IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S152934

CORAL CONSTRUCTION, INC., and
SCHRAM CONSTRUCTION, INC.,
Plaintiffs and Respondents,

v.

CITY & COUNTY OF SAN FRANCISCO
and JOHN L. MARTIN,
Defendants and Appellants.

After an Opinion by the Court of Appeal,
First Appellate District, Division Four
(Case No. A107803)

On Appeal from the Superior Court of San Francisco County
(Case No. 319549, Honorable James L. Warren, Judge)

PLAINTIFFS AND RESPONDENTS' REPLY TO DEFENDANTS AND APPELLANTS' CITY AND COUNTY OF SAN FRANCISCO ANSWER BRIEF

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Plaintiffs and Respondents Coral Construction, Inc., and Schram Construction Inc. (Contractors), reply to the Answer Brief of Defendants and Appellants City and County of San Francisco (San Francisco or City).

INTRODUCTION

San Francisco asks this Court to carve out a judicial exception to Article 1, section 31, of the California Constitution (Section 31 or Proposition 209). The language of Section 31 is clear and unambiguous. It prohibits the state and its political subdivisions, including San Francisco, from "discriminat[ing] against or grant[ing] preferential treatment to individuals or groups on the basis of race, sex, color, ethnicity, or national origin in the operation of . . . public contracting." Cal. Const. art. I, § 31.

According to City, when a political subdivision of the state self-proclaims that (1) since 1984 it has intentionally discriminated against minority and women contractors, (2) that it has taken no steps to punish the wrongdoers, and (3) it has not attempted to redress its practices through race-neutral means, it must be allowed to continue with a discriminatory preference program that it has had in place for decades. The City argues that it must take this type of "corrective" action under the Federal Equal Protection Clause regardless of Section 31's prohibition against race- and sex-preferences. The City is wrong.

The ultimate goal of the Equal Protection Clause, like Section 31, is "to do away with all governmentally imposed discrimination based on race." *Coalition for Economic Equity v. Wilson*, 122 F.3d 692, 701 (9th Cir. 1997) (quoting *Palmore v. Sidoti,* 466 U.S. 429, 432 (1984)). The Fourteenth Amendment creates rights "guaranteed to the individual. The rights established are personal rights." *Regents of the University of California v. Bakke*, 438 U.S. 265, 289 (1978) (opinion of Powell, J.). As this Court has noted, the Equal Protection Clause recognizes that "[l]aws that divide and index people to measure their civil rights by race are unconstitutional. Laws that encourage others to do so are similarly invalid. And laws attempting to advance either policy even in disguise will likewise be struck down whenever it is within the capacity of conscientious courts to see beneath their cellophane wrappers." *Hi-Voltage Wire Works, Inc. v. City of San Jose,* 24 Cal. 4th 537, 548 (2000) (citation omitted).

Section 31 "commands governmental actors to treat all individuals and groups equally in the operation of public . . . contracting." *Id.* at 571, (Mosk, J. concurring). Section 31(g) provides for individual remedies for intentional discrimination by a political subdivision. Both the Federal Equal Protection Clause and section 31 impose a mandatory duty on political subdivisions to eliminate race- and sex-based discrimination in the operation of public contracting.

Since 1984, City has had a discriminatory preference program in awarding public contracts. The 2003 Ordinance is its fifth version set to expire on July 1, 2008. It relies on a flawed disparity study and anecdotal evidence identifying a few isolated acts by City employees and private contractors. City claims that it is required to continue a race-conscious discriminatory preference program, which will apply to virtually all City contracts, or violate the Federal Equal Protection Clause.

Moreover, City's flawed disparity study cannot be stretched to support City's argument that it shows intentional discrimination or narrow tailoring—at most it shows an attempt by City to adopt a voluntary race-conscious remedial plan to assist preferred minorities and women. The trial court rejected City's argument that "Proposition 209 cannot be constitutionally applied to the City to prevent it from enacting remedial legislation to assist minorities and women." Joint Appendix (JA) XIII: 3481. In considering the disparity study, the trial court found that although it

> does not dispute the accuracy of the City's study, it does not appear relevant in the context of this proceeding. The intent of the voters in adopting Proposition 209 was to outlaw race- and sex-based programs irrespective of the good will and moral position behind any particular program. The Ballot Pamphlet for Proposition 209 provides ample evidence that the voters acted with the intention to abolish any type of race- and sex-conscious program adopted by the City, regardless of its genesis. And nobody argues that Proposition 209 carved out an exception

based on the concededly good intentions of the City when it created this remedial program.

