SUPREME COURT OF THE STATE OF CALIFORNIA

CORAL CONSTRUCTION, INC., an Oregon corporation,

Plaintiff and Appellee,

vs.

JOHN L. MARTIN, in his official capacity as Director of the San Francisco International Airport, HENRY E. BERMAN, LARRY MAZZOLA, MICHAEL S. STRUNSKY, LINDA S. CRAYTON, and CARYL ITO, in their official capacities as members of the Airport Commission of the City and County of San Francisco; and CITY AND COUNTY OF SAN FRANCISCO, a political subdivision of the State of California,

Defendants and Appellants.

SCHRAM CONSTRUCTION, INC., a California corporation,

Plaintiff and Appellee,

vs.

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

Defendants and Appellants.

S 152934

First Appellate District
No. A107803

(San Francisco Superior Court
Nos. 319549 and 421249)

ANSWER TO PETITION FOR REVIEW

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

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ADDITIONAL ISSUES PRESENTED FOR REVIEW

1. Whether Proposition 209 violates the constitutional right to equal protection in the political process when it selectively repeals only those contracting preferences that benefit women and minorities, and it relocates the process of securing future beneficial legislation for those protected groups from the local legislative to the state constitutional level?

2. Whether Proposition 209 violates the Supremacy Clause because it flatly prohibits all race-based affirmative action regardless of circumstance in contravention of the binding and legally superior International Convention on the Elimination of All Forms of Racial Discrimination (CERD), which affirmatively requires the use of race-based affirmative measures in the face of persistent racial disparities.

INTRODUCTION

To demonstrate that the corrective race- and sex-conscious public contracting program established by its ordinance was necessary to remedy ongoing, pervasive discrimination as mandated by the federal Constitution, Respondent City and County of San Francisco (City) introduced a tremendous quantity of evidence. This evidence included records from 14 public hearings – which contained testimony from hundreds of witnesses – as well as a comprehensive disparity study demonstrating the existence of such discrimination. The trial court, however, ignored this evidence and "declined to decide whether the City presented the extreme case of intentional discrimination in public contracting in San Francisco such that a narrowly tailored remedial preference program could be constitutionally required." (*Coral Construction, Inc. v. City and County of San Francisco* (2007) 149 Cal.App.4th 1218, 1250 [attached to Petition for Rehearing as App.1 at p.34].) As the Court of Appeal correctly held, the trial court erred in declining to address that issue.

Petitioner Coral Construction, Inc. (Coral) does not quarrel with this holding. Instead, Coral contends the Court of Appeal erred in remanding the case so the trial court could address the issue of whether the ordinance is mandated by the federal Constitution *in the first instance*. According to Coral, this Court should grant review to prevent the trial court from doing so and to decide the issue itself. Coral, however, not only ignores the criteria for review by this Court, it also errs as matter of law.

First, the case creates no conflict in the law. Indeed, the Court of Appeal merely did what California courts regularly do upon reversing summary judgment: remand the case so the trial court can decide in the

first instance issues on summary judgment that it mistakenly failed to adjudicate earlier.

Second, the issue of whether the particular remedial program established by the City's ordinance is mandated by the federal Constitution is not an important question of law. The issue is fact-specific, and its resolution depends on an evaluation of the voluminous record in this case – which applies solely to the City's ordinance. In any event, this Court can revisit the issue after the both the trial court and the Court of Appeal have had a chance to resolve the issue on the merits based on a more fully developed record.

Finally, the legislative findings in the record – and the extensive evidence supporting those findings – establish that the City's ordinance is mandated by the federal Constitution. Review is therefore unnecessary because the Court of Appeal did not err.

Nonetheless, if the Court chooses to grant Coral's petition, then the Court should also address two other issues raised in the appeal: (1) whether Proposition 209 violates the equal protection clause of the federal Constitution by preventing women and minorities from receiving the benefits of local remedial legislation while allowing other group to seek such legislation; and (2) whether Proposition 209 contravenes the International Convention on the Elimination of All Forms of Racial Discrimination. Both are unsettled and address the validity of Proposition 209 – an issue far more significant than the fact-specific issue on which Coral seeks review.

STATEMENT OF THE CASE

The City disputes Petitioners' improperly argumentative statement of the case and directs this Court to the lower court's description of the factual and procedural background, with which the City concurs. (App.1 to Petition at pp.3-9.)

ARGUMENT

I. THERE IS NO REASON FOR THIS COURT TO REVIEW WHETHER THE FEDERAL CONSTITUTION REQUIRES THE CITY TO ENFORCE THE CHALLENGED PROGRAMS UNTIL THE FACTUAL RECORD IN THIS CASE IS FULLY DEVELOPED.

In its Petition, Coral does not dispute that the Court of Appeal properly found that "state actors have a 'constitutional *duty* to take affirmative steps to eliminate the continuing effects of past unconstitutional discrimination.'" (App.1 to Petition at p.31, quoting *Wygant v. Jackson Board of Education* (1986) 476 U.S. 267, 291, conc. opn. of O'Connor, J. [emphasis in original]) Nor does Coral disagree with the court's conclusion that "If a city or other political subdivision were found to have engaged in intentional discrimination such that some type of race-based remedial program was *necessary* under the federal Constitution" [emphasis in original], then under both "the supremacy clause" and the text of Proposition 209 itself, federal law would require affirmative action that Proposition 209 might otherwise forbid. (App.1 to Petition at p.34.)

Instead, Coral contends the Court of Appeal erred in remanding the case so the trial court could determine *in the first instance* whether the City's ordinance is mandated by the federal Constitution. (App.1 to Petition at p.3.) According to Coral, this Court should grant review because the Court of Appeal – and not the trial court – should be the first to evaluate the voluminous factual record to determine whether the City would be in

violation of the federal equal protection clause absent the ordinance for its failure to remedy its own known discrimination against women-and minority-owned businesses in its contracting practices. Coral is wrong.

First, the remand does not create a conflict with any other California decision. Indeed, California courts regularly remand cases so trial courts can resolve issues on summary judgment that they mistakenly failed to adjudicate earlier. Thus, review is not necessary to secure uniformity of decision. (Cal. Rules of Ct., rule 8.500(b)(1).)

Second, the issue of whether the City has presented a sufficiently extreme case of discrimination to justify its ordinance is not an "important question of law." (Cal. Rules of Ct., rule 8.500(b)(1).) The issue is fact-specific and unique to this case. Moreover, this Court will likely have another opportunity to review the issue after the remand. Under these circumstances, there is no reason to grant review now.

Finally, the legislative findings of the City's Board of Supervisors – which are supported by the extensive evidence in the record – establish that the City's ordinance was mandated by the federal Constitution as a remedial measure that remedies intentional discrimination in public contracting. Thus, the Court of Appeal properly refused to affirm the summary judgment in favor of Coral, and no review is necessary.

A. The Court Of Appeal's Decision To Remand For Further Evidentiary Review Does Not Conflict With Any Other California Cases.

Coral contends the remand for evidentiary review by the trial court conflicts with several other California decisions. But this contention is meritless.

For example, Coral argues that the Court of Appeal's decision to remand conflicts with this Court's decision in *Hi-Voltage Wire Works, Inc. v. City of San Jose* (2000) 24 Cal.4th 537. But Coral fails to explain why. Indeed, even a cursory review of *Hi-Voltage* reveals no conflict. Review of the evidentiary record in *Hi-Voltage* was unnecessary because "the City of San Jose *conceded* that its program was not constitutionally required" and "its disparity study was not part of the record, and thus the court had no way to measure the fit between the remedy and the goal of eliminating the disparity." (App.1 to Petition at p.33 n.17, citing *Hi-Voltage*, 24 Cal.4th at pp.568-569 [emphasis in original].) Here, the City contends its ordinance *is* constitutionally required and asked the trial court to "measure the fit" between its ordinance and the discrimination the City seeks to remedy. For that reason, *Hi-Voltage* is simply inapposite.

