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.

S 152934

First Appellate District
No. A107803

(San Francisco Superior Court
Nos. 319549 and 421249)

RESPONDENT CITY AND COUNTY OF SAN FRANCISCO'S ANSWER BRIEF

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

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INTRODUCTION

Under the federal equal protection clause, there are circumstances where race-based corrective measures are not merely voluntary, but mandatory. San Francisco's (the City's) legislative record in support of its 2003 remedial public contracting ordinance, San Francisco Administrative Code § 12D.A (the Ordinance), makes a prima facie case that those circumstances are present here.

No matter the dictates of state law, the federal Constitution prohibits every level of government from committing, encouraging, or even just knowingly tolerating ongoing race or sex discrimination in its midst. The government has an affirmative duty to remedy such discrimination—using race- or sex-conscious means where neutral remedies have proven inadequate—as soon as the government discovers the discrimination. If it does not, its deliberate indifference to its duty to prevent and remedy discrimination puts the government in intentional violation of the Constitution.

Here, the over 2,000 page legislative record in support of the 2003 Ordinance—which includes three 2003 statistical studies, extensive testimony at public hearings, written submissions from the public, disparity studies of sister Bay Area jurisdictions, and academic research—provided a strong basis in evidence for the Board of Supervisors to conclude that there was ongoing race and sex discrimination by the City and its prime contractors in public contracting. In combination with a proven history of the failure of race- and sex-neutral measures alone to eliminate the discrimination, the evidentiary record triggered San Francisco's affirmative constitutional duty to remedy the discrimination using race- and sex-based measures. Accordingly, the Ordinance grants 5-10% bid discounts to

qualifying minority- and woman-owned businesses (MBEs and WBEs), and requires prime contractors to make good faith efforts to employ them.

These narrowly tailored remedial measures are corrective only, that is, they are calibrated to serve only as an equal counterbalance to the measurable competitive disadvantage currently suffered by MBEs and WBEs in City contracting so that rough parity of opportunity is achieved now. And as the City's careful studies show, they do not give MBEs and WBEs a competitive advantage over non-minority, male contractors. Further, they address only the groups for which the Board of Supervisors had evidence of discrimination, they sunset in 2008, and perhaps most important, they are demonstrably effective where other remedial measures are not.

Thus, the City's extensive legislative record in support of its constitutional duty to enact the Ordinance, along with the narrowly tailored corrective measures implemented by the Ordinance, must defeat petitioners' motion for summary judgment on the basis of Article I, section 31(a) of the California Constitution (Proposition 209) and its blanket prohibition on race- and sex-conscious public contracting programs. As the exception in Article I, section 31(h) makes plain, section 31(a) can only be implemented to the extent that the federal constitution permits. It does not so permit here.

BACKGROUND

A. The Legislative Record In Support Of The 2003 Ordinance.

In 2003, the San Francisco Board of Supervisors enacted Chapter 12D.A of the San Francisco Administrative Code (2003 Ordinance) in the wake of various predecessor ordinances dating from 1984. (S.F. Admin. Code Chap. 12D.A, JA III:684-763.) In order to correct for ongoing race and sex discrimination in City contracting (*id.* at p.684), the Ordinance reauthorized a bid discount ranging from 5-10% for certain minority- and woman-owned businesses (MBEs/WBEs) bidding on City prime contracts. (*Id.* at § 12D.A.9.(A)2, JA III:740.) In addition, the Ordinance required prime contractors to use good faith efforts to contract with MBE and WBE subcontractors in parity with their availability in the local, subspecialty contracting marketplace as determined on a case-by-case basis by the San Francisco Human Rights Commission (HRC). (*Id.* at § 12D.A.17, JA III:758-761.)

In enacting the Ordinance, the Board of Supervisors relied on over 2,000 pages of legislative record containing voluminous statistical, testimonial, anecdotal and academic evidence. (JA V:1108-JA XII 3180.) Specifically, the Board reviewed three disparity and statistical studies it had commissioned, the testimony of 134 individuals and organizations at joint hearings before both the Board and the San Francisco Human Rights Commission (HRC), written statements of additional interested constituents, HRC investigations and reports, disparity studies conducted by other public entities in the Bay Area, and academic articles and studies. (*Id.*) Taken together, this evidence demonstrated that despite significant inroads since the advent of the City's first efforts to combat contracting

discrimination in 1984, minorities and women were still subject to meaningful discrimination in taxpayer-funded City contracting in 2003.

1. The Three 2003 Statistical Studies.

The legislative record contains three disparity and statistical studies conducted in 2003 that compare the utilization of woman- or minority-owned firms by the City and/or private contractors to their availability by trade in the local marketplace, and that evaluate conditions in the private marketplace more generally. One such study was undertaken by the HRC and two were authored by NERA Economic Consulting. (JA V:1113-1226; 1230-1253.)

The HRC disparity study, which used City contracting data covering the period January 1998 to February 2003, measured the statistical differences in the utilization and availability of firms owned by several disadvantaged groups as well as non-minority male-owned firms in City contracting. (JA V:1237.) It calculated disparity ratios by identifying the City's utilization of firms, by race and gender, for a particular contracting specialty and dividing that number by the share of available firms in the same speciality by race and gender.[1] (*Id.*) The HRC study measured

[1] Disparity ratios provide a simple and clear measurement of differential treatment on the basis of race or gender when they compare similarly situated groups and care is taken to reduce or eliminate factors other than race or gender that could explain observed differences. (See Kaye & Freedman, Reference Manual on Scientific Evidence, Federal Judicial Data Center (2d. ed. 2000) Reference Guide on Statistics pp. 108-110.) In a race- and gender-neutral environment, the expected disparity ratio between groups comparable but for their race or gender is 1.00. (See *Concrete Works of Colorado, Inc. v. City and County of Denver* (10th Cir. 2003) 321 F.3d at p. 962.) Random fluctuations generally account for results ranging between .8 and 1.2. But results below .8 are generally considered to be significant evidence of underutilization on account of race or sex. (29 C.F.R. § 1607.4(D) [EEOC Uniform Guidelines].)

disparities using discrete contracting categories such as construction, architecture and engineering, and telecommunications to eliminate comparisons of dissimilar firms. (JA V:1233.) The study also measured availability by relying on lists of actual bidders on City projects, so as to limit comparisons to those firms indicating that they are willing and able to complete City projects. (JA V:1231-1232.)

Disparity Ratio Summary for HRC Disparity Analysis, 2003

Contract Type	African American	Arab American	Asian American	Iranian American	Latino	Native American	Woman (1)	Non-Minority Male
Prime								
Architecture & Engineering	0.68	0.00	0.38	0.12	0.10	--	0.25	1.40
Construction	0.22	0.00	0.36	--	2.06	--	0.93	1.05
Professional Services	1.89	0.74	1.84	0.01	0.28	--	1.38	0.97
Purchasing	1.65	1.12	0.44	0.78	1.15	--	0.74	1.03
General Services	0.50	0.12	0.43	0.04	1.45	--	1.29	1.00
Telecommunications	0.08	--	0.22	0.01	1.88	--	0.90	1.10
Sub								
Architecture & Engineering	0.96	0.41	1.09	1.26	0.60	--	0.74	1.05
Construction	1.75	0.33	0.95	--	2.17	--	1.71	0.75
Professional Services	10.01	0.00	2.28	0.00	0.58	--	3.27	0.75
Telecommunications	0.91	--	0.06	0.00	1.14	--	0.64	1.23

Notes:
-- indicates 0 availability
(1) Disparity ratios for woman include both non-minority and minority women contractors.

Source:
SF Human Rights Commission, "Disparity Analysis, MBE/WBE Utilization City and County of San Francisco", April 2003.
Disparity ratios for Architecture and Engineering Prime Contracts at JA V:1244.
Disparity ratios for Construction Prime Contracts at JA V:1245.
Disparity ratios for Professional Services Prime Contracts at JA V:1246.
Disparity ratios for Purchasing Prime Contracts at JA V:1247.
Disparity ratios for General Services Prime Contracts at JA V:1248.
Disparity ratios for Telecommunications Prime Contracts at JA V:1249.
Disparity ratios for Architecture and Engineering Sub Contracts at JA V:1250.
Disparity ratios for Construction Sub Contracts at JA V:1251.
Disparity ratios for Professional Services Sub Contracts at JA V:1252.
Disparity ratios for Telecommunications Sub Contracts at JA:V 1253.

