

ORDINANCE No.

114339

COUNCIL BILL No.

107136

Law Department

The City of

AN ORDINANCE amending the Women's and Minority Business Utilization Ordinance, S.M.C. Ch. 20.46, by making additional findings regarding discrimination against minority businesses and by changing the way utilization goals are calculated for the utilization of minority business enterprises on City contracts; appropriating funds for a study of discrimination against minority businesses and declaring an emergency therefor.

Honorable President:

Your Committee on \_\_\_\_\_

to which was referred the within Council report that we have considered the same

COMPTROLLER FILE No. \_\_\_\_\_

Introduced: JAN 13 1989	By: GALLE
Referred: JAN 20 1989	To: FULL COUNCIL
Referred:	To:
Referred:	To:
Reported: FEB 2 1989	Second Reading: FEB 2 1989
Third Reading: FEB 2 1989	Signed: FEB 2 1989
Presented to Mayor: FEB 2 1989	Approved: FEB 2 1989
Returned to City Clerk: FEB 2 1989	Published:
Vetoed by Mayor:	Veto Published:
Passed over Veto:	Veto Sustained:

FEB 2 1989

Voto

OK

Department

# The City of Seattle--Legislative Department

Date Reported  
and Adopted

## REPORT OF COMMITTEE

President:

Committee on \_\_\_\_\_

was referred the within Council Bill No. \_\_\_\_\_

we have considered the same and respectfully recommend that the same:

Vote 7-0

\_\_\_\_\_  
Committee Chair

RG:bjw  
1/27/89  
O9RD2.1

walked on  
C.B.107135

ORDINANCE

114339

1  
2  
3 AN ORDINANCE amending the Women's and Minority Business  
4 Utilization Ordinance, S.M.C. Ch. 20.46, by making  
5 additional findings regarding discrimination against  
6 minority businesses and by changing the way utilization  
goals are calculated for the utilization of minority  
business enterprises on City contracts; appropriating  
funds for a study of discrimination against minority  
businesses and declaring an emergency therefor.

7 WHEREAS, the United States Supreme Court's decision in the  
8 case of City of Richmond v. J. A. Croson Co., No. 87-998  
9 (1989) establishes new standards by which the constitu-  
tional of local governments' minority business  
enterprise ("MBE") programs will be judged; and

10 WHEREAS, the Supreme Court held in the Croson case that a  
11 local government may maintain a MBE program if such a  
12 program is necessary to assure that it is not a "passive  
13 participant" in a system of racial exclusion practiced by  
14 contractors in the private sector; and

15 WHEREAS, the City Council and the Mayor have been presented  
16 with persuasive evidence of the systematic exclusion of  
17 minority businesses from contracting opportunities in the  
18 various aspects of private commerce in Seattle and the  
19 surrounding communities; and

20 WHEREAS, the Supreme Court held in the Croson case that local  
21 governments' MBE goals must be established by reference to  
22 the availability of MBEs capable of performing work on the  
23 governments' contracts; and

24 WHEREAS, the City Council and the Mayor wish to obtain fur-  
25 ther information regarding discrimination against minority  
26 businesses in the private sector and whether it may be  
27 advisable to make further changes in the City's MBE  
28 program but have also been presented with persuasive  
evidence that any interruption in the City's MBE program  
will cause numerous MBEs to suffer irreversible injury;  
Now, Therefore,

BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

Section 1. Section 20.46.020 of the Seattle Municipal  
Code (Ordinance 109113 § 2) is amended as follows:

20.46.020 Findings.

Upon full consideration of all relevant facts, the City  
Council finds that:

1 A. Past societal discrimination, the City's overall  
2 contracting process, difficulties in the financing and bonding  
3 market, and problems obtaining credit and insurance, have had  
4 the effect of underutilization of women's business enterprises  
5 and minority business enterprises in contracts awarded by the  
6 City, and have contributed to the underdevelopment of such  
7 businesses;

8 B. As a result of this past discrimination against  
9 women's business enterprises and minority business  
10 enterprises, women and minorities have been deprived of  
11 numerous employment opportunities;

12 C. It is in the best interests of the City to promote the  
13 equitable utilization of women's business enterprises and  
14 minority business enterprises in City contracting; ~~((and))~~

15 D. The requirements of this chapter are necessary to  
16 overcome the present effects of discrimination, and are  
17 designed to achieve the goal of equitable utilization of  
18 women's business enterprises and minority business  
19 enterprises, while at the same time maintaining a high quality  
20 of goods and services provided to the City through competitive  
21 bidding as required by state law and the City Charter ~~((+))~~ ;

22 E. Nonminority developers, contractors and consultants  
23 have systematically excluded minority business enterprises  
24 from contracting and subcontracting opportunities in the  
25 private sector in Seattle and in the surrounding cities and  
26 communities;

27 F. Race-neutral measures employed by the City in the past  
28 did not prevent the City from being a passive participant in  
the systematic discrimination against minority business  
enterprises;

1           G. Unless the City takes affirmative steps to prevent  
2 the pervasive discrimination against minority business  
3 enterprises in the private sector from affecting its  
4 contracting processes, the City will become a passive  
5 participant in the system of racial exclusion practiced in the  
6 private sector; and

7           H. The City's minority business enterprise program must  
8 be continued to prevent the City from once again becoming a  
9 passive participant in the systematic exclusion of minority  
10 business enterprises from contracting and subcontracting  
11 opportunities.

