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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: CITY OF RICHMOND, Appellant V. J. A. CROSON
COMPANY
CASE NO: 87-998
PLACE: WASHINGTON, D.C.
DATE: October 5, 1988
PAGES: 1 thru 43

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 ----- x
3 CITY OF RICHMOND, ;
4 Appellant ;
5 V. ; No. 87-998
6 J. A. CROSON COMPANY, ;

7 ----- x
8 Washington, D.C.

9 Wednesday, October 5, 1988

10 The above-titled matter came on for oral
11 argument before the Supreme Court of the United States at
12 11:02 o'clock a.m.

1 APPEARANCES;

2
3 JOHN PAYTON, Washington, D.C.,

4 on behalf of the Appellant

5 WALTER H. RYLAND, Richmond, Virginia,

6 on behalf of the Appellee
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on behalf of Appellant	
WALTER H. RYLAND, ESQ.	25
on behalf of Appellee	
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on behalf of Appellant	

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P R O C E E D I N G S

(11:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in number 87-998, the city of Richmond v. the J. A. Croson Company.

Mr. Payton, you may proceed whenever you're ready.

ORAL ARGUMENT OF JOHN PEYTON

ON BEHALF OF APPELLANT

MR. PAYTON: Mr. Chief Justice, and may it please the Court, the sole issue in this case is the constitutionality of the ordinance enacted by the Appellant, the city of Richmond, to remedy the effects of racial discrimination in its construction industry.

That ordinance, the Minority Business Utilization Plan, provided that with respect to construction contracts with the city, at least 30 percent of the dollar amount of the contract must go to minority business enterprises.

The ordinance was designed to last five years, and contained an appropriate waiver provision.

By enacting this ordinance, Richmond was attempting to address one of the most difficult problems confronting our nation and its cities and States. Identified racial discrimination is a scourge of our

1 society. Richmond focused on discrimination in the
2 construction industry, and proceeded to try to remedy
3 that discrimination.

4 Aware of findings of the Congress regarding
5 discrimination nationwide in the construction industry,
6 and of this Court's decision in Fullilove, upholding
7 Federal legislation remedying that discrimination,
8 Richmond examined its own construction industry.

9 It learned that from 1978 to 1983, two-thirds
10 of one percent of its construction dollars went to
11 minority businesses -- this in a city that was 50 percent
12 Black. That was not all that Richmond knew --

13 QUESTION: Mr. Payton, can I interrupt you
14 there? Is that a correct statement that only two-thirds
15 of one percent went to minority business enterprises?
16 What about the subcontractors?

17 MR. PAYTON: There is no evidence in the record
18 with regard to how subcontracting was divided up, but as
19 the District Court found, there is no reason at all to
20 expect that the subcontracting would have gone another
21 way.

22 In fact, when Congress made its findings with
23 respect to the construction industry, it found that the
24 construction industry is an industry which is a business
25 system which has precluded measurable minority

1 participation. And the way that occurred, as the
2 Congress identified it, was by first of all having
3 formidable racial barriers to racial entry and
4 advancement.

5 The barrier to entry has to do with how you get
6 to be a contractor. The barrier to advancement has to do
7 with what the Congress found, and what this Court also
8 noted in Fullilove, is the problem of racial
9 discrimination in the relationship between prime
10 construction contractors and their subcontractors.

11 And they found that this business system
12 operates in the following way: that a prime contractor
13 often does business over and over again with the same
14 group of subcontractors. And in one of the items that we
15 cite in our brief, Glover, minority business -- minority
16 enterprise in construction, that is a study which noted
17 that often in that relationship, prime construction
18 contractors and their subcontractors, often it's
19 impossible to break in by minority contractors, even when
20 they have the low bid. That's one of the problems that
21 arises.

22 So, there is nothing in the record that says
23 exactly what the racial breakup of subcontracting is, but
24 the evidence with regard to prime contracting is stark
25 and dramatic, and there is no reason, as the trial court

1 found, to expect it to be any different.

2 QUESTION: But the ordinance purport to remedy
3 that disparity, did it?

4 MR. PAYTON: The ordinance purported to remedy
5 the fact that there were very few minority contractors in
6 the construction industry.

7 QUESTION: It just required subs to get to a --

8 MR. PAYTON: Yes. The means that Richmond
9 chose to try to remedy the discrimination that it
10 identified was to focus on a remedy that was both modest
11 and narrow. And The narrow focus of the remedy was to
12 look at subcontracting. And the reason for that, is that
13 I think that everyone would agree, that it is easier to
14 break into the business as a subcontractor, and break
15 into this, what I would call a closed business system, by
16 doing work with prime contractors. And the design of
17 this program was that by doing it that way, by having a
18 remedy that focuses on subcontractors, that will
19 establish relationships between majority prime
20 contractors and minority subcontractors.

21 It will establish some trust, relationships,
22 experiences, and thereby allow an expansion of the list
23 of subs that prime contractors would be doing business
24 with.

25 QUESTION: Mr. Payton, some of the cities

1 concerned seem to be with impediments to minority
2 participation, such as complicated bidding procedures and
3 lack of capital and bonding requirements and so forth.

4 Is there any indication that the city
5 considered any race-neutral alternatives before enacting
6 a percentage set-aside requirement?

7 MR. PAYTON: Well, the city was well aware of
8 other efforts, especially efforts by the United States
9 Congress, to deal with this problem.

