PACIFIC LEGAL FOUNDATION

May 6, 2009

The Honorable Chief Justice Ronald M. George
and Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: *Coral Constr., Inc. & Schram Constr., Inc. v. City & County of San Francisco*, No. S152934

Dear Chief Justice George and Associate Justices:

Plaintiffs and Respondents Coral Construction, Inc., and Schram Construction, Inc., respond to the Attorney General's letter brief dated April 22, 2009 (Ltr Brf) filed in this case, pursuant to this Court's Order dated March 18, 2009.

INTRODUCTION

This is not the first time that California's Attorney General has addressed the constitutionality of Article I, section 31, of the California Constitution (Section 31 or Proposition 209) under the Equal Protection Clause of the Fourteenth Amendment. Thirteen years ago, when the legality of Section 31 was a question of first impression, Attorney General Lungren forcefully rejected the argument that the measure violates the Supreme Court's *Hunter/Seattle* doctrine. In briefing before the Federal District Court in *Coal. for Econ. Equity v. Wilson*, the former Attorney General noted correctly that:

> Article I, section 31 is not "effectively drawn for racial purposes" and does not have a "racial nature" or a "racial focus," as those terms are used in *Seattle*. It does not single out racially conscious legislation for particular, disadvantageous treatment, as did the measures invalidated in *Seattle* and *Hunter*. Article I, section 31 *explicitly* deals with race, but does not single out a racial minority for disadvantageous treatment. *Rather, it prohibits racial classifications across the board.* Neither *Seattle* nor *Hunter* involved a measure that expressly prohibited classifications on the basis of race and gender. The Court in *Seattle*, obviously did not intend to include laws that banned discrimination.

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Defendant Wilson, et al.'s Memorandum of Points and Authorities in Opposition to Motion for Preliminary Injunction, *Coal. for Econ. Equity v. Wilson*, No. C-96-4024 TEH, Exhibit A to Plaintiffs' and Respondents' Request for Judicial Notice accompanying this letter brief (Wilson Brf), at 9. The Attorney General went on to note that Section 31 does not entail a restructuring of the political process to the disadvantage of minorities, but instead falls squarely within the State of California's rightful authority to ban all forms of racial and sexual discrimination through the normal operation of the legislative process. *Id.* at 13-14. Consequently, "Article I, section 31 does not fall within either prong of the rule of *Seattle*, and therefore it is not subject to a strict scrutiny standard." *Id.* at 15.

Yet oddly, twelve years after the constitutionality of Section 31 under the *Hunter/Seattle* analysis was resoundingly affirmed by the Ninth Circuit Court of Appeals in *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692 (9th Cir.), *cert. denied*, 522 U.S. 963 (1997) (*Coalition II*), the Attorney General now presents this Court with precisely the opposite argument. Whatever political expediency might account for this belated about-face, Plaintiffs and Respondents submit that the former Attorney General's position on the constitutionality of Section 31 in 1996 rests on far stronger analysis, and more compelling authority, than the Attorney General's position on the same question in 2009.

It is evident on the face of Section 31 that the measure does not create a racial classification, and does not restructure the political process to burden or benefit any race or gender relative to any other. Rather, the measure expressly advances the compelling state interest of guaranteeing equality before the law, by imposing a blanket prohibition against governmental discrimination against, or preferences in favor of, *any* race or gender, in the fields of public education, public employment, and public contracting.[1]

Perhaps most disturbingly, the Attorney General's most recent position reflects a presumption that the California Constitution cannot prohibit race- or sex-based discrimination that would be permissible under the Fourteenth Amendment. To the contrary, this Court has consistently held that the Federal Constitution provides a floor, not a ceiling, to the protection of individual rights under the California Constitution. Consequently, the Attorney General's repeated concern that Section 31's ban on racial and sexual discrimination is broader than the protections afforded by the Fourteenth Amendment is irrelevant to this Court's deliberations.

The Attorney General's current argument would turn the California Constitution on its head by prohibiting voters from ever amending their constitution to prohibit governmental entities from

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[1] For the sake of brevity, Plaintiffs use the term "race" to include "race, sex, color, ethnicity, or national origin" as those terms are used in Section 31.

adopting public contracting programs that treat individuals and groups differently, or encourage others to do so on the basis of race or sex. The Attorney General would have this Court interpret Section 31 in such a way as to make the California Constitution subservient to the Federal Constitution and overturn its opinion in *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537 (2000). This Court should reject the arguments of the Attorney General.

I

SECTION 31 DOES NOT ESTABLISH A RACIAL CLASSIFICATION

The Attorney General repeatedly asserts by implication that Section 31 triggers heightened scrutiny because it establishes a racial classification. *See* Ltr Brf at 7, 9. These oblique assertions are undocumented by any citation to the text of Section 31, and fail to acknowledge that the Ninth Circuit Court of Appeals has found directly to the contrary. *Coalition II*, 122 F.3d at 702. Nor does the Attorney General's brief mention—much less rebut—the former Attorney General's own previous analysis concluding that no such racial classifications are created. *See* Wilson Brf at 8: "[S]ection 31 . . . . does not create a racial classification."