12           Section 2. Section 20.46.030 (Ordinance 109113 § 3) is  
13 amended as follows:

14           20.46.030   Declaration of policy.

15           It is the policy of the City to ensure the full and  
16 equitable participation by women's business enterprises and  
17 minority business enterprises in the provision of goods and  
18 services to the City on a contractual basis. The ultimate  
19 goal of this chapter is to increase the use of women's  
20 business enterprises (~~and minority business enterprises~~)  
21 above the present low level to a level more comparable to the  
22 representation of women (~~and minorities~~) in the population  
23 (~~(→)~~) and to increase the use of minority business enterprises  
24 to a level comparable to the availability of minority business  
25 enterprises which are capable of providing goods and services  
26 to the City.

27           Section 3. Subsection A of section 20.46.060 of the  
28 Seattle Municipal Code is amended as follows:

          A. In addition to duties and powers given to the  
Director elsewhere, the Director shall:

1           1. Provide information and other assistance to  
2 women's business enterprises and minority business enterprises  
3 to increase their ability to effectively compete for the award  
4 of City contracts;

5           2. Assist City and community agencies to increase  
6 women's business enterprise and minority business enterprise  
7 participation on City contracts;

8           3. Adopt rules and regulations, consistent with  
9 Chapter 328, Washington Laws of 1987, this chapter and the  
10 Administrative Code of The City of Seattle (Ordinance 102228,  
11 as amended), establishing standards and procedures for  
12 effectively carrying out this chapter;

13           4. Accept certifications as bona fide women's,  
14 minority, combination women's and minority or disadvantaged  
15 business enterprises made by the Washington State Office of  
16 Minority and Women's Business Enterprises and those deemed  
17 certified by that Office pursuant to Washington Laws of 1987,  
18 Chapter 328; and provide access to a listing of such bona fide  
19 businesses for use by contract awarding authorities and  
20 contractors;

21           5. Recommend to the Mayor appropriate goals for  
22 minority and women's business enterprise utilization;

23           6. Recommend to the Mayor appropriate goals for  
24 "disadvantaged businesses" utilization in federally funded,  
25 City-administered projects where utilization of such  
26 businesses is required by state or federal law;

27           7. Adopt rules and regulations consistent with the  
28 Administrative Code of The City of Seattle (SMC Chapter 3.02,  
Ordinance 102228, as amended) establishing practices and

1 procedures for effectively implementing 49 CFR Part 23,  
2 subpart D; ~~((and))~~

3 8. Recommend to contract awarding authorities such  
4 sanctions as may be appropriate pursuant to SMC 20.46.080  
5 A4(~~-~~) ; and

6 9. Determine the level of utilization of minority  
7 business enterprises to be required on City contracts as  
8 described in SMC 20.46.090 B1.

9 Section 4. Section 20.46.070 of the Seattle Municipal  
10 Code is amended as follows:

11 20.46.070 Utilization goals.

12 A. The Mayor, with the advice of the Director, the  
13 Director of the Office for Women's Rights, and contract  
14 awarding authorities, shall establish separate City-wide  
15 annual goals for the utilization of women's business  
16 enterprises and for the utilization of minority business  
17 enterprises. These goals shall be expressed in terms of a  
18 percentage of the total dollar value of all contracts to be  
19 awarded by the City, and may be established separately for  
20 categories of contracting such as public works, consultant,  
21 concession and purchasing contracts. ~~((Goals shall be  
22 reasonably achievable, and shall be based upon factors such  
23 as+))~~

24 B. The City-wide annual goal for the utilization of  
25 women's business enterprises shall be reasonably achievable  
26 and shall be based on factors such as:

27 1. The level of participation of women's business  
28 enterprises ~~((and minority business enterprises))~~ on past  
contracts awarded by the City which have contained women ~~((and  
minority))~~ business enterprise requirements;

1                   2. The level of participation of women's business  
2 enterprises (~~and minority business enterprises~~) on contracts  
3 awarded by other governmental agencies in the Seattle area  
4 which have utilized women's business enterprise (~~and minority  
business enterprise~~) requirements;

5                   3. The availability of women's business enterprises  
6 (~~and minority business enterprises~~) which are capable of  
7 providing goods and services to the City; and

8                   4. The degree to which such annual goals will  
9 contribute to the achievement of the ultimate goal as set  
10 forth in Section 20.46.030.

11                   The City-wide annual goal shall be not less than (~~fifteen  
12 percent (15%) for minority business enterprises and not less  
than~~) three percent (3%) for women's business enterprises.

13                   C. The City-wide annual goal for the utilization of  
14 minority business enterprises shall be reasonably achievable  
15 and shall be based on the availability of minority business  
16 enterprises which are capable of providing goods and services  
17 to the City.

