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 REPLY BRIEF ON THE MERITS OF ISSUES TWO AND THREE

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

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 REPLY BRIEF ON THE MERITS OF ISSUES TWO AND THREE

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

DENNIS J. HERRERA, State Bar #139669
City Attorney
WAYNE K. SNODGRASS, State Bar #148137
DANNY CHOU, State Bar #180240
SHERRI SOKELAND KAISER, State Bar #197986
Deputy City Attorneys
City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102-4682
Telephone: (415) 554-4691
Facsimile: (415) 554-4747

G. SCOTT EMBLIDGE, State Bar #121613
ROBERT D. SANFORD, State Bar No. #129790
MICHAEL P. BROWN, State Bar #183609
MOSCONE, EMBLIDGE & QUADRA, LLP
220 Montgomery Street, Suite 2100
San Francisco, California 94104-4238
Telephone: (415) 362-3599
Facsimile: (415) 362-2006

Attorneys for Appellants and Respondents CITY AND COUNTY OF SAN FRANCISCO

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Other Authorities

INTRODUCTION

The lion's share of Respondents' answering brief is based on an erroneous conflation of "conventional" and "political structure" equal protection analyses. The conventional analysis – which is the focus of "issue one" before this Court and the subject of separate briefing – addresses whether the City and County of San Francisco would violate equal protection without its remedial Ordinance by allowing known and ongoing race and sex discrimination in publicly funded contracts to continue uncorrected. That analysis has no relevance, however, to the question of whether Article I, Section 31 violates the political structure prong of equal protection jurisprudence. Under the political structure cases, the sole question is whether Section 31 "distort[s] 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.) Therefore, even if San Francisco had taken *no* action to remedy its discrimination against minority contractors, Section 31 would violate the equal protection clause because it places a special burden on minority contractors who seek to remedy local governmental discrimination through local legislation.

Once Respondents' misplaced attacks on the validity of San Francisco's Ordinance are off the table, Respondents are left with a handful of unsound arguments against invalidation of Section 31 under the *Hunter/Seattle* doctrine. First, Respondents try to distinguish the political structure cases by claiming that the laws at issue in those cases merely *prohibited* discrimination, unlike San Francisco's Ordinance, which also provides affirmative assistance to remedy discrimination. That distinction

is factually and legally baseless. The political structure cases prohibit barriers to racial groups seeking "beneficial legislation," not simply non-discrimination legislation. Moreover, the legislation at issue in *Seattle* provided for affirmative, race-based pupil assignments in schools, not legislation merely forbidding discrimination by schools.

Second, Respondents argue that the political structure cases are inapplicable because (1) only political burdens imposed by a majority on a minority are forbidden, and (2) most of California's residents are not Caucasian. This argument is contrary to the Supreme Court's pronouncement that 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." (*Romer v. Evans* (1996) 517 U.S. 620, 633.) It is folly to argue that, for example, the Supreme Court would have reached a different conclusion in *Seattle* had there been evidence that only 49% of Washington's population was Caucasian. It matters not which racial group is in a position of political power or numerical strength; what matters under the Fourteenth Amendment is that members of no racial group be structurally disadvantaged in seeking to achieve beneficial legislation.

Third, Respondents argue that victims of discrimination have other avenues of relief – such as suits against those individuals foolish enough to have made a record of their discriminatory acts – so the victims' loss of access to local legislative remedies is constitutionally inconsequential. That argument cannot be squared with *Seattle*, where remedies other than busing existed for segregated schools. More fundamentally, it makes a mockery of the political structure doctrine to say that it is permissible to burden the political rights of racial groups to achieve *some* forms of

beneficial legislation as long as one does not burden their ability to pursue other remedies for discrimination. The Constitution does not have a loophole for partial deprivation of access to the political process.

Finally, Respondents' arguments regarding the federal funding exception are based on the following premises:

- Federal regulations sometimes require local governments to engage in affirmative action to remedy discrimination in local contracting, *but*
- Those regulations do not specifically require race-conscious affirmative action, *therefore*
- San Francisco is not required to engage in race-conscious affirmative action, and
- There is no conflict between Section 31 and the requirements of federal regulations.

