. On October 27, the day Brown learned Croson had asked for a waiver of the MBE requirement, Brown asked Bonn for the name of the second manufacturer's representative. J. S. Supp. App. G at 124. On October 31, Brown submitted a quote based on prices supplied by the second manufacturer's representative. J. S. Supp. App. G at 124-125. On that date, Brown called the Director of Purchasing and Stores for the City, and advised him that he had obtained a price. J. S. Supp. App. at 125. Brown added a $7,663.15 markup to his quote to Croson, which was $6,183.29 higher than the customary mark-up and Bonn's other quote. Transcript, Circuit Court of City of Richmond Ex. 18 at 45-46. Bonn advised the City that not only was Brown not a qualified supplier, but that the price he did quote was unreasonably high.

On November 18, the City advised Croson that it was cancelling the bids and was rebidding the contract. Bonn sought to appeal the decision and was advised that there was no appeal of a decision to rebid a contract. J. S. Supp. App. G at 129; Ex. 9. On December 16, Brown was notified by the manufacturer's representative that he was approved as a distributor ". . . in the event they are the successful bidder with respect to the replacement plumbing fixtures for the Richmond City Jail." Ex. 16.

At the hearing on motion for preliminary injunction in the Circuit Court of the City of Richmond prior to removal upon motion of the City to the United States District Court, the City testified that, since Continental Metal Hose was listed as a plumbing supplier with the various minority business referral sources it consulted, Continental Metal Hose was deemed to be an available minority business enterprise (MBE), and that no effort was made to ascertain whether Brown was in fact able to supply the equipment. Transcript, Ex. 18, at 21-22. The

City further testified that the price a minority contractor quoted was of no concern to the City. Deposition of Vernon Williams, Ex. 17(g) at 48-49; Deposition of H. R. Wall, Ex. 17(h) at 56-57.

Brown testified that he was charging ". . . whatever the market will bear." Transcript, Ex. 18 at 91.

C.

Adoption of The Ordinance

The most that can be said for the process employed by City Council is that it afforded the public the chance to comment on the Plan before it was put to a vote.

At the conclusion of a five hour Council meeting, the City held a two hour hearing in which five persons spoke against and two spoke for the need for the Plan. The hearing was the public hearing required by law, upon five days notice, for the adoption of any city ordinance after the ordinance has been introduced. *See* Richmond City Charter, Section 4.10, Acts of Assembly [Virginia] ch. 120 (1964). The hearing was not held for the purpose of ascertaining the nature of any problem which may require remedial action. Council debate is not a required part of the hearing. J.A. at 17.

The Plan was introduced by one of its two sponsors (Council members Richardson and Marsh) who described its purpose as being "to have those dollars recycled back to minority businesses . . ." J.A. at 12. No testimony from the citizens who spoke in favor of the Plan identified any basis for enacting the ordinance. Neither of the two proponents was connected with the construction industry. The tenor of the remarks of the first speaker was that other cities had such Plans and it was time for Richmond to have one. J.A. at 18-19. The other mentioned "a kind of closed atmosphere to entertaining new companies and new ideas and new vendors

here in the Richmond area." J.A. at 17. One of the sponsors of the Plan commented that blacks were victims of discrimination "in the construction industry in this area." J.A. at 41. No explanation of the nature of the discrimination was offered and this remark came in debate among Council members after the close of testimony. J.A. at 41. Apparently failing to recognize that opponents had no further opportunity to speak, Judge Sprouse's dissent described this as "unchallenged statements of council members." J. S. App. A at 16a. The sponsor then handed the clerk a listing of the contract amounts which had been awarded from 1978 through the first two months of 1983. That list (and a subsequently prepared list of prime contractors who received the contracts) appears as Exhibit 20. The list represents the only data that Council had before it. No speaker saw it. The sponsor stated at that time that only .67% of the City's prime contracts had been awarded to minority firms. No documentation of this was provided. The list of contractors does not indicate which were MBEs. J.A. at 41. The figure was not made available prior to the hearing. J. S. App. A at 16a.

There was no identification of the basis for choosing a 30% set-aside figure.

The vote in favor of adopting the Plan was along racial lines with the five black members and one of the four white members of the Council voting for it. J.A. at 49.

In contrast to the City's historical experience with prime contractors, City Officials were aware that the prime contractors were utilizing minority subcontractors at a significantly greater rate. In reply to a question from a council member, the City Manager stated that the City's experience with minority utilization was about 7 or 8% of the total. J.A. at 16. On the Community

Development Block Grant Program, which had a 10% utilization goal, minority utilization was between 17% and 22%. J.A. at 16. When the discussion among council members turned to the level of activity of subcontractors, one of the sponsors of the Plan suggested that the public hearing should continue. J.A. at 17.

