MEMO

To: Legal Team
From: Grace Suarez & Bernie Zimmerman
Subject: Restriction on Use of Public Land Trust Funds
Date: July 13, 1995

Issue: May article XI be modified to restrict the use of Marianas Public Land Trust funds for the exclusive benefit of persons of Northern Marianas descent?

Opinion: Such an amendment to article XI will probably run afoul of the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution because it seems unlikely that it would withstand strict scrutiny.

Discussion: The provisions of the Fourteenth Amendment to the United States Constitution requiring equal protection and due process of laws extend to the CNMI except in the area of the acquisition of land by persons not of Northern Mariana Islands descent. (Covenant, sec. 501(a).)

Racially based preferences are prohibited unless they withstand strict scrutiny by *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), recently affirmed and extended in *Adarand Constructors, Inc. v. Peña*, 63 USLW 4523 (1995), 95 CDOS 4381.[1] This test requires that the governmental interest underlying the preference must be "compelling" and that the measure must be "narrowly tailored" to serve that interest.

The *Croson* court explained the reasons behind the test:

> The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws."As this Court has noted in the past, the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights." *Shelley v Kraemer*, 334 US 1, 22, 92 L Ed 1161, 68 S Ct 836, 3 ALR2d 441 (1948). The Richmond Plan denies certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race. To whatever racial group these citizens belong, their "personal rights" to be treated with equal dignity and respect are implicated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking.
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> Absent searching judicial inquiry into the justification for such race-based

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[1]For purposes of this analysis, *Croson*, which dealt with state and local affirmative action programs, is the controlling authority. *Adarand* simply extends *Croson* to federal programs.

> measures, there is simply no way of determining what classifications are "benign" or "remedial" and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures 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.
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> Classifications based on race carry a danger of stigmatic harm. Unless they are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility. See *University of California Regents v Bakke*, 438 US, at 298, 57 L Ed 2d 750, 98 S Ct 2733 (opinion of Powell, J.) ("[P]referential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relation to individual worth"). We thus reaffirm the view expressed by the plurality in *Wygant* that the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification. *Wygant*, 476 US, at 279-280, 90 L Ed 2d 260, 106 S Ct 1842; id., at 285-286, 90 L Ed 2d 260, 106 S Ct 1842 (O'Connor, J., concurring in part and concurring in judgment). See also *San Antonio Independent School Dist. v Rodriguez*, 411 US 1, 105, 36 L Ed 2d 16, 93 S Ct 1278 (1973) (Marshall, J., dissenting) ("The highly suspect nature of classifications based on race, nationality, or alienage is well established")

And in *Adarand*, the high court reiterated its prior pronouncements that "'distinctions between citizens solely because of their ancestry are by their very nature odious,'" quoting *Hirobayashi v. United States*, 320 U.S. 31 at 100 (1943). (*Adarand, supra*, 95 C.D.O.S. at 4383.)

The fact that the proponents identify a "benign" purpose makes little difference to the analysis. The test used is still "strict scrutiny." As Justice O'Connor states in *Adarand*: "any person, of whatever race, has the 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." (At 95 C.D.O.S. 4385.)

Croson and *Adarand* both suggest that the only governmental interest sufficiently compelling to justify a racial preference is remedying past discrimination directly related to the preference. In order to support the use of a racial classification, the government must identify precisely the discrimination to be remedied. General and historical past discrimination

("societal" and "amorphous") is not enough.[2] While gross statistical disparities may constitute prima facie evidence of a pattern of discrimination, mere underrepresentation when compared to the minority's presence in the general community is not enough where special qualifications are required for the particular job.

Only if the Convention could make the required findings of past discrimination required by *Croson*, or if the preference could be drafted so as to be race-neutral,[3] would the amendment to article XI pass federal constitutional muster.

It will not be easy to make such findings, since we are not aware of any past discrimination against persons of Northern Mariana Islands descent, and certainly none by the Northern Mariana Islands government. While it might be possible to enact the particular program with only partial evidence of discrimination, without having to gather all the evidence beforehand, nevertheless some hard evidence must be gathered and presented before the provision is enacted.

Even if a pattern of past discrimination against persons of Northern Mariana Islands descent is identified and proved, thus passing the "compelling interest" test, the proponents must still show that the proposal is "narrowly tailored" to achieve the remedial objective. This second requirement contains several factors relevant here: 1) whether the government considered race-neutral alternatives; 2) the scope of the program, and whether there exists a waiver mechanism to narrow the program's scope; and 3) whether race is the factor in

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[2]"In *Wygant*, 476 US 267, 90 L Ed 2d 260, 106 S Ct 1842 (1986), four Members of the Court applied heightened scrutiny to a race-based system of employee layoffs. Justice Powell, writing for the plurality, again drew the distinction between "societal discrimination" which is an inadequate basis for race-conscious classifications, and the type of identified discrimination that can support and define the scope of race-based relief. The challenged classification in that case tied the layoff of minority teachers to the percentage of minority students enrolled in the school district. The lower courts had upheld the scheme, based on the theory that minority students were in need of "role models" to alleviate the effects of prior discrimination in society. This Court reversed, with a plurality of four Justices reiterating the view expressed by Justice Powell in Bakke that '[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy.'" *Wygant, supra*, at 276, 90 L Ed 2d 260, 106 S Ct 1842 (plurality opinion). *Crowson, supra*, 488 US 469, pp. 497 - 498.

