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' OPENING BRIEF

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ISSUES STATED BY THE COURT

This Court has directed the parties to address the following issues:

1. Did the Court of Appeal properly remand the case to the trial court to determine in the first instance whether the ordinance was required by the Federal Equal Protection Clause as a narrowly tailored remedial program to remedy ongoing, pervasive discrimination in public contracting?

2. 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)?

3. 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 Sch. Dist. No. 1*, 458 U.S. 457 (1982); *Hunter v. Erickson*, 393 U.S. 385 (1969).

STANDARD OF REVIEW

The trial court must grant summary judgment "if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Code of Civ. Proc.

§ 437c(c). On appeal, both the grant and denial of a motion for summary judgment are subject to de novo review. *Merrill v. Navegar, Inc.*, 26 Cal. 4th 465, 476 (2001). In addition, "issues of statutory and constitutional interpretation raise pure questions of law, subject to independent appellate review." *Slocum v. State Bd. of Equalization*, 134 Cal. App. 4th 969, 974 (2005).

STATEMENT OF THE CASE

More than 11 years ago, on November 6, 1996, the people of the State of California added Article I, Section 31, to the California Constitution when they approved Proposition 209. (Section 31 or Proposition 209.) Proposition 209 prohibits the state and its political subdivisions from "discriminat[ing] against, or grant[ing] 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).[1] This constitutional prohibition against race- and sex-based discrimination and preferences in public contracting applies to all subdivisions of the state including any city and county such as San Francisco. Cal. Const. art. I, § 31(a) and (f).

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[1] All references to race and sex include the categories identified in Section 31, including "color, ethnicity, and national origin."

Rejecting compliance with Section 31, the City and County of San Francisco (San Francisco or City), a political subdivision of the State of California, on June 1, 2003, reenacted Chapter 12D.A, titled "Minority/Women/Local Business Utilization Ordinance" of the San Francisco Administrative Code (Chapter 12D.A or Ordinance), Joint Appendix (JA) Vol. III at 684-763, with an operative date of July 1, 2003. *Id.* at 763. Chapter 12D.A. at 1. Chapter 12D.A continues the City's preferential treatment of minority-owned business enterprises (MBEs) and women-owned business enterprises (WBEs) with no material operational differences from City's predecessor enactments. As noted by the court below, Petition for Review Exhibit (Pet. Exh.) 1 at 6, City's 2003 Ordinance reenacted the 1998 ordinance without substantial change. The City's MBE/WBE preference program in public contracting dates back over 23 years to 1984, Pet. Exh. 1 at 5, JA III at 685:9. The Ordinance expires on June 30, 2008. JA III at 763.

Section 12D.A.3 of the Ordinance sets forth City's determination that "the relationship between the percentages of MBEs[2]/WBEs in the relevant sector of the San Francisco business community and their respective shares of City contract dollars [is the] measure of the effectiveness of this ordinance in remedying the effects of the aforementioned discrimination." JA III

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[2] The Ordinance defines "minority" to mean members of the following ethnic groups: African Americans, Arab Americans, Asian Americans, Iranian Americans, Latino Americans, and Native Americans. JA III at 728:1-21.

at 719:9-12. City's program is based on the principle that City contracting dollars shall be awarded to MBEs and WBEs in proportion to their respective percentages in the City's business community. *Id.* In plain words, the ordinance requires race and sex balancing of MBE/WBEs and City dollars.

In order to meet its race and sex preference goals, the MBE/WBE Ordinance requires City departments to give specified discounts on bids submitted by MBE/WBEs and requires bidders for prime contracts either to meet MBE/WBE subcontractor goals set by City or show a "good faith effort" to do so. Pet. Exh. 1 at 5-6.

A. Bid Discount Program Grants Preferences to MBE/WBE Prime Contractors

In selecting prime contractors, the Ordinance provides for a 10% bid discount for MBE/WBEs; a 7.5% bid discount for a joint venture with a MBE/WBE participation that equals or exceeds 40%; and a 5% bid discount for a joint venture with MBE/WBE participation that equals or exceeds 35% but is under 40%. JA III at 740:6-14.

B. City's Subcontracting Program Grants Preferences to MBE/WBEs

In addition, the Director of City's Human Rights Commission sets MBE/WBE subcontracting "participation goals," i.e., race and sex quotas, for each City public works construction project. JA III at 758-59. If the prime contractor fails to obtain the specific dollar percentages of work to be

performed by the MBEs and WBEs, the prime contractor's bid will be rejected as Non-Responsive unless the contractor submits evidence of its good faith efforts to recruit MBE and WBE subcontractors. *Id.*

The "good faith" option requires prime contractors to meet 10 requirements that give special advantages to MBE/WBE subcontractors. No similar requirements are imposed for recruitment of nonminority or male-owned businesses. JA III at 725-26.

Any contract modification or amendment that increases the total dollar value of a contract by more than 10% requires compliance with the MBE/WBE quota and recruitment requirements. JA III at 743. Prime contractors failing to satisfy City's quota or "good faith effort" to meet that quota are deemed nonresponsive and their bids are rejected. JA III at 759:19-20.

C. City's Bid Discount Program Provides Special Advantages to MBEs/WBEs

Further, the MBE/WBE Ordinance requires City departments to provide special notices of future public contracting opportunities to MBEs and WBEs. It also grants other special competitive advantages not provided to nonminority- and nonwoman-owned businesses. These special advantages include requiring the authorities awarding the City contracts to use good faith efforts to solicit bids from MBEs and WBEs, and to provide assistance to MBEs and WBEs to increase their ability to compete effectively for City contracts. 12D.A.5, JA III at 324-25; *id.* at 740, 12D.A.9(A)1. All City

authorities are required to use good faith efforts to attain the MBE/WBE participation goals and failure to do so is reported to the Board of Supervisors through the Director of the Human Rights Commission's annual report. 12D.A.8, JA III at 739.

Petitioner Coral Construction Inc. (Coral), a non-MBE/WBE general engineering contractor challenged these race- and sex-based preferences in 2002. First Amended Complaint, JA I at 1-58. Petitioner Schram Construction, Inc. (Schram), is a non-MBE/WBE licensed contractor, JA I at 71, has bid on City public contracts in the past, and is continuing to bid on City contracts both as a prime contractor and as a subcontractor. Schram filed its facial challenge to the 2003 MBE/WBE Ordinance in 2003. JA I at 68-144. The superior court consolidated the two cases, granted plaintiffs' motion for summary judgment, denied City's cross-motion, and permanently enjoined the challenged portions of City's preference ordinance. Pet. Exh. 1 at 9. A final judgment in favor of the plaintiffs was entered on September 10, 2004. JA XIV at 3620. City then appealed the judgment. JA XIV at 3624.