When this Court directly examined this issue in *Hi-Voltage*, it correctly found that "rather than classifying individuals by race or gender, Proposition 209 *prohibits* the State from classifying individuals by race." 24 Cal. 4th at 561 (citation omitted). In so holding, the Court endorsed and adopted the identical finding of the Federal Court of Appeals in *Coalition II*, 122 F.3d at 702. Because the Attorney General makes no effort to reconcile his current assertion with the contrary findings of this Court, the Ninth Circuit, and his own office, the claim that Section 31 must be analyzed under strict scrutiny because it creates a racial classification is unsupported by facts or law and should be ignored.

II

SECTION 31 DOES NOT CONFLICT WITH THE FOURTEENTH AMENDMENT UNDER THE UNITED STATES SUPREME COURT'S *HUNTER/SEATTLE* DOCTRINE

Every appellate court that has considered the question has rejected the Attorney General's argument that the *Hunter/Seattle* doctrine is applicable against a uniform, statewide ban on racial discrimination or racial preferences. The Ninth Circuit squarely rejected this argument with respect to Section 31 in *Coalition II*, 122 F.3d 692, and the Sixth Circuit upheld a similar measure in *Coal.*

to Defend Affirmative Action v. Granholm, 473 F.3d 237 (6th Cir. 2006), rejecting a similar *Hunter/Seattle* argument. Most recently, the district court in *Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 539 F. Supp. 2d 924 (E.D. Mich. 2008), rejected the applicability of *Hunter/Seattle* argument to Proposal 2, a statewide ban on state and local government discrimination and racial preferences. "It is one thing to say that individuals have equal protection rights against political obstructions to equal treatment; it is quite another to say that individuals have equal protection rights against political obstructions to preferential treatment." *Id.* at 957. A constitutional provision that outlaws discrimination and preferences on the basis of race, sex, color, ethnicity, or national origin simply cannot violate the Equal Protection Clause.

The Attorney General suggests that *Hunter* and *Seattle* would invoke strict judicial scrutiny of any measure that makes it institutionally more difficult for racial minorities to promote their "interests," however defined, through the political process. But the Attorney General's argument is not supported by either *Hunter* or *Seattle*. Neither of these cases represents a departure from the traditional requirement that in order to justify strict scrutiny, a challenger must demonstrate "that the particular law (1) employs a racial classification or has the purpose of adversely impacting racial minorities, and (2) alters the political landscape on a racial matter in a manner that places a special burden on racial minorities." Petition for Review, Exhibit 1 at 20. The laws in *Hunter* and *Seattle* were struck down under the Equal Protection Clause because they created explicit racial classifications and expressly altered the political decision-making process in ways that facilitated racial discrimination on the part of citizen-voters. In contrast, Section 31 is a facially neutral policy measure that prohibits *government* racial classification and discrimination, and leaves the political decision-making process untouched.

A. The Measure in *Hunter* and *Seattle* Discriminated on the Basis of Race

The Attorney General's effort to link Section 31 with the measures at issue in *Hunter* and *Seattle* is misplaced. In *Hunter*, the focus and effect of the charter amendment was to limit the availability of legislation designed to *prevent* discrimination in housing, and place burdensome rules on those seeking to win legislation combating race-based housing discrimination. *Hunter v. Erickson*, 393 U.S. 385, 390 (1969). Thus, the charter amendment made it more difficult for minority groups to exercise their constitutional *right* to (not "interest" in) nondiscrimination. "By repealing a local fair housing ordinance and making its re-promulgation extremely difficult, the charter amendment in *Hunter* thwarted the City of Akron's efforts to discourage racial discrimination by private citizens. It therefore lent aid and encouragement to private discriminators." Gail Heriot, *Proposition 209 and the United States Constitution*, 43 Loy. L. Rev. 613, 632 (1998).

In *Seattle*, the Supreme Court invalidated a voter-initiative statute which removed the power of school boards to order busing to segregated schools while permitting busing for virtually every other purpose. Thus, its "racial purpose," "racial nature" and "racial focus" was directed at preventing desegregation of the school system. As in *Hunter*, the Court held that *the initiative created a racial classification* by "remov[ing] the authority to address a racial problem—and only a racial problem—from the existing decisionmaking body," in such a way as to make it more difficult for minorities to assert their right to nondiscriminatory treatment. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 474 (1982). That type of selective restructuring burdened future attempts to desegregate "by lodging decisionmaking authority over the question at a new and remote level of government." *Id.* at 483. Thus, in *Seattle* as well as in *Hunter*, "the Court's decision can be seen as an attempt to prevent states from affirmatively encouraging its citizens to engage in racial discrimination." Heriot, *supra*, at 632-33.