18                   (~~B-~~) D. The Mayor, with the advice of the Director,  
19 the Director of the Office for Women's Rights, and each  
20 contract awarding authority, shall establish separate annual  
21 goals for utilization of women's business enterprises and  
22 minority business enterprises by that awarding authority;  
23 these goals shall be expressed as a percentage of the total  
24 dollar value of all contracts to be awarded by the contract  
25 awarding authority, and may be established separately by  
26 contract category; they shall equal or exceed the City-wide  
27 annual goals.  
28

1 Section 5. Subsection B1 of Section 20.46.090 of the  
2 Seattle Municipal Code is amended as follows:

3 1. In addition to the requirements set forth in  
4 subsection B of Section 20.46.080 and elsewhere, bid  
5 conditions and requests for proposals shall require bidders  
6 and proposers to include in their bid or proposal (~~both~~  
7 ~~minority business enterprise and~~) women's business enterprise  
8 participation in the contract in a percentage which equals or  
9 exceeds the awarding authority's annual goals(~~(-)~~) and  
10 minority business enterprise participation in the contract in  
11 a percentage to be determined by the Director for the  
12 contract. The Director shall determine the minority business  
13 enterprise percentage for each contract based on the extent  
14 of subcontracting opportunities presented by the contract and  
15 the availability of minority business enterprises to perform  
16 such subcontracting work. Except as provided in subsection B2  
17 of this section, bids or proposals not including both minority  
18 business enterprise and women's business enterprise  
19 participation in an amount which equals or exceeds that  
20 required by the bid conditions or request for proposals shall  
21 be declared nonresponsive.

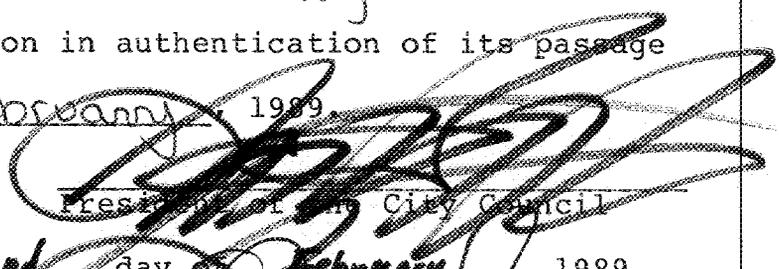
22 Section 6. The Human Rights Department shall enter into a  
23 contract with a qualified consultant to study the  
24 discrimination against minority businesses in the private  
25 sector in the Seattle area and to recommend any appropriate  
26 changes in the City's minority business enterprise program or  
27 other City ordinances. One Hundred Thousand Dollars  
28 (\$100,000.00) is hereby appropriated from the emergency fund  
for this purpose. The Director of the Human Rights Department  
shall report to the City Council and Mayor regarding the

1 consultant's recommendations on or before July 5, 1989.

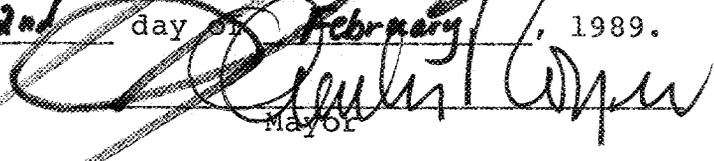
2 Section 7. The continuation of the City's MBE program  
3 during the period of the study referred to in section 6 is  
4 necessary to prevent numerous minority businesses from being  
5 irreversibly injured. The City Council shall review and act  
6 upon the Director's report referred to in Section 6 on or  
7 before August 7, 1989.

8 Section 8. WHEREAS, the appropriation herein made is  
9 to meet actual necessary expenditures of the City for which  
10 no appropriation has been made due to causes which could not  
11 reasonably have been foreseen at the time of making the 1988  
12 Budget; Now, Therefore, in accordance with RCW 35.32A.060, by  
13 reason of the facts above stated and the emergency which is  
14 hereby declared to exist, this ordinance shall become  
15 effective immediately upon the approval or signing of the same  
16 by the Mayor or passage over his veto, as provided by the  
17 Charter of the City.

18 PASSED by three-fourths vote of all the members of the  
19 City Council the 2nd day of February, 1989, and  
20 signed by me in open session in authentication of its passage  
21 this 2nd day of February, 1989.

  
\_\_\_\_\_  
President of the City Council

22 Approved by me this 2nd day of February, 1989.

  
\_\_\_\_\_  
Mayor

23 Filed by me this 2nd day of February, 1989.

24 ATTEST: Norman J. Brooks  
\_\_\_\_\_  
City Comptroller and City Clerk

25 By: Margaret Carter  
\_\_\_\_\_  
Deputy

26 (SEAL)

27 Published \_\_\_\_\_

*Real  
Darius  
M...*

January 23, 1989

M E M O R A N D U M

To: The Honorable Charles Royer, Mayor  
The Honorable Sam Smith, President,  
City Council, and all Councilmembers

From: Douglas N. Jewett *DNJ*  
City Attorney

Subject: Supreme Court Ruling on City of Richmond v.  
J.A. Croson Co.

Attached for your immediate information is the syllabus of the decision. We have given full-text copies to both the Office of Women's Rights and the Human Rights Department. I have also enclosed pages 33-35 of the opinion where the door is left open for continuing a MBE program.