Similarly, Coral suggests that the Court of Appeal's decision to remand conflicts with *C & C Construction, Inc. v. Sacramento Municipal Utilities District* (2004) 122 Cal.App.4th 284. But that case addressed whether a utility district's affirmative action program was required to maintain federal funding – not whether it was compelled by the equal protection clause. Moreover, in *C & C Construction*, "[t]he parties agreed that application of [the federal funding provisions of Proposition 209] to the affirmative action program is a question of law that may be determined from the undisputed facts in the record." (*Id. at p.297.*) Here, the City alleged the opposite: that disputed issues of fact precluded Coral from obtaining summary judgment.

Coral also cites to *Connerly v. State Personnel Board* (2001) 92 Cal.App.4th 16, and *Crawford v. Huntington Beach Union High School District* (2002) 98 Cal.App.4th 1275, for the proposition that a "racial

classification is presumptively invalid." (Petition at pp.8-10.) While true, that principle is of no relevance to the issue here: whether the trial court should have evaluated the record to determine whether the City's program was justified despite this presumption.

Thus, in remanding the case so the trial court could determine *in the first instance* whether the City's ordinance is mandated by the federal Constitution, the Court of Appeal caused no conflicts. It merely did what California courts often do: remand a case so the trial court could decide an issue on summary judgment that it mistakenly failed to address before.[1] Indeed, it would have been improper for the court "to determine whether the trial court's ruling might still be correct on a factual and evidentiary basis not yet considered by it." (*Mateel Environmental Justice Foundation v. Gray* (2004) 115 Cal.App.4th 8, 26.) Thus, review is not warranted here. (Cal. Rules of Ct., rule 8.500(b)(1).)

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[1] (See, e.g., *Scottsdale Ins. Co. v. State Farm Automobile Ins. Co.* (2005) 130 Cal.App.4th 890, 905 [remanding case after reversing summary judgment so the trial court can "reconsider the parties' summary judgment and adjudication motions in light of our holdings herein"]; *Avila v. Chua* (1997) 57 Cal.App.4th 860, 862 [remanding case after reversing summary judgment "so that the motions for summary judgment can be determined on the merits"]; *General Accident Ins. Co. v. Superior Court* (1997) 55 Cal.App.4th 1444, 1455 [remanding case after reversing summary judgment so trial court could "determine the summary judgment motion on the issues" it did not reach before]; *La Bato v. State Farm Fire and Casualty Co.* (1989) 215 Cal.App.3d 336, 345 [holding "that the trial court should have the opportunity to decide the validity of" the defendant's claim on summary judgment "in the first instance"].)

B. Whether The Court of Appeal Erred In Remanding The Case For Evidentiary Review Is Not An Important Question Of Law.

The Court of Appeal concluded that the trial court erroneously "declined to decide whether the City presented the extreme case of intentional discrimination in public contracting in San Francisco such that a narrowly tailored remedial preference program could be constitutionally required." (App.1 to Petition at p.34.) Coral does not disagree with this conclusion. Instead, it contends the Court of Appeal should have decided that issue itself instead of remanding. Coral now asks this Court to grant review to decide the issue. But Coral never explains why the issue is worthy of review. This is because it is not.

Whether the City presented a sufficiently extreme case of discrimination to justify its ordinance is fact-specific, and its resolution depends solely on the evidence in the record. That evidence only applies to the City and its ordinance. Thus, the issue has limited application beyond the City's particular ordinance and does not warrant review.

In any event, this Court will likely have another opportunity to consider the issue if it denies review at this time. By remanding, the Court of Appeal merely gave the trial court – which should have adjudicated the issue earlier – the first chance to resolve the issue. Once the trial court has adjudicated the issue on remand and the Court of Appeal has reviewed that adjudication, this Court would have another opportunity to decide whether to grant review. It makes far more sense for the Court to wait until then to decide whether the issue is worthy of review, because the evidentiary record would be complete and because this Court would have the benefit of two lower court decisions on the merits. Under these circumstances, there is no reason for this Court to intervene at this time.

C. The Legislative Findings Are Supported By The Extensive Evidence In The Record And Establish That The City's Ordinance Is Mandated By The Federal Constitution.

Coral seeks review because it contends the Court of Appeal should have held, as a matter of law, that the City's ordinance is not mandated by the federal Constitution. As explained above, this is insufficient to justify review under rule 8.500(b)(1) of the California Rules of Court. But review is unwarranted for a more fundamental reason. The undisputed facts establish pervasive and ongoing discrimination in public contracting in San Francisco necessitating the remedial preference program established by the ordinance.

Coral initially argues that the findings of the City's Board of Supervisors stated in the text of the City's ordinance are inadequate. (Petition at pp.9-15.) There are two flaws in this argument. First, the factual basis for the ordinance is crucial to determination of the constitutional question presented in this case, not the language of the legislative findings. (See *Professional Engineers v. Department of Transportation* (1997) 15 Cal.4th 543, 568-569.) Second, to the extent the legislative findings are important, the court below correctly explained how the ordinance's legislative findings were more than adequate. (App.1 to Petition at p.8.)

The evidence before the trial court showed that the City considered a wealth of evidence before making its findings and enacting the ordinance. Among other things, this evidence showed that the San Francisco Human Rights Commission ("HRC") conducted a Disparity Analysis in April 2003 to determine the extent of any underutilization of minority- and woman-owned businesses in City contracting. (JA V:1230-1291.) That study revealed significant disparities between the number of women and

minorities who were available to work on many types of public contracts, and those who were actually hired and participated in those contracts. (JA V:1238-1240.) In addition, the Board of Supervisors had before it volumes of evidence of discriminatory practices by City employees, discrimination by City-funded contractors, and the futility of previously enacted race-neutral measures.

For example, the legislative record showed:

- City inspectors waived majority-owned contractors' compliance with contract requirements, while forcing minority contractors to redo identical work on the same programs at substantial cost. (JA IX:2256, 2281-82.)
- City employees subjected minority contractors to more rigorous pre-contracting investigation and routinely called their qualifications for the work into question. (JA IX:2286.)
- A City investigator routinely shared his view that members of the contractor's ethnic group were "morons" and "monkeys." (JA IX:2281-82.)
- City employees changed the required scope and rules for subcontracting on projects to ensure exclusion of MBE/WBEs from some projects. (JA VII:1688, lines 8-14.)
- A City employee manipulated a member of a public contract selection panel to ensure that a certified MBE/WBE would receive a low score and thus be removed from consideration for the contract award. (JA V:1346-1347.)
- City employees placed such unnecessarily high minimum requirements on minority contractors—such as requiring $1,000,000 of insurance to qualify for a contract for delivery

of $2,500 worth of goods—that most MBE/WBEs were precluded from participation. (JA V:1346-47; JA IX:2262.)

This extensive body of evidence distinguishes the legislative record in this case from the records in both *Hi-Voltage* and *C & C Construction.* This record, on its face, supports the City's claim that the federal equal protection clause requires its ordinance as a corrective measure. Yet Coral failed to challenge the City's evidence in the trial court. Indeed, in addition to reversing summary judgment in favor of Coral, the Court of Appeal could properly have granted the City's cross-motion for summary judgment because its extensive evidentiary record in support of its ordinance was uncontested. Coral should not now be heard to complain that the Court of Appeal remanded the case to give Coral a second chance to contest the record.

