SUPREME COURT OF THE STATE OF CALIFORNIA

CORAL CONSTRUCTION, INC., an Oregon corporation,

Plaintiff and Appellee,

vs.

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 CITY AND COUNTY OF SAN FRANCISCO, a political subdivision of the State of California,

Defendants and Appellants.

SCHRAM CONSTRUCTION, INC., a California corporation,

Plaintiff and Appellee,

vs.

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 and Appellants.

No. S152934

First Appellate District
No. A107803

(San Francisco Superior Court
Nos. 319549 and 421249)

CITY'S OPENING BRIEF ON THE MERITS OF ISSUES TWO AND THREE

The Honorable James L. Warren
Superior Court for the City and County of San Francisco

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

STATEMENT OF THE ISSUES 1

INTRODUCTION 1

STATEMENT OF FACTS 2

I. SAN FRANCISCO'S MBE/WBE ORDINANCE IS BASED ON LEGISLATIVE FINDINGS THAT THE CITY AND ITS PRIME CONTRACTORS ACTIVELY DISCRIMINATE AGAINST WOMEN AND MINORITIES IN CITY CONTRACTING. 2

A. Precursors to the 2003 Ordinance. 2

B. The Evidence And Legislative Findings In Support Of The 2003 Ordinance. 4

II. PROCEDURAL HISTORY 9

A. The *Coral* Case 9

B. The *Schram* Case 11

C. Consolidation. 11

D. Summary Judgment 11

E. The Court of Appeal 11

F. Review in this Court 12

ARGUMENT 13

I. ARCTICLE I, SECTION 31 VIOLATES THE *HUNTER-SEATTLE* DOCTRINE BY SELECTIVELY BURDENING MINORITIES AND WOMEN BY MAKING LOCAL ANTI-DISCRIMINATION PROTECTIONS UNAVAILABLE TO THEM. 13

A. *Hunter* Invalidated A Facially Neutral, Voter-Enacted Measure Because The Measure Placed Special "Political Process" Burdens On Racial Minorities. 14

B. *Seattle* Applied *Hunter* To Invalidate A Facially Neutral Measure That Eliminated Local Legislative Measures Benefitting Racial Minorities. 15

C. Proposition 209 Is Unconstitutional Under *Hunter* and *Seattle* 19

D. In Upholding Proposition 209, the Majority Below Improperly Described And Misapplied the *Hunter-Seattle* Doctrine. 26

E. Conclusion 30

II. SAN FRANCISCO'S MBE ORDINANCE IS NECESSARY TO MAINTAIN THE CITY'S ELIGIBILITY FOR FEDERAL FUNDS 30

A. Section 31(e) Exempts Race-Conscious Measures Where Federal Law Requires The Elimination Of Discrimination And Race-Neutral Measures Have Proven Ineffective. 30

B. Federal Law Requires The City To Take Affirmative Action To Remove The Effects Of Discrimination In City Contracting. 31

C. It Is Undisputed The Race-Neutral Measures Have Failed To Remove The Effects Of Discrimination In City Contracting. 33

D. The Court Of Appeal Erred By Grafting Additional Requirements On To Section 31(e). 34

CONCLUSION 37

CERTIFICATE OF COMPLIANCE 39

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C&C Construction, Inc. v. Sacramento Municipal Utility District (2004) 122 Cal. App.4th 284 ..... passim

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STATEMENT OF THE ISSUES

On September 9, 2007, this Court limited the briefing and argument in this case to three issues. This Opening Brief on the Merits addresses the issues designated (2) and (3) by the Court (redesignated for purposes of this brief as (1) and (2)), because they were decided adversely to respondents by the court below.

(1) Does Article I, Section 31 of the California Constitution, which prohibits government entities from discrimination or preference on the basis of race, sex, or color in public contracting, improperly disadvantage minority groups and violate equal protection principles by making it more difficult to enact legislation on their behalf? (See *Washington v. Seattle School Dist. No. 1* (1982) 458 U.S. 457; *Hunter v. Erickson* (1969) 393 U.S. 385.)

(2) Does an ordinance that provides certain advantages to minority- and female-owned business enterprises with respect to the award of city contracts fall within an exception to Section 31 for actions required of a local government entity to maintain eligibility for federal funds under the federal Civil Rights Act (42 U.S.C. § 2000d)?

INTRODUCTION

"The Equal Protection Clause of the Fourteenth Amendment guarantees racial minorities the right to full participation in the political life of the community." (*Washington v. Seattle School Dist. No. 1* (1982) 458 U.S. 457, 467.) Accordingly, the United States Supreme Court has made clear that the Equal Protection Clause forbids ballot measures that selectively place special political burdens on racial minorities or women to achieve beneficial legislation. That is exactly what Article I, Section 31 of the California Constitution does. Before that ballot measure was enacted,

minorities and women could – and, in San Francisco, did – seek remedies from local legislative bodies for the effects of past and present discrimination in the award of public contracts. After Section 31's passage, women and minorities could seek those remedies only by amending California's Constitution. No fair application of United States Supreme Court precedent can square Section 31 with the Equal Protection Clause.

In addition, Section 31 exempts from its reach local, remedial legislation that is necessary to maintain a local government's eligibility for federal funds. The San Francisco ordinance challenged by the plaintiffs in these consolidated cases is an example of just such legislation. Thus, even if Section 31 could escape strict scrutiny under the Equal Protection Clause – which it cannot – the measure expressly permits San Francisco to implement the remedial legislation before this Court, because the Ordinance is necessary to prevent ongoing discrimination that jeopardizes the City's eligibility for federal funding.

For these reasons, the judgment of the Court of Appeal should be reversed.

STATEMENT OF FACTS

I. SAN FRANCISCO'S MBE/WBE ORDINANCE IS BASED ON LEGISLATIVE FINDINGS THAT THE CITY AND ITS PRIME CONTRACTORS ACTIVELY DISCRIMINATE AGAINST WOMEN AND MINORITIES IN CITY CONTRACTING.

A. Precursors to the 2003 Ordinance.

In 1989, San Francisco adopted a Minority/Women/Local Business Utilization Ordinance based on ongoing, widespread complaints to the City and substantial evidence that private contractors and even City agencies and employees were routinely discriminating against potential contracting partners on the basis of race and sex. (*Associated General Contractors of*

California, Inc. v. Coalition for Economic Equity (9th Cir. 1991) 950 F.2d 1401, 1416-1418.) Resolving an equal protection challenge to the 1989 Ordinance in favor of the City, 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" and that the 1989 Ordinance was narrowly tailored to redress identified discrimination. (*Id.* at p. 1416.) The 1989 Ordinance expired on October 31, 1998. (Joint Appendix in Court of Appeal, Vol. III, p. 655 ["JA III:655"], ¶ 2.)

To evaluate whether the 1989 Ordinance had eliminated – or at least mitigated – discrimination in the City's public contracting, the City conducted a second investigation in 1997 and 1998. This investigation included fourteen public hearings, live testimony from 254 witnesses, videotaped testimony from numerous additional witnesses, many volumes of social science materials, and extensive statistical disparity studies regarding discrimination in City contracting against minority- and women-owned businesses. (JA III:768; see JA V:1109 ¶ 2 and vols. V - XII.)