Opponents of the Plan testified that the Plan would be counterproductive because of the lack of available minority subcontractors. The lack of available local qualified contractors to work on fixed price government contracts was attributed to licensure requirements (J.A. at 32), lack of ability to estimate costs (J.A. at 36), bonding requirements and financial capabilities. J.A. at 37. Most of the trade associations which spoke mentioned efforts to recruit minority members. None were accused of discrimination by any speaker or member of Council, nor were they afforded the opportunity to respond to the broad allegations of racism and discrimination leveled at them for the first time in the City's brief.

The City's position in its "Petition for Rehearing and Suggestion for Hearing in Banc" in the Court of Appeals was that (1) it has the right to rely on the congressional findings of private and governmental discrimination (Petition at 9); and (2) that the "discriminatory barriers" that the City seeks to address through racial classification include:

> The MBE must also overcome proven obstacles to market entry, obstacles identified and discussed in *Fullilove*, including obtaining the necessary working capital, insurance, and bonding, as well as developing a "track record." If the MBE does not overcome each of the obstacles, the City of Richmond's hands are tied. It has no contracting choice but to deal almost exclu-

> sively, with nonminority contractors, as was the city's experience until the very recent past." Petition for Rehearing at 12.[3]

Appellee does not question the entitlement of the City to address such race-neutral barriers, but disputes the use of racial classifications as the means of doing so.

The City attorney expressly disavowed "intentional discrimination [by the City] in any particular case but relied on general discrimination by the construction industry cited in *Fullilove*. J.A. at 15.

SUMMARY OF ARGUMENT

This case presents to the court the narrow issue whether showing that a low percentage of awards of *prime contracts* to minority race contractors justifies adoption of a requirement that non-minority contractor subcontract 30% of the contracts to minority businesses.

It is assumed for purposes of argument that local governments can in proper circumstances adopt percentage requirements for the use of minority subcontractors. Appellee contends that in this case the record fails to disclose a proper basis for adoption of the racial classification.

Evaluating the constitutionality of race-conscious legal remedies under the equal protection clause of the

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[3] Other documents produced by the City in discovery showed that construction purchase orders (under $10,000) were awarded to minority firms at a 10.5% rate. It was known to counsel for both parties at trial that the City had active programs of minority utilization that were producing results significantly in excess of the representation of minority firms in the general population. That is why, at trial, there were no references to discrimination by the City or the construction industry. The references in the Brief on behalf of the City that minorities had been receiving "virtually none of Richmond's public construction contracts" are both inaccurate and not supported by the record. Brief on Behalf of Appellant, at 3.

fourteenth amendment requires a two-part analysis: first, that there be a compelling interest in adopting the remedy; and, second, that the remedy adopted be subject to strict scrutiny to assure that it is narrowly tailored to achieve the remedial purpose. Societal discrimination does not constitute a compelling interest in adopting the remedial racial classification.

It cannot be said that City Council was acting to remedy past discrimination by the City because the assumed societal discrimination is not probative of discrimination by the City. In addition, no effort was made to conform the terms of the remedy to any identified problem.

ARGUMENT

I

The Equal Protection Clause Requires a Governing Body to Show That It Bears the Responsibility for Racial Discrimination Before It Imposes a Racial Classification In the Award of Public Contracts.

A.

THE APPELLANT'S ARGUMENT ASSUMES FACTS WHICH ARE NOT IN THE RECORD.

This case presents issues, in a very precise factual context, regarding the extent to which governments may adopt racial classifications in the award of public contracts. A City Council member stated that .67% of the City's prime contracts had been awarded to minority contractors, and the Appellee has accepted the representation. (In *Fullilove*, .65% of contracts had been awarded minorities. 488 U.S. at 465.) However the Appellant and several briefs *amicus curiae* ask this Court to attribute a significance to the low rate of participation of minority firms which is unsupported by the record. This is not to

underestimate the impact of societal discrimination. However, this does not establish the Appellant's allegations, raised for the first time in this Court, of "a distribution of public contracts only to businesses owned by whites" or of "identified local industry discrimination," or "that minority businesses were receiving virtually none of the City's public construction contracts." Brief of Appellant at 14, 17, 19.