The glaring flaw in this argument is that San Francisco has tried a panoply of race-neutral measures to remedy discrimination in City contracting but those measures have proven inadequate on their own. Consequently, the only way in which San Francisco can comply with its federal obligations is also to resort to narrowly tailored, race-conscious measures.

For these reasons, the Court should direct the trial court to enter judgment in favor of the City because Article I, Section 31 is unconstitutional under *Hunter/Seattle* equal protection jurisprudence.

ARGUMENT

I. ARTICLE I, SECTION 31 VIOLATES THE *HUNTER-SEATTLE* DOCTRINE BY SELECTIVELY DEPRIVING DISFAVORED RACIAL GROUPS AND WOMEN OF THE ABILITY TO SEEK LOCAL, BENEFICIAL LEGISLATION.

Respondents do not dispute that Article I, Section 31 prevents women and minorities from using the local political process to seek remedial legislation to correct for known, ongoing discrimination by local governments. Nor do Respondents dispute that Section 31 permits other groups (such as the disabled, veterans or the poor) to seek beneficial legislation at the local level. This selective restructuring of the political process on the basis of suspect classifications is precisely what the Supreme Court has found to violate the "political structure" arm of the equal protection clause. (*Seattle, supra,* 458 U.S. at p. 467; *Hunter, supra,* 393 U.S. at pp. 390-391.)

Respondents' attempts to distinguish the political structure cases either conflict with the rationale of the cases themselves or are based on a "conventional" equal protection analysis that has no application here.

A. The Political Structure Arm Of Equal Protection Analysis Is Fundamentally Different From Conventional Equal Protection Analysis.

Since the Supreme Court decided *Hunter* and *Seattle*, the reasoning in those cases has come to be known as "political structure" equal protection analysis. The political structure doctrine protects against "distort[ions of] governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation." (*Seattle, supra,* 458 U.S. at p. 467.)

Judge Pregerson succinctly summarized the difference in the two modes of analysis:

> While a conventional equal protection analysis looks to a suspect classification and intentional discrimination, or a

> classification implicating a fundamental right, political structure equal protection analysis concerns a restructuring of the political process with a racial focus.

(*Valeria v. Davis* (9th Cir. 2003) 320 F.3d 1014, 1016, Pregerson, J., dissenting from the denial of rehearing en banc.)

Similarly, Justice Rivera, in her dissenting opinion in this case explained:

> Less well known in the arena of political process equal protection jurisprudence are the "political structure" cases. As has been noted, in these cases, the courts act to guard against a more subtle form of vote dilution-the reallocation of political power in a way that treats all individuals equally, but operates to the disadvantage of minority groups and their interests.

(*Coral Construction, Inc. v. City and County of San Francisco* (2007) 57 Cal.Rptr.3d 781, 805; see also *Coalition for Economic Equity v. Wilson* (9th Cir. 1997) 122 F.3d 692, 704 ("*Coalition II*") ["The 'political structure' equal protection cases, namely *Hunter* and *Seattle*, addressed the constitutionality of political obstructions that majorities had placed in the way of minorities to achieving protection against unequal treatment"])

The political structure doctrine stems, at least in part, from the need to protect the most fundamental of rights in a democracy: the right to vote. (See *Hunter, supra,* 393 U.S. at p. 391 [a restructuring that "places special burden on racial minorities . . . is no more permissible than denying them the vote, on an equal basis with others"])

In their brief, Respondents largely ignore the basis of this long-standing doctrine and gloss over the important distinctions between analyzing governmental action under political structure, as opposed to conventional, equal protection case law.

B. Respondents' Challenges To The Factual Predicate For The City's Ordinance Have No Place In Evaluating Whether Section 31 Can Survive Scrutiny Under The Political Structure Cases.