The City's inquiry revealed ongoing discrimination in public contracting against minority- and women-owned businesses. The San Francisco Board of Supervisors concluded that a new MBE/WBE ordinance was needed and that race-neutral measures employed by the City, standing alone, could not be effective in eliminating that discrimination. (See S.F. Admin. Code §§ 12D.A.9(A)4, 12D.A.10(A)4 and 12D.A.11(A)-(1)c, contained in JA at III:766-796.) Accordingly, the Board adopted the 1998 Ordinance. (JA III:775, ¶¶ 18 and 19.)

The 1998 Ordinance attempted to remedy identified discrimination in City contracting in a variety of ways. First, at the prime contracting level, the 1998 Ordinance contained a "Bid Discount Program." That

program required City departments to give specified percentage discounts to bids submitted by certified MBEs and WBEs for certain types of City prime contracts. (S.F. Admin. Code §12D.A.9(A)(2) at JA VII:786.)

Second, to remedy identified discrimination in subcontracting, the 1998 Ordinance contained a "Subcontracting Program." That program requiring bidders for certain types of City prime contracts to demonstrate their good-faith efforts to provide MBEs and WBEs an equal opportunity to compete for subcontracts. A bidder could comply with the Subcontracting Program by documenting its good-faith efforts to inform MBEs and WBEs of subcontracting opportunities. Bidders who showed that they planned to use MBE and WBE subcontractors at the level one would expect absent discrimination – as determined by the availability of MBEs and WBEs qualified to perform the work required by the particular contract – did not need to document their good-faith efforts. The 1998 Ordinance required the City to declare non-responsive any bid where the bidder failed to comply with the Subcontracting Program and the MBE/WBE requirements had not been waived. (S.F. Admin. Code §12D.A.17, at JA III:794 .) The 1998 Ordinance expired in 2003. (JA III:796.)

B. The Evidence And Legislative Findings In Support Of The 2003 Ordinance.

In mid-2003, based on a third extensive investigation that revealed continuing discrimination in City contracting, the Board of Supervisors reenacted the 1998 Ordinance, including its Bid Discount and Subcontracting Programs, without substantial change. ("2003 Ordinance," at JA III:683-775.) The evidence supporting the 2003 Ordinance demonstrates that minorities and women are still subjected to significant

discrimination in City contracting at the hands of some City employees and majority-owned prime contractors.

For example, in April 2003, the San Francisco Human Rights Commission ("HRC") conducted a Disparity Analysis to determine the extent of underutilization of MBEs and WBEs in City contracting. (JA V:1230-1291.) The HRC used the City's Diversity Tracking System, which identifies minority vendors used in every public contract, to track how much work minorities performed as prime- and subcontractors. (JA V:1231.) The HRC study revealed significant disparities between the number of woman- and minority-owned businesses that were able to work on public contracts in construction, architecture and engineering, professional services, purchasing, general services, and telecommunications, and those that were actually hired and participated in those contracts. (JA V:1238-1240.)

Further, in November 2002, a minority contractor testified before the HRC that City employees have changed the required scope and rules for subcontracting on projects to ensure exclusion of MBE/WBEs from some projects. (JA VII:1688, lines 8-14.) Similarly, a May 2003 report issued by the HRC relayed evidence that a City employee had manipulated a member of a public contract selection panel to ensure that a certified MBE/WBE would receive a low score and thus be removed from consideration for the contract award. (JA V:1346-1347.)

The investigation also revealed that some City employees will place such high minimum requirements on minority contractors – such as requiring $1,000,000 of insurance to qualify for a contract for delivery of $2,500 worth of goods – that most MBE/WBEs are precluded from participation. (JA V:1346-47; JA IX:2262.) And City employees have also

extended existing contracts to eliminate the need for bidding on a new contract, and the concomitant need for minority subcontracting. (JA V:1347.) Minority contractors also testified that they are held to higher standards by City inspectors than are non-minority contractors. Minority contractors have complained that they have seen inspectors waive majority-owned contractors' compliance with contract requirements, while forcing minority contractors to redo identical work on the same programs at substantial cost. (JA IX:2256, 2281-82.) Minority contractors also have complained that City employees subject them to more rigorous pre-contracting investigation and routinely call their qualifications for the work into question. (JA IX:2286.)

The record also contains evidence that City employees have harassed minority contractors. One minority contractor complained that a City inspector would routinely share his view that members of the contractor's ethnic group were "morons" and "monkeys." (JA IX:2281-82.) The same contractor complained that City inspectors would harass his staff and inform others of the inspector's belief that the contractor would soon be bankrupt. (*Id.*)

The record before the Board of Supervisors also reveals systematic efforts by majority prime contractors to avoid compliance with the 1998 Ordinance, usually in one of three ways. First, some majority contractors falsely claim that they have retained MBE or WBE subcontractors in order to obtain a City contract. (JA V:134.) The record contains the testimony of several minority contractors whose names and resumes have been used to obtain projects in which they are not involved, about which they have no knowledge, and involving prime contractors of whom they have never heard. (JA V:134, ¶ 2; JA V:134.) Minority contractors typically discover

that their names have been used in this way when a third party calls to inquire about the project. (JA VII:1746, lines 10-25.) Most report that they are not allowed to participate even after discovering the majority contractor's ruse. (*Ibid.*)

Second, some majority contractors who legitimately retain MBEs or WBEs for a project will immediately cancel the subcontract once the contract is obtained from the City. One minority contractor testified that once the work on a City project commenced, the prime contractor refused to give them the work for which they had subcontracted. (JA V:1376.)

Third, even if they allow subcontractors to do work on a project, some majority contractors will substantially curtail the scope and amount of the work once the project has begun. One WBE subcontractor complained that upon arrival at the jobsite, she discovered that much of the work she had subcontracted for would, in fact, be performed by the majority contractor. (JA V:1356.) Another woman contractor testified that on one contract, once the subcontracting goal percentage had been reached, the contractor dropped her firm from the job. (JA VII:1644, lines 10-20 JA VII:1644, lines 10-20.) A minority contractor testified that his firm was terminated in the middle of its work by the prime contractor, which then shifted the work to another majority contractor. (JA VII:1644, lines 10-20.)

Majority contractors have also discriminated against MBEs and WBEs on City-financed projects by holding them to higher performance standards than non-minority subcontractors. For example, one minority contractor was berated for taking 23 hours to deliver goods ordered for a project, when the industry standard for delivery is 5 days. (JA VI:1488-89, ¶¶ 4-7.) Another minority contractor told how he was forced to hire pilot vehicles to lead and follow his trucks even while traveling on closed streets

– a requirement that the prime contractor did not impose on itself or any other non-minority subcontractors performing the same work. (JA VI:1490, ¶ 3.)

Majority contractors have also mistreated MBEs and WBEs by refusing to tender prompt payment for their services. One minority contractor had to wait nearly four years to receive payment for services rendered. (JA VI:1456.)

The legislative record also established that the City has attempted to remedy discrimination using race-neutral programs, but that those programs proved to be inadequate. For example, the City provided race- and gender-neutral bid discounts for local disadvantaged bidders on City prime contracts. In addition, the City provided race-and gender-neutral bonding and financial assistance to local disadvantaged businesses, maintained race- and gender-neutral prompt payment policies, and provided greater City contracting opportunities for small businesses regardless of race or gender by requiring City departments to break down large prime contracts into smaller contracts, and to provide adequate online notice about City contracts. Despite all these efforts, the Board of Supervisors found that race-neutral measures were insufficient "to prevent discriminatory practices from occurring" and were not "successful in increasing MBE/WBE subcontractor participation." (SF Admin. Code §§ 12D.9(A)4; see generally, S.F. Admin. Code §§ 12D.A.9(A)4, 12D.A.10(A)4 and 12D.A.11(A)-(1)c, contained in JA at III:766-796.)

