IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S152934

CORAL CONSTRUCTION, INC., and
SCHRAM CONSTRUCTION, INC.,

Plaintiffs and Respondents,

v.

CITY & COUNTY OF SAN FRANCISCO
and JOHN L. MARTIN,

Defendants and 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, Honorable James L. Warren, Judge)

PLAINTIFFS AND RESPONDENTS' ANSWER BRIEF ON THE MERITS OF ISSUES TWO AND THREE

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INTRODUCTION

By its Order of October 24, 2007, this Court granted the application of Defendants/Appellants City and County of San Francisco, et al. (San Francisco or City), to file the CITY'S OPENING BRIEF ON THE MERITS OF ISSUES TWO AND THREE (City OB). By its Order of November 5, 2007, this Court extended the time to file an Answer Brief to December 19, 2007. Plaintiffs/Respondents Coral Construction, Inc., and Schram Construction, Inc. (Contractors), file this brief in response.

ARGUMENT

I

ARTICLE I, SECTION 31, IN PROHIBITING DISCRIMINATION AND PREFERENCES, REINFORCES THE *HUNTER/SEATTLE* DOCTRINE

The third issue the Court has directed the parties to address is:[1]

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

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[1] The City addressed this issue first, and in order to avoid confusion, Contractors will respond in the same order.

A. City Misinterprets the Requirements of *Hunter/Seattle*

City begins its argument by claiming that Article I, Section 31, of the California Constitution (Section 31 or Proposition 209) violates the *Hunter/Seattle* doctrine by selectively burdening minorities and women by making local anti-discrimination protections unavailable to them. City OB at 13-30. Specifically, City argues that Section 31 "violates the Equal Protection Clause of the United States Constitution because it prevents women and minorities from receiving the benefits of local remedial legislation, even to correct for known, ongoing governmental discrimination, while leaving other groups (such as the disabled, veterans or the poor) free to seek any sort of beneficial legislation at the local level." *Id.* at 13. As the Contractors address point by point below, instead of violating *Hunter/Seattle*, Section 31 reinforces that doctrine.

1. Section 31 Protects Rather Than Burdens Minorities and Women

First, as a reading of its operative language shows, Section 31 does not burden minorities and women. "The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting." Cal. Const. art. I, § 31(a). A prohibition of discrimination and preference on the basis of race and sex protects rather than burdens minorities and women.

Hunter v. Erickson struck down on Fourteenth Amendment Equal Protection grounds an amendment to the city charter of Akron, Ohio, that required its city council to obtain voter approval before implementing any housing ordinance regarding racial, religious, or ancestral discrimination. *Hunter*, 393 U.S. at 387. The Supreme Court found that the evil of this amendment was that it suspended the operation of the existing ordinance forbidding housing discrimination and further required voter approval before any future such ordinance could take effect. The amendment thus drew a distinction between those who sought the law's protection against discrimination on the basis of race, religion, or ancestry in real estate transactions and all others. *Id.* at 389-90. As the Court summarized, "[o]nly laws to end housing discrimination based on 'race, color, religion, national origin or ancestry must run [the charter amendment's] gauntlet." *Id.* at 390.

In *Seattle*, the voters of Washington adopted an initiative that prohibited all school boards, directly or indirectly, from requiring any student to attend a school other than the one geographically nearest or next nearest the student's home. The initiative, however, while providing a number of exceptions to this policy, prohibited the use of seven specified methods of student assignment that were a part of Seattle's existing race-balancing plan. 458 U.S. at 462-63. The Supreme Court succinctly defined the issue before it: "The single narrow question before us is whether the State has exercised its power in such a way

as to place special, and therefore impermissible, burdens on minority interests." *Id.* at 476 n.18.

The Supreme Court then held: "The Equal Protection Clause of the Fourteenth Amendment guarantees racial minorities the right to full participation in the political life of the community . . . . But the Fourteenth Amendment also reaches '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." *Id.* at 467. The Court found: "The initiative removes the authority to address a racial problem—and only a racial problem—from the existing decisionmaking body, in such a way as to burden minority interests." *Id.* at 474. The Supreme Court thus makes clear in *Hunter* and *Seattle* that it is laws that obstruct protection against discrimination that raise Equal Protection issues.

This s'ance was reaffirmed in *Romer v. Evans*, 517 U.S. 620 (1996). As City notes, City OB at 19, "[i]n *Romer*, a statewide voter initiative prohibited all legislative, executive or judicial action at any level of state or local government designed to protect gays, lesbians or bisexuals. In striking down the initiative, the Court stated, consistent with *Hunter* and *Seattle*: 'A law declaring that in general it shall be more difficult for one group of citizens

than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.' (*Id.* at p.633)."

A key distinction here is that the state initiative in *Romer* banned protection against discrimination while Section 31 bans both discrimination and preference. A second distinction is that the *Romer* initiative "made it more difficult for one group of citizens than for all others," 517 U.S. at 633, to seek aid in such protection, while Section 31 puts all citizens on an equal footing in seeking aid against discrimination. As the Sixth Circuit stated in *Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237 (6th Cir. 2006) (*Granholm*), "*Romer* struck down an amendment to the Colorado constitution that prohibited local governments from acting to protect homosexuals from discrimination, an amendment that 'impose[d] a special disability upon [homosexuals] alone.' 517 U.S. at 631." Section 31, by contrast, does not single out any group for the imposition of a "special disability." It applies equally, banning discrimination against or preferential treatment of, "any individual or group." Section 31(a).

The court below summarized: "Thus it is apparent that a challenger relying on the *Hunter* and *Seattle* decisions would have to demonstrate that the particular law (1) employs a racial classification or has the purpose of adversely impacting racial minorities, and (2) alters the political landscape on a racial matter in a manner that places a special burden on racial minorities."

Petition for Review, Exhibit (Pet. Ex.) 1 at 20. However, Section 31 prohibits such classification and discrimination, while San Francisco's ordinance here at issue, in enacting preferences that classify and affirmatively discriminate on the basis of race and sex, violates *Hunter/Seattle*.

a. City's Favored Minorities and Women Are in Fact an Overwhelming Majority

The Supreme Court found in *Hunter* that a further flaw in the Akron charter was that the law's impact fell on the minority, saying, "[t]he majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that." *Hunter*, 393 U.S. at 391. As set forth in Contractors' Request for Judicial Notice (RJN), filed with its Opening Brief, the minority here is "White non-Hispanic" males. The U.S. Census Bureau statistics as of 2005 show that "White persons, not Hispanic" are 43.8% of California's population. *Id.* at 1. That means the so-called "minorities" favored by City's race preferences are 56.2% of the population. The Census Bureau statistics further show that "Female persons" are 50.1%. *Id.* Assuming this statistic holds true for White non-Hispanics, the class discriminated against by San Francisco, White non-Hispanic males are 21.9% of the population and City's favored class of so-called "minorities" and women are 78.1%. Under the *Hunter* ruling, this overwhelming 78.1% "majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that." 393 U.S. at 391.

Hunter goes on to state: "Because the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race, racial classifications are 'constitutionally suspect,' and subject to the 'most rigid scrutiny.' They 'bear a far heavier burden of justification' than other classifications." *Id.* at 391-92 (internal citations omitted). Rebutting the basis of City's reliance on *Hunter*, this Court has held, "Rather than classifying individuals by race or gender, Proposition 209 *prohibits* the State from classifying individuals by race or gender." *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537, 561 (2000) (quoting *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 702 (9th Cir. 1997). Here, the government entity classifying individuals by race and gender and granting preferences on that basis is San Francisco. But City has failed to bear its "far heavier burden of justification" for its "constitutionally suspect" preferences.

The key holding of *Seattle* is that the Washington initiative placed special burdens on the ability of minorities to achieve beneficial legislation. 458 U.S. at 474. This holding does not apply in the present case for three reasons. First, as set out above, the so-called "minorities" favored by City's race preferences are 56.2% of the state population, and women constitute 50.1% of the population. RJN at 1. Thus, City's favored class of so-called "minorities" and women make up 78.1% of the population while the class discriminated against by San Francisco, White non-Hispanic males, is 21.9%.

The claim that Section 31 places "special burdens" on 78.1% of the state population is therefore without merit. Second, prohibiting race- and sex-based discrimination and preferences protects rather than burdens minorities and women. Third, unconstitutional race and sex classifications and preferences are not "beneficial legislation."

b. In Prohibiting Discrimination on the Basis of Race or Sex, Section 31 Protects Rather Than Burdens Minorities and Women

In upholding the constitutionality of Section 31, the Ninth Circuit rejected the argument that Section 31 violates *Hunter/Seattle*.