Notably, however, in applying strict scrutiny to the *Seattle* initiative, the Supreme Court made it clear that it was not departing from the requirement of discriminatory intent for facially neutral statutes: "[W]hen facially neutral legislation is subjected to equal protection attack, an inquiry into intent is necessary to determine whether the legislation in some sense was designed to accord disparate treatment on the basis of racial considerations." *Id.* at 484-85. The Court noted, that it is only "when the State allocates governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decisionmaking process" that a different analysis is required. *Id.* at 470.

B. Section 31 Is a Facially Neutral Policy Instrument That Does Not Invoke Heightened Scrutiny Under *Hunter/Seattle*

Hunter and *Seattle* make it clear that under the "political structure" Equal Protection analysis, it is laws that obstruct protection against discrimination that raise constitutional issues and that such measures incorporate an "*explicit racial classification*." As has already been pointed out, Section 31 is a facially neutral measure that establishes no racial classifications. The Attorney General's implications to the contrary are purely gratuitous, unsupported by any citations to fact or law, and in conflict with the holdings of this Court and the Ninth Circuit. As this Court held in *Hi-Voltage*, "[r]ather than classifying individuals by race or gender, Proposition 209 *prohibits* the State from classifying individuals by race." 24 Cal. 4th at 561 (citation omitted). Rather than facilitating discrimination, like the measures in *Hunter* and *Seattle*, Section 31 reinforces constitutional sanctions against local governments, such as Defendant City and County of San Francisco's efforts to classify contractors and grant preferences on the basis of their race.

In *Coalition II*, the Ninth Circuit held that

> when a state prohibits discrimination against, or the granting of preferential treatment to, anyone on the basis of race or gender, it promulgates a law that addresses race-and-gender related matters in a neutral fashion. Further, the court found that impediments to preferential treatment do not deny equal protection of the laws.

Jeanne-Marie Pochert, *Proposition 209: Public Policy Considerations in Coalition for Economic Equity v. Wilson*, 35 San Diego L. Rev. 689, 691 (1998).

In a similar challenge to Michigan's Proposal 2, the sister initiative to Proposition 209, the Sixth Circuit said: "In the end, a law eliminating presumptively invalid racial classifications is not itself a presumptively invalid racial classification." *Granholm*, 473 F.3d at 249. Addressing the viability of a *Hunter/Seattle* argument against Proposal 2, the Sixth Circuit concluded that, "Proposal 2 is more akin to the 'repeal of race-related legislation or policies that were not required by the Federal Constitution in the first place,' an action that does not violate the Equal Protection Clause." 473 F.3d at 251 (quoting *Crawford v. Bd. of Educ. of the City of L.A.*, 458 U.S. 527, 538 (1982)).

Likewise, Section 31's ban on racial preferences, and its allegedly adverse effects on minorities' political "interests," are simply not enough to trigger heightened scrutiny under *Hunter/Seattle*, or to disenfranchise California's voters on the issue of racial preferences. The clear effect of Section 31 is to prohibit the state and its political subdivisions from adopting race- and sex-based preference programs.[2] It guarantees equal opportunity in public education, employment, and contracting. It creates no racial classifications. As the Ninth Circuit found: "A law that prohibits the State from classifying individuals by race or gender *a fortiori* does not classify individuals by race or gender." *Coalition II*, 122 F.3d at 702. "The controlling words, we must remember, are 'equal' and 'protection.' Impediments to preferential treatment do not deny equal protection." *Id.* at 708.

Lacking any indication that Section 31 creates express racial classifications, heightened scrutiny under the Equal Protection Clause requires evidence of discriminatory intent. "The Supreme Court . . . probably will find that Proposition 209's prohibition on race-based affirmative action does not violate the Equal Protection Clause because it contains 'neither an illicit motive' nor a

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[2] California is not the first state constitutional provision to require absolute racial equality. In *La. Associated Gen. Contractors, Inc. v. State of Louisiana*, 669 So. 2d 1185 (La. 1996), the Supreme Court of Louisiana, noting the state constitution expressly banned discrimination on the basis of race or creed without any qualification, held that unlike the Fourteenth Amendment, there was no "strict scrutiny" exception to the state's equal protection clause for race or creed. On that basis, it invalidated a minority preference program for public contracts.

discriminatory intent on the part of the state of California." L. Darnell Weeden, *Affirmative Action California Style—Proposition 209: The Right Message While Avoiding a Fatal Constitutional Attraction Because of Race and Sex*, 21 Seattle U. L. Rev. 281, 292 (1997).

C. Section 31 Does Not Restructure the Political Process to the Detriment of Any Race or Sex

Legal scholars agree that Section 31 does not violate the *Hunter/Seattle* doctrine:

> According to the *Seattle* Court, a state may adopt race-neutral policies that preclude race-conscious measures at lower levels of government. What it may not do is *explicitly alter the decisionmaking process* on a specifically racial question in a way that makes it more difficult for racial minorities to obtain legislation that the Court might deem to be in their interest. Since Proposition 209 is a pure policy enactment and does not explicitly alter the political decision making process on a racial question, it does not offend the *Hunter* doctrine.