Based on this and similar evidence, the Board of Supervisors made extensive legislative findings in support of the 2003 Ordinance. For example, the Board found that:

- "the City and County of San Francisco is actively discriminating against women and minority groups in its contracting, and is passively participating in discrimination in the private sector." (JA III:707.)
- "the disproportionately small share of City contracting and subcontracting that goes to women- and minority-owned businesses in certain industries is due to discrimination by the City and discrimination in the private market." (JA III:694.)
- "the race- and gender-conscious remedial programs authorized by this Ordinance continue to be necessary to remedy discrimination against minority- and women-owned businesses in City prime contracting and subcontracting." (JA III:707.)
- "the evidence before it establishes that the City's current contracting practices are in violation of federal law and that, as a result, this ordinance continues to be required by federal law to bring the City into compliance with federal civil rights laws in its contracting practices." (JA III:707.)

(See generally JA III:685-718 [complete text of legislative findings in support of the 2003 Ordinance].)

II. PROCEDURAL HISTORY

A. The *Coral* Case.

Coral Construction, Inc. challenged the 1998 Ordinance by filing a petition for writ of mandate on September 12, 2000. In its petition, Coral alleged that the Bid Discount and Subcontracting Programs facially

discriminated and granted preferential treatment on the basis of race and gender in violation of Article I, Section 31 of the California Constitution.[1] (JA I:5-10.) Coral sought a writ of mandate compelling the City to implement "race- and sex-neutral' contracting policies, and to cease and desist from implementing the 1998 Ordinance. (JA I:15, ¶ 45.) Coral also sought a declaration that the 1998 Ordinance was unconstitutional. (JA I:15, ¶ 46.) Further, Coral sought a permanent injunction prohibiting the City from enforcing or attempting to enforce the 1998 Ordinance. (JA 1:15, ¶ 47.)

In mid-2002, the parties filed cross motions for summary judgment. Among other things, the City challenged Coral's standing to sue. On November 15, 2002, the trial court granted the City's motion, and denied Coral's motion. (See *Coral Construction, Inc. v. City and County of San Francisco* (2004) 116 Cal.App.4th 6, 14.) The court concluded that Coral had failed to establish a triable issue of material fact to support its standing to seek equitable relief against future enforcement of the Ordinance. (*Id.* at 10.) As a result, the trial court did not reach the merits of Coral's claims.

Coral appealed that ruling, and on February 24, 2004, the Court of Appeal reversed and remanded the case for further proceedings in Superior Court.

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[1] Article I, Section 31, also known as Proposition 209, provides in pertinent part:

> The state shall not discriminate against, or grant 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.

B. The *Schram* Case.

Schram Construction, Inc. filed its complaint against the City in June 2003. Like Coral, Schram alleged that the Bid Discount and Subcontracting Programs facially discriminated and granted preferential treatment on the basis of race and gender in violation of Section 31. (JA I:73-78, ¶¶ 10-20.) Also like Coral, Schram sought a declaration that the 1998 Ordinance was unconstitutional and an injunction prohibiting the City from enforcing or attempting to enforce the 1998 Ordinance. (JA I:12-13, ¶26-27; JA I:80, ¶2.)

On April 27, 2004, the Superior Court heard oral argument on the parties' cross-motions for summary judgment.

C. Consolidation.

On July 13, 2004, after *Coral* had been remanded and while the summary judgment motions were still pending in *Schram*, the Superior Court consolidated the two cases pursuant to a stipulation of the parties. (JA XIII:3465; JA XIII:3394.) The Court and the parties agreed that the resolution of the *Schram* motions would dispose of the issues in *Coral* as well. (JA I:3394, ¶ 2.)

D. Summary Judgment

On July 26, 2004, the Superior Court granted the plaintiffs' motion for summary judgment, denied the City's motion, and enjoined the challenged portions of the Ordinance on the basis that they violated Article I, Section 31. (JA XIII:3467-3483.)

E. The Court of Appeal

A split panel of the First District Court of Appeal affirmed. The majority (Justices Reardon and Sepulveda) held that Section 31 does not run afoul of the Equal Protection Clause under the *Hunter-Seattle* doctrine,

is not preempted by an international treaty, and that the Ordinance was not required to maintain San Francisco's eligibility for federal funds. The majority concluded, however, that the Superior Court had erred in failing to adjudicate the question of whether Section 31 is a narrowly tailored remedial program to remedy ongoing, pervasive discrimination in public contracting.

Writing in dissent from the panel's holding as to application of the *Hunter-Seattle* doctrine, Justice Rivera concluded that Section 31 drew a constitutionally impermissible racial classification and selectively burdened minorities and women in their ability to seek remedial legislation.

F. Review in this Court

On May 25, 2007, plaintiffs petitioned this Court to review the Court of Appeal's determination that the Superior Court had erred in failing to decide whether Section 31 is a narrowly tailored remedial program to remedy ongoing, pervasive discrimination in public contracting. On June 22, 2007, the City filed an answer in which it asked this Court, should it accept review, to also review the Court of Appeal's decisions regarding the *Hunter-Seattle* doctrine and Section 31's preemption by an international treaty.

On August 22, 2007, this Court granted review. On September 12, 2007, the Court announced that the issues on which it granted review were limited to:

> (1) Did the Court of Appeal properly remand the case to the trial court to determine in the first instance whether the ordinance was required by the federal equal protection clause as a narrowly tailored remedial program to remedy ongoing, pervasive discrimination in public contracting?
>
> (2) Does an ordinance that provides certain advantages to minority- and female-owned business enterprises with respect to the award of city contracts fall within an exception to section 31 for actions required of a local government entity to

maintain eligibility for federal funds under the federal Civil Rights Act (42 U.S.C. § 2000d)?

(3) Does article I, section 31 of the California Constitution, which prohibits government entities from discrimination or preference on the basis of race, sex, or color in public contracting, improperly disadvantage minority groups and violate equal protection principles by making it more difficult to enact legislation on their behalf? (See *Washington v. Seattle School Dist. No. 1* (1982) 458 U.S. 457; *Hunter v. Erickson* (1969) 393 U.S. 385.)

ARGUMENT

I. ARCTICLE I, SECTION 31 VIOLATES THE *HUNTER-SEATTLE* DOCTRINE BY SELECTIVELY BURDENING MINORITIES AND WOMEN BY MAKING LOCAL ANTI-DISCRIMINATION PROTECTIONS UNAVAILABLE TO THEM.

Article I, Section 31 – as applied to invalidate the Ordinance – violates the Equal Protection Clause of the United States Constitution because it prevents women and minorities from receiving the benefits of local remedial legislation, even to correct for known, ongoing, governmental discrimination, while leaving other groups (such as the disabled, veterans or the poor) free to seek any sort of beneficial legislation at the local level. Articulating what would come to be known as the *Hunter-Seattle* doctrine, the United States Supreme Court has strictly scrutinized and invalidated measures that, while neutral on their face, "subtly distort governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation." (*Washington v. Seattle School Dist. No. 1* (1982) 458 U.S. 457, 467; *Hunter v. Erickson* (1969) 393 U.S. 385, 390-391.)

