IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. _____

CORAL CONSTRUCTION, INC., an Oregon Corporation,
Plaintiff/Respondent,

v.

JOHN L. MARTIN, et al.,
Defendants/Appellants.

and

SCHRAM CONSTRUCTION, INC., a California Corporation,
Plaintiff/Respondent,

v.

CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation; SAN FRANCISCO PUBLIC UTILITIES COMMISSION, an agency of the City and County of San Francisco; and Does 1-50,
Defendants/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, Consolidated with San Francisco Superior Court No. 421249)

PETITION FOR REVIEW

JOHN H. FINDLEY, No. 50495
SHARON L. BROWNE, No. 119246
PAUL J. BEARD II, No. 210563
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, California 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
Attorneys for Plaintiffs/Respondents/Petitioners

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TO THE HONORABLE CHIEF JUSTICE OF CALIFORNIA AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Coral Construction, Inc., and Schram Construction, Inc., respectfully petition this Court for review of the decision of the Court of Appeal, First Appellate District, Division Four, dated April 18, 2007, Exhibit 1 hereto. Petitioners filed a petition for rehearing that was denied by that court on May 14, 2007, Exhibit 2.

ISSUES PRESENTED

1. Whether a city's failure on cross-motions for summary judgment to present facts that rebutted petitioners' showing of lack of intentional discrimination sufficient to justify, under Article I, section 31, of the California Constitution, the city's race and sex preferences in public contracting required the Court of Appeal to affirm summary judgment in favor of Petitioners.

2. Whether a city's failure on cross-motions for summary judgment to show that its race- and sex-based prime contractor bid preferences and subcontractor quota and outreach requirements in public contracting were narrowly tailored to the forms of discrimination alleged by the city required the Court of Appeal to affirm summary judgment in favor of Petitioners.

STANDARD OF REVIEW

The trial court must grant summary judgment "if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Code Civ. Proc. § 437c(c). On appeal, both the grant and denial of a motion for summary judgment are subject to de novo review. *Edward Fineman Co. v. Superior Court*, 66 Cal. App. 4th 1110, 1116 (1998). In addition, "issues of statutory and constitutional interpretation raise pure questions of law, subject to independent appellate review." *Slocum v. State Bd.of Equalization*, 134 Cal. App. 4th 969, 974 (2005).

STATEMENT OF THE CASE

On November 6, 1996, the people of the State of California added Article I, section 31, to the California Constitution through Proposition 209. This constitutional prohibition against race- and sex-based discrimination and preferences in public contracting applies to all subdivisions of the state including any city and county such as San Francisco. Cal. Const. art. I, § 31(a) and (f).

Rejecting compliance with Article I, section 31, the City and County of San Francisco (City), a political subdivision of the State of California reenacted Chapter 12D.A (Chapter 12D) of the San Francisco Administrative Code with an operative date of November 1, 1998. Exhibit 1 at 5, Joint

Appendix (JA) Vol. III: 796 (Ch.12D.A.20). Chapter 12D, titled "Minority/Women/Local Business Utilization Ordinance" (Ordinance), was a fourth version of San Francisco's ordinance which, by its own terms, continued City's preferential treatment of Minority Business Enterprises (MBEs) and Women Business Enterprises (WBEs) in awarding public contracts on the basis of race, sex, ethnicity, and/or national origin with no material operational differences from City's predecessor enactments, dating back to 1984. *Id.* at 685:9. City is now on its fifth version of the Ordinance, *id.* at 685:6-7; in 2003, City reenacted the 1998 ordinance without substantial change. Exhibit 1 at 6. Section 12D.A.3 of the Ordinance sets forth City's determination that "the relationship between the percentages of MBEs[1]/WBEs in the relevant sector of the San Francisco business community and their respective shares of City contract dollars [is the] measure of the effectiveness of this ordinance in remedying the effects of the aforementioned discrimination." JA III: 719:9-12. In plain words, the ordinance requires race and sex balancing of MBE/WBEs and City dollars. City's program is based on the constitutionally impermissible goal that City contracting dollars shall be awarded to MBEs and WBEs in proportion to their respective percentages in the City's business community. *Id.* In order to meet this goal City's

[1] 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.

Ordinance requires City departments to give specified discounts on bids submitted by MBE/WBEs and requires bidders for prime contracts either to meet MBE/WBE subcontractor goals set by City or show a "good faith effort" to do so. Exhibit 1 at 5-6.

Specifically, on prime contract bids, the Ordinance provides for a 10% bid discount for MBE/WBEs; a 7½% bid discount for a joint venture with a MBE/WBE participation that equals or exceeds 40%; and a 5% bid discount for a joint venture with MBE/WBE participation that equals or exceeds 35% but is under 40%. JA III: 740: 6-14. In addition, the Director of City's Human Rights Commission sets MBE/WBE subcontracting "participation goals," i.e., race and sex quotas, for each City public works construction project. JA III: 758-59. Prime contractors failing to satisfy City's quota or "good faith effort" to meet that quota are deemed nonresponsive and their bids are rejected. *Id.* at 759: 19-20.

Petitioner Coral Construction Inc. (Coral), a non-MBE/WBE general engineering contractor challenged these preferences in 2002. First Amended Complaint, JA I: 1-58. Petitioner Schram Construction, Inc. (Schram), a non-MBE/WBE contractor, JA I: 71, filed its challenge to these preferences in 2003. JA: I: 68-144. The superior court consolidated the two cases, granted plaintiffs' motion for summary judgment, and denied City's cross-motion and permanently enjoined the challenged portions of City's preference ordinance.

Exhibit 1 at 9. A final judgment in favor of the plaintiffs was entered on September 10, 2004. JA XIV: 3620. City then appealed the judgment. JA XIV: 3624.

On April 18, 2007, the Court of Appeal filed its opinion affirming the judgment in part but remanding for the limited purpose of adjudicating whether "City presented the extreme case of intentional discrimination in public contracting in San Francisco such that a narrowly tailored remedial preference program could be constitutionally required." Exhibit 1 at 34. Petitioners' Petition for Rehearing was denied on May 14, 2007, Exhibit 2, and the opinion became final on May 18, 2007.

WHY REVIEW SHOULD BE GRANTED

I

REVIEW SHOULD BE GRANTED TO RESOLVE WHETHER A CITY THAT HAS FAILED ON CROSS-MOTIONS FOR SUMMARY JUDGMENT TO ESTABLISH THE REQUIRED PREDICATE OF INTENTIONAL DISCRIMINATION AGAINST MINORITIES AND WOMEN SUFFICIENT TO PERMIT RACE AND SEX PREFERENCES IN PUBLIC CONTRACTING SHOULD BE ENTITLED TO A REMAND TO ATTEMPT TO PROVE SUCH DISCRIMINATION

The Court of Appeal remanded the case to the trial court for "the limited purpose of adjudicating" "whether the City presented the extreme case of intentional discrimination in public contracting in San Francisco such that

a narrowly tailored remedial preference program could be constitutionally required." Exhibit 1 at 34. Such a claim is an affirmative defense and therefore City bears the burden of proving it. *Moss v. Superior Court (Ortiz)*, 17 Cal. 4th 396, 425 (1988).

This is particularly true in cases such as this one that involve race and sex classifications. "A racial classification is presumptively invalid, and the burden is on the government to demonstrate extraordinary justification." *Connerly v. State Personnel Board*, 92 Cal. App. 4th 16, 36 (2001) (citations omitted). Under California law, classification on the basis of sex is similarly suspect, *Sail'er Inn v. Kirby*, 5 Cal. 3d 1, 17 (1971), and the same burden applies.

While City raised numerous affirmative defenses in its Answer to First Amended Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief and Damages in *Coral*, JA I: 65-66 and Answer to Verified Complaint for Declaratory and Injunctive Relief in *Schram*, JA I: 150-51, none of the affirmative defenses made the claim of intentional discrimination by City. Intentional discrimination requires a showing of an intent to discriminate which City has failed to make. And indeed, given that City has enforced its policy of race and sex preferences in favor of MBE/WBEs since 1984, Exhibit 1 at 1, it cannot now claim intentional discrimination against minorities and women. City had its chance to make its

proof in the trial court and failed to do so. The lower court's remand in order to give City a second bite at the preference apple contravenes the decisions of this Court and the courts of appeal.

A. The Decision Remanding the Issue of Intentional Discrimination When the City Failed to Carry Its Burden to Prove That Issue Below Conflicts with the Decisions of This Court and the Courts of Appeal

The appellate court's remand conflicts with the decision of this Court in *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537 (2000). When the City of San Jose failed to show intentional discrimination, and therefore necessarily conceded, that its preference program was not constitutionally required, *id.* at 568, this Court affirmed the judgment without remand. *Id.* at 570.

In *C & C Construction, Inc. v. Sacramento Municipal Utility District*, 122 Cal. App. 4th 284 (2004) (*SMUD*), the plaintiff contractor, C & C, similarly moved for summary judgment. Defendant Sacramento Municipal Utility District (SMUD) opposed that motion and itself moved for summary judgment, contending that its affirmative action program fell within Article I, section 31(e), the federal funding exception of Proposition 209. The trial court granted C & C's motion and denied SMUD's. *Id.* at 291. When SMUD appealed the judgment and permanent injunction, the Court of Appeal noted:

> The trial court granted C & C's motion and denied SMUD's motion. The court held that the affirmative action program violates subdivision (a) of section 31. It reasoned that SMUD

> failed to establish an affirmative defense under subdivision (e) because it produced no evidence of express federal contractual conditions, laws, or regulations that made approval of federal funds contingent upon race-based discrimination. Nor did SMUD offer federal legal authority to support the conclusion that failure to use the affirmative action program would result in the loss of federal funds because federal agencies may not terminate funding without an administrative hearing and judicial review.

Id. at 297.

The court emphasized that in reviewing a summary judgment in favor of a plaintiff, the burden was on the government agency to prove its case below. "Here, C & C has shown it is entitled to judgment against SMUD because SMUD's affirmative action program violates section 31 and SMUD has not shown its program is necessary to maintain federal funding." *Id.* at 311. In emphasizing the importance of the burden on the government entity, the court held: "[W]e conclude SMUD failed to proffer substantial evidence that its race-based discrimination is necessary to maintain federal funding. We therefore affirm the judgment." *Id.* at 291.

In contrast to the decision here, when the governmental entity failed to prove its case on cross-motions for summary judgment the *SMUD* court did not remand for a second chance, but rather affirmed the judgment. This Court denied review of the *SMUD* decision on December 15, 2004. *Id.* at 284.

Connerly v. State Personnel Board, 92 Cal. App. 4th 16, similarly emphasized the requirement on the government to prove its case in the first

instance. "A racial classification is presumptively invalid, and the burden is on the government to demonstrate extraordinary justification." *Id.* at 36, (citing *Shaw v. Reno*, 509 U.S. 630, 643-44 (1993)); *University of California Regents v. Bakke,* 438 U.S. 265, 305, 311 (1978) (lead opn.).

Connerly found that, "when the plaintiff has made a sufficient showing to trigger strict scrutiny review, the burden of justification is both demanding and entirely upon the government." 92 Cal. App. 4th at 43, citing *Bakke*, 438 U.S. at 306 and *Sail'er Inn,* 5 Cal. 3d at 16-17. *Connerly* concluded: "[W]hen the government chooses to rely upon racial and gender distinctions, the scheme is presumptively invalid; we cannot defer to legislative pronouncements, and the burden is on the government to justify the use of the distinction." 92 Cal. App. 4th at 55 (citing *City of Richmond v. J.A.Croson Co.*, 488 U.S. 469, 500-01 (1989)).

Crawford v. Huntington Beach Union High School District, 98 Cal. App. 4th 1275 (2002) (*Huntington Beach*) cites *Connerly* for the "core idea that 'racial classification is presumptively invalid and the burden is on the government to demonstrate extraordinary justification.'" *Id.* at 1281. As does San Francisco here, the school district in *Huntington Beach* claimed that its racial preference policy was required by the Equal Protection Clause of the Federal Constitution. *Id.* at 1285. But when the court found that the school district had failed to carry its burden in its racial balancing scheme, it did not

send the case back to give the district another shot at the target as did the court of appeal in this case. Rather, it directed the trial court to enter "a new order denying the District's motion for summary judgment and granting Crawford's motion for summary judgment. . . ." *Id.* at 1287. This Court denied the school district's petition for review on August 28, 2002. *Id.* at 1275.

Under the applicable standard of de novo review, Exhibit 1 at 9, it is plain that City has failed to meet its burden of proving intentional discrimination. Instead it has presented unverified allegations of isolated instances of discrimination by individuals contrary to City policy. Such acts do not comprise intentional discrimination by City as required by *Hi-Voltage*, 24 Cal. 4th at 568. When the City failed to meet its burden of proof the court of appeal should have affirmed the judgment in its entirety. Its failure to do so conflicts with the holding of *Hi-Voltage, Connerly, SMUD*, and *Huntington Beach*, and under Rule of Court 8.500(b)(1) review is necessary to establish uniformity of decisions.

B. City Has Made No Showing of Intentional Discrimination Sufficient to Support Any Remedy

1. City's Findings Fail to Meet the Constitutional Requirements

The Court of Appeal cited the following dicta in *Hi-Voltage*, 24 Cal. 4th at 568: "Where the state or a political subdivision has intentionally discriminated, use of a race-conscious or race-specific remedy necessarily

follows as the only, or at least the most likely, means of rectifying the resulting injury." Exhibit 1 at 29.

The court below then noted the findings of the San Francisco Board of Supervisors that City is actively discriminating against MBE/WBEs in its contracting and passively participating in discrimination in the private sector. Exhibit 1 at 8.[2]

But, as *Connerly* holds:

> "First, the discrimination must be identified with some degree of specificity. A generalized assertion that there has been discrimination in a particular industry or region is insufficient. . ."
>
> "Second, 'the institution that makes the racial distinction must have had a "strong basis in evidence" to conclude that [race-based] remedial action was necessary, '*before* it embarks on an affirmative-action program.' " "A governmental entity cannot satisfy this criterion simply by conceding past discrimination."

92 Cal. App. 4th at 38, (citing *Shaw v. Hunt,* 517 U.S. 899, 909-10 (1996));

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[2] In this regard, the Court of Appeal's citation, Exhibit 1 at 3-4, to *Associated General Contractors of California, Inc. v. Coalition for Economic Equity*, 950 F.2d 1401 (9th Cir. 1991), is misplaced. Judge O'Scannlain pointed out in his concurrence the limited nature of appellate review of the grant or denial of a preliminary injunction. "Detailed consideration of the merits of AGCC's constitutional claim is neither necessary nor appropriate in this context. The issue is not the constitutionality of the 1989 Ordinance, but simply whether AGCC has shown a sufficient probability of success on the merits to justify preliminary relief." *Id.* at 1419. Further, that case was decided prior to the 1996 enactment of Proposition 209 in which "the voters intended . . . essentially a repudiation of the decisional authority that permitted . . . discrimination and preferential treatment." *Hi-Voltage*, 24 Cal. 4th at 566.

Croson, 488 U.S. at 498-99, 504; and *Wygant v. Jackson Board of Education*, 476 U.S. 267, 278, n.5 (1986) (plur. opn).

While City alleges past discrimination, it is critical to note that there is no finding of intentional discrimination anywhere in the Ordinance. City's generalized findings suffer the identical defects that caused the race preference program to be struck down in *Connerly*.

That City's findings were indeed generalized is shown by the conflicting reality. The opinion below cited the legislative finding that "the disproportionately small percentage of City contracts and subcontracts going to women- and minority-owned businesses was due to discrimination by the City and discrimination in the private sector." Exhibit 1 at 8. This generalized finding was contradicted by the statistical facts set forth in the City's Minority/Women/Local Business Utilization Ordinance (Ordinance). The Ordinance found that for prime construction contracts Caucasian men represented 67.74% of construction firms and received 70.79% of contract dollars, and Latino American firms received more construction contracts than expected based on their availability. JA III: 696: 17-19. Further, "African Americans, Latino Americans and women received more than the number of construction subcontracts one would expect based on their availability. . . ." JA III: 701:9-10. And "[a]lthough Asian Americans represent 13.74 percent of the construction firms, they received only 12.99 percent of the construction

subcontract dollars." *Id.* 701: 7-8. This small disparity for Asian Americans may be attributed to the fact that each of the other major categories of MBE/WBEs received more than their proportionate "share."

These figures show that minorities and women in most cases received more than the expected amount of City construction dollars and in those instances where they received less, the disparity was minimal. The hard figures therefore demonstrate that the legislative finding of "the disproportionately small percentage of City contracts and subcontracts going to women and minority-owned businesses," Exhibit 1 at 8, was a sham as was its corollary of "discrimination by the City and discrimination in the private sector." *Id.*

The lower court's failure to address this undisputed material fact, indeed a fact vouched for in City's own Ordinance and presented both in Respondents' Brief at 28 and Petition for Rehearing at 4-5, indicates that the court's remand for the purpose of determining whether City had presented the extreme case of intentional discrimination, Exhibit 1 at 34, was unnecessary and incorrect as a matter of law.

The court of appeal noted the unsworn statements of claimed discrimination during hearings, Exhibit 1 at 7-8, but *Croson* criticized reliance on the highly conclusionary statements of proponents of the program that there

was racial discrimination in the construction industry in the area. 488 U.S. at 500.

The court of appeal cited the further finding that "the City's contracting practices were in violation of federal law and therefore the Ordinance was required to bring the City into compliance with federal civil rights law." Exhibit 1 at 8. But the court then stated: "the City's generalized arguments and statements [in this regard] are inadequate." Exhibit 1 at 14.

Lastly, the lower court noted City's finding that "race- and gender-conscious remedial programs continued to be required to remedy discrimination against minority- and women-owned businesses in City contracting and subcontracting programs" and that the Board "adopted the ordinance to 'remedy the specifically identified City contracting practices and conditions in the Community and industries that cause the exclusion or reduction of contracting opportunities for minority- and women-owned businesses in City prime and subcontracting programs.' " Exhibit 1 at 8.

The court itself rebutted this generalized finding. "Where is the factual predicate showing the *specific* type of past discrimination that triggers a *particular* regulation's requirement for race-based remedial measures like the bid discount and subcontracting programs? The City's generalized arguments and statements are inadequate." Exhibit 1 at 13-14.

In criticizing the City of Richmond's findings the Supreme Court declared:

> None of these "findings," singly or together, provide the city . . . with a "strong basis in evidence for its conclusion that remedial action was necessary. There is nothing approaching a prima facie case of a constitutional or statutory violation by *anyone* in the Richmond construction industry.
>
> . . . .
>
> This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation. Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice.
>
> The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis.

Croson, 488 U.S. at 500-01, internal citations and quotation marks omitted.

Having found that City had failed to show specific findings of discrimination, the court below departed from the rulings in *Hi-Voltage, SMUD*, and *Connerly* in failing to affirm the judgment against City.

2. City Admits It Has No Knowledge of Discrimination Against MBE/WBEs by Its Employees or Private Contractors with the City

In contradistinction to City's generalized findings and lack of specific findings, Exhibit 1 at 13-14, Petitioner Coral Construction (Coral) presented evidence completely rebutting City's findings. 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. Exhibit 1 at 6 to Respondents' Supplemental Appendix (RSA). 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.[3] *Id.* at 8-10 and 16. Although these admissions were presented to the appellate court in Respondents' Brief at 21-22 and Petition for Rehearing at 7-8, they were ignored by the court.

These admissions by City are part of the record in this case. 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. *Kropp v. Sterling Sav. & Loan Assn.*, 9 Cal. App.

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

3d 1033, 1046 (1970), holds that upon consolidation the separate pleadings are treated as one set. *Didier v. American Casualty Co.*, 261 Cal. App. 2d 742, 752 (1968), holds 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, the City reenacted the Ordinance in 2003, without substantial change. Exhibit 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. Exhibit 1 at 7. Since this is a de novo review, the appellate 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.