This belies the unfounded assertion now contained in the Appellant's brief of such charges as "longstanding pervasive racial discrimination in the construction industry" (Brief on Behalf of Appellant, at 14), that there was "identified local industry discrimination" (*Id.* at 15), "exclusion by unlawful racial discrimination" (*Id.* at 15), "pervasive unlawful industry discrimination" (*Id.* at 16); "a distribution of public contracts only to businesses owned by whites" (*Id.* at 17); "minority businesses were receiving virtually none of the City's public construction contracts." (*Id.* at 19.) Comments by a sponsor of the Plan are presented in the Appellant's Brief as "including the testimony of a former Richmond mayor." *Id.* at 23. From the fact that discrimination was not mentioned by any of the citizens who spoke at the hearing, the City's Brief infers "identified, pervasive, unlawful discrimination on its public works program." *Id.* at 33. In the District Court none of these charges were made.

Of course to reach the conclusion that the Plan was needed, the City Council needed to ignore the testimony of all the speakers, none of whom ever referred to the existence of discrimination. That a sponsor of the Plan mentioned his knowledge of discrimination in the construction industry adds nothing.

Thus, the pertinent facts are that the Plan was adopted upon a belief that .67% of $124 million of certain of the City's contracts were being awarded to minority

prime contractors. There is no other information in the record about that figure that adds anything to the recognition of societal discrimination.

Obviously, since the law would require non-minority firms to subcontract 30% of the contract price to minorities, the only useful statistics would be a comparison of participation of minority firms as subcontractors in relation to their availability. This would establish the parameters of any problem and would provide guidance as to the desirable terms of any law which would be enacted.

The use of the .67% figure simply fails to compare relevant populations. The threshold rule is that relevant populations must be compared in order to have a basis for further inquiry into the existence and nature of a problem. No decision of this Court has approved a race conscious legal remedy absent discrimination "traceable to [the governmental agency's] own actions." *Wygant*, 476 U.S. at 266 (O'Connor J., concurring).

Since the ordinance imposes a subcontracting requirement, it is possible that the quota could be achieved and the number of awards to prime contractors could be unaffected. In the instant case, the minority supplier was being "approved" as a distributor for this one project only, and only if Croson were to be awarded the contract by the City. Ex. 16. Not only does it serve no business interest for a contractor to purchase the product for $6,000 more from one who is not his regular supplier, but there was nothing about this contract which would encourage the minority business to become a prime contractor appearing on a list like that introduced at the hearing before City Council.

The factors identified by the City Attorney as barriers to entry (*supra*, p.9) were experience, financing, insurance, and bonding. The same factors were identified

in testimony at the hearing. J. A. at 32, 36, 37. The Record is equally probative of nondiscrimination. The laws prohibiting discrimination have been on the books for many years and there is no reported case brought against the City for discrimination in the award of City contracts. Nor have there been any relevant actions against the City by contractors alleging discrimination in the award of public contracts. *See Fullilove*, 448 U. S. at 540 (Stevens, J., dissenting.)

B.

The Record Should Establish The Responsibility of The Governing Body For The Discrimination Being Remedied.

Wygant v. Jackson Board of Education, 476 U.S. 267 (1986) which is the fullest and most recent expression of a plurality of this Court, establishes an efficacious method of assuring that race-conscious legal remedies for discrimination adopted by local governing bodies are consistent with protections provided by the equal protection clause. That is, before an asserted governmental interest in adopting a racial preference can be accepted as "compelling,"[4] there must be findings[5] of "prior discrimination by the governmental unit involved." *Wygant*, 476 U.S. at 274 (Powell, J., plurality opinion). And further, if this finding is to be drawn from mere statistical evidence, the evidence must focus on the population that is relevant for comparative purposes, such as the availability of qualified minorities in the relevant construction businesses. *Id.* at 275–26.[6]

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[4] The use of the term compelling interest to describe the asserted governmental interest is set forth in Argument Ic, *infra*.

[5] See p. 26, *infra*.

[6] The Court should reject appellant's suggestion that it is unreasonable to require that a legislative body make a factual

Dean Choper has noted that

> The extent to which the equal protection clause of the fourteenth amendment . . . permits government to use racial classification to remedy prior racial discrimination is one of the most significant and controversial issues of our time. Choper, *Continued Uncertainty as to the Constitutionality of Remedial Racial Classifications: Identifying the Pieces of the Puzzle*, 72 Iowa L. Rev. 255 (1987).