The United States District Court, five judges of the Ninth Circuit Court of Appeals, and Justice Rivera of the Court of Appeal below all agreed that a simple and straight-forward application of the *Hunter-Seattle* doctrine forbids a law, like Proposition 209, that repeals existing beneficial

legislation *and* reallocates power according to non-neutral principles – by making beneficial race- and gender-based legislation more difficult to achieve than similar legislation benefiting other groups.[2] Indeed, Justice Rivera and the dissenting judges of the Ninth Circuit recognized that only by ignoring the *Hunter-Seattle* doctrine, or erroneously "distinguishing" it out of existence, can the courts square Proposition 209 with the dictates of the Equal Protection Clause.

A. *Hunter* Invalidated A Facially Neutral, Voter-Enacted Measure Because The Measure Placed Special "Political Process" Burdens On Racial Minorities.

In *Hunter v Erickson*, the United States Supreme Court applied the Equal Protection Clause to invalidate a voter-enacted amendment to the city charter of Akron, Ohio, that repealed all existing housing anti-discrimination ordinances and required voter approval of any future anti-discrimination ordinances. (393 U.S. at p.387.) Importantly, in striking down the measure, the Court did not find that the measure facially discriminated against any specific group, or that it was adopted for discriminatory purposes. Rather, the Court explained that the charter amendment disadvantaged any group that might seek protection against racial, religious, or ancestral discrimination in the sale and rental of real estate, as compared to any group that might seek to regulate real property transactions in the pursuit of other purposes (*e.g.*, rent control or urban renewal advocates). (*Id.* at p. 390.) Because racial minorities are the groups that typically would pursue laws aimed at protection against racial

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[2] We refer to Article I, Section 31 as "Proposition 209" in this section because that is the way in which much of the case law and legal commentary addressing the measure's invalidity under the *Hunter-Seattle* doctrine refers to the measure.

discrimination in housing, the Court concluded, the measure "places special burden on racial minorities within the governmental process" by forcing those groups to run a "gantlet" of voter approval that other interest groups were spared. (*Id.* at 390.) Because the practical effect of the measure was to make it more difficult for racial minorities to seek political redress than for other groups, the measure discriminated against racial minorities. Accordingly, the Court subjected the measure to heightened scrutiny, and determined that there was no justification for the special burdens the measure imposed on racial minorities.

B. *Seattle* Applied *Hunter* To Invalidate A Facially Neutral Measure That Eliminated Local Legislative Measures Benefitting Racial Minorities.

In *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), the United States Supreme Court similarly applied the Equal Protection Clause to invalidate a voter-approved measure prohibiting local school districts from assigning students beyond their neighborhood schools. The initiative was adopted in response to the Seattle School District's race-conscious integration plan that made extensive use of busing and pupil reassignment to combat segregation. The initiative made no explicit reference to race. However, it contained broad exceptions that permitted busing for any purpose other than racial desegregation, and thus operated as a bar only to race-conscious busing. (458 U.S. at pp. 463, 474.) Applying *Hunter*, the Court determined that the initiative violated the Equal Protection Clause because it (1) was "drawn for racial purposes" or has a "racial focus," and (2) "impose[d] substantial and unique burdens on racial minorities." (*Id.* at 470, 471, 474.)

1. A Law Is "Drawn For Racial Purposes" When It Targets Legislation That Typically Benefits Racial Minorities.

The *Seattle* Court clearly described the sort of "racial purpose" or "racial focus" that will trigger strict scrutiny under the Equal Protection Clause. As the Court held, strict scrutiny will apply even absent evidence that the law was motivated by an intent to discriminate against a racial minority. "We have *not* insisted on a particularized inquiry into motivation in all equal protection cases: A *racial classification, regardless of purported motivation*, is presumptively invalid under the Equal Protection Clause." (*Id.*, at p.485, *emphasis added*). The Court held that the challenged busing ban contained a racial classification even though it was facially neutral, and even though the Court did not conclude that the ban was intended to disadvantage racial minorities.[3] As the Court explained, a law has a "racial purpose," and is based on a "racial classification," when, notwithstanding its facial neutrality, it targets the sort of legislation that typically benefits racial minorities. (*Id.* at 471-72.)

The Court had little trouble concluding that the challenged ban on desegregative busing rested on such a suspect classification, because it "use[d] *the racial nature of an issue* to define the governmental decisionmaking structure," and was "enacted *because of its adverse effects upon*" a legislative tool that benefited racial minorities. (*Id.* at 470, *emphasis added.*)

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[3] The Court did observe, in a footnote, that "singling out the political processes affecting racial issues for uniquely disadvantageous treatment inevitably *raises dangers* of impermissible motivation." (*Seattle*, 458 U.S. at 485 n. 30, *emphasis added.*) This is most assuredly *not* a "finding" of improper motive; to the contrary, it underscores that fact that no such finding was required before the Court could conclude that the challenged law was unconstitutional.

To make the point even clearer, the Court noted that laws based on "classifications *facially unrelated to race*," such as zoning laws, would *not* violate the Equal Protection Clause *even if* they had a disparate impact on minorities, because they do not intentional target a racial issue:

> Laws 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.* Because such laws make it more difficult for *every* group in the community to enact comparable laws, they provide a just framework within which the diverse political groups in our society may fairly compete . . . 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*, 458 U.S. at 485, *citing Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), *emphasis added.*)

2. A Law Imposes "Substantial And Unique Burdens" When It Forces Minorities Or Women To Seek Beneficial Legislation At A More Remote Level Of Government.

In discussing the second prong of its Equal Protection analysis – the alteration of the governmental decision-making process in a way that imposed special burdens on racial minorities – the *Seattle* Court observed that the challenged law banned desegregative busing statewide, but permitted local decisions to use busing for any other purpose. Thus, groups that would benefit from the former were forced to seek redress at a different level of government – the state legislature or the statewide electorate – than groups that might benefit from the latter – who could still appeal to local school boards. "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." (*Id.* at pp. 474, 479-80.)

Clarifying this prong of the two-part test, the Court noted that a law that was facially "racial" (that is, facially *related* to race), but did not alter the political process in a manner that disadvantaged minorities, would not be subject to the *Hunter* analysis. Thus, under *Hunter* a state was free to enact legislation that removed a benefit from racial minorities, such as desegregative busing, so long as the legislation left intact the political *process* that would allow the disadvantaged group free to seek beneficial legislation as they had before. (*Id.* at 483-85.) *Hunter* did not require that racial minorities always win, or never lose, in the political process; it merely required that the process not be altered in a manner that "subjected [them] to a debilitating and often insurmountable disadvantage." (*Id.* at 483-84.)

The companion case to *Seattle* clearly illustrated this important distinction. In *Crawford v. Los Angeles Bd. of Education* (1982) 458 U.S. 527, voters repealed a state constitutional provision that required race-conscious busing in some circumstances. But the repeal did not affect the capacity of a "public entity, board or official" voluntarily to adopt a desegregation program. (*Id.* at p. 532.) Thus, unlike the measures at issue in *Hunter* and *Seattle*, the initiative in *Crawford* did not alter the political process in any way: The parents of minority children could still urge their local school boards to adopt busing plans to remedy segregation. Because the measure did not "place special burdens" on the ability of racial minorities "to achieve legislation that is in their interest" locally or statewide, it did not run afoul of the *Hunter-Seattle* doctrine. (*Id.* at pp. 541-542.)