I am now meeting with Bill Hilliard to begin formulating a plan to document discrimination by non-minority contractors against minority businesses. I have also discussed the decision with Reggie Frye and have invited him to a meeting with Mr. Hilliard and myself tomorrow afternoon. I asked Mr. Frye to begin organizing testimony by minority contractors regarding discrimination.

Having the City Council or Human Rights Commission hold hearings to build a record is a subject we need to discuss as soon as possible.

DNJ-ms

Encl.

*Clyde*

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U. S. 321, 327.

# SUPREME COURT OF THE UNITED STATES

Syllabus

CITY OF RICHMOND *v.* J. A. CROSON CO.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR  
THE FOURTH CIRCUIT

No. 87-998. Argued October 5, 1988—Decided January 23, 1989

Appellant city adopted a Minority Business Utilization Plan (Plan) requiring prime contractors awarded city construction contracts to subcontract at least 30% of the dollar amount of each contract to one or more "Minority Business Enterprises" (MBEs), which the Plan defined to include a business from anywhere in the country at least 51% of which is owned and controlled by black, Spanish-speaking, Oriental, Indian, Eskimo, or Aleut citizens. Although the Plan declared that it was "remedial" in nature, it was adopted after a public hearing at which no direct evidence was presented that the city had discriminated on the basis of race in letting contracts or that its prime contractors had discriminated against minority subcontractors. The evidence that was introduced included: a statistical study indicating that, although the city's population was 50% black, only 0.67% of its prime construction contracts had been awarded to minority businesses in recent years; figures establishing that a variety of local contractors' associations had virtually no MBE members; the city's counsel's conclusion that the Plan was constitutional under *Fullilove v. Klutznick*, 448 U. S. 448; and the statements of Plan proponents indicating that there had been widespread racial discrimination in the local, state, and national construction industries. Pursuant to the Plan, the city adopted rules requiring individualized consideration of each bid or request for a waiver of the 30% set-aside, and providing that a waiver could be granted only upon proof that sufficient qualified MBEs were unavailable or unwilling to participate. After appellee construction company, the sole bidder on a city contract, was denied a waiver and lost its contract, it brought suit under 42 U. S. C. § 1983, alleging that the Plan was unconstitutional under the Fourteenth Amendment's Equal Protection Clause. The Federal District Court upheld the Plan in all respects, and the Court of Appeals affirmed, applying a test derived

## Syllabus

from the principal opinion in *Fullilove, supra*, which accorded great deference to Congress' findings of past societal discrimination in holding that a 10% minority set-aside for certain federal construction grants did not violate the equal protection component of the Fifth Amendment. However, on appellee's petition for certiorari in this case, this Court vacated and remanded for further consideration in light of its intervening decision in *Wygant v. Jackson Board of Education*, 476 U. S. 267, in which the plurality applied a strict scrutiny standard in holding that a race-based layoff program agreed to by a school board and the local teacher's union violated the Fourteenth Amendment's Equal Protection Clause. On remand, the Court of Appeals held that the city's Plan violated both prongs of strict scrutiny, in that (1) the Plan was not justified by a compelling governmental interest, since the record revealed no prior discrimination by the city itself in awarding contracts, and (2) the 30% set-aside was not narrowly tailored to accomplish a remedial purpose.

*Held:* The judgment is affirmed.

822 F. 2d 1355, affirmed.

JUSTICE O'CONNOR delivered the opinion of the Court with respect to Parts I, III-B, and IV, concluding that:

1. The city has failed to demonstrate a compelling governmental interest justifying the Plan, since the factual predicate supporting the Plan does not establish the type of identified past discrimination in the city's construction industry that would authorize race-based relief under the Fourteenth Amendment's Equal Protection Clause. Pp. 22-31.

(a) A generalized assertion that there has been past discrimination in the entire construction industry cannot justify the use of an unyielding racial quota, since it provides no guidance for the city's legislative body to determine the precise scope of the injury it seeks to remedy and would allow race-based decisionmaking essentially limitless in scope and duration. The city's argument that it is attempting to remedy various forms of past societal discrimination that are alleged to be responsible for the small number of minority entrepreneurs in the local contracting industry fails, since the city also lists a host of nonracial factors which would seem to face a member of any racial group seeking to establish a new business enterprise, such as deficiencies in working capital, inability to meet bonding requirements, unfamiliarity with bidding procedures, and disability caused by an inadequate track record. Pp. 23-24.