This Court has approved a number of voluntarily adopted racial classifications, but always in situations in which competent findings were made that the racial classification was to remedy discrimination by the actor involved. *Wygant*, 476 U.S. at 274 (Powell, J.)[7]; *Fulli-*

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record. Since it is uncontested that the purpose for adopting the Plan is centeral to determination of its validity, it is natural that the City must make a record which justifies the remedial purpose of the Plan. In administrative law there is a clear parallel. *S.E.C. v. Chenery Corp.*, 332 U.S. 194 (1946) acknowledged the "fundamental" rule that administrative agencies must clearly state the basis upon which their determinations and judgments rest. This judge-made principle has been codified as part of the Administrative Procedure Act. 5 U.S.C. Section 553(c); *Cf. National Black Media Coalition v. F.C.C.*, 775 F.2d 342 (D.C. Cir. 1985) (in holding that low minority employment is a basis for sanction, agency must offer sufficient explanation to ensure court that it is not repudiating precedent simply to conform with a shifting political mood). Where no basis or an inadequate basis is offered, the court is not at liberty to substitute its own basis. *Chenery*, 332 U.S. at 196.

[7] Appellant has suggested that there was a burden on the party attacking the racial classification to rebut the "inference of discrimination" created by the statistics. Brief of Appellant at 27. However, the plaintiff adduced all of the reasons given by the City for enacting the ordinance and introduced them into evidence. Plaintiff argued the reasons to be insufficient in law in part because the comparison

love, 448 U.S. at 497 (Powell, J. concurring) Voluntarily imposed race-based classifications as remedies for one's own discrimination is perhaps an evolution away from the views of Justice Douglas, who rejected the idea that racial set-asides in law school admissions could be justified by a "compelling interest;"

> "If discrimination based on race is constitutionally permissible when those who hold the reins can come up with 'compelling' reasons to justify it, then constitutional guarantees acquire an accordianlike quality." *DeFunis* v. *Odegaard*, 416 U.S. 312, 341 (1974) (Douglas, J., dissenting.)

Justice Douglas, urged that remedial efforts be race neutral. *Id.* at 340.

That the principles articulated by the *Wygant* plurality have proved practical is seen in their application to uphold remedial classifications in *United States* v. *Paradise*, 107 S. Ct. 1053 (1987); *Johnson* v. *Transportation Agency, Santa Clara County*, 107 S. Ct. 1442 (1986); and *Local 28 of the Sheet Metal Workers Int'l Ass'n* v. *E.E.O.C.*, 478 U.S. 421 (1986).

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of minority participation with general population statistics is not competent to justify adoption of a race-conscious legal remedy. The City disagreed and decided not to introduce additional evidence where the profferred statutes were incompetent. In *Hazelwood*, the plaintiff was not required to go forth with additional evidence where the profferred statistics were incompetent. 433 U.S. at 303-04. Employment cases which have attached weight to the low representation of minorities in the work force are distinguishable on a number of grounds—most importantly that the proof was not being offerred to justify imposition of a race-conscious legal remedy for societal discrimination. *See, e.g. International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) (use of statistics plus anecdotal evidence); *Johnson v. Transportation Agency, Santa Clara County*, 107 S.Ct. 1442 (1987) (sex as a factor in selection.)

In addition, those circuits which have considered the issue since *Wygant* have uniformly rejected the argument that a race conscious remedy is justified upon a recognition of generalized discrimination or by unrefined statistical comparisons showing a low participation by minorities. Such statistics merely reflect to an unknown extent the existence of the same societal discrimination. *See Michigan Road Builders Association, Inc.* v. *Milliken*, 834 F.2d 583 (6th Cir. 1987); *Associated General Contractors of California* v. *City and County of San Francisco*, 813 F.2d 922 (9th Cir. 1987) (failure to consider awards of contracts to minority subcontractors as well as minority prime contractors); *J. Edinger & Son* v. *City of Louisville*, 802 F.2d 213 (6th Cir. 1986); *Janowiak* v. *City of South Bend* 836 F.2d 1034 (7th Cir. 1987). The *Wygant* analysis was applied to strike down a requirement of racial quotas favoring whites in public housing in *United States* v. *Starrett City Associates*, 840 F.2d 1096 (2d Cir. 1988).

The point is not that the governmental body must conclude that it is guilty of discrimination. Nor can it relieve itself from scrutiny of the constitutional question by admitting discrimination. *Wygant*, 476 U.S. at 279, n.5. (Powell, J.). Rather, if the race-based action is taken to remedy past discrimination by the governmental body, then a fact finder must be able to determine whether the employer was justified in instituting a remedial plan. *Ibid.* As Dean Choper has written, "In other words, the trial court must find that the government agency was attempting to remedy its prior unlawful conduct." Choper, *supra*, at 265–266. No such finding is present in this case. The trial court held that the City was remedying "present adverse effects of past discrimination in the construction industry." J. S. Supp. App. G at 163.