On April 18, 2007, the court of appeal filed its opinion affirming the judgment but remanded the matter for the limited purpose of adjudicating whether "City presented the extreme case of intentional discrimination in public contracting in San Francisco such that a narrowly tailored remedial preference program could be constitutionally required." Pet. Exh. 1 at 34.

Petitioners' Petition for Rehearing was denied on May 14, 2007, Pet. Exh. 2, and the opinion became final on May 18, 2007. This Court granted review on August 22, 2007, and on September 5, 2007, extended the time to file this brief to October 19, 2007.

SUMMARY OF ARGUMENT

Section 31 categorically prohibits discrimination and preferential treatment in public contracting and, as this Court found in *Hi-Voltage Wire Works, Inc. v. City of San Jose*, "[i]ts literal language admits no 'compelling state interest' exception." 24 Cal. 4th 537, 567 (2000). This means that race- and sex-based programs are prohibited regardless of whether they can meet the strict scrutiny test. Even if the Equal Protection Clause creates a duty to eliminate past and present discrimination, the City's voluntary discriminatory program fails. First, the City must attempt race-neutral means before resorting to a race-conscious program. Yet, there is no evidence in the record that the City has attempted to remedy its own discrimination through race-neutral means such as disciplining City employees or contractors for discrimination. Second, San Francisco failed on cross motions for summary judgment, as conceded in City's Ordinance statistics and admissions in discovery, to carry its burden to prove intentional discrimination against minority and women business enterprises. Third, City failed to rebut the dispositive fact that its mandated preferences are in no way narrowly tailored to remedy City's

claimed forms of discrimination. City's race and sex preferences therefore violate the holdings of *Hi-Voltage*, and the subsequent court of appeal holdings.

Where, as here, the standard of review is de novo, "an appellate court can and should make its own determination when the case involves the 'resolution of questions of law where the facts are undisputed.'" *Seligsohn v. Day*, 121 Cal. App. 4th 518, 522 (2004) (citations omitted). Remanding this case in order to give San Francisco a second opportunity to prove "the extreme case of intentional discrimination in public contracting," and "a narrowly tailored remedial preference program," Pet. Exh. 1 at 34, when City failed to make that case on cross-motions for summary judgment contravenes that standard.

City has also failed to show that Section 31's federal funding exception requires its race- and sex-based preferences. City has not shown that any federal statute or regulation requires its preferences. Further, City has not shown the required factual predicate of discrimination against minorities and women or that its preferences are narrowly tailored to redress specifically identified discrimination as required by federal law. Further, City has not employed the mandatory race neutral measures such as disciplining alleged discriminators. City has therefore failed to carry its burden of proving that its preferences are necessary to prevent the loss of federal funds.

City has further failed to show that Section 31's prohibition on race- and sex-based discrimination or preference improperly disadvantages minority groups by making it more difficult to enact legislation on their behalf. City fails to take into account that U.S. Census Bureau figures show that its designated "minority" groups are in fact the majority in California, and together with women, an overwhelming majority. The thrust of the *Hunter/Seattle* doctrine is that a majority may not adopt racial classifications in order to impose obstructions to remedying discrimination. But as this Court held in *Hi-Voltage*, Section 31 does not adopt racial classifications, it prohibits them. 24 Cal. 4th at 561. City further ignores the fact that racial preferences are suspect and presumed to be invalid. While the Federal and state Constitutions protect against race-based discrimination they do not mandate suspect and presumably invalid race preferences. City has therefore failed to carry its burden to show that Section 31's prohibition of its preferences are barred by the Federal Constitution.

The decisions of this Court and the courts of appeal cited herein should therefore be upheld by affirming the judgment of the trial court in its entirety and without remand.

ARGUMENT

I

A CITY THAT FAILED TO CARRY ITS BURDEN TO ESTABLISH ITS RACE AND SEX PREFERENCES WERE A NARROWLY TAILORED REMEDY FOR ONGOING PERVASIVE DISCRIMINATION AGAINST MINORITIES AND WOMEN IN PUBLIC CONTRACTING IS NOT ENTITLED TO A REMAND TO MAKE A SECOND ATTEMPT TO PROVE SUCH DISCRIMINATION AND NARROW TAILORING

A. The Federal and State Constitutions Do Not Require State and Local Governments to Voluntarily Implement Race- or Sex-Based Preferences to Remedy Identified Discrimination

The lower court affirmed that the City's MBE/WBE Ordinance violates Section 31's prohibition against race- and sex-based discrimination and preferences in the operation of public contracting. Pet. Exh. 1 at 34. Nonetheless, the court remanded this matter for the limited purpose of determining "whether the Ordinance is mandated by the federal Constitution as a narrowly tailored remedial program to remedy ongoing pervasive discrimination in public contracting." *Id.* The lower court misreads this Court's decision in *Hi-Voltage*, 24 Cal. 4th 537, and subsequent appellate court decisions. These decisions clearly hold: that Section 31 does not violate the Federal Equal Protection Clause in banning all voluntary race- and sex-based programs including race- and sex-based remedial programs

voluntarily adopted by the City; is not synonymous with the Equal Protection Clause; and that Section 31 allows no exception for compelling state interest. This Court should reject the City's invitation to create a judicial exception to Section 31's mandate of absolute equality in public contracting.

Article I, Section 31, of the California Constitution provides in pertinent part:

> (a) 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 . . . contracting.
> . . . .
> (f) For the purposes of this section, "State" shall include . . . any . . . city and county . . . .

Cal. Const. art. I, §§ 31(a), (f).