(b) None of the "facts" cited by the city or relied on by the District Court, singly or together, provide a basis for a prima facie case of a constitutional or statutory violation by anyone in the city's construction industry. The fact that the Plan declares itself to be "remedial" is insuffi-

## Syllabus

cient, since the mere recitation of a "benign" or legitimate purpose for a racial classification is entitled to little or no weight. Similarly, the views of Plan proponents as to past and present discrimination in the industry are highly conclusory and of little probative value. Reliance on the disparity between the number of prime contracts awarded to minority businesses and the city's minority population is also misplaced, since the proper statistical evaluation would compare the percentage of MBEs in the relevant market that are qualified to undertake city subcontracting work with the percentage of total city construction dollars that are presently awarded to minority subcontractors, neither of which is known to the city. The fact that MBE membership in local contractors' associations was extremely low is also not probative absent some link to the number of MBEs eligible for membership, since there are numerous explanations for the dearth of minority participation, including past societal discrimination in education and economic opportunities as well as both black and white career and entrepreneurial choices. Congress' finding in connection with the set-aside approved in *Fullilove* that there had been nationwide discrimination in the construction industry also has extremely limited probative value, since, by including a waiver procedure in the national program, Congress explicitly recognized that the scope of the problem would vary from market area to market area. In any event, Congress was acting pursuant to its unique enforcement powers under § 5 of the Fourteenth Amendment. Pp. 24-29.

(c) The "evidence" relied upon by JUSTICE MARSHALL's dissent—the city's history of school desegregation and numerous congressional reports—does little to define the scope of any injury to minority contractors in the city or the necessary remedy, and could justify a preference of any size or duration. Moreover, JUSTICE MARSHALL's suggestion that discrimination findings may be "shared" from jurisdiction to jurisdiction is unprecedented and contrary to this Court's decisions. Pp. 29-30.

(d) Since there is *absolutely no evidence* of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the city's construction industry, the Plan's random inclusion of those groups strongly impugns the city's claim of remedial motivation. Pp. 30-31.

2. The Plan is not narrowly tailored to remedy the effects of prior discrimination, since it entitles a black, Hispanic, or Oriental entrepreneur from anywhere in the country to an absolute preference over other citizens based solely on their race. Although many of the barriers to minority participation in the construction industry relied upon by the city to justify the Plan appear to be race neutral, there is no evidence that the city considered using alternative, race-neutral means to increase minority participation in city contracting. Moreover, the Plan's rigid 30%

## Syllabus

quota rests upon the completely unrealistic assumption that minorities will choose to enter construction in lockstep proportion to their representation in the local population. Unlike the program upheld in *Fullilove*, the Plan's waiver system focuses upon the availability of MBEs, and does not inquire whether the particular MBE seeking a racial preference has suffered from the effects of past discrimination by the city or prime contractors. Given the fact that the city must already consider bids and waivers on a case-by-case basis, the city's only interest in maintaining a quota system rather than investigating the need for remedial action in particular cases would seem to be simply administrative convenience, which, standing alone, cannot justify the use of a suspect classification under equal protection strict scrutiny. Pp. 31-33.

JUSTICE O'CONNOR, joined by THE CHIEF JUSTICE and JUSTICE WHITE, concluded in Part II that if the city could identify past discrimination in the local construction industry with the particularity required by the Equal Protection Clause, it would have the power to adopt race-based legislation designed to eradicate the effects of that discrimination. The principal opinion in *Fullilove* cannot be read to relieve the city of the necessity of making the specific findings of discrimination required by the Clause, since the congressional finding of past discrimination relied on in that case was made pursuant to Congress' unique power under § 5 of the Amendment to enforce, and therefore to identify and redress violations of, the Amendment's provisions. Conversely, § 1 of the Amendment, which includes the Equal Protection Clause, is an explicit constraint upon the power of States and political subdivisions, which must undertake any remedial efforts in accordance with the dictates of that section. However, the Court of Appeals erred to the extent that it followed by rote the *Wygant* plurality's ruling that the Equal Protection Clause requires a showing of prior discrimination by the governmental unit involved, since that ruling was made in the context of a race-based policy that affected the particular public employer's own work force, whereas this case involves a state entity which has specific state-law authority to address discriminatory practices within local commerce under its jurisdiction. Pp. 11-17.

JUSTICE O'CONNOR, joined by THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE KENNEDY, concluded in Parts III-A and V that:

1. Since the Plan denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely on their race, *Wygant's* strict scrutiny standard of review must be applied, which requires a firm evidentiary basis for concluding that the underrepresentation of minorities is a product of past discrimination. Application of that standard, which is not dependent on the race of those burdened or benefited by the racial classification, assures that the city is pursuing a reme-

## Syllabus

dial goal important enough to warrant use of a highly suspect tool and that the means chosen "fit" this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype. The relaxed standard of review proposed by JUSTICE MARSHALL's dissent does not provide a means for determining that a racial classification is in fact "designed to further remedial goals," since it accepts the remedial nature of the classification before examination of the factual basis for the classification's enactment and the nexus between its scope and that factual basis. Even if the level of equal protection scrutiny could be said to vary according to the ability of different groups to defend their interests in the representative process, heightened scrutiny would still be appropriate in the circumstances of this case, since blacks comprise approximately 60% of the city's population and hold five of nine seats on the City Council, thereby raising the concern that the political majority may have acted to disadvantage a minority based on unwarranted assumptions or incomplete facts. Pp. 17-22.

2. Even in the absence of evidence of discrimination in the local construction industry, the city has at its disposal an array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races who have suffered the effects of past societal discrimination, including simplification of bidding procedures, relaxation of bonding requirements, training, financial aid, elimination or modification of formal barriers caused by bureaucratic inertia, and the prohibition of discrimination in the provision of credit or bonding by local suppliers and banks. Pp. 34-35.