These admissions show that City's generalized findings lack the "strong basis in evidence for its conclusion that remedial action was necessary." *Croson*, 488 U.S. at 500. The findings instead suggest that, as warned in *Croson*, they "are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Id.* at 493.

C. San Francisco's Race and Sex Preferences Are Based on an Unconstitutional Policy of Race and Sex Balancing

San Francisco's race and sex preferences are not remedial but rather based on unconstitutional race and sex balancing. The City's Ordinance specifies that "the relationship between the percentages of MBEs/WBEs [Minority Business Enterprises/Women Business Enterprises] in the relevant sector of the San Francisco business community and their respective shares of City contract dollars [is the] measure of the effectiveness of this ordinance in remedying the effects of the aforementioned discrimination." JA III at 719: 9-12. This provision sets the policy that discrimination is defined by race and sex balancing. Race and sex balancing is unconstitutional under both the California and United States Constitutions.

Hi-Voltage criticized "this change in focus from protection of equal opportunity for all individuals to entitlement based on group representation." 24 Cal. 4th at 555. *Hi-Voltage* quoted with approval Justice Harlan's dissent in *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896): "'Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.'" 24 Cal. 4th at 546. This Court then forcefully declared the error of race and sex-balancing programs such as City's.

> [They] purport to *eliminate* discrimination by means of *creating* discrimination; they construe *equality* of all persons regardless of race to mean *preference* for persons of some races over others; and a hiring program which *compels* compliance by a reluctant [county agency] is described as *voluntary*. It is now

> clear that undergirding much of the rhetoric supporting racial quotas, and preferential treatment in general, is a view of justice that demands not that the state treat its citizens without reference to their race, but that it rearrange and index them precisely on the basis of their race. The objective is not equal treatment but equal representation.

Id. at 558, internal citation and quotation marks omitted.

Croson criticized the City of Richmond's race preference program in public contracting stating that it "cannot be said to be narrowly tailored to any goal, except perhaps outright racial balancing." 488 U.S. at 507. More recently that Court declared in *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003), that racial balancing is "patently unconstitutional."

Connerly, in striking down state race and sex preference policies, spoke directly to the issue.

> The establishment of an overall and continuing hiring goal . . . is, unquestionably, a preferential hiring scheme in violation of Proposition 209. Moreover, a goal of assuring participation by some specified percentage of a particular group merely because of its race or gender is "discrimination for its own sake" and must be rejected as facially invalid under equal protection principles.

92 Cal. App. 4th at 59, citation omitted.

This holding was cited with approval in *Huntington Beach*, 98 Cal. App. 4th at 1282-83. That court cited *Milliken v. Bradley*, 433 U.S. 267, 280 n.14 (1977), for the principle that there is no federal constitutional right to a particular degree of racial balance, 98 Cal. App. 4th at 1285, and went on to

rule that "the racial balancing component of the District's open transfer policy is invalid under our state Constitution." *Id.* at 1287.

Here, City's goal of seeking race and sex proportionality in public contracting through race and sex preferences similarly violates Article I, section 31. This policy of preferences constitutes "'a line drawn on the basis of race and ethnic status' as well as sex," and thereby "plainly runs counter to the express intent . . . of Proposition 209." *Hi-Voltage*, 24 Cal. 4th at 563, citations omitted. The Court of Appeal's failure to apply this standard, presented to the court in Respondents' Brief at 3-6 and Petition for Rehearing at 1-2, contravenes *Hi-Voltage, Connerly*, and *Huntington Beach*.

D. City's Disparity Report Is Irrelevant and Inadequate to Justify Race and Sex Preferences

The court below criticized the trial court's finding that City's reliance on its disparity study was not compelling and indeed was irrelevant. Exhibit 1 at 29-30. Disparity studies may have some utility under the strict scrutiny standard of the Fourteenth Amendment which "allows discrimination and preferential treatment whenever a court determines they are justified by a compelling state interest and are narrowly tailored to address an identified remedial need.... Unlike the equal protection clause, section 31 categorically prohibits discrimination and preferential treatment. Its literal language admits no 'compelling state interest' exception...." *Hi-Voltage*, 24 Cal. 4th at 567. Disparity studies are thus irrelevant in section 31 litigation.

City's disparity study is further irrelevant because it does not actually find discrimination in City's policies and practices and does not identify anyone who is discriminating. Instead, the disparity study is based on a faulty premise: "Under a fair and equitable system of awarding contracts, the proportion of contract dollars awarded to minority-and women-owned business enterprises would be equal to the proportion of willing and able minority-and women-owned enterprises in the relevant market area." Ordinance 12D.A.2, JA III: 693: 17-19. As noted above, this is the race-sex balancing rationale uniformly found unconstitutional by California and federal courts. *Hi-Voltage,* 24 Cal. 4th at 555 and 558; *Croson*, 488 U.S. at 507-08; *Grutter v. Bollinger*, 539 U.S. at 330.

As this Court found in *Hi-Voltage*: "The City's disparity study, at best, creates only an inference of discrimination against MBE/WBE subcontractors by prime contractors; it does not establish intentional acts by the City." 24 Cal. 4th at 568. That inference must be proved by actual evidence. Here, City's disparity report is irrelevant because its findings of underutilization of minority- and women-owned businesses are contradicted by the actual evidence of MBE/WBE participation set forth in the Ordinance as noted in Section I.B. of this petition. *See*, JA III: 696: 17-19; JA III: 701: 9-10; JA III: 701: 7-8. The fact that these figures show no substantial disparity in

MBE/WBE utilization proves that the disparity study is not only irrelevant but false on its face.

II

REVIEW SHOULD BE GRANTED TO RESOLVE WHETHER A CITY THAT ENACTS RACE AND SEX PREFERENCES IN PUBLIC CONTRACTING THAT HAVE NO RELATION TO ALLEGED FORMS OF DISCRIMINATION AGAINST MINORITIES AND WOMEN IS ENTITLED TO A REMAND IN ORDER TO MAKE A SECOND ATTEMPT TO JUSTIFY SUCH PREFERENCES

Notwithstanding extensive briefing on this issue, Respondents' Brief at 26-32, Petition for Rehearing at 12-17, the court below failed to discuss the blatant lack of narrow tailoring of City's race and sex preferences. Even had City proved the requisite predicate of intentional discrimination, and it did not, its indiscriminate award of preferences to every MBE/WBE does not meet this Court's standard of "limited use of racial classification in order to remedy such discrimination." *Hi-Voltage*, 24 Cal. 4th at 568.

A. The Decision Remanding the Issue of Showing a Narrowly Tailored Remedy When the City Failed to Prove That Issue Below Conflicts with the Decisions of This Court and of the Courts of Appeal

This Court questioned in *Hi-Voltage*, "the City's implicit premise that its Program meets the federal equal protection standard. As the Supreme Court explained in *Wygant, supra*, 476 U.S. 267, 'the means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to

accomplish that purpose [Citation.] 'Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.'" 24 Cal. 4th at 569.

The courts of appeal similarly require that remedies be narrowly tailored. As stated in *C & C Construction*,

> [H]ere, SMUD's disparity studies concluded that there had been past discrimination. . . . [H]owever, SMUD made no attempt in its disparity studies to identify federal laws and regulation and to test factual findings against those laws and regulations. Nor did it study whether race-neutral programs would suffice. [ ] Once a factual predicate for current race-based measures is established, the state agency must narrowly tailor its remedy to conform to the federal requirement in the least discriminatory manner.

122 Cal. App. 4th at 300.

The *SMUD* court criticized SMUD's use of its disparity study:

> [T]o justify race-based discrimination [that] ignored SMUD's constitutional burden under section 31 to prefer race-neutral remedies over race-based remedies and avoided a determination of whether there were race-neutral alternatives available to remedy disparities in contracting. Far from showing the program was narrowly tailored to maintain federal funding while complying to the extent it could with section 31, subdivision (a), SMUD simply adopted a race-based affirmative action without regard to section 31, subdivision (a) and, only later, tried to justify its actions.

Id. at 310.

This is what San Francisco did here. Instead of showing its preferences were narrowly tailored to meet the requirements of the Federal Equal Protection Clause, City simply renewed its race- and sex-based preferences

without regard to section 31 and now seeks to justify its actions on remand. This was not allowed in *SMUD* and should not be permitted here.

The *SMUD* court concluded:

> SMUD cannot impose race-based affirmative action unless it can establish that it cannot remediate past discrimination with race-neutral measures. The California Constitution requires the state agency to comply with *both* the federal laws and regulations *and* section 31, subdivision (a), if possible. Applying these basic principles to the undisputed facts of this case shows why SMUD has failed to provide substantial evidence justifying its discrimination.

Id. at 311.

When City failed to provide substantial evidence justifying its discrimination here, the lower court should have followed *SMUD* and affirmed the judgment.

Connerly v. State Personnel Board, 92 Cal. App. 4th at 33 holds,

> Because suspect classifications are pernicious and are so rarely relevant to a legitimate governmental purpose, they are subjected to strict judicial scrutiny; i.e., they may be upheld only if they are shown to be necessary for furtherance of a compelling state interest and they address that interest through the least restrictive means available.

(Citations omitted). Here, City's MBE/WBE bid preferences and subcontractor preferences failed this standard.

Connerly got to the heart of the narrow tailoring issue in this case:

> Where the government proposes to assure participation of "some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial but as facially invalid. Preferring

> members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids."

92 Cal. App. 4th at 34, (quoting *Bakke,* 438 U.S. at 307; and citing *Croson,* 488 U.S. at 497).

City's policy of mirroring the percentage of minorities and women in the industry, JA III 719: 9-12, is the epitome of assuring participation of "some specified percentage" of those particular groups and this preferential purpose must be rejected as facially invalid.

In addition, City's means chosen to this unconstitutional end further fails the narrow tailoring standard. As *Connerly* notes, 92 Cal. App. 4th at 38-39, in order to be lawful, the governmental use of racial classification to redress specific discrimination must actually be remedial. *Connerly* emphasizes that

> the remedy must be created with the awareness that the right to be free of discrimination belongs to the individual rather than any particular group. Thus, the remedy must be designed as nearly as possible to restore the victims of specific discriminatory conduct to the position they would have occupied in the absence of such conduct. Random inclusion of racial groups without individualized consideration whether the particular groups suffered from discrimination will belie a claim of remedial motivation. The lack of any effort to limit the benefits of a remedial scheme to those who actually suffered from specific discrimination will be fatal to the scheme.

Connerly, 92 Cal. App. 4th at 38-39 (citing *Shaw v. Hunt,* 517 U.S. at 915, *Croson* at 488 U.S. at 506, 508, *Wygant*, 476 U.S. at 284).

In words that apply equally here, Connerly held:

> The statutory scheme does not arguably withstand strict scrutiny. No justification has been shown. . . . There was no effort to measure the remedy against the consequences of identified discrimination. There was no effort to limit recovery to those who actually suffered from prior discrimination. There was no showing that non-race-based and non-gender-based remedies would be inadequate or were even considered. The scheme is unlimited in duration.

92 Cal. App. 4th at 53.

Here, the court of appeal's refusal to examine and measure the lack of narrow tailoring of City's race and sex preference programs puts its opinion squarely at odds with *Hi-Voltage*, *SMUD*, and *Connerly*.

B. Bid Preferences and Subcontractor Preferences Have No Relation to the Alleged Instances of Discrimination

This Court held in *Hi-Voltage* that racial classifications require the most exact connection between justification and classification. 24 Cal. 4th at 669. To similar effect *SMUD* holds: "[O]nce a factual predicate for current race-based measures is established, the state agency must narrowly tailor its remedy to conform to the federal requirement in the least discriminatory manner." 122 Cal. App. 4th at 300. The court below did not hold City to those standards.

The court of appeal, Exhibit 1 at 7, cited a City Human Rights Commission (HRC) memorandum stating alleged examples of departmental

and subcontractor resistance to the HRC's attempts to enforce the ordinance, as well as examples of noncompliance, such as:

> [A] City staffer who manipulated a member of the selection panel to ensure that a certified firm received a low score and therefore would not be considered. Further, City staffers (1) would blame MBE/WBE prime contractors for project delays, knowing they were caused by non-MBE/WBE subcontractors; (2) impose unreasonably strict technical requirements (e.g., unnecessarily high number of years experience), resulting in automatic exclusion of many MBE/WBE companies; and (3) routinely extend contracts rather than putting them out for a new bid, thus limiting opportunities for MBE/WBE firms.

Id.

The court also cited the HRC hearings at which "minority contractors spoke of experiencing unfair scoring practices and indicated that a City official changed subcontracting rules and the scope of work to ensure exclusion of MBE's/WBE's from some contracting opportunities." Exhibit 1 at 7. The court further stated that

> [t]he record reviewed by the Board also exposed the ways in which prime contractors tried to circumvent compliance with the MBE/WBE ordinance. For example, MBE/WBE firms listed as subcontractors often receive little or none of the promised work; instead, work was performed by the prime contractor or another noncertified subcontractor. In one instance, once the subcontractor reached the allotted percentage as a subcontractor, her firm was immediately dropped from the job. Majority contractors have also refused to tender prompt payment for services of MBE's and WBE's.

Id. at 7-8.

But as *Connerly* holds:

> Once a compelling interest is shown, the inquiry focuses on the means chosen to address the interest. It is not enough that the means chosen to accomplish the purpose are reasonable or efficient. Only 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 (citing *Croson*, 488 U.S. at 507, 510).

The means chosen by City are neither reasonable, efficient, nor in any way connected, let alone exactly connected, to the complaints set forth. Bid discounts and Subcontractor Quotas and Outreach have no relation to any of these alleged violations and would do nothing to remedy them. Indeed, the court below ignored the fact that these alleged violations occurred under the predecessor ordinance which was reenacted in 2003 without substantial change. Exhibit 1 at 8, n.4. If the bid preferences and subcontractor preferences were useless to prevent or remedy those alleged violations under the 1998 ordinance, it is apparent that they will similarly be useless under the current Ordinance. Under *Connerly*, this fact is "fatal to the classification." 92 Cal. App. 4th at 37.

The narrowly tailored remedy in the event of actual discrimination would be to sanction those City employees or construction firms that engaged in prohibited discrimination by firing the City employees and debarring the contractors from future City work. City has stubbornly ignored this remedy, presumably because, as it admitted in discovery, it has never actually identified any discrimination on the part of its employees or contractors. Respondents' Supplemental Appendix at 8-10 and 16. As *Connerly* dictates, City's failure to consider sanctioning those who are actually discriminating, if any, is fatal to City's suspect preferences. 92 Cal. App. 4th at 37.

City's preference program further fails the narrow tailoring requirement because, as in *City of Richmond v. J.A. Croson Co.*, 488 U.S. at 508, "there is no inquiry into whether or not the particular MBE [or here, WBE] seeking a racial [or sex] preference has suffered from the effects of past discrimination by the city or prime contractors." This concern was echoed in *Connerly*. "There was no effort to limit discovery to those who actually suffered from prior discrimination." 92 Cal. App. 4th at 53. It is therefore apparent that City's race and sex preferences fail the constitutional command of narrow tailoring and the court below's failure to enforce this standard conflicts with this Court's holding in *Hi-Voltage* and the decisions in *Connerly* and *SMUD*.

C. City's Stated Intention to Maintain Its Race and Sex Preferences in Perpetuity Shows They Are Not Narrowly Tailored

Despite the fact that City has found that MBE/WBEs have statistically met or exceeded their proportional "share," City justifies its ongoing discrimination against non-MBE/WBEs based on the speculation that if it abandoned its preferences these numbers would diminish. JA III: 701:10-15. This rationalization ensures that City's discriminatory preferences will continue in perpetuity in violation of California and federal constitutional decisions requiring that any "deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter. . . ." *Croson*, 488 U.S. at 510. More recently, *Grutter* found that the requirement that race-conscious policies must be limited in time "reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands. Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle." 539 U.S. at 342. City's statement of intent to continue its race and sex preferences in perpetuity shows that City's policies are not narrowly tailored remedies but rather "simple racial politics," *Croson*, 488 U.S. 49.

City's perpetual preference conflicts with the holding in *Connerly* that "the use of a racial classification must be limited in scope and duration to that which is necessary to accomplish the legislative purpose." 92 Cal. App. 4th at

37. Indeed, the Court of Appeal there held the state's bond preference program violated Proposition 209 in part because "[t]he scheme is unlimited in duration." *Id.* at 53.

As *Connerly* summarized:

> The establishment of an overall and continuing hiring goal . . . is, unquestionably, a preferential hiring scheme in violation of Proposition 209. Moreover, a goal of assuring participation by some specified percentage of a particular group merely because of its race or gender is 'discrimination for its own sake' and must be rejected as facially invalid under equal protection principles.

Id. at 59 (citing *Bakke*, 438 U.S. at 307; *Croson*, 488 U.S. at 497).

The refusal of the court below to address City's violation of Proposition 209's and the Fourteenth Amendment Equal Protection Clause's prohibition of perpetual preferences, Respondents' Brief at 28-29, Petition for Rehearing at 13, conflicts with the ruling in *Connerly*.

D. City Has Ignored Article I, Section 31(g), and Other Antidiscrimination Laws

Proposition 209 itself sets forth the remedy for discrimination. Subsection (g) provides: "The 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." Cal. Const. art. I, § 31(g). There has been no showing that the City or any MBE/WBE has ever filed suit under this or any other antidiscrimination provision against any City employee or prime

contractor with the City. This is yet another indication that there has been no proven discrimination on the basis or race or sex against MBE/WBEs in City public works contracting.

As *Croson* held, "[t]he complete silence of the record concerning enforcement of the city's own antidiscrimination ordinance flies in the face of the . . . vision of a 'tight-knit industry'. . . ." 488 U.S. at 502 n.3. While City is required to use "the least restrictive means available" when applying suspect classifications such as race and sex, *Connerly*, 92 Cal. App. 4th at 33, it has failed to take the obvious and most effective sanction of finding and disciplining actual malfeasors. Instead, City uses the broadest possible measure of race- and sex-based bid preferences and subcontractor quotas and recruitment. Because City's preferences are the antithesis of narrow tailoring they violate both the California and Federal Constitutions. The court of appeal's failure to follow these authorities conflicts with the decisions of this Court in *Hi-Voltage* and the decisions of the Courts of Appeal in *SMUD* and *Connerly*.

CONCLUSION

In remanding this case the court of appeal ignored the fact that San Francisco failed, as conceded in City's Ordinance statistics and admissions in discovery, to carry its burden to prove intentional discrimination against minority and women business enterprises. The court further ignored the

dispositive fact that the preferences mandated by San Francisco are in no way narrowly tailored to remedy City's claimed forms of discrimination. The decision below thus conflicts with *Hi-Voltage, Connerly, SMUD*, and *Huntington Beach* and pursuant to Rule of Court 8.500(b) review is necessary to secure uniformity with those decisions.

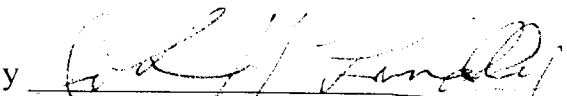
Where, as here, the standard of review is de novo, "an appellate court can and should make its own determination when the case involves the 'resolution of questions of law where the facts are undisputed.'" *Seligsohn v. Day*, 121 Cal. App. 4th 518, 522 (2004) (citations omitted). Remanding this case in order to give San Francisco a second opportunity to prove "the extreme case of intentional discrimination in public contracting," and "a narrowly tailored remedial preference program," Exhibit 1 at 34, when City failed to make that case on cross-motions for summary judgment contravenes that standard. Review should be granted to bring the decision below into

conformity with the decisions of this Court and the courts of appeal cited herein by affirming the judgment of the trial court in its entirety and without remand.

DATED: May 24, 2007.