Coral's other arguments are disingenuous at best. Relying on discovery responses in earlier litigation between the parties, when a predecessor to the current ordinance was at issue, Coral claims that the City has admitted that it has no evidence of intentional discrimination. (Petition at 15-17.) Coral acknowledges the misleading nature of it argument, but claims the discovery responses are somehow binding "admissions" because the City reenacted its earlier ordinance "without substantial change." (Petition at 17.) Of course, Coral ignores the central issue: Whether the evidentiary basis for the ordinance was identical to the evidentiary basis for the earlier ordinance. As the City made clear below, and as the Court of

Appeal recognized, those evidentiary bases were quite different.[2] (App.1 to Petition at pp.6-8.)

Coral next argues that the City's ordinance is an unconstitutional attempt to achieve race and sex balancing. (Petition at 18.) According to the U.S. Supreme Court, "balancing" is the unconstitutional practice of setting quotas that mirror the percentage of a given minority group in the local population. (See *City of Richmond v. J.A. Croson Co.* (1989) 488 U.S. 469, 507.) But Coral misunderstands the nature of the City's evidence in support of its ordinance. Far from blindly setting its expectations of minority participation on the percentage of various minorities within the City, it conducted a sophisticated disparity study that measured the utilization of minority and women contractors compared to the availability of such contractors in the marketplace. (App.1 to Petition at p.7.) Such a disparity study remedies the defects in balancing and may constitutionally be used to justify a corrective preference program. (See *City of Richmond v. J.A. Croson Co.* (1989) 488 U.S. 469, 509 ["Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise"].) Where the City relied on a properly constructed study, Coral's claims of balancing ring hollow.

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[2] Nor is it accurate for Coral to characterize the discovery responses as "admissions" regarding the absence of "intentional discrimination." Rather, the admissions merely show that the City has no official policy of discriminating against minority- and woman-owned businesses, and is not aware of any specific City department that discriminated against a minority-owned business between 1996 and 1998. (Petition at 16.)

Indeed, the City's Board of Supervisors had before it a tremendous quantity of evidence about the history of discrimination in City contracting when it enacted the Ordinance. For example, the Board had the records of "14 public hearings (eight of which occurred in 1997 and 1998), live testimony from 254 witnesses, videotaped testimony from numerous other witnesses, statistical disparity studies and other documentary evidence pertinent to alleged discrimination and bidding irregularities." (App. 1 at pp. 4-5.) In addition, the Board was presented with "a 2003 disparity analysis conducted by HRC to assess the utilization of MBE's and WBE's in City contracting. This study revealed continued statistically significant underutilization of racial, ethnic, and nonminority women-owned businesses as prime contractors on various types of City projects." (*Id.* at p. 7.) Also, the Board had evidence from hearings "in 2002-2003 at which 134 individuals testified." (*Ibid.*)

Thus, the voluminous evidentiary record in this case – which is unrebutted by Coral – establishes that the City's ordinance is constitutionally compelled, and that the remedies provided by the ordinance are narrowly tailored. Accordingly, review is unnecessary.

II. THIS COURT SHOULD SETTLE THE IMPORTANT QUESTION WHETHER PROPOSITION 209 IS UNCONSTITUTIONAL UNDER THE POLITICAL PROCESS ARM OF EQUAL PROTECTION LAW.

If this Court does grant review, then it should also review the issue of whether Proposition 209 violates the equal protection clause of the United States Constitution by preventing women and minorities from receiving the benefits of local remedial legislation while leaving other groups, such as the disabled, veterans, or the poor, free to seek just such beneficial legislation at the local level. The United States Supreme Court

has invalidated measures like Proposition 209 that, while neutral on their face, "subtly distort governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation." (*Washington v. Seattle School Dist. No. 1* (1982) 458 U.S. 457, 467; *Hunter v. Erickson* (1969) 393 U.S. 385, 390-391.) *Seattle* and *Hunter* hold that the state may not grant power to local authorities over contracting decisions, and then *selectively* withdraw that power in a way that burdens minorities. (*Seattle*, at pp. 475-482, 478 fn.19, 479 fn.22, 480 fn.23; *Hunter*, at pp.392-393.)

Whether Proposition 209 operates in just this impermissibly selective manner has caused great debate in the courts and in the scholarly literature. Even the court below disagreed on this question. Two justices found that Proposition 209 was distinguishable from the legislation struck down in *Hunter* and *Seattle*, but one Justice disagreed. That Justice correctly found that under the equal protection clause, "a law [like Proposition 209] that repeals existing beneficial legislation *and* reallocates power according to *nonneutral* principles – by making beneficial race-based legislation more difficult to achieve than similar legislation benefiting all others – is "'no more permissible than [is] denying [minorities] the vote, on an equal basis with others.'" (App.1 to Petition at p.6 of conc. & disn. opn. of Rivera, J., quoting *Seattle*, 458 U.S. at p.470.)

This question is of great importance to the people of this State. The *Hunter-Seattle* doctrine is one of the important constitutional limits on the power of direct democracy. The doctrine must be safeguarded to ensure that the political process cannot be hijacked to the detriment of protected classes. This Court should review the divided decision below on this issue and give the courts of this state definitive guidance.

A. *Hunter* and *Seattle* Interpret The Equal Protection Clause To Prohibit Legislation That Alters The Political Process And Makes It More Onerous For Racial Minorities To Achieve Favorable Legislation

In *Hunter*, the United States Supreme Court reviewed a voter-enacted amendment to Akron's city charter that repealed all existing housing anti-discrimination ordinances and required voter approval of any future anti-discrimination ordinance. (393 U.S. at p.387.) Although the charter amendment was facially neutral, it violated federal equal protection principles because it "drew a distinction between those groups who sought the law's protection against racial, religious, or ancestral discrimination in the sale and rental of real estate and those who sought to regulate real property transactions in the pursuit of other ends," *e.g.*, rent control advocates. (*Id.* at p.390.)

In *Seattle*, the United States Supreme Court reviewed a voter initiative that prohibited school districts from assigning students beyond their neighborhood schools. Again, although the initiative was facially neutral, it "us[ed] the racial nature of a decision to determine the decision-making process," thereby burdening minorities. (458 U.S. at p.470.) This restructuring of the political process was "no more permissible than [is] denying [members of a racial minority] the vote on an equal basis with others." (*Id.* at p.485.)

Twenty four years after *Seattle*, the United States Supreme Court decided *Romer v. Evans*, 517 U.S. 620 (1996). In *Romer*, a statewide voter initiative prohibited all legislative, executive or judicial action at any level of state or local government designed to protect gays, lesbians or bisexuals. In striking down the initiative, the Court stated: "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."[3] (*Id.* at p.633.)

The majority opinion below summed up this line of cases: "In a nutshell, the *Hunter/Seattle* doctrine invokes the constitutional guarantee of equal protection to invalidate certain facially neutral enactments that explicitly alter the established political process with respect to a racial issue, thereby making it more onerous for racial minorities to achieve favorable legislation with respect to that issue." (App.1 to Petition at p.19.)