As summarized in the table above, the HRC study revealed significant disparities between the number of woman- or minority-owned firms that were available 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.) These disparities persisted despite the remedial effect throughout the study period of the

then-effective 1998 Ordinance, which had also provided for bid discounts and good faith efforts.

For example, for prime contracts the HRC study calculated a disparity ratio of .22 for African-American-owned construction firms and a ratio of .36 for Asian-owned construction firms on prime contacts. (JA V: 1245.) In other words, the study found that African-American owned construction firms were used on City contracts only slightly more than one-fifth as often, and that Asian-owned construction firms were used only slighty more than one-third as often, as one would expect based on the number of available firms in those categories. The study also found a disparity ratio for Latino-owned professional service firms of .28. (JA V: 1246.) A disparity ratio of .44 was reported for Asian-owned purchasing firms, .54 for non-minority woman-owned purchasing firms, and .74 for all woman-owned purchasing firms on prime contracts. (JA V: 1247.) With respect to general service prime contracts, the study found a disparity ratio of .50 for African-American-owned firms and .43 for Asian-owned firms. (JA V: 1248.) Among telecommunications prime contractors, the disparity ratio for African-American-owned firms was .08 and for Asian-owned firms .22. (JA V: 1249.)

Examining architecture and engineering subcontracting opportunities, the HRC study found a disparity ratio of .60 for Latino-owned firms, .74 for woman-owned firms, and .51 for non-minority woman-owned firms. (JA V:1250.) Regarding professional service subcontracting opportunities, the study found a disparity ratio of .58 for Latino-owned firms. (JA V:1252.) Measuring telecommunications subcontracting opportunities, the HRC study found a disparity ratio for Asian-owned firms of .06, and the disparity ratio for woman-owned firms

was .64. (JA V: 1253.) Each of these disparity ratios met the EEOC Guidelines for inferring discrimination. (See 29 C.F.R. § 1607.4(D).)

In sum, nearly 60% (33/56) of the disparity ratios for prime and subcontracts awarded to MBEs and WBEs[2] in the HRC study still fell below the .80 EEOC threshold of practical significance for proving discrimination, despite the fact that the City already was instituting corrective measures. Nine of the fifty-six measurements, or 16%, fell within the general range of parity. Twenty-five percent (14/56) revealed utilization higher than would be expected given the level of availability of the relevant businesses, but these results may be less meaningful if the market share of the business type is very small because, for such businesses, even small fluctuations in utilization can have a profound impact on the disparity ratio. (Baldus & Cole, Statistical Proof of Discrimination (1980) § 5.13.)

While these results revealed a significant and continuing problem, they also indicated progress. As the table below summarizes, a similar disparity study that Mason Tillman Associates had conducted for the City in 1998 found comparatively more severe race- and sex-based disparities in the award of public contracting dollars.

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[2] The fifty-six disparity ratios identified here consist of those for all prime and subcontracts for African Americans, Arab Americans, Asian Americans, Iranian Americans, Latinos, Native Americans and Women. Categories for which there was no available MBE or WBE have not been counted. Non-minority males were also not included in the count.

Disparity Ratio Summary for Mason Tillman Disparity Study, 1998

Contract Type	African American			Arab American			Asian American		
	Utilization (%)	Availability (%)	Disparity Ratio	Utilization (%)	Availability (%)	Disparity Ratio	Utilization (%)	Availability (%)	Disparity Ratio
Construction	1.44	10.24	0.14	0.00	0.8	0.00	3.00	20.71	0.14
Architecture & Engineering	9.68	6.52	1.48	0.01	0.91	0.01	17.75	27.12	0.65
Professional Services	5.08	10.55	0.48	0.00	4.66	0.00	11.92	16.32	0.73
Purchasing	2.75	5.52	0.50	0.00	4.37	0.00	2.43	12.14	0.20

Contract Type	Latino American			Native American		
	Utilization (%)	Availability (%)	Disparity Ratio	Utilization (%)	Availability (%)	Disparity Ratio
Construction	5.28	9.57	0.55	0.00	0.80	0.00
Architecture & Engineering	6.18	5.75	1.07	0.00	0.30	0.00
Professional Services	0.95	5.77	0.16	0.00	0.78	0.00
Purchasing	2.28	4.99	0.46	0.06	0.22	0.27

Contract Type	Woman-Owned Business Enterprise (WBE) [1]			Non-Minority Male		
	Utilization (%)	Availability (%)	Disparity Ratio	Utilization (%)	Availability (%)	Disparity Ratio
Construction	1.49	11.38	0.13	88.92	49.72	1.79
Architecture & Engineering	6.10	24.24	0.25	60.31	41.67	1.45
Professional Services	14.15	33.52	0.42	78.83	40.07	1.97
Purchasing	3.88	19.20	0.20	89.98	50.81	1.77

Notes:

Disparity ratios is calculated as the ratio of utilization to availability.

(1) Woman-owned Business Enterprises (WBE) refers to firms that have been formally certified as a WBE.

Source:

Mason Tillman Associates, "Disparity Study: City and County of San Francisco MBE/WBE/LBE Program," January 1998.
Disparity ratios for Construction are calculated using utilization and availability found at JA:VIII 2175.
Disparity ratios for Architecture and Engineering are calculated using utilization and availability found at JA VIII:2184.
Disparity ratios for Professional Services are calculated using utilization and availability found at JA VIII: 2193.
Disparity ratios for Purchasing are calculated using utilization and availability found at JA VIII: 2202.

Thus, while the 1998 Ordinance and its bid discounts and good-faith-efforts requirements had not eliminated the problem by 2003, it had meaningfully improved the situation.

In addition to the HRC study measuring discrimination in City contracting, the City engaged NERA to study whether there was evidence of race and sex discrimination in the private market. The first NERA study, entitled "Statistical Disparities in Minority and Female Business Formation and Earnings in and Surrounding San Francisco, California," examined the effects that race and sex had on the rate at which individuals working in the

same industries formed their own businesses in the San Francisco area from 1994 to 2002. (JA V:1113-1114.) NERA found that firm formation among minorities (African Americans, Asians and Latinos) and women was significantly below the rate for similarly situated white males even after controlling for those factors other than race and sex, including education and experience, that influence firm formation rates. (*Id.*) This study also found statistically significant lower earnings among self-employed women and African Americans compared to white men, though the data was insufficient to study Asian or Latino earnings. (*Id.*)

The second NERA study, entitled "Statistical Disparities in Capital Markets Facing Minority-Owned and Woman-Owned Business Establishments, 1993-1998," examined race- and gender-based differences in access to capital. (JA V:1149-1226.) This study found that African-American and Latino-owned firms, and to a lesser extent Asian- and woman-owned firms, experienced higher denial rates and higher interest rates than white male firms of comparable size and credit history in the critical enterprise of capitalizing their small businesses with business loans. (JA V:1155-1156.)

Taken together, the NERA studies give context to the HRC analysis and show that minority- and woman-owned businesses are impacted by discrimination even before they are disproportionately denied opportunities to contract for public projects.[3]

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[3] NERA's work for the city of Denver, including firm formation and lending discrimination studies like those here, was extensively analyzed and approved by the Tenth Circuit in *Concrete Works*, *supra*, 321 F.3d 950, 978-981.

2. The Testimonial And Anecdotal Evidence.

In 2003, the Board of Supervisors and the HRC also held public hearings at which they received testimony from 134 individuals and organizations, as well as numerous written submissions from other constituents. (JA III:688.) In addition, the HRC independently investigated and reported on continuing discrimination in City contracting and the City's efforts to enforce its 1998 Ordinance. (E.g., JA V:1346-1347.)

This information revealed an ongoing pattern of discrimination by City staff members as well as resistance throughout City agencies to observing the requirements of the Ordinance. For example, the HRC found 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.) Similarly, in November 2002, a minority contractor testified before the HRC that City employees had changed the required scope and rules for subcontracting on some projects to ensure the exclusion of MBEs and WBEs. (JA VII:1688.) The HRC also found that some City employees 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.)