> 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.

Coalition for Economic Equity v. Wilson, 122 F.3d 692, 707 (9th Cir. 1997) (*Wilson*).

The *Wilson* rationale was adopted in *Kidd v. State,* 62 Cal. App. 4th 386, 408-09 (1998):

> In addressing the plaintiffs' equal protection claims, the *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].)

The Sixth Circuit in *Granholm* considered a challenge to Michigan's Proposal 2, an initiative similar to Proposition 209.

> Like Proposal 2, Proposition 209 outlawed discrimination or preferential treatment "on the basis of race, sex, color, ethnicity, or national origin" in the realms of public employment, education and contracting. Cal. Const. Art. I § 31(a). Like the plaintiffs in our case, the plaintiffs in the Ninth Circuit case [*Wilson*] argued that the state initiative denied them equal protection of the laws by burdening their right to seek the benefits of existing affirmative action programs. And like the Ninth Circuit, we find these arguments unpersuasive.

473 F.3d at 250.

The Sixth Circuit found that Michigan's Proposal 2 did not burden minority interests because it, like Section 31, "prohibits the State from discriminating against or granting preferential treatment to individuals on the basis of 'race, sex, color, ethnicity, or national origin.' Mich. Const. art. I, § 26." *Granholm*, 473 F.3d at 250-51. That court noted that women and

minorities, the classes the plaintiffs claimed were burdened by the law, made up the majority of the Michigan population, and cited *Hunter's* statement that the " 'majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that.' 393 U.S. at 391." *Granholm*, 473 F.3d at 251. The Sixth Circuit thus found that under the *Hunter* line of cases, the initiative did not "single out minority interests for this alleged burden but extends it to a majority of the people of the State." *Id.*

The court went on to find that even considering only the law's restrictions on racial preferences, the political-process claim was unlikely to succeed. *Granholm*, 473 F.3d at 251. "The challenged enactments in *Hunter*, *Seattle* and *Romer* made it more difficult for minorities to obtain *protection from discrimination* through the political process; here, by contrast, Proposal 2 purports to make it more difficult for minorities to obtain *racial preferences* through the political process. These are fundamentally different concepts." *Id.* Like Proposal 2, Section 31 prohibits the granting of racial preferences through the political process.

The Sixth Circuit further found that while *Hunter/Seattle* objected to a state's impermissible attempt to reallocate political authority, Michigan's Proposal 2, instead of reallocating the political structure in the state, was more similar to the " 'repeal of race-related legislation or policies that were not required by the Federal Constitution in the first place,' " *id.* (quoting *Crawford*

v. Bd. of Education of the City of Los Angeles, 458 U.S.527, 538 (1982)). The court quoted *Wilson*, 122 F.3d at 708 n.17, for its holding "'that [i]mpediments to preferential treatment do not deny equal protection.'" *Granholm*, 473 F.3d at 251.

As the Sixth Circuit held:

> In contending that the Equal Protection Clause compels what it presumptively prohibits, plaintiffs face a steep climb. The Clause prevents "official conduct discriminating on the basis of race," *Washington v. Davis*, 426 U.S. 229 (1976), and on the basis of sex, *United States v. Virginia*, 518 U.S. 515 (1996), not official conduct that bans "discriminat[ion] against" or "preferential treatment to" individuals on the basis of race or sex—as Proposal 2 does.

Granholm, 473 F.3d at 248.

Here, the court below noted that the reach of the *Hunter/Seattle* doctrine was clarified in *Crawford*, 458 U.S. 527. Pet. Ex. 1 at 20. *Crawford* upheld California's Proposition 1, a constitutional amendment that limited state court-ordered school busing for desegregation purposes to instances in which a federal court would order busing as a remedy for violation of the federal Equal Protection Clause. *Id.*

> The court rejected the petitioner's contention that Proposition 1 embodied a "racial classification" and imposed a race-specific burden on racial minorities. "It neither says nor implies that persons are to be treated differently on account of their race." (*Crawford*, *supra*, 458 U.S. at p. 537). Further, the court explained that there was a distinction "between state action that discriminates on the basis of race and state action that addresses, in neutral fashion, race-related matters. This distinction is implicit in the Court's repeated statement that the Equal

> Protection Clause is not violated by the mere repeal of race-related legislation or policies that were not required by the Federal Constitution in the first place . . . . In sum, the simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification." (*Id.* at pp. 538-539.)

Pet. Ex. 1 at 20-21.

Here, San Francisco's public contracting Ordinance grants preferences on the basis of race and sex—it is not an antidiscrimination law. Its effective repeal by Section 31 therefore reinforces, rather than violates, the Equal Protection Clause. The court below held: "Section 31 terminates the ability of racial minorities and women to obtain preferences in the operation of public education, public employment and public contracting. Although stated as positive law, it also operates as the functional equivalent of an enactment that repeals preferential race- or gender-related legislation not *required* by the federal equal protection clause. Read in its entirety with the savings clause, section 31 is on footing similar to Proposition I (*sic)*, upheld in *Crawford*." *Id.* at 23 (footnote omitted).

The court of appeal concluded that "there is a constitutional symmetry to section 31" finding that "[i]ts dual prohibition against discrimination and preferential treatment, coupled with the savings clause, propel section 31 into neutral territory that brooks no impermissible racial classification." *Id.* at 24. Section 31's prohibition against race- and sex-based discrimination and

preference, such as San Francisco employs here, therefore protects rather than burdens all minorities and both sexes.

c. City's Unconstitutional Race and Sex Preferences Are Not Beneficial Legislation

The term "beneficial legislation" as used in *Hunter/Seattle* must mean legislation that is legitimate and cannot include the type of race and sex classifications and preferences that this Court found unconstitutional in *Hi-Voltage*. 24 Cal. 4th at 561. *Kidd v. State* conclusively rebutted the claim that invalid race and sex preferences constitute "beneficial legislation":

> "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.)

62 Cal. App. 4th at 409 (quoting *Wilson.*)

What City actually objects to is that Section 31 prohibits its race and sex preferences program. City's argument that it is entitled to create, under the "beneficial legislation" specification, race- and sex-based classifications for the purpose of granting preference in public contracting contravenes both federal and California constitutional law. As *Seattle* holds: "A racial

classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." 458 U.S. at 485 (internal quotation marks and citation omitted). City has failed to carry its burden to show "extraordinary justification."

Similarly, under state law, race and sex classifications such as San Francisco's are suspect and therefore presumed to be invalid. *Connerly v. State Personnel Board*, 92 Cal. App. 4th 16, 33 (2001); *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 17 (1971). By distinction, this Court held in *Hi-Voltage Wireworks*, 24 Cal. 4th at 561, "[r]ather than classifying individuals by race or gender, Proposition 209 *prohibits* the State from classifying by race." (Quoting *Wilson*, 122 F.3d at 702). The court below noted that the distinction between *Hunter/Seattle* and this case was that the laws in the former case "'made it more difficult for minorities to obtain *protection from discrimination* through the political process.' " Pet. Ex. 1 at 28. By contrast, Section 31 makes " 'it more difficult to obtain *racial preferences* through the political process. These are fundamentally different concepts.' " *Id.* (quoting *Granholm*, 473 F.3d at 251).

2. Section 31 Maintains All Existing Valid Anti-Discrimination Provisions

City's second claim is that Section 31 violates *Hunter/Seattle* by making local anti-discrimination protections unavailable to minorities and women. City OB at 13. To the contrary, Section 31 specifies: "The remedies

available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of then-existing California antidiscrimination law." Art. I, § 31(g).[2] In plain language, Section 31 specifies that existing remedies for discrimination are made available under its terms. As shown in City's responses to discovery, City has never availed itself of federal, state, or local antidiscrimination laws.

For example, the City Ordinance at issue specifies that prime contractors that discriminate in their selection of subcontractors face sanctions. City contract authorities are empowered to: refuse to award the contract; order the suspension of a contract; order the withholding of funds; order the revision of a contract based upon a material breach of contract provisions pertaining to minority business enterprise (MBE) or woman business enterprise (WBE) participation; and disqualify a bidder, contractor, subcontractor, or other business from bidding on City contracts for a period of up to five years. Ordinance § 12D.A.9(A)(7). JA III at 742.

However, City has never identified any specific instance of discrimination against a minority or woman subcontractor that occurred after

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[2] For a scholarly discussion of remedies available under Section 31(g), *see* Cynthia C. Jamison, *The Cost of Defiance: Plaintiffs' Entitlement to Damages Under the California Civil Rights Initiative*, 33 Sw. U. L. Rev. 521 (2004).