Section 31 goes further to protect against discrimination than the Equal Protection Clause. *Coal. for Econ. Equity v. Wilson*, 946 F. Supp. 1480 (N.D. Cal. 1996), was the first court to interpret Section 31. The federal district court found that Proposition 209 conflicted with federal law because, among other things, it would prevent government agencies from enacting race-based and sex-based remedies to correct identified instances of past discrimination. *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 698 (9th Cir. 1997) (*Wilson*). The district court recognized that Proposition 209 was intended to do something more than "simply restate existing law" prohibiting discrimination and restricting government use of race and sex preferences. 946 F. Supp.

at 1489. In identifying public contracting programs that would be outlawed by Proposition 209, the court recognized that "[t]hese programs are designed to address the continuing effects of past or present bias against the use of women- and minority-owned contractors on public sector projects." 946 F. Supp. at 1496. The district court issued a preliminary injunction and the matter was immediately appealed to the Ninth Circuit Court of Appeals.

The Ninth Circuit quickly dismissed any notion that the Federal Constitution required discrimination or preferences on the basis of race as a remedy for past discrimination. "That the Constitution *permits* the rare race-based or gender-based preference hardly implies that the state cannot ban them altogether." *Wilson*, 122 F.3d at 708. As the court noted: "The Fourteenth Amendment, lest we lose sight of the forest for the trees, does not require what it barely permits." *Id.* at 709. A race- and sex-based program that meets the federal standards does not mean that the program is constitutionally required. *Id.*

This Court agreed in *Hi-Voltage* that Section 31 does not violate the Equal Protection Clause and goes further to protect against discrimination than the Equal Protection Clause, holding that Section 31 is similar to, but not synonymous with the Equal Protection Clause. 24 Cal. 4th at 567. Under equal protection principles, state actions that rely upon suspect classifications must be tested under strict scrutiny to determine whether there is a compelling

governmental interest. This Court found 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 (emphasis added).

This Court also found that Section 31 repudiated decisional authority of the Federal Equal Protection Clause "that permitted such discrimination and preferential treatment, notwithstanding antecedent statutory and constitutional law to the contrary." *Id.* at 566.

The guidance and interpretation set by this Court in *Hi-Voltage* has been followed consistently by lower appellate courts. In *Connerly v. State Pers. Bd.*, 92 Cal. App. 4th 16 (2001), the Third District Court of Appeal said that Section 31 "prohibits discrimination against or preferential treatment to individuals or groups regardless of whether the governmental action could be justified under strict scrutiny." *Id.* at 42. *Connerly* found that Section 31 barred race- and sex-based programs including state civil service and community college "hiring timetables and goals" and preferential "participation goals" for procurement, services, bonding, and other contracts let by the State Lottery, Treasurer, and Department of General Services. As the court pointed out:

> Proposition 209 overlaps, but is not synonymous with, the principles of equal protection . . . . Under equal protection principles, all state actions that rely upon suspect classifications must be tested under strict scrutiny, but those actions which can meet the rigid strict scrutiny test are constitutionally permissible. Proposition 209, on the other hand, prohibits discrimination against or preferential treatment to individuals or groups regardless of whether the governmental action could be justified under strict scrutiny. In this respect, the distinction between what the federal Constitution permits and what it requires becomes particularly relevant . . . to the extent the federal Constitution would permit, but not require, the state to grant preferential treatment to suspect classes, Proposition 209 precludes such action.

Connerly, 92 Cal. App. 4th at 42-43 (citations omitted).

The argument that the Equal Protection Clause of the Federal Constitution permits the City to adopt a MBE/WBE Ordinance was soundly rejected in *Kidd v. State*, 62 Cal. App. 4th 386 (1998).

> "The [federal] Constitution permits the people to grant a narrowly tailored racial preference only if they come forward with a compelling interest to back it up. '[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.' 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."

Id. at 409-10 (quoting *Wilson*, 122 F.3d at 709 (citations omitted)).

Additionally, *Crawford v. Huntington Beach Union High Sch. Dist.*, 98 Cal. App. 4th 1275 (2002) (*Huntington Beach*), rejected an equal protection

defense to a Section 31 challenge to a school district's racial balancing program.

> The District proposes that the transfer policy is required under the equal protection clause of the Constitution of the United States. While there can be no question the United States Constitution prohibits a school district from acting to segregate schools, there is no federal constitutional mandate necessitating the implementation of a proactive program of integration. The United States Supreme Court has made it clear that such a plan *is not required* by the federal equal protection clause.

Id. at 1285.

It is plain that race- and sex-based preference programs for the purpose of remedying past and present discrimination are prohibited by Section 31 even if such programs serve a compelling state interest under the Federal Equal Protection Clause, or that the City's disparity study is narrowly tailored to justify a race-based discriminatory program. Section 31 has no compelling state interest exception.[3] This Court should reject the City's request to carve out a judicial exception to Section 31.

B. A Remand Is Inappropriate When City Failed to Carry Its Burden to Establish Discrimination or That Race and Sex Preferences Were a Narrowly Tailored Remedy

The court of appeal remanded the case to the trial court for "the limited purpose of adjudicating" "whether the City presented the extreme case of

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[3] This does not mean that the City can continue its discriminatory practices. Section 31 tolerates no discrimination by the City. The City has a duty under Section 31 to eliminate all discrimination in the operation of public contracting.

intentional discrimination in public contracting in San Francisco such that a narrowly tailored remedial preference program could be constitutionally required." Pet. Exh.1 at 34. If such a claim were available to the City, and as set forth above, under Section 31 it is not, it would be an affirmative defense and the City bears the burden of proving it. *Moss v. Superior Court (Ortiz)*, 17 Cal. 4th 396, 425 (1988).

The burden of proving this affirmative defense is particularly applicable in cases such as this one that involve race and sex classifications. "A racial classification is presumptively invalid, and the burden is on the government to demonstrate extraordinary justification." *Connerly*, 92 Cal. App. 4th at 36. Under California law, classification on the basis of sex is similarly suspect, *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 17 (1971), and the same burden applies.

While City raised numerous affirmative defenses in its Answer to First Amended Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief and Damages in *Coral*, JA I at 65-66 and Answer to Verified Complaint for Declaratory and Injunctive Relief in *Schram*, JA I at 150-51, none of the affirmative defenses made the claim of intentional discrimination by City. Intentional discrimination requires a showing of an intent to discriminate which City has failed to raise. And indeed, given that City has enforced its policy of race and sex preferences in favor of MBE/WBEs since 1984, Pet. Exh. 1 at 1, it cannot now claim intentional

discrimination against minorities and women. City had its chance to make its proof in the trial court and failed to do so. The lower court's remand in order to give City a second bite at the race and sex preference apple contravenes the decisions of this Court and the courts of appeal.