Minority contractors testified that they are held to higher standards by City inspectors than are non-minority contractors. Minority contractors complained that they had seen inspectors waive majority-owned contractors' compliance with contract requirements, while forcing minority contractors to redo identical work on the same projects at substantial cost.

(JA IX:2256, 2281-2282.) Minority contractors also complained that City employees subjected them to more rigorous pre-contracting investigations and routinely called their qualifications for the work into question. (JA IX:2286.) City staff also had unfairly blamed MBE/WBE contractors for delays on projects that they knew majority subcontractors had actually caused. (JA V:1346.)

The record also contained evidence that City employees had racially harassed minority contractors. One minority contractor complained that a City investigator 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.*)

In addition to this sort of discrimination within City ranks, the record also reflected that City departments had largely resisted complying with the Ordinance. For example, departments routinely extended existing contracts rather than put new contracts out to bid, thus circumventing the requirements put in place to increase contracting and subcontracting opportunities for MBEs and WBEs. (JA V:1347.) City departments also failed to give the HRC adequate time to review bids and proposals for fairness to MBEs and WBEs, included unnecessarily onerous technical requirements in their requests for proposals to the detriment of MBEs and WBEs, and failed to enforce the prompt payment requirements of the Ordinance, which require prime contractors to promptly pay sums due to subcontractors and are particularly important to small businesses. (JA V:1346-47.)

The record also revealed systematic efforts by majority-owned prime contractors to avoid complying with the 1998 Ordinance, usually in one of three ways. First, some majority contractors would falsely claim that they had retained MBE or WBE subcontractors in order to obtain a City contract. (JA V:134.) The record contained the testimony of several minority contractors whose names and resumes had been used to obtain projects in which they are not involved, about which they had no knowledge, and involving prime contractors of whom they had never heard. (JA V:134.) Minority contractors typically discovered that their names had been used in this way when a third party called to inquire about the project. (JA VII:1746.) Most reported that they were not allowed to participate on the public project even after discovering the majority contractor's ruse. (*Ibid.*)

Second, some majority contractors who legitimately retained MBEs or WBEs for a project immediately canceled the subcontracts once the contract was obtained from the City. One minority contractor testified that once the work on a City project had commenced, the prime contractor refused to give it the work for which it had contracted. (JA V:1376.)

Third, even if they allowed subcontractors to work on a project, some majority contractors would substantially curtail the scope and amount of the work once the project had 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 once the subcontracting goal on a particular contract had been reached, the contractor dropped her firm from the job. (JA VII:1644.) A third minority contractor testified that the prime contractor terminated his firm in the

midst of a project and replaced it with another majority contractor. (JA VII:1644.)

The record showed that majority contractors 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 subcontractor 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.) Another minority subcontractor described 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.)

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.)

3. Race-Neutral Attempts To Correct Ongoing Discrimination

The City's undisputed evidence also establishes that the City has attempted to remedy discrimination in public contracting using race-neutral programs, but that those approaches on their own have been insufficient to counteract the full measure of discrimination in City contracting. For example, prior to the 2003 Ordinance and its findings of continuing discrimination, the City already provided (1) bid discounts on City prime contracts for all economically disadvantaged local businesses, regardless of race and sex (1998 Ordinance § 12D.A.4, JA III:776); (2) race-and gender-neutral bonding and financial assistance to local disadvantaged businesses,

including City subsidies of up to $750,000 for surety bonds and construction loans (1998 Ordinance § 12D.A.10, JA III:789); (3) training in bond applications, developing financial statements, creating internal financial control systems, and accurate financial reporting tools, all available regardless of race or gender (*ibid.*); (4) race-and gender-neutral prompt payment policies (1998 Ordinance § 12D.A.9(A)12; JA III:787); (5) increased 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 assign realistic bonding and insurance requirements (1998 Ordinance § 12D.A.9(A)3&4; JA III:786); and (6) yearly training for all City department heads and commissioners regarding these measures (1998 Ordinance § 12D.A.9(G); JA III:789).

Even in combination with the race- and sex-conscious measures already existing in the 1998 Ordinance, the HRC study demonstrates that these race-neutral measures did not provide adequate correction for the competitive disadvantage inflicted on MBEs and WBEs by race and sex discrimination.

4. The Legislative Findings

Based on this and similar evidence, the Board of Supervisors made extensive legislative findings in support of the 2003 Ordinance. (See generally JA III:685-718 [complete text of legislative findings].) Most relevant here, 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 City's current contracting practices are in violation of federal law and ... , 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.)
- Race-neutral measures have proven insufficient to prevent ongoing discrimination against minority- and woman-owned businesses. (§§ 12D.A.10(A), 12D.A.11(A), 12D.A.12(A), 12D.A.13(A), JA III:748, 751-752.)

The Board also declared, "It is the policy of the City and County of San Francisco to ensure full and equitable opportunities" to participate in City contracting. (§ 12D.A.3, JA III:357.)

B. Procedural History[4]

1. 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 of the 1998 Ordinance facially discriminated and granted preferential treatment on the basis of race and gender in violation of Article I, Section 31 of the California Constitution (Proposition 209). (JA I:5-10.) In its answer, the City included an Eighth Affirmative Defense entitled "Conflict with Federal Law" that states, in part, that Coral's complaint "is barred on the ground that Proposition 209 is invalid because it conflicts with federal law." (JA I:66.)

In mid-2002, the parties filed cross motions for summary judgment. Among other things, the City challenged Coral's standing to sue. The City opposed Coral's motion in part based on the existence of triable issues of fact regarding whether the federal Constitution imposes a duty on the City to enforce the challenged programs. On November 15, 2002, the trial court granted the City's motion, and denied Coral's motion, concluding that Coral had failed to establish standing to seek equitable relief against future enforcement of the Ordinance. (See *Coral Construction, Inc. v. City and County of San Francisco* (2004) 116 Cal.App.4th 6, 10.) As a result, the trial court did not reach the merits of Coral's claims.

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[4] A more extensive recitation of the procedural history is located in the City's Opening Brief on the Merits of Issues (2) and (3). This section focuses only on those facts particularly relevant to the discussion in this brief.

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

2. The *Schram* Case.

Schram Construction, Inc. filed its complaint against the City in San Francisco Superior Court 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 Article I section 31. (JA I:73-78.) In its answer to Schram's complaint, the City included an Eighth Affirmative Defense entitled "Federal Preemption" stating that Schram's complaint "is barred on the ground that the federal Constitution preempts the application of Proposition 209 to invalidate the Ordinance." (JA I:151.)

In early 2004, the parties filed cross-motions for summary judgment. As it had in *Coral*, the City opposed Schram's motion based on, among other arguments, the existence of triable issues of fact, particularly in regard to its federal preemption argument. (See JA XXII: 3181-3197.)

3. Consolidation and Summary Judgment.

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.)

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 of the California Constitution. (JA XIII:3467-3483.) Although the City had argued that public entities have a federal constitutional duty to remedy intentional, invidious discrimination, and that there were triable issues of fact as to whether the Ordinance was necessary to comply with such a duty, the trial court did not discuss those arguments in its Order. In fact, the court stated that it "does not dispute the accuracy of the City's study [of discrimination in City contracting]" but found the City's evidence irrelevant. (JA XIII:3480.)

4. The Court of Appeal

A split panel of the First District Court of Appeal reversed. (*Coral Construction, Inc. v. City and County of San Francisco* (2007) 149 Cal.App.4th 1218.) The majority (Justices Reardon and Sepulveda) held that Section 31 does not run afoul of the Equal Protection Clause under the *Hunter-Seattle* doctrine. The full court held that Sectionis not preempted by an international treaty, and that the Ordinance was not required to maintain San Francisco's eligibility for federal funds. The full court also concluded, however, that the Superior Court had erred in failing to determine whether the 2003 Ordinance is a narrowly tailored remedial program necessary to correct for ongoing, pervasive discrimination in public contracting, and remanded the case for fact-finding on this issue. (*Id.* at 57 Cal.Rptr.3d 781, 800-804.)

