SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S152934

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

v.

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

and

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

v.

CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation; SAN FRANCISCO PUBLIC UTILITIES COMMISSION, an agency of the City and County of San Francisco; and Does 1-50,
Defendants/Appellants.

After an Opinion by the Court of Appeal,
First Appellate District, Division Four (Case No. A107803)

On Appeal from the Superior Court of
San Francisco County (Case No. 319549, Consolidated
with San Francisco Superior Court No. 421249)

REPLY TO ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

Plaintiffs, Respondents, Petitioners, Coral Construction, Inc., and Schram Construction, Inc. (Contractors), reply to the Answer to Petition for Review (APR) of the City and County of San Francisco, et al. (City.) At issue is the court of appeal's remand for the limited purpose of adjudicating whether "City presented the extreme case of intentional discrimination in public contracting in San Francisco such that a narrowly tailored remedial preference program could be constitutionally required." Exhibit 1 to Petition for Review at 34.

I

CITY'S ANSWER FAILS TO REBUT THE REASONS FOR REVIEW SET FORTH IN THE PETITION

A. City Fails to Rebut Contractors' Showing of City's Inadequate Factual Predicate for City's Race and Sex Preference Programs

1. City Does Not Rebut Its Failure to Carry Its Burden of Proof

City ignores the law set out in the Petition for Review at 7-10, that a government entity engaging in racial classifications bears the burden to demonstrate the justification. City attempts to distinguish *C & C Construction, Inc. v. Sacramento Municipal Utility District*, 122 Cal. App. 4th 284 (2004), *Connerly v. State Personnel Board*, 92 Cal. App. 4th 16 (2001), and *Crawford v. Huntington Beach Union High School District*, 98 Cal. App. 4th 1275

(2002), on various grounds, APR at 6-7, but fails to address the principle for which Contractors cited those cases: when the government entity fails to carry its burden to justify its racial and/or sex preferences, the parties challenging those preferences are entitled to summary judgment. Petition for Review at 7-10.

City cites *Mateel Environmental Justice Foundation v. Edmund A. Gray Co.*, 115 Cal. App. 4th 8, 26 (2004), *Scottsdale Ins. Co. v. State Farm Mutual Automobile Ins. Co.*, 130 Cal. App. 4th 890, 905 (2005), *Avila v. Chua*, 57 Cal. App. 4th 860, 862 (1997), *General Accident Ins. Co. v. Superior Court*, 55 Cal. App. 4th 1444, 1455 (1997), and *La Bato v. State Farm Fire and Casualty Co.*, 215 Cal. App. 3d 336, 345 (1989), for the unremarkable principle that when summary judgment is reversed the trial court should reconsider its holding. APR at 7 and n.1. None of those cases involved the situation here where the party prevailing in part on appeal, as City did as to determination of the limited issue of intentional discrimination and narrow tailoring, had failed to carry its burden of proof that its conduct met the extraordinary circumstances required by the state and federal constitutions.

2. City Fails to Note That the Trial Court Has Already Considered and Rejected Its Claim That the Federal Constitution Requires Its Race and Sex Preferences

City argues that the court of appeal remanded the case so that the trial court could determine *in the first instance* whether the City's ordinance is

mandated by the federal Constitution. APR at 4. City ignores the fact that the trial court has already done that. The trial court held:

> After full consideration of the evidence, declarations, the separate statements of each party, the requests for judicial notice, the authorities submitted by both Schram and the City regardless of whether they were submitted in support of or in opposition to any particular motion, as well as the oral arguments that were presented, and the matter having been submitted for decision, the Court finds there is no triable issue of material fact in this action and that both Schram and Coral are entitled to summary judgment as a matter of law. Accordingly, both motions for summary judgment are GRANTED. Both are also entitled to an injunction permanently enjoining the City from enforcing the provisions of Chapter 12D.A. The City's cross motions for summary judgment are DENIED.

Joint Appendix (JA) Vol. XIII: 3468.

The evidence considered by the trial court included City's claim:

> The testimony of 42 live witnesses, 127 submittals, and statistical data established that some City departments operated under the "old boy network" when awarding contracts. The Human Rights Commission and the National Economic Research Associates performed two studies and found that SF has a history of active and passive discrimination against these groups in the awarding of public contracts.

JA XIII: 3470.