JA XIII: 3480.

The evidence in the record discloses that the statistical studies are flawed and fail to show intentional discrimination or that the discriminatory preference program is narrowly tailored. First, it shows no policy, pattern, or practice of intentional discrimination by City. The anecdotal evidence alleges a few isolated incidents of discrimination by City employees, which City never examined for accuracy of the allegations being made nor did City punish any wrongdoers. Moreover, there is no evidence that any responsible low bid by a minority or a woman prime contractor or subcontractor has ever been rejected in favor of a white male contractor's higher bid after 1996. Similarly, the disparity ratios fail to show differential treatment on the basis of race and sex when properly compared to other similar groups as pointed out in the Declaration of George LaNoue. In short, the Disparity Study is simply result driven. Respondents' Supplemental Appendix (RSA), Exhibit 2 at 24-58.

Further, City has not shown that it has exhausted race-neutral mechanisms for remedying any past discrimination. As Professor LaNoue explained, race-neutral mechanisms should include both "enforcement and enhancement. "Enforcement policies carefully define the discriminatory behaviors the jurisdiction seeks to prohibit and commit appropriate resources to punishing those prohibited behaviors. Enhancement policies seek to remove

barriers to participating in public contractors for all small and/or new firms or create attractive opportunities for those firms by targeting contracts for them." *Id.* at 53.

City has not taken any steps to identify and punish any City employees who may have discriminated against minority and women contractors in the past. Further, the barriers to minority and women contractors identified in the Disparity Study appear to be race-neutral including lack of capital, inability to meet boding requirements, or financing problems. Clearly, City has at its disposal a whole array of race-neutral mechanisms to increase the accessibility of public contracting to small businesses of all races. As mentioned by Justice O'Connor, the types of race-neutral tools include:

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

City of Richmond v. J.A.Croson Co., 488 U.S. 469, 509-10 (1989) (plurality).

City is using a discriminatory preference program *not* to remedy intentional discrimination but to increase the accessibility of public contracting to minority and women contractors as an end in itself. There is no reason to believe that the City cannot meet the prohibitions of both the Equal Protection Clause and Section 31 by removing the race line and doing away with all governmentally imposed discrimination based on race through race-neutral means to increase the participation of all small businesses without regard to race and sex. City's attempt to carve out a judicial exception to Section 31 fails and there is no justification for remanding this case for further proceedings.

ARGUMENT

I

CITY HAS FAILED TO CARRY ITS BURDEN OF PROVING THE FACTUAL PREDICATE FOR ITS RACE AND SEX PREFERENCES

A. City Has Failed to Rebut the Lack of Disparity Stated in Its Ordinance

City argues that "the Court must accept the legislative record as true on its face and consider only its legal sufficiency, 'liberally construe[ing] the evidence in support of the party opposing summary judgment and resolv[ing] doubts concerning the evidence in favor of that party.'" City Answer Brief (AB) at 31 (citing *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal. 4th 1028, 1037 (2005)). While legislative acts are in most cases presumed to be constitutional

and entitled to deference, this standard has no application in cases of race and sex classifications such as those at issue here. *See*, *Connerly v. State Personnel Board*, 92 Cal. App. 4th 16, 33 (2001), holding that judicial deference does not extend to laws that employ suspect classifications, such as race. As explained below, City's legislative record is grossly insufficient to overcome the presumption of unconstitutionality of its race and sex classifications and preferences.

City relies on three statistical studies purporting to show a disparity in the utilization of minority business enterprises (MBE) and women business enterprises (WBE) as a proof of discrimination by City in public contracting. City AB at 3-9. City then presses on this Court the City's finding that: "'[T]he disproportionately small share of City contracting and subcontracting that goes to women-and-minority-owned businesses in certain industries is due to discrimination by the City and discrimination in the private market. (JA) (Joint Appendix) III: 694.' " City AB at 15. As the authorities set forth in Contractors' Answer Brief at 24-28 declare, such disparity studies are notoriously unreliable.

But what is astounding is that City nowhere answers Contractors' presentation of the facts showing that these disparity studies and City's finding of discrimination based on them are a sham. Contractors pointed out in their Opening Brief, (Contractors' OB) at 22-23, that City's generalized finding of

discrimination was contradicted by the statistical facts set forth in City's Ordinance. Those statistics demonstrate that any disparity in MBE/WBE contracting is either nonexistent or insignificant.