JUSTICE STEVENS, although agreeing that the Plan cannot be justified as a remedy for past discrimination, concluded that the Fourteenth Amendment does not limit permissible racial classifications to those that remedy past wrongs, but requires that race-based governmental decisions be evaluated primarily by studying their probable impact on the future. Pp. 1-8.

(a) Disregarding the past history of racial injustice, there is not even an arguable basis for suggesting that the race of a subcontractor or contractor on city projects should have any relevance to his or her access to the market. Although race is not always irrelevant to sound governmental decisionmaking, the city makes no claim that the public interest in the efficient performance of its construction contracts will be served by granting a preference to minority-business enterprises. Pp. 2-3.

(b) Legislative bodies such as the City Council, which are primarily policymaking entities that promulgate rules to govern future conduct, raise valid constitutional concerns when they use the political process to punish or characterize past conduct of private citizens. Courts, on the

## Syllabus

other hand, are well equipped to identify past wrongdoers and to fashion remedies that will create the conditions that presumably would have existed had no wrong been committed, and should have the same broad discretion in racial discrimination cases that chancellors enjoy in other areas of the law to fashion remedies against persons who have been proven guilty of violations of law. Pp. 3-4.

(c) Rather than engaging in debate over the proper standard of review to apply in affirmative-action litigation, it is more constructive to try to identify the characteristics of the advantaged and disadvantaged classes that may justify their disparate treatment. Here, instead of carefully identifying those characteristics, the city has merely engaged in the type of stereotypical analysis that is the hallmark of Equal Protection Clause violations. The class of persons benefited by the Plan is not limited to victims of past discrimination by white contractors in the city, but encompasses persons who have never been in business in the city, minority contractors who may have themselves been guilty of discrimination against other minority group members, and firms that have prospered notwithstanding discriminatory treatment. Similarly, although the Plan unquestionably disadvantages some white contractors who are guilty of past discrimination against blacks, it also punishes some who discriminated only before it was forbidden by law and some who have never discriminated against anyone. Pp. 4-8.

JUSTICE KENNEDY concluded that the Fourteenth Amendment ought not to be interpreted to reduce a State's power to eradicate racial discrimination and its effects in both the public and private sectors, or its absolute duty to do so where those wrongs were caused intentionally by the State itself, except where there is a conflict with federal law or where, as here, a state remedy itself violates equal protection. Although a rule striking down all racial preferences which are not necessary remedies to victims of unlawful discrimination would serve important structural goals by eliminating the necessity for courts to pass on each such preference that is enacted, that rule would be a significant break with this Court's precedents that require a case-by-case test, and need not be adopted. Rather, it may be assumed that the principle of race neutrality found in the Equal Protection Clause will be vindicated by the less absolute strict scrutiny standard, the application of which demonstrates that the city's Plan is not a remedy but is itself an unconstitutional preference. Pp. 1-3.

JUSTICE SCALIA, agreeing that strict scrutiny must be applied to all governmental racial classifications, concluded that:

1. The Fourteenth Amendment prohibits state and local governments from discriminating on the basis of race in order to undo the effects of past discrimination, except in one circumstance: where that is necessary

## Syllabus

to eliminate their own maintenance of a system of unlawful racial classification. Moreover, the State's remedial power in that instance extends no further than the scope of the constitutional violation, and does not encompass the continuing effects of a discriminatory system once the system itself has been eliminated. Pp. 1-6.

2. The State remains free to undo the effects of past discrimination in permissible ways that do not involve classification by race—for example, by according a contracting preference to small or new businesses or to actual victims of discrimination who can be identified. In the latter instance, the classification would not be based on race but on the fact that the victims were wronged. Pp. 6-9.

O'CONNOR, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, III-B, and IV, in which REHNQUIST, C. J., and WHITE, STEVENS, and KENNEDY, JJ., joined, an opinion with respect to Part II, in which REHNQUIST, C. J., and WHITE, J., joined, and an opinion with respect to Parts III-A and V, in which REHNQUIST, C. J., and WHITE and KENNEDY, JJ., joined. STEVENS, J., and KENNEDY, J., filed opinions concurring in part and concurring in the judgment. SCALIA, J., filed an opinion concurring in the judgment. MARSHALL, J., filed a dissenting opinion, in which BRENNAN and BLACKMUN, JJ., joined. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN, J., joined.

*Fullilove*, the Richmond Plan's waiver system focuses solely on the availability of MBEs; there is no inquiry into whether or not the particular MBE seeking a racial preference has suffered from the effects of past discrimination by the city or prime contractors.

Given the existence of an individualized procedure, the city's only interest in maintaining a quota system rather than investigating the need for remedial action in particular cases would seem to be simple administrative convenience. But the interest in avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered the effects of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification. See *Frontiero v. Richardson*, 411 U. S. 677, 690 (1973) (plurality opinion) ("[W]hen we enter the realm of 'strict judicial scrutiny,' there can be no doubt that 'administrative convenience' is not a shibboleth, the mere recitation of which dictates constitutionality"). Under Richmond's scheme, a successful black, Hispanic, or Oriental entrepreneur from anywhere in the country enjoys an absolute preference over other citizens based solely on their race. We think it obvious that such a program is not narrowly tailored to remedy the effects of prior discrimination.