On August 22, 2007, this Court granted review.

ARGUMENT

I. STANDARD OF REVIEW

Under the familiar standard of review for summary judgment, this Court considers questions of law de novo and independently reviews the

record as it existed before the trial court to determine whether a triable issue of fact exists that would reinstate the action. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.) The Court "liberally construe[s] the evidence in support of the party opposing summary judgment and resolve[s] doubts concerning the evidence in favor of that party." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037.)

Because the City's legislative record in support of its 2003 Ordinance shows, on its face, that that legislation is constitutionally required and narrowly tailored, the Court of Appeal properly held that the trial court's grant of summary judgment in favor of petitioners must be reversed.

II. THE CITY HAS AN AFFIRMATIVE CONSTITUTIONAL DUTY TO REMEDY KNOWN, ONGOING RACE AND SEX DISCRIMINATION IN ITS PUBLIC CONTRACTING.

The equal protection clause of the Fourteenth Amendment places a mandatory federal constitutional duty on the City to eliminate intentional race and gender discrimination in its public contracting, even if it must take race- and sex-conscious corrective measures to do so. The legislative record contains ample evidence that the City was aware of ongoing discrimination, both by its employees and its prime contractors, against women and certain minorities in the award of public contracts. No matter the dictates of state law, the City could not fail to correct for this known discrimination without itself committing an intentional violation of the federal Constitution.

A. The City Has An Affirmative Constitutional Duty To Remedy Intentional Race And Sex Discrimination In Its Public Contracting.

"The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race." (*Washington v. Davis* (1976) 426 U.S. 229, 239.) Thus, the federal constitution affirmatively mandates public entities to take action to redress any ongoing government discrimination. "[A] state or its political subdivision has the authority—indeed the constitutional *duty*—to ascertain whether it is denying its citizens equal protection of the laws and, if so, to take corrective steps." (*Associated General Contractors v. City and County of San Francisco* (9th Cir. 1987) 813 F.2d 922, 929 [emphasis in original; quotation and citations omitted]; see also *Wygant v. Jackson Board of Education* (1986) 476 U.S. 267, 291 ["[O]ur recognition of the responsible state actor's competency to take [race-conscious action] is assumed in our recognition of the States' constitutional *duty* to take affirmative steps to eliminate the continuing effects of past unconstitutional discrimination"] (O'Connor, J., concurring) (emphasis in original).) The failure to do so constitutes "constitutional culpability." (*Coral Construction Co. v. King County* (9th Cir. 1991) 941 F.2d 910, 920-921.)[5]

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[5] Plaintiffs seek to rely on *Coalition for Economic Equity v. Wilson* (9th Cir. 1997) 122 F.3d 692 and its oft-quoted observation, "[t]he Fourteenth Amendment . . . does not require what it barely permits" (*id.* at p. 709) to assert that the City has no constitutional duty to rectify its own ongoing discrimination. But plaintiffs overlook the critical fact that *Coalition* involved only a facial challenge to Proposition 209, rather than circumstances like these, in which race- and gender-conscious measures are necessary to remedy the effects of identified and ongoing discrimination in a government program, and where race-neutral measures do not alone suffice. (See *Associated General Contractors of California, Inc. v. Coalition for Economic Equity, et al.* (9th Cir. 1991) 950 F.2d 1401 at 1417

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This duty to take race-conscious corrective measures when necessary to combat ongoing governmental discrimination has been well established in U.S. Supreme Court jurisprudence for nearly forty years. In 1968, the Court in *Green v. County School Board of New Kent County (1968) 391 U.S. 430* rejected a race-neutral school assignment plan that failed to remedy the ongoing effects of past discrimination, holding that the school board had "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." (391 U.S. 430, 437-438.) Similarly, in *Swann v. Charlotte-Mecklenburg Board of Education* (1971) 402 U.S. 1 ("*Swann I*"), the Court upheld a court-imposed race-based student assignment plan after finding that school officials had failed to "meet their constitutional obligations" of eradicating the ongoing effects of past discrimination. (402 U.S. at pp. 14-15.) In the companion case, *North Carolina State Board of Education v. Swann* (1971) 402 U.S. 43 ("*Swann II*"), the U.S. Supreme Court likewise invalidated a state statute that banned race-based student assignments because the ban conflicted with school officials' constitutional duty:

> 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 the fulfillment of their constitutional obligation* to

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(footnote continued from previous page)
[finding that the City had attempted to use race-neutral measures to eradicate discrimination]; see also evidence discussed *supra* at Background § A.3.) For this reason, *Coalition* has no bearing on this case, and does nothing to relieve the City of its duty to enact the Ordinance to redress identified, ongoing discrimination in public contracting.

> eliminate existing dual school systems. (402 U.S. at p. 46 [emphasis added].)

In 1986, the Court reaffirmed that "in order to remedy the effects of prior discrimination, it may be *necessary* to take race into account." (*Wygant v. Jackson Board of Education* (1986) 476 U.S. 267, 280 (emphasis added) [public employment].) And again in 1989, the Court recognized that "some form of narrowly tailored racial preference might be *necessary* to break down patterns of deliberate exclusion." (*City of Richmond v. J.A. Croson Co.* (1989) 488 U.S. 469, 509 (emphasis added) [public contracting].)

California law is to the same effect. For example, in *San Francisco Unified School Dist. v. Johnson* (1971) 3 Cal.3d 937, this Court analyzed a state statute addressing transportation of school children. The Court recognized that the statute could be construed to impinge on the ability of school districts to use busing to eliminate racial segregation in schools, but the Court declined to so interpret the statute because busing "will often be the only effective device to eliminate de facto segregation," and courts must construe statutes in a manner consistent with the Constitution where possible. (*Id.* at p. 959.)

More recently, in *Hi-Voltage Wire Works, Inc. v. City of San Jose* (2000) 24 Cal.4th 537, this Court expressly recognized that "[w]here 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." (24 Cal.4th at p. 568; see also *id.* at p. 569 ["[I]f it were determined the City had violated federal constitutional or statutory law, the supremacy clause as

well as the express terms of Proposition 209 would dictate federal law prevails."].)[6] Thus, as these federal and state authorities uniformly make clear, the equal protection clause does not tolerate ongoing governmental discrimination. Such discrimination *must* be remedied, Article I, section 31 notwithstanding.

Petitioners never engage the many federal and state authorities, surely familiar to them from the long history of briefing in this case, indicating the existence of this federal duty. Rather, they open their brief with five pages of argument directed to the wrong issue, discussing a series of cases construing Article I, section 31 to outlaw race- and sex-based remedial programs that the equal protection clause would otherwise permit, but not require. (Opening Br. at pp. 10-14.) But the issue here is whether the federal equal protection clause indeed does require the City's program,

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[6] While the Court in *Hi-Voltage* ultimately struck down San Jose's race-conscious remedial program, that program—and the record in that case—differed critically from the facts presented here. Most important, San Jose conceded that its program was neither constitutionally required nor federally mandated, and it did not submit even a disparity study into the record. (*Hi-Voltage, supra,* 24 Cal.4th at pp. 568-69.) Here, in contrast, the City's program responds to its constitutional duty to rectify its own ongoing discrimination and rests on legislative findings that are, in turn, grounded in substantial evidence in the legislative record. Based on that evidence, the Board of Supervisors expressly 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. This Board finds that 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.)

because if it does then the state constitutional provision becomes ineffective. (*Connerly v. State Personnel Board* (2001) 92 Cal.App.4th 16, 43, fn.5 ["Proposition 209 yields where federal law requires the state to engage in particular action, but not where it would merely permit such action"].) Petitioners' silence on this question speaks volumes.

B. The Government Intentionally Violates Its Duty Not To Discriminate If It Fails To Remedy Known Race And Sex Discrimination That It Commits, Encourages Or Funds.

Absent its 2003 Ordinance, the City would stand in violation of the equal protection clause because it would have failed to correct for the race and sex discrimination that it knew existed in its ranks and in the contracting market that it directly finances with its public dollars. The federal Constitution does not tolerate such deliberate indifference to race and sex discrimination.

1. Government has a constitutional obligation to remedy known discriminatory acts by third parties that it finances with its public dollars.