B. Whether Proposition 209 Conflicts With The *Hunter-Seattle* Doctrine Is An Important And Unresolved Issue.

The question that split the court below – whether Proposition 209 violates the *Hunter-Seattle* doctrine – was first addressed in 1996, by the United States District Court in *Coalition for Economic Equity v. Wilson* (N.D.Cal. 1996) 946 F.Supp. 1480, *rev'd* (9th Cir. 1997) 122 F.3d 692. The district court held that Proposition 209 violated the Equal Protection

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[3] In discussing the *Hunter-Seattle* doctrine, the majority below cites *Crawford v. Los Angeles Board of Education* (1982) 458 U.S. 527, as establishing the "reach" of the doctrine. (App.1 at to Petition at p.20.) *Crawford* addressed a California ballot proposition that sought "to embrace the requirements of the Federal Constitution with respect to mandatory school assignments and transportation," and retreat from state standards that had developed in the courts to require stronger desegregation measures than might have been required under federal law." (*Crawford*, at p.535.) As the dissent below recognized, the measure evaluated in *Crawford* differed from those struck down in *Hunter* and *Seattle* and from Proposition 209, because it did not restructure the political process or force minorities to seek change at a more remote level of government. (See App.1 to Petition, conc. & disn. opn. of Rivera, J., at pp.10-11.) Moreover, unlike Proposition 209, which impairs the ability of minorities to achieve beneficial legislation in the future, the measure addressed in *Crawford* had no such future impact. Minorities were free to ask their local school boards for relief and school boards remained free to provide it. (See *id.* at p.10.)

Clause by selectively impeding political access and imposing a substantial burden on women and minorities. (946 F.Supp. at p.1508.)

The district court's opinion was based on a straightforward application of *Hunter* and *Seattle*. The district court correctly held that an enactment is unconstitutional if it "removes the authority to address a *racial problem* – and only a racial problem – from the existing decisionmaking body, in such a way as to burden minority interests." (Coalition, *supra,* 946 F.Supp at p.1505, quoting *Seattle*, 458 U.S. at p.474.) The court went on to find that Proposition 209 was just this type of enactment:

> Proposition 209 displaces authority with respect to a race and gender issue to "a new and remote level of government," *Seattle*, 458 U.S. at 483, and thus reorders the political process to the detriment of women and minorities. . . .

(946 F.Supp. at p.1508.)

The district court's decision was overturned after a fractious battle at the Ninth Circuit and a narrow rejection of a petition for rehearing. (See *Coalition for Economic Equity v. Wilson* (9th Cir. 1997) 122 F.3d 692 ["*Coalition II*"].) Indeed, criticizing the denial of rehearing, four Ninth Circuit judges found that, when the *Hunter-Seattle* doctrine is applied to Proposition 209, a court "has no legitimate choice but to declare it unconstitutional." (*Coalition II*, 122 F.3d at p. 712 [Norris, J., respecting the denial of rehearing *en banc*].) Judge Norris correctly explained that "[i]t is the core holding of [*Hunter* and *Seattle*] that the state may not 'place special burdens on the ability of minority groups to achieve beneficial legislation . . . by lodging decision making authority over the question at a new and remote level of government,' " (quoting *Seattle*, 458 U.S. at 467, 483) and "[i]t is hard to imagine a more onerous burden in the political process than mounting a statewide initiative campaign." (*Coalition II* at

pp. 712-13.) Further, Judge Norris rightly criticized the three-judge panel in *Coalition II* for neglecting its duty to follow Supreme Court precedent "in favor of a path of conservative judicial activism." (*Id.* at p. 717.)

Indeed, the Ninth Circuit panel drew a distinction between constitutionally permitted affirmative action programs and other legislation that benefits minorities. (See 122 F.3d at p.708 [asserting that affirmative action programs do not fall under the purview of *Hunter-Seattle* because they do not secure "equal treatment"].) But neither the antidiscrimination laws in *Hunter* nor the remedial busing program in *Seattle* were found to be constitutionally required. The constitutionality of Proposition 209 under *Hunter/Seattle* has nothing to do with the wisdom or efficacy of affirmative action programs or whether San Francisco's affirmative action program is constitutionally required.

The majority's reasoning in this case suffered from the same flaws. While the majority recognized that Proposition 209 makes it "more difficult for any citizen *to secure preferences* on the basis of race or gender," the majority found that Proposition 209 could be squared with the political process doctrine under the equal protection clause. (App.1 to Petition at p.27 [emphasis in original].) The dissent below found otherwise: "Because section 31 creates a two-tiered political structure – one for minorities and women and one for all others – it is discriminatory." (App.1 to Petition. conc. & disn. opn. of Rivera, J., at p.2, citing *Hunter*, 393 U.S. at 390-393.)

The dissent summed up the *Hunter-Seattle* doctrine as follows: "*Hunter* and *Seattle* teach us, however, that even a facially neutral law can be discriminatory if it restructures political access in this way—by selectively burdening only "racially conscious legislation"—because it

"plainly 'rests on "distinctions based on race . . ." ' " (App.1 to Petition, conc. & disn. opn. of Rivera, J., at p.1, quoting *Seattle,* 458 U.S. at 485.)

> But a law that repeals existing beneficial legislation *and* reallocates power according to *nonneutral* principles-by making beneficial race-based legislation more difficult to achieve than similar legislation benefiting all others-is " 'no more permissible than [is] denying [minorities] the vote, on an equal basis with others.' " (*Seattle, supra,* 458 U.S. at 470, 102 S.Ct. 3187.)

(App.1 to Petition, conc. & disn. opn. of Rivera, J., at p.12.)

Consistent with the United States District Court and dissenting justices in the Ninth Circuit, the dissent found that Proposition 209 was such a law.

> Broadly stated, women and minorities seeking remedial race- or gender-based policies in San Francisco contracting practices must mount a *statewide* campaign to amend the California Constitution; any others seeking preferences in San Francisco contracting practices – e.g., based upon residency or economic status – need only convince the board of supervisors to adopt an ordinance. Section 31 thus restructures the political process in a way that specifically and selectively burdens race- and gender-conscious legislation.

(*Id.* at pp.12-13.)

The question of Proposition 209's validity has not only vexed the courts, it has provoked an unusual wealth of scholarly commentary, nearly all of which concludes that Proposition 209 cannot be reconciled with the *Hunter-Seattle* doctrine. (See, e.g., Goodman, *Redacting Race in the Quest for Colorblind Justice: How Racial Privacy Legislation Subverts Antidiscrimination Laws* (2004) 88 Marq. L.Rev. 299, 344 [finding Ninth Circuit analysis of classification prohibitions constitutionally flawed]; Strasser, *Albany Law Review 2001 Symposium: "Family" and the Political Landscape for Lesbian, Gay, Bisexual and Transgender People (LGBT: Same-sex Marriage Referenda and the Constitution: On Hunter, Romer, and Electoral Process Guarantees* (2001) 64 Alb. L.Rev. 949, 974

[observing Ninth Circuit misrepresented the spirit of *Hunter*]; Bangs, *Who Should Decide What Is Best for California's LEP Students? Proposition 227, Structural Equal Protection, and Local Decision-Making Power* (2000) 11 La Raza L.J. 113, 149 [determining Ninth Circuit opinion flies in the face of *Hunter*]; Tokaji & Rosenbaum, *Promoting Equality by Protecting Local Power: A Neo-Federalist Challenge to State Affirmative Action Bans* (1999) 10 Stan. L. & Pol'y Rev. 129, 130 [criticizing Ninth Circuit's failure to apply the principles articulated in *Hunter* and *Seattle*].)[4]