November 5, 1996,[3] when that subcontractor was the lowest responsive bidder. Respondents' Supplemental Appendix (RSA), Exhibit 1 at 8, City Response to Request for Admission No. 23. Similarly, City admits that it has not identified any specific San Francisco Contract Awarding Authority that discriminated against a MBE or WBE in the awarding of one of City's contracts after November 5, 1996. Response to Request for Admission No. 24, RSA at 8-10.

The Supreme Court held in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), that "the complete silence of the record concerning enforcement of the city's own antidiscrimination ordinance flies in the face of the . . . vision of a 'tight-knit industry' which has prevented blacks from obtaining the experience necessary to participate in construction contracting." *Id.* at 502 n.3 (plurality). San Francisco's claims of discrimination against MBE/WBEs, when its enforcement record is similarly silent, fail the *Croson* test.

Seattle declared 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.*, 458 U.S. at 485. But as *Hi-Voltage* held, 24 Cal. 4th at 561: "'Rather than classifying individuals by race or gender, Proposition

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

209 prohibits the State from classifying by race . . . .' " (Quoting *Wilson*, 122 F.3d at 702).

The Sixth Circuit agreed, holding that "a law eliminating presumptively invalid racial classifications is not itself a presumptively invalid racial classification." *Granholm*, 473 F.3d at 249. That court included sex-based classifications, holding that "a State acts well within the letter and spirit of the Equal Protection Clause when it eliminates the risk of any such [heightened] scrutiny by removing gender classifications altogether." *Id.* at 249-50.

Kidd agrees with this standard in quoting the *Wilson* 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.

The Sixth Circuit put it succinctly:

> The First and Fourteenth Amendments to the United States Constitution, to be sure, *permit* States to use racial and gender preferences under narrowly defined circumstances. But they do not *mandate* them, and accordingly they do not prohibit a State from eliminating them. In the absence of any likelihood of prevailing in invalidating this state initiative on federal grounds, we have no choice but to permit its enforcement in accordance with the state-law framework that gave it birth.

Granholm, 473 F.3d at 240.

Since City's race and sex preferences are not required by the federal Constitution and the *Hunter/Seattle* doctrine, but rather stem from City's impermissible policy of race and sex balancing set forth below, these preferences are not valid antidiscrimination measures, but amount to "simple racial politics," and violate the Federal Equal Protection Clause as spelled out in *Croson*, 488 U.S. at 493, as well as Section 31.

3. City's Race and Sex Preferences Are Not Remedial

City's third claim that its race and sex preferences in public contracting are necessary remedial legislation to correct for known, ongoing governmental discrimination, City OB at 13, is patently false. The Supreme Court cogently held in *Croson*: "The history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis." 488 U.S. at 501. Therefore, the Court "put the burden on state actors to demonstrate that their race-based policies are justified." *Johnson v. California*, 543 U.S. 499, 506 n.1 (2005). San Francisco has failed to carry that burden.

This Court has already held in *Hi-Voltage* that Section 31 is similar to, but not synonymous with, the Federal Equal Protection Clause in that it goes further than the federal mandate in order to protect against discrimination. 24 Cal. 4th at 567. Under federal equal protection standards, state or local actions that rely upon suspect classifications must be tested under strict

scrutiny to determine whether there is a compelling governmental interest. But *Hi-Voltage* held that Section 31 *allows no compelling state interest exception.* "Unlike the equal protection clause, section 31 categorically prohibits discrimination and preferential treatment. Its literal language admits no 'compelling state interest' exception; we find nothing to suggest the voters intended to include one sub silentio." *Id.* at 567.

a. City Has Failed to Carry Its Burden to Show the Factual Predicate of Intentional Discrimination Against Minorities and Women

Seattle declared that "'purposeful discrimination is "the condition that offends the Constitution." 458 U.S. at 484 (quoting *Personnel Administration of Massachusetts v. Feeney*, 442 U.S. 256, 274 (1979)). This Court noted the federal cases involving intentional discrimination in *Hi-Voltage* and stated the federal standard: that where the state's "public 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 568 (citing *North Carolina State Bd. of Education v. Swann*, 402 U.S. 43, 46 (1971)). Even under the federal standard, race-conscious remedies are limited to intentional discrimination by government because "racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." *Gratz v. Bollinger*, 539 U.S. 244, 270 (2003) (internal quotation marks omitted).

Therefore, as this Court held in *Hi-Voltage*, "the Court has insisted upon some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classification in order to remedy such discrimination." 24 Cal. 4th at 568. San Francisco utterly failed to make that showing. As noted above, City admitted in discovery that at least since 1984, it has not been a City policy to discriminate against MBEs or WBEs. City Response to Request for Admission No. 18, RSA at 6. City now confirms this by citing "the City's strong official policy against discrimination." City OB at 36. City further admitted that at least since the enactment of Section 31 in 1996, it has not identified any specific discrimination against minority or women contractors or subcontractors who were the lowest responsive bidder. RSA at 8-10. Further, the bid discounts and subcontractor preferences, set forth in City OB at 3-4, awarded to minority and women contractors are in no way remedial to the claimed instances of discrimination set forth in City OB at 5-8.

(1) City Unconstitutionally Equates Race and Sex Balancing with Discrimination

San Francisco's claim of discrimination is initially based on its unconstitutional policy of race and sex balancing. The City's Ordinance specifies that "City will continue to rely on 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 as a

measure of the effectiveness of this ordinance in remedying the effects of the aforementioned discrimination." JA III at 719:9-12.

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

> [They] purport to *eliminate* discrimination by means of *creating* discrimination; they construe *equality* of all persons regardless of race to mean *preference* for persons of some races over others; and a hiring program which *compels* compliance by a reluctant [county agency] is described as *voluntary*. It is now clear that undergirding much of the rhetoric supporting racial quotas, and preferential treatment in general, is a view of justice that demands not that the state treat its citizens without reference to their race, but that it rearrange and index them precisely on the basis of their race. The objective is not equal treatment but equal representation.

Id. at 558 (internal citation and quotation marks omitted).

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

in Cmty. Schools v. Seattle Sch. Dist. No. 1, 127 S. Ct 2738 (2007) (*PICS*), the Supreme Court reaffirmed *Grutter*'s holding that "an effort to achieve racial balance" is "patently unconstitutional." *Id.* at 2753.

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

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

92 Cal. App. 4th at 59 (citation omitted).

This holding was cited with approval in *Crawford v. Huntington Beach Union High Sch. Dist.*, 98 Cal. App. 4th 1275, 1282-83 (2002). That court cited *Milliken v. Bradley*, 433 U.S. 267, 280 n.14 (1977), for the principle that there is no federal constitutional right to a particular degree of racial balance, 98 Cal. App. 4th at 1285, and went on to rule that "the racial balancing component of the District's open transfer policy is invalid under our state Constitution." *Id.* at 1287.

Here, City's goal of seeking race and sex proportionality in public contracting through race and sex preferences similarly violates Section 31. This policy of preferences constitutes "'a line drawn on the basis of race and ethnic status' as well as sex," and thereby "plainly runs counter to the express

intent . . . of Proposition 209." *Hi-Voltage*, 24 Cal. 4th at 563 (citations omitted).

(2) City's Own Ordinance Rebuts Its Claims of Statistical Disparity

Ironically, even under its unconstitutional standard of race and sex balancing, City has failed to show discrimination. City cites the San Francisco Human Rights Commission's (HRC) April, 2003, Disparity Analysis which City claims "revealed significant disparities between the number of woman- and minority-owned businesses that were able to work on public contracts in construction . . . and those that were actually hired and participated in those contracts." City OB at 5. But as *Hi-Voltage* found: "The City's disparity study, at best, creates only an inference of discrimination against MBE/WBE subcontractors; it does not establish intentional acts by the City." 24 Cal. 4th at 568. The statistical facts set forth in City's Ordinance do not support even an inference of discrimination by anyone against MBE/WBEs, let alone intentional discrimination by City.

The City's 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. Asian Americans, representing 13.74 percent of the construction firms, received 12.99 percent of the construction subcontract dollars. *Id.* 701: 7-8. The slight disparity for Asian Americans is doubtless due 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. To the extent they exist, any statistical disparities must be "significant," *Croson*, 488 U.S. at 509 (plurality). *Md. Troopers Ass'n v. Evans*, 993 F.2d 1072, 1078 and n.3 (4th Cir. 1993), for example, held that there was no statistical evidence of discrimination where blacks constituted 22% of the relevant qualified labor pool and 17.1% of the Maryland State Police force. The hard figures therefore demonstrate that City's claim of "significant disparities" is a sham and no race- or sex-based remedy was necessary or appropriate.