It would undermine the purpose of the equal protection clause if the government could avoid its duty not to discriminate by inducing and promoting discrimination when hiring private contractors. (See *Norwood v. Harrison* (1973) 413 U.S. 455, 465 ["Racial discrimination in state-operated schools is barred by the Constitution and [i]t is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish"].) Thus, along with its own constitutional duty not to discriminate, the government has a concomitant duty to prevent or remedy the known discrimination of others acting on its behalf. Otherwise, the government is tarred by the same evil: "If prime contractors on County projects were discriminating against minorities and this was known to the County, whose funding of the

contracts thus knowingly perpetuated the discrimination, the County might be deemed . . . a kind of joint tortfeasor, coconspirator, or aider and abettor." (*Builders Assoc. of Greater Chicago v. County of Cook* (7th Cir. 2001) 256 F.3d 642, 645 [Posner, J.].)

So, for example, where statistical evidence supported the inference that a private union discriminated against African-Americans, the Eighth Circuit deemed the NLRB to have violated the Constitution and become a "willing participant" in the private discrimination simply by recognizing the union as a bargaining representative. (*NLRB v. Mansion House Center Management Corp.* (8th Cir. 1973) 473 F.2d 471, 473, 477.) As the Court explained,

> Federal complicity through recognition of a discriminating union serves not only to condone the discrimination, but in effect legitimizes and perpetuates such invidious practices. Certainly such a degree of federal participation in the maintenance of racially discriminatory practices violates basic constitutional tenets.

(*Id.* at p. 477.)

Similarly, the Seventh Circuit held HUD to constitutional account for its knowing acquiescence in racially discriminatory conduct by the Chicago Housing Authority, even though HUD had made "numerous and consistent efforts" to dissuade the CHA from the objectionable conduct. (*Gautreaux v. Romney* (7th Cir. 1971) 448 F.2d 731, 737, 739.) Solely because HUD continued to fund what it knew to be discriminatory practices, "the Secretary's past actions constituted racially discriminatory conduct in their own right. The fact that the Secretary's exercise of his powers may have more often reflected CHA's own racially discriminatory choices than it did any ill will on HUD's part, does not alter the question before us." (*Id.* at p. 739; see also *NAACP v. Brennan* (D.C. 1973) 360

F.Supp. 1006, 1015 [federal officials violated U.S. Constitution by renewing funding of state farmworker program while aware of a report detailing discrimination and other problems at the subject agencies: "Through these actions, Defendants knowingly acquiesced in and helped to perpetuate the discriminatory and otherwise improper practices ..."]; *Hicks v. Weaver* (E.D.La. 1969) 302 F.Supp. 619, 623 [HUD violated the Constitution as an "active participant" in discrimination where it funded and oversaw a local public housing program but did nothing to halt known discrimination].)

Thus, the City is constitutionally required to take affirmative steps to correct for discrimination in activities that it funds whenever it is on notice—whether by means of an investigatory report, statistical study or otherwise—that ongoing discrimination exists.

2. Deliberate indifference to known discrimination by those it funds constitutes intentional discrimination by the government itself.

The U.S. Supreme Court has held deliberate indifference to known discrimination that the City has a duty to prevent or remedy to be a form of intentional discrimination.

In *Monell v. New York City Department of Social Services* (1978) 436 U.S. 658, the Court held that a municipality can only be liable for a constitutional violation when it "*itself* causes the constitutional violation at issue." (*City of Canton v. Harris* (1989) 489 U.S. 378, 385 [emphasis in original].) Liability may spring from either an act or an omission. (See *id.* at p. 388.) When a municipality fails to implement appropriate safeguards to prevent an obvious risk of constitutional injury, such failure to act "amounts to deliberate indifference" and violates the Constitution. (*Van Ort v. Stanewich* (9th Cir. 1996) 92 F.3d 831, 835.) In the context of sex

discrimination, the Court has further held that deliberate indifference to known acts of discrimination constitutes *intentional* discrimination. (See *Jackson v. Birmingham Board of Education* (2005) 544 U.S. 167, 182 [under Title IX duty to eliminate sex discrimination, deliberate indifference to one student's sexual harassment of another constitutes "intentional discrimination on the basis of sex"]; *Davis v. Monroe County Board of Education* (1999) 526 U.S. 629, 643 [a school board "intentionally violates Title IX ... where the recipient is deliberately indifferent to known acts of teacher-student discrimination"].)

Accordingly, if the Board knew of race and sex discrimination among the contractors it hired and financed, the Board had an affirmative duty to halt the discrimination. If it failed to act, despite the known risk of constitutional injury to its citizens, the Board's deliberate indifference would constitute intentional discrimination in violation of the federal equal protection clause. And if it acted solely in a race-neutral fashion, which it knew to be inadequate to address the scope of the problem, the Board would likewise fail in its duty to do what was necessary to provide an effective remedy. Thus, it was in direct obeisance to the federal Constitution that the Board enacted the 2003 Ordinance to correct for known discrimination taking place on its dime.

III. THE COURT OF APPEAL CORRECTLY HELD THAT REMAND IS NECESSARY TO DETERMINE WHETHER THE FEDERAL CONSTITUTION REQUIRES SAN FRANCISCO TO IMPLEMENT ITS REMEDIAL PROGRAM.

The Court of Appeal held that this case should be remanded to the trial court to decide whether the evidence of intentional discrimination in public contracting in San Francisco is sufficient to find that San Francisco's

remedial program is "constitutionally required." (149 Cal.App.4th at 1250.) Petitioners argue at pages 15 to 20 of their opening brief that the Court of Appeal erred in requiring remand because the City allegedly failed to "carry its burden" of proving an "affirmative defense" that the federal constitution requires the City to engage in narrowly tailored remedial action. (Opening Br. at p. 15.)

Petitioners' argument appears to be this:

- The City's claim that its program is constitutionally required is an affirmative defense.
- The City failed to plead this affirmative defense and therefore waived it.
- Even if the City did not waive this affirmative defense, the City failed to carry its burden of proving this defense.

Petitioners are wrong on the latter two points. In addition, they waived any objection to the adequacy of the City's affirmative defenses by failing to raise this objection in the trial or appellate courts at any point over the *five years* this case has been litigated.

A. The City Raised As An Affirmative Defense The Issue Of Proposition 209's Conflict With Federal Law.

First, it is clear that the City has consistently pleaded that its program is constitutionally mandated. In its answer to Schram's complaint, the City included an Eighth Affirmative Defense entitled "Federal Preemption" that states that Schram's complaint "is barred on the ground that the federal Constitution preempts the application of Proposition 209 to invalidate the Ordinance." (JA I:151.) Similarly, in its answer to Coral's first amended complaint, the City included an Eighth Affirmative Defense entitled "Conflict with Federal Law" that states, in part, that Coral's

complaint "is barred on the ground that Proposition 209 is invalid because it conflicts with federal law." (JA I:66.) The City has always asserted that one way in which Proposition 209 conflicts with federal law is by interfering with the City's constitutional duty under the federal equal protection clause.

Petitioners never objected to these affirmative defenses as vague or uncertain. A failure to do so object waives any later objection on appeal. (See *FPI Development, Inc. v. Nakashima* (1991) 231 Cal.App.3d 367, 385.) Moreover, Coral and Schram have litigated this case for five years with two trips to the Court of Appeal knowing that one of the primary issues is whether the City's program is required under the federal constitution, thereby preempting Proposition 209's application to the City's program. It borders on the absurd for Coral or Schram to suggest that they were not on notice of the City's defense or that the City's defense was somehow not sufficiently placed before the trial court on summary judgment.

Finally, neither Coral nor Schram ever argued in the trial or appellate courts that the City failed to allege as an affirmative defense the City's constitutional duty to comply with the federal equal protection clause. By failing to make this argument in the courts below, they cannot now raise this argument in this Court. (See *Marshall v. Bankers Life & Casualty Co.* (1992) 2 Cal.4th 1045, 1058.) This doctrine is of particular force when applied to an argument like Coral's and Schram's, which could easily have been addressed and cured had it been raised in the trial court. (See *Union Bank v. Wendland* (1976) 54 Cal.App.3d 393, 400-401 [amendment of answer to conform to proof should be liberally granted].)