Given the focus of the political structure doctrine on whether hurdles have been placed in the path of enactment of racially conscious beneficial legislation, Respondents' lengthy arguments regarding the *validity* of the City's remedial legislation are of no relevance.[1] (RAB at pp. 14-40.) Even if the City's ordinance did not exist, Section 31 would be subject to constitutional attack because it restructures the political process to prohibit the City (and other local governments) from enacting such an ordinance. To paraphrase *Seattle*, Section 31 "burdens all future attempts to [remedy race and gender-based discrimination in city contracting] throughout the State, by lodging decisionmaking authority over the question at a new and remote level of government." (*Seattle, supra,* 458 U.S. at p. 483.)

The Supreme Court has made clear that the *Hunter/Seattle* doctrine does not depend on the nature of the discrimination a local jurisdiction seeks to remedy, be it intentional governmental discrimination or more indirect societal discrimination. What matters is whether the political process has been skewed in a non-neutral manner to burden those seeking legislative solutions to a race-based problem. For this point, the Court in *Seattle* repeatedly cited to its earlier summary affirmance of *Lee v. Nyquist*, 318 F.Supp. 710 (WDNY 1970) (three-judge court), summarily aff'd, (1971) 402 U.S. 935.

In *Lee*, a state statute took discretion over school desegregation efforts away from local, appointed school boards and placed that discretion

---

[1] The City answers Respondents' attacks on the validity of its Ordinance in its Answer Brief, filed with this Court on December 19, 2007.

with the state legislature. (See *Seattle*, 458 U.S. at p. 482 and n.26.) In the district court, the defenders of the state statute argued that *Hunter* did not apply because the school district had not shown that it had engaged in intentional discrimination, just as the Respondents here argue that the City has failed to show that its Ordinance is a constitutionally mandated remedy for discrimination in City contracting. The district court in *Lee* disposed of this argument:

> Defendants, however, argue that Section 3201(2) does not constitute impermissible state involvement in racial discrimination, since in the absence of de jure segregation, the state is under no obligation to take affirmative action to reduce de facto segregation in the public schools and thus does not discriminate when it leaves such matters to a local elected board, so long as freedom of choice is preserved. . . . But the argument that the state has not discriminated because it has no constitutional obligation to end de facto racial imbalance fails to meet the issue under *Hunter v. Erickson*. The statute places burdens on the implementation of educational policies designed to deal with race on the local level. . . . The discrimination is clearly based on race alone, and the distinction created in the political process, based on racial considerations, operates in practice as a racial classification. [Citations omitted.]

(*Lee*, *supra*, 318 F.Supp. at p. 719.) In *Seattle*, the Supreme Court rejected an attempt to distinguish *Lee*, finding that case to be "a straightforward application of the *Hunter* doctrine." (*Seattle, supra*, 458 U.S. at n.26.)

In sum, for purposes of the *Hunter/Seattle* analysis, the precise nature of the race-conscious local legislation forbidden by Section 31 is of no import. What counts is what is undeniable: that Section 31 singles out "racially conscious legislation . . . for peculiar and disadvantageous treatment" and "places unusual burdens on the ability of racial groups to enact legislation specifically designed to overcome the 'special condition' of prejudice." (*Seattle, supra*, 458 U.S. at pp. 485-486.) As Justice Rivera explained in her dissent below:

> It is critical to remember that "political structure" equal protection focuses not on the substance of the legislation, but on whether and how the legislation affects political access. The doctrine protects the right to lobby for any legislation that might be sought by a minority group "in its behalf" . . . or " 'in [its] interest' " . . . and not just legislation securing rights guaranteed under the constitution.

(*Coral Construction, supra,* 57 Cal.Rptr.3d at p. 815.)