Thomas E. Wood, *Does Decisional Law Grant Whites Fewer Political Rights Under the Fourteenth Amendment Than It Grants to Racial Minorities?: A Response to Vikram D. Amar and Evan H. Caminker*, 24 Hastings Const. L.Q. 969, 999-1000 (1997) (emphasis added).

> Unlike the initiatives in *Hunter* and *Seattle School District No. 1*, Proposition 209 does not explicitly restructure the political process. It is a substantive policy pronouncement banning state-sponsored racial and gender discrimination in public employment, public education and public contracting.

Heriot, *supra*, at 629.

Here, the Attorney General asserts that Section 31 violates equal protection principles under *Hunter* and *Seattle* because

> those seeking a remedy for discrimination that would be allowable under the federal constitution would be treated differently from those seeking a similar remedy for discrimination based on other characteristics, such as religion or disability. The latter groups and others are free to urge their local governing bodies, school boards or the Legislature to adopt remedial or preference programs that affirmatively take religion, disability, or military service into account, while the former must undertake the extraordinary effort to *amend the constitution* to achieve a similar remedy with respect to race or gender.

Ltr Brf at 7-8. What this analysis overlooks is that classifications based on disability and military service are not suspect classifications, so preferences based on such characteristics would not be subject to the same constitutional constraints as preferences based on race and gender, with or without Section 31. *See Hunter*, 393 U.S. at 391-92; *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 17 (1971). As to governmental preferences for religious minorities, the Attorney General seems unaware that these are already specifically prohibited by the California Constitution: "Free exercise and enjoyment of religion *without discrimination or preference* are guaranteed." Cal. Const. art. I, § 4 (emphasis added).

Moreover, the Attorney General's position that it would be impermissible for the voters to outlaw preferences based on suspect classifications, while other nonsuspect classes are not prohibited from seeking preferential treatment, runs contrary to the Supreme Court's unequivocal approval of the use of voter referendums to address issues that have an impact upon race. In *Crawford*, 458 U.S. 527, the Supreme Court upheld an amendment to California's Constitution that limited school districts' authority to reassign and bus students in those instances necessary to remedy a violation of the Equal Protection Clause, that is, when a school district had to respond to prior *de jure* segregation. In holding that "the Equal Protection Clause is not violated by the mere repeal of race-related legislation or policies that were not required by the Federal Constitution in the first place," *id.* at 538, the Court made a point to distinguish that case from both *Hunter* and *Seattle* because the constitutional amendment in the California case did not involve political restructuring. *Id.* at 535.

In *James v. Valtierra*, the Supreme Court again squarely rebuffed the Attorney General's argument. In *James*, the Court rejected a claim that a state constitutional provision singling out low-income public housing decisions for mandatory referendum approval fell afoul of *Hunter*, despite the fact that public-housing projects were undoubtedly perceived by many minorities as "legislation that [wa]s in their interest."

> Unlike the Akron referendum provision [at issue in *Hunter*], it cannot be said that California's Article XXXIV rests on 'distinctions based on race' . . . . Provisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice . . . . Under [appellees' view], presumably a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group. And this Court would be required to analyze governmental structures to determine whether a gubernatorial veto provision or a filibuster rule is likely to "disadvantage" any of the diverse and shifting groups that make up the American people.

402 U.S. 137, 141-42 (1971).

If the Attorney General's interpretation of Section 31 was correct, that Section 31 is unconstitutional on the grounds that it makes it too difficult for minorities to seek preferences, then all state and federal antidiscrimination laws would be suspect "racial classifications" because they prohibit racial classifications.[3] Such laws deal with "racial problems," and they make it harder for some groups to lobby government officials to discriminate on the basis of race. As the Supreme Court made clear in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 216, 223 (1995), racial classifications are constitutionally suspect no matter which racial group is burdened. To the extent that Section 31 disadvantages persons in their ability to seek race- or sex-based preferences, all persons are equally disadvantaged by this constitutional provision. Moreover, Section 31 burdens no effort aimed at eliminating racial discrimination. The effect of Section 31 bears no similarity to the measures invalidated by *Seattle* or *Hunter*. It therefore does not justify the anti-democratic inversion of state governmental policy-making processes demanded by the Attorney General.

Moreover, as the Ninth Circuit in *Coalition II* recognized: "Even a state law that does restructure the political process can only deny equal protection if it burdens an individual's right to equal treatment." 122 F.3d at 707. The *Hunter/Seattle* equal protection analysis does not prohibit the state from banning programs that give an advantage on the basis of the beneficiary's race. Prohibiting the State of California from granting preferences or advantages based upon racial classifications does not conflict with the Equal Protection Clause. Neither *Hunter* nor *Seattle* hold otherwise. Because the political restructuring effected by Section 31 does not offend the Equal Protection Clause by distancing racial minority groups from the means of obtaining *equal* protection, the Attorney General's argument cannot prevail. The Attorney General turns the Equal Protection Clause on its head by ignoring the settled principle that no one has a "right" to special racial preferences under the Fourteenth Amendment. As the Ninth Circuit observed, "[t]hat the Constitution *permits* the rare race-based or gender-based preference hardly implies that the state cannot ban them altogether." *Coalition II*, 122 F.3d at 708. In adopting Proposition 209, the voters of California chose to ban preferential treatment based on race and sex altogether. Consequently, "Proposition 209's ban on race and gender preferences, as a matter of law and logic, does not violate the Equal Protection Clause in any conventional sense." *Id.* at 702.