As held in *City of Richmond v. J.A. Croson Co.*, 488 U.S. at 509, to the extent they exist, any statistical disparities must be "significant" in order to indicate discrimination. These minimal disparities do not meet the *Croson* tests. City's failure to answer these facts set forth in its own Ordinance concedes that its claim of discrimination against MBE/WBEs is utterly false.

B. City's Anecdotal Claims of Discrimination Are Unreliable

City purports to rely on testimonial and anecdotal evidence of discrimination against MBE/WBEs. City AB at 10-13. But as set forth in Contractors' AB at 34-35, such evidence is unreliable. *Croson* criticized the City of Richmond's reliance "on the highly conclusionary statement of a proponent of [its race preference] plan that there was racial discrimination in the construction industry in this area." 488 U.S. at 500. City's reliance on such conclusionary anecdotal evidence to justify its race and sex preferences is therefore improper.

The City's Executive Director of the San Francisco Human Rights Commission stated the City "has awarded an average of 41,065 contracts each year, worth approximately $568,859,634. More than 70 contract departments and agencies have awarded contracts during this period." JA XIV: 3563

(Declaration of Virginia Harmon). Given the magnitude of city contracting the few anecdotal allegations of discrimination are miminal.

C. City Admits It Has No Specific Proof of Discrimination Against MBEs/WBEs

City argues that if its Board of Supervisors "knew of race and sex discrimination among the contractors it hired and financed, the Board had an affirmative duty to halt the discrimination. If it failed to act, despite the known risk of constitutional injury to its citizens, the Board's deliberate indifference would constitute intentional discrimination in violation of the federal equal protection clause." City AB at 27. The problem with this argument is that City had no knowledge of discrimination against MBE/WBEs.

When put to the test of discovery City's claims of discrimination were shown to be a sham. Thus, in response to Coral's Request for Admission No. 18, City admits that at least since April 2, 1984, it has not been a policy of City to discriminate against MBEs or WBEs. RSA Exhibit 1 at 6. In response to Request for Admission No. 23, City admits that it has not identified any specific instance of discrimination which occurred after November 5, 1996, against a MBE or WBE subcontractor where the MBE or WBE subcontractor was the lowest responsive bidder. *Id.* at 8. In response to Request for Admission No. 24 and Answer to Interrogatory No. 31, City admits that it has not identified any specific San Francisco Contract Awarding Authority which

discriminated against a MBE or WBE in the awarding of one of City's contracts after November 5, 1996.[1] *Id.* at 8-10 and 16.

San Francisco argues that these admissions of City are not part of the record in this case because they were filed in the *Coral* case. City AB at 40-41, n.7. However, upon consolidation of the two cases, counsel for all parties, including San Francisco, stipulated that the pleadings in *Coral* would automatically come into possession of the trial court upon consolidation of *Coral* with the *Schram* case. JA XIII: 3394. In any event, even without such a stipulation the *Coral* pleadings were before the trial court, the court of appeal and now this Court. *See, Kropp v. Sterling Sav. & Loan Assn.*, 9 Cal. App. 3d 1033, 1046 (1970), holding that upon consolidation the separate pleadings are treated as one set; *Didier v. American Casualty Co.*, 261 Cal. App. 2d 742, 752 (1968), holding that for purposes of further proceedings consolidated cases are to be treated as if the cases had been united originally. Although these admissions by City referred to the 1998 Ordinance, as the court below found, the City reenacted the Ordinance in 2003 without substantial change. Petition for Review, Exhibit (Pet. Exh.) 1 at 8, n.4. It should also be noted that San Francisco made these admissions on July 2, 2002, RSA at 11, 12, and 17, during the 2002-2003 period in which the hearings for the 2003 Ordinance were being held. Pet. Exh.1 at 7. Since this is a de novo review, the appellate

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[1] Proposition 209 was enacted November 6, 1996.

courts may affirm the summary judgment on any correct legal theory as long as the parties had an opportunity to address the theory in the trial court. *Calif. School of Culinary Arts v. Lujan*, 112 Cal. App. 4th 16, 22 (2003). San Francisco had the opportunity to address the admitted lack of discrimination by either itself or prime contractors against MBEs and WBEs in the *Coral* summary judgment proceedings in which those admissions were filed.