In *Western States Paving Co., Inc. v. Washington State Department of Transportation*, 407 F.3d 983 (9th Cir. 2005), the Ninth Circuit struck down a state race and sex preference program. The state sought to justify its preferences on the basis of studies purporting to show statistical disparities in the award of contracts to minorities and women, classified as disadvantaged

business enterprises (DBEs). But the court rejected this argument, holding, *id.* at 1000-01:

> This oversimplified statistical evidence is entitled to little weight, however, because it does not account for factors that may affect the relative capacity of DBEs to undertake contracting work. Indeed, the fact that DBEs constitute 11.17% of the Washington market does not establish that they are able to perform 11.17% of the work. *See Md. Troopers Ass'n v. Evans*, 993 F.2d 1072, 1077 (4th Cir. 1993) ("Inferring past discrimination from statistics alone assumes the most dubious of conclusions: that the true measure of racial equality is always to be found in numeric proportionality."). DBE firms may be smaller and less experienced than non-DBE firms (especially if they are new businesses started by recent immigrants) . . . . *See Associated Gen. Contractors of Ohio, Inc.*[*v. Drabik*,] 214 F.3d [730] at 736 (6th Cir. 2000) ("If [minority-owned firms] comprise 10% of the total number of contracting firms in the state, but only get 3% of the dollar value of certain contracts, that does not alone show discrimination, or even disparity. It does not account for the relative size of the firms, either in terms of their ability to do particular work or in terms of the number of tasks they have the resources to complete."); *O'Donnell Constr. Co. v. District of Columbia*, 963 F.2d [420 (D.C. Cir. 1992)] at 426 (holding that the small proportion of D.C. public contracts awarded to minority-owned firms did not establish discrimination because "[m]inority firms may not have bid on . . . construction contracts because they were generally small companies incapable of taking on large projects; or they may have been fully occupied on other projects; or the District's contracts may not have been as lucrative as others available in the Washington metropolitan area; or they may not have had the expertise needed to perform the contracts; or they may have bid but were rejected because others came in with a lower price.") The State's statistical evidence controls for none of these factors.

Similarly, San Francisco's disparity studies fail to take any of these factors into account and are likewise invalid. The Ninth Circuit held in

Western States that where the government has failed to prove discrimination, then the "DBE program does not serve a remedial purpose; it instead provides an unconstitutional windfall to minority contractors solely on the basis of race and sex." *Id.* at 998. That is what is happening here.

The most common explanation for a statistical disparity is not racial discrimination, but the study's failure to correctly assess the *availability* of minority-owned businesses. George R. La Noue, *Who Counts?: Determining the Availability of Minority Businesses for Public Contracting After Croson*, 21 Harv. J.L. & Pub. Pol'y 793, 798-99 (1998). ("Availability analysis is the Achilles heel of *Croson* disparity studies . . . ." (Citation and internal quotation marks omitted.)). Available minority-owned businesses are those that are "qualified, . . . willing and able" to engage in public contracting. *Croson*, 488 U.S. at 509. Most studies completely ignore qualifications, such as bonding, licensing, experience, or other objective nondiscriminatory requirements. George R. La Noue, *Standards for the Second Generation of Croson-Inspired Disparity Studies*, 26 Urb. Law 485, 497 (1994) (*Standards*). "Frequently there are substantial differences in the qualifications of [minority-owned] firms and [nonminority-owned] firms," making the omission of this essential factor responsible for disparities. *Id.* Here, for example, it appears that *none* of the studies considered qualifications—including relative

experience—when assessing the availability of minority-owned businesses. As one testifier on disparity studies has explained:

> [I]t may be that the companies owned by a particular racial group in a particular market do not have the specific expertise or capability of doing the actual work sought. And, even if they are, there may not be a problem if these companies are for nondiscriminatory reasons not submitting bids in the first place . . . . [E]ven if it is shown that a particular group bids on contracts in a particular market and fails to receive the contracts in its proportion, this does not mean that discrimination has occurred: The explanation may be simply that the bids submitted by the minority company were not the best bids, because they were too high or failed to meet other objective qualifications.

U.S. Commission on Civil Rights, *Disparity Studies As Evidence of Discrimination in Federal Contracting: Briefing Report* at 73 (May 2006) (testimony of Roger Clegg).

Discrimination provides a poor explanation for statistical disparities when other factors are considered. For example, as is the case here, disparity studies often find greater "underutilization" of minority-owned firms in the award of prime contracts thar in the award of subcontracts. These findings are difficult to explain with charges of institutional discrimination. A more likely explanation is that minority-owned firms tend to be both younger and smaller, making it easier for them to obtain subcontracts. Docia Rudley & Donna Hubbard, *What a Difference a Decade Makes: Judicial Response to State and Local Minority Business Set-Asides Ten Years After City of Richmond v. J.A. Croson*, 25 S. Ill. U. L.J. 39, 92 (2000) ("In case after case, courts have zeroed

in on the argument that [minority] firms tend to be younger and smaller and thus have less capacity to perform the work required by the larger contracts.). As Professor La Noue has observed:

> One would have to believe that more discrimination took place by public bureaucracies who control the low-bid process where penalties for violations are severe and where there is scrutiny by the legislators and executives who have approved [minority preference] programs, than in the private sector where most prime-subcontractor relationships are not very visible and regulated. Or one could believe that this outcome reflects the relative differences in the size and qualifications of [minority- and nonminority-owned businesses].

La Noue, *Standards*, at 519.

Yet another fact that explains statistical disparities—at least with respect to state or local government contracting—is the tendency of minority-owned firms to work on federal as opposed to state or local contracts. One sophisticated Louisiana disparity study applying regression analysis made that precise finding. La Noue, *Standards*, at 520.

Finally, one cannot lose sight of the reasons why most disparity studies are commissioned: to provide support *post hoc* for the decision to implement racial preferences, often as insurance against litigation. George R. La Noue, *The Impact of Croson on Equal Protection Law and Policy*, 61 Alb. L. Rev. 1, 12-13 (1997). Other city officials openly have criticized their consultants for failing to come up with racial disparities to justify racial preference policies *See, e.g.*, Jeffrey M. Hanson, Note, *Hanging By Yarns?: Deficiencies in*

Anecdotal Evidence Threaten the Survival of Race-Based Preference Programs for Public Contracting, 88 Cornell L. Rev. 1433, 1445 and n.88 (2003) (reporting the outrage of officials in Miami and Los Angeles with their commissioned studies that concluded there was no minority underutilization). Given these political realities, disparity studies like the ones relied on by San Francisco deserve no deference—particularly where constitutional rights are at stake.

(3) City's Policy of Perpetual Race and Sex Preferences Violates Both Section 31 and the Federal Equal Protection Clause

City rationalizes its continuing discrimination against non-MBE/WBEs on the speculation that if it abandoned its race and sex preference program, "African Americans, Latino Americans and women would receive well below the level of City construction subcontracts that one would expect based on their availability." JA III:701:10-15. This rationale ensures that City's preferences will continue in perpetuity in violation of the rule requiring that any "deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter." *Croson*, 488 U.S. at 510. *Grutter* found that the requirement that race-conscious policies must be limited in time "reflects that racial classifications, however compelling their goals, are potentially so dangerous that they may be employed no more broadly than the interest demands. Enshrining a permanent justification for racial preferences would

offend this fundamental equal protection principle." 539 U.S. at 342. San Francisco's continuation of preference for MBE/WBEs when by City's own account they have not only met but exceeded their proportional "share" shows that City's preference policies are not narrowly tailored remedies but "simple racial politics," *Croson*, 488 U.S. at 493, that violate the Fourteenth Amendment as well as Section 31.

b. City's Race and Sex Preferences Fail the Narrow Tailoring Requirement

Although race and sex preferences are prohibited by Section 31, even under federal standards, City's preferences fail the requirement of narrowly tailoring the remedy to the claimed violation. The Supreme Court held in *Grutter v. Bollinger*, 539 U.S. at 333:

> Even in the limited circumstance when drawing racial distinctions is permissible to further a compelling state interest, government is still constrained in how it may pursue that end: [T]he means chosen to accomplish the [government's] asserted purpose must be specifically and narrowly framed to accomplish that purpose. The purpose of the narrow tailoring requirement is to ensure that the means chosen fit . . . th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.

The Court further ruled that in order to be narrowly tailored, a race-conscious program "cannot use a quota system—it cannot 'insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants.'" *Id.* at 334. City's race and sex preferences violate this rule by insulating WBEs and MBEs from competition with other bidders.