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[3] Examples include the Federal Fair Housing Act of 1968, 42 U.S.C. §§ 3601-3619 (1988), which prohibits homeowners from discriminating on the basis of race in the sale of their homes. According to the Attorney General's reasoning, it would be unconstitutional because it preempts racial minorities from seeking preferences at the state or local level. Such groups would be required to seek repeal of the federal law first. Similarly, Title VII of the Civil Rights Act of 1965, 42 U.S.C. §§ 2000e-2000e-17, would be unconstitutional because it preempts state and local governments from granting preferences.

The Attorney General claims that Section 31 violates *Hunter/Seattle* because it denies "the right to seek lawful remedies on the same basis." Ltr Brf at 8. To the contrary, Section 31 specifies that "[t]he remedies available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of then-existing California antidiscrimination law." Art. I, § 31(g). This provision does not limit the type of remedies available for courts to award. The remedies available are the same as allowed under other current antidiscrimination laws. *See* Cynthia C. Jamison, *The Cost of Defiance: Plaintiffs' Entitlement to Damages Under the California Civil Rights Initiative*, 33 Sw. U. L. Rev. 521 (2004).

D. Interpreting the *Hunter/Seattle* Doctrine to Ban Facially Neutral Measures That Forbid Racial Discrimination and Racial Preferences by Government Would Be Absurd

This Court should reject the Attorney General's arguments because Section 31 clearly does not fall within the class of race-conscious measures triggering heightened scrutiny under *Hunter* or *Seattle*. Even if this fact were not clear from the face of the measure itself, and the prior careful analysis by this Court and by the Ninth Circuit Court of Appeals, the Attorney General's argument should be rejected for the simple reason that it would lead to an absurdity: a ruling that providing for equal treatment before the law is a violation of Equal Protection.

"Whatever these cases [*Hunter* and *Seattle*] mean, they do not mean that a state may not repeal racial preferences on a statewide basis. Indeed, the one thing in this five-to-four decision that both sides agree upon is that such a result would be absurd." Heriot, *supra*, at 630. *Accord*, Wood, *supra*, at 997 ("The view that a state is barred by the Federal Constitution from preempting all race-conscious measures within its borders is strange enough in itself.").

Obviously, a state has a compelling state interest in avoiding the possibility of unjustifiably discriminating on the basis of race by authorizing racial preferences, because such official discrimination may become invidious, and that scarce public benefits will be denied to individuals on the basis of their race. *Associated Gen. Contractors of Cal. v. San Francisco Unified Sch. Dist.*, 616 F.2d 1381, 1386 (1980). Certainly there can be no more narrowly-tailored remedy than a ban on any racial discrimination or preferences that would guarantee equal treatment to all. After all, the "color-blind" goal of the Equal Protection Clause is "to do away with all governmentally imposed discrimination based on race." *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984).

At their core, neither *Hunter* nor *Seattle*

> has anything to do with Proposition 209. Proposition 209 in no way entangles the state in, or otherwise encourages, private racial discrimination. Proposition 209 is

> concerned solely with state action and (lest we forget) it prohibits discrimination rather than encourages it. Consequently, efforts to link it with cases like *Hunter* and *Seattle Sch. Dist. No. 1* are misplaced.

Heriot, *supra*, at 634.

III

SECTION 31 EXPRESSLY AND FORCEFULLY ADVANCES THE GOALS OF THE FOURTEENTH AMENDMENT

Although moderate in tone, the Attorney General's brief embodies an ideologically extreme, doctrinally unsupportable interpretation of the Equal Protection Clause and Section 31. As previously noted, no appellate court, anywhere, has ever endorsed the Attorney General's position that an absolute ban on governmental racial discrimination and racial preferences violates the Fourteenth Amendment's requirement of racial equality. Consequently, the Attorney General is forced to resurrect and rely on a flawed, preliminary analysis of Section 31 published in a law review 13 years ago. *See* Ltr Brf at 4 (citing to Vikram D. Amar & Evan H. Caminker, *Equal Protection, Unequal Political Burdens, and the CCRI*, 23 Hastings Const. L.Q. 1019 (1996)). However, the Attorney General neglected to refer the Court to the body of legal scholarship disputing the conclusions of that article. *See, e.g.*, Weeden, *supra*, at 292 ("Amar and Caminker's limited and relatively guarded prediction that Proposition 209 is unconstitutional should not be given too much weight.").