B. The City Did Not Fail To Carry Any Burden Below Because The City Did Not Seek Summary Judgment Based On Its Constitutional Duty Defense, But Instead Argued That Triable Issues Of Fact Existed On This Claim.

When the parties filed cross-motions for summary judgment in the trial court, the City moved for summary judgment on several grounds, but did not argue that it was entitled to summary judgment based on its "constitutional duty" argument. (See JA II:515-542.) Instead, solely in response to Schram's motion seeking summary judgment, the City asserted (1) given the voluminous evidentiary record supporting the City's remedial ordinance, triable issues of fact existed regarding the City's constitutional duty to enforce its ordinance, and (2) the existence of these triable issues precluded summary judgment in favor of the plaintiffs. (See JA XXII: 3181-3197.)

Coral cites *Hi-Voltage*, *C&C Construction*, *Connerly* and *Crawford*, arguing that remand did not occur in those cases. (Cf. *Concrete Works*, *supra*, 321 F.3d 950 [reviewing bench trial conducted by district court to test strength of Denver's contested evidence of need for race-based remedial program, particularly expert interpretation of disparity studies].) But in none of those cases does it appear that the defendant argued, as the City did and does in this case, that triable issues of material fact precluded summary judgment. In fact, in none of those cases did a defendant claim, as the City does here, that it was compelled to take remedial measures under the equal protection clause because of evidence of intentional discrimination. (See *Hi-Voltage, supra,* 24 Cal.4th at p. 568 [San Jose conceded that its program was not constitutionally required]; *C&C Construction, Inc. v. Sacramento Municipal Utility District* (2004) 122 Cal.App.4th 284, 291 [defense based on federal funding exception to

Proposition 209, not constitutional duty to remedy intentional discrimination]; *Connerly v. State Personnel Board* (2001) 92 Cal.App.4th 16, 57, 61 [noting the absence of evidence of intentional discrimination]; and *Crawford v. Huntington Beach Union High School District* (2002) 98 Cal.App.4th 1275, 1285-1286 [noting the absence of de jure segregation].)

C. On Its Face, The Legislative Record Provides A Strong Basis In Evidence For The Board's Finding That Ongoing Discrimination In Its Public Contracting Requires Race- And Sex-Conscious Corrective Measures.

At this procedural juncture, the Court must accept the City's legislative record as true on its face and consider only its legal sufficiency, "liberally construing the evidence in support of the party opposing summary judgment and resolving doubts concerning the evidence in favor of that party." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037.)

A legislative decision to implement a race- and sex-conscious corrective program must be based on legislative findings that have a "strong basis in evidence." (*City of Richmond v. J.A. Croson Co.* (1989) 488 U.S. 469, 500.) "Strong evidence is that 'approaching a prima facie case of a constitutional or statutory violation,' *not* irrefutable or definitive proof of discrimination." (*Concrete Works*, *supra*, 321 F.3d at p. 971 (quoting *Croson*, *supra*, 488 U.S. at p. 500) (emphasis in original); see also *id.* ["Denver's only burden was to introduce evidence which raised the inference of discriminatory exclusion"].) The City need not "convince the court of its liability" for unlawful discrimination, but instead must demonstrate a "firm basis for concluding" that its race-conscious corrective measures are warranted. (*Associated General Contractors of California, Inc. v. Coalition for Economic Equity* (9th Cir. 1991) 950 F.2d 1401, 1416.)

A strong basis in evidence for the necessity of the City's program is present here. When all of the evidence recited above is accepted as true and all doubts are construed in favor of the City, the statistical studies properly allow the Board to infer and give it a strong evidentiary basis for its finding that "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.) Likewise, the extensive testimonial and written evidence of ongoing, discriminatory acts against MBEs and WBEs by both the City itself and prime contractors gives the Board a strong evidentiary basis to conclude 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). With this knowledge, and in light of the City's constitutional duty not to discriminate, the Board properly concluded that it was "required by federal law" to enact an ordinance to remedy the discrimination. (*Id.*) And given the further evidence that race-neutral approaches to ending discrimination in contracting had been insufficient to accomplish their purpose, the Board also had a strong evidentiary basis to conclude that "the race- and gender-conscious remedial programs authorized by this Ordinance continue to be necessary." (JA III:707.)

Petitioners raise scattershot objections to these findings and the underlying evidence. But, as next explained, none of their complaints has merit.

1. The evidence shows that, under the circumstances, the Board's failure to act would be intentional discrimination.

First, petitioners argue that the City's showing of intentional discrimination is insufficient because (1) the City has long had an official anti-discrimination policy in place (Opening Br. at p. 16); (2) the City has presented only "unverified allegations of isolated instances of discrimination by individuals contrary to City policy" (Opening Br. at p. 20); and (3) the Board found "active" discrimination but did not also call it intentional. (*Id.* at pp. 21-22.) These objections are empty.

Addressing petitioners' first and second points, the intentional discrimination at issue in this case would arise from the City's failure to correct for its own and its contractors' discrimination, despite having knowledge of that discrimination, not from proof of the City's discriminatory animus. Thus, the governing law does not require the existence of a discriminatory policy on the City books. Moreover, the Board may infer intentional discrimination in particular instances from the statistical and anecdotal evidence before it. (*Wygant, supra*, 476 U.S. at p. 292 (O'Connor, J., concurring) [a public employer need not "convinc[e] the court of its liability for prior unlawful discrimination" but rather must only demonstrate "a firm basis for determining" that its race-based program is necessary]; *Concrete Works, supra*, 321 F.3d at p. 978 ["discriminatory motive can be inferred from the results shown in disparity studies"].) The legislative record is not required to contain irrefutable proof of discriminatory intent in individual cases. (*Concrete Works, supra*, 321 F.3d at p. 972.) "To impose such a burden on a municipality would be tantamount to requiring direct proof of discrimination and would eviscerate any reliance the municipality could place on statistical studies and

anecdotal evidence." (*Ibid.*) As for petitioners' third point, it does not matter whether the Board described the discrimination in the record as "active" or "intentional." There is no magic word requirement for legislative findings, and petitioners point to none.

2. The statistical evidence in the disparity study supports the legislative findings.

Next, citing only *two* of at least 56 disparity calculations from the HRC study, petitioners also object that the City's legislative findings of widespread underutilization of MBEs and WBEs are "contradicted by the statistical facts set forth in the City's Ordinance." (Opening Br. at p. 22.) It follows, argue petitioners, that the legislative findings of discrimination by the City and its prime contractors are a "sham." (*Id.* at p. 23.)

These assertions misleadingly take the statistical findings out of context. The City expected—indeed hoped—that the HRC disparity study quoted by petitioners would *not* find substantial disparities for most disadvantaged groups because the City already had a race- and gender-conscious corrective program in place. The more effective the program, the more disparities would in fact be corrected by the bid discounts and good-faith-effort requirements. As the petitioners' two statistical examples demonstrate, that was indeed the case in some instances. But the HRC study also showed that well over half of the disparity ratios for prime and subcontracts awarded to MBEs and WBEs still fell below the .80 EEOC threshold of practical significance for proving discrimination, despite the fact that the City was instituting corrective measures. If anything, rather than showing that discrimination has disappeared and the program should be defunct, the HRC study demonstrates just how persistent discrimination

remains and how necessary the Ordinance is to provide some counterbalance.

3. The legislative findings are specific and well grounded in the evidence.

Petitioners next argue that the legislative findings are too general and conclusory, and wrongfully rely on "highly conclusory statements of proponents of the program that there was racial discrimination in the construction industry." (Opening Br. at pp. 24-25.) For this objection petitioners repeat the U.S. Supreme Court's criticisms of Richmond's legislative record in *Croson*.

Petitioners' reliance on *Croson* is misplaced, however, because the evidentiary record before the local legislative body in that case was far less extensive than the record here. In *Croson*, the City of Richmond enacted a race-based ordinance based only on a single public hearing at which five people spoke against the plan and two in favor; on the observation that 50% of Richmond's population was black but only 0.67% of the city's prime construction contracts had been awarded to minority businesses between 1978 and 1983; on evidence that there were virtually no minority members of local contractors' associations; on unsupported generalizations by one councilperson that the local, state and national construction industry all participated in race discrimination; and on statements by the City Manager that there was race discrimination in the construction industry in his home city of Pittsburgh. (*Croson*, *supra*, 488 U.S. at pp. 479-480.)