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[4] See also Note, *Ruling by Numbers: Political Restructuring and the Reconsideration of Democratic Commitments after Romer v. Evans* (1999) 109 Yale L.J. 587, 605-06 [arguing Ninth Circuit's avoidance of *Hunter* doctrine has led to doctrinal instability for future political restructuring cases]; Miller, *"Democracy in Free Fall:" The Use of Ballot Initiatives to Dismantle State-Sponsored Affirmative Action Programs* (1999) 1999 Ann. Surv. Am. L. 1, 37 [faulting Ninth Circuit's distinguishing of *Hunter* as flawed]; Sealing, *Proposition 209 as Proposition 14 (As Amendment 2): The Unremarked Death of Political Structure Equal Protection* (1999) 27 Cap. U. L.Rev. 337, 338-39 [arguing Ninth Circuit wrongly ignored political structure equal protection in *Coalition II*]; Lazos Vargas, *Judicial Review of Initiatives and Referendums in Which Majorities Vote on Minorities' Democratic Citizenship* (1999) 60 Ohio St. L.J. 399, 537 [finding Ninth Circuit misses the main thrust of the *Hunter/Romer* line of cases]; Amar, *Recent Cases: The Equal Protection Challenge to Proposition 209* (1998) 5 Asian L.J. 323, 323, 328 [finding Ninth Circuit wide of the mark in not applying the equal protection analysis established in *Hunter* and *Seattle*]; Comment, *Rough Terrain Ahead: A New Course for Racial Preference Programs* (1998) 49 Mercer L.Rev. 915, 934 [faulting Ninth Circuit interpretation of equal protection under *Hunter* and *Washington*]; Comment, *Constitutional Law: The Redefinition of "Minority" and its Impact on Political Structure Equal Protection Analysis* (1997) 9 U. Fla. J.L. & Pub. Pol'y 121, 126-27 [arguing Ninth Circuit distorted *Hunter* doctrine by redefining "minority"]; Note, *Gender Blindness and the Hunter Doctrine* (1997) 107 Yale L.J. 261, 261 [criticizing Ninth Circuit's variance from *Hunter* doctrine as undermining gender-based equal protection]; Comment, *A World Without Color: The California Civil Rights Initiative and the Future of Affirmative Action* (1997) 38 Santa Clara L.Rev. 235, 263 [finding Ninth Circuit's analysis of

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Given the uncertainty over whether Proposition 209 violates the political process arm of the equal protection clause by singling out race-based and gender-based contracting and employment laws from all other problems in the same area, the Court should address that issue if it chooses to grant review. Indeed, the issue of whether Proposition 209 is constitutional presents a far more important question of law than the fact-specific issue of whether the City's ordinance is mandated by the federal question.

III. THE LOWER COURT'S ERRONEOUS INTERPRETATION OF A GOVERNING HUMAN RIGHTS TREATY SHOULD ALSO BE REVIEWED BECAUSE IT CREATES CONFLICTS REGARDING AN IMPORTANT QUESTION OF LAW.

If this Court grants review, it should also review whether Proposition 209 contravenes CERD, a human rights treaty ratified by the United States in 1994.[5] This is an important question of law not only because a ratified treaty like CERD is the law of the land under the supremacy clause (U.S. Const., Art. VI, cl. 2), but also because California is one of the most

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the constitutional issues before it suggests a lack of understanding of the United States Constitution]; Margolis, *Affirmative Action: Deja Vu All Over Again?* (1997) 27 Sw. U. L.Rev. 1, 65 [warning that Ninth Circuit's opinion will allow Equal Protection Clause to perpetrate racial supremacy]; Spann, *Proposition 209* (1997) 47 Duke L.J. 187, 252 [criticizing Ninth Circuit failure to develop the arguments necessary to justify such a major jurisprudential revolution]; but see Carcieri, *A Progressive Reply to Professor Oppenheimer on Proposition 209* (2000) 40 Santa Clara L.Rev. 1105, 1118 [contending *Hunter/Seattle* doctrine does not apply to invalidate Proposition 209]; Kmiec, *The Abolition of Public Racial Preference--An Invitation to Private Racial Sensitivity* (1997) 11 Notre Dame J.L. Ethics & Pub. Pol'y 1, 6-7 [suggesting *Seattle* was not sufficiently analogous to invalidate Proposition 209].

[5] The full text of the treaty is attached hereto as Appendix 3 for the convenience of the Court.

racially diverse states in the country with a large stake in the subject matter of the treaty.

In this case, the lower court correctly recognized that treaties into which the United States has entered preempt all contrary state law. (App. 1 to Petition at p. 14; *United States v. Pink* (1942) 315 U.S. 203, 230-31.) But it incorrectly interpreted CERD, which mandates race-based affirmative action under some conditions, as instead mandating race-based *or race-neutral* affirmative action. So interpreted, held the court, Proposition 209 can be harmonized with the treaty, and the treaty does not preempt it. (App.1 to Petition at p.18.) The lower court's ruling should be reviewed because it conflicts with other California and federal authorities on treaty interpretation.

Under well-established federal law, courts must construe a treaty "liberally to give effect to the purpose that animates it." (*Bacardi Corp. v. Domenech* (1940) 311 U.S. 150, 163; see also *Kolovrat v. Oregon* (1961) 366 U.S. 187, 193 [the U.S. Supreme Court "has many times set its face against treaty interpretations that unduly restrict rights a treaty is adopted to protect"].) This is because "a treaty ratified by the United States is not only the law of this land, see U.S. Const., Art. II, § 2, but also an agreement among sovereign powers." (*Zicherman v. Korean Air Lines Co.* (1996) 516 U.S. 217, 226.) Moreover, although federal law is normally construed when possible to avoid conflicts with state law, there is no such presumption in favor of saving state laws from preemption by treaties. (*El Al Israel Airlines, Ltd. v. Tseng* (1999) 525 U.S. 155, 175.) Rather, "the focus of the [treaty] and the perspective of our treaty partners" must be of primary importance. (*Ibid.*)

Accordingly, courts should " give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties." (*Air France v. Saks* (1985) 470 U.S. 392, 399.) Interpretation begins "with the text of the treaty and the context in which the written words are used." (*Volkswagenwerk Aktiengesellschaft v. Schlunk* (1988) 486 U.S. 694, 699 [internal quotation marks omitted].) "The clear import of treaty language controls unless 'application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.' " (*Sumitomo Shoji America, Inc. v. Avagliano* (1982) 457 U.S. 176, 180 [quoting *Maximov v. United States* (1963) 373 U.S. 49, 54].) A court may also consult the history of the treaty, its negotiations, and the practical construction adopted by the parties, and it may bring other rules of construction to bear on difficult passages. (*Eastern Airlines, Inc. v. Floyd* (1991) 499 U.S. 530, 535.) As treaty interpretation is a question of federal law, California cases rely on these same interpretive principles. (See, e.g., *Denlinger v. Chinadotcom Corp.* (2003) 110 Cal.App.4th 1396, 1400 [first step in interpretation is to look at the text of the treaty in the context in which it appears; court can also resort to history, negotiations, and practical construction adopted by the parties; liberal interpretation favoring treaty rights is required].)

In this case, the Court of Appeal departed from these canons by interpreting the treaty language in a manner at odds with the context in which it arises, inconsistent with the treaty's purpose, and unduly restrictive of treaty rights.

The provision of CERD defining the disputed term, "special measures," appears in Article 1, which defines the scope of the "racial

discrimination" the treaty seeks to end. Paragraph 1 of Article 1 presents a general definition of "racial discrimination":

> In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race . . . which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise . . . of human rights and fundamental freedoms . . . .

(App.3 to Answer at p.546, art. 1(1).) Three qualifying paragraphs follow that all carve out various race- or nationality-based practices from the blanket definition in Article 1(1). Article 1, paragraph 2 explains that the Convention does not apply to distinctions states make between citizens and non-citizens. Article 1, paragraph 3 provides that the Convention does not reach laws concerning citizenship or naturalization, provided those laws do not target any particular nationality. And, at issue here, paragraph 4 provides:

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

(App.3 to Answer at p.546, art. 1(4) [emphasis added].)