1. Remanding the Issue of Intentional Discrimination When the City Failed to Carry Its Burden to Prove That Issue Below Conflicts with the Decisions of This Court and the Courts of Appeal

In *Hi-Voltage*, 24 Cal. 4th 537, when the City of San Jose failed to show intentional discrimination, and therefore necessarily conceded, that its preference program was not constitutionally required, *id.* at 568, this Court affirmed the judgment without remand. *Id.* at 569.

In *C & C Constr., Inc. v. Sacramento Mun. Util. Dist.*, 122 Cal. App. 4th 284 (2004) (*SMUD*), plaintiff contractor C & C, similarly moved for summary judgment. Defendant Sacramento Municipal Utility District (SMUD) opposed that motion and itself moved for summary judgment, contending that its affirmative action program fell within Article I, Section 31(e), the federal funding exception of Proposition 209. The trial court granted C & C's motion and denied SMUD's. *Id.* at 291. When SMUD appealed the judgment and permanent injunction, the court of appeal noted:

> The trial court granted C & C's motion and denied SMUD's motion. The court held that the affirmative action program violates subdivision (a) of section 31. It reasoned that SMUD failed to establish an affirmative defense under subdivision (e) because it produced no evidence of express federal contractual

> conditions, laws, or regulations that made approval of federal funds contingent upon race-based discrimination. Nor did SMUD offer federal legal authority to support the conclusion that failure to use the affirmative action program would result in the loss of federal funds because federal agencies may not terminate funding without an administrative hearing and judicial review.

Id. at 297.

The court emphasized that in reviewing a summary judgment in favor of a plaintiff, the burden was on the government agency to prove its case below. "Here, C & C has shown it is entitled to judgment against SMUD because SMUD's affirmative action program violates section 31 and SMUD has not shown its program is necessary to maintain federal funding." *Id.* at 311. In emphasizing the importance of the burden on the government entity, the court held: "We conclude SMUD failed to proffer substantial evidence that its race-based discrimination is necessary to maintain federal funding. We therefore affirm the judgment." *Id.* at 291.

In contrast to the decision here, when the governmental entity failed to prove its case on cross-motions for summary judgment, the *SMUD* court did not remand for a second chance, but rather affirmed the judgment. This Court denied review of the *SMUD* decision on December 15, 2004. *Id.* at 284.

Connerly similarly emphasized the requirement on the government to prove its case in the first instance. "A racial classification is presumptively invalid, and the burden is on the government to demonstrate extraordinary

justification." 92 Cal. App. 4th at 36 (citing *Shaw v. Reno*, 509 U.S. 630, 643-44 (1993)); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 305, 311 (1978) (lead opinion).

Connerly found that, "when the plaintiff has made a sufficient showing to trigger strict scrutiny review, the burden of justification is both demanding and entirely upon the government." 92 Cal. App. 4th at 43 (citing *Bakke*, 438 U.S. at 306 and *Sail'er Inn*, 5 Cal. 3d at 16-17). *Connerly* concluded: "[W]hen the government chooses to rely upon racial and gender distinctions, the scheme is presumptively invalid; we cannot defer to legislative pronouncements, and the burden is on the government to justify the use of the distinction." 92 Cal. App. 4th at 55 (citing *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500-01 (1989)). *Connerly* did not send the case back for retrial but rather directed the trial court to enter a judgment consistent with its decision. 92 Cal. App. 4th at 64.

Huntington Beach cites *Connerly* for the "core idea that 'racial classification is presumptively invalid, and the burden is on the government to demonstrate extraordinary justification.'" 98 Cal. App. 4th at 1281. As does San Francisco here, the school district in Huntington Beach claimed that its racial preference policy was required by the Equal Protection Clause of the Federal Constitution. *Id.* at 1285. But when the court found that the school district had failed to carry its burden in its racial balancing scheme, it did not

send the case back to give the district another shot at the target as did the court of appeal in this case. Rather, it directed the trial court to enter "a new order denying the District's motion for summary judgment and granting Crawford's motion for summary judgment . . . ." *Id.* at 1287. This Court denied review on August 28, 2002. *Id.*

Under the applicable standard of de novo review, Pet. Exh. 1 at 9, it is plain that City has failed to meet its burden of proving intentional discrimination. Instead it has presented unverified allegations of isolated instances of discrimination by individuals contrary to City policy. Such acts do not comprise intentional discrimination by City as required by *Hi-Voltage*, 24 Cal. 4th at 568. When the City failed to meet its burden of proof the court of appeal should have affirmed the judgment in its entirety. Its failure to do so conflicts with the holding of *Hi-Voltage*, *Connerly*, *SMUD*, and *Huntington Beach*.

a. City Failed to Make the Showing of Intentional Discrimination Constitutionally Required to Support a Race or Sex Preference Remedy

Relying upon this Court decision in *Hi-Voltage*, the superior court rejected the City's argument "that Proposition 209 cannot be constitutionally applied to the City to prevent it from enacting remedial legislation to assist minorities and women." Order on Cross Motions for Summary Judgment at 15, JA XIII at 3481. Nonetheless, the court below cited the following dicta

in *Hi-Voltage*, 24 Cal. 4th at 568: "Where the state or a political subdivision has intentionally discriminated, use of a race-conscious or race-specific remedy necessarily follows as the only, or at least the most likely, means of rectifying the resulting injury." Pet. Exh. 1 at 29.

The court then noted the findings of the San Francisco Board of Supervisors that City is actively discriminating against MBE/WBEs in its contracting and passively participating in discrimination in the private sector. Pet. Exh. 1 at 8.[4]

But, as *Connerly* holds:

> First, the discrimination must be identified with some degree of specificity . . . . A generalized assertion that there has been discrimination in a particular industry or region is insufficient . . .
>
> Second, "the institution that makes the racial distinction must have had a 'strong basis in evidence' to conclude that [race-based] remedial action was necessary, '*before* it embarks on an affirmative-action program.'"

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[4] In this regard, the court of appeal's citation, Pet. Exh. 1 at 3-4, to *Associated Gen. Contractors of Cal., Inc. v. Coal. for Econ. Equity*, 950 F.2d 1401 (9th Cir. 1991), is misplaced. Judge O'Scannlain pointed out in his concurrence the limited nature of appellate review of the grant or denial of a preliminary injunction. "Detailed consideration of the merits of AGCC's constitutional claim is neither necessary nor appropriate in this context. The issue is not the constitutionality of the 1989 Ordinance, but simply whether AGCC has shown a sufficient probability of success on the merits to justify preliminary relief." *Id.* at 1419. Further, that case was decided prior to the 1996 enactment of Proposition 209 in which "the voters intended . . . essentially a repudiation of the decisional authority that permitted . . . discrimination and preferential treatment." *Hi-Voltage*, 24 Cal. 4th at 566.