The U.S. Supreme Court criticized this record on a number of grounds, among them the generality of the findings—nationwide discrimination in an entire industry—and the conclusory nature of the

statements of the councilperson and the City Manager in establishing proof of local contracting discrimination. (*Id.* at pp. 498, 500.)

Here, in contrast, the Board of Supervisors had a deep and extensive legislative record before it when it enacted the 2003 Ordinance. As recited above, that record includes numerous first-hand accounts from a number of local MBEs and WBEs who have experienced discrimination by the City and/or its prime contractors. Further, such testimony is only one of many sources of evidence that put the City's Ordinance on entirely different footing than Richmond's. As the Ninth Circuit observed in regard to a predecessor ordinance:

> In contrast to the "mere recitation of a 'benign' or legitimate purpose" criticized in *Croson*, 488 U.S. at 500, the record in this case discloses that the Board made detailed findings of prior discrimination ... [b]ased on testimony taken at more than ten public hearings ... [and] large disparities between the award of city contracts to available non-minority businesses and to MBEs.

(*Associated General Contractors, supra,* 950 F.2d at p. 1414.) In 2003, the City's record evidence was even more detailed, containing multiple studies, extensive testimony, written submissions, the findings of sister localities, and academic research.

Moreover, petitioners do not indicate which statements of proponents of the Ordinance they believe to be improperly conclusory, so it is difficult to evaluate their claim. But if their point is that all statements by proponents of legislation are inherently unreliable, the point is not well taken. Rather, "individual accounts of discrimination ... bring 'the cold numbers convincingly to life.' " (*Associated General Contractors, supra,* at p. 1415 (quoting *Coral Construction, supra*, 941 F.2d at p. 919, itself

quoting *International Brotherhood of Teamsters v. United States* (1976), 431 U.S. 324, 339).)

4. Neither the Ordinance nor the underlying disparity study relies on "racial balancing."

Petitioners further criticize both the Ordinance and the disparity studies underlying it as impermissible exercises in "racial balancing" because they compare the percentage of qualified MBE and WBE businesses in the contracting pool and infer discrimination if there is not rough parity between that number and the percentage of such businesses participating in public contracting. (Opening Br. at pp. 28-32.) But this sound statistical method is not the "racial balancing" that has concerned the courts.

Petitioners erroneously conflate two different kinds of race-based numerical comparisons. The first, which is prohibited "racial balancing," acts on the assumption that racism exists and will not cease until all social goods are distributed equally in lockstep proportion to the percentage of members of different races *in the general population*. This was one error Richmond made in enacting its program. (*Croson*, *supra*, 488 U.S. at p. 501.) Indeed, the Court called the 30% quota for hiring MBEs in Richmond, without any predicate showing of their availability in the local construction industry, "outright racial balancing [because] [i]t rests upon the completely unrealistic assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population." (*Croson*, *supra*, 488 U.S. at p. 507.)

This sort of racial balancing also caused the U.S. Supreme Court recently to strike down student assignment plans in *Parents Involved in Community Schools v. Seattle School Dist. No. 1* (2007) 127 S.Ct. 2738.

"The plans are tied to each district's specific racial demographics, rather than to any pedagogic concept of the level of diversity needed to obtain the asserted education benefits. ... This working backward to achieve a particular type of racial balance, rather than working forward from some demonstration of the level of diversity that provides the purported benefits, is a fatal flaw under our existing precedent." (*Id.* at pp. 2755, 2757; see also *Freeman v. Pitts* (1992) 503 U.S. 467, 494 ["Racial balance is not to be achieved for its own sake"]; *Lomack v. City of Newark* (3d Cir. 2006) 463 F.3d 303, 311 [where there has been no antecedent discrimination, creating "a rainbow" in the fire department with race-conscious means is illegal "racial balancing"].)

The second type of race-based numerical comparison, however, is not racial balancing, but instead potent statistical evidence of discrimination. As *Croson*, a case rejecting racial balancing, itself recognized, carefully comparing the number of MBEs hired with the subset of MBEs qualified to do the work in the particular public contracting market soundly "demonstrate[es] discriminatory exclusion." (*Croson*, *supra*, 488 U.S. at pp. 501-502; *id.* at p. 509 ["When there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise"]; see also *Adarand Constructors, Inc. v. Slater* (10th Cir. 2000) 228 F.3d 1147, 1174 ["[A] generalized assertion that disparity studies lack reliability is in conflict with *Croson*"].) "Disparity studies are probative evidence of discrimination because they ensure that the relevant statistical pool" of qualified minority contractors rather than the public at large "is being

considered." (*W.H. Scott Construction Co., Inc. v. City of Jackson* (5th Cir. 1999) 199 F.3d 206, 218 (internal quotation omitted).)

This sound statistical proof of discrimination—and yardstick for measuring its diminishment—is what underlies the Ordinance and the City's commitment to "measure the effectiveness of this ordinance in remedying the effects of ... discrimination" by examining "the relationship between the percentages of MBEs/WBEs in the relevant sector of the San Francisco business community and their respective shares of City contract dollars." (JA III:719.) This is not racial balancing, and it is not impermissible.

5. Petitioners' objections to the soundness of the evidence are out of place in this proceeding and require remand to evaluate.

Because the City's legislative record presents a prima facie case that the City and its contractors continue to discriminate and that race-neutral remedies alone are ineffective to combat the discrimination, and given the legal authority holding that its failure to act would tarnish the City with intentional, constitutionally forbidden race and sex discrimination, the Board had a sound basis in evidence to conclude that the Ordinance is necessary.

To the extent that petitioners now dispute the correctness of the City's evidence rather than its legal sufficiency, remand is required for proper fact-finding. In addition to presenting its full case in favor of the Ordinance for the trial court's consideration, the City is entitled to present expert evidence to explain the sound methods and conclusions to be drawn from its statistical evidence—and to fend off petitioners' attack. (See, e.g., *Concrete Works*, *supra*, 321 F.3d at pp. 962-969; Section III.C.2, *supra*.) Several statistical methods are employed across three different studies, all

of which require technical sophistication to evaluate. And the results require careful, knowledgeable interpretation. The City should be allowed to have its evidence evaluated with the aid of expert witnesses who could explain in greater detail the methods of analysis available, their limitations, and how the various results can and should be considered as evidence of ongoing discrimination. Because of the procedural posture of the case, the City has to date been denied that opportunity.

Petitioners also claim to have evidence that, in their view, "completely rebuts City's findings" and reveals the City's supposedly illegitimate intent. (Opening Br. at pp. 26-27.) But for now, their evidence can show nothing beyond a material dispute of fact that can only be resolved by the trial court.[7] Remand is required for both of these reasons.

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[7] In addition, petitioners' proffered evidence may not be given credence here because petitioners have sought to augment the appellate record with evidence that was not before the trial court on summary judgment. "Augmentation does not function to supplement the record with materials not before the trial court. ... Rather, normally 'when reviewing the correctness of a trial court's judgment, an appellate court will consider only matters which were part of the record at the time the judgment was entered.' " (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444 n. 3, (1996) (citations omitted).)

As their captions reveal, petitioners' new documents (Tabs 1 and 2, respectively, of Respondents' Supplemental Appendix) were part of the record in *Coral,* not *Schram*. When the two cases were consolidated while the decision on summary judgment was pending in *Schram*, counsel for both petitioners stipulated that "no additional briefing or record submissions are required for consolidation," and no additional evidence was necessary "to fully and finally adjudicate *Coral* on the same bases currently before the Court in *Schram*." (JA XIII:3393-3395.) Accordingly, the trial court expressly found that "[t]he parties agreed that both cases would be decided based on the pleadings and argument from the cross motions for summary judgment in *Schram*." (JA XIII:3468.)

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IV. THE ORDINANCE IS NARROWLY TAILORED.