Reading this language in context, the plain import of paragraph 4 is that "special measures" are *race-based* measures taken to benefit minorities who have not yet achieved the equal enjoyment of rights and freedoms. This is why the term "special measures" is placed in the article defining and carving out exclusions to "racial discrimination," and this is why it is

important to announce that special measures should not be deemed to be racial discrimination.

There is no similar internal logic to the treaty if, as the Court of Appeal concluded, "special measures" means just any sort of helpful measure, whether race-based or race-neutral. The definition of "special measures" does not say that. It says that special measures are measures taken to "secur[e] adequate advancement" of affected groups and that they "should not be deemed racial discrimination." (App. 3 to Answer at p.546, art. 1(4).) Nor does CERD anywhere indicate that its concern with the interplay between "racial discrimination" and "special measures" applies only to some subset of special measures. But the Court of Appeal is not at liberty to add what it considers to be missing terms. (*Guardianship of Ariana K., supra*, (2004) 120 Cal.App.4th 690, 706 [" 'To alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions.' "] [quoting *Chan v. Korean Air Lines, Ltd.* (1989) 490 U.S. 122, 135] [internal citations omitted].)

Nor does the lower court's analysis best serve the purpose of the treaty: to end racial discrimination. To the contrary, its interpretation takes race-based affirmative action—one tool for ending entrenched, systemic race discrimination that the treaty foresees, approves and under some circumstances requires[6]—entirely off the table by allowing Proposition 209

[6] Article 2 paragraph 2 of the treaty provides:

> State Parties *shall*, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them . . . .

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always to force a race-neutral choice instead. This cannot be squared with the principles of treaty interpretation requiring liberal construction and the preeminence of the clear import of treaty language over state law.

The lower court also sows confusion when it defers without analysis to a statement of position in a State Department report to the CERD Committee that oversees signatory nations and advises them of their ongoing treaty obligations. (App.1 to Petition at pp.17-18.) In its report, the State Department asserted that CERD permits but does not require race-based affirmative action. (*Id.* at p.17.) The CERD Committee responded that this view is incorrect; rather, CERD *requires* the adoption of race-based remedies in the face of persistent disparities. (See United Nations Report of the Committee on the Elimination of Racial Discrimination (2001) General Assembly Official Records, Fifty-Sixth Session, Supplement No. 18 at ¶399 [emphasis added] [attached to Opening Brief on Appeal as Appendix C].)

While the lower court resolved this dispute in favor of the State Department as a matter of "great deference," that deference was misplaced and without support in the case law. The Court of Appeal relied on a single sentence from a U.S. Supreme Court decision that "[r]espect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty," (App.1 to Petition at p.18 [quoting *El Al Israel Airlines, supra,* 525 U.S. at p.168]), but it did not analyze that case or the prior cases on which it in turn relies. Those cases show that it is actually the consistent interpretation of two or more signatory nations, not just the

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(App.3 to Answer at p.547, art.2(2).)

unilateral views of the United States, that provide grounds for judicial deference.

The *El Al* case cited by the lower court rests its rule of deference on a prior case, *Sumitomo Shoji America, Inc. v. Avagliano* (1982) 457 U.S. 176. (*El Al Israel Airlines, supra,* 525 U.S. at p.168.) In that case, the Court was charged with interpreting a provision of a treaty between the U.S. and Japan. While the private litigants disagreed as to its meaning, both the U.S. and Japan shared the same view of the treaty. The Court explained, "Our role is limited to giving effect to the intent of the Treaty parties. When the parties to a treaty both agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, we must, absent extraordinarily strong contrary evidence, defer to that interpretation." (*Sumitomo Shoji, supra*, 457 U.S. at p.185.)

Sumitomo Shoji, in turn, relied for its principle of deference to government agencies on *Kolovrat, supra,* 366 U.S. 187. In that case, the Court explained: "While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight." (*Id.* at p.194.) It is meaningful that the word "departments" is in the plural, for as the Court next explains, both the United States and Yugoslavia, the two signatory nations, consistently construed the treaty at issue in the same way. (*Ibid.*)

Indeed, even the *El Al* case cited by the court below for its blind deference to the State Department's narrow view rather than the CERD Committee's expansive one, actually relies not only on the views and practices of the U.S. Executive Branch, but also on the "decisions of the courts of other Convention signatories" which "corroborate our

understanding." (*El Al, supra*, 525 U.S. 175 [noting also that the "opinions of our sister signatories" . . . are "entitled to considerable weight"] [quoting *Air France v. Saks* (1985) 470 U.S. 392, 404].)

In sum, the unreasonable view of the State Department, particularly where it stands in contrast to the view of the treaty's own interpretive body, cannot supplant the normal interpretive process. By carelessly granting "great deference" to the State Department in these circumstances, the Court of Appeal has created a conflict with the correct interpretive principles, as it also did by ignoring the plain language and context of the disputed treaty term, by inserting its preferred term, by acting at odds with the purpose of the treaty, and by embracing a narrowing construction over a liberal, expansive one. For all of these reasons, this Court should grant review to eliminate these newly minted conflicts in the law.

CONCLUSION

For the reasons set forth above, the City respectfully requests that this Court deny review. In the event that the Court grants review, the City

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asks that the Court also review the legality of Proposition 209 under the *Hunter/Seattle* doctrine and whether it is preempted by CERD.

Dated: June 18, 2007

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 7,840 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on June 18, 2007.

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UNITED NATIONS

International Convention on the Elimination of All Forms of Racial Discrimination

NEW YORK 7 March 1966

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The States Parties to this Convention,

Considering that the Charter of the United Nations is based on the principles of the dignity and equality inherent in all human beings, and that all Member States have pledged themselves to take joint and separate action, in co-operation with the Organization, for the achievement of one of the purposes of the United Nations which is to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion,

Considering that the Universal Declaration of Human Rights proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set out therein, without

distinction of any kind, in particular as to race, colour or national origin,

Considering that all human beings are equal before the law and are entitled to equal protection of the law against any discrimination and against any incitement to discrimination,

Considering that the United Nations has condemned colonialism and all practices of segregation and discrimination associated therewith, in whatever form and wherever they exist, and that the Declaration on the Granting of Independence to Colonial Countries and Peoples of 14 December 1960 (General Assembly resolution 1514 (XV)) has affirmed and solemnly proclaimed the necessity of bringing them to a speedy and unconditional end,

Considering that the United Nations Declaration on the Elimination of All Forms of Racial Discrimination of 20 November 1963 (General Assembly resolution 1904 (XVIII)) solemnly affirms the necessity of speedily eliminating racial discrimination throughout the world in all its forms and manifestations and of securing understanding of and respect for the dignity of the human person,

Convinced that any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination, in theory or in practice, anywhere,

Reaffirming that discrimination between human beings on the grounds of race, colour or ethnic origin in an obstacle to friendly and peaceful relations among nations and is capable of disturbing peace and security among peoples and the harmony of persons living side by side even within one and the same State,

Convinced that the existence of racial barriers is repugnant to the ideals of any human society,

Alarmed by manifestations of racial discrimination still in evidence in some areas of the world and by governmental policies based on racial superiority or hatred, such as policies of apartheid, segregation or separation,

Resolved to adopt all necessary measures for speedily eliminating racial discrimination in all its forms and manifestations, and to prevent and combat racist doctrines and practices in order to promote understanding between races and to build an international community free from all forms of racial segregation and racial discrimination,

Bearing in mind the Convention concerning Discrimination in respect of Employment and Occupation adopted by the International Labour Organisation in 1958, and the Convention against Discrimination in Education adopted by the United Nations Educational, Scientific and

Cultural Organization in 1960,

Desiring to implement the principles embodied in the United Nations Declaration on the Elimination of All Forms of Racial Discrimination and to secure the earliest adoption of practical measures to that end,

Have agreed as follows:

PART I

Article 1

1. In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.
2. This Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens.
3. Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nationality.
4. Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

Article 2

1. States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:
    - (a) Each State Party undertakes to engage in no act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all public authorities and public institutions, national and local, shall act in conformity with this obligation;
    - (b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;

- (c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;
- (d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;
- (e) Each State Party undertakes to encourage, where appropriate, integrationist multi-racial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division.