> A governmental entity cannot satisfy this criterion simply by conceding past discrimination.

92 Cal. App. 4th at 38 (citing *Shaw v. Hunt*, 517 U.S. 899, 909, 910 (1996); *Croson*, 488 U.S. at 498-99, 504; and *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 278 n.5 (1986) (plurality opinion)).

While City alleges past discrimination, it is critical to note that there is no finding of intentional discrimination anywhere in the Ordinance. City's generalized findings suffer the identical defects that caused the race preference program to be struck down in *Connerly*.

b. City's Generalized Findings Are Contradicted by City's Specific Findings Showing Little or No Disparity in Minority and Women Participation in Public Contracting

The generality of City's findings is underlined by the conflicting reality. The opinion below cited the legislative finding that "the disproportionately small percentage of City contracts and subcontracts going to women- and minority-owned businesses was due to discrimination by the City and discrimination in the private sector." Pet. Exh. 1 at 8. This generalized finding was contradicted by the statistical facts set forth in City's Ordinance. The Ordinance found that for prime construction contracts Caucasian men represented 67.74% of construction firms and received 70.79% of contract dollars, and Latino American firms received more construction contracts than expected based on their availability. JA III at 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 at 701:9-10. And "[a]lthough Asian Americans represent 13.74% of the construction firms, they received only 12.99% of the construction subcontract dollars." *Id.* at 701:7-8. This small disparity for Asian Americans may be attributed to the fact that each of the other major categories of MBE/WBEs received more than their proportionate "share."

These figures show that minorities and women in most cases received more than the expected amount of City construction dollars and in those instances where they received less, the disparity was minimal. The hard figures therefore demonstrate that the legislative finding of "the disproportionately small percentage of City contracts and subcontracts going to women and minority-owned businesses," Pet. Exh. 1 at 8, was a sham as was its corollary of "discrimination by the City and discrimination in the private sector." *Id.*

The lower court's failure to address this undisputed material fact, indeed a fact vouched for in City's own Ordinance and presented both in Respondents' Brief at 28 and Petition for Rehearing at 4-5, indicates that the court's remand for the purpose of determining whether City had presented the extreme case of intentional discrimination, Pet. Exh. 1 at 34, was not only unnecessary but incorrect as a matter of law.

c. The Lower Court Erred in Relying on Conclusionary Statements of Discrimination by Proponents of City's Race and Sex Preference Program

The court of appeal noted the unsworn statements of claimed discrimination during hearings, Pet. Exh. 1 at 7-8, but *Croson* criticized reliance on the highly conclusionary statements of proponents of the program that there was racial discrimination in the construction industry in the area. 488 U.S. at 500.

The lower court cited the further finding that "the City's contracting processes were in violation of federal law and therefore the Ordinance was required to bring the City into compliance with federal civil rights law." Pet. Exh. 1 at 8. But the court then stated: "[T]he City's generalized arguments and assertions [in this regard] are inadequate." *Id.* at 14.

Lastly, the court noted City's finding that "race- and gender-conscious remedial programs continued to be required to remedy discrimination against minority- and women-owned businesses in City contracting and subcontracting programs" and that the Board "adopted the ordinance to 'remedy the specifically identified City contracting practices and conditions in the Community and industries that cause the reduction of contracting opportunities for minority- and women-owned businesses in City prime and subcontracting programs.'" *Id.* at 8.

The court itself rebutted this generalized finding. "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." *Id.* at 13-14.

As the Supreme Court declared in *Croson*:

> None of these "findings," singly or together, provide the city . . . with a "strong basis in evidence for its conclusion that remedial action was necessary." There is nothing approaching a prima facie case of a constitutional or statutory violation by *anyone* in the Richmond construction industry.
>
> . . . .
>
> "This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation." Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice.
>
> 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.

Croson, 488 U.S. at 500-01 (citations omitted).

Having found that City had failed to show specific findings of discrimination, the court below departed from the rulings in *Hi-Voltage*, *SMUD*, and *Connerly* in failing to affirm the judgment against City in its entirety.

d. City Admits It Has No Knowledge of Discrimination Against MBE/WBEs By Its Employees or Private Contractors with the City

In contradistinction to City's lack of specific findings, Pet. Exh. 1 at 13-14, Plaintiff Coral presented evidence completely rebutting City's findings. When put to the test of discovery City's claims of discrimination were shown to be a sham. Thus, in response to Coral's Request for Admission No. 18, City admits that at least since April 2, 1984, it has not been a policy of City to discriminate against MBEs or WBEs. Respondents' Supplemental Appendix (RSA) Exhibit 1 at 6. In response to Request for Admission No. 23, City admits that it has not identified any specific instance of discrimination which occurred after November 5, 1996,[5] against a MBE or WBE subcontractor where the MBE or WBE subcontractor was the lowest responsive bidder. *Id.* at 8. In response to Request for Admission No. 24 and Answer to Interrogatory No. 31, City admits that it has not identified any specific San Francisco Contract Awarding Authority which discriminated against a MBE or WBE in the awarding of one of City's contracts after November 5, 1996. *Id.* at 8-10 and 16. Although these admissions were presented to the appellate court in Respondents' Brief at 21-22 and Petition for Rehearing at 7-8, they were ignored by the court.