Respectfully submitted,

JOHN H. FINDLEY
SHARON L. BROWNE
PAUL J. BEARD II

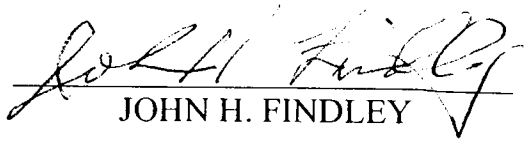
By 
JOHN H. FINDLEY

Attorneys for Plaintiffs/Respondents/Petitioners

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing Petition for Review is proportionately spaced, has a typeface of 13 points or more, and contains 7,662 words.

DATED: May 24, 2007.



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.

On May 24, 2007, true copies of PETITION FOR REVIEW were placed in envelopes addressed to:

DENNIS J. HERRERA
JAMES M. EMERY
City Attorney's Office
City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102

MARA E. ROSALES
JOSEPH M. QUINN
K. SCOTT DICKEY
Meyers, Nave, Riback, Silver & Wilson
555 12th Street. Suite 1500
Oakland, CA 94607

G. SCOTT EMBLIDGE
RACHEL J. SATER
Moscone, Emblidge & Quadra, LLP
220 Montgomery Street, Suite 2100
San Francisco, CA 94104-4238

Filed 4/18/07

CERTIFIED FOR PUBLICATION

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

CORAL CONSTRUCTION, INC., Plaintiff and Respondent, v. CITY AND COUNTY OF SAN FRANCISCO et al., Defendants and Appellants.	A107803 (San Francisco County Super. Ct. No. 319549)
SCHRAM CONSTRUCTION, INC., Plaintiff and Respondent, v. CITY AND COUNTY OF SAN FRANCISCO et al., Defendants and Appellants.	(San Francisco County Super. Ct. No. 421249)

Since 1984, the City and County of San Francisco has operated under various iterations of its Minority/Women/Local Business Utilization Ordinance (Ordinance). The Ordinance, in its several forms, has called for race- and gender-conscious remedies to ameliorate the effects of past discrimination in the awarding of City contracts.

More than 10 years ago the California electorate adopted Proposition 209, the California Civil Rights Initiative, thereby adding article I, section 31 (§ 31) to our Constitution. This amendment prohibits all state and local governments and entities from discriminating against, or granting preferential treatment to, "any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of

public employment, public education, or public contracting." (§ 31, subd. (a).) This appeal centers on the prohibition against distribution of race- and gender-based preferences in public contracting.

Subsequent to the adoption of section 31, the City enacted another version of the Ordinance. Two construction companies[1] challenged the Ordinance on grounds that certain provisions patently violated section 31.

On cross-motions for summary judgment, the trial court struck down the Ordinance as violative of section 31 and rejected the City's arguments that (1) section 31 is preempted by the International Convention on the Elimination of All Forms of Racial Discrimination (Race Convention), a human rights treaty ratified by Congress in 1994; (2) section 31 offends the *Hunter/Seattle*[2] political restructuring arm of equal protection jurisprudence; and (3) pervasive past discrimination in public contracting converts the Ordinance into a remedial measure *required* by the federal equal protection clause such that the superior mandate of that clause preempts section 31. The City has appealed.

We conclude that the trial court correctly determined that section 31 (1) is not preempted by the Race Convention and (2) does not offend the *Hunter/Seattle* restructuring arm of equal protection jurisprudence. We further hold that the Ordinance is not required to maintain the City's eligibility for federal funds.

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[1] The companies are Coral Construction, Inc. (Coral) and Schram Construction, Inc. (Schram) (collectively, respondents).

Appellants herein are the City and County of San Francisco; John L. Martin, in his official capacity as Director of the San Francisco International Airport; Henry E. Berman, Larry Mazzola, Michael S. Strunsky, Linda S. Crayton and Caryl Ito, in their official capacities as members of the Airport Commission of the City and County of San Francisco; and the San Francisco Public Utilities Commission (collectively, City). Coalition for Economic Equity has filed an amicus curiae brief on behalf of appellants in this appeal.

[2] Based on *Hunter v. Erickson* (1969) 393 U.S. 385 (*Hunter*) and *Washington v. Seattle School Dist. No. 1* (1982) 458 U.S. 457 (*Seattle*).

However, the trial court failed to adjudicate the matter of whether the Ordinance is mandated by the federal Constitution as a narrowly tailored remedial program to remedy ongoing, pervasive discrimination in public contracting. Accordingly, we will remand the matter to the trial court for the limited purpose of adjudicating this issue. In all other respects, the judgment is affirmed.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. *History of the Ordinance*

1. *1984 and 1989 Ordinances*

In *Associated Gen. Contractors of Cal. v. Coalition* (9th Cir. 1991) 950 F.2d 1401 (*AGCC II*), involving a challenge to the 1989 Ordinance, the reviewing court summarized the early history of the Ordinance, as follows:

"In April 1984, the San Francisco Board of Supervisors (the 'Board') passed the Minority/Women/Local Business Utilization Ordinance . . . , which required the City to set aside designated percentages of its contracting dollars to minority-owned business enterprises [MBE's] and women-owned business enterprises [WBE's]. In addition, the 1984 Ordinance required that MBEs, WBEs and locall[y]-owned business enterprises ('LBEs') receive a five percent bidding preference to be taken into account when the City calculated the low bid on city contracts.

"AGCC, an organization of contractors engaged in the building and construction industry, . . . challenged the implementation of the 1984 Ordinance in court. In reviewing the ordinance, this circuit upheld the provisions favoring WBEs and LBEs against AGCC's constitutional challenge but invalidated the provisions favoring MBEs. *AGCC v. City and County of San Francisco*, 813 F.2d 922, 928-44 (9th Cir. 1987), *petition dismissed*, 493 U.S. 928, [citations] (1989) (*AGCC I*). In addition, we ruled that all bidding preferences, insofar as they applied to contracts over $50,000, violated [the] San Francisco City Charter . . . .

"Shortly after our decision in *AGCC I*, the Supreme Court considered a similar minority set-aside plan in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 [*Croson*] [citations] (1989). In that decision, a deeply divided Supreme Court struck

down the racial set-aside plan adopted by the city of Richmond, Virginia. At the same time, however, the Court confirmed that municipalities could employ race-conscious remedies to redress discrimination in certain circumstances. [Citations.] Prior to *Croson*, the City had been investigating continued discrimination in city contracting. In that capacity, it had received, among other information, testimony from 42 witnesses, and written submittals from 127 minority, women, local, and other business representatives. Subsequently, in an attempt to determine whether *Croson*'s criteria for permitting race-conscious ordinances were met with respect to San Francisco, the City held an additional ten public hearings, commissioned two statistical studies, and sought written submissions from the public. Out of this process emerged the 1989 Ordinance . . . ." (*AGCC II*, *supra*, 950 F.2d at pp. 1403-1404, fn. omitted.)

The summary continued: "Rather than providing the set-asides mandated by the 1984 Ordinance, the 1989 Ordinance gives bid preferences to prime contractors who are members of groups found disadvantaged by previous bidding practices." (*AGCC II*, *supra*, 950 F.2d at p. 1404.) AGCC contested the 1989 Ordinance as well, arguing that it violated the federal equal protection clause and failed to satisfy the *Croson* standards for race-conscious remedies. The Ninth Circuit concluded that the City was "likely to demonstrate a 'strong basis in evidence' supporting its decision to adopt a race-conscious plan" (*id.* at p. 1416, fn. omitted) and that the Ordinance was narrowly tailored to redress the consequences of discrimination (*id.* at pp. 1416-1418).

2. *1998 Ordinance*

The 1989 Ordinance expired on October 31, 1998. In the interim period the City's Board of Supervisors (Board) and the City's Human Rights Commission (HRC) conducted further investigations to determine whether discrimination in contracting had been eradicated or mitigated. This effort included 14 public hearings (eight of which occurred in 1997 and 1998), live testimony from 254 witnesses, videotaped testimony from numerous other witnesses, statistical disparity studies and

other documentary evidence pertinent to alleged discrimination and bidding irregularities.

Minority contractors observed that, as compared with nonminority contractors, City inspectors imposed more onerous requirements on them, scrutinized their work more closely and treated them more harshly if they made mistakes. For example, while inspectors would waive compliance with certain requirements for majority-owned firms, they forced minority contractors to redo the same work on the same programs, at substantial cost. As well, one minority contractor spoke of being harassed and subjected to racist and derogatory remarks from City inspectors. Another complained of being subjected to more rigorous background-vetting despite his extensive qualifications and experience.

Upon review of all the materials, the Board made findings of continued discrimination in public contracting and subcontracting against minority- and women-owned businesses, concluding that a new MBE/WBE ordinance was needed and that race-neutral measures employed by the City had not been helpful in preventing such discrimination. The Board adopted the 1998 version of the Ordinance, which was in effect at the time the instant complaints were filed.

The 1998 Ordinance provided for a bid discount program which required City departments to give specified discounts to contract bids submitted by certified WBE's or MBE's. (S.F. Admin. Code, §§ 12D.A.9(A)(2), 12D.A.5, 12D.A.6(b).) Additionally, it contained a subcontracting program requiring bidders for certain prime contracts to document their good-faith efforts to use MBE and WBE subcontractors. (*Id.*, § 12D.A.17.) As summarized by the HRC director, the subcontracting program works this way: " '[B]idders for certain types of prime City contracts must demonstrate their good faith efforts to provide certified MBEs and WBEs an equal opportunity to compete for subcontracts. A bidder may comply with the Subcontracting Program by documenting its good faith efforts to inform MBEs and WBEs of subcontracting opportunities. Bidders who show that they plan to use

MBE and WBE subcontractors at a level one would expect absent discrimination need not document their good faith efforts.' "[3]

"Good-faith efforts" which a prime contractor must demonstrate to comply with the MBE/WBE participation goals include: identifying specific items on the project to be performed by MBE's/WBE's to provide participation opportunities by those entities; advertising for MBE's or WBE's in one or more newspapers, trade publications, minority-oriented publications or other media, not less than 10 calendar days before the bid submittal date; providing written notice of the contractor's interest in bidding on the contract to the number of MBE's or WBE's required to be notified by the project specifications; following up initial solicitations of interest by contacting potential MBE/WBE subcontractors to ascertain their interest; providing interested MBE's/WBE's with information about plans, specifications and requirements of the project; requesting assistance from minority and women community organizations, professional groups or business assistance offices to identify available MBE's and WBE's; negotiating in good faith with interested MBE's and WBE's and not rejecting bids unjustifiably; and advising and making efforts to assist interested MBE's/WBE's in obtaining bonds, credit or insurance. (S.F. Admin. Code, § 12D.A.5.)

3. *The 2003 Ordinance*

The 1998 Ordinance expired in 2003. Further investigation and public hearings followed, and in May 2003 the Board reauthorized the 1998 Ordinance, without substantial change.

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[3] *Coral Construction, Inc. v. City and County of San Francisco* (2004) 116 Cal.App.4th 6, 10, footnote omitted (*Coral I*). The level of MBE/WBE subcontract work one would anticipate absent discrimination is set by the HRC director and staff. It is based on the subcontracting opportunities presented by the particular contract and the availability of certified MBE's and WBE's qualified to perform the type of work involved in the contract. (*Ibid.*, fn. 2.)

The investigation included a 2003 disparity analysis conducted by HRC to assess the utilization of MBE's and WBE's in City contracting. This study revealed continued statistically significant underutilization of racial, ethnic, and nonminority women-owned businesses as prime contractors on various types of City projects. Additionally, there was statistically relevant underutilization of such businesses at the subcontracting level. HRC also released a memorandum in 2003 relaying examples of departmental and subcontractor resistance to the commission's attempts to enforce the ordinance, as well as examples of noncompliance, including an example of a City staffer who manipulated a member of the selection panel to ensure that a certified firm received a low score and therefore would not be considered. Further, City staffers (1) would blame MBE/WBE prime contractors for project delays, knowing they were caused by non-MBE/WBE subcontractors; (2) impose unreasonably strict technical requirements (e.g., unnecessarily high number of years' experience), resulting in automatic exclusion of many MBE/WBE companies; and (3) routinely extend contracts rather than putting them out for a new bid, thus limiting opportunities for MBE/WBE firms.

The Board and the HRC conducted hearings in 2002-2003 at which 134 individuals testified. The general findings supporting the 2003 Ordinance describe the testimony as recounting "*the discrimination minorities and women continue to face in City contracting and in obtaining contracts in the Bay Area that are not subject to affirmative action programs*." For example, minority contractors spoke of experiencing unfair scoring practices and indicated that a City official changed subcontracting rules and the scope of work to ensure exclusion of MBE's/WBE's from some contracting opportunities.

The record reviewed by the Board also exposed the ways in which prime contractors tried to circumvent compliance with the MBE/WBE ordinance. For example, MBE/WBE firms listed as subcontractors often receive little or none of the promised work; instead, work was performed by the prime contractor or another noncertified subcontractor. In one instance, once the subcontractor reached the

allotted percentage as a subcontractor, her firm was immediately dropped from the job. Majority contractors have also refused to tender prompt payment for services of MBE's and WBE's.

Extensive legislative findings accompanied enactment of the 2003 ordinance, including that (1) the disproportionately small percentage of City contracts and subcontracts going to women and minority-owned businesses was due to discrimination by the City and discrimination in the private sector; (2) the City was actively discriminating against women and minority groups in its contracting, and was passively participating in private sector discrimination; (3) the City's contracting practices were in violation of federal law and therefore the Ordinance was required to bring the City into compliance with federal civil rights law; and (4) race- and gender-conscious remedial programs continued to be required to remedy discrimination against minority- and women-owned businesses in City contracting and subcontracting programs. The Board adopted the ordinance to "remedy the specifically identified City contracting practices and conditions in the Community and industries that cause the exclusion or reduction of contracting opportunities for minority- and women-owned businesses in City prime and subcontracting programs."

B. *Procedural History*

Coral challenged the Ordinance in 2001, seeking a writ of mandate compelling the City to implement race- and sex-neutral contracting policies and practices and directing it to cease implementing the 1998 Ordinance.[4] Coral also sought declaratory relief on the assertion that the bid discount and subcontracting programs facially violated section 31. The City successfully attacked Coral's standing in the trial court, but we reversed. (*Coral I, supra*, 116 Cal.App.4th at pp. 10, 28.)

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[4] Although the 1998 Ordinance has expired, Coral's challenge is not moot because the 2003 Ordinance reenacted the 1998 law without significant change, based on new findings.

Meanwhile, in 2003 Schram filed a complaint for declaratory and injunctive relief, similarly alleging that the Ordinance facially violated section 31. Schram and the City filed cross-motions for summary judgment. The City presented volumes of evidence consisting primarily of the evidence the Board cited and relied upon in the preamble and findings to the 1998 and 2003 Ordinances.

While the summary judgment motions were pending, *Coral I* was remanded to the trial court and the two cases were consolidated by stipulation. All agreed that Coral would join Schram's motion and opposition, with no further briefing or record submissions.

Thereafter the trial court granted respondents' motion, denied the City's motion and entered judgment and permanent prohibitory injunction. This appeal followed.

II. DISCUSSION

A. *Standard of Review*

The trial court must grant summary judgment "if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) Both the denial and grant of a motion for summary judgment are subject to de novo review. (*Edward Fineman Co. v. Superior Court* (1998) 66 Cal.App.4th 1110, 1116.) "As well, issues of statutory and constitutional interpretation raise pure questions of law, subject to independent appellate review. [Citation.]" (*Slocum v. State Bd. of Equalization* (2005) 134 Cal.App.4th 969, 974.)

B. *The Federal Funding Exception to Section 31 Does Not Save the Ordinance*

There is a federal funding exception to section 31 that exempts certain enactments and actions from its reach. It states: "Nothing in this section shall be interpreted as prohibiting action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the State." (§ 31, subd. (e).) The City presented undisputed evidence that several departments and agencies—including the Port of San Francisco

and the San Francisco International Airport, Public Utilities Commission, Municipal Railway and Department of Public Works—receive funding from various federal agencies and that the granting agencies require its recipients to comply with title VI of the Civil Rights Act of 1964 (Civil Rights Act)[5] and the implementing regulations. The City is adamant that without the race- and gender-conscious measures set forth in the Ordinance, it will lose federal funding.

In detail, the City's argument is this: Receipt of all these federal funds is conditioned on compliance with 49 Code of Federal Regulations part 21 (2005). Pursuant to 49 Code of Federal Regulations part 21.5(c)(1) and (3), where the primary objective of the federal grant is to provide employment, or where the recipient has a record of discrimination, the recipient must meet the requirements of Executive Order No. 11246.[6] Because the City has a record of direct and passive discrimination, the Executive Order and regulations require it to " 'develop and maintain an affirmative action program' " that includes race- and gender-conscious project participation goals, training opportunities and recruitment and outreach. (Citing 41 C.F.R. §§ 60-1.40, 60-4.2 & 60-4.3(7)(a)-(p) (2004).) If the City fails to establish and maintain a program with these race- and gender-conscious measures, "it could, among other things, lose FHWA [Federal Highway Administration] funding and the opportunity to obtain such funding in the future."

Respondents clarify that 49 Code of Federal Regulations part 21 sets forth regulations pertaining to the *employment practices* of the recipient (49 C.F.R.

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[5] Title VI of the Civil Rights Act states in part: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." (42 U.S.C. § 2000d.)

[6] 30 Federal Register 12319 (Sept. 24, 1965).

§ 21.5(c)(1), (3)) or the recipient's contractor (41 C.F.R. § 60-4).[7] These provisions are irrelevant because they do not govern contracting practices.

The City counters that its reference to employment regulations is a valid means "to ascertain the contours of [its] contracting obligations." The question here is not whether and how courts look to terms in the employment context to define standards in public contracting, but whether the Ordinance is necessary to maintain or establish eligibility for federal funds. (§ 31, subd. (e).)

The City also calls our attention to other regulations which it contends mandate implementation of race-conscious remedies. These include Department of Transportation regulations which provide: "This part does not prohibit the consideration of race, color, or national origin if the purpose and effect are to remove or overcome the consequences of practices or impediments which have restricted the

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[7] As an example, 49 Code of Federal Regulations part 21.5(c)(1) (2005) is entitled "Employment practices" and provides in part: "(1) Where a primary objective of the Federal financial assistance to a program . . . is *to provide employment*, a recipient . . . shall not . . . subject a person to discrimination on the ground of race, color, or national origin *in its employment practices* . . . [and] shall take affirmative action to insure that applicants *are employed,* and *employees are treated during employment*, without regard to their race, color, or national origin." (Italics added.)

Similarly, subdivision (c)(3) provides that where the primary aim of federal assistance is not to provide employment, but nonetheless "discrimination on the grounds of race, color, or national origin in the *employment practices* of the recipient . . . tends, on the grounds of race, color, or national origin, to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program to which this regulation applies, the provisions of paragraph (c)(1) of this section shall apply to the *employment practices* of the recipient or other persons subject to the regulation, to the extent necessary to assure equality of opportunity to, and nondiscriminatory treatment of, beneficiaries." (49 C.F.R. § 21.5(c)(3), italics added.)

41 Code of Federal Regulations part 60-4 (2005) sets forth affirmative action requirements for construction contractors and applies to "all of a construction contractor's or subcontractor's construction employees . . . ." (*Id.*, § 60-4.1) Part 60-4.2(d) concerns construction contractors and refers to male and female participation goals as a percentage "for the Contractor's *aggregate workforce in each trade* . . . ." (Italics added.)

availability of, or participation in, the program or activity receiving Federal financial assistance, on the grounds of race, color, or national origin. Where prior discriminatory practice or usage tends, on the grounds of race, color, or national origin to exclude individuals from participation in, to deny them the benefits of, or to subject them to discrimination under any program . . . , the applicant or recipient must *take affirmative action* to remove or overcome the effects of the prior discriminatory practice or usage. Even in the absence of prior discriminatory practice or usage, a recipient in administering a program or activity to which this part applies, is expected to take affirmative action to assure that no person is excluded from participation in or denied the benefits of the program or activity on the grounds of race, color, or national origin." (49 C.F.R. § 21.5(b)(7) (2005).)