Twenty four years after *Seattle* and *Crawford*, the United States Supreme Court decided *Romer v. Evans* (1996) 517 U.S. 620. In *Romer*, a statewide voter initiative prohibited all legislative, executive or judicial action at any level of state or local government designed to protect gays, lesbians or bisexuals. In striking down the initiative, the Court stated, consistent with *Hunter* and *Seattle*: "A law declaring that in 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." (*Id.* at p.633.)

C. Proposition 209 Is Unconstitutional Under *Hunter* and *Seattle*

As Justice Rivera correctly explained, the application of the *Hunter-Seattle* doctrine to the facts of this case is quite simple. First, it is beyond dispute that Proposition 209 took specific aim at the *sort of legislation* that especially benefits minorities and women when it banned all such laws. Indeed, as the majority below stated, the law was intend to repeal legislation benefiting women and minorities. (*Coral Construction, Inc. v. City and County of San Francisco* (2007) 149 Cal.App.4th 1218, 1244-45.) Thus, like the desegregative busing ban struck down in *Seattle*, Proposition 209 was "enacted *because of*, not merely in spite of," its adverse effects on a legislative tool used to correct discrimination against racial minorities (and women). (*Seattle*, *supra* at p. 474, *emphasis added.*) Because Proposition 209 was "drawn for racial [and gender] purposes," it necessarily "trigger[s] application of the *Hunter* doctrine." (*Id.* at 474.)

Second, Proposition 209 clearly and inevitably changes the locus of political decisionmaking in a way that specifically burdens racial minorities and women. The law draws a clear distinction between (1) those who seek

the law's protection against race- and gender-based discrimination in municipal government contracting (groups now forced to resort to a constitutional amendment to secure legislation to remediate discrimination in municipal contracting) and (2) those who seek beneficial legislation relating to municipal government contracting *for any other reason* (*e.g.*, disabled veterans or locally-owned businesses). Those groups may continue to resort to their *local* government to secure such legislation. As such, Proposition 209 "uses the racial [and gender] nature of an issue to define the governmental decisionmaking structure, thus imposing substantial and unique burdens on racial minorities [and women]" and "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." (*Seattle*, 458 U.S. at 470, 474.)

This was the conclusion reached by the first federal court to address the constitutionality of Proposition 209. In *Coalition for Economic Equity v. Wilson* (N.D.Cal. 1996) 946 F.Supp. 1480 ("*Coalition I*"), rev'd (9th Cir. 1997) 122 F.3d 692 ("*Coalition II*"), the United States District Court asked whether Proposition 209 "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." (*Coalition I*, 946 F.Supp at p.1505, quoting *Seattle*, 458 U.S. at p.474.) The court first observed what all parties to the litigation had effectively conceded: "that Proposition 209, at the very least, will prohibit race- and gender-conscious affirmative action efforts" but that "preferences unrelated to race and gender remain unaffected" by the legislation. (*Id.* at 1505.) Because the former are "of special interest to minorities and women" and have "been singled out for unfavorable political treatment" by Proposition 209, that law has a "racial

focus" within the meaning of the *Hunter-Seattle* doctrine. The court went on to conclude, also correctly, that Proposition 209 "displaces authority with respect to a race and gender issue to 'a new and remote level of government,' *Seattle*, 458 U.S. at 483, and thus reorders the political process to the detriment of women and minorities. . . ." (946 F.Supp. at p.1508.) The court concluded, "the initiative plainly rests on distinctions based on race," and as such violates the *Hunter-Seattle* doctrine. (*Id.*)

In *Coalition II*, a three-judge panel of the Ninth Circuit Court of Appeals reversed *Coalition I*. The court purported to distinguish *Hunter* and *Seattle* on the basis that those cases did not invalidate statutes that interfered with *affirmative* action, but rather statutes that denied minorities the right to seek protection from *direct* discrimination. The panel reasoned, incorrectly, that Proposition 209 *could not* deny equal protection by forbidding racial or gender preferences, because by their very nature "preferences" do not guarantee "equal" treatment:

> Plaintiffs challenge Proposition 209 not as an impediment to protection against unequal treatment but as an impediment to receiving preferential treatment . . . Impediments to preferential treatment do not deny equal protection . . . While the Constitution protects against obstructions to equal treatment, it erects obstructions to preferential treatment by its own terms.

(*Coalition II*, 122 F.3d at 708.)

After a fractious battle, the Ninth Circuit declined to rehear the case *en banc*. In an unusually pointed dissent from the decision not to rehear the case, Judge Norris, joined by three other judges, noted that the panel had minted a brand-new distinction – between affirmative action programs and other laws aimed at protecting minorities – that found no support in *Hunter* or *Seattle*. The mandate of *Hunter* and *Seattle* was quite simple: a state may not enact any law that has the purpose and effect of making it more

difficult for minorities or women to secure *legislation that is in their interest*. "The relevant inquiry under *Hunter* and *Seattle* is simply to ask whether legislation is *beneficial to minorities*." (*Id.* at 714.) If it is, any law that places special burdens on it in the political process is unconstitutional. Thus, when the *Hunter-Seattle* doctrine is applied to Proposition 209, a court "*has no legitimate choice* but to declare it unconstitutional." (*Id.* at 712.)

The panel's contrary conclusion, Judge Norris observed, was based on the *political* proposition that equal treatment *cannot* be achieved by implementation of preferential treatment for groups that had historically been treated *un*equally. But that "personal view" is by no means a universal one: indeed, "[t]he proponents of affirmative action . . . would no doubt argue that such programs do in fact secure equality because they level the playing field by remedying the inequalities that are the product of the long history of state-sponsored discrimination." (*Id.* at 714.) The courts' task is not to choose sides in that policy battle, as the panel had done, but rather faithfully to apply the clear test set out in *Hunter* and *Seattle*. By choosing sides, the panel had neglected its duty to follow precedent "in favor of a path of conservative judicial activism." (*Id.* at p.717.)

In addition to the four-judge dissent, Judge Hawkins wrote separately to criticize the panel decision for ignoring the clear mandate of the *Hunter-Seattle* doctrine. Judge Hawkins correctly noted that, whatever the wisdom of affirmative action or Proposition 209, the Ninth Circuit was duty-bound to faithfully apply clearly controlling precedents (*Hunter* and *Seattle*) and strike the measure down. He criticized the panel for eschewing that faithful and straight-forward application, and instead feeling "free to

predict" what the U.S. Supreme Court *would do* if it re-examined the doctrine:

> The Supreme Court may well tell us that this case is not governed by [*Hunter-Seattle*] or that an exception to the application of those cases should be made for [Proposition 209]. Until that happens, it is not our role to predict – however accurate our predictions might turn out to be.

(*Id.* at p. 718). Indeed, as Judge Hawkins pointed out, the United States Supreme Court has itself criticized lower courts for engaging in this sort of "precedent-defying predictionism," a practice that Justice Stevens described as "an indefensible brand of judicial activism." (*Id.* at nn. 1 & 2, *citing Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484 & 486 (1989).)

In addition to these well-reasoned judicial determinations that Proposition 209 is unconstitutional under *Hunter* and *Seattle,* legal scholars have nearly unanimously reached the same conclusion. Indeed, the great weight of the scholarly commentary on the issue concludes that Proposition 209 cannot be reconciled with the *Hunter-Seattle* doctrine. Even before Proposition 209 was passed, legal commentators pointed out its vulnerability under the *Hunter-Seattle* doctrine. (*See, e.g.*, Amar and Caminker, Equal Protection, Unequal Political Burdens, and the CCRI, 23 Hastings Const. L.Q. 1019 (1996).)