[3]For example, if a scholarship program were based on length of residence, or willingness to pursue Chamorro or Carolinian language studies, it might be upheld, even if persons of Northern Mariana Islands descent would in fact be the primary beneficiaries. Similarly, trust funds could probably be used to fund or support local educational institutions that are traditionally but not exclusively attended by Northern Mariana Islands descendants.

determining eligibility, or whether it is just one of the considerations; 4) the duration of the program and whether it is subject to periodic review; and 5) the degree and type of burden caused by the program.

This second requirement might present serious problems here. We are not aware whether the proponents have considered race-neutral alternatives. The scope of the program seems extremely broad. Race (or descent that may be construed to amount to race), is the determining factor for eligibility. The program lasts as long as the constitutional provision is on the books. And finally, the burden might be considerable, if persons not of Northern Mariana Islands descent are excluded from many governmental programs.

An additional problem is presented in the CNMI because the preferential treatment is being accorded by a majority to itself. This question was discussed in *Croson*:

> Even were we to accept a reading of the guarantee of equal protection under which the level of scrutiny varies 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. One of the central arguments for applying a less exacting standard to "benign" racial classifications is that such measures essentially involve a choice made by dominant racial groups to disadvantage themselves. If one aspect of the judiciary's role under the Equal Protection Clause is to protect "discrete and insular minorities" from majoritarian prejudice or indifference, see *United States v Carolene Products Co.*, 304 US 144, 153, n 4, 82 L Ed 1234, 58 S Ct 778 (1938), some maintain that these concerns are not implicated when the "white majority" places burdens upon itself. See J. Ely, Democracy and Distrust 170 (1980).
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> In this case, blacks constitute approximately 50% of the population of the city of Richmond. Five of the nine seats on the city council are held by blacks. The concern that a political majority will more easily act to the disadvantage of a minority based on unwarranted assumptions or incomplete facts would seem to militate for, not against, the application of heightened judicial scrutiny in this case. See Ely, The Constitutionality of Reverse Racial Discrimination, 41 U Chi L Rev 723, 739, n 58 (1974) ("Of course it works both ways: a law that favors Blacks over Whites would be suspect if it were enacted by a predominantly Black legislature").

Even though both *Croson* and *Adarand* involve government contracting, it seems clear that the strict scrutiny standard will apply whenever a racial or ethnic classification is used to establish any preference.

It should be noted that neither *Croson* nor *Adarand* dealt with programs that did not purport to remedy past discrimination, but simply promoted racial diversity and inclusion. The question remains unsettled whether programs that promote diversity might meet the compelling interest test. In *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), Justice Powell, in the controlling opinion, held that increasing racial and ethnic diversity of a university student body constituted a compelling interest because it enriched the academic experience. Diversity, however, may not be enough outside of the academic setting. (See *Bakke, supra; Metro Broadcasting Inc. v. FCC*, 497 U.S. 547 (1990) (overruled in part by *Adarand*).) I suppose one route article XI could take is simply to announce that the program promotes diversity and inclusion, and be prepared to litigate.[4]

Diversity itself, however, is not a goal. Some other objective must be identified. In *Bakke* it was an enriched academic experience. In *Metro Broadcasting* it was the more varied perspective provided by radio programs produced by minorities. In the present situation, the proponents of the amendment would have to identify a goal for the program other than diversity itself.

The argument may be made that the definition of persons of Northern Mariana Islands descent is not in fact a racial or ethnic classification, because the law defines such persons as Trust Territory citizens who were in the Northern Mariana Islands as of 1950 or their descendants, without reference to race or ethnicity.

There are two problems with this approach. The first is that the program may then be considered arbitrary and capricious, little different from simply saying that every third person should be a beneficiary of the program.

The second problem is that the definition may be found to be, in effect, a sham. In other words, that even though the language of the law appears to be race-neutral, in effect it defines a race or ethnic group. In *Yick Wo v. Hopkins*, 118 US 356, 373-374, 30 L Ed 220, 6 S Ct 1064 (1886), for instance, the high court struck down a San Francisco ordinance prohibiting the existence of wooden laundries because in fact the law was designed to bar Chinese laundries, since they were the only ones in San Francisco that were made of wood.[5] (See also *Adarand,*

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[4]For a more extended discussion of the nonremedial objective, see pages 14-19 of the Justice Department memo of June 28, 1995.

[5]A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification. *Brown v Board of Education*, 347 US 483 [98 L Ed 873, 74 S Ct 686, 38 ALR2d 1180]; *McLaughlin v Florida*, 379 US 184 [13 L Ed 2d 222, 85 S Ct 283]. This rule applies as well to a classification that is ostensibly neutral but is an obvious pretext for racial discrimination. *Yick Wo v Hopkins*, 118 US 356 [30 L Ed 220, 6 S

supra, at 95 C.D.O.S. 4383.)

Ct 1064].