The Supreme Court noted in *PICS*: "The entire gist of the analysis in *Grutter* was that the admissions program at issue there focused on each applicant as an individual, and not simply as a member of a particular racial group." But City makes its preferences available solely on the basis of group identification and not as a remedy for any individual discrimination. Further, as *Croson* found "it is almost impossible to assess whether the [City's] Plan is narrowly tailored to remedy prior discrimination since it is not linked to identified discrimination in any way." 488 U.S. at 507. As set forth below, City's program is in no way linked to the alleged incidents of discrimination.

(1) Bid Discounts Do Nothing to Remedy Alleged Race- and Sex-Based Discrimination by City Employees

City's claimed remedy for discrimination by its employees, the Bid Discount program, is set forth in Section 12D.A.9 of its MBE/WBE/LBE [LBE is Local Business Enterprise] Ordinance. Specifically, the Ordinance provides that City contract awarding authorities shall, unless otherwise indicated by the Ordinance, extend a discount in all bids and contracts to minority- and woman-owned businesses. The discount is 5% for a joint venture with local MBE or WBE participation that equals or exceeds 35% but is under 40% of the dollar amount of the bid. The bid discount is 7½% for a joint venture with a local MBE/WBE that equals or exceeds 40%. The bid discount is 10% for a local MBE or WBE or a joint venture among local MBE/WBEs. The bid discount provision provides that a bid submitted by a

MBE or WBE or joint venture with MBE/WBEs will be treated as if it were 5-10% lower than the actual bid amount, but a bid submitted by a business owned by individuals from a nonpreferred group, *i.e.*, non-MBE/WBE, is evaluated at full value. JA III:740. As shown below, these preferences have no relation to, and would do nothing to remedy, the alleged acts of discrimination.

City states that "in November, 2002, a minority contractor testified before the HRC that City employees have changed the required scope and rules for subcontracting on projects to ensure exclusion of MBE/WBEs from some projects . . . . Similarly, a May 2003 report issued by the HRC relayed evidence that a City employee had manipulated a member of a public contract selection panel to ensure that a certified MBE/WBE would receive a low score and thus be removed from consideration for the contract award." City OB at 5. However, City's MBE/WBE bid discounts would do nothing to remedy these alleged misdeeds. If in fact such instances occurred, the appropriate remedy would be to discipline the City employees who were guilty of such discrimination. But as noted above, City conceded in discovery that it had never actually found discrimination against a MBE or WBE by any specific City Contract Awarding Authority. City Answer to Request for Admission No. 24, RSA at 8-10.

City further states that its

> investigation also revealed that some City employees will place such high minimum requirements on minority contractors—such as requiring $1,000,000 of insurance to qualify for a contract for delivery of $2,500 worth of goods—that most MBE/WBEs are precluded from participation . . . . And City employees have also extended existing contracts to eliminate the need for bidding on a new contract, and the concomitant need for minority subcontracting . . . . Minority contractors also testified that they are held to higher standards by City inspectors than are non-minority contractors. Minority contractors have complained that they have seen inspectors waive majority-owned contractors' compliance with contract requirements, while forcing minority contractors to redo identical work on the same programs at substantial cost . . . . Minority contractors also have complained that City employees subject them to more rigorous pre-contracting investigation and routinely call their qualifications for the work into question.

City OB at 5-6. Again, however, City's MBE/WBE bid discounts would do nothing to remedy these alleged violations. If these violations actually occurred, the required remedy is disciplining the City employees guilty of discrimination.

City states that the "record also contains evidence that City employees have harassed minority contractors. One minority contractor complained that a City inspector would routinely share his view that members of the contractor's ethnic group were 'morons' and monkeys.'. . . 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." City OB at 6.

But even if these complaints were true, City's race-based bid discounts would do nothing to remedy them. As the Supreme Court held in *PICS*, 127 S. Ct. at 2768 (plurality), "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." If City employees are in fact discriminating on the basis of race or sex, the way to stop such discrimination is to remove or at least discipline those employees. That is the only way to stop such discrimination. Yet City has never done so, choosing instead through bid discounts to discriminate against non-MBE/WBEs who have nothing to do with the alleged violations.

In any event, City's reliance on unsworn statements of discrimination is improper. *Croson* criticized the City of Richmond's reliance "on the highly conclusionary statement of a proponent of [its race preference] plan that there was racial discrimination in the construction industry in 'this area.'" 488 U.S. at 500.

Anecdotal evidence of alleged discrimination is generally unreliable and thus "should be treated cautiously," primarily because of the inherent difficulty in verifying that it is "remembered, perceived, or reported accurately." Teresa Lee Brown, *Deceived by Disparity Studies: Why the Tenth Circuit Failed to Apply Croson's Strict Scrutiny Standard in Concrete Works of Colorado*, 81 Denv. U. L. Rev. 573, 594 (2004) (quoting George R. La Noue, *Standards*, 26 Urb. Law at 525 (internal quotation marks omitted).

The unreliability of anecdotal evidence is borne out by the following telling statistics:

> In . . . 1991, the EEOC found probable cause in only 17% of the employment discrimination charges it investigated. Between 1971 and 1984, only 20% of all faculty suing universities for discrimination in federal courts were successful, and none of the plaintiff wins were by minorities. In 1992, the Office of Civil Rights investigated fourteen claims of discrimination in grading policies in universities and found none of them valid.

La Noue, *Standards*, at 522.

Anecdotal evidence of discrimination is unreliable for other reasons as well. Anecdotes may be anomalous and reflect no pattern of discrimination that would justify a government-sponsored racial preference program. They may leave unanswered the most relevant question: Whether the alleged discrimination resulted in the actual loss of a contract. Anecdotal statements may be motivated by the knowledge that the continuing use of racial preferences is dependent upon the "ability to create a record of discrimination," such that "the incentive to engage in memory contrivance, consciously or unconsciously, is substantial." La Noue, *Standards*, at 524.

But even if the allegations City presents were true, race-based bid discounts have no relation to, and would do nothing to remedy, these complaints as shown by the fact that they allegedly occurred under the prior Ordinance which was reenacted in 2003 without substantial change. City OB

at 4. The appropriate remedy is disciplining any discriminatory City employees in order to prevent further violations.

(2) Race- and Sex-Based Preferences Do Nothing to Remedy Alleged Discrimination by Prime Contractors

City's claimed remedy for discrimination by prime contractors is set forth in Section 12D.A.17 of the Ordinance which imposes quotas and recruitment requirements on prime contractors for the hiring of MBEs and WBEs as subcontractors. To be deemed responsive, a bid submitted by a prime contractor must either demonstrate that the contractor has satisfied City's race- and sex-based goals for hiring a sufficient number of MBE/WBE subcontractors (quota option) or demonstrate that the contractor has satisfied City's "good faith effort" requirements by extending preferential treatment to subcontractors of City's preferred races and sex (recruitment option).

In the quota option, the City Human Rights Commission Director sets MBE and WBE subcontracting "participation goals" for a public works project. Ordinance § 12D.A.17(C). JA III:758-59. To satisfy the quota option, prime contractors must provide a list of all MBE and WBE subcontractors to be utilized for the project, specifying for each the dollar value and participation and the work to be performed. If the prime contractor fails to obtain the City specified dollar percentages of the work to be performed by MBEs and WBEs, the prime contractor's bid will be rejected as

nonresponsive—unless it submits evidence that it has taken specific steps to recruit subcontractors who are MBEs and WBEs. Ordinance § 12D.A.17(D). JA III:759.

The recruitment option includes: (1) attending any presolicitation or pre-bid meetings scheduled by City to inform all bidders of MBE and WBE program requirements for the project; (2) identifying and selecting specific items of the project to be performed by MBEs and WBEs; (3) advertising for MBEs and WBEs that are interested in participating in the project, not less than 10 calendar days before the date the bids can first be submitted, in one or more daily or weekly newspapers, trade association publications, minority or trade-oriented publications, trade journals, or other media specified by city; (this requirement (3) applies only if City gave public notice of the project not less than 15 days before bids can first be submitted); (4) providing, not less than 10 calendar days prior to the date on which bids can first be submitted, written notice of the prime contractor's interest in bidding on the contract to the number of MBEs and WBEs required to be notified by the project's specifications; (5) following up initial solicitations of interest by contacting potential MBE and WBE subcontractors to determine with certainty whether those enterprises were interested in performing specific items of the project; (6) providing interested MBEs and WBEs with information about the plans, specifications, and requirements for the selected subcontracting or material

supply work; (7) requesting assistance from minority and women community organizations; minority and women contractor or professional groups; local, state, or federal minority and women business assistance offices; or other organizations that provide assistance in the recruitment and placement of MBEs or WBEs, if any are available; (8) negotiating in good faith with interested MBEs and WBEs and not unjustifiably rejecting as unsatisfactory bids or proposals prepared by any MBE or WBE as determined by City; (9) where applicable, advising and making efforts to assist MBEs and WBEs in obtaining bonds, lines of credit, or insurance required by City or contractor; and (10) making efforts to obtain MBE and WBE participation that City would reasonably expect would produce a level of participation sufficient to meet City's "goals and requirements." Ordinance § 12D.A.5, "Good-faith efforts." JA III:724-26. No similar requirements are imposed for recruitment of nonminority or male-owned businesses. As shown below, these MBE/WBE preferences are not related to, nor would they do anything to remedy, the claimed discrimination.