The trial court stated it " has considered all the proffered evidence and all the objections made to that evidence." JA XIII: 3476. The trial court then noted that

> City argues that *Hi-Voltage* allows the City to act remedially when it has intentionally discriminated in the past. *Hi-Voltage* stated "Where the state or a political subdivision has intentionally discriminated, use of a race-conscious or race-specific remedy necessarily follows as the only, or at least the most likely, means of rectifying the resulting injury." *Id.* at 568.

> The City states that its uncontested legislative findings, upon which the Ordinance is based, convert the Ordinance into a necessary, remedial measure.
>
> This Court does not find the City's reliance on its historical disparity study compelling.

JA XIII: 3480.

It is therefore plain that the trial court did indeed consider whether City's program of race and sex preferences was mandated by the federal Constitution and found that it was not.

3. City's Findings of Discrimination Are Inadequate as a Matter of Law

City states rather cavalierly, that "to the extent the legislative findings are important, the court below correctly explained how the ordinance's legislative findings were more than adequate." APR at 9. This is exactly backwards. In fact the court said in considering City's claim that its preferences were required by the federal funding exception to Proposition 209, Article I, section 31(e):

> Here the record is devoid of evidence sufficient to rouse the federal funding exception to section 31. Where is the factual predicate showing the *specific* type of past discrimination that triggers a *particular* regulation's requirement for race-based remedial measures like the bid discount and subcontracting programs? The City's generalized arguments and statements are inadequate.

Exhibit 1 at 13-14.

If the factual predicate is lacking to establish the federal funding exception it is similarly lacking to establish any constitutional violation.

City cites the statement in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989), that "[w]here 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." APR at 12.

City then points to a 2003 disparity study which "'revealed continued statistically significant underutilization of racial, ethnic, and nonminority woman-owned businesses as prime contractors on various types of City projects.'" APR at 13. City then claims "the voluminous evidentiary record in this case—which is unrebutted by Coral—establishes that the City's ordinance is constitutionally compelled, and that the remedies provided by the ordinance are narrowly tailored." *Id.*

In fact, this evidence was rebutted not only by the Contractors but by City itself. As noted in the Petition for Review at 12-13, this generalized finding was contradicted by the statistical facts set forth in the City's Minority/Women/Local Business Utilization Ordinance (Ordinance). The Ordinance found that for prime construction contracts Caucasian men represented 67.74% of construction firms and received 70.79% of contract

dollars, and Latino American firms received more construction contracts than expected based on their availability. JA III: 696: 17-19. Further, "African Americans, Latino Americans and women received more than the number of construction subcontracts one would expect based on their availability. . . ." JA III: 701: 9-10. And "[a]lthough Asian Americans represent 13.74 percent of the construction firms, they received only 12.99 percent of the construction subcontract dollars." *Id.* 701: 7-8. This small disparity for Asian Americans may be attributed to the fact that each of the other major categories of MBE/WBEs received more than their proportionate "share."

These figures show that minorities and women in most cases received more than the expected amount of City construction dollars and in those instances where they received less, the disparity was minimal. The hard figures therefore demonstrate that the legislative finding of statistically significant underutilization of racial, ethnic, and nonminority women-owned business on City contracts was a sham as was its corollary of discrimination by the City and the private sector.

Indeed, City concedes that its admissions on discovery "show that the City has no official policy of discriminating against minority- and woman-owned businesses and is not aware of any specific City department that discriminated against a minority-owned business between 1996 and 1998 [sic,

actually 2002, Exhibit 1 to Respondents' Supplemental Appendix]." APR at 12 n.2.

B. City Fails to Rebut, or Even Address the Lack of Narrow Tailoring of Its Race and Sex Preferences Shown by the Fact That They Have No Relationship to the Alleged Violations and Would Do Nothing to Remedy Them

The Petition for Review, at 22-32, set out in detail why review should be granted to correct the court of appeal's ignoring the total lack of narrow tailoring of City's race and sex preferences to the alleged violations. City's APR does not respond to these points and therefore must be found to concede them. A failure to narrowly tailor remedies to claimed violations is fatal. As this Court held in *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537, 569 (2000), "[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.' "

The justifications alleged by City, APR at 10-11, show there are no connections whatever between the alleged constitutional violations and the classifications.

- City inspectors waived majority-owned contractors' compliance with contract requirements, while forcing minority contractors to redo identical work on the same programs at substantial cost. (JA IX: 2256, 2281-82.)