2. States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

Article 3

States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.

Article 4

States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

- (a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;
- (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such

organizations or activities as an offence punishable by law;
- (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

Article 5

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

- (a) The right to equal treatment before the tribunals and all other organs administering justice;
- (b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual, group or institution;
- (c) Political rights, in particular the rights to participate in elections--to vote and to stand for election--on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;
- (d) Other civil rights, in particular:
  - (i) The right to freedom of movement and residence within the border of the State;
  - (ii) The right to leave any country, including one's own, and to return to one's country;
  - (iii) The right to nationality;
  - (iv) The right to marriage and choice of spouse;
  - (v) The right to own property alone as well as in association with others;
  - (vi) The right to inherit;
  - (vii) The right to freedom of thought, conscience and religion;
  - (viii) The right to freedom of opinion and expression;
  - (ix) The right to freedom of peaceful assembly and association;
- (e) Economic, social and cultural rights, in particular:
  - (i) The rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;
  - (ii) The right to form and join trade unions;
  - (iii) The right to housing;
  - (iv) The right to public health, medical care, social security and social services;
  - (v) The right to education and training;
  - (vi) The right to equal participation in cultural activities;
- (f) The right of access to any place or service intended for use by the general public, such as transport, hotels, restaurants, cafes, theatres and parks.

Article 6

States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

Article 7

States Parties undertake to adopt immediate and effective measures, particularly in the fields of teaching, education, culture and information, with a view to combating prejudices which lead to racial discrimination and to promoting understanding, tolerance and friendship among nations and racial or ethnical groups, as well as to propagating the purposes and principles of the Charter of the United Nations, the Universal Declaration of Human Rights, the United Nations Declaration on the Elimination of All Forms of Racial Discrimination, and this Convention.

PART II

Article 8

1. There shall be established a Committee on the Elimination of Racial Discrimination (hereinafter referred to as the Committee) consisting of eighteen experts of high moral standing and acknowledged impartiality elected by States Parties from among their nationals, who shall serve in their personal capacity, consideration being given to equitable geographical distribution and to the representation of the different forms of civilization as well as of the principal legal systems.
2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by the States Parties. Each State Party may nominate one person from among its own nationals.
3. The initial election shall be held six months after the date of the entry into force of this Convention. At least three months before the date of each election the Secretary-General of the United Nations shall address a letter to the States Parties inviting them to submit their nominations within two months. The Secretary-General shall prepare a list in alphabetical order of all persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties.
4. Elections of the members of the Committee shall be held at a meeting of States Parties convened by the Secretary-General at United Nations Headquarters. At that meeting, for which two-thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those nominees who obtain the largest

number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

5.
   c (a) The members of the Committee shall be elected for a term of four years. However, the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these nine members shall be chosen by lot by the Chairman of the Committee.
   c (b) For the filling of casual vacancies, the State Party whose expert has ceased to function as a member of the Committee shall appoint another expert from among its nationals, subject to the approval of the Committee.
6. States Parties shall be responsible for the expenses of the members of the Committee while they are in performance of Committee duties.

Article 9

1. States Parties undertake to submit to the Secretary-General of the United Nations, for consideration by the Committee, a report on the legislative, judicial, administrative or other measures which they have adopted and which give effect to the provisions of this Convention: (a) within one year after the entry into force of the Convention for the State concerned; and (b) thereafter every two years and whenever the Committee so requests. The Committee may request further information from the States Parties.
2. The Committee shall report annually, through the Secretary-General, to the General Assembly of the United Nations on its activities and may make suggestions and general recommendations based on the examination of the reports and information received from the States Parties. Such suggestions and general recommendations shall be reported to the General Assembly together with comments, if any, from States Parties.

Article 10

1. The Committee shall adopt its own rules of procedure.
2. The Committee shall elect its officers for a term of two years.
3. The secretariat of the Committee shall be provided by the Secretary-General of the United Nations.
4. The meetings of the Committee shall normally be held at United Nations Headquarters.

Article 11

1. If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may bring the matter to the attention of the Committee. The Committee shall then transmit the communication to the State Party concerned. Within three months,

the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.

2. If the matter is not adjusted to the satisfaction of both parties, either by bilateral negotiations or by any other procedure open to them, within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter again to the Committee by notifying the Committee and also the other State.
3. The Committee shall deal with a matter referred to it in accordance with paragraph 2 of this article after it has ascertained that all available domestic remedies have been invoked and exhausted in the case, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged.
4. In any matter referred to it, the Committee may call upon the States Parties concerned to supply any other relevant information.
5. When any matter arising out of this article is being considered by the Committee, the States Parties concerned shall be entitled to send a representative to take part in the proceedings of the Committee, without voting rights, while the matter is under consideration.

Article 12

1.
   - (a) After the Committee has obtained and collated all the information it deems necessary, the Chairman shall appoint an ad hoc Conciliation Commission (hereinafter referred to as the Commission) comprising five persons who may or may not be members of the Committee. The members of the Commission shall be appointed with the unanimous consent of the parties to the dispute, and its good offices shall be made available to the States concerned with a view to an amicable solution of the matter on the basis of respect for this Convention.
   - (b) If the States parties to the dispute fail to reach agreement within three months on all or part of the composition of the Commission, the members of the Commission not agreed upon by the States parties to the dispute shall be elected by secret ballot by a two-thirds majority vote of the Committee from among its own members.
2. The members of the Commission shall serve in their personal capacity. They shall not be nationals of the States parties to the dispute or of a State not Party to this Convention.
3. The Commission shall elect its own Chairman and adopt its own rules of procedure.
4. The meetings of the Commission shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Commission.
5. The secretariat provided in accordance with article 10, paragraph 3,

of this Convention shall also service the Commission whenever a dispute among States Parties brings the Commission into being.

6. The States parties to the dispute shall share equally all the expenses of the members of the Commission in accordance with estimates to be provided by the Secretary-General of the United Nations.
7. The Secretary-General shall be empowered to pay the expenses of the members of the Commission, if necessary, before reimbursement by the States parties to the dispute in accordance with paragraph 6 of this article.
8. The information obtained and collated by the Committee shall be made available to the Commission, and the Commission may call upon the States concerned to supply any other relevant information.

Article 13

1. When the Commission has fully considered the matter, it shall prepare and submit to the Chairman of the Committee a report embodying its findings on all questions of fact relevant to the issue between the parties and containing such recommendations as it may think proper for the amicable solution of the dispute.
2. The Chairman of the Committee shall communicate the report of the Commission to each of the States parties to the dispute. These States shall, within three months, inform the Chairman of the Committee whether or not they accept the recommendations contained in the report of the Commission.
3. After the period provided for in paragraph 2 of this article, the Chairman of the Committee shall communicate the report of the Commission and the declarations of the States Parties concerned to the other States Parties to this Convention.