Thus, this Court has required that care be taken to establish that an identified disparity is in fact caused by discrimination. *Hazelwood School District* v. *United States*, 433 U.S. 299, 308, n. 13 (1977) identified the inadequacy of comparing percentages of teachers with the representation of minorities in the general population; *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971) approved a race-conscious legal remedy ordered by a court where discrimination by the governing body had been established. The Court criticized the concept of remedial racial quotas:

> If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance, or mixing, that approach would be disapproved. . . . *Id.* at 24.

In *Bazemore v. Friday*, 478 U.S. 385, 106 S.Ct. 3000, 3012 (1986), five justices held that the mere fact of low minority participation in voluntary clubs failed to establish the existence of discrimination in the activities of North Carolina's Cooperative Extension Service. The Court also held that where the Service was administered by race-neutral programs low minority participation was not evidence of discrimination. *Id.* 106 S.Ct. at 3012. (White J., concurring).

C.

Societal Discrimination Is Too Unrevealing To Permit A Governing Body to Adopt a Remedial Racial Classification.

A disparity with general population statistics has never been held to establish discrimination under a

constitutional standard.[8]

Justice Powell has described societal discrimination, the belief that members of certain groups face discrimination in all their activity on a continuous basis, as "an amorphous concept of injury that may be ageless in its reach into the past." *University of California Regents v. Bakke*, 438 U.S. 265, 307 (1978) (Powell, J.). Societal discrimination is discrimination not traceable to a governmental agency's own action. *See Wygant*, 476 U.S. at 266 (O'Conner, J.). Societal discrimination does not justify a classification that imposes disadvantages upon persons who bear no responsibility for whatever harm the minorities included in the coverage of the City's ordinance are thought to have suffered. *Id.* at 310, *Accord Fullilove*, 448 U.S. 448 (1980) (Stevens, J., dissenting.).

The City would convert a remedy which the Court has previously reserved for proven violations of legal rights into a privilege that could be granted to any group characterized by the City Council as victims of societal

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[8] In *Fullilove*, 448 U.S. at 448 (1980), the Court gave deference to the special competence of the Congress to correct societal discrimination, *Id.* at 472 (Burger, C.J.), noting that the broad remedial powers of Congress were distinguishable from the limited remedial powers of a federal court. *Id.* at 482. The Court also noted that the regulations implementing the Act were to benefit small and disadvantaged businesses owned by socially or economically disadvantaged persons and not just the specified minority groups. *Id.* at 463. Members of the minority groups who were not disadvantaged were excluded. *Id.* at 466, 472. One barrier to minority firms being awarded federal contracts was the exercise of discretion by government procurement officers to disfavor minority businesses. *Id.* at 467. "In my view . . . Congress reasonably concluded that private and governmental discrimination had contributed to the negligible percentage of government contracts awarded minority contractors." *Id.* at 503 (Powell, J.).

discrimination. The City lacks a compelling interest in such a policy:

> "One such purpose appears to have been to assure to minority contractors a certain percentage of federally funded public works contracts. But since the guarantee of equal protection immunizes from capricious governmental treatment 'persons'—not 'races'—it can never countenance laws that seek racial balance as a goal in and of itself." *Fullilove*, 448 U.S. at 529-30 (Stevens, J., dissenting), citing *Bakke*, 438 U.S. at 307 (Powell, J., concurring).

A major failing of societal discrimination as the basis for adopting racial preferences lies in that it has no outer limits. It allows the governing body to engage in discriminatory relief long past the point required by an legitimate remedial purpose. *Wygant*, 476 U.S. at 275 (Powell, J.). Race-based allocations of public contracts should not be permitted after the discriminatory conduct ceases. *See Swann, supra*, 402 U.S. at 31–32.

Societal discrimination thus proves too much. As a test for adopting race-based classification it permits expansion beyond the carefully articulated exceptions recognized in the case law.

Describing the City's role as one of passive participation, Brief for Appellant at 40-41, is not distinguishable from societal discrimination. Passive participation in discrimination should not be grounds for imposition of a race-based remedy. Vicarious liability is not grounds for imposition of racial classifications under civil rights acts, so it should not be permitted under the equal protection clause. See *Bazemore*, *supra* 478 U.S. 385 (1986); General Building Contractors, *infra* at 26, 458 U.S. 375 (1982).

