CITY AND COUNTY OF SAN FRANCISCO

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Supreme Court Copy

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May 7, 2009

Frederick K. Ohlrich
Clerk of the Court
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: *Coral Construction, Inc. v. City and County of San Francisco*; No. S152934

Dear Mr. Ohlrich:

On March 18, 2009, this Court asked the Attorney General to file a letter brief in the above action addressing (1) whether article I, section 31 of the California Constitution violates federal equal protection principles by making it more difficult to enact legislation on behalf of minority groups, citing *Washington v. Seattle Sch. Dist. No. 1* (1982) 458 U.S. 457 ("*Seattle*"), and *Hunter v. Erickson* (1969) 393 U.S. 385 ("*Hunter*"); and, if so, (2) whether section 31 is narrowly tailored to serve a compelling governmental interest. The Court also provided the parties an opportunity to file their own letter briefs responding to the Attorney General. Defendant City and County of San Francisco ("City") now files its response.

In his letter brief, filed April 22, the Attorney General correctly concludes that section 31 violates the *Hunter-Seattle* doctrine to the extent that section 31 bars those race- or gender-conscious remedial programs that the Fourteenth Amendment permits. The Attorney General also persuasively analyzes why this aspect of section 31 is not narrowly tailored to serve a compelling governmental interest and is therefore unconstitutional under the Fourteenth Amendment.

Because the Attorney General's discussion of section 31's presumptive unconstitutionality under *Hunter* and *Seattle* is consistent with the analysis the City has presented at every stage of this litigation, including in its earlier briefs to this Court, that discussion need not be repeated here. It suffices to reiterate only the final conclusion of that analysis, since it is also the starting point for what follows: section 31's selective foreclosure of racial minorities' and women's ability to seek state and local beneficial legislation is subject to strict scrutiny as a race- and sex-based classification. This letter brief now applies strict scrutiny to section 31, focusing particularly on why section 31 fails every single test for narrow tailoring.

I. THE BALLOT MATERIALS DO NOT SPECIFY A COMPELLING GOVERNMENTAL INTEREST IN BARRING EQUAL ACCESS TO THE POLITICAL PROCESS BASED ON RACE OR GENDER.

To survive strict scrutiny, legislation must not only be shown to further a compelling governmental interest, it must also be narrowly tailored to serve that interest. (See *Wygant v. Jackson Bd. of Educ.* (1986) 476 U.S. 267, 274.)[1] Thus, the first step in the strict scrutiny analysis involves identifying the compelling governmental interest supporting the challenged measure with precision. Assuming the compelling interest is itself valid, this step provides the measuring stick the Court will use to conduct the narrow tailoring analysis. (*Richmond v. J.A. Croson* (1989) 488 U.S. 469, 498.)

The bare language of section 31, enacted by the voters as Proposition 209 in 1996, does not reveal its purpose in barring equal access to the political process. It says that "the state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race [or] sex . . ." (art. I, sec. 31(a)). Perhaps unsurprisingly, section 31 does not explicitly say that women and minorities shall be selectively denied access to the political process, much less explain why. It is difficult to know, then, whether this partial political disenfranchisement was a desired or incidental effect of the legislation and, most importantly for present purposes, whether it had a separate rationale. The compelling state interest to be tested must be limited to the purpose asserted at the time the law was enacted; it cannot be hypothesized after the fact. "[A] racial classification cannot withstand strict scrutiny based upon speculation about what 'may have motivated' the legislature . . . . [T]he State must show that the alleged objective was the legislature's 'actual purpose' for the discriminatory classification . . . ." (*Shaw v. Hunt* (1996) 517 U.S. 899, 908, fn. 4.)

To determine the voters' purpose in enacting an initiative, courts can look to the language of the initiative and, as needed, to the ballot arguments in support of the initiative to try to determine the voters' actual purpose in enacting the initiative. (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798.) Here, the ballot materials in support of Proposition 209 assert that its overall general purpose was to end discrimination on the basis of race and sex. (Ballot Pamp., General Elec. (Nov. 5, 1996) argument in favor of Prop. 209, Cal. Sec'y of State website, <http://vote96.sos.ca.gov/BP/209yesarg.htm> (as of May 6, 2009).) The ballot argument in support of the measure equates "discrimination" with "preference" programs intended to correct for discrimination. For example, the ballot argument explains that returning to an earlier state of "no discrimination" is "why Proposition 209 prohibits discrimination and preferences and allows any program that does not discriminate, or prefer, because of race or sex, to continue." (*Ibid.*; see also *Hi-Voltage Wire Works, Inc. v. City of San Jose* (2000) 24 Cal.4th 537, 561-62 [voters intended to outlaw remedial preference programs as discriminatory].)