- City employees subjected minority contractors to more rigorous pre-contracting investigation and routinely called their qualifications for the work into question. (JA IX: 2286.)
- A City investigator routinely shared his view that members of the contractor's ethnic group were "morons" and "monkeys." (JA IX: 2281-82.)
- City employees changed the required scope and rules for subcontracting on projects to ensure exclusion of MBE/WBEs from some projects. (JA VII:1688, lines 8-14.)
- A City employee 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.)
- City employees placed such unnecessarily 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 were precluded from participation. (JA IX: 2262.)

As pointed out in the Petition for Review at 28, City's bid preferences and subcontractor quotas and outreach have no relation to any of these alleged violations and would do nothing to remedy them. City, like the court of appeal, ignores the fact that these claimed violations occurred under the

predecessor ordinance which was reenacted in 2003 without substantial change. Exhibit 1 to the Petition for Review at 8 n.4. Since the bid preferences and subcontractor preferences did not prevent or remedy those claimed violations, they will similarly not be narrowly tailored under the current ordinance.

Lacking "the most exact connection between justification and classification," *Hi-Voltage*, 24 Cal. 4th at 569, or indeed any connection whatever, City's preferences fail the narrow tailoring mandate. The lower court's failure to address this issue is by itself grounds for review and reversal of its decision to remand the issue of intentional discrimination and narrow tailoring to the trial court. City provides no indication of the required connection and no opposition to this ground for review, presumably because it cannot find a reason for either position.

II

CITY'S *HUNTER/SEATTLE* ARGUMENT HAS BEEN REJECTED BY BOTH STATE AND FEDERAL COURTS

City seeks to raise the additional issue that Proposition 209, California Constitution Article I, section 31, is unconstitutional under the political process arm of equal protection law. APR 13-21. City cites *Hunter v. Erickson*, 393 U.S. 385 (1969), as striking down a city charter amendment on "federal equal protection principles because it 'drew a distinction between

those groups who sought the law's protection against racial . . . or ancestral discrimination . . . .'" (*Id.* at 390.) APR at 15. City seems oblivious to the irony that it is the City's race and sex preference ordinance at issue that "drew a distinction between those groups who sought the law's protection against racial . . . or ancestral [or sex] discrimination." The law providing protection in this case is Proposition 209 because it bars such discrimination. Cal. Const. Art. I, § 31.

In addition to *Hunter*, City relies on *Washington v. Seattle School District No. 1*, 458 U.S. 457, 467 (1982), and *Romer v. Evans*, 517 U.S. 620 (1996), as prohibiting state action that burdens minority interests and preventing creation of a political structure that treats all individuals as equals yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation. APR at 14-16. In a thorough analysis and rejection of this argument, the appellate court cited *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997); *Kidd v. State*, 62 Cal. App. 4th 386 (1998); *Hi-Voltage*; and *Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237, 250-51 (6th Cir. 2006). Exhibit 1 at 18-28. *Coalition for Economic Equity v. Wilson* (*Coalition*), considered the *Hunter* and *Seattle School* arguments against Section 31 at length and rejected them. The Ninth Circuit found:

> When, in contrast, a state prohibits all its instruments from discriminating against or granting preferential treatment to anyone on the basis of race or gender, it has promulgated a law that addresses in neutral-fashion race-related . . . matters. It does not isolate race . . . antidiscrimination laws from any specific area over which the state has delegated authority to a local entity. Nor does it treat race . . . antidiscrimination laws in one area differently from race . . . antidiscrimination laws in another. Rather, it prohibits all race . . . preferences by state entities.

122 F.3d at 707.

City claims there is "uncertainty over whether Proposition 209 violates the political process arm of the equal protection clause by singling out race-based and gender-based contracting and employment laws from all other problems in the same area." APR at 21. *Coalition*'s analysis of *Hunter/Seattle* was cited in *Valeria v. Davis*, 307 F.3d 1036, 1040-41 (9th Cir. 2002), in dismissing a "political structure" attack on Proposition 227, the limitation on bilingual education initiative. That court held that given that initiative's facial neutrality and the lack of evidence that it was motivated by racial considerations it did not offend the Equal Protection Clause. *Id.* at 1042. This is equally true for Proposition 209.