The tendency of proponents of race conscious legal remedies to rely on broad brush assumptions of the effect of societal discrimination has been noted in Days, *Fullilove*, 96 Yale L.J. 453 (1987). The author, who represented the United States in its successful defense of the minority set-aside program in *Fullilove*, cogently argues that most minority set-asides developed after *Fullilove* have been poorly designed and implemented. He recognizes the courts' failure to compel heightened accountability on the part of federal, state, and local governments—by emphasizing competence, findings, and means:

> "It is difficult to criticize the efforts of people of goodwill seeking to rid our society of its unfortunate legacy of racial discrimination. I would be the first to argue that minority business set-asides have been proposed, adopted and judicially sanctioned by people acting out of the very best of motives. But more than good motives should be required when government seeks to allocate its resources by way of an explicit racial classification system. It must be shown that such a system is responsive to findings of racial discrimination, is designed to redress that problem, and is employed only as long as necessary to achieve its remedial objective. These standards were not met by the Public Works Employment Act. of 1977. They were not demanded of Congress by the Supreme Court which upheld the Act in *Fullilove*, and they have not characterized subsequent set-aside programs at any level of government. This is an indefensible state of affairs that threatens to undermine the principle of affirmative action and the appropriate use of ex-

> plicit race-conscious remedies for racial discrimination. It ought to stop. *Id.* at 485.

Days writes in detail about deficiencies which frequently are encountered in affirmative actions which allocate scarce resources: lack of scrutiny and testing of means to ends, failure to examine various remedies, and third, when such plans have become the subject of litigation, proponents of affirmative action in general have felt compelled to defend them in unqualified terms instead of helping the courts to develop criteria that separate permissible from impermissible programs, differentiating the plans that are well designed to counteract discrimination from those that promise no such result. *Id.* at 459.

James Madison's expression of the fear that governments with small constituencies are more likely to be oppressive is illustrative:

> The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression. Extend the sphere, and you take in a greater variety of parties and interests you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other. *The Federalist* No. 10, at 22 (J. Madison) (2d ed. Johns Hopkins Univ. Press 1966).

This Court tested a remedy formulated by a federal District Court in *United States* v. *Paradise*, 107 S. Ct. 1053 (1987) under a compelling interest standard. There would appear to be every reason to insist that a City be held to an equally high standard.

D.

The Court Should Require The Record To Show That The Governing Body Has A Compelling Interest in Adopting The Racial Classification.

This court should articulate that the interest required to justify enactment of a race-conscious legal remedy must be narrowly tailored to achieve a "compelling interest." This was the standard adopted by the plurality opinion in *Wygant*, 476 U.S. at 286 (O'Connor, J., concurring). The point is that it should be clear that the remedy in question is remedying discrimination. Professor Ely has described this process as "insisting that the classification in issue fit a constitutionally permissible goal with greater precision than any permissible alternative." Ely, *Reverse Racial Discrimination*, 41 U. Chi. L. Rev. 723, 727, n. 26 (1974).

The compelling interest analysis was employed in the plurality opinion in *United States v. Paradise*, 107 S.Ct. 1053 (1987) (Brennan, J., plurality opinion) to uphold a judicial remedy imposed by a court in a case of proven violations. Similarly, *Local 28 of the Sheet Metal Workers International Ass'n. v. E.E.O.C.*, 478 U.S. 421, 106 S.Ct. at 3019 (1986), affirmed a court-ordered remedy which was found to be narrowly tailored to further the government's "compelling interest in remedying past discrimination." *Id.* 106 S.Ct. at 3053 (Brennan, J., pluralty opinion).

The City contends that the record in the instant case is adequate to establish the existence of a compelling interest. Brief for Appellant at 20. While some of the

briefs *amicus curiae* on behalf of the Appellant argue for a less restrictive standard, all concur in the Appellant's argument that the low number of black prime contractors on certain projects creates a compelling interest in adopting the 30% minority subcontractor utilization requirement.[9]

It is clear, in the case of a legislative enactment to remedy discrimination, that its failure to be "narrowly tailored to achieve a compelling governmental interest" will result in adoption of race-conscious legal remedies without the requisite showing that the action is really remedying past discrimination. Courts of Appeals are finding that legislative bodies enacting racial preferences pursuant to tests of a different label have given inadequate consideration to whether the plan in question was shown to be a remedy for past discrimination. In *Wygant* the Court of Appeals had found the governmental interest to be "sufficiently important." 476 U.S. at 274-78. *Michigan Road Builders v. Milliken*, 834 F.2d 583, 594 (6th Cir., 1987), rejected the District Court's holding that the State need only demonstrate "a significant interest in ameliorating the present effects of past discrimination rather than the 'compelling interest' standard." Using the significant interest test the District Court had found the record sufficient to establish "past intentional discrimination." *Michigan Road Builders v. Milliken*, 571

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[9] *Johnson v. Transportation Agency, Santa Clara County*, 107 S.Ct. 1442 (1986) relied on the provisions of Title VII to hold that gender could be considered "as one factor", *Id.* at 1455, where there were no women employees, if a "manifest imbalance" was determined by a comparison between the percentage of minority as women in the employer's work force *with those in the labor force who possess the relevant qualifications*. *Id.* at 1452.