City argues that the record before its Board of Supervisors shows "systematic efforts by majority prime contractors to avoid compliance with the 1998 Ordinance, usually in one of three ways." City OB at 6. The first method alleged is that "some majority contractors falsely claim that they have retained MBE or WBE subcontractors in order to obtain a City contract." *Id.*

However, City's race- and sex-based subcontractor preferences do nothing to remedy this claim. This becomes apparent when considering City's claim that these violations occurred under the 1998 Ordinance which, as City notes, was reenacted without substantial change. City OB at 4. If the 1998 Ordinance provisions did not remedy these alleged violations, neither will the substantially similar provisions of the current Ordinance. The proper remedy, if such violations actually occurred, would be to discipline the discriminatory prime contractors by debarring them from City contracts. But City admitted in discovery, it has never actually identified any such discriminatory prime contractors. City Response to Request for Admission No. 23, RSA at 7-8.

City's second allegation against prime contractors is that "some majority contractors who legitimately retain MBEs or WBEs for a project will immediately cancel the subcontract once the contract is obtained from the City." City OB at 7. City's third claim is that "even if they allow subcontractors to do work on a project, some majority contractors will substantially curtail the scope and amount of the work once the project has begun." *Id.* Again, the allegation that these misdeeds occurred under the similar 1998 Ordinance shows that the current race- and sex-based preferences would do nothing to remedy the claimed practices.

City further claims that "[m]ajority contractors have also discriminated against MBEs and WBEs on City-financed projects by holding them to higher

performance standards than non-minority subcontractors." *Id.* City also alleges that "[m]ajority contractors have also mistreated MBEs and WBEs by refusing to tender prompt payment for their services." *Id.* at 8. It is significant that City nowhere explains how its race- and sex-based preferences would remedy any of these alleged violations. That is because such preferences have no relationship whatsoever to the alleged instances of discrimination. The only effective, and therefore constitutionally required, remedy is to discipline those prime contractors who are discriminating on the basis of race and sex.

While City presents a list of its attempts to remedy discrimination through race-neutral programs, *id.*, the glaring omission is any actual discipline against anyone who actually is discriminating. Where race- and sex-based preferences do nothing to correct alleged claims of discrimination, nor provide relief to actual victims of discrimination, they are not remedial, but rather, as the United States Supreme Court warned in *Croson,* 488 U.S. at 493, "simple racial politics."

4. Section 31 Authorizes Minorities and Women to Seek Beneficial Legislation That Does Not Require Unconstitutional Race and Sex Classifications

City's fourth claim, that Section 31 leaves groups other than women and minorities, such as disabled, veterans and poor, free to seek any sort of beneficial legislation at the local level, City OB at 13, ignores a basic tenet of our federal and state Constitutions. As set forth above, race and sex

classifications are suspect and presumed to be unconstitutional. *Seattle*, 458 U.S. at 457; *Sail'er Inn,* 5 Cal. 3d at 17. The classifications of disabled, veterans, and poor are not similarly suspect nor presumed to be unconstitutional. Minorities and women are fully entitled to seek beneficial legislation that protects them as individuals against discrimination. Section 31(a). But there is no right to demand a classification of race or sex that provides constitutionally impermissible preferences.

City's argument that the Equal Protection Clause of the federal Constitution puts the adoption of race- and sex-based preference programs on an impermissibly inferior footing to laws dealing with veterans, the disabled, and the poor was soundly rejected in *Kidd* (quoting *Wilson*).

> That the Constitution *permits* the rare race-based or gender-based preference hardly implies that the state cannot ban them altogether. States are free to make or not make any constitutionally permissible legislative classification. Nothing in the Constitution suggests the anomalous and bizarre result that preferences based on the most suspect and presumptively unconstitutional classifications—race and gender—must be readily available at the lowest level of government while preferences based on another presumptively legitimate classification—such as wealth, age or disability—are at the mercy of statewide referenda.

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

Kidd thus makes the critical distinction. Race and sex classifications are presumptively unconstitutional. Classifications based on poverty, disability, or veteran status are presumptively legitimate. As *Kidd* concludes:

> "The Constitution permits the people to grant a narrowly tailored racial preference only if they come forward with a compelling interest to back it up. [Citation.] '[I]n the context of a Fourteenth Amendment challenge, courts must bear in mind the difference between what the law permits, and what it requires.' [Citation.] To hold that a democratically elected affirmative action program is constitutionally permissible because the people have demonstrated a compelling state interest is hardly to hold that the program is constitutionally required. The Fourteenth Amendment, lest we lose sight of the forest for the trees, does not require what it barely permits." (122 F.3d at pp. 708-709, italics in original.)

Id. at 409-10 (quoting *Wilson*).

Likewise, this Court in *Hi-Voltage* noted that the Equal Protection Clause "does not, however, preclude a state from providing its citizens greater protection" from discrimination than may be allowed under federal law, 24 Cal. 4th at 567. This Court warned that "'courts must bear in mind the difference between what the law permits and what it requires.' Unlike the equal protection clause, Section 31 categorically prohibits discrimination and preferential treatment." *Id.* (citations omitted).

Of course, San Francisco's favored classes are not otherwise barred from legitimate preferences, as the Court of Appeal recognized. "[R]acial and ethnic minorities and women would be among the pool of poor people, veterans, small business owners, persons with disabilities and the like who might push for such preferences. In other words, the sway of section 31 commands that racial and ethnic minorities and women take their place alongside others, based on nonracial and nongender classifications, in the quest

for preferences in the distribution of government contracts and public educational and employment opportunities." Pet. Ex.1 at 27-28.

B. City's Race and Sex Preferences Burden the Minority Class of White Males in Violation of the *Hunter/Seattle* Doctrine

It is not Section 31, but rather City's race and sex preference policies, that violate *Hunter/Seattle* by creating and enforcing unconstitutional race and sex classifications, denying to a discrete minority, White non-Hispanic males, the antidiscrimination and preference protections guaranteed by Section 31.

In *Hunter v. Erickson*, 393 U.S. at 387, the Supreme Court made clear that laws that obstruct protection against race-based discrimination raise Equal Protection issues. Section 31 prohibits such discrimination while San Francisco's Ordinance here at issue, in enacting preferences that affirmatively discriminate on the basis of race and sex, violates *Hunter/Seattle*.

The Supreme Court found that a flaw in the Akron charter amendment was that the law's impact fell on the minority. *Id.* at 391. As noted above, the U.S. Census Bureau statistics show that the true minority here is "White non-Hispanics," constituting 43.8% of California's population. RJN at 1. The so-called "minorities" favored by City's race preferences are 56.2% of the population and when combined with the fact that "Female persons" are 50.1%, *id.*, the favored class of so-called "minorities" and women are 78.1% of the population. The class discriminated against by San Francisco, White non-

Hispanic males, is a mere 21.9% of the population. Under the *Hunter* ruling, this overwhelming 78.1% "majority needs no protection against discrimination and if it did, a referendum might be bothersome but no more than that." 393 U.S. at 391. It is the 21.9% minority class of white non-Hispanic males that needs the protection of Section 31 against City's race and sex classification and discrimination.

Hunter goes on to state: "Because the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race, racial classifications are 'constitutionally suspect' and subject to the 'most rigid scrutiny.' They 'bear a far heavier burden of justification' than other classifications. *Id.* at 391-92 (internal citations omitted). But as this Court held in *Hi-Voltage*, 24 Cal. 4th at 561, "Rather than classifying individuals by race or gender Proposition 209 *prohibits* the State from classifying individuals by race." The government entity classifying individuals by race and gender and granting preferences on that basis is San Francisco. But City has failed to bear its "far heavier burden of justification" for its "constitutionally suspect" preferences.