Likewise, the City refers to 40 Code of Federal Regulations part 7.35(a)(7), which contains a similar directive to recipients of assistance from the Environmental Protection Agency (EPA) to "take affirmative action to provide remedies to those who have been injured by the [past] discrimination."

The City maintains that these "take affirmative action" directives require recipients to remedy past discrimination with race-conscious programs. We disagree.

The first sentence of the Department of Transportation regulation quoted above permits—but does not require—the recipient of federal funds to use race-based measures to remedy past discrimination. The second sentence imposes a duty to take affirmative action to remove the effects of such discrimination, but again it does not *require* that those measures be race-based. And finally, the last sentence embodies an expectation that recipients will pursue affirmative action to avoid discrimination by ensuring that minorities are not excluded from participating in applicable programs. Likewise, this provision is permissive in terms of the nature of the steps take, i.e. be they race-neutral or race-conscious. (*C&C Construction, Inc. v. Sacramento Municipal Utility Dist.* (2004) 122 Cal.App.4th 284, 308-309 (*C&C Construction*).) We further point out that the Civil Rights Act contains an express provision generally limiting the preemptive effect of the act, as follows: "Nothing

contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof." (42 U.S.C. § 2000h-4.) Section 31, with its categorical prohibition of discrimination in the operation of public employment, education and contracting, is consistent with the intent of title VI of the Civil Rights Act to prevent recipients from discriminating on the basis of race, color or national origin in funded activities and programs.

Turning to the EPA regulation directing affirmative action to remedy the effects of past discrimination, we note that the language calls for specific targeting of remedies to those who have been injured by past discrimination. The Ordinance is not designed to pinpoint remedies to those suffering prior injuries and thus whether it remains in effect or not would not impact this directive. Moreover, the dictate itself prohibits a recipient from using "criteria or methods of administering its program or activity which have the effect of subjecting individuals to discrimination because of their race . . . or sex . . . ." (40 C.F.R. § 7.35(b).)

It is the City's burden to bring forth "substantial evidence that it will lose federal funding if it does not use race-based measures and must narrowly tailor those measures to minimize race-based discrimination." (*C&C Construction*, *supra*, 122 Cal.App.4th at p. 298.) And, if a particular federal regulation "expressly requires a state agency to use race-based measures to remedy past discrimination, the state agency must have substantial evidence of the type of past discrimination that triggers the federal regulation's requirement for current race-based measures. What facts, if present, require race-based remedial measures—the factual predicate for race-based measures—must be defined in the federal law or regulation, not by the state agency." (*Id.* at p. 299.)

Here the record is devoid of evidence sufficient to rouse the federal funding exception to section 31. Where is the factual predicate showing the *specific* type of

past discrimination that triggers a *particular* regulation's requirement for race-based remedial measures like the bid discount and subcontracting programs? The City's generalized arguments and statements are inadequate.

C. *Ratification of the Race Convention Does Not Prompt Federal Preemption of Section 31*

The United States Senate ratified the Race Convention in 1994 with the declaration and reservation that the treaty would be implemented by the federal government to the extent of its jurisdiction over the matter and otherwise by the state and local governments. (Race Convention, Declaration and Reservations <http://www.hri.ca/fortherecord1997/documentation/reservations/cerd.htm> [as of Aug. 10, 2006]). Signatory nations to the Race Convention declared that they "condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms . . . ." (Race Convention, pt. I, art. 2, ¶ 1; Gov. Code, § 8315, subd. (d)(1).) California implemented the Race Convention in 2003 pursuant to Government Code section 8315.

The supremacy clause of the United States Constitution announces the doctrine of federal preemption, including that "all treaties made . . . under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding." (U.S. Const., art. VI, cl. 2.) The question here is whether, as the City suggests, section 31 conflicts with, and therefore must yield to, the Race Convention. To answer this question we must construe the treaty's key terms and determine whether the Race Convention requires the use of race-conscious remedial measures, such as the City's bid preference and subcontracting programs.

The Race Convention defines "racial discrimination" as "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and

fundamental freedoms in the political, economic, social, cultural or any other field of public life." (Race Convention, pt. I, art. 1, ¶ 1; Gov. Code, § 8315, subd. (b).) However, certain measures are *not* encompassed within this definition: "Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved." (Race Convention, pt. I, art. 1, ¶ 4; Gov. Code, § 8315, subd. (b).) Special measures shall be undertaken as follows: "States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms." (Race Convention, pt. I, art. 2, ¶ 2.)

Government Code section 8315 attempts to bring the definition of "discrimination" in section 31 in line with the definition of "discrimination" in the treaty. When enacting this provision, the Legislature found and declared that section 31 does not define "racial discrimination," that the absence of a definition has led to confusion and in order to clarify that confusion, "racial discrimination" as used in section 31 shall have the same meaning as contained in paragraphs 1 and 4 of the Race Convention, quoted above. (Stats. 2003, ch. 211, § 1; Gov. Code, § 8315, subd. (a).)

First, it is apparent that in attempting to synchronize these definitions, the Legislature overlooked *Hi-Voltage Wire Works, Inc. v. City of San Jose* (2000) 24 Cal.4th 537, 559-560 (*Hi-Voltage*), wherein our Supreme Court *rejected* any specialized meaning of "discriminate" in favor of the dictionary meaning. As recently pointed out in *C&C Construction*, the Supreme Court is the final authority

on interpretation of our state Constitution and therefore its definition—not the Legislature's—controls. (*C&C Construction, supra*, 122 Cal.App.4th at p. 302, citing *Sands v. Morongo Unified School Dist.* (1991) 53 Cal.3d 863, 902-903.) In effect, the enactment of Government Code section 8315 amounted to a legislative attempt to amend the state Constitution without following the proper procedures for amendment. (*C&C Construction, supra,* at p. 302.)

The City contends that the *C&C Construction* is wrong, reasoning that "the Legislature's power to enact Section 8315 does not arise under state law. Rather, in this instance, the California Legislature was acting pursuant to an express federal duty placed upon it by the United States Senate to execute a United States treaty within its jurisdiction. Because the Legislature's power to act derived from federal rather that state law, it was superior to Proposition 209 and validly exercised without the need for a constitutional amendment." This argument blatantly ignores key government concepts like the separation of powers and the unique role of our judicial system. The Legislature was not operating on a clean slate because our Supreme Court had already interpreted section 31. The overturning of that constitutional interpretation must also take place within the court system, or by way of amendment to the Constitution. The Legislature's duty to respond to a federal treaty does not come fortified with federal superpowers enabling it to bypass the judicial and amendatory processes.

Alternatively, the City maintains that whether or not Government Code section 8315 is valid, federal preemption principles require us to favor the Race Convention's definition of discrimination over that of section 31, and thus evaluate the Ordinance under that treaty. This would be so if the two laws were in fatal conflict, but they are not.

The issue is not the basic definitions of discrimination in the treaty and the California Constitution—they are comparable. Rather, the issue is whether the Race Convention's exclusion of "special measures" from its definition of discrimination, and its directive to signatory countries in part I, article 2, paragraph 2 to take such

measures when warranted, create a conflict. In its report to the United Nations, the United States took note of the two "special measures" provisions and then construed them as follows: "Together, article 1 (4) ['special measures' exclusion] and article 2 (2) permit, but do not require, States parties to adopt race-based affirmative action programmes without violating the Convention. Deciding when such measures are in fact warranted is left to the discretion of each State party." (Reps. Submitted by State Parties Under Article 9 of the Convention, Com. on the Elimination of Racial Discrimination (CERD), CERD/C/351/Add.1, Oct. 10, 2000, Addendum, U.S.A., ¶ 249, p. 60 (CERD Report).)[8] The CERD Report also noted that "Proposition 209 . . . prohibits the state from considering race or gender in state employment, public contracting or education programmes" and indicated that despite Proposition 209, the federal government has argued consistently that the Constitution and title VII of the Civil Rights Act allow for the narrowly tailored consideration of race in elementary and secondary school and university admissions. (CERD Rep., ¶¶ 268, 269, p. 64.) Significantly, the United States did not argue that the Constitution *compelled* race-conscious remedial measures.

In response, the CERD voiced concern with the United States' position "that the provisions of the [Race] Convention permit, but do not require States parties to adopt affirmative action measures to ensure the adequate development and protection of certain racial, ethnic or national groups. The Committee emphasizes that the adoption of special measures by States parties when the circumstances so warrant, such as in the case of persistent disparities, is an obligation stemming from article 2, paragraph 2, of the [Race] Convention." (Rep. of CERD, Gen. Assem. Off. Records, 56th Sess., Supp. No. 18 (A/56/18), 2001, ¶ 399, p. 71.)

CERD views the Race Convention as *requiring* adoption of race-based remedies in the face of persistent inequities while the State Department interprets the

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[8] The CERD Report was prepared by the United States Department of State. (CERD Rep., ¶ 2, p. 3.)

companion provisions as calling for a permissive approach. "Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty. [Citation.] ('Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.)' " (*El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng* (1999) 525 U.S. 155, 168.) The State Department's interpretation is reasonable and accordingly we accord it great deference. Nothing in article 2, paragraph 2 requires that a particular *type* of "special and concrete measure[]" be utilized to remedy persistent discrimination. Indeed the plain meaning of the two provisions, read together, is that a state party is required to undertake *some sort* of special measures when "circumstances so warrant" in order to "ensure the adequate development and protection of certain racial groups" (Race Convention, pt. I, art. 2, ¶ 2); and to the extent such special measures would come within the normal definition of discrimination, those measures would not violate the Race Convention (*id.*, pt. I, art. 1, ¶ 4). In other words the Race Convention does not mandate race-conscious special measures. Since section 31 can be reconciled with the Race Convention, it is not preempted by it.

D. *The Trial Court Properly Rejected the City's Assault on Section 31 under the Seattle-Hunter Political Restructuring Doctrine*

The City in its own motion for summary judgment took the position that section 31 cannot be applied constitutionally to prevent it from enacting remedial legislation to assist minorities and women.[9] Developing this argument, the City has invoked equal protection principles announced in *Seattle* and *Hunter*, in particular the idea that the Fourteenth Amendment extends to " 'a political structure that treats all individuals as equals,' [citation], yet more subtly distorts governmental processes

[9] Although the City sprinkles this argument with "as applied" language, the heart of this matter is whether section 31 is a valid enactment, a matter more squarely resolved as a facial challenge to the constitutionality of section 31.

in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation." (*Seattle*, *supra*, 458 U.S. at p. 467; see also *Hunter, supra*, 393 U.S. at pp. 390-391.) The trial court rebuffed this approach and denied the motion. We likewise conclude that section 31 does not implicate concerns under the political restructuring branch of federal equal protection jurisprudence.

1. *Overview of Key Principles and Cases*

In a nutshell, the *Hunter/Seattle* doctrine invokes the constitutional guarantee of equal protection to invalidate certain facially neutral enactments that explicitly alter the established political process with respect to a racial issue, thereby making it more onerous for racial minorities to achieve favorable legislation with respect to that issue. In other words, the equal protection clause will preclude laws that change the political landscape for racial reasons, or allocate governmental power to achieve an illicit, discriminatory purpose. (See *Crawford v. Los Angeles Board of Education* (1982) 458 U.S. 527, 541 (*Crawford*).) As we explain, *Hunter* and *Seattle* expound the core concepts of the doctrine; *Crawford* exposes its reach.

The factual setting in *Hunter* harks back to 1964 when the Akron City Council enacted a fair housing ordinance to assure equal housing opportunities to all persons, regardless of race, color or creed. Nellie Hunter attempted to invoke the ordinance after being denied the opportunity to be shown houses on the for-sale list because she was African-American. Ms. Hunter's complaint was met with the response that the ordinance had been amended and no longer afforded her recourse. Indeed the electorate of Akron had amended the city charter to require that *any* fair housing ordinance enacted by the city council—including the ordinance invoked by Ms. Hunter—be subjected to a referendum prior to taking effect. (*Hunter*, *supra*, 393 U.S. at p. 390.) All other ordinances regulating real estate transactions became effective 30 days after enactment by the city council.

The Supreme Court struck down the city charter amendment on equal protection grounds. Although the amendment was facially neutral, the court was disturbed by the reality "that the law's impact falls on the minority." (*Hunter*, *supra*,

393 U.S. at p. 391.) The amendment placed a "special burden on racial minorities within the governmental process." (*Ibid.*) Holding that the amendment constituted "a real, substantial, and invidious denial of the equal protection of the laws" (*id.* at p. 393), the court reasoned that the government "may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable size." (*Ibid.*)

Finding support in *Hunter*, the court in *Seattle* invalidated a state initiative which forbade mandatory busing of public school pupils for purposes of racial integration. The court held that "despite [the initiative's] facial neutrality there is little doubt that the initiative was effectively drawn for racial purposes." (*Seattle*, *supra*, 458 U.S. at p. 471.) In other words, the initiative was enacted because it would adversely effect busing for integration. (*Ibid.*) The court further concluded "that the practical effect of Initiative 350 is to work a reallocation of power of the kind condemned in *Hunter*. The initiative removes the authority to address a racial problem—and only a racial problem—from the existing decisionmaking body, in such a way as to burden minority interests. . . . [T]he initiative expressly requires those championing school integration to surmount a considerably higher hurdle than persons seeking comparable legislative action." (*Id.* at p. 474.)

Thus it is apparent that a challenger relying on the *Hunter* and *Seattle* decisions would have to 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.

The reach of this doctrine was clarified in *Crawford* with the upholding of a California constitutional amendment (Proposition I) limiting state court-ordered school busing for desegregation purposes to those instances in which a federal court would order such a remedy to correct a violation of the federal equal protection clause. The court rejected the petitioner's contention that Proposition I embodied a

racial classification and imposed a race-specific burden on racial minorities. "It neither says nor implies that persons are to be treated differently on account of their race." (*Crawford, supra,* 458 U.S. at p. 537.) Further, the court explained that there was a distinction "between state action that discriminates on the basis of race and state action that addresses, in neutral fashion, race-related matters. This distinction is implicit in the Court's repeated statement 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. . . . In sum, the simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification." (*Id.* at pp. 538-539.) However, where the purpose for repealing legislation is to disadvantage a racial minority, the repeal is unconstitutional. (*Id.* at p. 539, fn. 21.)

Countering the argument that Proposition I fundamentally altered the judicial system by leaving those seeking relief from racial isolation in violation of state law with less than full judicial relief, the court clarified: "Nor can it be said that Proposition I distorts the political process for racial reasons or that it allocates governmental or judicial power on the basis of a discriminatory principle. . . . [¶] . . . [H]aving gone beyond the requirements of the Federal Constitution, the State was free to return in part to the standard prevailing generally throughout the United States." (*Crawford, supra,* 458 U.S. at pp. 541-542, fn. omitted.) In other words, it worked no impermissible distortion of the political process for the people to align the state's desegregation responsibilities and remedies with the standard set by the Fourteenth Amendment rather than the more protective standard repealed in part by Proposition I. The people can change their collective minds on state constitutional matters, so long as the result does not offend federal constitutional principles.

More recently, in *Coalition for Economic Equity v. Wilson* (9th Cir. 1997) 122 F.3d 692, certiorari denied (1997) 522 U.S. 963 (*Wilson*), the Ninth Circuit decided the precise issue presented here, namely whether section 31 reallocates political power in a racially discriminatory manner such that women and racial minorities are

denied equal treatment because section 31 prohibits enactment and implementation of legislation such as the Ordinance. (*Id.* at pp. 706-708.) Vacating the preliminary injunction that enjoined the state from executing or enforcing the "preferential treatment" strand of section 31, the *Wilson* court concluded that the amendment did not work any constitutional injury. (*Wilson, supra,* at pp. 710-711.)[10] [11] During the course of the opinion the court reviewed the *Hunter/Seattle* doctrine, characterizing the enactments under attack in the two cases as having "reallocated [political] authority in a racially discriminatory manner." (*Id.* at p. 706.) Drawing fuel from *Crawford (id.* at pp. 705-706*)*, the court distinguished section 31, as follows: "When, in contrast, a state prohibits all its instruments from discriminating against or granting preferential treatment to anyone on the basis of race or gender, it has promulgated a law that addresses in neutral-fashion race-related and gender-related matters. It does not isolate race or gender antidiscrimination laws from any specific area over which the state has delegated authority to a local entity." (*Wilson, supra,* at p. 707.)

2. *Analysis*

The heart of this matter is whether an enactment such as section 31, on its face neutral and nonoffending of federal equal protection principles, nonetheless runs afoul of those principles when examined under the *Hunter/Seattle/Hunter* political

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[10] While *Wilson* would be considered persuasive authority, it is not binding on state courts. (*Walker v. Kiousis* (2001) 93 Cal.App.4th 1432, 1441.) A number of courts have referred to *Wilson* with approval. (See *Hi-Voltage, supra,* 24 Cal.4th at p. 561; *Kidd v. State of California* (1998) 62 Cal.App.4th 386, 408-410.) However, these cases do not resolve the constitutionality of section 31 under the *Hunter/Seattle* doctrine. That is for us to decide.

[11] See also *Coalition to Defend Affirmative Action v. Granholm* (6th Cir. 2006) 473 F.3d 237, 250-251 (*Granholm*), in which the Sixth Circuit also rejected a similar equal protection challenge to Michigan's Proposition 2, a statewide ballot initiative modeled after California's Proposition 209.

restructuring doctrine. We conclude that it does not and that lodged under a *Crawford* analysis, section 31 survives this equal protection challenge.

a. *No Impermissible Racial Classification or Racial Animus*

A law may address a race-related matter, in neutral fashion, without embodying an invalid racial classification that discriminates on the basis of race. (*Crawford, supra*, 458 U.S. at p. 538.) Thus, "the simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification." (*Id.* at p. 539.) Or, as framed a little differently by the dissent in *Seattle*: "In the absence of a federal constitutional violation requiring race-specific remedies, a policy of strict racial neutrality by a State would violate no federal constitutional principle." (*Seattle, supra*, 458 U.S. at p. 491, dis. opn. of Powell, J.)

Section 31 terminates the ability of racial minorities and women to obtain preferences in the operation of public education, public employment and public contracting. Although stated as positive law, it also operates as the functional equivalent of an enactment that repeals preferential race- or gender-related legislation not *required* by the federal equal protection clause. Read in its entirety with the savings clause,[12] section 31 is on footing similar to Proposition I, upheld in *Crawford*.[13] Section 31 embraces general principles of nondiscrimination, including

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[12] The savings clause provides that if any part is "found to be in conflict with federal law or the United States Constitution, the section shall be implemented to the maximum extent that federal law and the United States Constitution permit." (§ 31, subd. (h).)

[13] It is true that Proposition I was *less than* a repeal of our state equal protection clause because it retained in local school boards certain more expansive desegretative powers. However, that the voters did not choose to conform to the federal Constitution in all respects, but only receded part way, was irrelevant to the analysis in *Crawford*. "In short, having gone beyond the requirements of the Federal Constitution, the State was free to return in part to the standard prevailing generally throughout the United States. *It could have conformed its law to the Federal Constitution in every respect.*" (*Crawford, supra*, 458 U.S. at p. 542, italics added.)

the prohibition of favoring persons on the basis of race or gender, and can only be viewed as standing for the proposition that racial and gender discrimination, affirmative or reverse, is unfair and wrong.