Indeed, City's claim that Proposition 209 violates the political process branch of Equal Protection doctrine has already been decided by a California

court. The *Coalition* rationale was adopted in *Kidd v. State*, 62 Cal. App. 4th 386:

> [*Coalition*] concerned an action filed by individuals and groups (plaintiffs) claiming to represent the interests of minorities and women. Plaintiffs argued, inter alia, Proposition 209 denied minorities and women equal protection as guaranteed by the Fourteenth Amendment . . . .
>
> . . . .
>
> In addressing the plaintiffs' equal protection claims, the [*Coalition v.*] *Wilson* court had this to say: "As a matter of 'conventional' equal protection analysis, there is simply no doubt that Proposition 209 is constitutional . . . . [¶] The ultimate goal of the Equal Protection Clause is 'to do away with all governmentally imposed discrimination based on race.' [Citation] . . . . [¶] The standard of review under the Equal Protection Clause does not depend on the race or gender of those burdened or benefited by a particular classification. [Citation.] When the government prefers individuals on account of their race or gender, it correspondingly disadvantages individuals who fortuitously belong to another race or to the other gender . . . . Proposition 209 amends the California Constitution simply to prohibit state discrimination against or preferential treatment to any person on account of race or gender. Plaintiffs charge that this ban on unequal treatment denies members of certain races and one gender equal protection of the laws. *If merely stating this alleged equal protection violation does not suffice to refute it, the central tenet of the Equal Protection Clause teeters on the brink of incoherence.*" (122 F.3d at pp. 701-702, italics added [by court].)

Kidd, 62 Cal. App. 4th at 408-09 (citations omitted).

Washington v. Seattle School District held that "'purposeful discrimination is "the condition that offends the Constitution."'" 458 U.S. at 484 (quoting *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S.

256, 274, (1979)). The Court went on to hold that the flaw in the Washington law was its racial classification. "'A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification.'" *Id.* at 485 (quoting *Feeney*, 442 U.S. at 274). But as *Hi-Voltage* held, 24 Cal. 4th at 561: "'Rather than classifying individuals by race or gender, Proposition 209 *prohibits* the State from classifying by race . . . .'" (quoting *Coalition*, 122 F.3d at 702).

Kidd followed this standard and quoted the *Coalition* analysis:

> The first step in determining whether a law violates the Equal Protection Clause is to identify the classification that it draws. . . . A law that prohibits the State from classifying individuals by race or gender *a fortiori* does not classify individuals by race or gender. Proposition 209's ban on race and gender preferences, as a matter of law and logic, does not violate the Equal Protection Clause in any conventional sense." (122 F.3d at p.702).

Kidd, 62 Cal. App. 4th at 409.

In language that resonates in the present case, *Kidd* continues its *Coalition* quotation:

> Plaintiffs challenge Proposition 209 not as an impediment to protection against unequal treatment but as an impediment to receiving preferential treatment. The controlling words, we must remember, are "equal" and "protection." Impediments to preferential treatment do not deny equal protection. It is one thing to say that individuals have equal protection rights against political obstructions to equal treatment; it is quite another to say that individuals have equal protection rights against political obstructions to preferential treatment. While the Constitution protects against obstructions to equal treatment, it erects

> obstructions to preferential treatment by its own terms. (122 F.3d at p.708, fn. omitted.)

Kidd, 62 Cal. App. 4th at 409.

Since City's race and sex preferences are not required by the Federal Constitution and the *Hunter/Seattle Schools* doctrine, but rather stem from City's impermissible policy of race and sex balancing, these preferences amount to "simple racial politics," and violate the Federal Equal Protection Clause as spelled out in *Croson*, 488 U.S. at 493. This issue has thus already been settled in the California courts and review is unnecessary.

III

THE RACIAL DISCRIMINATION TREATY DOES NOT AUTHORIZE THE CITY'S RACE AND SEX-BALANCING POLICY

A. City's Race Balancing Policies Violate the Treaty

City raises as an additional issue whether Proposition 209 contravenes the International Convention on the Elimination of All Forms of Racial Discrimination (Treaty) set out in Appendix 3 of the APR. The Treaty provides in pertinent part:

> 1. In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.
> . . . .

> 4. Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

APR Exhibit 3 at 3.