10 The problem that the city was faced with wasn't
11 that there was a group of minority contractors out there
12 who were simply having trouble with bonding requirements
13 or bidding requirements -- not to say that those aren't
14 problems, but they are, I think, secondary problems.

15 The problem was that we had a business system
16 that had precluded measurable minority participation.
17 The number two-thirds of one percent is insignificant.
18 It's close to zero.

19 QUESTION: But we don't know what the figures
20 were on subcontractors, as your response to Justice
21 Stevens pointed out.

22 MR. PAYTON: Yes, that's correct.

23 And what the city was doing was to address the
24 problem of the two-thirds of one percent selecting a
25 remedy which is probably the best remedy to address that

1 problem.

2 QUESTION: Did the -- now, the ordinance
3 supplied also, in addition to Blacks, to Orientals,
4 Indians and Aleut persons?

5 MR. PAYTON: Yes.

6 QUESTION: And was there evidence before the
7 city that they had been subject to discrimination in the
8 Richmond construction industry, do you know?

9 MR. PAYTON: There is no evidence in the record
10 with regard to that.

11 QUESTION: And you think with the absence of
12 all such evidence that the ordinance is valid as to those
13 groups?

14 MR. PAYTON: The reason the description of
15 minorities that exists in this ordinance is there is that
16 it is the same description of minorities the exists in
17 the Federal program in Fullilove, and in fact, it's the
18 same description of minorities that exists in the
19 Virginia code that defines what a minority business
20 enterprise is.

21 I don't think that it really matters that much.
22 There's no showing that Aleuts or some of the other
23 groups are present in any significant numbers in
24 Richmond, and there's certainly no claim here that
25 someone lost some contract because of an Aleut getting a

1 contract.

2 Let me go back to your first question, though,
3 Justice O'Connor, with regard to what the City Council
4 looked at when it was considering this.

5 This is not a problem that is brand new on the
6 stage of racial problems. It's one that has been studied
7 and studied, and there have been a lot of different
8 remedies out there. And I guess it's important to
9 realize that when Congress looked at this, when it
10 enacted the 1977 legislation that was the subject of
11 Fullilove, Congress went through a lot of other remedies
12 that had been designed to try and deal with this problem,
13 including laws that made underlying discrimination
14 unlawful, including executive orders like Executive Order
15 11246, including special efforts by various departments
16 of the Federal Government to try to assist minority
17 contractors -- and in the face of all these things,
18 Richmond also had its own anti-discrimination city code.
19 It had experience with these Federal programs, including
20 some Federal programs that set goals that applied to
21 minority contractors.

22 In the face of all this, when they looked at
23 this in 1983, the number still is two-thirds of one
24 percent of its construction business. So, those other
25 alternatives, which are the ones that are normally set

1 forth, simply weren't working. It was faced with a
2 problem that required a different solution.

3 QUESTION: Although Richmond had not tried any
4 of those other race-neutral alternatives, I take it?

5 MR. PAYTON: Well, that's not exactly right.

6 QUESTION: You're saying Congress had not, or
7 -- but I guess Richmond --

8 MR. PAYTON: That's part of the Congressional
9 remedy. In fact, the design of the statute in the
10 Fullilove case, it's designed to administer funds through
11 the State's two localities.

12 Richmond was familiar with how these programs
13 had worked. It's a beneficiary of a lot of these
14 National programs, and in the face of that, it knows that
15 those programs certainly didn't affect this problem that
16 it saw, and that it sought to remedy.

17 QUESTION: Do you think that State and local
18 government have as much authority and power to act in
19 this area as Congress does, with its express grant of
20 authority under the Fourteenth Amendment?

21 MR. PAYTON: I think that State and local
22 governments have greater responsibility -- I'll come to
23 power in just a second. I think they have greater
24 responsibility. These are problems that are very
25 difficult to solve. We haven't come up with magic

1 bullets for racism, or vaccinations to prevent it, and
2 localities have to deal with these problems that they see
3 every day in their contracting dollars, for example.

4 And I think that it's not possible for Congress
5 to come up with remedies that affect various localities
6 in ways that will actually deal with these problems.

7 With regard to power, I think that when this
8 Court in Fullilove made reference to Section Five of the
9 Fourteenth Amendment, that really was to find a basis for
10 the Congress being able to impose a program on the
11 States. And when it looked to whether or not it could do
12 this for itself, it didn't have to look there.

13 So I think Section --

14 QUESTION: Do you mean the commerce power
15 wouldn't have handled it? I would have thought you could
16 do almost anything under the commerce clause. We had to
17 mention the Fourteenth Amendment or we would have
18 thought, "My goodness, this is not one of those areas
19 that the Federal Government can get into."

20 MR. PAYTON: Well, you may be right, Justice
21 Scalia, but in then Chief Justice Burger's opinion, he
22 made explicit reference to Section Five when he wanted to
23 find a basis for power for the Congress imposing the
24 requirements of the Public Works Employment Act on the
25 States and, through the States, on their subdivisions.

1 Now, that's the way he analyzed it. He also
2 looked at the commerce power for other parts of the Act.
3 That may or may not -- you may or may not agree with him,
4 but that is the way he walked through the analysis in
5 Fullilove.

6 And I would say that there is no reason to
7 believe that States and cities and any other subdivision
8 -- as long as they make appropriate findings and have the
9 authority under State law to do what they do --

10 QUESTION: Although in a sense, the Fourteenth
11 Amendment was precisely designed to prohibit States from
12 taking action on the basis of race, wasn't it?