Unlike the laws struck down in *Hunter* and *Seattle*, there is a constitutional symmetry to section 31. Its dual prohibition against discrimination and preferential treatment, coupled with the savings clause, propel section 31 into neutral territory that brooks no impermissible racial classification. Justice Mosk, in his concurring opinion in *High-Voltage*, expands eloquently on the interplay between these two strands, as he addresses the impact and import of section 31. So doing, he makes it clear that the amendment brooks no impermissible racial classification. We quote at length: "Stated negatively, section 31 prohibits governmental actors from improperly burdening or benefiting any individual or group in the operation of public employment, public education, or public contracting. The prohibition is not limited to barring such actors from improperly assigning burdens or benefits themselves. Rather, it extends to barring them from enabling, facilitating, encouraging, or requiring private parties to do so as well. For the operation of each of the indicated activities involves private parties as well as governmental actors—in other words, the *operation* of each entails the *cooperation* of both. One of section 31's purposes is to preclude any invidious barrier or privileged entrance to participation. [¶] Stated positively, section 31 commands governmental actors to treat all individuals and groups equally in the operation of public employment, public education, and public contracting. The command is not limited to compelling governmental actors to afford equal treatment themselves. Rather, it extends to compelling governmental actors to enable, facilitate, encourage, and require private parties to do so as well. Again, the operation of each of the indicated activities involves private parties as well as governmental actors, the *operation* of each entailing the *cooperation* of both. One of section 31's purposes is to remove all invidious barriers and privileged entrances to participation. [¶] Neither section 31's prohibition against the improper assigning of any burden or benefit in the operation of public employment, public

education, or public contracting, nor its command of equal treatment therein, is limited solely to ends. Rather, both extend to means as well. Thus, one may not assign any burden or benefit improperly in an attempt to assign some other burden or benefit properly. Similarly, one may not afford treatment that in any respect is unequal in an attempt to afford treatment that in some other respect is equal. For section 31 at least, the end does not justify the means. Rather, means and end must each justify itself in light of section 31's prohibition and command." (*Hi-Voltage, supra*, 24 Cal.4th at pp. 570-571, conc. opn. of Mosk, J.)

b. *No Impermissible Political Hurdle*

It bears underscoring that the legislation passed in both Akron and Seattle placed explicit procedural hurdles in the way of racial minorities' pursuit of antidiscrimination remedies: In Akron, a city charter amendment subjecting any fair housing ordinance enacted by the city council to a referendum; in Seattle, a statewide initiative which prohibited local school broads from mandating busing to achieve racial integration of the public schools. These enactments were not overt policy pronouncements. Rather, by sanctioning procedural changes that rigged the political process against racial minorities, the challenged laws impeded the efforts of racial minorities to secure protection *against* discrimination.

Although the Akron amendment was facially neutral, the legislation discriminated against racial minorities because it placed a special burden on them in their efforts to achieve antidiscrimination housing laws. (*Hunter, supra*, 393 U.S. at pp. 390-391.) Justice Harlan, concurring, cast the crux of the matter accurately when he said that Akron "has not attempted to allocate governmental power on the basis of any general principle. Here, we have a provision that has the clear purpose of making it more difficult for certain racial and religious minorities to achieve legislation that is in their interest." (*Id.* at p. 395.)

The *Seattle* court was more forthright in discerning the purpose of the challenged initiative, saying it was "beyond reasonable dispute" that the people enacted the initiative because of its adverse effects upon busing for integration.

(*Seattle*, *supra*, 458 U.S. at p. 471.) In other words, in both *Hunter* and *Seattle* there was an underlying, though not overtly stated, assumption that one had to but barely scratch the surface of the challenged law to expose its racially discriminatory purpose.[14] [15] That purpose was to restructure the political process so that racial minorities would be impeded in achieving, respectively, antidiscrimination in housing and busing for integration of public schools.

Here, section 31 is a substantive policy enactment *barring* race- and gender-based discrimination and preferences in public employment, contracting and education. It is utopian in nature, seeking to ensure that public benefits are allocated in a color-blind and gender-blind fashion. Section 31 is a sweeping change in policy operating at the highest level of government. As our Supreme Court explained, "[t]he ballot arguments—from which we draw our historical perspective—make clear that in approving Proposition 209, the voters intended section 31, like the Civil Rights Act as originally construed, 'to achieve equality of [public employment,

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[14] The *Seattle* court was well aware that the Akron measure failed as a *direct* attempt to legitimize a right to discriminate in real estate transactions on the basis of race. (*Hunter*, *supra*, 393 U.S. at pp. 559-560.) Two years before deciding *Hunter*, the high court had invalidated a California statewide initiative which prohibited the state from denying *private* property owners the right to decline to sell or lease their real property to such persons as they, in their absolute discretion, chose. (*Reitman v. Mulkey* (1967) 387 U.S. 369, 380-381.) In *Reitman*, the court had no trouble spotting the state's involvement in private racial discrimination where the intent and effect of the initiative was to authorize racial discrimination in the housing market.

[15] By dismissing as irrelevant any reading of *Hunter* and *Seattle* that examines the context for, and gives credence to, a racially discriminatory purpose informing the challenged legislation, the dissent moves the *Hunter/Seattle* doctrine too far afield from the core of equal protection jurisprudence. It is, after all, " 'purposeful discrimination' " that offends the Fourteenth Amendment, "for the 'central purpose of the Equal Protection Clause . . . is the prevention of official conduct discriminating on the basis of race.' [Citation.]" (*Seattle*, *supra*, 458 U.S. at p. 484.) Ultimately in both *Seattle* and *Hunter*, any distinction between the impact of the legislation and the legislative purpose to discriminate on the basis of race merge: No one reasonably could say that the impact in those cases was an unintended consequence of the legislation. Rather, the impact—discrimination on the basis of race—*was* the purpose.

education, and contracting] opportunities' [citation] and to remove 'barriers [that] operate invidiously to discriminate on the basis of racial or other impermissible classification.' [Citation.]" (*Hi-Voltage, supra,* 24 Cal.4th at pp. 561-562.) In contrast, as the *Seattle* court articulated, "the political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action. But a different analysis is required when the State allocates governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decisionmaking process." (*Seattle, supra,* 458 U.S. at p. 470.)

The effect of section 31 is to make it more difficult for any citizen *to secure preferences* on the basis of race or gender. On the assumption that in the future it is racial and ethnic minorities and women who would want to push for such preferences, short of prevailing in court they will have to launch a statewide initiative to do so.[16] (See *Wilson, supra,* 122 F.3d at p. 705, fn. omitted: "We accept without questioning the district court's findings that Proposition 209 burdens members of insular minorities within the majority that enacted it who otherwise would seek to obtain race-based and gender-based preferential treatment from local entities.") Poor people, veterans, owners of small businesses, persons with disabilities and others will not have to go this extra lap, but of course racial and ethnic minorities and women would be among the pool of poor people, veterans, small business owners, persons with disabilities and the like who might push for such preferences. In other words, the sway of section 31 commands that racial and ethnic minorities and women take

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[16] The dissent mischaracterizes this sentence as constituting our "determination" that one of the "dual purposes" of section 31 is to require racial and ethnic minorities and women to launch a statewide initiative in order to obtain such preferences. (Dis. opn., *post,* at pp. 18-19.) The *purpose* of section 31 is to ban discrimination and preferential treatment on the basis of race, ethnicity and gender in the operation of public employment, education and contracting. To state the obvious, once such preferences are banned, those impacted would have to take steps to undo the ban should they desire to do so. A potential impact is not the same thing as the legislative purpose.

their place alongside others, based on nonracial and nongender classifications, in their quest for preferences in the distribution of government contracts and public educational and employment opportunities. As a policy matter reasonable minds can hold differing viewpoints on the impact and wisdom of such a policy. However, if the policy itself does not discriminate on the basis of race or gender, and is not a pretext for discrimination but rather aims at advancing a discrimination-free society, how can it be said to violate federal equal protection principles? Under *Crawford*, the people are free to retreat from a more expansive and protective civil rights policy and return to a standard that conforms to the federal Constitution. (*Crawford, supra,* 458 U.S. at pp. 541-542.) Under *Crawford*, it is clear that "even when a neutral law has a disproportionately adverse effect on a racial minority, the Fourteenth Amendment is violated only if a discriminatory purpose can be shown." (*Id.* at pp. 537-538, fn. omitted.)

Moreover, as the *Granholm* court explained in its examination of the *Hunter/Seattle* line of cases, unlike Proposal 2 (and Proposition 209, the California prototype), the challenged enactments in those earlier cases "made it more difficult for minorities to obtain *protection from discrimination* through the political process . . . ." (*Granholm, supra,* 473 F.3d at p. 251.) In contrast, Proposal 2 (and Proposition 209) "purport[] to make it more difficult for minorities to obtain *racial preferences* through the political process. These are fundamentally different concepts." (*Ibid.*; see also *Wilson, supra,* 122 F.3d at p. 708.) And, notwithstanding these fundamental differences, as we discuss in part II.E., *post*, if resort to racial or gender preferences *is or becomes necessary as a corrective measure to rectify invidious discrimination*, then section 31 must yield to the federal Constitution. Indeed, the savings clause of section 31 mandates submission to that higher law. (§ 31, subd. (h).) Construing section 31 as a whole as we must, we thus conclude that the constitutional amendment does not impermissibly restructure the political process in a manner that burdens the equal protection rights of racial and ethnic minorities and women.

E. *The Trial Court Erred in Failing to Look at the Other Side of the Equation: Does the Federal Equal Protection Clause Mandate Race-conscious Legislation to Remedy Past Discrimination, Such That the Sway of Section 31's No-preferences Clause Must Yield to the Imperative of the Ordinance?*

1. *The City's Position and the Trial Court's Ruling*

The City's stance on appeal is this: It has presented undisputed evidence documenting the ongoing race- and gender-based discrimination of its employees and prime contractors in the awarding of City contracts. The federal equal protection clause imposes an affirmative duty on the City to rectify this documented discrimination with continuation of the race- and gender-conscious programs set forth in the Ordinance. Applying section 31 to invalidate the Ordinance would preclude constitutionally mandated affirmative action programs, thereby impermissibly trumping the federal equal protection clause. Thus, respondents' challenge must fail.

The trial court ruled as follows: "The City argues that *Hi-Voltage* allows the City to act remedially when it has intentionally discriminated in the past. *Hi-Voltage* stated[:] 'Where the state or a political subdivision has intentionally discriminated, use of a race-conscious or race-specific remedy necessarily follows as the only, or at least the most likely, means of rectifying the resulting injury.' [Citation.] The City states that its uncontested legislative findings, upon [which] the Ordinance is based, convert the Ordinance into a necessary, remedial measure. [¶] This Court does not find the City's reliance on its historical disparity study compelling. Although the Court 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. [Citation.] 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."

The trial court was correct on the matter of the voters' intent, and correct that Proposition 209 does not tolerate a "good intentions" caveat. However, it misunderstood the hierarchy of constitutional jurisprudence. The court's logic is flawed for two reasons. First, the issue was never whether section 31 could invalidate remedial efforts based on good intentions. The issue has always been whether the federal Constitution *required* the City to take the affirmative remedial steps set forth in the Ordinance in light of its assertion of pervasive past and ongoing discrimination. Second, the court assumed that section 31 is the last word. It is not. The federal equal protection clause is the last word. The court had no option but to engage in the appropriate analysis to determine whether the legislative history and supporting documents sustained the City's claim of discrimination in public contracting and, if so, whether the City had a constitutional obligation to remedy this history by implementing and administering the Ordinance.

2. *Pertinent Constitutional Principles*

The most sweeping pronouncements concerning the government's duty to eradicate discrimination have developed in the context of public school desegregation. Local school boards that operated state-compelled dual systems of education have been "clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." (*Green v. County School Board* (1968) 391 U.S. 430, 437-438 [holding, at pp. 438-442, that school board's adoption of freedom-of-choice plan, 11 years after *Brown v. Board of Education* (1954) 347 U.S. 483, did not sufficiently respond to this mandate].) Similarly, in *Board of Education v. Swann* (1971) 402 U.S. 43, the high court struck down an antibusing statute that absolutely forbade assignment of any student on account of race or for the purpose of creating a racial balance in the schools. Assessed against the backdrop of segregation, a state policy directing that school assignment plans be color blind hindered vindication of

federal constitutional guarantees and rendered "illusory the promise of *Brown v. Board of Education*, 347 U. S. 483 (1954). Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy. To forbid, at this stage, all assignments made on the basis of race would deprive school authorities of the one tool absolutely essential to fulfillment of their constitutional obligation to eliminate existing dual school systems." (*Board of Education v. Swann, supra,* at p. 46.)

In the context public contracting programs, the court has employed a strict scrutiny standard to evaluate the constitutionality of remedies, such as minority set-asides, that rely on racial classifications. This standard is grounded in the proposition that classifications based on race generally are inimical to a society whose institutions are founded on the principle of equality. (*Wygant v. Jackson Board of Education* (1986) 476 U.S. 267, 273, plur. opn. of Powell, J.) Therefore, " '[r]acial and ethnic distinctions of any sort are inherently suspect and . . . call for the most exacting judicial examination.' " (*Ibid.*) Any preference rooted in racial or ethnic criteria must be subject to "a most searching examination" to ensure constitutional compatibility. (*Ibid.*) This examination requires (1) that any racial classification " 'be justified by a compelling governmental interest' " and (2) that the means selected by the state to achieve its purpose "must be 'narrowly tailored to the achievement of that goal.' " (*Id.* at p. 274.) Nonetheless, as the Supreme Court has recognized, "in order to remedy the effects of prior discrimination, *it may be necessary* to take race into account. As part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy." (*Id.* at pp. 280-281, plur. opn. of Powell, J., italics added.) Indeed, state actors have a "constitutional *duty* to take affirmative steps to eliminate the continuing effects of past unconstitutional discrimination." (*Id.* at p. 291, conc. opn. of O'Connor, J.) Stated a little differently, "the State has the power to eradicate racial discrimination and its effects in both the public and private sectors, and the

absolute duty to do so where those wrongs were caused intentionally by the State itself." (*Croson, supra,* 488 U.S. at p. 518, conc. opn. of Kennedy, J.)

Croson is pertinent to this case because it, too, involved a challenge to a city public contracting plan that granted certain preferences to minority business enterprises. There, the court overturned the City of Richmond's minority set-aside program because it did not have a sufficient factual predicate to justify imposing a racially classified remedy. The court explained that "a generalized assertion that there has been past discrimination in an entire industry provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy." (*Croson, supra,* 488 U.S. at p. 498.) Moreover, "an amorphous claim that there has been past discrimination in a particular industry cannot justify the use of an unyielding racial quota." (*Id.* at p. 499.)

The court concluded that the predicate facts relied upon by the district court did not begin to approach "a prima facie case of a constitutional or statutory violation by *anyone* in the Richmond construction industry." (*Croson, supra,* 488 U.S. at p. 500.) Those "facts" included (1) the city council's designation of the plan as ' "remedial' "; (2) "highly conclusionary" statements of several supporters of the plan that racial discrimination in the construction industry existed locally, in the state and around the country; (3) the disparity between the percent of prime contracts awarded to minority firms as compared with the minority population in the city; (4) the dearth of minority contractors within the membership of local contractors' associations; and (5) a prior congressional determination that there was nationwide discrimination in the construction industry. (*Id.* at pp. 499-504.) With respect to the third point, the court explained that when special qualifications are needed for a particular job, the relevant statistical pool for showing discriminatory exclusion is the number of minorities qualified to undertake the particular job, not the general population. (*Id.* at pp. 501-502.)

The court was also concerned that it was nearly impossible to determine whether the plan was narrowly tailored to remedy prior discrimination, since it was

not linked to identified discrimination. The court criticized what appeared to be a lack of consideration of alternative, race-neutral ways to increase minority participation in city contracting. (*Croson, supra,* 488 U.S. at pp. 507-508.) Further, the quota rested on the faulty assumption that minorities would choose a particular trade in lockstep proportion to their representation in the city. (*Id.* at p. 508.)

The court reiterated, however, that with the appropriate evidentiary support, a public entity could take action to dismantle a discriminatory, closed business system that excluded minority contractors. (*Croson, supra,* 488 U.S. at p. 509, plur. opn.) And, "[i]n the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion." (*Ibid.*)

In *Hi-Voltage* our Supreme Court held that San Jose's program to encourage participation by minority and women business enterprises in public works projects violated section 31. (*Hi-Voltage, supra,* 24 Cal.4th at pp. 564-565.)[17] In reaching this conclusion the court also addressed the issue of whether and when some type of race-conscious remedy may be necessary in order for a city to discharge its duty under federal law to eradicate discrimination in public contracting: " '[T]he [United States Supreme] Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classification in order to remedy such discrimination.' [Citation.] Thus, the only constitutional obligation is the ' "affirmative duty to desegregate" ' [citations], also referred to as the duty to 'disestablish' the results of intentional discrimination. [Citations.] Where the state or a political subdivision has intentionally discriminated, use of a race-conscious or race-specific remedy necessarily follows as the only, or at least the most likely, means of rectifying the resulting injury. [Citations.]" (*Hi-Voltage, supra,* 24 Cal.4th at p. 568.)

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[17] Significantly, unlike the current situation, the City of San Jose *conceded* that its program was not constitutionally required. (*Id.* at p. 568.) Moreover, its disparity study was not part of the record, and thus the court had no way to measure the fit between the remedy and the goal of eliminating the disparity. (*Id.* at p. 569.)

If a city or other political subdivision were found to have engaged in intentional discrimination such that some type of race-based remedial program was *necessary* under the federal Constitution, the supremacy clause as well as section 31 dictate that federal law prevails: "If any part or parts of this section are found to be in conflict with federal law or the United States Constitution, the section shall be implemented to the maximum extent that federal law and the United States Constitution permit. Any provision held invalid shall be severable from the remaining portions of this section." (§ 31, subd. (h); see *Hi-Voltage, supra*, 24 Cal.4th at p. 569.)

The 1989 version of the Ordinance survived a *Croson* challenge. The federal district court (*Associated General Contractors v. San Francisco* (N.D. Cal. 1990) 748 F.Supp. 1443, 1456) and the Ninth Circuit Court of Appeals (*AGCC II, supra,* 950 F.2d 1401, 1412-1418) both declined to enjoin the ordinance. And unlike the City of San Jose, here the City has argued vigorously that the record backing the *current* ordinance presents the extreme case that mandates a narrowly tailored racial preference program to root out intentional discrimination in public contracting in San Francisco.

III. CONCLUSION

Because the trial court declined to decide whether the City presented the extreme case of intentional discrimination in public contracting in San Francisco such that a narrowly tailored remedial preference program could be constitutionally required (*Hi-Voltage, supra,* 24 Cal.4th at p. 568), the cause is remanded for the limited purpose of adjudicating this issue. In all other respects, the judgment is affirmed.

Reardon, Acting P.J.

I concur:

Sepulveda, J.

Concurring and Dissenting Opinion of Rivera, J.
Coral Construction, Inc. v. City and County of San Francisco
A107803

In my view, the majority opinion applied a truncated equal protection analysis and thereby reached the erroneous conclusion that California Constitution, article I, section 31 (section 31) does not offend federal constitutional principles. I would conclude that section 31 cannot escape the constitutional review required by *Hunter v. Erickson* (1969) 393 U.S. 385 (*Hunter*) and *Washington v. Seattle School Dist. No. 1* (1982) 458 U.S. 457 (*Seattle*). With respect to that issue, I respectfully dissent and would reverse and remand the portion of the judgment that determined there was no facial equal protection violation.[1]

The majority readily acknowledges that the *effect* of section 31 is to create greater political obstacles for those seeking remedial race- and gender-based preferences as compared to those seeking preferences on other grounds (e.g., on the basis of wealth, poverty, disabilities, or age) in the arenas of public education, employment and contracting. (Maj. opn., *ante*, at p. 27.) Yet the majority concludes that because section 31 is facially neutral and is grounded in good intentions it does not violate equal protection. (Maj. opn., *ante*, at pp. 23-24, 27-28.)