The trial court found in discussing section 4, that "the City's public contracting program violates this provision by seeking separate rights for different racial groups and women." JA XIII: 3481: 9-10. City further violates the treaty by enacting a "distinction, exclusion, restriction or preference based on race" against non MBEs, APR Exhibit 3 at 3.1. City suggested to the court of appeal that it is not violating the Treaty's prohibition of maintenance of separate rights for different racial groups because its preferences are temporary. Appellants' Opening Brief at 34-35. This ignores the fact that City's own ordinance, 12D.A.2, states that the MBE preferences have been in effect since 1984. JA III: 685: 9. When a policy has been in effect for over twenty years it is not temporary. Moreover, since City achieved or exceeded statistical parity for Latino American prime contractors and African American, Latino American, Asian American and women subcontractors, JA III: 696: 18-19, 701: 9-10 and 701: 7-8, the objectives for these groups have been achieved and City violates the treaty provision prohibiting maintaining separate rights

for those groups. But in any event the treaty cannot authorize City's preferences in contravention of the federal Constitution.

B. A Treaty May Not Override Constitutional Protections

The Supreme Court declared in *Foster v. Neilson*, 27 U.S. 253 (1829), that a treaty must "be regarded in courts . . . as equivalent to an act of the legislature." *Id.* at 314. Thus treaties are subject to the same restrictions as acts of Congress and are not valid if they contravene the limitations of the Constitution. This was made explicit in *Reid v. Covert*, 354 U.S. 1 (1957), which held "no agreement with a foreign nation can confer power on the Congress, or any other branch of Government, which is free from the restraints of the Constitution." *Id.* at 16. This constitutional protection extends to the states. As *Reid* explains:

> The treaty power, as expressed in the constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the constitution forbids, or a change in the character of the government or in that of one of the States . . . without its consent.

Id. at 17-18.

While City cites *C & C Construction, Inc. v. Sacramento Municipal Utility District*, 122 Cal. App. 4th 284 (*SMUD*), for different purposes, APR

at 6, 11, it does not see fit to inform this Court that the *SMUD* case has already decided this issue.

> [T]he Convention does not allow these "special measures" unless there are "certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms . . . ." In California, the people are sovereign, whose power may be exercised by initiative. By adopting section 31, the people have determined, by implication, that special measures are not only unnecessary to ensure human rights and fundamental freedoms in California, but inimical to those principles. Therefore, "special measures," in the form of exceptions to the plain meaning of "discrimination," are not permitted in California, even under the Convention. Certainly, SMUD does not have the authority to determine otherwise, contrary to the sovereign's will.

122 Cal. App. 4th at 303, internal citations omitted.

Similarly, City cannot overrule the People's will by adopting a new and different standard of discrimination contrary to that set forth in the California Constitution. These judicial precedents make clear that the Treaty cannot override the protections against discrimination and preferential treatment provided by the United States Constitution in its prohibition against governmental laws or policies of racial balancing.

CONCLUSION

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

City further fails to rebut that its bid and subcontractor preferences are in no way narrowly tailored to remedy City's claimed forms of discrimination. The decision below thus conflicts with *Hi-Voltage*, *Connerly*, *SMUD*, and *Huntington Beach* and pursuant to Rule of Court 8.500(b) review is necessary to secure uniformity with those decisions by affirming the judgment of the trial court in its entirety and without remand.

DATED: June 28, 2007.

Respectfully submitted,

JOHN H. FINDLEY
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By _____
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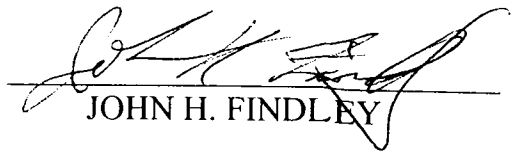
CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing REPLY TO ANSWER TO PETITION FOR REVIEW is proportionately spaced, has a typeface of 13 points or more, and contains 4,064 words.

DATED: June 28, 2007.



JOHN H. FINDLEY

DECLARATION OF SERVICE BY MAIL

I, Janice Daniels, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California.

I am over the age of 18 years and am not a party to the above-entitled action.

My business address is 3900 Lennane Drive, Suite 200, Sacramento, California 95834.

On June 28, 2007, true copies of REPLY TO ANSWER TO PETITION FOR REVIEW were placed in envelopes addressed to:

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which envelopes, with postage thereon fully prepaid, were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 28th day of June, 2007, at Sacramento, California.

JANICE DANIELS