C. The Political Structure Arm Of Equal Protection Analysis Does Not Apply Only To Laws That Forbid Discrimination.

Respondents claim that the type of legislation prohibited by Section 31 is not "beneficial legislation" as the Supreme Court used that phrase in *Hunter* and *Seattle*. (RAB at 13-14.) Respondents draw a distinction between legislation that simply protects one from discrimination and legislation that provides some form of race-conscious correction for discrimination. (*Ibid.*)

But the *Hunter/Seattle* doctrine draws no such distinction. It speaks to obstacles to the enactment of local, beneficial legislation, not just non-discrimination legislation. Moreover, *Seattle* itself involved not simply legislation outlawing discrimination in public schools, but legislation prohibiting local school districts from using busing and other student reassignment mechanisms to ameliorate the burdens suffered by students languishing in overcrowded, racially isolated schools. (*Seattle, supra*, 458 U.S. at pp. 461 and 464.) These local measures – designed to move many students from schools nearest their homes in order to address "racial imbalances" in the schools – can only be described as providing affirmative, race-conscious relief. (*Id.* at p. 461.)

D. There Is No Factual Or Legal Basis For Respondents' Argument That, Because Caucasians Do Not Make Up Over Half Of California's Population, Section 31 Is Consistent With The Political Structure Analysis.

Next, Respondents argue that the *Hunter/Seattle* doctrine does not apply in this case because persons falling within the category of "White person, not Hispanic" are less than 50% of California's population. (RAB at pp. 6-10 and pp. 43-46.) Essentially, Respondents divide California into two monolithic blocks – Caucasian and non-Caucasian individuals – and then argue that because the Caucasian block falls below 50% of the population, *Hunter/Seattle* cannot apply. The problems with Respondents' argument are legion.[2]

First, the local legislation at issue in *Hunter* prohibited housing discrimination on the basis of "race, color, religion, ancestry or national origin." (*Hunter*, *supra*, 393 U.S. at p. 396.) Surely *Hunter* would not have come out the other way had there been evidence that those who stood to benefit from this legislation exceeded half the population of Akron.

Second, California and its localities are not split into simple racial dichotomies. They are pluralistic, multi-racial communities in which many different racial and ethnic groups live and work. Individuals from some of these groups may be justified in seeking local, beneficial legislation, while others may not. The political structure doctrine protects the rights of *all* of them to have the same access as others to local government.

Third, Respondents' argument ignores the incontestable fact that regardless of the Caucasian percentage of California's population, racial prejudice – and the need to remedy the effects of that prejudice – continues

---

[2] Among the problems is Respondents' reliance on population statistics from 2006 rather than eligible voters from 1996 when the voters adopted Section 31.

to exist in California. That women make up half the population does not mean that gender discrimination has disappeared. And the fact that over half of California's population is not Caucasian says nothing about who holds – and therefore potentially can abuse – political power in the state and its cities and counties, including the power over the awarding of government contracts.

Fourth, Respondents appear to believe that *Hunter/Seattle* is a one-way racial doctrine, intended to protect non-Caucasians from the tyranny of Caucasians. But if a California city is politically dominated by, for example, Latinos who misuse their power and discriminate in the award of city contracts, then the racial groups shut out of city contracting have the right under the equal protection clause to seek local remedies on the same basis as any other groups who might seek beneficial legislation. *Hunter/Seattle* protects the ability of those groups, be they African-American, Asian *or Caucasian*, to seek local, beneficial legislation. (See *Shaw v. Reno* (1993) 509 U.S. 630, 650-651 ["equal protection analysis 'is not dependent on the race of those burdened or benefited by a particular classification.'"], quoting, *Richmond v. J.A. Croson Co.* (1989) 488 U.S. 469, 494.)[3]

In sum, as *Seattle* itself points out, it matters not who specifically supports or benefits from the outlawed, remedial legislation. What matters is that the political process was skewed against adopting local legislation to address local racial issues:

---

[3] These points were overlooked (or at least, not addressed) by the Sixth Circuit in *Coalition to Defend Affirmative Action v. Granholm* (6th Cir. 2006) 473 F.3d 237, on which Respondents heavily rely.

> It undoubtedly is true . . . that the proponents of mandatory integration cannot be classified by race: Negroes and whites may be counted among both the supporters and the opponents of Initiative 350. And it should be equally clear that white as well as Negro children benefit from exposure to "ethnic and racial diversity in the classroom." But neither of these factors serves to distinguish *Hunter*, for we may fairly assume that members of the racial majority both favored and benefited from Akron's fair housing ordinance.

