

IN THE SUPREME COURT OF OHIO

CLEVELAND CONSTRUCTION, INC., : CASE NO. 2007-0114
 :
 Plaintiff-Appellee, : APPEAL NO. C050749
 : APPEAL NO. C050779
 vs. : APPEAL NO. C050888
 : (Consolidated)
 :
 CITY OF CINCINNATI, : COURT OF APPEALS
 : FIRST APPELLATE DISTRICT
 Defendant-Appellant. : TRIAL COURT NO. A-0402638
 :

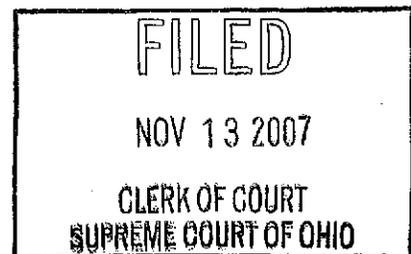
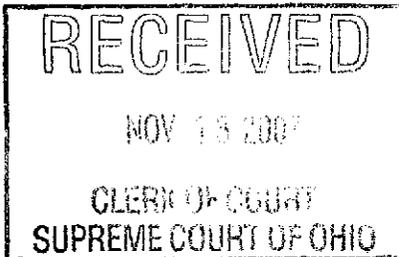
MEMORANDUM OF APPELLEE CLEVELAND CONSTRUCTION, INC., IN
OPPOSITION TO MOTION OF APPELLANT CITY OF CINCINNATI TO ADD
PROPOSITION OF LAW TO PENDING APPEAL

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MEMORANDUM

Appellant City of Cincinnati, (“the City”), without reliance upon any authority in this Court’s Rules of Practice, seeks to change the issues on appeal at this late date by adding a proposition of law relating to the decision of the First District Court of Appeals on Appellee Cleveland Construction, Inc.’s (“Cleveland”) challenge to the City’s SBE Program on equal protection grounds, an issue which this Court has already rejected in ruling on the City’s Motion in Support of Jurisdiction. As a basis for its Motion the City asserts that, first, the decision of the United States Supreme Court in *Parents Involved in Community Schools v. Seattle School District No. 1*¹ somehow creates an unanswered federal constitutional question for this court to address in the context of the facts of this appeal. It does not. Secondly, the City tries to construe the refusal of the United States Supreme Court to review the equal protection issue upon the City’s recent Petition for Certiorari as being only on jurisdictional grounds rather than on the merits. The City mischaracterizes the nature of Cleveland’s Opposition to the City’s Petition for Writ. As shown below, the City’s argument is baseless. Finally, the City still fails to accurately represent existing well established principles of constitutional law governing race-conscious public contracting programs established by the United States Supreme Court, which leave no doubt that the City’s SBE Program was properly subjected to strict scrutiny, and that the race-conscious provisions of the SBE Program were properly struck down by the lower courts. The City’s Motion cites no authority under this Court’s Rules of Practice for such action, is based on inaccurate and unsupportable factual assertions, and is unwarranted on the merits of its legal arguments. The Motion should be denied.

¹ (June 28, 2007), 127 S.Ct. 2738, 168 L.Ed.2d 508.

The law governing race-conscious public contracting programs was firmly established by the United States Supreme Court in *Adarand Constructors v. Peña*² where the court stated “any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.”³ The City’s reliance upon *Parents Involved in Community Schools* is misplaced, and that decision provides no support for the City’s assertion that its blatantly race-based SBE Program, including its SBE Subcontracting Outreach component which is the Program’s implementing mechanism, should somehow not have been subjected to strict scrutiny.

To begin with, the decision in *Parents Involved in Community Schools* bears little, if any, relevance to this appeal since it involved the educational environment for public school children created by the subject school districts’ race-based programs.⁴ This appeal involves the realm of public contracting, not public education, and that distinction makes a great deal of difference. Even were the City’s supposition that its SBE Program does not create a racial preference in city contracting because consideration of race is “permissive” rather than mandatory⁵ factually accurate, (it is not), it would not change the legal requirement that the City’s race-conscious SBE Program be subjected to strict scrutiny. “We have held that all racial classifications imposed by government ‘must be

² (1995), 515 U.S. 200, 115 S.Ct. 2097, 132 L.Ed.2d 158.