13 MR. PAYTON: I think the Fourteenth Amendment
14 was designed in a way to require States to treat people
15 fairly. And I think this Court has dealt in the past, on
16 several occasions, with whether or not States can take
17 action that would be characterized as affirmative action,
18 and I think the analysis is, there are disagreements on
19 the edges, but the analysis is, if there is a sufficient
20 or compelling State interest, and the means are
21 sufficiently related or narrowly tailored, that it is
22 authorized for a State to do that, and for the State's
23 political subdivisions to do it as well.

24 Richmond satisfied those criteria.

25 QUESTION: Well, it didn't copy -- it didn't

1 follow the Fullilove scheme entirely, did it? On
2 Fullilove, didn't the regulations require that before any
3 entity could take advantage of the preference, that it
4 prove that it itself had been discriminated against?

5 MR. PAYTON: There are -- there is something to
6 that effect in the Fullilove.

7 QUESTION: It's an expressed provision of the
8 regulation.

9 MR. PAYTON: Yes. There are later
10 Congressional actions, including the Surface
11 Transportation Act of 1983, which don't have such
12 explicit requirements.

13 QUESTION: Well, that means that we -- you're
14 talking about Fullilove. In Fullilove, the opinion of
15 the Court itself indicated that the only people who could
16 take advantage of the preference were people who
17 themselves could prove they had been discriminated
18 against. There's nothing like that in --

19 MR. PAYTON: There's nothing like that.

20 QUESTION: There's nothing like that in
21 Richmond. People get this preference whether or not
22 they've ever suffered discrimination. Isn't that right?

23 MR. PAYTON: Yes, that is right. I think there
24 are two responses, though.

25 The first response is that I believe the

1 Jurisprudence on this is that it is not necessary, or is
2 not a fatal defect, if a plan such as this plan is
3 overinclusive.

4 Second, given what we learned about the
5 construction industry, the number of contractors that you
6 are talking about that would not be the victims of the
7 past discrimination is very small, if at all, and I
8 should also say that just because a Black person manages
9 to be a contractor in the face of this system doesn't
10 mean that he is not a victim. That there are clear
11 findings that there are other obstacles to his
12 advancement, and that in some sense, because of how stark
13 these numbers are, I would say it is fair to have a
14 presumption that all the minority contractors were in
15 some sense --

16 QUESTION: Was it -- this isn't exactly like
17 Fullilove?

18 MR. PAYTON: It is not exactly like Fullilove.

19 QUESTION: So you have to mix.

20 QUESTION: Was this ordinance, Mr. Payton,
21 reenacted in 1988?

22 MR. PAYTON: No, it was not.

23 QUESTION: So it's expired?

24 MR. PAYTON: It was not reenacted.

25 QUESTION: Well, then, its prescribed duration

1 was five years from June?

2 MR. PAYTON: That's correct.

3 QUESTION: So it expired on June 30, 1988?

4 MR. PAYTON: Yes.

5 QUESTION: Does that raise a mootness problem?

6 MR. PAYTON: I think not. There is a damages
7 cause of action here that survives, and that's why we're
8 still here.

9 QUESTION: Mr. Payton, where did the 30 percent
10 figure come from? Out of the air?

11 MR. PAYTON: The 30 percent figure -- let me
12 describe the reach of the remedy, here, and I will get to
13 your question right away, Justice Blackmun.

14 Richmond's share of the construction business,
15 the city's share of the construction business in
16 Richmond, is only about 10 percent. Therefore, even if
17 the 30 percent figure is a complete success, that would
18 only have an impact on some three percent of the
19 construction business.

20 Where did the 30 percent figure come from?
21 Because there is a virtual preclusion of minority
22 contractors from the construction industry, it isn't
23 possible to look at that set of numbers and use it.
24 Therefore, the 30 percent figure is a figure that is
25 simply roughly between the two-thirds of one percent and

1 fifty percent. That's where it comes from.

2 There is no magic formula or any more precise
3 way of coming up with the 30 percent, and I guess in
4 looking at it, it is fair to look at its impact on the
5 entire construction industry, which I represent is very
6 modest.

7 QUESTION: In this case, the bid from the
8 minority subcontractor was some \$7,000 over the quotes
9 that the prime had received from other suppliers.

10 Is it the most narrowly tailored remedy for
11 correcting past discrimination?

12 MR. PAYTON: Well, let me --

13 QUESTION: To permit an increased price, and
14 require that the increased price be paid, without a
15 waiver?

16 MR. PAYTON: There are two points to this, as
17 well. I think that the record does not support the
18 proposition that the minority contractor's bid was going
19 to -- would have been higher or lower or the same as the
20 majority subcontractor's bid. This is what is in the
21 record.

22 Croson, when it went to put in its bid,
23 contacted two majority subs and received bids back from
24 them. When it received those bids back, it had the two
25 majority subcontractors engage on a little price war back

1 and forth among themselves, and they adjusted their bids
2 down, down, down, until they got the lowest bid, and then
3 they put in that lowest bid.

4 When Croson received the bid from the minority
5 subcontractor, after the bid had been submitted, it
6 received that bid. It was higher as you just explained,
7 but Croson never sought to negotiate with the minority
8 subcontractor to take that price down, as it had with the
9 majority subcontractors.

10 So, on this record, we don't know what the
11 minority price would have been, if Croson had engaged in
12 the negotiation that it did with the majority.