(*Seattle, supra*, 458 U.S. at p. 472 [citations omitted].) Legislation is suspect when it designates racial issues for a more burdensome political process, regardless of the number of voters of any particular race or their political affiliations.

E. Section 31 Is Not Saved By The Fact That It Skews The Political Process Only As To Some Forms Of Beneficial Legislation.

Respondents assert that Section 31 survives strict scrutiny because it permits minorities to "seek beneficial legislation that protects them as individuals against discrimination." (RAB at p. 40.) While it is not clear what "beneficial legislation" Respondents believe survives Section 31's enactment, other than general legislation banning discrimination, Respondents' argument fails for a more obvious reason. The political structure doctrine does not permit the partial skewing of the political process on a racial basis as long as other avenues remain open to those against whom the process has been skewed. As Justice Rivera summarized in her dissent below, "there is no principled analytical distinction between a narrow displacement of political access and a global one." (*Coral Construction, supra,* 57 Cal.Rptr.3d at p. 813.)

Seattle itself proves this point. In that case, a student in an overcrowded school populated predominately by minority students could, of course, file suit alleging that he or she was being discriminated against. But the availability of that remedy did not stop the Supreme Court from

finding that Washington's political restructuring to prohibit local desegregation efforts through pupil reassignments violated the Fourteenth Amendment.

After all, the right to vote, out of which the political structure doctrine grows, is offended when one's vote is diluted, not just eliminated. "It must be remembered that 'the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.'" (*Bush v. Gore* (2000) 531 U.S. 98, 105, quoting *Reynolds v. Sims* (1964) 377 U.S. 533, 555.) Just as the fact that a person can vote, albeit in a racially-gerrymandered district, does not make the equal protection clause impotent to address this wrong, the fact that a victim of discrimination in public contracting may have *some* potential recourse does not eliminate an equal protection remedy for rigging the political process to prevent beneficial legislative remedies.

Policymakers may legitimately disagree about the wisdom or efficacy of affirmative action as a means of remedying the effects of past discrimination. The *Hunter/Seattle* doctrine does not depend on which side of that debate one stands. That doctrine simply teaches that a state may not enact a law that has the purpose and effect of making it more difficult for racial groups or women to secure beneficial legislation. Thus, when the *Hunter-Seattle* doctrine is applied to Section 31, a court "has no legitimate choice but to declare it unconstitutional." (*Coalition for Economic Equity v. Wilson* (9th Cir. 1997) 122 F.3d 692, 712, Norris, J., dissenting.)

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

As discussed in the City's opening brief, 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.

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).) Because the City (1) has compelling evidence of discrimination in City contracting, and (2) has tried race neutral measures to overcome this discrimination, but those measures have proven woefully ineffective, the City is obligated to pursue the race-conscious corrective steps in its Ordinance. Section 31 expressly permits the City to do so.

Respondents ignore the City's demonstrated history of using race-neutral measures without success, a fundamental fact that distinguishes this case from the case on which Respondents principally rely: *C&C Construction, Inc. v. Sacramento Municipal Utility District* (2004) 122 Cal.App.4th 284.

A. The City Has Tried – and Continues To Try – Race-Neutral Measures To Remedy The Effects Of Discrimination, But Those Measures Have Proven Ineffective.

As explained at length in the City's Answering Brief on Issue One, the City had a vast amount of evidence before its Board of Supervisors when the Board concluded, among other things, that the City was actively discriminating against women and minority groups in its contracting," and

that "its current contracting practices are in violation of federal law." (Answering Brief at pp. 3-15.)

Moreover, it is undisputed that the City has tried a wide variety of race-neutral measures to address this discrimination, but those measures have proven ineffective. For example, prior to the 2003 Ordinance and its findings of continuing discrimination, the City provided:

- 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);
- 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);
- 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.);
- race-and gender-neutral prompt payment policies (1998 Ordinance § 12D.A.9(A)12; JA III:787);
- 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);
- yearly training for all City department heads and commissioners regarding these measures (1998 Ordinance § 12D.A.9(G); JA III:789).