Then, in the wake of its enactment and the decisions in *Coalition I* and *II*, the legal literature burgeoned with articles decrying the Ninth Circuit failure to accurately apply *Hunter* and *Seattle*. (*See, e.g.*, Comment, Constitutional Law: The Redefinition of "Minority" and its Impact on Political Structure Equal Protection Analysis (1997) 9 U. Fla. J.L. & Pub. Pol'y 121, 126-27 [arguing Ninth Circuit distorted *Hunter* doctrine by redefining "minority"]; Note, Gender Blindness and the *Hunter* doctrine

(1997) 107 Yale L.J. 261, 261 [criticizing Ninth Circuit's variance from *Hunter* doctrine as undermining gender-based equal protection]; Comment, A World Without Color: The California Civil Rights Initiative and the Future of Affirmative Action (1997) 38 Santa Clara L.Rev. 235, 263 [finding Ninth Circuit's analysis of the constitutional issues before it suggests a lack of understanding of the United States Constitution]; Margolis, Affirmative Action: Deja Vu All Over Again? (1997) 27 Sw. U. L.Rev. 1, 65 [warning that Ninth Circuit's opinion will allow Equal Protection Clause to perpetrate racial supremacy]; Spann, Proposition 209 (1997) 47 Duke L.J. 187, 252 [criticizing Ninth Circuit failure to develop the arguments necessary to justify such a major jurisprudential revolution]; Amar, Recent Cases: The Equal Protection Challenge to Proposition 209 (1998) 5 Asian L.J. 323, 323, 328 [finding Ninth Circuit wide of the mark in not applying the equal protection analysis established in *Hunter* and *Seattle*]; Comment, Rough Terrain Ahead: A New Course for Racial Preference Programs (1998) 49 Mercer L.Rev. 915, 934 [faulting Ninth Circuit interpretation of equal protection under *Hunter* and *Seattle*]; Note, Ruling by Numbers: Political Restructuring and the Reconsideration of Democratic Commitments after *Romer v. Evans* (1999) 109 Yale L.J. 587, 605-06 [arguing Ninth Circuit's avoidance of *Hunter* doctrine has led to doctrinal instability for future political restructuring cases]; Miller, "Democracy in Free Fall:" The Use of Ballot Initiatives to Dismantle State-Sponsored Affirmative Action Programs (1999) 1999 Ann. Surv. Am. L. 1, 37 [faulting Ninth Circuit's distinguishing of *Hunter* as flawed]; Sealing, Proposition 209 as Proposition 14 (As Amendment 2): The Unremarked Death of Political Structure Equal Protection (1999) 27 Cap. U. L.Rev. 337, 338-39 [arguing Ninth Circuit wrongly ignored political structure equal

protection in *Coalition II*]; Lazos Vargas, Judicial Review of Initiatives and Referendums in Which Majorities Vote on Minorities' Democratic Citizenship (1999) 60 Ohio St. L.J. 399, 537 [finding Ninth Circuit misses the main thrust of the *Hunter/Romer* line of cases]; Tokaji & Rosenbaum, Promoting Equality by Protecting Local Power: A Neo-Federalist Challenge to State Affirmative Action Bans (1999) 10 Stan. L. & Pol'y Rev. 129, 130 [criticizing Ninth Circuit's failure to apply the principles articulated in *Hunter* and *Seattle*].); but see Carcieri, A Progressive Reply to Professor Oppenheimer on Proposition 209 (2000) 40 Santa Clara L.Rev. 1105, 1118 [contending *Hunter/Seattle* doctrine does not apply to invalidate Proposition 209]; 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 [suggesting *Seattle* was not sufficiently analogous to invalidate Proposition 209].)

Even years after Proposition 209 was on the ballot, the legal literature continued to criticize the Ninth Circuit's analysis. (*See, e.g.*, Goodman, Redacting Race in the Quest for Colorblind Justice: How Racial Privacy Legislation Subverts Antidiscrimination Laws (2004) 88 Marq. L.Rev. 299, 344 [finding Ninth Circuit analysis of classification prohibitions constitutionally flawed]; Strasser, Albany Law Review 2001 Symposium: "Family" and the Political Landscape for Lesbian, Gay, Bisexual and Transgender People (LGBT: Same-sex Marriage Referenda and the Constitution: On *Hunter*, *Romer*, and Electoral Process Guarantees (2001) 64 Alb. L.Rev. 949, 974 [observing Ninth Circuit misrepresented the spirit of *Hunter*]; Bangs, Who Should Decide What Is Best for California's LEP Students? Proposition 227, Structural Equal Protection,

and Local Decision-Making Power (2000) 11 La Raza L.J. 113, 149 [determining *Coalition II* opinion flies in the face of *Hunter*].)

In sum, an intellectually honest adherence to United States Supreme Court precedent can lead to only one conclusion: Proposition 209 cannot survive scrutiny under the *Hunter-Seattle* doctrine.

D. In Upholding Proposition 209, the Majority Below Improperly Described And Misapplied the *Hunter-Seattle* Doctrine.

The First District majority was able to conclude that Article I, Section 31 does not violate the *Hunter-Seattle* doctrine only by significantly re-defining, and thus misinterpreting, those United States Supreme Court decisions. The majority below began with a faithful explication of the controlling line of U.S. Supreme Court precedents:

> 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. (App.1 to Petition at p.19.)

(*Coral Construction*, 149 Cal.App.4th 1218, 1238.)

The majority also conceded that the two prongs of the *Hunter-Seattle* test – the targeting of race- or gender-conscious legislation for special burdens – were met in this case:

> The effect of [Proposition 209] 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 . . . Poor people, veterans, owners of small businesses, persons with disabilities and others will not have to go this extra lap . . .

(*Id.* at 1245.)

Having conceded the applicability of the *Hunter/Seattle* doctrine to Proposition 209, the majority curiously departed from these precedents. For example, the majority read into the *Hunter* and *Seattle* opinions "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," and then, by contrast, found under the surface of Proposition 209 an intent that is "utopian in nature, seeking to ensure that public benefits are allocated in a color-blind and gender-blind fashion." (*Id.* at 1244)[4] How, the majority asks, can a law violate the Equal Protection Clause when it "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*?" (*Id.* at 1245 [emphasis added].)

While the majority's question was intended to be rhetorical, Justice Rivera, in her dissent, nonetheless offered a compelling answer: the purported "aims" of the lawmakers are *not* the focus of the inquiry, and under *Hunter* and *Seattle* a law *does* "discriminate on the basis of race or gender" when it selectively targets race- or gender-conscious legislation for special burdens in the political process:

> 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* . . . This is true of [Proposition 209]. *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

[4] The majority also reveals an inherently value-laden viewpoint when it argues that Proposition 209 "stand[s] for the proposition that racial and gender discrimination, affirmative or reverse, is unfair and wrong," and "*embraces* general principles of nondiscrimination," and "*brooks* no impermissible racial classification." (*Id.* at 1242.)

> action programs, and to enshrine that selective prohibition in our Constitution—at the state's most inaccessible political level. (*Id.* at 1266 quoting *Seattle*, 458 U.S. at 470 [emphasis added].)