13 In a larger sense, though, I think that whether
14 the price is higher or not raises no real Constitutional
15 question here. It is -- Richmond can decide if it wants
16 to pay more money in order to achieve a remedy for this
17 past discrimination. And as between various contractors
18 for the city's business, there is no discrimination at
19 all. They all get judged by the same rules.

20 QUESTION: Well, is it a requirement then for
21 the validity of an ordinance with such an escalation
22 mechanism that the city absorb the excess?

23 MR. PAYTON: It would have.

24 QUESTION: Is that a requirement for the
25 validity of the ordinance?

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MR. PAYTON: No.

QUESTION: So that the costs of curing past discrimination can rest on a third party?

MR. PAYTON: Well, construction is competitively bid, and if the city attaches requirements to the bids, people can choose not to bid. They can bid, they can eat some of their own profits, they can shop around and make the minority contractors take their price down -- this would be a competitive market. And it is a competitive market, also, for the minority subcontractors.

That is, if Croson identifies one, two, three subcontractors, he can negotiate with them, and take their price down. And in the end, we fully expect competitive forces to operate here, to create thriving, competitive minority contractors who begin as subs and will graduate to be --

QUESTION: But if the competitive forces were not operating, and minority subcontracting was at a premium borne by the prime contractor, that would still not impair the validity of the ordinance?

MR. PAYTON: I think not, but that is not the case we have here. The case we have here is that the prime negotiates with the sub, and he puts in a bid, and the city -- the lowest bid wins. And it's just like the market operated before. The primes have to negotiate

1 with their subs to get their prices. In order to put in
2 a price here, to be responsive you have to find a
3 minority contractor. And you put in your price in the
4 kitty, and the city takes the lowest bidder and pays the
5 price.

6 Clearly, this way, the -- any increase would be
7 borne by the city.

8 The design of the program is in fact to
9 increase the number of minority contractors.

10 QUESTION: There was a minority contractor, a
11 sub, who bid here?

12 MR. PAYTON: Yes.

13 QUESTION: And the only reason he didn't get
14 it, you suggest, is that the prime really discriminated
15 against him?

16 MR. PAYTON: No, I'm not suggesting that.

17 The prime --

18 QUESTION: Well, you say you didn't have an
19 opportunity to lower his bid, and meet some lower bids.

20 MR. PAYTON: No, Croson took the position that
21 the requirements imposed by this program have violated
22 its rights, and rather than rebid this contract once the
23 minority subcontractor had been identified, Croson chose
24 to file this lawsuit, which is an appropriate way to
25 proceed. And --

1 QUESTION: Why wouldn't the city really attain
2 its objective in this particular case if it had just had
3 an ordinance that forbade discrimination by prime
4 contractors against minority subs?

5 MR. PAYTON: There is such an ordinance, 1981,
6 I think, would forbid discrimination between primes and
7 subs. I think there are a lot of other statutes out
8 there that affect in one way or another a lot of the
9 underlying actions in this case.

10 The problem that you face in the construction
11 industry -- it is not that easy to get at this. And just
12 to say that all those things are now unlawful -- they
13 have been unlawful. It doesn't affect the fact that we
14 have a closed business system. It is to affect the
15 ramifications of this closed business system that this
16 ordinance is necessary.

17 QUESTION: Well, if there had been 100, say 100
18 minority subs had bid this job, and all of them had been
19 above the -- all had been high bids, shouldn't the low
20 bid prevail?

21 MR. PAYTON: Well, the question is, I guess
22 that question is whether or not under Virginia law, I
23 don't think that's a Constitutional question, under
24 Virginia law, it's authorized for Richmond to have an
25 ordinance where it has an exception to taking the low

1 bid, because it wants to remedy this discrimination in
2 this way.

3 And that was litigated, and it's clear that
4 Richmond has the authority to do that. But I don't think
5 it raises a Constitutional question. All the primes are
6 treated the same.

7 QUESTION: As I understand your answers, you
8 want us to consider this case as if the minority
9 contractor did not make a higher bid?

10 MR. PAYTON: I think --

11 QUESTION: And that's how we evaluate this
12 record, and this case, and this ordinance?

13 MR. PAYTON: Yes, I think you can consider this
14 as though it's a facial challenge. And I think that it's
15 clear that the minority contractor did make a higher bid,
16 but I think you can't draw the significance from it that
17 you started off with -- which is that if there had been
18 negotiations, it would have remained a higher bid.

19 That may be, but we don't know on this record.
20 I think this case should be analyzed by looking at it as
21 a facial challenge to this ordinance.

22 With regard to whether or not Croson --

23 QUESTION: Well, Croson's damages aren't -- I
24 take it are based on the loss of the contract.

25 MR. PAYTON: Yes. But I was going to go to --

1 the only way the other part of this comes into it, the
2 \$7,000 and the higher bid -- is if there is something to
3 whether or not Croson was improperly denied its waiver.
4 And I think there is a finding by the District Court,
5 which heard witnesses on this, there's a finding that the
6 city acted absolutely reasonably. That's the District
7 Court's description, absolutely reasonably, in denying
8 the waiver.

9 QUESTION: But you say it's a facial challenge.
10 That means that the ordinance couldn't be applied
11 constitutionally in any conceivable circumstance.

12 Suppose there's -- suppose the minority
13 contractor was asked to lower his bid, and he said, "No,
14 I'm not going to lower my bid, that's a low as I can go."
15 Now, could the ordinance be constitutionally -- could the
16 ordinance constitutionally require Croson to re-bid?