Hunter and *Seattle* teach us, however, that even a facially neutral law can be discriminatory if it restructures political access in this way—by selectively burdening only "racially conscious legislation"—because it "plainly 'rests on "distinctions based on race." ' " (*Seattle, supra*, 458 U.S. at p. 485.) Therefore, in assessing the constitutionality of section 31, we must determine not only whether it is neutral or discriminatory in its articulated goals, but also whether the *means* chosen to accomplish

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[1] As noted in the majority opinion's introduction, section 31 was adopted by the voters' approval of Proposition 209 (maj. opn., *ante*, at p. 1); accordingly, section 31 will occasionally be referred to as Proposition 209. As the majority opinion also notes, the appeal focuses on the portion of section 31 that prohibits race- and gender-based preferences. (Maj. opn., *ante*, at pp. 1-2.) In referring to section 31, I also address that disputed provision.

those goals have the effect of violating the rights of minorities and women to participate fully in our political system. Because section 31 creates a two-tiered political structure—one for minorities and women and one for all others—it is discriminatory. (*Hunter, supra,* 393 U.S. at pp. 390-393.)

In reaching this conclusion, I begin with a discussion of the basic principles to be applied.[2]

I. "Political Structure" Equal Protection, or the *Hunter-Seattle* Doctrine

A. The Context

Traditionally, equal protection cases in the political context have challenged legislation that directly attacked the right to vote, such as the redrawing of boundaries to exclude African-American voters (*Gomillion v. Lightfoot* (1960) 364 U.S. 339), or the reapportionment of districts in order to dilute voting power (*Baker v. Carr* (1962) 369 U.S. 186; *Reynolds v. Sims* (1964) 377 U.S. 533 (*Reynolds*); *Avery v. Midland County* (1968) 390 U.S. 474 (*Avery*)). These cases commonly are thought of as vindicating the right to vote guaranteed by the United States Constitution's Fifteenth Amendment, rather than its Fourteenth Amendment (Fourteenth Amendment) guarantees to equal protection. But in most of these cases the courts explicitly enforced not only the citizens' right to vote but also their right to be treated equally in the political process.[3]

Less well known in the arena of political process equal protection jurisprudence are the "political structure" cases. As has been noted, in these cases, the courts act to

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[2] Because the enactments at issue in *Hunter* and *Seattle* raised only issues of racial discrimination, this discussion of "political structure" equal protection will often be couched in terms of the impact on "minorities." The analysis, however, would apply equally to laws, like section 31, that create a political structure that disadvantages women.

[3] For example, in *Avery*, the court stated: "When the State apportions its legislature, it must have due regard for the Equal Protection Clause. Similarly, when the State delegates lawmaking power to local government and provides for the election of local officials from districts specified by statute, ordinance, or local charter, it must insure that those qualified to vote have the right to an equally effective voice in the election process." (*Avery, supra*, 390 U.S. at p. 480.)

guard against a more subtle form of vote dilution—the reallocation of political power in a way that treats all *individuals* equally, but operates to the disadvantage of minority groups and their interests. The majority opinion has touched on the three major cases in which the doctrine has been developed and demarcated. In my view, a more in-depth examination of the federal Supreme Court's explication of the doctrine, including a review of arguments made and rejected in those cases, will better inform our analysis of section 31. I therefore discuss each in detail.

B. **Hunter**

As the majority's opinion has already described, the voters of Akron, Ohio, repealed a fair housing ordinance and amended the city charter to require that " '[a]ny ordinance enacted by the Council of the City of Akron which regulates the use, sale, . . . lease, sublease or financing of real property of any kind . . . on the basis of race, color, religion, national origin or ancestry must first be approved by a majority of the electors . . . at a regular or general election.' " (*Hunter, supra*, 393 U.S. at p. 387.)

The City of Akron defended the measure arguing that, unlike the initiative struck down in *Reitman v. Mulkey* (1967) 387 U.S. 369, which effectively prohibited the adoption of antidiscrimination ordinances, the charter amendment neither authorized nor encouraged housing discrimination and did not preclude the enactment of a new fair housing ordinance. (*Hunter, supra*, 393 U.S. at p. 389.) The Supreme Court disagreed, holding that the vice was not in the repeal of the antidiscrimination ordinance, but in requiring that "[o]nly laws to end housing discrimination based on 'race, color, religion, national origin or ancestry' must run the . . . gauntlet [of a referendum]" (*id.* at p. 390), thus placing "special burdens on racial minorities within the governmental process" (*id.* at p. 391). The amendment "not only suspended the operation of the existing ordinance forbidding housing discrimination, but also required the approval of the electors before any future ordinance could take effect. [The amendment] thus drew a distinction between those groups who sought the law's protection against racial, religious, or ancestral discriminations in the sale and rental of real estate and those who sought to regulate real property transactions in the pursuit of other ends." (*Id.* at pp. 389-390.)

The fact that the amendment did not, on its face, discriminate against minority groups was not relevant to the court's analysis. "It is true" the *Hunter* court explained, "the section draws no distinction among racial and religious groups. Negroes and whites, Jews and Catholics are all subject to the same requirements if there is housing discrimination against them which they wish to end. But [the charter amendment] nevertheless disadvantages those who would benefit from laws barring racial, religious, or ancestral discriminations as against those who would bar other discriminations or who would otherwise regulate the real estate market in their favor. The automatic referendum system does not reach housing discrimination on sexual or political grounds, or against those with children or dogs, nor does it affect tenants seeking more heat or better maintenance from landlords, nor those seeking rent control, urban renewal, public housing, or new building codes." (*Hunter, supra*, 393 U.S. at pp. 390-391.) Because the amendment placed "special burdens on racial minorities," it was subject to "the 'most rigid scrutiny.' " (*Id.* at pp. 391-392.)

The U.S. Supreme Court was "unimpressed" with the city's various proffered justifications for the amendment, including its argument that the state is entitled to "distribute legislative power as it desires and that the people may retain for themselves the power over certain subjects . . . ." (*Hunter, supra*, 393 U.S. at p. 392.) Acknowledging this to be true as a general matter, the court found that the principle nevertheless "furnish[ed] no justification for a legislative structure which otherwise would violate the Fourteenth Amendment. . . . The sovereignty of the people is itself subject to . . . constitutional limitations . . . ." (*Ibid.*)

The court concluded, "the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote or give any group a smaller representation than another of comparable

size." (*Hunter, supra*, 393 U.S. at p. 393, citing *Reynolds, supra*, 377 U.S. 533 & *Avery, supra*, 390 U.S. 474.)[4]

C. **Seattle**

Seattle arose out of a mandatory pupil reassignment program instituted in Seattle to desegregate its schools, called the Seattle Plan. (*Seattle, supra*, 458 U.S. at p. 461.) A group of Seattle residents formed an organization to oppose the plan. (*Id.* at pp. 461-462.) The group first attempted to enjoin the Seattle Plan, and when that failed, it sponsored a statewide initiative "designed to terminate the use of mandatory busing for purposes of racial integration." (*Id.* at p. 462.) The initiative prohibited any school district from requiring any student " 'to attend a school other than the school which is geographically nearest or next nearest the student's place of residence . . . .' " (*Ibid.*) But the statute excepted from its prohibition pupil reassignments based upon special education requirements, health or safety hazards, physical barriers or obstacles between the student's residence and nearby schools, or unfitness of the neighborhood school due to " 'overcrowding, unsafe conditions or lack of physical facilities.' " (*Ibid.*) The statute expressly prohibited the use of student assignment methods that had been part of Seattle's desegregation plan, such as redefinition of attendance zones, pairing of schools, and use of " 'feeder' " schools. (*Id.* at pp. 462-463.) A challenge to this statute ultimately made its way to the federal Supreme Court.

Building upon the principle enunciated in *Hunter*, the U.S. Supreme Court explained that the Fourteenth Amendment prohibits not only the outright denial of the franchise to racial or ethnic groups, but also prohibits a " 'political structure that treats all individuals as equals,' [citation], yet more subtly distorts governmental processes in such

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[4] The following year the principle enunciated in *Hunter* was applied to invalidate a statute that prohibited school desegregation by means of pupil reassignments unless implemented by an *elected* school board. (*Lee v. Nyquist* (W.D.N.Y. 1970) 318 F.Supp. 710, 712-713, 720 (*Nyquist*) ["The . . . [l]egislature has acted to make it more difficult for racial minorities to achieve goals that are in their interest. The statute thus operates to disadvantage a minority, a racial minority, in the political process."].)

a way as to place special burdens on the ability of minority groups to achieve beneficial legislation." (*Seattle, supra*, 458 U.S. at p. 467.)

Seattle's "simple but central principle" was this: "[L]aws structuring political institutions or allocating political power according to 'neutral principles'—such as the executive veto, or the typically burdensome requirements for amending state constitutions—are not subject to equal protection attack, though they may 'make it more difficult for minorities to achieve favorable legislation.' [Citation.] Because such laws make it more difficult for *every* group in the community to enact comparable laws, they 'provid[e] a just framework within which the diverse political groups in our society may fairly compete.' [Citation.] . . . But a different analysis is required when the State allocates governmental power nonneutrally, by explicitly using the *racial* nature of a decision to determine the decisionmaking process. State action of this kind . . . 'places *special* burdens on racial minorities within the governmental process,' [citation], thereby 'making it *more* difficult for certain racial . . . minorities [than for other members of the community] to achieve legislation that is in their interest.' [Citation.] Such a structuring of the political process . . . [is] 'no more permissible than [is] denying [members of a racial minority] the vote, on an equal basis with others.' [Citation.]" (*Seattle, supra*, 458 U.S. at pp. 469-470.)

The Supreme Court found this principle to be "dispositive." (*Seattle, supra*, 458 U.S. at p. 470.) "In our view, [the initiative] must fall because it does 'not attemp[t] to allocate governmental power on the basis of any general principle.' [Citation.] Instead, it uses the racial nature of an issue to define the governmental decisionmaking structure, and thus imposes substantial and unique burdens on racial minorities." (*Ibid.*)

The court emphasized that a " 'simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification.' [Citations.]" (*Seattle, supra*, 458 U.S. at p. 483.) For example, had the Akron fair housing ordinance in *Hunter* merely been defeated by referendum, " 'Negroes would undoubtedly [have lost] an important political battle, but they would not thereby [have been] denied equal protection.' [Citation.]"

(*Seattle*, at p. 483.) Similarly, the Washington initiative did not merely repeal the desegregation programs then extant, but also "burden[ed] all future attempts to integrate Washington schools in districts throughout the State, by lodging decisionmaking authority over the question at a new and remote level of government. . . . This imposes direct and undeniable burdens on minority interests. 'If a governmental institution is to be fair, one group cannot always be expected to win,' [citation]; by the same token, one group cannot be subjected to a debilitating and often insurmountable disadvantage." (*Id.* at pp. 483-484.)

The state argued that the statute contained no racial classification—that it did not even mention " 'race' " or " 'integration' " but merely permitted busing for some purposes "while neutrally forbidding it for all other reasons." (*Seattle, supra*, 458 U.S. at p. 471.) The court provided a twofold response. First, it rejected out of hand the state's claim that the law had no racial purpose. "Neither the initiative's sponsors, nor the District Court, nor the Court of Appeals had any difficulty perceiving the racial nature of the issue settled by [the initiative]." (*Ibid.*) Beyond that, the court observed the initiative's effect was to remove the local school board's authority to use pupil assignments to address a racial problem—and only a racial problem. "In a very obvious sense" this disadvantages those who would benefit from pupil reassignment on racial grounds as compared to those who would benefit from pupil reassignment for any other purposes; this "work[s] a reallocation of power of the kind condemned in *Hunter*." (*Id.* at pp. 474-475.)

The state also argued that the initiative did not work *any* reallocation of power; after all, the state has ultimate authority over all of its school districts and is entitled to set educational policy on a statewide basis. Therefore, the initiative "worked a simple change in policy rather than a forbidden reallocation of power." (*Seattle, supra*, 458 U.S. at pp. 475-476.) Conceding the argument was superficially attractive, the court nonetheless soundly rejected it. While "States traditionally have been accorded the widest latitude in ordering their internal governmental processes," their ability to do so does not justify the creation of a legislative structure that violates the Fourteenth

Amendment. (*Seattle*, at p. 476.) "The issue here, after all, is not whether Washington has the authority to intervene in the affairs of local school boards; it is, rather, whether the State has exercised that authority in a manner consistent with the Equal Protection Clause." (*Ibid.*)

Finally, the state argued that *Hunter* had been effectively overruled by subsequent U.S. Supreme Court decisions. According to the state, because *Hunter* applied a simple " 'disparate impact' " analysis its reasoning was "swept away, along with the disparate-impact approach to equal protection, in *Washington* v. *Davis*, 426 U. S. 229 (1976), and *Arlington Heights* v. *Metropolitan Housing Dev. Corp.* 429 U. S. 252 (1977) [*Arlington*]." (*Seattle, supra*, 458 U.S. at p. 484.) While accepting the state's legal premise—that facially neutral legislation does not violate equal protection in the absence of discriminatory intent—the court rejected the state's characterization of the initiative as neutral. "[W]hen the political process or the decisionmaking mechanism used to *address* racially conscious legislation—and only such legislation—is singled out for peculiar and disadvantageous treatment, the governmental action plainly 'rests on "distinctions based on race." ' " (*Id.* at pp. 484-485.)

D. **Crawford**

On the same day the U.S. Supreme Court issued its opinion in *Seattle* it also decided *Crawford v. Los Angeles Board of Education* (1982) 458 U.S. 527 (*Crawford*). This decision helps to define the essential characteristics of suspect political restructuring by describing what it is not.

The historical setting of *Crawford* can be briefly summarized. In 1963 a group of minority students filed a class action against the Los Angeles Unified School District seeking desegregation of the schools. (*Crawford, supra*, 458 U.S. at pp. 529-530.) After a trial, in 1970 the trial court determined the school was "substantially segregated in violation of the State and Federal Constitutions." (*Id.* at p. 530.) The California Supreme Court affirmed, but relied only on the equal protection clause of the state's Constitution, holding that, in California, " 'school boards . . . bear a constitutional obligation to take reasonable steps to alleviate segregation in the public schools, whether

the segregation be de facto or de jure in origin.' [Citation.]" (*Id.* at pp. 530-531.) Thus, the California Supreme Court imposed upon California school districts a higher duty to desegregate than was required under the federal Constitution. (See *Crawford v. Board of Education* (1976) 17 Cal.3d 280.) Accordingly, on remand, a desegregation plan was approved by the court and implemented by the district in 1978. The plan included "substantial mandatory school reassignment and transportation—'busing'—on a racial and ethnic basis." (*Crawford, supra*, 458 U.S. at p. 531.)

In November 1979 the voters of California ratified Proposition I, which amended the state Constitution, and "conform[ed] the power of state courts to order busing to that exercised by the federal courts under the Fourteenth Amendment." (*Crawford, supra*, 458 U.S. at pp. 531-532.) Proposition I provided, in part, as follows: " '[N]o court of this state may impose upon the State of California or any public entity, board, or official any obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause . . . .' " (*Crawford*, at p. 532.) However, Proposition I *did not* " 'prohibit the governing board of a school district from voluntarily continuing or commencing a school integration plan after the effective date of this subdivision as amended.' " (*Crawford*, at p. 532, fn. 6.)

The petitioners in *Crawford* argued that Proposition I was unconstitutional because it "limit[ed] the power of state courts to enforce a state-created right to desegregated schools, [and thus created] a 'dual court system' that discriminates on the basis of race. They emphasize[d] that other state-created rights may be vindicated by the state courts without limitation on remedies." (*Crawford, supra*, 458 U.S. at p. 536.)

The U.S. Supreme Court acknowledged that if Proposition I had employed a racial classification it would be constitutionally suspect. (*Crawford, supra*, 458 U.S. at p. 536.) But Proposition I did not embody a racial classification because "[i]t neither says nor

implies that persons are to be treated differently on account of their race. It simply forbids state courts to order pupil school assignment or transportation in the absence of a Fourteenth Amendment violation." (*Id.* at p. 537.)[5]

There is a distinction, the court explained, between "state action that discriminates on the basis of race and state action that addresses, in neutral fashion, race-related matters." (*Crawford, supra*, 458 U.S. at p. 538.) Thus, the mere repeal of a state-mandated policy addressing a racial issue does not violate equal protection. A contrary rule would "limit seriously the authority of States to deal with the problems of our heterogeneous population[and] States would be committed irrevocably to legislation that has proved unsuccessful or even harmful in practice." (*Id.* at pp. 539-540.)

The petitioners in *Crawford*, then, made the only argument remaining to them—that Proposition I was not a "mere repeal" but, like the enactment in *Hunter*, was a fundamental "alter[ation of] the judicial system so that 'those seeking redress from racial isolation in violation of state law must be satisfied with less than full relief from a state court.' " (*Crawford, supra*, 458 U.S. at p. 540.) Again, the court disagreed. The charter amendment in *Hunter* "involved more than a 'mere repeal' of the fair housing ordinance" because in *Hunter* "persons seeking antidiscrimination housing laws—presumptively racial minorities—were 'singled out for mandatory referendums while no other group . . . face[d] that obstacle.' [Citation.] By contrast, . . . Proposition I is *less* than a 'repeal' of the California Equal Protection Clause [because] after Proposition I, the State Constitution still places upon school boards a greater duty to desegregate than does the Fourteenth Amendment." (*Crawford*, at p. 541, italics added.) Similarly, under Proposition I—unlike the initiative in *Seattle*—racial minorities retained the right to seek desegregation plans from their local districts that included racial busing. Proposition I

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[5] The court also recognized that, under conventional equal protection analysis, a facially neutral legislative act with discriminatory intent would be constitutionally suspect, and that evidence of a disproportionate impact of the act on racial minorities could indicate such a motivation. But the court found no such evidence in *Crawford*. (*Crawford, supra*, 458 U.S. at p. 544.)

did not restructure the political or judicial process; it merely implemented the people's determination that "the standard of the Fourteenth Amendment was more appropriate for California courts to apply in desegregation cases than the standard repealed by Proposition I." (*Crawford*, at p. 542, fn. omitted.)[6]

Thus, Proposition I differed from the *Seattle* and *Hunter* legislation in a critical respect. The *Seattle* initiative created " 'distinctions based on race' " (*Seattle, supra*, 458 U.S. at p. 485) by embedding racial busing prerogatives at the statewide level while leaving all other busing decisions to the school boards. The *Hunter* ordinance created distinctions based on race by subjecting race- or religion-based fair housing laws to a referendum but permitting all other fair housing laws to be adopted by ordinance. (*Hunter, supra*, 393 U.S. at pp. 389-390.) Proposition I, in contrast, was racially neutral because it forbade court-ordered busing not just for racial purposes, but for *any* purpose (in the absence of a federal constitutional violation) (*Crawford, supra*, 458 U.S. at p. 537.), and so did not implicate "political structure" equal protection.

E. Summary and Application

The principles enunciated in *Hunter*, *Seattle*, and *Crawford* can be distilled to a simple formula: A law that "mere[ly] repeal[s]" legislation benefiting racial minorities, but does not reallocate political power (i.e., does not restrict future legislation), raises no constitutional red flags. (*Hunter, supra*, 393 U.S. at p. 390, fn. 5; *Seattle, supra*, 458 U.S. at p. 483; *Crawford, supra*, 458 U.S. at p. 539.) And a law that reallocates political power, but does so according to neutral principles, does not implicate "political structure" equal protection because it imposes the same political burdens on all who would seek beneficial legislation. (*Crawford, supra*, 458 U.S. at p. 537; *Seattle, supra*,

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[6] In his concurrence, Justice Blackmun provided a slightly different analysis. Proposition I did not change the political structure of the decisionmaking process, he wrote, because "[s]tate courts do not create the rights they enforce." (*Crawford, supra*, 458 U.S. at p. 546 (conc. opn. of Blackmun, J.).) The courts merely enforce rights that are created elsewhere—in the legislature, in local ordinances or in the constitution itself. Because Proposition I removed a remedy only from the courts and did not remove access to any legislative source of "rights," the political process was not affected at all. (*Ibid.*)

458 U.S. at pp. 469-470.) But a law that repeals existing beneficial legislation *and* reallocates power according to *nonneutral* principles—by making beneficial race-based legislation more difficult to achieve than similar legislation benefiting all others—is " 'no more permissible than [is] denying [minorities] the vote, on an equal basis with others.' " (*Seattle, supra*, 458 U.S. at p. 470.)