F. Supp. 173, 187 (E.D. Mich. 1983).[10]

This is not to say that there is a compelling interest in enacting racial classifications to remedy societal discrimination.

A governing body which is otherwise competent to do so may have a compelling interest in adopting legislative enactments which prohibit discrimination. Such was the case in *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), which involved a provision of the Minnesota Human Rights Act which makes it an "unfair discriminatory practice" to deny access to places of public accommodation based on sex. *Id.* at 615. The Supreme Court of Minnesota accepted certification from the District Court whether the Jaycees was a place of public accommodation. *Id.* at 616. This Court held that the Minnesota Act "' responds precisely to the substantive problem which legitimately concerns' the State and abridges no more speech or associational freedom than is necessary to accomplish that purpose." *Id.* at 629. Minnesota's "compelling interest" in eradicating discrimination justified enactment of the statute. *Id.* at 623.

However, this exercise of a compelling interest is significantly different from the showing of a compelling interest by a governing body seeking to impose a race-conscious legal remedy in the absence of violation. This is using a racial classification to exclude persons from a commercial benefit without a showing that any of the

[10] In *Janowiak v. The Corporate City South Bend,* 836 F.2d 1034 (7th Cir. 1987), the Court of Appeals ruled that an affirmative action plan, which resulted in a better qualified white worker being passed over by a minority, had been based on an inadequate factual predicate. This was vacated and remanded for consideration in light of *Wygant* and *Johnson*. 107 S. Ct. 1620 (1987). On remand the Court of Appeals held that there was no showing of prior discrimination by the City. *Janowiak*, 836 F.2d at 1041-42.

excluded persons committed a wrong.

In *General Building Contractors v. Pennsylvania*, 458 U.S. 375, 400 (1982), this Court held that minority hiring quotas could not be imposed, under 42 U.S.C. Section 1981, upon a construction contractors' trade association absent a finding of intentional discrimination.

In the instant case, the City imposed a remedy without first finding a violation, and in this it has no compelling interest.

II.

The Record Must Provide Positive Assurance That Racial Restrictions Were Necessary As a Narrowly Tailored Remedy for Discrimination for Which The Governing Body is Responsible.

The need for a race-conscious legal remedy to be narrowly tailored to achieve its remedial purpose is generally recognized in prior decisions of this Court. In *Fullilove*, Justice Powell articulated the factors to be included in the analysis in the employment context as being:

(i) the efficacy of alternative remedies;
(ii) the planned duration of the remedy;
(iii) the relationship between the percentage of minority participation and minority availability;
(iv) availability of waiver provisions;
(v) the effect on innocent third parties. *Fullilove*, 448 U.S. at 510-11, 514.

Similar criteria were employed in *Paradise, supra* 107 S. Ct. 1053. In the context of this case another requirement should be added: identification of the problem to be remedied.

Identification of the Problem. Analysis of the correlation between remedy and problem is rendered difficult by the fact that there was no attempt to narrowly tailor the Plan. As Judge Wilkinson noted in dissent in

the original decision of the Court of Appeals,

> "Though factual findings alone do not ensure a "narrowly tailored" remedy, the absence of such findings makes it impossible to limit the remedy appropriately, for there is no evidence of the scope of past discrimination at which the program is aimed. A court can determine that the remedy substantially furthers its asserted purpose only if it is certain that the persons enacting the remedy know what it is that they intended to redress. J. S. Supp. App. E at 102-03.

The only intent evidenced by the record in this case was to adopt the same provision, without the underlying system of administration, which had been approved in *Fullilove*. J.A. at 15. The process which was followed excluded any careful attention to the scope of the problem. In fact, no particular race-based problem was identified. In this case an ordinance was drafted, a perfunctory hearing was held on short notice, the testimony at the hearing was ignored, a sponsor said he knew there was discrimination in the construction industry and announced that he had figures which showed that .67%[11] of prime contracts were awarded to minorities. The figures were neither given to any Council member nor otherwise made public. The only causes of the low representation to be identified were barriers to entry which were not race-related.

The Court of Appeals has correctly noted that the procedures followed in enacting the Richmond Ordi-

[11] Appellee does not contest the .67% for purposes of this case, but does contend that there is nothing about the way the numbers were calculated or used that says anything about the fact of discrimination.

nance constitute the most casual deployment of race in the dispensation of public benefits. *Croson*, J. S. App. A at 14a. It is for this reason that the Court of Appeals concluded, "If this plan is supported by a compelling governmental interest, then so is every other plan that has been enacted in the past or that will be enacted in the future." *Id.* at 10a.