17 MR. PAYTON: Yes. All that would happen in
18 that circumstance is that Croson would take the minority
19 bid, which for the purposes of this I will concede is
20 higher, put it in -- Croson was the only bidder on this
21 -- Croson would have got the contract, the city would
22 have paid the difference.

23
24 That's exactly what would have happened, and I
25 think that raises no constitutional question at all.

1 QUESTION: But could he -- could -- well, so
2 the question of re-bidding would never come up?

3 MR. PAYTON: That's correct. That's correct.
4 I'd like to reserve the rest of my time.

5 QUESTION: May I just clear up one thing,
6 though? The ordinance does not require that the sub be a
7 Richmond concern, does it?

8 MR. PAYTON: No, it does not.

9 QUESTION: It does not.

10 MR. PAYTON: Let me just clarify that. Under
11 Virginia law, it is not possible for the city of
12 Richmond, except in very, very narrow circumstances, to
13 discriminate on the basis of where a sub or a prime comes
14 from. And the narrow circumstance is if the bids are
15 exactly the same.

16 Also, I think it is the case -- and there is no
17 evidence to the contrary -- that the substantial portion
18 of all the construction work done in Richmond for
19 Richmond is by Richmond contractors and subcontractors.
20 Construction is by its very nature a local --

21 QUESTION: But if out-of-State materials, the
22 items involved here could have been purchased out of
23 State, presumably, from a minority business enterprise in
24 Baltimore, or North Dakota, or some place.

25 MR. PAYTON: Yes, they could have.

1 QUESTION: Thank you, Mr. Payton.

2 We'll hear now from you, Mr. Ryland.

3 ORAL ARGUMENT OF WALTER H. RYLAND

4 ON BEHALF OF THE APPELLEE

5 MR. RYLAND: Mr. Chief Justice, and may it
6 please the Court, responding to the last question which
7 was asked of Mr. Payton, on the question of whether the
8 city would absorb the higher bid by the minority supplier
9 in this case, the record is quite explicit that J. A.
10 Croson Company asked the city to do just that, and was
11 refused by the city, on grounds that the bid could not be
12 increased. The price could not be increased after the
13 bids were in.

14 QUESTION: And so what happened? The city said
15 re-bid?

16 MR. RYLAND: The city then announced that
17 because of Croson's noncompliance with the ordinance, the
18 contract would be re-bid.

19 QUESTION: So the real -- so the question is,
20 was this ordinance constitutionally applied in this case?

21 MR. RYLAND: I think the threshold question
22 which we attack is whether the council had a proper basis
23 for adopting the ordinance in the first place.

24 We did argue that --

25 QUESTION: So you say it's a facial challenge?

1 MR. RYLAND: It's facial in the sense that we
2 attack the authority to adopt the ordinance. It's not a
3 facial challenge in that it's --

4 QUESTION: You're saying it couldn't be
5 constitutionally applied in any circumstance?

6 MR. RYLAND: We're not contending that the
7 ordinance could not be constitutionally applied in some
8 circumstance.

9 QUESTION: But you're contending that it
10 couldn't be applied in this circumstance?

11 MR. RYLAND: We're contending that in this
12 particular case, the city had no authority to adopt it.
13 It had no --

14 QUESTION: Well, but -- suppose the city did
15 have authority to adopt an ordinance that might do some
16 of these things. It's your contention, isn't it, that
17 that ordinance cannot constitutionally be applied to your
18 situation here, where Croson was bidding on this contract?

19 MR. RYLAND: Yes.

20 QUESTION: We must infer from what you have
21 told us, I take it, that if the -- if Croson had absorbed
22 the \$7,000 himself, he would have received the contract?

23 MR. RYLAND: Yes.

24 QUESTION: And that because of his refusal to
25 absorb it, he did not get the contract.

1 MR. RYLAND: It's only because of his refusal
2 to absorb it that he did not get the contract.

3 QUESTION: (inaudible)

4 MR. RYLAND: Essentially, what we have here is
5 a conclusion by the city that because prime contracts
6 were being awarded to minority businesses in a low
7 number, that this justified the adoption of a
8 race-conscious legal remedy to correct the situation.

9 In effect, it was determined that because of
10 the low percentage of awards to minority firms, the
11 construction industry would be required to remedy the
12 situation by having those contractors who were owned by
13 non-minorities contract 30 percent of their contracts to
14 minority firms. There was no finding by the city, no
15 evidence before City Council which would entitle City
16 Council to infer that this societal discrimination should
17 be remedied by the adoption of such a racial
18 classification.

19 Our position is that if City Council wanted to
20 attack societal discrimination, they could do it by
21 adopting various means, race-neutral means on their face.
22 The City Council had an ordinance which prohibited
23 discrimination in the award of public contracts. It
24 could have exercised its authority under that ordinance,
25 and put the effort into enforcing that ordinance, that it

1 put into administering this one, and achieved a
2 constitutional result.

3 QUESTION: Did the city make any finding that
4 it had previously discriminated against minority
5 contractors?

6 MR. RYLAND: No, the transcript of the hearing
7 before City Council was quite explicit in rejecting any
8 contention that the city had discriminated in any way.

9 Clearly, no court could force the adoption of a
10 law like Richmond's, unless the city itself had been
11 guilty of discrimination against the groups identified in
12 the ordinance. When a city voluntarily adopts a racial
13 preference, it should be looked at very carefully.