Applying this formula, one cannot escape the conclusion that section 31 violates equal protection. Section 31 repealed all preferences benefiting women and minorities in public employment, education and contracting. But it was not a "mere repeal." Section 31 also prohibited future race- and gender-based preferences. In order to accomplish that prohibition it altered the political landscape according to nonneutral principles. Section 31 moved to the most inaccessible political level—a state constitutional amendment—the adoption of race- and gender-based preferences. No other preferences—such as those favoring veterans, the elderly, the disabled or the economically disadvantaged—were so affected, and they continue to be available at any and all levels of government. In this way, like the amendment in *Hunter* and the initiative in *Seattle*, section 31 has placed a special political burden on minorities and women not imposed on others. It is therefore subject to " 'the most rigid scrutiny.' " (*Hunter, supra*, 393 U.S. at pp. 391-392.)[7]

This case presents a concrete example. Under section 31, in the operation of its public contracting the City and County of San Francisco (City) can grant special benefits to locally-owned businesses (see, e.g., S.F. Admin. Code, ch. 6, § 6.4), to economically disadvantaged businesses (see, e.g., *id.*, ch. 14A), or to any other individuals or affinity groups, such as veterans, seniors, or persons with disabilities, but the City cannot grant special benefits on the basis of race or gender (unless one of the narrowly drawn exceptions in section 31 can be shown to apply). Broadly stated, women and minorities seeking remedial race- or gender-based policies in San Francisco contracting practices

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[7] The pertinent legal literature I have located and reviewed overwhelmingly supports this conclusion. (See Appendix to Concurring and Dissenting Opinion, *post.*)

must mount a *statewide* campaign to amend the California Constitution; any others seeking preferences in San Francisco contracting practices—e.g., based upon residency or economic status—need only convince the board of supervisors to adopt an ordinance. Section 31 thus restructures the political process in a way that specifically and selectively burdens race- and gender-conscious legislation. It is therefore subject to strict scrutiny.[8]

Respondents, Coral Construction, Inc., and Schram Construction, Inc., (collectively respondents) contend the *Hunter-Seattle* doctrine does not apply to section 31. They—and to a more limited extent, the majority—rely on the reasoning deployed in *Coalition for Economic Equity v. Wilson* (9th Cir. 1997) 122 F.3d 692 (*Wilson II*). In my view, *Wilson II* is not faithful to the principles enunciated in *Hunter* and *Seattle*.[9] And because *Wilson II* is routinely cited as authority for the facial constitutionality of section 31, I turn now to a discussion of that decision.

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[8] As the majority points out, in the "extreme case of intentional discrimination" (maj. opn., *ante*, at p. 34) race- or gender-based preferences may be *required* by the federal Constitution and section 31 has a savings clause excepting such cases (maj. opn., at pp. 30-34). This does not, however, save section 31 from constitutional scrutiny, as the majority seems to imply. (Maj. opn, *ante*, at p. 28.) First, it is far from clear whether all race- and gender-based preferences that are *permitted* by the equal protection clause are also *required*. (See, e.g., *Grutter v. Bollinger* (2003) 539 U.S. 306, 327-333 [holds that a law school's use of race as a factor for admissions was constitutionally justified, but does not state that it is constitutionally required].) But even if all preferences that survive strict scrutiny were required under equal protection, the unequal *political structure* created by section 31 is itself a matter subject to constitutional review. While the savings clause would be relevant in determining whether section 31 is narrowly tailored to achieve its goal, it is no substitute for a proper constitutional inquiry requiring, as a threshold matter, demonstration of a compelling state interest.

[9] Indeed, in a comment on the denial of rehearing en banc in *Wilson II*, Judge Hawkins of the Ninth Circuit implies that the panel in *Wilson II* was reading tea leaves rather than hewing closely to precedent (*Wilson II, supra*, 122 F.3d at pp. 717-718), thus offering one possible explanation for the result in that case. Certainly, it has been argued that the *Hunter-Seattle* doctrine would not survive if it arrived on the U.S. Supreme Court's doorstep today. (See, e.g., Bell, *California's Proposition 209: A Temporary Diversion on the Road to Racial Disaster* (1997) 30 Loyola L.A. L.Rev. 1447, 1454-1459.) On the other hand, the jurisprudential underpinnings of *Hunter-Seattle* have been strongly embraced in other contexts. (See, e.g., *Romer v. Evans* (1996) 517 U.S. 620, 633 ["[a] law declaring that in

II. The *Wilson II* Decision

I begin with a point of general agreement. For purposes of its analysis, the Ninth Circuit in *Wilson II* "accept[ed] without questioning the district court's findings that Proposition 209 burdens members of insular minorities . . . who otherwise would seek to obtain race-based and gender-based preferential treatment from local entities." (*Wilson II, supra*, 122 F.3d at p. 705, fn. omitted.) This can hardly be disputed.

Section 31 was specifically designed to eliminate existing race- and gender-conscious affirmative action programs. Although section 31 also prohibits *discrimination* based on race and gender, this provision added nothing to existing law. As the California Supreme Court stated, quoting *Coalition for Economic Equity v. Wilson* (N.D.Cal. 1996) 946 F.Supp. 1480, 1489 (*Wilson I*), " 'the people of California meant to do something more than simply restate existing law when they adopted Proposition 209.' " (*Hi-Voltage Wire Works, Inc. v. City of San Jose* (2000) 24 Cal.4th 537, 561 (*Hi-Voltage*).) This " 'something more' " is succinctly summarized in Chief Justice George's concurring and dissenting opinion in *Hi-Voltage*: "[An] overview of the ballot pamphlet materials relating to Proposition 209 makes several points clear. First, the measure's principal purpose clearly was to limit the types of affirmative action programs that governmental entities could employ in three areas—public employment, public education, and public contracting. Second, the measure was not intended to preclude all governmental affirmative action programs within these areas, but rather was intended to prohibit only those affirmative action programs that discriminate against or

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general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense"].) We, of course, leave to the commentators any speculation about how the high court would treat the question. Our role, as an inferior court, is to make an honest and forthright application of existing precedent. "[I]t is not our role to predict—however accurate our predictions might turn out to be." (*Wilson II, supra*, 122 F.3d at p. 718 (com. of Hawkins, J., on denial of reh. en banc) citing *Rodriguez de Quijas v. Shearson/Am. Exp.* (1989) 490 U.S. 477, 484.)

grant preferential treatment to any individual or group on the basis of race or gender." (*Id.* at p. 587.)

Unquestionably, then, section 31 set a higher bar for achieving affirmative action legislation on behalf of women and minorities as compared to all others. *Wilson II* nonetheless concludes that section 31 does not effectuate a political restructuring *at all*, because it merely constitutes a proper exercise of state authority to prohibit *all* state instrumentalities from granting preferences on the basis of race or gender. (*Wilson II, supra*, 122 F.3d at pp. 706-707.) According to the Ninth Circuit, section 31's comprehensive scope—prohibiting "all race and gender preferences by state entities"—effectuates nothing more nor less than the state's authority to vest in itself " 'all decisionmaking authority' " (*Wilson II*, at p. 707, quoting *Seattle, supra*, 458 U.S. at p. 477), and therefore it does not selectively redistribute political power (*Wilson II, supra*, 122 F.3d at p. 707).[10]

Here, the Ninth Circuit appears to have created out of whole cloth an exception to the *Hunter-Seattle* doctrine that would effectively negate the rule. *Wilson II* acknowledges that an isolated reallocation of political desegregative prerogatives is constitutionally suspect. (*Wilson II, supra*, 122 F.3d at p. 706.) Yet it insists that a statewide reallocation of political power with respect to racial and gender matters across multiple governmental arenas does no violence to equal protection. (*Id.* at p. 707.) Even apart from the fact that this argument was soundly rejected in *Seattle*, there is no principled analytical distinction between a narrow displacement of political access and a

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[10] In so holding, the *Wilson II* court pieces together truncated quotes from the *Seattle* decision to create the impression that the holding in *Seattle* excludes from its purview any legislation effectuating pervasive, statewide policies on racial matters, as distinguished from isolated changes such as occurred in *Hunter* and in *Seattle*. (*Wilson II, supra*, 122 F.3d at pp. 706-707.) *Seattle* contains no such exclusion. Indeed, it makes clear that while the state retains full authority to adopt legislation which removes local prerogatives, it can only do so in conformance with equal protection requirements. (*Seattle, supra*, 458 U.S. at p. 480, fn. 23 ["[i]t is . . . clear, as we have noted at several points in our opinion, that the State remains free to vest all decisionmaking power in state officials, or to remove authority from local [entities] *in a race-neutral manner*" (italics added)].)

global one. My views on this point are synchronous with those of Judge Norris in his opinion respecting the denial of rehearing en banc in *Wilson II*. Because I cannot improve upon his eloquent reasoning, I simply repeat it here.

"The *Hunter-Seattle* doctrine holds that it works an injury upon minorities to subject them to a structural disadvantage in the political process. It therefore forbids the State from 'differentiat[ing] between the treatment of problems involving racial matters and that afforded other problems in the same area.' [Citation.] In *Seattle*, as the panel correctly observes, the State of Washington had inflicted this injury upon minorities at only one level of government: local school districts. What the panel suggests is that if the State inflicts a *Hunter-Seattle* injury at *every* level of representative government and 'differentiates between the treatment of problems involving racial matters and that afforded other problems' in local school boards *and* city councils *and* the state legislature *and* state agencies such as the University of California Board of Regents, then the constitutional error is somehow cured. [Citation.] Neither *Hunter* nor *Seattle*—nor common sense, for that matter—supports the Proposition that *expanding* the levels at which the State disadvantages minorities will render that action any less constitutionally suspect." (*Wilson II, supra*, 122 F.3d at p. 715 (dis. opn. of Norris, J., to denial of reh. en banc).)

The Ninth Circuit's secondary rationale for shielding section 31 from constitutional scrutiny rests on the assertion that "preferences" are not *guaranteed* under the Fourteenth Amendment and therefore they are not *protected* under the Fourteenth Amendment. According to *Wilson II*, section 31 does not even implicate the equal protection clause because it does not create "an impediment to protection against unequal treatment" but only "an impediment to receiving preferential treatment." (*Wilson II, supra*, 122 F.3d at p. 708.) " '[I]n the context of a Fourteenth Amendment challenge,' " the court reasoned, " 'courts must bear in mind the difference between what the law permits, and what it requires.' [Citation.]" (*Id.* at p. 709.) Pointing out that the federal Constitution permits narrowly tailored affirmative action preferences only if justified by a compelling state interest, the court goes on to state: "To hold that a[n] . . . affirmative

action program is constitutionally permissible . . . is hardly to hold that the program is constitutionally required. The Fourteenth Amendment, lest we lose sight of the forest for the trees, does not require what it barely permits. [¶] . . . As in *Crawford*, '[i]t would be paradoxical to conclude that by adopting the Equal Protection Clause of the Fourteenth Amendment, the voters of the State thereby had violated it.' " (*Wilson II*, at p. 709.)

This reasoning is predicated upon two unstated assumptions, both of which are incorrect.[11]

First, the analysis assumes that section 31 and the equal protection clause are coextensive. They are not. True, the equal protection clause "barely permits" race- and gender-conscious remedial programs by requiring that they be both necessary and narrowly tailored to achieve a compelling interest. (*Richmond v. J. A. Croson Co.* (1989) 488 U.S. 469, 493-498.) But section 31 goes beyond this; it forbids not just discrimination but also narrowly-tailored preferences designed to *eliminate* discrimination. Thus, as one commentator has argued, "[i]f the Equal Protection Clause does not prohibit the race and gender preferences barred by Proposition 209, compliance with the Equal Protection Clause cannot constitute a justification for Proposition 209's discriminatory invalidation of race and gender preferences." (Spann, *Proposition 209* (1997) 47 Duke L.J. 187, 255.)

Second, and more fundamentally, the *Wilson II* analysis assumes that in "political structure" equal protection there is a pivotal distinction between what the Fourteenth Amendment "permits" and what it "requires." (*Wilson II, supra*, 122 F.3d at p. 709.) This notion is sui generis, and cannot be reconciled with *Seattle*. The race-based busing program in *Seattle* was not *required* under the Fourteenth Amendment—the record clearly shows that the busing program was designed to remedy de facto, not de jure, segregation. (*Seattle, supra*, 458 U.S. at p. 460 ["segregated housing patterns . . . created

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[11] The *Wilson II* analysis also seems decidedly asymmetrical: Under its reasoning, preferences designed to *eliminate* racial discrimination are properly subject to strict scrutiny while a blanket prohibition on the same remedial programs gets a constitutional "pass." (*Wilson, supra*, 122 F.3d at p. 709.)

racially imbalanced schools"]; see also *Seattle School Dist. No. 1, etc. v. State* (W.D.Wash. 1979) 473 F.Supp. 996, 1001 [finding that the segregation was the result of housing patterns].) Yet this remedial program—clearly a race-based preference—was nevertheless entitled to the same constitutional protection that was afforded to the antidiscrimination laws in *Hunter*. (See also *Nyquist, supra*, 318 F.Supp. at p. 719 [rejecting the state's argument that *Hunter* does not apply to a law that restricts political access to desegregative busing because the state "has no constitutional obligation to end *de facto* racial imbalance"].)

It is critical to remember that "political structure" equal protection focuses not on the substance of the legislation, but on whether and how the legislation affects political access. The doctrine protects the right to lobby for *any* legislation that might be sought by a minority group "in its behalf" (*Hunter, supra*, 393 U.S. at p. 393) or " 'in [its] interest' " (*Seattle, supra*, 458 U.S. at p. 470) and not just legislation securing rights guaranteed under the constitution.[12]

In sum, I cannot agree that the Ninth Circuit's analysis in *Wilson II* is a reliable application of the *Hunter-Seattle* doctrine. As has been explained, I would conclude that section 31 is subject to strict constitutional scrutiny. (Conc. & dis. opn, *ante*, at pp. 11-13.) My task, now, is to respond to specific points made in the majority opinion.

III. The Majority Opinion

The majority poses the core question in this way: "[A] challenger relying on the *Hunter* and *Seattle* decisions would have to 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

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[12] In *Coalition to Defend Affirmative Action v. Granholm* (6th Cir. 2006) 473 F.3d 237, the court was led astray by *Wilson II*'s faulty analysis. *Granholm* agreed with *Wilson II*'s conclusion that " '[i]mpediments to preferential treatment do not deny equal protection.' " (*Granholm*, at p. 250, citing *Wilson II, supra*, 122 F.3d at p. 708.) The majority in this case also incorrectly finds meaning in the distinction between forbidding *discrimination* and forbidding *preferences*. (Maj. opn., *ante*, at p. 28.)

a special burden on racial minorities." (Maj. opn., *ante*, at p. 20.) The opinion then concludes that section 31 employs no racial (or gender) classification, has no purposeful adverse impact on minorities, and places no special burdens on racial minorities or women not borne by others. (*Id.*, at pp. 23-27.) These conclusions, however, are contradicted by the majority's own determination that the dual purposes of section 31 were (1) to "repeal[existing] preferential race- or gender-related legislation," and (2) to require that "racial and ethnic minorities and women who would want to push for such preferences [in the future], . . . launch a statewide initiative to do so[, while p]oor people, veterans, owners of small businesses, persons with disabilities and others will not have to go this extra lap . . . ." (Maj. opn., *ante*, at pp. 23, 27.)

This, of course, is precisely what the *Hunter-Seattle* doctrine forbids.

The majority takes issue with the notion that section 31 had as its *purpose* the creation of an unfair political structure; it seeks to distinguish the *purpose* of section 31 ["to ban discrimination and preferential treatment on the basis of race, ethnicity and gender"] from its *effect* ["to require racial and ethnic minorities and women to launch a statewide initiative in order to obtain such preferences" in the future]. The latter, the majority asserts, is merely a "potential impact" of the former. (Maj. opn., *ante*, at p. 27, fn 16.) Thus, the majority supports its conclusion that section 31 should escape review under *Hunter* and *Seattle* by characterizing the political handicaps created by section 31 as merely unintended and inchoate consequences of the purposeful ban on preferences. But the cases contain no such purpose/effect dichotomy.

With respect to legislative purpose, section 31 is indistinguishable from the ban on busing in *Seattle*. The purpose of the *Seattle* initiative was to effectuate a ban on racial busing by local school districts in the future, just as the purpose of section 31 was to effectuate a ban on racial and gender preferences in public contracting, employment, and education in the future. It is self-evident that such bans on future action can only be achieved by some method of political restructuring, that is, by removing authority over the subject matter to a higher political level. To pass constitutional muster, this must be done in a racially neutral fashion. Accordingly, the question asked by "political

structure" equal protection is not whether the purpose of the legislation was to create an unfair political structure, but whether the legislation *created* an unfair political structure. Neither *Hunter* nor *Seattle* hold, or even suggest, that an impermissible political restructuring evades constitutional review in the absence of language evincing a legislative intent to discriminate against minorities (and women) in the political process.

The majority points to the fact that section 31 "itself does not discriminate on the basis of race or gender" (maj. opn., *ante*, at p. 28) because it places the same restrictions on every individual—whites and minorities, women and men (*id.*, at p. 27.) As has been noted, however, this is not the focus of "political structure" equal protection. Indeed, it is a hallmark of this type of suspect legislation that it " 'treats all individuals as equals' " while "subtly distort[ing] governmental processes" to the disadvantage of minorities. (*Seattle, supra*, 458 U.S. at p. 467; and see *Hunter, supra*, 393 U.S. at pp. 390-391.) The laws under scrutiny in both *Seattle* and *Hunter* also did not create racial categories but placed the same restrictions on everyone—whites and minorities alike. The question was whether those laws nevertheless created a discriminatory *political* structure, which they did. In the same way, section 31 selectively burdens "[gender and] racially conscious legislation" and therefore "plainly 'rests on "distinctions based on race" ' " [and gender]." (*Seattle, supra*, 458 U.S. at p. 485.)

The majority opines that in *Hunter* and *Seattle* "there was an underlying, though not overtly stated, assumption that one had to but barely scratch the surface of the challenged law to expose its racially discriminatory purpose," a purpose purportedly absent in section 31. (Maj. opn., *ante*, at p. 26.) While I disagree that this unspoken rationale can be read into the majority opinions of *Hunter* or *Seattle*, it is of no moment. The *Hunter-Seattle* doctrine examines the *intent* and *effect* of legislation, not whether there was racial animus. If the law reallocates political power in a way that treats all individuals equally, but operates to the political disadvantage of minority groups and their interests—that is, where there is "race-conscious restructuring of [the] decisionmaking process"—the legislation is discriminatory, irrespective of the lawmakers' motivations. (*Seattle, supra*, 458 U.S. at pp. 470, 485-486 & fn. 29.) This is

true of section 31. However pure the voters' *motives* may have been in seeking to achieve the goal of nondiscrimination, their *intent* was clear: to prohibit *only* race- and gender-based affirmative action programs, and to enshrine that selective prohibition in our Constitution—at the state's most inaccessible political level.

The majority suggests I have "move[d] the *Hunter/Seattle* doctrine too far afield from the core of equal protection jurisprudence" by "dismissing as irrelevant any reading of *Hunter* and *Seattle* that examines the context for, and gives credence to, a racially discriminatory purpose informing the challenged legislation." (Maj. opn., *ante*, at p. 26, fn 15.) This overstates what was intended to be a narrow point, viz., that proof of invidious discriminatory intent is not a sine qua non of an equal protection violation in this context.[13] In fact, I would not disagree with the majority's view that the context and purpose of legislation can and should inform our analysis of it. Without belaboring the point, I would simply refer to the thoroughgoing analyses of section 31's ballot materials conducted by the court in *Wilson I* (*Wilson I, supra*, 946 F.Supp. at pp. 1493-1495) and by Chief Justice George in his concurring and dissenting opinion in *Hi-Voltage, supra*, 24 Cal.4th 537 at pages 582-587, which leave no doubt that section 31 was engendered not by opposition to *all* preferences, but by opposition to preferential treatment for *racial minorities and women*.[14] This is no different in kind from the motivations of those who opposed busing for *racial* purposes only in *Seattle*.