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

These admissions by City are part of the record in this case. Counsel for all parties, including San Francisco, stipulated that the pleadings in Coral would automatically come into possession of the trial court upon consolidation of Coral with the Schram case. JA XIII at 3394. In any event, even without such a stipulation the Coral pleadings were before the trial court, the court of appeal, and now this Court. *Kropp v. Sterling Sav. & Loan Ass'n*, 9 Cal. App. 3d 1033, 1046 (1970), holds that upon consolidation the separate pleadings are treated as one set. *Didier v. Am. Cas. Co. of Reading, Pa.*, 261 Cal. App. 2d 742, 752 (1968), holds that for purposes of further proceedings consolidated cases are to be treated as if the cases had been united originally. Although these admissions by City referred to the 1998 Ordinance, the City reenacted the Ordinance in 2003 without substantial change. Pet. Exh. 1 at 8 n.4. It should also be noted that San Francisco made these admissions on July 2, 2002, RSA at 11, 12 and 17, during the 2002-2003 period in which the hearings for the 2003 Ordinance were being held. Pet. Exh. 1 at 7. Since this is a de novo review, the appellate courts may affirm the summary judgment on any correct legal theory as long as the parties had an opportunity to address the theory in the trial court. *Cal. Sch. of Culinary Arts v. Lujan*, 112 Cal. App. 4th 16, 22 (2003). San Francisco had the opportunity to address the admitted lack of discrimination by either itself or prime contractors against MBEs and WBEs

in the *Coral* summary judgment proceedings in which those admissions were filed.

These admissions show that City's generalized findings lack the "strong basis in evidence for its conclusion that remedial action was necessary." *Croson*, 488 U.S. at 500 (citation omitted). The findings instead suggest that, as warned in *Croson*, they "are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Id.* at 493.

e. San Francisco's Race and Sex Preferences Are Based on an Unconstitutional Policy of Race and Sex Balancing

City's race and sex preferences are not remedial but rather based on unconstitutional race and sex balancing. The City's Ordinance specifies that "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 [is the] measure of the effectiveness of this ordinance in remedying the effects of the aforementioned discrimination." JA III at 719:9-12. This provision sets the policy that discrimination is defined by race and sex balancing. Race and sex balancing is unconstitutional under both the California and United States Constitutions.

Hi-Voltage criticized the change in focus of case law "from protection of equal opportunity for all individuals to entitlement based on group representation." 24 Cal. 4th at 555. *Hi-Voltage* noted 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 . . . . 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. In *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003), the United States Supreme Court held that racial balancing is "patently unconstitutional." More recently that Court reaffirmed that principle in *Parents Involved in Cmty. Schools v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738 (2007), and went on to say:

> Allowing racial balancing as a compelling end in itself would "effectively assur[e] that race will always be relevant in American life, and that the 'ultimate goal' of 'eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race' will never be achieved."

Id. at 2758 (quoting *Croson*, 488 U.S. at 495 (plurality opinion of O'Connor,

J.) (quoting *Wygant*, 476 U.S. at 320 (Stevens, J., dissenting), in turn quoting *Fullilove v. Klutznick*, 448 U.S. 448, 547 (1980) (Stevens, J., dissenting); brackets and citation omitted). As Chief Justice Roberts said, "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved in Cmty. Schools*, 127 S. Ct. at 2768.

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 *Huntington Beach*, 98 Cal. App. 4th at 1282-83. 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 (citation omitted). The court of appeal's failure to apply this standard contravenes *Hi-Voltage*, *Connerly*. and *Huntington Beach*.

f. City's Disparity Report Is Irrelevant and Inadequate to Justify Race and Sex Preferences

The court below criticized the trial court's finding that City's reliance on its disparity study was not compelling and indeed was irrelevant. Pet. Exh. 1 at 29-30. Disparity studies may have some utility under the strict scrutiny standard of the Fourteenth Amendment which "allows discrimination and preferential treatment whenever a court determines they are justified by a compelling state interest and are narrowly tailored to address an identified remedial need . . . . Unlike the equal protection clause, section 31 categorically prohibits discrimination and preferential treatment. Its literal language admits no 'compelling state interest' exception . . . ." *Hi-Voltage*, 24 Cal. 4th at 567.

City's disparity study is further irrelevant because it is based on a faulty premise: "Under a fair and equitable system of awarding contracts, the proportion of contract dollars awarded to minority-and-women-owned business enterprises would be equal to the proportion of willing and able minority-and-women-owned enterprises in the relevant market area." Ordinance 12D.A.2, JA III at 693:17-19. As noted above, this is the race-sex

balancing rationale uniformly found unconstitutional by California and federal courts. *Hi-Voltage*, 24 Cal. 4th at 555 and 558; *Croson*, 488 U.S. at 507-08; *Grutter*, 539 U.S. at 330; *Parents Involved in Cmty. Schools*, 127 S. Ct. at 2758.

As this Court found in *Hi-Voltage*: "The City's disparity study, at best, creates only an inference of discrimination against MBE/WBE subcontractors by prime contractors; it does not establish intentional acts by the City." 24 Cal. 4th at 568. That inference must be proved by actual evidence. *Anderson v. Metalclad Insulation Corp.*, 72 Cal. App. 4th 284, 296-97 (1999). Here, San Francisco's disparity report's findings of underutilization of minority- and women-owned businesses are contradicted by the actual statistical evidence of MBE/WBE participation set forth in the Ordinance. *See* JA III at 696:17-19; JA III at 701:9-10; JA III at 701:7-8. *See also* Section I.B.1(b) above. The fact that these figures show no substantial disparity in MBE/WBE utilization proves that the disparity study is not only irrelevant but false on its face.

2. Because City's Race and Sex Preferences in Public Contracting Have No Relation to the Alleged Instances of Discrimination Against Minorities and Women, City Is Not Entitled to a Remand in Order to Provide a Second Attempt to Justify Such Preferences

Although this Court has made it clear that Section 31 has "no "compelling state interest" exception," *Hi-Voltage*, 24 Cal. 4th at 567, and notwithstanding extensive briefing on this issue, Respondents' Brief at 26-32,

Petition for Rehearing at 12-17, the court below failed to discuss the blatant lack of narrow tailoring of City's race and sex preferences.

a. The Decision Remanding the Issue of Showing a Narrowly Tailored Remedy When the City Failed to Prove that Issue Below Conflicts with the Decisions of this Court and of the Courts of Appeal

This Court questioned in *Hi-Voltage*,

> the City's implicit premise that its Program meets the federal equal protection standard. As the Supreme Court explained in *Wygant*, *supra*, 476 U.S. 267, "the means chosen to accomplish the State's asserted purpose must be specifically and narrowly framed to accomplish that purpose." [Citation.] "Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification."

24 Cal. 4th at 569.

The courts of appeal similarly require that remedies be narrowly tailored. *Connerly*, 92 Cal. App. 4th at 33, holds:

> Because suspect classifications are pernicious and are so rarely relevant to a legitimate governmental purpose, they are subjected to strict judicial scrutiny; i.e., they may be upheld only if they are shown to be necessary for furtherance of a compelling state interest and they address that interest through the least restrictive means available.