Indeed, the majority's focus on the purported motivations of Proposition 209's drafters and supporters is precisely what the *Seattle* Court rejected: "A racial classification, *regardless of purported motivation*, is presumptively invalid under the Equal Protection Clause." (*Seattle*, 485 U.S. at 485, *emphasis added*).[5]

The majority's argument in this regard suffers from several additional flaws. First, the majority's premise – that the *Hunter* and *Seattle* Courts relied on "unstated" observations that the challenged laws were motivated by racial animus – is entirely unsupported, and, as discussed above, is in fact contrary to the *Seattle* Court's insistence that racial animus was not a *sine qua non* of the application of the doctrine. (*Seattle*, 458 U.S. at 485.)

Second, even if a law such as Proposition 209 can be said to *have* an "aim" in the sense that the majority uses that term, as Justice Rivera points out, it is far from self-evident that the aim of Proposition 209 was to "advance[e] a discrimination-free society." (*Coral Construction*, 149 Cal.App.4th at 1269-70.) Different people surely had different "aims" when they drafted, supported or voted for Proposition 209.

Third, whatever the aims of Proposition 209 are, whether they are "utopian" is a political question and not one for the courts to decide. As Justice Rivera pointed out in this regard, "[i]t is not for us to decide the normative issue of whether racial and gender preferences promote or

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[5] The *Seattle* Court further noted that, with respect to voter initiatives, "as to the subjective intent [of the voters] the secret ballot raises an impenetrable barrier." (*Seattle*, 458 U.S. at p. 466, n.9.)

undermine the goals of the Fourteenth Amendment. We decide only whether the enactment meets constitutional standards." (Id. at 1270.) Like the facially colorblind measures invalidated in *Hunter* and *Seattle*, Article I, Section 31 precludes remedial legislation to address the effects of unlawful discrimination.

In short, the inherent uncertainty a court will face in attempting to divine the subjective motivations behind legislation, and the inevitable disagreements that will exist regarding the benign or malignant nature of the "aims" of the law, both underscore the wisdom of the objective and practical test established in *Hunter* and *Seattle*: Does the challenged law have a racial focus, and will it create special burdens on minorities or women seeking beneficial legislation? If the answer to both is yes, the law is presumptively unconstitutional and subject to strict scrutiny.

The majority also suggests that Proposition 209 is different from the laws struck down in *Hunter* and *Seattle* because, while minorities and women will be disadvantaged in seeking legislation that benefits them *as* minorities and women, as *individuals* they will nevertheless "be among the pool" of people in groups that are *not* disadvantaged by the legislation. In other words, while Proposition 209 prevents an African American from securing beneficial legislation *as* an African American, she may still seek preferences as a poor person, or veteran, or disabled person if she also belongs to one of those groups. (*Id.* at 1245.) But the very same could be said of the laws struck down in *Hunter* and *Seattle*. The groups that those laws did *not* target (*e.g.*, proponents of rent control or disabled renters (*Hunter*) or parents who wanted their children assigned to a distant school for reasons other than race (*Seattle*)) certainly counted racial minorities among *their* members also. The fact that members of the burdened groups

happen also to comprise a portion of the groups left unscathed by the challenged legislation is of no moment for equal protection purposes. If the law targets the interests and limits the political access of racial minorities and women *as* racial minorities and women, it is unconstitutional.

E. Conclusion

This Court should apply the *Hunter-Seattle* doctrine, reverse the Court of Appeal and find Proposition 209 unconstitutional because it impermissibly alters the political process to the distinct disadvantage of minorities in women. In the alternative, the Court should reverse and remand for a determination of whether Proposition 209 can be justified by a compelling state interest, and is narrowly tailored to do so.

II. SAN FRANCISCO'S MBE ORDINANCE IS NECESSARY TO MAINTAIN THE CITY'S ELIGIBILITY FOR FEDERAL FUNDS

Federal law requires the City to "take affirmative action to remove or overcome the effects of the prior discriminatory practice[s]" in order to be eligible for federal funding. (*See, e.g.*, 49 C.F.R. §21.5(b)(7).) Here, the City has compelling evidence of discrimination in City contracting. The City has tried race neutral measures to overcome this discrimination, but those measures have proven woefully ineffective. Therefore, the City is obligated to pursue the race-conscious steps in its Ordinance, and Article I, Section 31 expressly permits the City to do so.

A. Section 31(e) Exempts Race-Conscious Measures Where Federal Law Requires The Elimination Of Discrimination And Race-Neutral Measures Have Proven Ineffective.

Article I, Section 31(e), expressly permits race- and gender-conscious remedies where necessary for a public entity to maintain eligibility for federal funding:

> 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.

According to the court in *C&C Construction, Inc. v. Sacramento Municipal Utility District* (2004) 122 Cal. App.4th 284, the only other appellate court to have considered the reach of Section 31(e), the exception is triggered if the City would become ineligible for federal funding under federal regulations, regardless of whether its funding or eligibility is also actually terminated. (*See C&C Construction, Inc., supra,* 122 Cal. App.4th at p. 299.) That court further held that Section 31(e) permits race-or gender-conscious corrective measures when (1) federal regulations require a public entity to eliminate the effects of past discrimination and ensure equal access to federal funding, and (2) to effectively comply with these federal regulations the public entity must engage in race-conscious actions because race-neutral measures have proven ineffective. (122 Cal.App.4th at 311.)

B. Federal Law Requires The City To Take Affirmative Action To Remove The Effects Of Discrimination In City Contracting.

Federal law requires the City to take "affirmative action" to remedy discrimination in contracting. Through Title VI of the Civil Rights Act, Congress directs that "[n]o 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.) Congress further "direct[s]" all federal agencies providing financial assistance to any program or activity "to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with

achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken." (*Id.* § 2000d-1.) "Program or activity" refers to "all of the operations of . . . a department, agency, special purpose district, or other instrumentality of a State or of a local government." (*Id.* § 2000d-4a(1)(A).)

So, for example, to remain an eligible recipient of U.S. Department of Transportation ("DOT") funding, the City cannot exclude any person from participation in its operations or discriminate against any person on the ground of race, color, or national origin. DOT regulations "specific[ally]" prohibit "[a] recipient . . . *directly or through contractual or other arrangement*, [from discriminating] on the grounds of race, color or national origin." (49 C.F.R. §21.5(b)(1) [emphasis added].) DOT also specifically authorizes race-conscious remedies and requires "affirmative action" to remedy the effects of prior discriminatory practice and to ensure ongoing fair access:

> *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 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 or activity to which this part applies, *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) [emphasis added]]; *see also* 40 C.F.R. § 7.35(a)(7) [Environmental Protection Agency regulation].)

C. It Is Undisputed The Race-Neutral Measures Have Failed To Remove The Effects Of Discrimination In City Contracting.

The City has demonstrated that it cannot meet these federal requirements with race-neutral measures alone. For example, as described in the Statement of Facts above, the City has

- provided race- and gender-neutral bid discounts for local disadvantaged bidders on City prime contracts;
- provided race-and gender-neutral bonding and financial assistance to local disadvantaged businesses;
- maintained race-and gender-neutral prompt payment policies; and
- required City departments to break down large prime contracts into smaller contracts and provide improved public notice about City contracts.