D. City Has Failed to Carry Its Burden to Prove Intentional Discrimination

Contractors noted that none of the affirmative defenses raised by City in the trial court made the claim of intentional discrimination by City. Contractors' OB at 16. City responds that in answering Contractors' complaints it included boiler plate affirmative defenses stating that the Federal Constitution preempts the application of Proposition 209 to invalidate the Ordinance. (JA I:151; JA I:66.) City AB at 28-29. But these generalized statements fail to raise the critical point of the lack of an affirmative defense pleading intentional discrimination by City.

City further argues, City AB at 29, that Contractors cannot raise this argument in this Court because they did not make it below (citing *Marshall v. Bankers Life & Casualty Co.*, 2 Cal. 4th 1045, 1058 (1992)). In that case the plaintiffs asserted for the first time on appeal that defendants were equitably estopped to raise as a defense the issue of Federal Employee Retirement

Income Security Act (ERISA) preemption for the first time on appeal. The court "decline[d] to address the issue in the absence of a fully developed record." *Id.* Here, the record is fully developed, witness the 14 volumes of the Joint Appendix plus Respondents' Supplemental Appendix. This Court is thus fully able to address the issue.

E. *Hi-Voltage* Rejected City's Constitutional Duty Defense

City claims that in cases such as *Hi-Voltage*, the defendants did not "claim, as the City does here, that it was compelled to take remedial measures under the equal protection clause because of evidence of intentional discrimination." City AB at 30. This is incorrect. In *Hi-Voltage*, "the City . . . contended[ed] the [race and sex preference] Program is necessary to discharge the City's duty under federal law to eradicate the discrimination against subcontractors documented by its disparity study." 24 Cal. 4th at 568. It was not until oral argument before this Court that counsel changed course 180 degrees and conceded that the race- and sex-based program was not constitutionally required. *Id.*

City's claim that it is compelled by the Federal Equal Protection Clause to enact race and sex classifications and preferences has therefore been tried and found wanting, particularly when City has failed to carry its burden of proving intentional discrimination. Indeed, City's Ordinance specifically admits that it goes beyond the requirements of federal law by stating: "The

requirements of this ordinance are in addition to those imposed by the United States or the State of California as a condition of financial assistance or otherwise." Ordinance 12.D.A.6(C), JA III: 736:13-14. Since the Ordinance's race and sex preferences are "in addition to" federal requirements, not only for federal financial assistance but "or otherwise," City concedes that these preferences are not federally required.

II

CITY HAS FAILED TO CARRY ITS BURDEN OF PROVING ITS RACE AND SEX PREFERENCES ARE NARROWLY TAILORED

City claims it has a mandatory federal constitutional duty to eliminate intentional race and sex discrimination in its public contracting, "even if it must take race-and-sex conscious corrective measures to do so." City AB at 19. But as set forth above, and in Contractors' Opening Brief and Answer Brief, City has failed to show intentional discrimination against MBE/WBEs. Further, any "race-and-sex conscious corrective measures" must actually be corrective. As set forth in Contractors' OB at 32-39, City's race and sex preferences have no relation whatever to acts of claimed discrimination against MBE/WBEs and would do nothing to correct those acts. Nowhere does City answer how its preferences relate to, and would correct, the alleged acts of discrimination.

City attempts to evade this inconvenient fact by presenting a list of rationalizations. "First, the legislative record shows that the Board has considered, enacted and reenacted a series of race-and sex-neutral measures, but these measures have not been adequate on their own (or to date even in combination with race-and sex-conscious measures) to remedy the ongoing discrimination." City AB at 42. Yet, notwithstanding the admitted failure of those measures, City reenacted them without substantial change. Pet. Exh.1 at 6.

Next, City claims: "Second, the Ordinance is limited both in scope and duration . . . and sunsets five years after enactment." City AB at 42. However, City ensures that its race and sex preferences will continue in perpetuity, based on the stated City policy that if it abandoned its race and sex preference program, "African Americans, Latino Americans and women would receive well below the level of City construction subcontracts that one would expect based on their availability." JA III:701:13-15.

City then claims: "Third, it includes only those minority groups and women for which it has evidence of discrimination, and no others." City AB at 42. However, the Ordinance defines "minority" to mean members of the following ethnic groups: African Americans, Arab Americans, Asian Americans, Iranian Americans, Latino Americans, and Native Americans. JA III: 728:1-21. This list appears to include every ethnic group other than

Caucasians, suggesting either that City believes that Caucasians are the only group never to have suffered discrimination or that its preferences are, in *Croson's* words, "simple racial politics." *Croson*, 488 U.S. at 493.