In *Seattle*, the Supreme Court succinctly defined the issue before it. "The single narrow question before us is whether the State has exercised its power in such a way as to place special, and therefore impermissible, burdens on minority interests." 458 U.S. at 476 n.18.

Here, San Francisco has exercised its power to place special, and therefore impermissible, burdens on the interests of the 21.9% minority class of White, non-Hispanic males through its unconstitutional race and sex classifications and preferences in public contracting.

The Supreme Court has made clear that "one form of injury under the Equal Protection Clause is being forced to compete in a race-based system that may prejudice the plaintiff." *PICS*, 127 S. Ct. at 2751 (citing *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995), and *Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville*, 508 U.S. 656, 666 (1993)). The Supreme Court explained in *Rice v. Cayetano*, 528 U.S. 495, 517 (2000): "One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities."

San Francisco displays its demeaning disregard for individual merit, our Constitution, and the courts' interpretation of it, in the following argument. "The [Court of Appeal] majority also reveals an inherently value-laden viewpoint when it argues that Proposition 209 'stand[s] for the proposition that racial and gender discrimination, affirmative or reverse, is unfair and wrong,' and '*embraces* general principles of nondiscrimination,' and '*brooks* no impermissible racial classification.'" City OB at 27 n.4. City thus makes clear its "value-laden viewpoint" that racial and gender discrimination is fair and

right and thereby embraces City's own general principles of impermissible discrimination. This is precisely the type of biased viewpoint that Section 31 protects against and that *Hunter/Seattle* outlaws.

II

CITY HAS FAILED TO MEET ITS BURDEN OF PROVING ITS RACE AND SEX PREFERENCES ARE NECESSARY TO MAINTAIN ELIGIBILITY FOR FEDERAL FUNDS

The second issue the Court has directed the parties to address is:

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

Section 31(e) provides: "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."

City's reliance on this exception is an affirmative defense and it bears the burden of proving the facts necessary to establish the defense. *Moss v. Superior Court (Ortiz)*, 17 Cal. 4th 396, 425 (1998). As the court below held: "It is the City's burden to bring forth 'substantial evidence that it will lose federal funding if it does not use race-based measures and must narrowly tailor those measures to minimize race-based discrimination.' " Pet. Ex. 1 at 13

(quoting *C & C Construction, Inc. v. Sacramento Municipal Utility District*, 122 Cal. App. 4th 284 (2004) *(SMUD)*). The court below correctly found City failed to carry this burden, Pet. Ex. 1 at 13-14, for the reasons set forth below.

A. No Federal Law Requires City's Race and Sex Preferences

Initially, San Francisco relies on Title VI of the Civil Rights Act, 42 U.S.C. § 2000d, which specifies that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

But as both *Granholm*, 473 F.3d at 251, and the court of appeal noted, Pet. Ex. 1 at 12-13, the Civil Rights Act expressly limits its preemptive effect.

> Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.

42 U.S.C. § 2000h-4. *Granholm* declared, "Nor does Proposal 2 thwart the purposes of Title VI—'prevent[ing] discrimination in federally assisted programs.' Proposal 2 reinforces that goal by prohibiting state universities from discriminating, or granting preferential treatment, on the basis of race." 473 F.3d at 251-52 (citation omitted).

The court below similarly stated: "Section 31, with its categorical prohibition of discrimination in the operation of public employment, education and contracting, is consistent with the intent of Title VI of the Civil Rights Act to prevent recipients from discriminating on the basis of race, color or national origin in funded activities and programs." Pet. Ex. 1 at 13.

This holding follows that of *Hi-Voltage*, which declared that "the federal courts have held Proposition 209 does not conflict with Titles VI, VII, or IX of the Civil Rights Act of 1964. The mere fact that affirmative action is permissible under the Title VI and IX regulations, and some judicial interpretation, does not require preemption of a state law that prohibits affirmative action." 24 Cal. 4th at 569 (internal citations and quotation marks omitted; citing *inter alia Wilson*, 122 F.3d at 709-19).

The issue of the federal funding exemption was examined in detail in *SMUD*, 122 Cal. App. 4th 284. SMUD conducted a disparity study in 1993 to determine whether the factual conditions existed within SMUD's market area to justify remedial discrimination through a race-based affirmative action program. The study found significant statistical disparities in the number of MBEs awarded contracts, in terms of contract dollars. SMUD accepted the study and found that its outreach and other race-neutral programs had not increased MBE participation as much as SMUD's board desired and concluded that race-based remedial action should be used to remedy past discrimination

against the groups identified in the study. SMUD then implemented an affirmative program that set race-based goals for MBE utilization. *Id.* at 292-93.

In 1998, after Section 31's enactment, SMUD conducted another disparity study which included an evaluation of SMUD's progress in eliminating the disparities found in the 1993 study. While the 1998 study showed improvement in the utilization of certain groups, it concluded that a statistically significant disparity still existed among certain subsets of MBEs. The SMUD board accepted the 1998 study and authorized a revised affirmative action plan. That plan provided a 5% "price advantage" [bid discount] for African-American and Hispanic-American MBE prime contractors, capped at $50,000 for bids up to $1,000,000. A similar 5% "price advantage," also capped at $50,000, was awarded to Asian Pacific-American and African-American MBEs on subcontract bids over $50,000 and less than $1,000,000. SMUD further extended evaluation credits to all prime contractors who met the subcontractor participation goal of 8% each for Asian Pacific-American and African-American MBEs on proposals over $50,000 for subcontracts less than $1,000,000. *Id.* at 294.

For contracts over $50,000, each bidder was required to provide written evidence of its attempts to meet the specified MBE outreach requirements and its good faith efforts to meet the specified MBE participation goals.

Contractors failing to meet the goals and not complying with the "good faith requirements" were deemed nonresponsive and their bids were rejected. *Id.* at 295. In adopting this race-based program, SMUD stated that its receipt of federal funding obligated it to comply with Title VI of the Civil Rights Act of 1963, 42 U.S.C. § 2000d, *et. seq.*, and all relevant regulations. *SMUD,* 122 Cal. App. 4th at 296.

Like SMUD, City argues that federal law requires it to take "affirmative action" to remedy discrimination in contracting. City OB at 31. But the term "affirmative action" is not necessarily restricted to race- and sex-based actions. Thus, *SMUD* holds that while federal Department of Transportation regulations, for example, allow race-based affirmative action, they do not require it, but instead refer to affirmative action which may be either race-neutral or race-based. 122 Cal. App. 4th at 309. The court then states:

> Because in California the electorate has determined that race-based affirmative action is prohibited, an agency in California receiving funding from the Department of Transportation must opt for race-neutral affirmative action to comply. . . . In other words, because there is an option to use race-neutral affirmative action to comply with the *mandates*, as opposed to the permissions of this subsection, race-based affirmative action is not necessary to maintain federal funding and therefore cannot be used in California.

Id.

Here, the lower court addressed City's reliance on a federal Department of Transportation (DOT) regulation, 49 C.F.R. § 21.5(b)(7), City OB at 32, by

similarly pointing out that regulation permits—but does not require—federal fund recipients to use race-based measures to remedy past discrimination. While the DOT regulation required recipients to take affirmative action to remedy past discrimination, the court noted that the regulation did not require those measures to be race-based. Pet. Ex. 1 at 12. Similarly, the Environmental Protection Agency (EPA) regulation cited by City, City OB at 32, 34, 40 C.F.R. § 7.35(a)(7), requiring recipients to "take affirmative action to provide remedies to those who have been injured by the discrimination," does not require race-based remedies. The court below found that "the [regulation's] language calls for specific targeting of remedies to those who have been injured by past discrimination. The Ordinance is not designed to pinpoint remedies to those suffering prior injuries." Pet. Ex. 1 at 13. Indeed, the preferences are provided to all members of the favored racial and gender classifications without any requirement of showing prior injury.

The *SMUD* court criticized SMUD's reliance on disparity studies that concluded there had been past discrimination, noting that "SMUD made no attempt in its disparity studies to identify federal laws and regulations and to test factual findings against those laws and regulations." 122 Cal. App. 4th at 300. City has similarly failed, conceding in discovery that it is unaware of any federal program that requires it to use its Bid Discount or Subcontracting

Preference programs. City Response to Request for Admission No. 33, RSA at 21. In response to Request for Admission No. 33, "City admits that it is unaware of any federal program that explicitly identifies the Bid Discount or Subcontracting Programs set forth in Sections 12D.A9(A) and 12D.A17 of Chapter 12D.A as a program that the City must use." RSA at 21. City has similarly been unable to identify any such federal program in its brief.