Despite all of these efforts, the Board of Supervisors found, on the basis of substantial evidence of continued discrimination, that race-neutral measures were insufficient "to prevent discriminatory practices from occurring" and were not "successful in increasing MBE/WBE subcontractor participation." (SF Admin. Code §§ 12D.9(A)4; see generally, S.F. Admin. Code §§ 12D.A.9(A)4, 12D.A.10(A)4 and 12D.A.11(A)-(1)c, contained in JA at III:766-796.) Thus, because it must take "affirmative action" to remedy discrimination in public contracting in order to remain eligible for federal funding, and because it cannot meet its obligations with race-neutral measures alone, the Ordinance falls within the express exception stated in Section 31(e).

D. The Court Of Appeal Erred By Grafting Additional Requirements On To Section 31(e).

Despite this undisputed evidence of specific discrimination that threatens federal funding under particular regulations such as 40 C.F.R. § 7.35(a)(7), the appellate court held that Section 31(e) did not apply because the City allegedly failed to provide substantial evidence of a "*specific* type of past discrimination that triggers a *particular* regulation's requirement for race-based remedial measures." (149 Cal. App.4th at 1234 [emphasis in original].) Not only is the appellate court's holding contrary to the substantial evidence, Section 31(e) does not permit race- or gender-conscious corrective measures only if expressly *mandated* by a federal regulation on the basis of prescribed findings of specific discrimination. To the contrary, Section 31(e) saves all race- or gender-conscious corrective measures that are *necessary* to maintain the City's eligibility for federal funding. That necessity may arise from an express federal regulatory mandate to implement a particular program on the basis of specified findings, but it can also, as here, spring from the failure of race-neutral measures to eliminate ongoing discrimination and the effects of past discrimination in the face of a federal regulatory mandate to eliminate discrimination.

The Court of Appeal's limited view is based on its misreading of *C&C Construction*. Citing *C&C Construction*, the Court of Appeal opined that:

> [I]f 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." (*C & C Construction, supra,* 122 Cal.App.4th at p. 299, 18 Cal.Rptr.3d 715.)

(*Coral Construction, supra,* 149 Cal. App.4th at 1234 [citation in original].)

But in the passage from *C&C Construction* quoted above, the *C&C Construction* court actually used a hypothetical federal regulation's requirements of race-based measures as an example that would fall within Article I, Section 31(e), not as the rule of Section 31(e):

> An agency's determination that race-based discrimination is necessary to maintain federal funding must be supported by substantial evidence. *For example*, if a 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.

(*C&C Construction, supra,* 122 Cal. App.4th at 299 [emphasis added].)

Thus, rather than limiting Section 31(e) only to federal regulations expressly requiring race-or gender-based preferences on the basis of a particular finding defined in the federal regulation, the *C&C Construction* court followed the language of the constitutional provision:

> To be lawful under section 31, subdivision (e), [the State's] action "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." . . . *It is sufficient to show that, under the federal laws and regulations, the failure to implement a race-based affirmative action program would subject [the State] to the loss of the funds.*

(*Id.* at 299 [emphasis added].)

The *C&C Construction* court proceeded to "consider each regulation to determine (1) whether it establishes a factual predicate for requiring race-based affirmative action and (2), if it does, to what extent race-based measures are required." (*Id.* at 305.)[6] In its analysis, the "factual

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[6] In a divided decision, the *C&C Construction* court concluded that Section 31(e) did not apply to a water district's affirmative action program, although in dissent Justice Blease persuasively demonstrates that, under principles of preemption, the majority impermissibly intrudes into federal

(continued on next page)

predicate" to justify race-based affirmative action under Section 31(e) was not simply whether the federal regulation mandated race-based affirmative action, but whether "the race-based measures contained in [the governmental entity's] current affirmative action program [were] necessary to maintain federal funding [and] the record establishes that [the governmental entity] cannot utilize an affirmative action program that imposes only race-neutral measures and thereby maintain federal funding." (*Id.* at 309.) The inquiry tracks the language of Section 31(e): whether the race-based preferences "must be taken" to maintain the City's eligibility to receive funding under federal regulations. It does not impose additional requirements.

In this case, the Ordinance is required for the City to remain eligible to benefit from federally funded programs that require recipients to eliminate the effects of past discrimination and ensure equal access to program benefits. The legislative record demonstrates that notwithstanding the City's strong official policy against discrimination, individual agents of the City continue to discriminate on the basis of race and gender in the City's public contracting, and the effects of past discrimination and continue to plague minority contractors seeking to do business with the City. (SF Admin. Code §§ 12D.9(A)4.) Race-neutral remedial measures have failed to correct this problem and there is no evidence that the City

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(footnote continued from previous page)
jurisdiction by prohibiting an affirmative action program required under federal regulations, "in the absence of a ruling by a federal agency or court that the regulations do not require the program." (122 Cal.App.4th at 316-319.) Justice Blease also shows that the term "affirmative action" in the DOT anti-discrimination regulation, 49 C.F.R. §21.5(b)(7), can only mean race-based measures, not also race-neutral actions. (*Id.* at 319-321.)

failed to try any race-neutral measure that could reasonably be expected to "remove or overcome the effects of the prior discriminatory practices." (49 C.F.R. §21.5(b)(7).)

The City, therefore, must take race-conscious measures like the Ordinance that are narrowly tailored attempts to remedy ongoing discrimination and the pernicious effects of past discrimination. In fact, if the City failed to take these steps in light of the legislative record in this case, the City would be perpetuating the very discrimination it is obligated to overcome. Section 31(e) applies to allow the City to continue to meet its federal obligations as an ongoing funding recipient.

CONCLUSION

This Court should apply the *Hunter-Seattle* doctrine, reverse the Court of Appeal and find Proposition 209 unconstitutional because it impermissibly alters the political process to the distinct disadvantage of minorities in women. In the alternative, the Court should reverse and remand for a determination of whether Proposition 209 can be justified by a compelling state interest, and is narrowly tailored to do so.

If the Court reaches the federal funding issue, it should reverse the Court of Appeal and hold that the Ordinance is exempt from Section 31's reach because it is necessary for the City to maintain its eligibility for federal funds.

Dated: October 19, 2007

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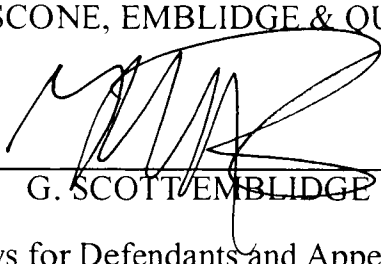
By: 
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 11,484 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on October 19, 2007.

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By:_____
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PROOF OF SERVICE

I, OMAR LATEEF, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the within entitled action. I am employed with Moscone, Emblidge & Quadra, LLP, 220 Montgomery Street, Mills Tower – Suite 2100, San Francisco, CA 94104.

On October 19, 2007, I served the attached:

CITY'S BRIEF ON THE MERITS OF ISSUES TWO AND THREE

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

THE HONORABLE JAMES L. WARREN
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☒ **BY MAIL:** I caused true and correct copy(ies) of the above documents to be placed and sealed in envelope(s) addressed to the addressee(s) named above and, following ordinary business practices, placed said envelope(s) at the Law Offices of Moscone, Emblidge & Quadra, LLP, 220 Montgomery, Ste. 2100, San Francisco, California, 94104, for collection and mailing with the United States Postal Service and there is delivery by the United States Post Office at said address(es). In the ordinary course of business, correspondence placed for collection on a particular day is deposited with the United States Postal Service that same day.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed October 19, 2007, at San Francisco, California.

OMAR LATEEF