City concludes by arguing: "Finally, it seeks to counterbalance the systemic discriminatory conduct evidenced in the legislative record with a calibrated compensatory advantage neither larger nor smaller than necessary to achieve a level playing field for all contractors seeking to participate in City contracting." City AB at 42. City couples this with its earlier statement that its preferences "do not give MBEs and WBEs a competitive advantage over non-minority, male contractors." City AB at 2. City does not explain how a 10% bid preference for MBE/WBEs, JA III: 740, is not a competitive advantage over non-MBE/WBEs. Further, City conflates "a level playing field" for MBE/WBEs with "parity with their availability." City AB at 3. This is the essence of race and sex balancing prohibited by both the State and Federal Constitutions. *Hi-Voltage*, 24 Cal. 4th at 558, *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

City argues that "in petitioners' view the *only* permissible, narrowly tailored remedy is individual enforcement actions against offending employees and contractors." City AB at 42. Contractors' view is that where the only acts of discrimination complained of are offenses by individual City employees and contractors, the narrowly tailored remedy is enforcement actions against those

offenders through the remedies available under Section 31(g). Contractors' OB at 36-38, 40-41. City may also adopt race-neutral mechanisms to increase public contracting accessibility to small businesses of all races. *See*, *Croson*, 488 U.S. at 509-10 for examples of race-neutral mechanisms.

The point of City's cite to Justice O'Connor's concurrence in *Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 287 (1986), opining that a race-conscious remedial plan "need not be limited to the remedying of specific instances of identified discrimination for it to be deemed sufficiently 'narrowly tailored.'" City AB at 43, has been superseded by the more recent holding in *Croson*, finding that the City of Richmond's race preference program failed the narrow tailoring requirement because "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." 488 U.S. at 508. Moreover, this Court held in *Hi-Voltage* that the Federal Equal Protection Clause "does not, however, preclude a state from providing its citizens greater protection" from discrimination that may be allowed under federal law. 24 Cal. 4th at 567.

Connerly held, "[o]nly the most exact connection between justification and classification will suffice. The classification must appear necessary rather than convenient, and the availability of nonracial alternatives—or the failure of the legislative body to consider such alternatives—will be fatal to the

classification." 92 Cal. App.4th at 37. *Connerly* struck down state laws providing race and sex preferences as violating Section 31. That court found those preferences were not narrowly tailored: "There was no effort to limit recovery to those who actually suffered from prior discrimination." *Id.* at 53. Here, San Francisco grants its race and sex preferences to all members of the favored groups without regard to whether they have actually suffered discrimination. City's policy of race and sex classifications and preferences therefore fail the constitutional command of narrow tailoring.

CONCLUSION

San Francisco has failed to carry its burden of proving that its race and sex classifications and preferences in public contracting are permitted by Section 31 or mandated by the Federal Constitution, laws, and regulations. Specifically, City has failed to show it has discriminated against its favored classes of minorities and women, either directly or indirectly, and has further failed to show that its race and sex classifications and preferences are narrowly

tailored to remedy any form of identified discrimination. The judgment of the trial court should therefore be affirmed in its entirety and without remand.

DATED: January 7, 2008.

Respectfully submitted,

JOHN H. FINDLEY
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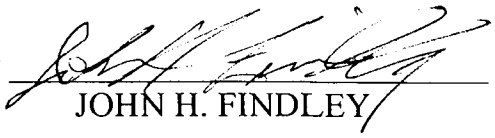
By 
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CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing PLAINTIFFS AND RESPONDENTS' REPLY TO DEFENDANTS AND APPELLANTS' CITY AND COUNTY OF SAN FRANCISCO ANSWER BRIEF is proportionately spaced, has a typeface of 13 points or more, and contains 3,895 words.

DATED: January 7, 2008.

JOHN H. FINDLEY

DECLARATION OF SERVICE BY MAIL

I, JANICE DANIELS, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California.

I am over the age of 18 years and am not a party to the above-entitled action.

My business address is 3900 Lennane Drive, Suite 200, Sacramento, California 95834.

On January 7, 2008, true copies of PLAINTIFFS AND RESPONDENTS' REPLY TO DEFENDANTS AND APPELLANTS' CITY AND COUNTY OF SAN FRANCISCO ANSWER BRIEF were placed in envelopes addressed to:

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which envelopes, with postage thereon fully prepaid, were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 7th day of January, 2008, at Sacramento, California.

Janice Daniels

JANICE DANIELS