While there can be no doubt that ending invidious discrimination is a compelling state interest, it is also antithetical to denying women and minorities their right to participate fully in the political process. As the next section shows, for this reason and for others, section 31 is not narrowly tailored, fails the strict scrutiny test, and must be invalidated as unconstitutional.

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[1] While racial classifications are subject to strict scrutiny, gender-based classifications are not. Instead, they can survive equal protection scrutiny only if they have an exceedingly persuasive justification (*Miss. Univ. for Women v. Hogan* (1982) 458 U.S. 718, 724) and the discriminatory means employed are substantially related to the achievement of that justification. (*Tuan Anh Nguyen v. I.N.S.* (2001) 533 U.S. 53, 60.) In this case, the City is of the view that the distinctions between the two standards of review do not lead to different outcomes. For that reason, the City treats race and sex interchangeably.

II. SECTION 31 FAILS EVERY TEST FOR NARROW TAILORING.

Even if prohibiting local, remedial legislation and minorities' and women's equal participation in the political process could somehow serve a compelling governmental interest, section 31 would still need to be narrowly tailored to serve that interest. For the reasons that follow, it is not.

In determining whether race-conscious legislation is narrowly tailored, the Supreme Court has looked at a number of factors. First, only the most exact connection between a measure's justification and its use of a suspect classification can suffice. (*Adarand Constructors v. Pena* (1995) 515 U.S. 200, 236; *Wygant v. Jackson Bd. of Educ.* (1986) 476 U.S. 267, 280 (plur.opn.).) Second, there must be convincing evidence that race-based remedial action is necessary. (*Shaw v. Hunt, supra*, 517 U.S. at p. 910 (maj.opn.); *Wygant,*at pp. 277-278 (plur.opn.).) Third and relatedly, race-neutral measures must also have been considered. (See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1* (2007) 551 U.S. 701 [127 S.Ct. 2738, 2760] ["Narrow tailoring requires "'serious, good faith consideration of workable race-neutral alternatives.'"]; *Richmond v. J.A. Croson, supra,* 488 U.S. at p. 507 [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.].) Fourth, the characteristics of the tested measure are scrutinized, including "the flexibility and duration of the relief, including the availability of waiver provisions; . . . and the impact of the relief on the rights of third parties." (*United States v. Paradise* (1987) 480 U.S. 149, 171.) Section 31 fails every last one of these tests.

First, rather than the required tight nexus, there is no logical connection at all between section 31's compelling interest in ending race and sex discrimination and its selective limitation of access to the political process on the basis of race and sex. As the Attorney General put it, "[i]ronically, by effectively disadvantaging racial minorities and women in the political process, [fn] without an evident compelling reason for doing so, section 31 seems to accomplish the very evil it purported to eliminate, viz. racial and gender discrimination." (AG Letter Br. at p. 9.) Moreover, directly to the contrary of section 31's asserted principle that preference programs are discriminatory, the U.S. Supreme Court has repeatedly identified the government's interest in remedying the effects of prior governmental discrimination as a compelling interest justifying race-conscious preference legislation. (See *Parents United, supra*, 127 S.Ct. at 2752; *Bush v. Vera* (1996) 517 U.S. 952, 982.) Rather than serve this equality interest, Section 31 stifles it and stands directly in the way of local and statewide legislative efforts to address this subject. There can be no compelling governmental interest in prohibiting local legislation that itself would further a compelling governmental interest. Because section 31's anti-discrimination rationale cannot be reconciled with its discriminatory effect nor controlling Supreme Court precedent much less tightly matched to them, section 31 fails strict scrutiny and must be overturned.

Second, section 31's selective race- and sex-based classifications must rest on convincing factual evidence that such suspect classifications were necessary. Statistical evidence is typically necessary to support a law that makes sex- and race-based distinctions, even in service of ending discrimination. (*W. States Paving Co., Inc. v. Washington State DOT* (9th Cir. 2005) 407 F.3d 983, 992-993.) Anecdotal evidence can also be helpful. (*Ibid.*) It is difficult to forecast the sort of factual evidence that would ever be sufficient to demonstrate the necessity of curtailing political participation only for suspect classes. Perhaps one could collect evidence that women and minorities are unduly politically powerful and must be hindered in their successful efforts to enact unconstitutional programs. But it is doubtful that the desire to thwart further proven success in the political arena demonstrates the necessity of race- and sex-based restrictions on

access to that arena. Here, in any case, there was no evidence that it was necessary to place unique barriers to political participation in the way of racial minorities, as section 31 does.