³ *Adarand Constructors*, (1995), 515 U.S. at 223, 115 S.Ct. 2097, 132 L.Ed.2d. 158.

⁴ (June 28, 2007), 127 S.Ct. 2738, 2746, 168 L.Ed.2d 508.

⁵ City’s Memorandum, p. 3.

analyzed by a reviewing court under strict scrutiny.”⁶ In *Grutter v. Bollinger*, the Court held that the goal of achieving student body diversity by consideration of numerous factors of which race and ethnicity were only part, was a compelling governmental interest which fulfilled strict scrutiny analysis.⁷ But the program was still subject to strict scrutiny because it was race-conscious. The school districts’ programs in *Parents Involved in Community Schools*, again subject to strict scrutiny because they were race conscious, were found by the Court to not have that same compelling governmental interest in educational diversity because race alone, rather than a wider range of considerations of diversity, was the final determining factor in the decision making process of those programs.⁸ But, in any event, the United States Supreme Court has *never* held that the goal of “diversity” is a compelling governmental interest in the realm of public contracting. And as for any compelling interest in remedying intentional racial discrimination in the contracting market in which the City has been a participant, the City admitted below that it had insufficient evidence as a result of its “Disparity Study” to establish the compelling governmental interest of employing race as a remedial device for past intentional discrimination.⁹ The City’s arguments continue to simply miss the point and obfuscate the law: it admittedly lacks any factual or evidentiary foundation to provide the compelling interest which would allow it to utilize race in the first place,

⁶ *Grutter v. Bollinger* (2003), 539 U.S. 306, 123 S.Ct. 2325, 156 L.Ed.2d 304, quoting *Adarand Constructors, Inc. v. Peña*, (1995), 515 U.S. at 227, 115 S.Ct. 2097, 132 L.Ed.2d. 158.

⁷ *Grutter v. Bollinger* (2003), 539 U.S. 306, 325, 123 S.Ct. 2325, 156 L.Ed.2d 304.

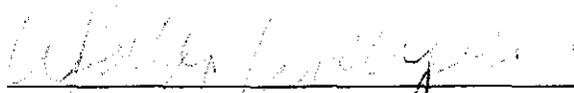
⁸ (June 28, 2007), 127 S.Ct. 2738, 2753-2754, 168 L.Ed.2d 508.

⁹ *See supra*, *Parents Involved in Community Schools* (June 28, 2007), 127 S.Ct. 2738, 2752, 168 L.Ed.2d 508.

yet it created blatant racial preferences in its SBE Program anyway. Its facially race conscious SBE Program, with its SBE Subcontracting Outreach Program as its implementing mechanism, must be subjected to strict scrutiny under long-standing constitutional principles established by the United States Supreme Court. Since the City admittedly has no factual justification to provide it with a compelling governmental interest to utilize racial classifications and preferences, the SBE Program automatically fails such scrutiny at the outset of the inquiry. The race conscious provisions of the City's SBE Program were correctly found to violate the equal protection clause. There is simply nothing for this Court to review on the equal protection issues decided below.

The City's assertion that Cleveland's Opposition to the City's Petition for Certiorari was based "primarily" upon jurisdictional grounds is a mischaracterization. Of the argument section in Cleveland's Opposition, 6 pages dealt with the argument on jurisdictional grounds, and 8 pages addressed the lack of merit of the substance of the appeal. There were then forty-four pages from the SBE Program's Rules and Guidelines, the bid forms and other SBE Program documents attached in Cleveland's Appendix for the Court to consider on the merits. And there is nothing in the language of the denial of the City's Petition for Writ of Certiorari that indicates that the denial of review was based upon jurisdictional grounds alone. The City simply offers no justification for its backwards supposition that this Court should review a constitutional issue which has been presented to the United States Supreme Court, the judicial body having final authority for review of federal constitutional questions, and denied. The City's Motion is without merit and should be denied.

Respectfully submitted,

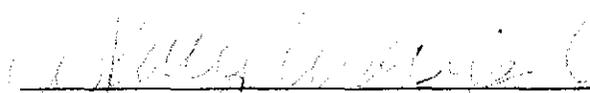

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Appellee is being mailed to all parties entitled to service under XIV of the Ohio Supreme Court Rules of Practice on the 13th day of November, 2007.


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