Here, City's MBE/WBE bid preferences and subcontractor preferences failed this standard.

Connerly got to the heart of the narrow tailoring issue:

> Where the government proposes to assure participation of "some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be

> rejected not as insubstantial but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids."

92 Cal. App. 4th at 34 (citing *Bakke*, 438 U.S. at 307; *Croson*, 488 U.S. at 497).

City's policy of mirroring the percentage of minorities and women in the industry, JA III at 719:9-12, is the epitome of assuring participation of "some specified percentage" of those particular groups and this preferential purpose must be rejected as facially invalid.

City's means chosen to this unconstitutional end further fail the narrow tailoring standard. As *Connerly* notes, 92 Cal. App. 4th at 38-39, in order to be lawful, the governmental use of racial classification to redress specific discrimination must actually be remedial. *Connerly* emphasizes that

> the remedy must be created with the awareness that the right to be free of discrimination belongs to the individual rather than any particular group. Thus, the remedy must be designed as nearly as possible to restore the victims of specific discriminatory conduct to the position they would have occupied in the absence of such conduct. Random inclusion of racial groups without individualized consideration whether the particular groups suffered from discrimination will belie a claim of remedial motivation. The lack of any effort to limit the benefits of a remedial scheme to those who actually suffered from specific discrimination will be fatal to the scheme.

Connerly, 92 Cal. App. 4th at 38-39 (citing *Shaw v. Hunt*, 517 U.S. at 915; *Croson*, 488 U.S. at 506, 508; *Wygant*, 476 U.S. at 284).

In words that apply equally here, *Connerly* held:

> The statutory scheme does not arguably withstand strict scrutiny. No justification has been shown. . . . . There was no effort to measure the remedy against the consequences of identified discrimination. There was no effort to limit recovery to those who actually suffered from prior discrimination. There was no showing that non-race-based and non-gender-based remedies would be inadequate or were even considered. The scheme is unlimited in duration.

92 Cal. App. 4th at 53.

Here, the court of appeal's refusal to examine and measure the lack of narrow tailoring of City's race- and sex-preference programs puts its opinion squarely at odds with *Hi-Voltage*, *SMUD*, and *Connerly*.

b. Bid Preferences and Subcontractor Preferences Have No Relation to the Alleged Instances of Discrimination

Although Plaintiffs do not concede that the Equal Protection Clause creates a duty on the part of the City to adopt a race- and sex-based preference program to remedy past and present discrimination, even under the Equal Protection Clause, the City's program fails because the City cannot establish that its racial classifications meet the most exacting connection between justification and classification. *Hi-Voltage*, 24 Cal. 4th at 569.

In addressing Section 31's federal funding exception, the court in *SMUD* held: "Once a factual predicate for current race-based measures is established, the state agency must narrowly tailor its remedy to conform to the

federal requirement in the least discriminatory manner." 122 Cal. App. 4th at 300. The court below did not hold City to those standards.

The Court of Appeal, Pet. Exh. 1 at 7, cited a City Human Rights Commission (HRC) memorandum stating alleged examples of departmental and subcontractor resistance to the HRC's attempts to enforce the ordinance, as well as examples of noncompliance, such as:

> [A] City staffer who manipulated a member of the selection panel to ensure that a certified firm received a low score and therefore would not be considered. Further, City staffers (1) would blame MBE/WBE prime contractors for project delays, knowing they were caused by non-MBE/WBE subcontractors; (2) impose unreasonably strict technical requirements (e.g., unnecessarily high number of years experience), resulting in automatic exclusion of many MBE/WBE companies; and (3) routinely extend contracts rather than putting them out for a new bid, thus limiting opportunities for MBE/WBE firms.

Id.

The court also cited the HRC hearings at which "minority contractors spoke of experiencing unfair scoring practices and indicated that a City official changed subcontracting rules and the scope of work to ensure the exclusion of MBE's/WBE's from some contracting opportunities." Pet. Exh. 1 at 7. The court further stated that

> the record reviewed by the Board also exposed the ways in which prime contractors tried to circumvent compliance with the MBE/WBE ordinance. For example, MBE/WBE firms listed as subcontractors often receive little or none of the promised work; instead, work was performed by the prime contractor or another noncertified subcontractor. In one instance, once the subcontractor reached the allotted percentage as a subcontractor,

> her firm was immediately dropped from the job. Majority contractors have also refused to tender prompt payment for services of MBE's and WBE's.

Id. at 7-8.

But as *Connerly* holds:

> Once a compelling interest is shown, the inquiry focuses on the means chosen to address the interest. It is not enough that the means chosen to accomplish the purpose are reasonable or efficient. Only the most exact connection between justification and classification will suffice. The classification must appear necessary rather than convenient, and the availability of nonracial alternatives—or the failure of the legislative body to consider such alternatives—will be fatal to the classification.

92 Cal. App. 4th at 37 (citing *Croson*, 488 U.S. at 507).

The means chosen by City are neither reasonable, efficient, nor *in any way* connected, let alone exactly connected, to the complaints set forth. Bid discounts and Subcontractor Quotas and Outreach have no relation to any of these alleged violations and would do nothing to remedy them. Indeed, the court below ignored the fact that these alleged violations occurred under the predecessor ordinance which was reenacted in 2003 without substantial change. Pet. Exh. 1 at 8 n.4. If the bid preferences and subcontractor preferences were useless to prevent or remedy those alleged violations under the 1998 ordinance, it is apparent that they will similarly be useless under the current Ordinance. Under *Connerly*, this fact is "fatal to the classification." 92 Cal. App. 4th at 37.

The narrowly tailored remedy in the event of actual discrimination would be to sanction those City employees or construction firms that engaged in prohibited discrimination by firing the City employees and debarring the contractors from future City work. These remedies would be race neutral and therefore would not violate Section 31's prohibitions. City has stubbornly ignored this remedy, presumably because, as it admitted in discovery, it has never actually identified any discrimination on the part of its employees or contractors. Respondents' Supplemental Appendix at 8-10 and 16. As *Connerly* dictates, City's failure to consider sanctioning those who are actually discriminating, if any, is fatal to City's suspect preferences. 92 Cal. App. 4th at 37.