Article 14

1. A State Party may at any time declare that it recognizes the competence of the Committee to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that State Party of any of the rights set forth in this Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.
2. Any State Party which makes a declaration as provided for in paragraph 1 of this article may establish or indicate a body within its national legal order which shall be competent to receive and consider petitions from individuals and groups of individuals within its jurisdiction who claim to be victims of a violation of any of the rights set forth in this Convention and who have exhausted other available local remedies.
3. A declaration made in accordance with paragraph 1 of this article and the name of any body established or indicated in accordance with paragraph 2 of this article shall be deposited by the State Party concerned with the Secretary-General of the United Nations, who

shall transmit copies thereof to the other States Parties. A declaration may be withdrawn at any time by notification to the Secretary-General, but such a withdrawal shall not affect communications pending before the Committee.

4. A register of petitions shall be kept by the body established or indicated in accordance with paragraph 2 of this article, and certified copies of the register shall be filed annually through appropriate channels with the Secretary-General on the understanding that the contents shall not be publicly disclosed.
5. In the event of failure to obtain satisfaction from the body established or indicated in accordance with paragraph 2 of this article, the petitioner shall have the right to communicate the matter to the Committee within six months.
6.
   - (a) The Committee shall confidentially bring any communication referred to it to the attention of the State Party alleged to be violating any provision of this Convention, but the identity of the individual or groups of individuals concerned shall not be revealed without his or their express consent. The Committee shall not receive anonymous communications.
   - (b) Within three months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.
7.
   - (a) The Committee shall consider communications in the light of all information made available to it by the State Party concerned and by the petitioner. The Committee shall not consider any communication from a petitioner unless it has ascertained that the petitioner has exhausted all available domestic remedies. However, this shall not be the rule where the application of the remedies is unreasonably prolonged.
   - (b) The Committee shall forward its suggestions and recommendations, if any, to the State Party concerned and to the petitioner.
8. The Committee shall include in its annual report a summary of such communications and, where appropriate, a summary of the explanations and statements of the States Parties concerned and of its own suggestions and recommendations.
9. The Committee shall be competent to exercise the functions provided for in this article only when at least ten States Parties to this Convention are bound by declarations in accordance with paragraph 1 of this article.

Article 15

1. Pending the achievement of the objectives of the Declaration on the Granting of Independence to Colonial Countries and Peoples, contained in General Assembly resolution 1514 (XV) of 14

December 1960, the provisions of this Convention shall in no way limit the right of petition granted to these peoples by other international instruments or by the United Nations and its specialized agencies.

2.
   - (a) The Committee established under article 8, paragraph 1, of this Convention shall receive copies of the petitions from, and submit expressions of opinion and recommendations on these petitions to, the bodies of the United Nations which deal with matters directly related to the principles and objectives of this Convention in their consideration of petitions from the inhabitants of Trust and Non-Self-Governing Territories and all other territories to which General Assembly resolution 1514 (XV) applies, relating to matters covered by this Convention which are before these bodies.
   - (b) The Committee shall receive from the competent bodies of the United Nations copies of the reports concerning the legislative, judicial, administrative or other measures directly related to the principles and objectives of this Convention applied by the administering Powers within the Territories mentioned in sub-paragraph (a) of this paragraph, and shall express opinions and make recommendations to these bodies.

3. The Committee shall include in its report to the General Assembly a summary of the petitions and reports it has received from United Nations bodies, and the expressions of opinion and recommendations of the Committee relating to the said petitions and reports.
4. The Committee shall request from the Secretary-General of the United Nations all information relevant to the objectives of this Convention and available to him regarding the Territories mentioned in paragraph 2 (a) of this article.

Article 16

The provisions of this Convention concerning the settlement of disputes or complaints shall be applied without prejudice to other procedures for settling disputes or complaints in the field of discrimination laid down in the constituent instruments of, or in conventions adopted by, the United Nations and its specialized agencies, and shall not prevent the States Parties from having recourse to other procedures for settling a dispute in accordance with general or special international agreements in force between them.

PART III

Article 17

1. This Convention is open for signature by any State Member of the United Nations or member of any of its specialized agencies, by any State Party to the Statute of the International Court of Justice, and

by any other State which has been invited by the General Assembly of the United Nations to become a Party to this Convention.

2. This Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 18

1. This Convention shall be open to accession by any State referred to in article 17, paragraph 1, of the Convention.
2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article 19

1. This Convention shall enter into force on the thirtieth day after the date of the deposit with the Secretary-General of the United Nations of the twenty-seventh instrument of ratification or instrument of accession.
2. For each State ratifying this Convention or acceding to it after the deposit of the twenty-seventh instrument of ratification or instrument of accession, the Convention shall enter into force on the thirtieth day after the date of the deposit of its own instrument of ratification or instrument of accession.

Article 20

1. The Secretary-General of the United Nations shall receive and circulate to all States which are or may become Parties to this Convention reservations made by States at the time of ratification or accession. Any State which objects to the reservation shall, within a period of ninety days from the date of the said communication, notify the Secretary-General that it does not accept it.
2. A reservation incompatible with the object and purpose of this Convention shall not be permitted, nor shall a reservation the effect of which would inhibit the operation of any of the bodies established by this Convention be allowed. A reservation shall be considered incompatible or inhibitive if at least two-thirds of the States Parties to this Convention object to it.
3. Reservations may be withdrawn at any time by notification to this effect addressed to the Secretary-General. Such notification shall take effect on the date on which it is received.

Article 21

A State Party may denounce this Convention by written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

Article 22

Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, which is not settled by negociation or by the procedures expressly provided for in this Convention, shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.

Article 23

1. A request for the revision of this Convention may be made at any time by any State Party by means of a notification in writing addressed to the Secretary-General of the United Nations.
2. The General Assembly of the United Nations shall decide upon the steps, if any, to be taken in respect of such a request.

Article 24

The Secretary-General of the United Nations shall inform all States referred to in article 17, paragraph 1, of this Convention of the following particulars

- (a) Signatures, ratifications and accessions under articles 17 and 18;
- (b) The date of entry into force of this Convention under article 19;
- (c) Communications and declarations received under articles 14, 20 and 23;
- (d) Denunciations under article 21.

Article 25

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit certified copies of this Convention to all States belonging to any of the categories mentioned in article 17, paragraph 1, of the Convention.

IN FAITH WHEREOF the undersigned, being duly authorized thereto by their respective Governments, have signed the present Convention, opened for signature at New York, on the seventh day of March, one thousand nine hundred and sixty-six.

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PROOF OF SERVICE

I, DIANA QUAN, declare as follows:

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

On June 18, 2007, I served the attached:

ANSWER TO PETITION FOR REVIEW

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

By Express
SHARON L. BROWNE, ESQ.
TIMOTHY M. SANDEFUR, ESQ.
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, CA 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

By Express
JOHN H. FINDLEY
PAUL J. BEARD, II
ARTHUR B. MARK, III
Pacific Legal Foundation
3900 Lennane Drive, Suite 200
Sacramento, CA 95834
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

☒ **BY EXPRESS SERVICES OVERNITE**: I caused true and correct copies of the above documents to be placed and sealed in envelope(s) addressed to the addressee(s) and I caused such envelope(s) to be delivered to EXPRESS SERVICES OVERNITE for overnight courier service to the office(s) of the addressee(s).

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

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

☒ **BY PERSONAL SERVICE**: I caused true and correct copies of the above documents to be placed and sealed in envelope(s) addressed to the addressee(s) and I caused such envelope(s) to be delivered by hand on the office(s) of the addressee(s).

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

Executed June 18, 2007, at San Francisco, California.

DIANA QUAN