## V

Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction. If the city of Richmond had evidence before it that nonminority contractors were systematically excluding minority businesses from subcontracting opportunities it could take action to end the discriminatory exclusion. Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise. See *Bazemore v. Friday*, 478 U. S., at 398; *Team-*

*sters v. United States*, 431 U. S., at 337-339. Under such circumstances, the city could act to dismantle the closed business system by taking appropriate measures against those who discriminate on the basis of race or other illegitimate criteria. See, e. g., *New York State Club Assn. v. New York City*, 487 U. S. —, — (1988). In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion.

Nor is local government powerless to deal with individual instances of racially motivated refusals to employ minority contractors. Where such discrimination occurs, a city would be justified in penalizing the discriminator and providing appropriate relief to the victim of such discrimination. See generally *McDonnell Douglas Corp. v. Green*, 411 U. S. 792, 802-803 (1973). Moreover, evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified. See *Teamsters*, 431 U. S., at 338.

Even in the absence of evidence of discrimination, the city has at its disposal a whole array of race-neutral devices to increase the accessibility of city contracting opportunities to small entrepreneurs of all races. Simplification of bidding procedures, relaxation of bonding requirements, and training and financial aid for disadvantaged entrepreneurs of all races would open the public contracting market to all those who have suffered the effects of past societal discrimination or neglect. Many of the formal barriers to new entrants may be the product of bureaucratic inertia more than actual necessity, and may have a disproportionate effect on the opportunities open to new minority firms. Their elimination or modification would have little detrimental effect on the city's interests and would serve to increase the opportunities available to minority business without classifying individuals on the basis of race. The city may also act to prohibit discrimination in the provision of credit or bonding by local sup-

pliers and banks. Business as usual should not mean business pursuant to the unthinking exclusion of certain members of our society from its rewards.

In the case at hand, the city has not ascertained how many minority enterprises are present in the local construction market nor the level of their participation in city construction projects. The city points to no evidence that qualified minority contractors have been passed over for city contracts or subcontracts, either as a group or in any individual case. Under such circumstances, it is simply impossible to say that the city has demonstrated "a strong basis in evidence for its conclusion that remedial action was necessary." *Wygant*, 476 U. S., at 277.

Proper findings in this regard are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects. Such findings also serve to assure all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself. Absent such findings, there is a danger that a racial classification is merely the product of unthinking stereotypes or a form of racial politics. "[I]f there is no duty to attempt either to measure the recovery by the wrong or to distribute that recovery within the injured class in an evenhanded way, our history will adequately support a legislative preference for almost any ethnic, religious, or racial group with the political strength to negotiate 'a piece of the action' for its members." — *Fullilove*, 448 U. S., at 539 (STEVENS, J., dissenting). Because the city of Richmond has failed to identify the need for remedial action in the awarding of its public construction contracts, its treatment of its citizens on a racial basis violates the dictates of the Equal Protection Clause. Accordingly, the judgment of the Court of Appeals for the Fourth Circuit is

*Affirmed.*

# City of Seattle

ORDINANCE 116228

AN ORDINANCE amending the Women's and Minority Business Utilization Ordinance, S.M.C. Ch. 20.46, by making additional findings regarding discrimination against minority businesses and by changing the way utilization goals are calculated for the utilization of minority business enterprises on City contracts; appropriating funds for a study of discrimination against minority businesses and declaring an emergency therefor.

WHEREAS, the United States Supreme Court's decision in the case of City of Richmond v. J. A. Croson Co., No. 87-998 (1989) establishes new standards by which the constitutionality of local governments' minority business enterprise ("MBE") programs will be judged; and

WHEREAS, the Supreme Court held in the Croson case that a local government may maintain a MBE program if such a program is necessary to assure that it is not a "passive participant" in a system of racial exclusion practiced by contractors in the private sector; and

WHEREAS, the City Council and the Mayor have been presented with persuasive evidence of the systematic exclusion of minority businesses from contracting opportunities in the various aspects of private commerce in Seattle and the surrounding communities; and

WHEREAS, the Supreme Court held in the Croson case that local governments' MBE goals must be established by reference to the availability of MBEs capable of performing work on the governments' contracts; and

WHEREAS, the City Council and the Mayor wish to obtain further information regarding discrimination against minority businesses in the private sector and whether it may be advisable to make further changes in the City's MBE program but have also been presented with persuasive evidence that any interruption in the City's MBE program will cause numerous MBEs to suffer irreparable injury; Now, Therefore,

BE IT ORDAINED BY THE CITY OF SEATTLE AS FOLLOWS:

Section 1. Section 20.46.020 of the Seattle Municipal Code (Ordinance 109113 § 2) is amended as follows:

20.46.020 Findings.

Upon full consideration of all relevant facts, the City Council finds that:

A. Past societal discrimination, the City's overall contracting process, difficulties in the financing and bonding market, and problems obtaining credit and insurance, have had the effect of underutilization of women's business enterprises and minority business enterprises in contracts awarded by the City, and have contributed to the underdevelopment of such businesses;

B. As a result of this past discrimination against women's business enterprises and minority business enterprises, women and minorities have been deprived of numerous employment opportunities;

C. It is in the best interests of the City to promote the equitable utilization of women's business enterprises and minority business enterprises in City contracting; ~~((and))~~

D. The requirements of this chapter are necessary to overcome the present effects of discrimination, and are designed to achieve the goal of equitable utilization of women's business enterprises and minority business enterprises, while at the same time maintaining a high quality of goods and services provided to the City through competitive bidding as required by state law and the City Charter ~~((-))~~ ;

E. Nonminority developers, contractors and consultants have systematically excluded minority business enterprises from contracting and subcontracting opportunities in the private sector in Seattle and in the surrounding cities and communities;

F. Sex-neutral measures employed by the City in the past did not prevent the City from being a passive participant in the systematic discrimination against minority business enterprises;

## Opportunities.

Section 2. Section 20.46.030 (Ordinance 109113 § 3) is amended as follows:

20.46.030 Declaration of policy.

It is the policy of the City to ensure the full and equitable participation by women's business enterprises and minority business enterprises in the provision of goods and services to the City on a contractual basis. The ultimate goal of this chapter is to increase the use of women's business enterprises ~~((and minority business enterprises))~~ above the present low level to a level more comparable to the representation of women ~~((and minorities))~~ in the population ~~((-))~~ and to increase the use of minority business enterprises to a level comparable to the availability of minority business enterprises which are capable of providing goods and services to the City.

Section 3. Subsection A of section 20.46.080 of the Seattle Municipal Code is amended as follows:

A. In addition to duties and powers given to the Director elsewhere, the Director shall:

1. Provide information and other assistance to women's business enterprises and minority business enterprises to increase their ability to effectively compete for the award of City contracts;

2. Assist City and community agencies to increase women's business enterprise and minority business enterprise participation on City contracts;

3. Adopt rules and regulations, consistent with Chapter 328, Washington Laws of 1987, this chapter and the Administrative Code of The City of Seattle (Ordinance 102228, as amended), establishing standards and procedures for effectively carrying out this chapter;

4. Accept certifications as bona fide women's, minority, combination women's and minority or disadvantaged business enterprises made by the Washington State Office of Minority and Women's Business Enterprises and those deemed certified by that Office pursuant to Washington Laws of 1987,

Chapter 328; and provide access to a listing of such bona fide businesses for use by contract awarding authorities and contractors;

5. Recommend to the Mayor appropriate goals for minority and women's business enterprise utilization;

6. Recommend to the Mayor appropriate goals for "disadvantaged businesses" utilization in federally funded, City-administered projects where utilization of such businesses is required by state or federal law;

7. Adopt rules and regulations consistent with the Administrative Code of The City of Seattle (SMC Chapter 3.02, Ordinance 102228, as amended) establishing practices and procedures for effectively implementing 49 CFR Part 23, subpart D; ~~((and))~~

8. Recommend to contract awarding authorities such sanctions as may be appropriate pursuant to SMC 20.46.080 A4 ~~((-))~~ ; and

9. Determine the level of utilization of minority business enterprises to be required on City contracts as described in SMC 20.46.090 B1.

Section 4. Section 20.46.070 of the Seattle Municipal

---

**STATE OF WASHINGTON - KING COUNTY**

11935  
City of Seattle, City Clerk

—ss.

No.

**Affidavit of Publication**

The undersigned, on oath states that he is an authorized representative of The Daily Journal of Commerce, a daily newspaper, which newspaper is a legal newspaper of general circulation and it is now and has been for more than six months prior to the date of publication hereinafter referred to, published in the English language continuously as a daily newspaper in Seattle, King County, Washington, and it is now and during all of said time was printed in an office maintained at the aforesaid place of publication of this newspaper. The Daily Journal of Commerce was on the 12th day of June, 1941, approved as a legal newspaper by the Superior Court of King County.

The notice in the exact form annexed, was published in regular issues of The Daily Journal of Commerce, which was regularly distributed to its subscribers during the below stated period. The annexed notice, a

Ordinance No. 114339

was published on

02/06/89

The amount of the fee charged for the foregoing publication is the sum of \$ \_\_\_\_\_, which amount has been paid in full.

\_\_\_\_\_  
*R. Sprague*

Subscribed and sworn to before me on

\_\_\_\_\_  
*February 6, 1989*  
\_\_\_\_\_  
*Barbara C. Brown*

Notary Public for the State of Washington,  
residing in Seattle

TIME AND DATE STAMP

**SPONSORSHIP**

THE ATTACHED DOCUMENT IS SPONSORED FOR FILING WITH THE CITY COUNCIL BY THE MEMBER(S) OF THE CITY COUNCIL WHOSE SIGNATURE(S) ARE SHOWN BELOW:

*Virginia Galle*

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**FOR CITY COUNCIL PRESIDENT USE ONLY**

COMMITTEE(S) REFERRED TO: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
PRESIDENT'S SIGNATURE