14 The city is more likely to -- more likely than
15 a court to be acting for a purpose not permitted by the
16 Constitution. This is different from the situation in
17 Fullilove, where this Court gave proper deference to the
18 findings of Congress that it was acting for remedial
19 purposes.

20 Here we have an action by a locality, and the
21 record before the Court shows quite clearly that the
22 reason they were adopting the ordinance was that other
23 cities had it. That was the testimony at the hearing
24 before City Council.

25 QUESTION: Well, why should we give a different

1 presumption as to a remedial purpose for what Congress
2 did than for what the city of Richmond did? Wouldn't
3 they both be doing it for pretty much the same purpose?

4 MR. RYLAND: Not necessarily.

5 I think that if the Congress says it's acting
6 for remedial purpose, because of the breadth of the
7 national government and the breadth of national problems
8 that it's seeking to deal with, that finding inherently
9 has more credibility than the unsupported action of a
10 local government in adopting what could be a mere pork
11 barrel political dispensation of public money.

12 QUESTION: But what Congress adopted might be
13 just a pork barrel thing, too, but we do give it a
14 presumption.

15 MR. RYLAND: It might be, but it's less likely
16 to be.

17 QUESTION: Well, I don't know what you're
18 driving at.

19 Is it clear from the record in this case that
20 we are dealing with the majority favoring the minority in
21 the particular political unit? We've been talking about
22 minority contractors.

23 MR. RYLAND: You mean whether --

24 QUESTION: Are these people -- do we know from
25 the record that they are in fact a minority of the

1 political unit that adopted this race-based law?

2 MR. RYLAND: I don't think that there is
3 anything in the record per se which talks about the
4 minority percentage in the area. It was assumed for
5 purposes of discussion that it was approximately 50
6 percent. Is --

7 QUESTION: Do you think that we might take a
8 different view of race-based matters where the political
9 unit is favoring a race that's the minority, as opposed
10 to what is the case, where a political unit favors a race
11 that is the majority?

12 MR. RYLAND: Yes, one of the amicus briefs
13 filed some Census data which showed that the actual
14 minority percentage in Richmond was more than 50
15 percent. It was known that a majority of the people on
16 City Council were Black.

17 We have not chosen to make an issue of that
18 because of one of those decisions that lawyers make in
19 representing a case. Essentially, it seemed to us that
20 the tendency to adopt an ordinance for the wrong reason
21 would be there any time you were dealing with a
22 significant political interest group, without regard to
23 whether it was in the majority or not. So we decided not
24 to attach legal significance to the fact that they had a
25 majority vote on council and perhaps had a majority in

1 the population.

2 QUESTION: The transcript of the hearing before
3 the City Council does show that the city is approximately
4 50 percent Black and 50 percent white.

5 MR. RYLAND: Yes, that's in the transcript.

6 The fact that the population was approximately
7 50 percent Black was used in the explanation of why the
8 city chose the 30 percent number. And I submit that
9 that's no justification for choosing that number, but
10 that was the explanation given for why it was chosen.

11 QUESTION: Mr. Ryland, are you -- do you think
12 that the city can only act affirmatively on the basis of
13 remedying its own prior discrimination?

14 MR. RYLAND: Yes.

15 QUESTION: So that if the city had evidence
16 that in fact private construction contractors were indeed
17 discriminating against minorities, that the city would be
18 powerless to take action to remedy that private
19 discrimination?

20 MR. RYLAND: No, I would not take that
21 position. I would think that's a different situation,
22 when there is, where there is known discrimination, as
23 opposed to the unidentified, amorphous concept that there
24 is discrimination out there somewhere by somebody.

25 In a specific case of known discrimination, I

1 would --

2 QUESTION: By private --

3 MR. RYLAND: By a private party.

4 QUESTION: Parties, against others.

5 MR. RYLAND: Yes, I would not --

6 QUESTION: So you do concede that the city
7 would then have the power to try to remedy that?

8 MR. RYLAND: In proper circumstances, yes.

9 QUESTION: Now, that was not the view taken by
10 the court below, was it?

11 MR. RYLAND: Well, in -- before the court
12 below, there was no identified discrimination for the
13 court to address. The court was only addressing --

14 QUESTION: By either the city or private
15 parties, is that your position?

16 MR. RYLAND: That's correct. That's correct.

17 QUESTION: But there certainly was language in
18 the opinion to the effect that the city would be
19 powerless to remedy private discrimination.

20 QUESTION: And where did he get that language,
21 do you know? What's the root of it?

22 MR. RYLAND: Well, I think the root of that
23 language comes from the reference in Wygant, in the
24 plurality opinion to remedying discrimination by the
25 governing body.

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QUESTION: But it's a plurality opinion.

MR. RYLAND: It's a plurality opinion. And the reference is in the context of this Court never having approved a race-conscious legal remedy by a state actor in the absence of discrimination by that actor.

QUESTION: The city certainly would have authority to remedy private discrimination. It's a question of what would be -- how would it remedy it? It could certainly have an ordinance forbidding private discrimination.

MR. RYLAND: Yes.

QUESTION: And then give appropriate remedies against those who are discriminating.

MR. RYLAND: Yes. If it identified --

QUESTION: But the issue is whether it itself could use its own authority to enact a set aside to remedy somebody else's discrimination.

MR. RYLAND: Precisely. Precisely. We don't take issue with the city's authority to act affirmatively in an identified case.