The peculiarly skewed interpretation of the Fourteenth Amendment reflected in the Attorney General's brief and the article it relies on was noted by Professor Carcieri:

> Amar and Caminker's [argument] . . . implies that any time a minority or woman is denied a preference in applying for a scarce public benefit, which then goes to a white male, the minority or woman has been the subject of discrimination. She has been left unprotected from the "lingering effects" of discrimination because there is no possibility of an objective process in which each applicant receives substantially equal consideration. There is, in other words, no possible middle ground between "discrimination" and "no preference."

Martin D. Carcieri, *A Progressive Reply to the ACLU on Proposition 209*, 39 Santa Clara L. Rev. 141, 177 (1998). Professor Carcieri correctly observes that this radical position

> seems aimed at ensuring that race and gender relations never progress past the warfare stage . . . . Those who believe that people who look a certain way should be given preferential treatment do a great disservice to the efforts and sacrifices of those in the civil rights and feminist movements. They have fought so that race and gender will not continue to be the criteria by which human beings are treated by government or any other locus of influence.

Id. at 180-81.

The backward-looking ideology of government as an instrument of race and class warfare is wholly at odds with the purpose and function of the Fourteenth Amendment. As was reiterated by the Ninth Circuit in *Coalition II*, 122 F.3d at 701, "'[t]he ultimate goal of the Equal Protection Clause is "to do away with all governmentally imposed discrimination based on race."' The court further noted the "'goal" of the Fourteenth Amendment, "to which the Nation continues to aspire," is "a political system in which race no longer matters."'" Pochert, *supra*, at 705 (quoting from *Coalition II*). The Ninth Circuit recognized that doing away with all governmentally imposed discrimination, and implementing a political system in which race no longer matters, is precisely what Section 31 accomplishes. As such, the measure is a powerful expression of the values underlying the Fourteenth Amendment.

Notwithstanding Amar's and Caminker's politically charged assertion that Section 31 conflicts with the *Seattle/Hunter* line of equal protection jurisprudence, a more reasonable interpretation of constitutional values suggests that

> [t]he Equal Protection Clause is designed to keep states from intentionally discriminating against persons on the basis of race. Its ultimate duty is to make race an irrelevant factor in governmental decisions. Not only does Proposition 209 lack the discriminatory intent required for an Equal Protection Clause violation, but it advances the Fourteenth Amendment's goal of abolishing all race-based discrimination imposed by the government.

Weeden, *supra*, at 294 (citations omitted). In short,

> Proposition 209 forbids discrimination based on race or sex; it does not require it. It thus fulfills the "central purpose" of the Equal Protection Clause: 'the prevention of official conduct discriminating on the basis of race.' It would be paradoxical if the

> Equal Protection Clause were found to prohibit states from prohibiting their agencies from racial discrimination.

Heriot, *supra*, at 623 (citation omitted).

IV

THE CALIFORNIA CONSTITUTION PROVIDES GREATER PROTECTION TO THE PEOPLE OF CALIFORNIA THAN DOES THE FEDERAL CONSTITUTION

The Attorney General asks this Court to gut *Hi-Voltage* to enable the state to indulge in racial preferences so long as they do not violate the Equal Protection Clause. Ltr Brf at 11. This Court has expressly rejected the Attorney General's invitation, noting that the Equal Protection Clause does not "preclude a state from providing its citizens greater protection" against both discrimination and racially preferential treatment. *Hi-Voltage*, 24 Cal. 4th at 567. As Chief Justice Roberts recognized in *Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 127 S. Ct. 2738, 2768 (2007) (plurality opn.): "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."

The Attorney General's argument, which advocates that this state's constitution should be interpreted in "lockstep" with the Federal Constitution, is anathema to this Court's long-recognized duty to decide state constitutional questions independently of the Federal Constitution. This Court's interpretation of the California Constitution is "informed but untrammelled by the United States Supreme Court's reading of parallel federal provisions." *Reynolds v. Superior Court*, 12 Cal. 3d 834, 842 (1974).

In *People v. Pettingill*, 21 Cal. 3d 231 (1978), Justice Mosk, writing for the Court, explained the role of the Federal Constitution in construing provisions of the California constitution:

> The construction of a provision of the California Constitution remains a matter of California law regardless of the narrower manner in which decisions of the United States Supreme Court may interpret provisions of the federal Constitution. Respect for our Constitution as "a document of independent force" forbids us to abandon settled applications of its terms every time changes are announced in the interpretation of the federal charter. Indeed our Constitution expressly declares that "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." (Cal Const., art. I, § 24.)

Id. at 247-48 (citation omitted). Justice Mosk continued:

> In such constitutional adjudication, our first referent is California law and the full panoply of rights Californians have come to expect as their due. Accordingly, decisions of the United States Supreme Court defining fundamental civil rights are persuasive authority to be afforded respectful consideration, but are to be followed by California courts only when they provide no less individual protection than is guaranteed by California law.