Once it has been justified as mandatory to redress ongoing discrimination, a race- and sex-conscious remedial program must be necessary and narrowly tailored to accomplish its purpose but no more. "[T]he availability of nonracial alternatives—or the failure of the legislative body to consider such alternatives—will be fatal to the classification." (*Connerly v. State Personnel Board* (2001) 92 Cal.App.4th 16, 37 (citing *Croson*, supra, 488 U.S. at p. 507).) Although "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative," it does "require serious, good faith consideration of workable race-neutral alternatives." (*Grutter v. Bollinger* (2003) 539 U.S. 306, 339.)

In addition, the use of a racial classification must be "limited in scope and duration to that which is necessary to accomplish the legislative purpose." (*Connerly, supra,* 92 Cal.App.4th at p. 37.) Further, the program must actually be remedial and "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." (*Id.* at p. 38.) That is to say, "[r]andom inclusion of racial groups without individualized consideration of whether the groups suffered from discrimination will belie a claim of remedial motivation." (*Id.* at p. 39.)

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In any event, the petitioners' new "smoking gun" evidence is irrelevant because it consists solely of 2002 discovery responses and a 2002 expert declaration that do not even address the 2003 Ordinance or the many additional public hearings, additional disparity studies, and additional evidence of continued discrimination in minority contracting that the City received in support of the 2003 Ordinance. (JA III:681, 688-695.)

The Ordinance meets all of these requirements. First, the legislative record shows that the Board has considered, enacted and reenacted a series of race- and sex-neutral measures, but these measures have not been adequate on their own (or to date even in combination with race- and sex-conscious measures) to remedy the ongoing discrimination. (See Background sections A.1 and A.3, *supra.*) Second, the Ordinance is limited both in scope and duration. It affects only local City contracting, breaks down specific remedies according to contracting specialty and business type, and sunsets five years after enactment. (JA III:720, 728, 731, 748, 751-753, 763.) Third, it includes only those minority groups and women for which it has evidence of discrimination, and no others. (Compare JA III:728 [defining MBE] with JA V:1234 [listing same ethnic groups as subjects of the HRC disparity study].) Finally, it seeks to counterbalance the systemic discriminatory conduct evidenced in the legislative record with a calibrated compensatory advantage neither larger nor smaller than necessary to achieve a level playing field for all contractors seeking to participate in City contracting. According to the HRC study, limited parity has indeed been achieved in a few circumstances, but on the whole the corrective measures still somewhat undercompensate for the effects of ongoing discrimination.

Still, petitioners argue that the Ordinance is not narrowly tailored because it does not remedy the precise acts of discrimination about which the City received testimony. In fact, in petitioners' view, the *only* permissible, narrowly tailored remedy is individual enforcement actions against offending employees and contractors. (Opening Br. at pp. 35-38, 40-41.)

The assertion that only individualized remedies are narrowly tailored is legally incorrect and proposes an obviously inadequate response to a systemic problem. As Justice O'Connor explained in *Wygant*, a race-conscious remedial plan "need not be limited to the remedying of specific instances of identified discrimination for it to be deemed sufficiently 'narrowly tailored.' " (*Wygant, supra*, 476 U.S. at p. 287 (O'Connor, J., concurring).) The Ninth Circuit, considering a similar objection to a prior City ordinance, further explained,

> Race-conscious plans, by their nature, are not tailored to remedy individual injuries suffered by individual victims. Here, the City has found that continued discrimination places MBEs at a competitive disadvantage and seeks to counteract this situation by providing MBEs with a counterbalancing advantage. We find this nexus between violation and remedy to be close enough ...

(*Associated General Contractors, supra*, 950 F.2d at p. 1417, fn.12.) In fact, it is obvious from the persistence of discrimination despite nearly 150 years of the equal protection clause and nearly 50 years of the benchmark federal civil rights statutes that official policies decrying discrimination and providing for enforcement actions are often not enough to prevent ongoing violations. Yet that is the City's charge here: it must halt discrimination. Where the City cannot directly accomplish that by officially forbidding discrimination and providing for enforcement actions, the only realistic remedy is to provide a systemwide counterbalance for discrimination's measurable effects.

Indeed, the record shows that the systemwide race- and sex-conscious corrective measures are effective and, over time, have substantially reduced the competitive disadvantage that MBEs and WBEs suffer on account of their race or sex. (See Background § A.1, *infra*

[reporting substantially improved results from 2003 HRC disparity study compared to 1998 Mason Tillman study].) The fact that the City's efforts date back to 1984 does not throw the remedial efficacy of the Ordinance into question, but instead shows only that discrimination in City contracting is an entrenched rather than transient problem. As the Tenth Circuit has explained while exploring a similar ineffectiveness objection made against Denver's remedial program, a city need only

> show that the ordinances are narrowly tailored to remedy the *City's participation* in the identified discrimination; there is no requirement that the ordinances must also eliminate the discrimination. In fact, any such requirement would be illogical. If firms persisted in their discrimination, they could effectively defeat all affirmative action legislation.

(*Concrete Works*, *supra*, 321 F.3d at p. 973 (emphasis added).) Here, San Francisco's Ordinance is likewise designed to cleanse the taint of discrimination from its award of public contracting dollars alone, not from all aspects of the private marketplace. That the Ordinance has not eliminated all discrimination does not mean that it is ineffective in counterbalancing the effects of that quantum of discrimination that still affects the award of public monies.

Petitioners also complain that the Ordinance is not narrowly tailored because the City "intends" to maintain it without end, whereas a narrowly tailored remedy must be time-limited. (Opening Br. at pp. 39-40.) They base their objection on their skepticism about the City's assertion that discriminatory disparities in the award of public dollars to MBEs and WBEs would increase if the Ordinance were not in effect.[8] They claim that

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[8] It is hard to understand petitioners' objection. As a matter of simple logic, it follows that when eliminating a 10% bid discount, the number of contracts received by the groups that had enjoyed the discount

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"[t]his rationalization ensures that City's discriminatory preferences will continue in perpetuity ..." (Opening Br. at p. 39.)

In fact, the 2003 Ordinance sunsets in 2008. (2003 Ordinance § 12D.A.22, JA III:763.) This makes nonsense of petitioners' claim that "the City's discriminatory preferences will continue in perpetuity." (Opening Br. at p. 39.) The requirement that a race-conscious corrective program be limited in time allows the government to address, in steps if need be, a continuing evil while at the same time "assur[ing] all citizens" through ongoing legislative debate "that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself." (*Grutter v. Bollinger* (2003) 539 U.S. 306, 342; see also *Western States Paving Co., Inc. v. Washington State Dept. of Transportation* (9th Cir. 2005) 407 F.3d 983, 994.) By including a sunset provision and thereby necessarily requiring the investigation of the state of public contracting discrimination before a successor ordinance could be enacted, the City ensures that its policies are fully vetted, aired before the public, and easily changed or discarded when no longer needed.

Thus, the Ordinance is narrowly tailored. The City has studied the problem, identified its constitutional duty to implement race- and sex-based remedies only to the extent necessary to prevent known, ongoing discrimination in City contracting against those groups that suffer it, implemented calibrated and targeted remedies, and studied their

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will decrease, unless their bids had always been more than 10% below the next lowest bidder.

effectiveness before reenacting them for another five-year period. There is nothing else the City must do to discharge its duties under the equal protection clause to create truly fair and equal public contracting opportunities in San Francisco. But everything it has done the federal Constitution.

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CONCLUSION

For the foregoing reasons, this Court should affirm the holding of the Court of Appeal that this case must be remanded to the trial court for fact-finding.

Dated: December 19, 2007

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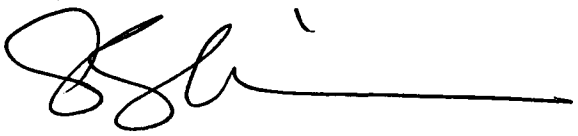

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CERTIFICATE OF COMPLIANCE

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 11,912 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 December 19, 2007.

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PROOF OF SERVICE

I, DIANA QUAN, declare as follows:

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

On December 19, 2007, I served the attached:

RESPONDENT CITY AND COUNTY OF SAN FRANCISCO'S ANSWER BRIEF

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

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

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

DIANA QUAN