QUESTION: If the city's aware that a private contractor is discriminating, may it continue to deal with that contractor?

MR. RYLAND: If it were aware of the discrimination, and were aware that its continuing to

1 deal with the contractor would further that
2 discrimination, I think the city would be exposing itself
3 to liability. I think it could continue to deal with the
4 contractor, but at its peril.

5 QUESTION: But surely Richmond has done that in
6 the years prior to the distant past?

7 MR. RYLAND: I don't believe so. I don't
8 believe so. I don't think that we have any identified
9 instances of discrimination by any entity against
10 minority firms.

11 I think that the accusation that there is
12 discrimination in the construction industry does not
13 extend to the award of relief against the industry or any
14 particular firms because of that general finding.

15 QUESTION: Well, if this ordinance had been
16 enacted in the year 1870, would the chances for its being
17 sustained be any greater than now? That's two years
18 after the enactment of the Fourteenth Amendment.

19 MR. RYLAND: I understand.

20 I don't feel competent to answer that, Justice
21 Kennedy, because I don't know the context of the time and
22 what the courts would have done.

23 QUESTION: Well, we know about our history, we
24 know about the context of the time, we know about
25 slavery, we know about the necessity for the Fourteenth

1 Amendment, and we know about the existence (a), of
2 slavery, and (b), of discrimination after slavery ended.

3 MR. RYLAND: Yes. You had the Freedman's
4 Bureau, which was established at that time specifically
5 to provide aid to former slaves. Nobody has ever
6 suggested that that was unconstitutional or some sort of
7 unlawful preference. Congress was struggling with the
8 powers of the Fourteenth Amendment.

9 I think that under the line of cases since
10 Brown v. Board of Education, we do not find this Court
11 approving race-conscious legal remedies in the absence of
12 a shown violation. So, I would have to answer that based
13 on recent constitutional history, the rule should have
14 been the same in 1870.

15 QUESTION: And you think it's unlikely that
16 this ordinance could have been sustained in 1870, when
17 Blacks had been emancipated for simply, approximately six
18 years?

19 MR. RYLAND: Well, you would have had a
20 different factual situation in that regard. Certainly
21 the Government would have been entitled to provide aid to
22 former slaves to help them become skilled tradesmen,
23 craftsmen, contractors able to stand on their own in the
24 business world. There's no question about that.

25 For the Government to have said to white

1 businessmen who were not former slaveowners that they had
2 to provide the remedy to slavery, I think, raises a very
3 different constitutional question.

4 I'm uncomfortable dealing with this in the
5 abstract, because there are so many variables in there.
6 But I don't think we had any remedies in the post-Civil
7 War period that imposed affirmative duty on
8 non-violators, so that's the distinction we make in this
9 case.

10 A second aspect of our position is that this
11 ordinance was not narrowly tailored to achieve a proper
12 remedial objection. We've mentioned the fact that the 30
13 percent quota was pulled out of the air. The fact that
14 it's over inclusive and that it grants preferential rights
15 to groups that are not resident in the Richmond area, and
16 which have never been subject to discrimination in the
17 Richmond area, would automatically give rise to a
18 constitutional violation as soon as one of these minority
19 group members exercised its right to preferential
20 treatment under the Richmond ordinance.

21 It's not enough to dismiss the seriousness of
22 the problem by saying none of these groups have
23 participated yet. Under this law, there's nothing to
24 prevent qualified and competent minority firms from areas
25 of the country which have not experienced discrimination

1 to come into the Richmond area and participate under the
2 ordinance. There's no real supervision of the
3 administration of the ordinance to assure that it
4 achieves a business purpose.

5 The 30 percent quota requirement has a problem
6 in it, in that it's so high that it can force the award
7 of a much higher proportion of the contract to minority
8 firms. This has a serious impact on non-minority
9 subcontractors who are in the same trades where there are
10 qualified minority firms already participating.

11 The impact on those people can be exclusion
12 from the marketplace, and the impact on them is as great
13 as the impact on Croson, with the loss of its contract in
14 this case.

15 QUESTION: If the figure were five percent,
16 would you be making the same argument?

17 MR. RYLAND: I could not make the argument that
18 it would force the award of a much larger percentage.

19 QUESTION: No, but would you be making the same
20 basic argument?

21 MR. RYLAND: Yes, yes, a constitutional
22 violation is a constitutional violation, whether it's a
23 little one or a big one.

24 QUESTION: And if it were two percent, you
25 would still be making the same argument?

1 MR. RYLAND: Yes.

2 QUESTION: So the figure, really, is
3 meaningless?

4 MR. RYLAND: The figure is meaningless on the
5 down side. The higher it gets, the more practical
6 problems result.

7 QUESTION: You said exclusion from the
8 marketplace. But even the 30 percent figure, according
9 to your opponent, really is only three percent of the
10 market.

11 MR. RYLAND: It's three percent of the market,
12 by that computation, but for the individual subcontractor
13 who is in competition with one eligible for the minority
14 preference, on him that three percent is a much larger
15 proportion of his business.

16 And let us not forget that the subcontractors
17 who are competing for these jobs are not all large,
18 wealthy firms. The subcontractors struggle without regard
19 to race. There are many tradesmen out there who would
20 like to be a prime contractor with a governmental entity
21 but don't have the expertise or the skill and never
22 will. And that's without regard to race. There are a
23 lot of struggling businesses out there, so any time you
24 adopt a law which has the effect of denying a substantial
25 part of the market -- of their market -- to them, the

1 impact is quite severe.