It is telling that City's race and sex preferences were enjoined by the trial court on July 26, 2004. JA XIII:3483. That means that City has operated without those preferences for three years and five months. City has made no showing that in the interim, it has lost any federal funds as a result of this injunction, proving that its race and sex preferences are not required to establish or maintain eligibility for any federal program.

B. City Does Not Meet the Section 31(e) Exemption Criteria Because It Has Not Shown Discrimination Against Women and Minorities; Nor Are Its Preferences Narrowly Tailored to Remedy the Claimed Violations Against MBEs and WBEs

Hi-Voltage holds: "There is . . . no duty under federal statutory law to take corrective action in the absence of discrimination." 24 Cal. 4th at 569. City claims that the Section 31(e) exemption is triggered because it has "compelling evidence of discrimination in City contracting." City OB at 30. As shown above in Section I.A.3.a., there is no reliable evidence of discrimination against MBE/WBEs by either City employees or prime

contractors. San Francisco has not established the factual predicate for its preference programs by carrying its burden to establish that it has discriminated against MBE/WBEs. As the court below found:

> 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.

Pet. Ex. 1 at 13-14. City's OB does nothing to remedy this defect.

Similarly, as presented in Section I.A.3.b. of this brief, City's race and sex preferences are not remedial because they have no relation to, and would do nothing to remedy, the allegations of discrimination against minorities and women and therefore fail the narrow tailoring requirement.

C. The Court of Appeal Correctly Held That City's Race and Sex Preferences Were Not Required by Section 31(e)

San Francisco argues that the court below erred by grafting additional requirements on to Section 31(e). City OB at 34-37. City's claim is based on taking a portion of that court's opinion out of context. Thus, City declares that "the appellate court held that Section 31(e) did not apply because the City allegedly failed to provide substantial evidence of a '*specific* type of past discrimination that triggers a *particular* regulation's requirement for race-based remedial measures.'" City OB at 34 (quoting Pet. Rev. Ex. 1 at 13).

The portion City quotes follows the preceding paragraph that sets forth the context in noting City's reliance on the DOT and EPA regulations discussed above. "It is the City's burden to bring forth 'substantial evidence that it will lose federal funding if it does not use race-based measures and must narrowly tailor those measures to minimize race-based discrimination.'" *Id.* (quoting *SMUD*, 122 Cal. App. 4th at 298). This is the actual holding of the court below that sets out the requirements of Section 31(e).

The court then goes on in the same paragraph to expound on the type of claim that City makes: that its preferences are based on specific regulations. *See* City OB at 32 (citing DOT regulation 49 C.F.R. § 21.5(b)(1) and EPA regulation 40 C.F.R. § 7.35(a)(7)). In response to this type of claim, the court declares:

> And, if a particular federal regulation 'expressly requires a state agency to use race-based measures to remedy past discrimination, the state agency must have substantial evidence of the type of past discrimination that triggers the federal regulations's requirement for current race-based measures. What facts, if present, require race-based remedial measures—the factual predicate for race-based measures—must be defined in the federal law or regulation, not by the state agency. *Id.* [*SMUD*, 122 Cal. App. 4th] at p. 299.

Pet. Rev. Ex. 1 at 13.

Thus, the statement City objects to applies only to the situation where the agency is relying upon a specific federal regulation, there the above cited DOT and EPA regulations. Pet. Ex. 1 at 13.

D. City Has Never Tried the Most Effective Race-Neutral Anti-Discrimination Measure: Disciplining Those Who Actually Discriminate

City claims that "[t]he legislative record demonstrates that notwithstanding the City's strong official policy against discrimination, individual agents of the City continue to discriminate on the basis of race and gender in the City's public contracting . . . ." City OB at 36. This statement contains two admissions. First, that it is City's strong policy not to discriminate against MBE/WBEs; second, that there are individual agents who allegedly do discriminate.

Even if it had established discrimination, City has failed to use the necessary race-neutral measures required by the alleged acts of discrimination— direct sanctions against the alleged individual discriminators. Indeed, City admits it has never taken corrective action because it has never identified a single incident of discrimination against MBE/WBEs by City in the award of public contracts since Section 31's enactment in November, 1996. Response to Interrogatory No. 31, RSA at 16. As *SMUD* declares, "race-based affirmative action is constitutionally prohibited when there has been no prior discrimination." 122 Cal. App. 4th at 309 (citing *Croson*, 488 U.S. at 505-06).

> The *SMUD* court criticized SMUD's use of its disparity study
>
> to justify race-based discrimination [that] ignored SMUD's constitutional burden under section 31 to prefer race-neutral remedies over race-based remedies and avoided a determination of whether there were race-neutral alternatives available to

> remedy disparities in contracting. Far from showing the program was narrowly tailored to maintain federal funding while complying to the extent it could with section 31, subdivision (a), SMUD simply adopted a race-based affirmative action without regard to section 31, subdivision (a) and, only later, tried to justify its actions.

122 Cal. App. 4th at 310.

This is what San Francisco is doing here. Instead of showing its preferences were narrowly tailored to meet the requirements of the federal Equal Protection Clause, City simply renewed its race- and sex-based preferences without regard to Section 31 and now seeks to justify its actions without meeting the constitutional prerequisites. This was not allowed in *SMUD* and should not be permitted here.

The *SMUD* court concluded:

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

Id. at 311.

City's race and sex preferences thus fail the federal funding exception provision of Section 31 on multiple counts. First, City has failed to show any federal statute or regulation that requires its race and sex preferences. Second, when put to the legal test of discovery, City failed to show race- or sex-based

discrimination against MBE/WBEs. Third, City failed to employ the required race-neutral measures that would remedy the alleged discrimination, specifically, sanctioning the discriminators. The federal funding exception thus cannot save City's constitutionally prohibited preferences.

CONCLUSION

Apparently acknowledging that Article I, Section 31, of the California Constitution provides greater protection against race and sex discrimination and preferences than the federal Equal Protection Clause and recognizes no compelling state interest exception to this protection, City's brief attempts to create a judicial exception to this protection. But San Francisco has failed to bear its burden of proof on these affirmative defenses.

City has failed to show that Section 31 violates the *Hunter/Seattle* doctrine by burdening minorities and women. Rather, Section 31 protects all Californians. Specifically, here it protects the 21.9% White, non-Hispanic male minority against the race and sex discrimination practiced by San Francisco in its public contracting Ordinance.

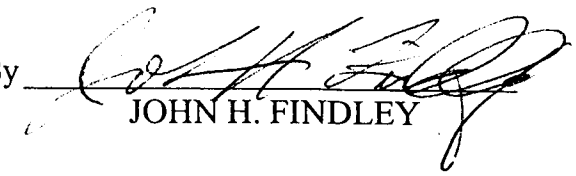
City has also failed to carry its burden of proof to show that Section 31(e) permits it to maintain its race and sex preferences. City has shown no federal law or regulation which requires such preferences and indeed conceded in discovery that it was not aware of any such federal law. Similarly, San Francisco has failed to establish, and indeed admitted in discovery it had

not established, discrimination against minorities or women that is the factual predicate for race- and sex-based remedies. What has been established is that City has failed to narrowly tailor its program by using the constitutionally mandated race-neutral remedies, and specifically disciplining those who discriminate for any identified discrimination. City's affirmative defenses of *Hunter/Seattle* and the federal funding exception should therefore be rejected and the judgment of the trial court affirmed in its entirety and without remand.

DATED: December 18, 2007.

Respectfully submitted,

JOHN H. FINDLEY
SHARON L. BROWNE
PAUL BEARD II

By 
JOHN H. FINDLEY

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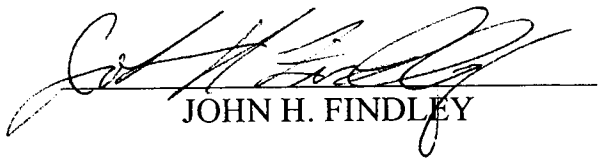
CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing PLAINTIFFS AND RESPONDENTS' ANSWER BRIEF ON THE MERITS OF ISSUES TWO AND THREE is proportionately spaced, has a typeface of 13 points or more, and contains 13,791 words.

DATED: December 18, 2007.



JOHN H. FINDLEY

DECLARATION OF SERVICE

I, Barbara A. Siebert, 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 December 18, 2007, true copies of PLAINTIFFS AND RESPONDENTS' ANSWER BRIEF ON THE MERITS OF ISSUES TWO AND THREE 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 18th day of December, 2007, at Sacramento, California.

Barbara A. Siebert
BARBARA A. SIEBERT