Third, and independently fatal to section 31, there is no evidence that race-neutral methods for ending discriminatory preference programs were even considered, much less found lacking. But rather than focus on race and sex, section 31 could have taken a neutral approach by including other groups that enjoy preferences because of their unalterable or constitutionally protected status. So, for example, it could have eliminated status-based government preferences for seniors and veterans, for gay men and lesbians, for religious groups and the disabled along with those for women and minorities. That, at least, would have been an equal application of a neutral principle.

Alternatively, proponents of section 31 could have created barriers to political participation in a race- and sex-neutral fashion by preempting all local preference programs and requiring such programs to win approval or re-approval, perhaps on the basis of newly specified criteria, from the state legislature. In this way section 31 could have accomplished its desired ends while at the same time establishing a level political playing field for all comers—and rectifying its *Hunter-Seattle* violation. Where, as here, a race-neutral approach can satisfy the interest supporting the legislation, that is the way the legislation must be crafted. (See *Engineering Contrs. Ass'n v. Metro. Dade County* (11th Cir. 1997) 122 F.3d 895, 927 ["If a race-neutral remedy is sufficient to cure a race-based problem, then a race-conscious remedy can never be narrowly tailored to that problem"]; *Richmond v. J.A. Croson, supra*, 488 U.S. at p. 507 [The availability of nonracial alternatives-or the failure of the legislative body to consider such alternatives-will be fatal to the classification.].)

Finally, there is a series of reasons relating to the measure's scope, flexibility and duration that independently disqualify it from satisfying the narrow tailoring requirement. First, it is overbroad in scope because it bans local remedial legislation throughout the state as well as all state legislation, all without factual evidence of a statewide problem, and without regard as to whether the affected remedial preference programs do or would satisfy strict scrutiny and, consequently, the equality guarantees of the 14th Amendment. Section 31 is also impermissibly inflexible, lacking all mechanisms for taking particular circumstances into account such as, for example, granting a limited program-specific waiver from the prohibitions when warranted. Finally, and perhaps most importantly, as a constitutional measure, section 31 has no limits on its duration nor any requirement that it be reevaluated periodically to examine its actual effects on discrimination against minorities, women, and non-minority males. Assume, for example, that section 31 were simply a state statute enacted by the legislature, and assume further that instead of doing the hoped-for good for California citizens, section 31 measurably harmed them, or it particularly harmed some of them. The continuing validity of such legislation would be called into question, and subject to repeal based on the new evidentiary record. As a constitutional initiative, that cannot happen to section 31, and that is a final reason why section 31 is not, from any angle, narrowly tailored.

CONCLUSION

Because it fails the *Hunter-Seattle* test by impinging on the rights of women and minorities to participate equally in the political process, section 31 must satisfy strict scrutiny to

survive federal constitutional muster. For the panoply of reasons explored above, it cannot. This Court should strike it down.

Very truly yours,

MOSCONE, EMBLIDGE & QUADRA, LLP
G. Scott Emblidge

DENNIS J. HERRERA
City Attorney

Sherri Kaiser
Deputy City Attorney

PROOF OF SERVICE

I, DIANA QUAN, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the within entitled action. I am employed at the City Attorney's Office of San Francisco, City Hall, Room 234, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102.

On May 7, 2009, I served the attached:

RESPONDENT CITY AND COUNTY OF SAN FRANCISCO'S LETTER BRIEF

on the interested parties in said action, by placing a true copy thereof in sealed envelope(s) addressed as follows and served the named document in the manner indicated below::

By Express
SHARON L. BROWNE, ESQ.
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☒ **BY EXPRESS SERVICES OVERNITE**: I caused true and correct copies of the above documents to be placed and sealed in envelope(s) addressed to the addressee(s) and I caused such envelope(s) to be delivered to EXPRESS SERVICES OVERNITE for overnight courier service to the office(s) of the addressee(s).

By Hand
THE HONORABLE JAMES L. WARREN
JUDGE OF THE SUPERIOR COURT
San Francisco Superior Court
400 McAllister Street, Dept. 301
San Francisco, CA 94102

By Hand
CALIFORNIA COURT OF APPEAL
DIVISION 4
350 McAllister Street
San Francisco, CA 94102

☒ **BY PERSONAL SERVICE**: I caused true and correct copies of the above documents to be placed and sealed in envelope(s) addressed to the addressee(s) and I caused such envelope(s) to be delivered by hand on the office(s) of the addressee(s).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed May 7, 2009, at San Francisco, California.

DIANA QUAN