Despite 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.) Nonetheless, because the race-neutral measures contribute to eliminating discrimination, the City retained them all in the 2003 Ordinance.

B. In *C&C Construction*, The Public Entity Failed To Show That Race-Neutral Measures Had Proven Ineffective.

Respondents cite repeatedly to *C&C Construction* to rebut the City's arguments that federal statutes require the City to implement its Ordinance. But Respondents fail to discuss the critical fact that distinguishes that case from this one: In *C&C Construction*, the Sacramento Municipal Utilities District ("SMUD") was not employing race-neutral measures and therefore, unlike San Francisco, could not show that race-conscious measures were necessary.

The court repeatedly cited to SMUD's failure to adequately consider and implement race neutral measures:

- SMUD did not "study whether race-neutral programs would suffice." (*C&C Construction, supra,* 122 Cal. App.4th at p. 300.)
- SMUD did not "consider race-neutral opportunities." (*Id.* at p. 310.)
- "SMUD abandoned race-neutral remedies [in 1993], explicitly precluding consideration of new or additional race-neutral remedies." (*Id.* at p. 312.)
- "Accordingly, while SMUD may have tried some race-neutral remedies to eliminate disparities in contracting more than a decade ago, it did not determine then that there were no other race-neutral remedies it could utilize. And, since then, it has

refrained from considering race-neutral remedies, at all." (*Ibid.*)

Respondents' reliance on *C&C Construction* is therefore misplaced. The legislative record in this case demonstrates that race-neutral remedial measures have been thoroughly explored and repeatedly implemented, but those measures have failed to correct the effects of discrimination in City contracting, and there is no evidence that the City – unlike SMUD – failed to enact 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); see *Davis v. Bd. of Sch. Comm'rs* (1971) 402 U.S. 33, 37 ["The measure of a desegregation plan is its effectiveness."].) Therefore, to continue to meet its federal obligations as an ongoing funding recipient, the City must utilize race-conscious measures like the Ordinance that are narrowly tailored attempts to remedy ongoing discrimination and the pernicious effects of past discrimination.

CONCLUSION

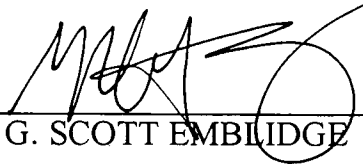
This Court should apply the *Hunter-Seattle* doctrine, reverse the Court of Appeal and find that Proposition 209 impermissibly alters the political process to the distinct disadvantage of minorities and women. If the Court reaches the federal funding issue, it should reverse the Court of Appeal and hold 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: January 8, 2008

DENNIS J. HERRERA
City Attorney
WAYNE K. SNODGRASS
DANNY CHOU

SHERRI SOKELAND KAISER
Deputy City Attorneys

G. SCOTT EMBLIDGE
ROBERT D. SANFORD
MICHAEL P. BROWN
MOSCONE, EMBLIDGE & QUADRA, LLP

By: 
G. SCOTT EMBLIDGE

Attorneys for Defendants and Appellants
CITY AND COUNTY OF SAN FRANCISCO

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 5854 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 January 8, 2008.

MOSCONE, EMBLIDGE & QUADRA, LLP

By: _____
G. SCOTT EMBLIDGE

Attorneys for Defendants and Appellants
CITY AND COUNTY OF SAN FRANCISCO

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 January 08, 2008, I served the attached:

CITY'S REPLY 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::

JOHN H. FINDLEY
SHARON L. BROWNE
PAUL J. BEARD, II
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, CA 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
Attorneys for Plaintiffs and Respondents CORAL CONSTRUCTION, INC. AND SCHRAM CONSTRUCTION, INC.

ATTORNEY GENERAL
Office of the Attorney General
455 Golden Gate, Suite 11000
San Francisco, CA 94102
Telephone: (415) 703-5500

☒ **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.

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

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

☒ **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 January 08, 2008, at San Francisco, California.

_____

OMAR LATEEF