Id. at 248 (citation omitted).

Similarly, in *People v. Brisendine*, 13 Cal. 3d 528 (1975), holding a warrantless search invalid under California precedents, despite its probably validity under United States Supreme Court decisions, this Court stated that it cannot seriously be questioned that our state constitution imposes higher constitutional standards than the federal minimum:

> [T]he California Constitution is, and always has been, a document of independent force. Any other result would contradict not only the most fundamental principles of federalism, but also the historic bases of state charters. It is a fiction too long accepted that provisions in state constitutions textually identical to the Bill of Rights were intended to mirror their federal counterpart. The lesson of history is otherwise: the Bill of Rights was based upon the corresponding provisions of the first state constitutions, rather than the reverse.

Id. at 549-50.

Indeed, it has long been recognized that federal constitutional guarantees represent a minimum, "a floor beneath which no state may go. Above that floor, however, states should be free to grant greater protection to their citizens." Robert K. Fitzpatrick, *Note, Neither Icarus Nor Ostrich: State Constitutions as an Independent Source of Individual Rights*, 79 N.Y.U. L. Rev. 1833, 1842 (2004). This approach allows a state to act as "'a laboratory' conducting policy experiments that the rest of the country (both other states and the federal government) can observe and perhaps emulate if they are successful." *Id.* at 1843. Accord, 7 B. E. Witkin, *Summary of California Law* § 109 (10th ed. 2008) ("while state courts must enforce the minimum federal constitutional standards as interpreted by the U.S. Supreme Court, they remain free to interpret state constitutional provisions, including those similar to or the same as federal constitutional provisions, in a manner that will grant *additional protection*").

In 1996, the voters of California adopted Proposition 209 to abolish race-based affirmative action. They intended the state constitutional provision to have independent significance beyond United States Supreme Court's interpretation of the Fourteenth Amendment. The Attorney General fails to recognize that the "interest" of any racial group in seeking preferences or favoritism from government solely on the grounds of race must yield to the *right* of California's citizens to demand that their government treat everyone equally. The Attorney General recognizes but fails to appreciate the significance of the fact that, in adopting Section 31, the people of California intended to do "something more than simply restate existing law." *Hi-Voltage*, 24 Cal. 4th at 561. They intended to amend their constitution to provide stronger guarantees of equality than what the federal constitution provides in order to "achieve equality of [] opportunities and to remove 'barriers [that] operate invidiously to discriminate on the basis of racial or other impermissible classification.'" *Id.* at 562 (citations omitted).

The Attorney General believes that "it is uncertain what governmental interest section 31 was intended to serve" and that the "ballot materials . . . explain neither the need to nor the factual basis for prohibiting preferences that are permissible under the Fourteenth Amendment." Ltr Brf at 9. Yet the clear and unambiguous language of Section 31 and the ballot materials show unmistakably that the voters intended to prohibit government entities from improperly burdening or benefiting any individual or group, and to remove all race-based barriers to participation in public employment, education, and contracting. *Hi-Voltage*, 24 Cal. 4th at 560, 575-76 (Kennard, J., conc.), 580-588 (George, C.J., conc. and diss.).

This Court has already examined the ballot pamphlet and other ballot materials accompanying Proposition 209 and found that the overwhelming purpose of Section 31 is to force the government to abandon race-conscious policies that had morphed into schemes of racial balancing, racial favoritism, and racial politics, unchecked by the Fourteenth Amendment:

> The argument in favor of Proposition 209 stated in part, "A generation ago, we did it right. We passed civil rights laws to prohibit discrimination. But special interests hijacked the civil rights movement. Instead of equality, governments imposed quotas, preferences, and set-asides. [¶] Proposition 209 is called the California Civil Rights Initiative because it restates the historic Civil Rights Act . . . . [¶] . . . [¶] . . . Real 'affirmative action' originally meant no discrimination and sought to provide opportunity." (Ballot Pamp., Gen. Elec. (Nov. 5, 1996) argument in favor of Prop. 209, p. 32 (Ballot Pamphlet).) "Anyone opposed to Proposition 209 is opposed to the 1964 Civil Rights Act." (*Id.*, rebuttal to argument against Prop. 209, p. 33.)

24 Cal. 4th at 560; *see also*, *id.* at 581-82 (concurring and dissenting opinion of George, C.J.).

> The initiative's proponents further argued: "'Reverse Discrimination' Based on Race or Gender Is Plain Wrong! [¶] And two wrongs don't make a right! . . . [¶] . . . Government should not discriminate. It must not give a job, a university admission, or a contract based on race or sex. Government must judge all people equally, without discrimination! [¶] . . . [¶] Government cannot work against discrimination if government itself discriminates . . . . It's time to bring us together under a single standard of equal treatment under the law. [¶] . . . [¶] We are individuals! Not every white person is advantaged. And not every 'minority' is disadvantaged. Real 'affirmative action' originally meant no discrimination and sought to provide opportunity . . . . [¶] [Current] law requires [state] departments . . . to reject bids from companies that have not made sufficient 'good faith efforts' to meet ['affirmative action' contracting] goals."].)