Correlation of Availability. Any correlation between the thirty percent figure and the actual capability of minority subcontractors and suppliers in the City of Richmond is purely accidental. "The figure simply emerged from the mists." *Id.* at 11a. The City made no determination of their capacity either to identify the scope of the alleged problem or determine how to address it. This is important because, as noted in *Fullilove*, 448 U.S. at 536, n. 7 (Stevens, J., dissenting) if the existing successful minority businesses expanded to perform the work, no remedial purpose would be achieved. More money would flow through minority businesses, as was stated by the sponsor when Richmond's Plan was introduced, but this is not a compelling interest.

Effect on Innocent Third Parties. This failure to consider the adequacy of the 30% requirement further serves to impose an unduly harsh competitive burden on non-minority contractors. As was observed by the Court of Appeals, subcontracting exactly thirty percent of a contract is often impossible. *Croson*, J. S. App. A at 11a. The case at issue is instructive; Croson would have had to subcontract seventy-five percent of the project in order to meet the thirty per cent quota.[12]

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[12] Normally the purchase of supplies by the general contractor would not be a subcontract, but the parties regarded this as an acceptable method of satisfying the 30% subcontract requirement. By contrast, Regulations of the Department of Transportation would allow the full amount of purchases from minority suppliers to satisfy

Failure to comply with the City's requirement that the fixtures be purchased from the supplier who was willing to supply them thus meant that the contractor was denied the ability to perform the work. The racial classification employed here meant that the regular supplier who submitted the low quote lost the order. Furthermore, the thirty percent set aside does not apply to minority prime contractors, which only serves to further disadvantage non-minority contractors. In other words, non-minority contractors are faced with submitting bids containing minority subcontractors' uncompetitive bids while minority contractors can seek competitive bids from non-minority subcontractors. The effect is not help to the poor or the disadvantaged but to transfer public monies anyone who happens to be one of the minorities selected for inclusion in the protected category. The resulting impact on third parties is too great in comparison to the benefit that might be gained by the set aside. No effort was made to include limiting provisions designed to assure that the plan would aid only those minorities who had been subjected to discrimination for which the City is responsible, see p. . . . , *supra*.

The City's plan is similarly overbroad in its definition of the minorities to be included. This Court in *Wygant* looked disfavorably upon an almost identical, overlybroad definition of minority. 476 U.S. at 284, n.13 (Powell, J.). "Because the layoff provision here acts to maintain levels of minority hiring that have no relation to remedying employment discrimination, it cannot be adjudged narrowly tailored . . ." *Id.* 476 U.S. at 266 (O'Connor, J.). Richmond City Council in adopting the

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minority participation goals only if the supplier performed a "commercially useful function" and is a "regular dealer." Participation of Minority Business Enterprise in Department of Transportation Programs, 49 CFR. Part 23, 52 Fed. Reg. 39, 227 (October 31, 1987).

plan did not give due consideration to either methods of identifying the particular minorities included in the definition or to whether in fact all of the groups had in fact been purposefully discriminated against in the past. Thus, the definition adopted impacts innocent third parties to such an extent that it is not narrowly tailored enough to achieve the objective of the plan.

Waiver and Duration. The Court of Appeals correctly noted that the plan's validity is not enhanced by the presence of the so-called waiver provision and the five-year duration. J. S. App. A at 13a.

Finally, both the waiver provision and the length of time during which the plan is to be effective are not closely enough fitted to the objective of the plan. The waiver provision is a waiver in name only, since it is only involved when no qualified minority is available. Not only is the waiver to be granted "only in exceptional circumstances," but the contractor is also shouldered with the burden of showing a lack of available minority participants, who may come in after the bids are opened.[13] The plan is to be effective for five years, and there is no limitation provided on City Council's ability to renew the plan indefinitely without reexaming the need for the race conscious plan. By contrast, the plan approved by this Court in *Fullilove* was limited to a four month period. The temporary nature of that plan compared with the long term nature of the Richmond plan demonstrates the objectionable length of the ordinance at issue.[14]

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[13] This was a finding of the District Court. *See* Note 2 *supra*.

[14] That minority participation programs are not short term remedies is seen in the legislative history of the Surface Transportation Act, P.L. 100-17, 101 Stat 132 which extended the minority participation program of the 1982 Surface Transportation Assistance Act, on grounds that while the programs have been helpful "barriers

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals should be affirmed and the case remanded to the District Court for determination of damages.

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still remain. . ." 1987 U.S. Code Cong. & Admin. News 76. Women-owned businesses participate in that program. *Id.* at 78. The list of minorities who participate is taken from that which was adopted in 1978 and approved in *Fullilove*. *Id.* at 76.