

IN THE SUPREME COURT OF OHIO

CITY OF CINCINNATI : CASE NO. 07-0114
Appellant :
v. :
CLEVELAND CONSTRUCTION, INC. :
Appellee :

CITY OF CINCINNATI'S MOTION FOR LEAVE TO ADD
PROPOSITION OF LAW TO PENDING APPEAL AND
MEMORANDUM IN SUPPORT

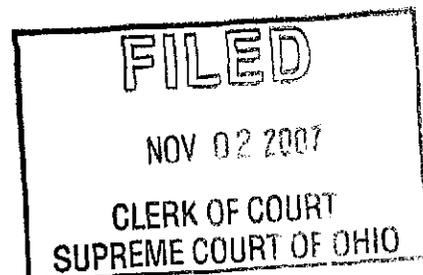
JULIA L. MCNEIL (0043535)
City Solicitor

RICHARD GANULIN (0025642C)
MARY FRANCES CLARK (0077497)
Assistant City Solicitors
CITY OF CINCINNATI
801 Plum Street, Room 214
Cincinnati, Ohio 45202
Telephone: (513) 352-3329
Facsimile: (513) 352-1515
richard.ganulin@cincinnati-oh.gov
mary.clark@cincinnati-oh.gov

*Attorneys for Appellant
City of Cincinnati*

W. KELLY LUNDRIGAN (0059211)
GARY E. POWELL (0037546)
ELIZABETH L. HUTTON (0081187)
MANLEY BURKE
225 West Court Street
Cincinnati, Ohio 45202
Telephone: (513) 721-5525
Facsimile: (513) 721-4268
wkl.@manleyburke.com
gpowell@manleyburke.com
ehutton@manleyburke.com

*Attorneys for Appellee
Cleveland Construction, Inc.*



The City of Cincinnati moves the Court for leave to add an equal protection proposition of law to this pending appeal. The reason for this motion is the June 28, 2007, race-based equal protection decision by the United States Supreme Court in *Parents Involved in Community Schools v. Seattle School District No. 1*.¹

In this Court's opinion filed May 2, 2007, the Court accepted the City's appeal for review on due process and damages issues. The Court did not accept the City's appeal challenging the lower courts' ruling applying strict scrutiny and enjoining on equal protection grounds the City's subcontracting outreach requirements. The City filed a petition for writ of certiorari with the United States Supreme Court seeking review of the lower courts' equal protection ruling. The Respondent, Cleveland Construction, Inc., opposed the City's petition for writ of certiorari primarily with the argument that this Court's May 2, 2007, opinion was not a final appealable judgment because the due process and damages issues remain pending before this Court. Cleveland Construction argued, therefore, that the Supreme Court of the United States could not assert jurisdiction over the equal protection issue at this time.

In light of the June 28, 2007, race-based equal protection decision by the United States Supreme Court, and its relevance and materiality to the error of the lower courts' ruling applying strict scrutiny and enjoining the City's subcontracting outreach requirements, the City requests leave to add the following proposition of law: A subcontracting outreach program is not impermissibly race-based or gender-based when

¹ 127 S.Ct. 2738 (June 28, 2007).

all bidders have an equal opportunity to comply with the subcontracting outreach program and the program does not create a preference.²

Parents Involved in Community Schools v. Seattle School District No. 1 held that government racial classifications resulting in *mandatory* government decisions based *solely* on race were subject to strict scrutiny. In that case, students were categorically and oversimplistically classified by race, and school placement decisions were based solely on a student's race. Consequently, the United States Supreme Court applied strict scrutiny to the government program.

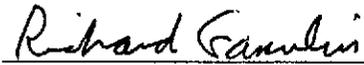
By contrast, the City's subcontracting outreach program is part of a nonexhaustive list of factors subject to discretionary consideration by the City's purchasing agent, and the City's "lowest and best bid" procurement decisions are *permissive* (not mandatory) and are not based *solely* on compliance with the subcontracting outreach program. Under the equal protection rule established by the United States Supreme Court in *Parents Involved in Community Schools v. Seattle School District No. 1*, the lower courts should not have applied strict scrutiny to the City's program.

The case at bar is set for oral argument on January 9, 2008. If the Court grants this motion, the City agrees to file its merit brief supporting this equal protection proposition of law within ten days of the Court's ruling.

² This proposition was originally presented to the Court in the City's memorandum in support of jurisdiction filed January 22, 2007.

Respectfully submitted,

JULIA L. MCNEIL (0043535)
City Solicitor

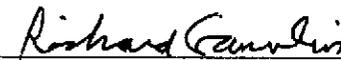


RICHARD GANULIN (0025642C)
MARY FRANCES CLARK (0077497)
Assistant City Solicitors
City of Cincinnati
Room 214, City Hall
801 Plum Street
Cincinnati, OH 45202
Telephone: (513) 352-3329
Facsimile: (513) 352-1515
richard.ganulin@cincinnati-oh.gov
mary.clark@cincinnati-oh.gov

Attorneys for Appellant
City of Cincinnati

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing City of Cincinnati's Motion for Leave to Add Proposition of Law to Pending Appeal and Memorandum in Support has been hand-delivered to W. Kelly Lundrigan, Esq., Manley Burke, 225 West Court Street, Cincinnati, Ohio 45202 this 1st day of November, 2007.



RICHARD GANULIN
Assistant City Solicitor

JLM/RG/MFC/(chs)
(DOTE) Cleveland Constr Leave to Add 1107-RG