24 Cal. 4th at 560-61.

Thus, the ballot materials leave no doubt that, in enacting Section 31, the people of California intended to provide guarantees of equality surpassing those provided by the Fourteenth Amendment. As this Court recognized:

> [T]he 'historic Civil Rights Act' referent tells us the voters intended to reinstitute the interpretation of the Civil Rights Act and equal protection that predated predated *Weber* [*United Steelworkers of America v. Weber*, 443 U.S. 193 (1979)], and *Bakke II* [*Regents of the University of California v. Bakke*, 438 U.S. 265 (1978)], as well as *Price* [*v. Civil Service Commission of Sacramento County*, 26 Cal. 3d 257 (1980)], and *DeRonde* [*v. Regents of the University of California*, 28 Cal. 3d 875 (1981)], viz., an interpretation reflecting the philosophy that "[h]owever it is rationalized, a preference to any group constitutes inherent inequality. Moreover, preferences, for any purpose, are anathema to the very process of democracy."

Id. at 561 (citation omitted).

The language of Section 31 and the California Ballot Pamphlet leave no doubt regarding the intent of the voters in prohibiting racial discrimination and preferences by their government, even if such programs would meet strict scrutiny under the Equal protection Clause. The voters intended to eliminate not only programs in public contracting that refer to quotas, goals, timetables, or plus factors, but any such government program that treats people differently based on one of the prohibited criteria.

This Court has recognized that, in so doing, the voters "set a different course." Rather than classifying individuals by race or gender, as had become commonplace in government programs notwithstanding the Equal Protection Clause, Proposition 209 *prohibited* the State from classifying individuals by race or gender. *Hi-Voltage*, 24 Cal. 4th 561. For the Attorney General now to assert, 13 years after the fact, that the people of California must be prevented from ensuring equality before the law for everyone in the state, because such equality goes beyond what is ensured by the Fourteenth Amendment, does a disservice to the people, the California Constitution, and this Court.

CONCLUSION

The Attorney General's argument is premised on the view that certain racial groups (and women) are entitled to special benefits from the State not available to others. Such a focus is irreconcilable with the policy choice made by the California voters who enacted Section 31, demanding that their government "must judge all people equally, without discrimination! . . . Let's instead move forward by returning to the fundamentals of our democracy: individual achievement, equal opportunity and *zero tolerance for discrimination against-or for-any individual*." *Hi-Voltage*, 24 Cal. 4th at 561. As this Court has recognized, "the people of California meant to do something more than simply restate existing law when they adopted Proposition 209." *Id.* (citation omitted). "[T]he California electorate 'set a different course' . . . . 'Rather than classifying individuals by race or gender, Proposition 209 *prohibits* the State from classifying individuals by race or gender." *Id.* (citations omitted). The voters intended "'to achieve equality of [public employment, education, and contracting'] opportunities and 'to remove barriers [that] operate invidiously to discriminate on the basis of racial other impermissible classification.'" *Id.* at 562 (citations omitted).

This Court should reject the invitation of the Attorney General to constrain Section 31 to provide no greater protection to the rights of the people of California than the Federal Constitution. Such a holding would be doctrinally unjustified, it would conflict with long-settled rulings of this Court and the Ninth Circuit Court of Appeals, it would denigrate the California Constitution's status as an independent guarantor of equality, and it would undermine this State's democratic process.

The Attorney General's argument would eviscerate Section 31's prohibition of discrimination by allowing all state and local agencies to adopt racially-preferential programs based upon back-room politics and social engineering. Such relics of a long-gone era of racial politics are dispensed with in their entirety by the text of Section 31 that states with unusual clarity that the state shall not discriminate or grant preferential treatment to any individual or group on the basis of race or sex. Cal. Const. art. I, § 31(a). As this Court has already explained, Section 31 leaves no room for government programs that mandate race-conscious actions. Unlike the Federal Equal Protection Clause, "[S]ection 31 categorically prohibits discrimination and preferential treatment. Its literal

language admits no 'compelling state interest' exception; we find nothing to suggest the voters intended to include one *sub silentio*." 24 Cal. 4th at 567.

In the absence of any evidence that Section 31 establishes racial classifications or effectuates a discriminatory intent, the *Hunter/Seattle* doctrine is wholly inapplicable. A due respect for the voters of California in their legislative capacity mandates that this Court should reject the analysis proffered by the Attorney General.

Respectfully submitted,

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DECLARATION OF SERVICE BY MAIL

I, Barbara A. Siebert, 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 May 6, 2009, true copies of PLAINTIFFS AND RESPONDENTS' LETTER BRIEF IN RESPONSE TO ATTORNEY GENERAL'S LETTER 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 6th day of May, 2009, at Sacramento, California.

Barbara A. Siebert

BARBARA A. SIEBERT