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[13] As is explained in *Seattle*, the United States Supreme Court has "not insisted on a particularized inquiry into motivation in all equal protection cases: 'A racial classification, *regardless of purported motivation*, is presumptively invalid and can be upheld only upon an extraordinary justification.' [Citation.]" (*Seattle, supra*, 458 U.S. at p. 485, italics added.) A political restructuring along racial lines—although engendered by a facially neutral law—creates just such a classification. "[W]hen the political process or the decisionmaking mechanism used to *address* racially conscious legislation—and only such legislation—is singled out for peculiar and disadvantageous treatment, the governmental action plainly 'rests on "distinctions based on race." ' [Citation.]" (*Id.* at pp. 485-486.)

[14] One of the ballot arguments for section 31 makes this point emphatically. " 'REVERSE DISCRIMINATION' BASED ON RACE OR GENDER IS JUST PLAIN WRONG!. . . . [*Sic.*] [S]tudents are being rejected from public universities because of their

The majority also attempts to distinguish section 31 from the laws in *Hunter* and *Seattle* based upon a procedural/substantive dichotomy. The majority declares, citing no authority, that the laws under scrutiny in *Hunter* and *Seattle* were not "overt policy pronouncements" but only "procedural changes that rigged the political process against racial minorities." (Maj. opn., *ante*, at p. 25.) The majority then characterizes section 31 as a "substantive policy enactment *barring* race- and gender-based . . . preferences" (maj. opn., *ante*, at p. 26) implying that, unlike the enactments in *Hunter* and *Seattle*, section 31 had no procedural component and was not intended to reallocate political power (maj. opn., *ante*, at pp. 25-28). But nothing in the *Hunter* or *Seattle* opinions even begins to suggest that the pieces of legislation under review in those cases enacted procedural changes only and were not also policy statements. It is difficult to imagine, for example, how a statewide initiative on the issue of busing could *not* be a policy enactment. Nor can it be said that section 31 is *only* a policy pronouncement. It is undisputed that section 31 also makes procedural changes that rig the political process against women and minorities, as did the legislation in *Hunter* and *Seattle*. (Maj. opn., *ante*, at p. 27.)

The majority concludes that section 31 is more akin to Proposition I, the anti-busing amendment at issue in *Crawford, supra*, 458 U.S. 527. (Maj. opn., *ante*, at p. 23.) Describing Proposition I the majority states, "it worked no impermissible distortion of the political process for the people to align the state's desegregation responsibilities and remedies with the standard set by the Fourteenth Amendment rather than the more protective standard repealed in part by Proposition I. The people can change their collective minds on state constitutional matters, so long as the result does not offend federal constitutional principles." (*Id.* at p. 21.) True enough. But the majority's conclusion that section 31 is "on footing similar to Proposition I" (*id.* at p. 23) does not

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RACE. Job applicants are turned away because their RACE does not meet some 'goal' or 'timetable.' Contracts are awarded to high bidders because they are of the preferred RACE. . . . Proposition 209 will stop [these] terrible programs. . . ." (*Wilson I, supra*, 946 F.Supp. at p. 1494.)

follow from the premise because, unlike Proposition I, section 31 *does* offend constitutional principles.

To begin with, in distinguishing *Crawford* from *Seattle* Justice Powell pointed out that after the adoption of Proposition I, "[t]he school districts themselves retain a state-law obligation to take reasonably feasible steps to desegregate, and they remain free to adopt reassignment and busing plans to effectuate desegregation. [¶] [footnote] In this respect this case differs from the situation presented in [*Seattle*]." (*Crawford, supra*, 458 U.S. at pp. 535-536 & fn. 12.) This also differentiates Proposition I from section 31; pursuant to the latter, state and local agencies do *not* remain free to adopt racial preferences to ameliorate racial discrimination.

But more to the point of our analysis is the simple fact that Proposition I did not use the "racial nature of an issue to define the governmental decisionmaking structure" (*Seattle, supra*, 458 U.S. at p. 470)—that is, it did not create a two-tiered political structure—while section 31 does. Under Proposition I, pupil reassignment cannot be ordered as a judicial remedy for *any* purpose except to remedy a Fourteenth Amendment violation in accordance with federal standards. This constitutes a total prohibition, not one defined by race or gender. Thus, in the absence of a federal constitutional violation, Proposition I forbids court-ordered busing for *any* student seeking an advantageous reassignment, whether based on race, gender, special needs, sibling relationships, or any other distinction. Therefore, although it was reasonably foreseeable that Proposition I would have a disproportionate *impact* on minorities—a situation that requires a different equal protection analysis (see, e.g., *Arlington, supra*, 429 U.S. 252)—it did not erect structural barriers peculiar to minorities nor place special limits on their political options, as does section 31.

The majority relies upon Justice Mosk's concurring opinion in *Hi-Voltage, supra*, 24 Cal.4th at pages 570-571, as showing that section 31 "brooks no impermissible racial classification." (Maj. opn., *ante*, at p. 24.) That reliance is misplaced. The concurrence addresses neither the issue of "racial classification[s]" nor *any* constitutional question. Rather, in addressing the City of San Jose's ordinance granting preferences in public

contracting Justice Mosk merely explains that one cannot avoid the prohibitions of section 31 by using an improper *means* to achieve a proper *end*. (*Hi-Voltage, supra*, 24 Cal.4th at pp. 570-571 (conc. opn. of Mosk, J.).) Moreover—and precisely because he was *not* addressing an equal protection issue—Justice Mosk's shorthand characterization of the provisions of section 31 glosses over its critical feature. He writes: "Stated negatively, section 31 prohibits governmental actors from improperly burdening or benefiting *any* individual or group in the operation of public employment, public education or public contracting. . . . [¶] Stated positively, section 31 commands governmental actors to treat *all* individuals and groups equally in the operation of public employment, public education, and public contracting." (*Hi-Voltage*, at pp. 570-571 (conc. opn. of Mosk, J.), italics added.) This clearly overstates the reach of section 31. Its provisions do not command governmental actors to treat *all* individuals and groups equally; nor do they prohibit government actors from improperly burdening or benefiting *any* individual or group. Section 31 prohibits *only* race- or gender-based burdens or benefits. Justice Mosk perhaps had reason to paint section 31 with overly broad strokes, but in doing so, he did not purport to supply any constitutional or equal protection analysis.

Finally, the fact that section 31 can be described as "utopian" in nature, that it "embraces general principles of nondiscrimination," and that it "can . . . be viewed as standing for the proposition that racial and gender discrimination, affirmative or reverse, is unfair and wrong," (maj. opn., *ante*, at pp. 26, 23, 24) is irrelevant. In fairness, it should be noted that benign interpretations of section 31 and its particular type of color-blindness are not universally shared.[15] For example, a law prohibiting *only* race and

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[15] See, e.g., Note, *Proposition 209: Does It Eliminate or Perpetuate Discrimination? The Ninth Circuit Dismantles Affirmative Action in* Coalition for Economic Equity v. Wilson (1998) 42 St. Louis U. L.J. 883, 885 ["[w]hile Proposition 209 purports to reinforce anti-discrimination legislation, opponents of the initiative argue that the amendment, as applied, only prohibits discrimination against whites in that it targets affirmative action programs that solely benefit African-Americans and other minorities, even though such programs have been deemed necessary to remedy the present effects of past discrimination"]; López, *Colorblind*

gender preferences in state university admissions—while allowing preferences for family lineage (legacies), athletic ability, wealth, special gifts, or even just connections—may reflect a utopian *or* dystopian vision, depending on one's point of view.[16] But that is a political debate, not a judicial one. It is not for us to decide the normative issue of whether racial and gender preferences promote or undermine the goals of the Fourteenth Amendment. We decide only whether the enactment meets constitutional standards.

Judge Henderson's incisive remarks in *Wilson I* apply with equal force here: "It . . . cannot be overemphasized that this case does not call upon this Court to adjudicate whether affirmative action is right or wrong, or whether it is no longer an appropriate policy for addressing the continuing effects of past and present discrimination against racial minorities and women. Such questions, while they are most certainly of vital public policy interest, lie beyond the purview of this Court. Nor does this case implicate the ability of governmental entities to voluntarily repeal affirmative action policies . . . . [¶] Rather, the substantive issues raised by this action are considerably more narrow, albeit no less important: whether the particular *method* chosen by Proposition 209 to curtail affirmative action is unlawful because it . . . violates the rights of women and minorities to fully participate in our political system . . . ." (*Wilson I, supra*, 946 F.Supp. at p. 1490.)

IV. Conclusion

I agree with the Ninth Circuit's observation that states have " 'extraordinarily wide latitude' " in reserving or delegating political power. (*Wilson II, supra*, 122 F.3d at p. 706.) And no one questions the voters' authority to "resolve[] an issue at a higher

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to the Reality of Race in America, The Chronicle of Higher Education (Nov. 3, 2006) p. B6 ["[w]e find ourselves now in the midst of a racial era marked by what I term 'colorblind white dominance,' in which a public consensus committed to formal antiracism deters effective remediation of racial inequality, protecting the racial status quo while insulating new forms of racism and xenophobia"].

[16] Comment, *A World Without Color: The California Civil Rights Initiative and the Future of Affirmative Action* (1997) 38 Santa Clara L.Rev. 235, 265.

level of state government." (*Ibid.*) But these actions must be accomplished by *a method* that conforms to equal protection principles. (*Seattle, supra*, 458 U.S. at p. 487.)

I dissent from the majority opinion only insofar as it upholds the judgment of the trial court with respect to the constitutionality of section 31. I would reverse that portion of the judgment and remand for a determination of whether section 31 can be justified by a compelling state interest, and is narrowly tailored to do so.

RIVERA, J.

APPENDIX TO CONCURRING AND DISSENTING OPINION

A. Articles that Argue Section 31 Violates Equal Protection

Goodman, *Redacting Race in the Quest for Colorblind Justice: How Racial Privacy Legislation Subverts Antidiscrimination Laws* (2004) 88 Marq. L.Rev. 299, 344 [the *Wilson II* court's statement—that a law does not classify by race if it prohibits classification by race—misses the point of the *Hunter* doctrine]

Strasser, *Same-sex Marriage Referenda and the Constitution: On* Hunter, Romer, *and Electoral Process Guarantees* (2001) 64 Alb. L.Rev. 949, 970-974 [*Wilson II* is "not persuasive" because it "overstated the case" and misrepresented the spirit of *Hunter*]

Miller, *"Democracy in Free Fall": The Use of Ballot Initiatives to Dismantle State-sponsored Affirmative Action Programs* (1999) 1999 Ann. Surv. Am. L. 1, 36-37 & fn. 239 ["[*Hunter* and *Romer*] clearly stand for the proposition that when a minority of the population is deprived access, via ballot initiative, to governmental and political processes it had received through the legislative process, the Equal Protection Clause is violated. Proposition 209 . . . eliminating state-sponsored affirmative action programs fall[s] within the scope of these precedents."]

Sealing, *Proposition 209 as Proposition 14 (as Amendment 2): The Unremarked Death of Political Structure Equal Protection* (1999) 27 Cap.U. L.Rev. 337, 367-380 [Proposition 209, the charter amendment in *Hunter*, and the referendum in *Seattle* all "placed a structural impediment to fair access to the political process by those who would seek protection from discrimination; therefore, they violated the Equal Protection Clause"]

Pillai, *Neutrality of the Equal Protection Clause* (1999) 27 Hastings Const. L.Q. 89, 113-115 [section 31 is not neutral but contains "a facial classification based on race and gender" by singling out racial and gender preferences for prohibition and therefore is subject to strict scrutiny]

Vargas, *Judicial Review of Initiatives and Referendums in Which Majorities Vote on Minorities' Democratic Citizenship* (1999) 60 Ohio St. L.J. 399, 537-538 [*Wilson II* missed the point of *Hunter-Seattle* and *Romer,* which is that a majority cannot unfairly and unequally burden minorities' access to the political process]

Oppenheimer,[34] *Carcieri's Self-described "Progressive" Critique of the ACLU on Proposition 209: A "Conservative" Response* (1999) 39 Santa Clara L.Rev. 1153, 1165-1167 [Proposition 209 violates equal protection under the *Hunter-Seattle* doctrine]

Tokaji and Rosenbaum,[35] *Promoting Equality by Protecting Local Power: A Neo-federalist Challenge to State Affirmative Action Bans* (1999) 10 Stan. L.Rev. 129, 138-139 [*Wilson II*, "[w]hile purporting to apply the principle articulated by the Supreme Court, . . . is irreconcilable with both the holding and the result of *Seattle*"]

Comment, *Reassessing the Right of Equal Access to the Political Process: The* Hunter *Doctrine, Affirmative Action, and Proposition 209* (1999) 73 Tul. L.Rev. 1415, 1435-1440 [the dissenters in *Wilson II* and the district court in *Wilson I* more accurately interpreted and applied the *Hunter* doctrine to Proposition 209]

Note, *Ruling by Numbers: Political Restructuring and the Reconsideration of Democratic Commitments after* Romer v. Evans (1999) 109 Yale L.J. 587, 605-606, 622 [*Wilson II* failed to recognize and reconcile the holding in *Romer* in which the court "repudiated the notion that an act of political restructuring is neutral because the protections that it repeals are not constitutionally required"; Proposition 209 is subject to strict scrutiny under the long-established *Hunter* doctrine]

Amar, *Recent Cases: The Equal Protection Challenge to Proposition 209* (1998) 5 Asian L.J. 323, 325-327 [*Wilson II* failed to follow U.S. Supreme Court precedent]

Note, *Proposition 209: Does It Eliminate or Perpetuate Discrimination? The Ninth Circuit Dismantles Affirmative Action in* Coalition for Economic Equity v. Wilson (1998) 42 St. Louis U. L.J. 883, 912-914 [*Wilson II* incorrectly concluded Proposition 209 addressed race in a " 'neutral fashion' " because the court looked only at the language of the amendment rather than its effect, which was to eliminate race- and gender-based affirmative action]

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[34] Oppenheimer authored a brief on behalf of amici curiae the American Jewish Congress and the National Council of Churches arguing for an affirmance of *Wilson I*. (*Wilson II, supra*, 122 F.3d at pp. 695-696; see Oppenheimer, *Carcieri's Self-described "Progressive" Critique of the ACLU on Proposition 209: A "Conservative" Response* (1999) 39 Santa Clara L.Rev. 1153, fn. *.)

[35] The authors were part of the team of attorneys representing plaintiffs in the *Wilson* case. (*Wilson I, supra*, 946 F.Supp. at p. 1487; *Wilson II, supra*, 122 F.3d at p. 695; see Tokaji & Rosenbaum, *Promoting Equality by Protecting Local Power: A Neo-federalist Challenge to State Affirmative Action Bans* (1999) 10 Stan. L.Rev. 129, 143, fn. 1 (Tokaji & Rosenbaum).)

Spann, *Proposition 209* (1997) 47 Duke L.J. 187, 242-256 [*Wilson II* incorrectly characterizes Proposition 209 as "neutral"; Proposition 209 categorically prohibits programs designed to *end* discrimination against minorities and women, and therefore is subject to strict scrutiny for the same reasons the affirmative action programs in *Croson, supra*, 488 U.S. 469 and *Adarand Constructors, Inc. v. Peña* (1995) 515 U.S. 200 are subject to strict scrutiny]

Comment, *A World Without Color: The California Civil Rights Initiative and the Future of Affirmative Action* (1997) 38 Santa Clara L.Rev. 235, 263-265 [the *Wilson II* opinion ignores the central meaning behind the theory of equal protection and ignores the legal significance of *Hunter* and *Seattle*]

Margolis, *Affirmative Action: Déjà Vu All Over Again?* (1997) 27 Sw.U. L.Rev. 1, 60-62 [*Wilson II* used a flawed analysis by equating preferences with unequal treatment that is constitutionally prohibited]

Note, *Gender Blindness and the* Hunter *Doctrine* (1997) 107 Yale L.J. 261 [the *Wilson II* opinion rests on "questionable grounds"]

Amar and Caminker,[36] *Equal Protection, Unequal Political Burdens, and the CCRI* (1996) 23 Hastings Const. L.Q. 1019, 1045 ["[Proposition 209] embodies the kind of political process burden on the exercise of minority political power that the *Hunter* doctrine forbids"]

B. **Articles that Argue Section 31 Does Not Violate Equal Protection**

Carcieri, *A Progressive Reply to Professor Oppenheimer on Proposition 209* (2000) 40 Santa Clara L.Rev. 1105, 1118-1121 [Proposition 209 does not violate equal protection because women and minorities are not constitutionally entitled to preferences]

Heriot,[37] *Proposition 209 and the United States Constitution* (1998) 43 Loyola L.Rev. 613, 623-634 [Proposition 209 is valid because it does not "explicitly restructure the political process," but instead, is a "substantive policy pronouncement banning state-sponsored racial and gender discrimination in public employment, public education and public contracting"]

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[36] The authors were part of a team of attorneys representing plaintiffs in *Wilson I*. (*Wilson I, supra*, 946 F.Supp. at p. 1487; see Tokaji & Rosenbaum, *supra*, 10 Stan. L.Rev. at pp. 129, 143, fn. 1.)

[37] The author cochaired the Yes on Proposition 209 campaign. (Heriot, *Proposition 209 and the United States Constitution* (1998) 43 Loyola L.Rev. 613, fn. a1.)

Wood,[38] *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* (1997) 24 Hastings Const. L.Q. 969, 999-1000 [neither *Seattle* nor *Hunter* applies to Proposition 209 because it is a "pure policy enactment and does not explicitly alter the political decision making process on a racial question"]

Kmiec, *The Abolition of Public Racial Preference—An Invitation to Private Racial Sensitivity* (1997) 11 Notre Dame J.L. Ethics & Pub. Pol'y 1, 6-7 [Proposition 209 is valid because it has merely amended the California Constitution to be "expressly" color-blind]

Weeden, *Affirmative Action California Style—Proposition 209: The Right Message While Avoiding a Fatal Constitutional Attraction Because of Race and Sex* (1997) 21 Seattle U. L.Rev. 281, 297-316 [Proposition 209 is valid because it does not contain a racial classification and had no discriminatory purpose]

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[38] Wood was the co-author and coproponent of Proposition 209, and is a coprincipal in Californians Against Discrimination and Preferences, which was a defendant intervener in *Wilson*. (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* (1997) 24 Hastings Const. L.Q. 969, fn. *.)

Trial Court:	San Francisco Superior Court
Trial Judge:	Hon. James L. Warren
Counsel for Appellants:	Dennis J. Herrera City Attorney Wayne K. Snodgrass Sherri Sokeland Kaiser James M. Emery Deputy City Attorneys Moscone, Emblidge & Quadra LLP G. Scott Emblidge Rachel J. Sater Meyers, Nave, Riback, Silver & Wilson Mara E. Rosales Joseph M. Quinn K. Scott Dickey
Counsel for Amicus Curiae on Behalf of Appellants:	Bingham McCutchen LLP Michael Isaku Begert Sujal J. Shah Rianne E. Nolan Renee M. DuPree Nancy M. Wang Elizabeth M. Hall Lawyers' Committee for Civil Rights Oren Sellstrom
Counsel for Respondents:	Pacific Legal Foundation John H. Findley Sharon L. Browne Paul J. Beard II

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DIVISION 4

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CORAL CONSTRUCTION, INC.,
Plaintiff/Respondent.
v.
CITY AND COUNTY OF SAN FRANCISCO COUNTY, et al.,
Defendants/Appellants.

A107803
San Francisco County No. 319549

BY THE COURT:

The petition for rehearing is denied.

Date: MAY 14 2007

BUVOLO, P.J. P.J.

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