2 Thank you.

3 QUESTION: Thank you, Mr. Ryland.

4 Mr. Payton, you have four minutes remaining.

5 REBUTTAL ARGUMENT BY JOHN PAYTON

6 MR. PAYTON: Thank you, Mr. Chief Justice.

7 Let me respond to four points. With regard to
8 the question you raised, Justice Scalia, about isn't
9 there a problem because Croson wasn't allowed to raise
10 their bid at the end, the reason -- or maybe Mr. Ryland
11 raised it -- the reason Croson wasn't allowed to raise
12 their bid once it got the bid from its minority
13 contractor is, under the city's procurement policies, you
14 put in a bid, and that's it.

15 And when he asked permission to raise his bid
16 in light of this, it was denied, and he was asked to
17 re-bid. And instead of re-bidding, he filed this
18 lawsuit. There's just no issue that raises any
19 constitutional question out of that.

20 The District Court, in ruling on this waiver
21 issue -- if I can just read what the District Court said
22 at note 20, supplemental appendix 231 -- "Croson has not
23 persuaded this court that any of the additional evidence
24 it has adduced, after full discovery, that Continental"
25 -- that's the minority sub -- "was in fact unavailable or

1 was taking advantage of the plan to charge excessive
2 prices.

3 "The city's decision was not only reasonable,
4 but appears to have been absolutely correct" -- that is,
5 in having the contract re-bid.

6 With regard to what was actually before the
7 Richmond City Council, and what it was trying to address,
8 it was not societal discrimination. The City Council was
9 aware of what Congress had found, in the construction
10 industry, and how it had described that industry, and
11 what Congress had tried to do to remedy that. But it was
12 also aware of what had happened in its own industry, and
13 at the City Council hearing, it heard evidence from
14 various of the construction trade associations, and from
15 that it learned that there were virtually no minority
16 members of any of the construction trade associations.

17 It also heard testimony from a former mayor
18 that there was widespread discrimination in Richmond's
19 own construction industry. And that testimony was
20 concurred in by the City Manager.

21 So, what Richmond had was a very full set of
22 findings and understandings. There was no question that
23 this was a remedial statute. It said so on its face, and
24 when the issue of its remedial nature came up, it came up
25 before all of the trade association representatives

1 testified, and none of them took issue with that.

2 In the District Court, where there was fully
3 opportunity to litigate this, the issue of whether or not
4 there was sufficient factual predicate of discrimination
5 was not joined by Croson. There is no rebutting
6 testimony about the factual predicate of discrimination
7 in this case.

8 With regard to whether or not there should be a
9 different standard of proof, or scrutiny, that attaches
10 to a Governmental body that depends on its racial
11 composition, I guess I can only say it's the same
12 Fourteenth Amendment and I think it's the same standards,
13 and it applies whatever the racial composition of
14 Richmond, whatever the racial composition of Richmond's
15 City Council, whatever the racial composition of --

16 QUESTION: But at some point, don't you reach a
17 situation -- supposing a State had 60 percent Black
18 people in it. Would that State still be able to allow a
19 set-aside for what they would call "minority" businesses
20 -- i.e. Black businesses?

21 MR. PAYTON: Well, I can remove the word
22 "minority" if it helps the analysis.

23 If the State determined that in fact its
24 construction industry was characterized by past racial
25 discrimination which had locked out of that business

1 system minority contractors, I would say it's irrelevant
2 what the minority population of that State is, as long as
3 it makes the appropriate findings in its own locality and
4 then goes about trying to remedy that in a way consistent
5 with the jurisprudence of this Court.

6 QUESTION: But you surely wouldn't call them
7 minority contracts?

8 MR. PAYTON: I will remove the word. As long
9 as it defines that Black contractors have been locked
10 out, it can seek that remedy. And the Constitutionality
11 of that remedy can be litigated in District Court.

12 But certainly there is a sufficient basis in
13 evidence for Richmond to do exactly what it did, and in
14 the District Court where this was litigated, nothing was
15 presented to rebut any of that factual finding of past
16 discrimination -- nothing at all.

17 I think that this is not societal
18 discrimination --

19 QUESTION: The discrimination was practiced by
20 -- who discriminated against the minority contractors?

21 MR. PAYTON: I think it was a closed business
22 system, as described by --

23 QUESTION: Well, that doesn't help me very
24 much. Who? Who did the discriminating? The city?

25 MR. PAYTON: No, it's not the city. It's not

1 the city. It is all aspects of the construction industry
2 itself, from the trades -- one of the ways you become a
3 construction contractor is to enter as a member of a
4 trade and then leave that and become a small construction
5 contractor. That's blocked for Black members.

6 QUESTION: Well, I suppose you could say that
7 about any industry.

8 MR. PAYTON: No, you can't.

9 QUESTION: In the past? Way back in the past?

10 MR. PAYTON: No, you can't. With the
11 construction industry, we know a lot about what we speak
12 here, and there have been studies and studies and
13 judicial findings that establish that there is a closed
14 business system in the construction industry that was
15 being remedied by Richmond, here.

16 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
17 Payton.

18 The case is submitted.

19 (Whereupon, at 11:47 o'clock a.m., the case in
20 the above-titled matter was submitted.)
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CERTIFICATION

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#87-998 - CITY OF RICHMOND, Appellant V. J.A. CROSON COMPANY

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