City's preference program further fails the narrow tailoring requirement because, as in *Croson*, 488 U.S. at 508, "there is no inquiry into whether or not the particular MBE [or here, WBE] seeking a racial [or sex] preference has suffered from the effects of past discrimination by the city or prime contractors." This concern was echoed in *Connerly*. "There was no effort to limit recovery to those who actually suffered from prior discrimination." 92 Cal. App. 4th at 53. Here, City grants its race and sex preferences to all members of the favored groups without regard to whether they have actually suffered discrimination. It is therefore apparent that City's race and sex preferences fail the constitutional command of narrow tailoring and the court

below's failure to enforce this standard conflicts with this Court's holding in *Hi-Voltage* and the decisions in *Connerly* and *SMUD*.

c. City's Stated Intention to Maintain Its Race and Sex Preferences in Perpetuity Shows They Are Not Narrowly Tailored

Despite the fact, set forth above, that City has found that MBE/WBEs have statistically met or exceeded their proportional "share," City justifies its ongoing discrimination against non-MBE/WBEs based on the speculation that if it abandoned its preferences these numbers would diminish. JA III at 701:10-15. This rationalization ensures that City's discriminatory preferences will continue in perpetuity in violation of California and federal constitutional decisions 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. More recently, *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. City's statement of intent to continue its race and sex preferences in perpetuity shows that City's policies are not narrowly tailored remedies but rather "simple racial politics," *Croson*, 488 U.S. 493.

City's perpetual preference conflicts with the holding in *Connerly* that "the use of a racial classification must be limited in scope and duration to that which is necessary to accomplish the legislative purpose." 92 Cal. App. 4th at 37. Indeed, that court held the state's bond preference program could not withstand strict scrunity in part because "[t]he scheme is unlimited in duration." *Id.* at 53.

As *Connerly* summarized:

> 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.

Id. at 59 (citing *Bakke*, 438 U.S. at 307; *Croson*, 488 U.S. at 496).

The refusal of the court below to address City's violation of Section 31's and the Fourteenth Amendment Equal Protection Clause's prohibition of perpetual preferences, presented in Respondents' Brief at 28-29, Petition for Rehearing at 13, conflicts with the rulings in *Connerly*, *Croson*, and *Grutter*.

d. City Has Ignored Article I, Section 31(g), and Other Antidiscrimination Laws

Section 31 itself sets forth the remedy for discrimination. Subsection (g) provides: "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." Cal. Const. art. I, § 31(g). There has been no showing that the City or any MBE/WBE has ever filed suit under this or any other antidiscrimination provision against any City employee or prime contractor with the City. This is yet another indication that there has been no proven discrimination on the basis of race or sex against MBE/WBEs in City public works contracting.

As *Croson* held: "[T]he 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' . . . ." 488 U.S. at 502 n.3. While City is required to use "the least restrictive means available" when applying suspect classifications such as race and sex, *Connerly*, 92 Cal. App. 4th at 33, it has failed to take the obvious and most effective sanction of finding and disciplining actual malfeasors. Instead, City uses the broadest possible measure of race- and sex-based bid preferences and subcontractor quotas and recruitment. Because City's preferences are the antithesis of narrow tailoring they violate both the California and Federal Constitutions. The court of appeal's failure to follow these authorities conflicts with the decisions of this Court in *Hi-Voltage*, the decisions of the courts of appeal in *SMUD* and *Connerly*, and the United States Supreme Court in *Croson*.

II

SECTION 31'S FEDERAL FUNDING EXCEPTION DOES NOT PERMIT CITY'S RACE AND SEX PREFERENCES

The second issue present is whether an ordinance that provides certain advantages to minority- and female-owned business enterprises with respect to the award of city contracts falls within an exception to Section 31 for actions required of a local government entity to maintain eligibility for federal funds under the Federal Civil Rights Act (42 U.S.C. § 2000d). This is an affirmative defense and City bears the burden of proving the facts necessary to establish the defense. *Ortiz*, 17 Cal. 4th at 425. City has utterly failed to meet this burden.

A. No Federal Statute or Regulation Requires a Race-Based Remedy

Title VI of the Civil Rights Act provides in part: "No 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." 42 U.S.C. § 2000d.

Article I, 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."

As the court of appeal noted, Pet. Exh. 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 any 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.

The court went on to state: "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. Exh. 1 at 13.

The lower court noted, *id.* at 10-11, that most of the federal regulations relied on by City dealt with workforce employment discrimination (covered by Title VII not Title VI) which is not at issue in this case dealing with public contracting. The court further addressed City's reliance on a Federal Department of Transportation (DOT) regulation, 49 C.F.R. § 21.5(b)(7), by pointing out that the regulation permits—but does not require—federal funds 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. Exh. 1 at 12. Similarly, the Environmental Protection Agency regulation cited by City, 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 found that "the 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. Exh. 1 at 13.

B. City Has Failed to Carry Its Burden to Show Its Preferences Are Necessary to Prevent the Loss of Federal Funding

The court below found: "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 498). The court below found City failed to carry this burden. "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. Exh. 1 at 13-14.

Indeed, City conceded 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. More to the point, City has not established the factual predicate for such programs.

As *Hi-Voltage* held: "There is also no duty under federal statutory law to take corrective action in the absence of discrimination." 24 Cal. 4th at 569. As set forth above, City has failed its burden to establish that it has discriminated against MBE/WBEs. *Hi-Voltage* went on to declare:

> [M]oreover, 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."

Id. (citations omitted).

C. City Has Failed to Use Race Neutral Measures to Narrowly Tailor a Remedy

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 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 November, 1996. Response to Interrogatory No. 31, RSA at 16. As *SMUD* declares, "race-based affirmative action is constitutionally prohibited where there has been no prior discrimination." 122 Cal. App. 4th at 309 (citing *Croson*, 488 U.S. at 505-06).

As stated in *SMUD*:

> Here, SMUD's disparity studies concluded that there had been past discrimination . . . . [H]owever, SMUD made no attempt in its disparity studies to identify federal laws and regulations and to test factual findings against those laws and regulations. Nor did it study whether race-neutral programs would suffice.
>
> Once a factual predicate for current race-based measures is established, the state agency must narrowly tailor its remedy to conform to the federal requirement in the least discriminatory manner.

122 Cal. App. 4th at 300.

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.

Id. at 310.

This is what San Francisco did 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 on remand. 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 remedy 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 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 is thus inapplicable to City's preferences.

III

ARTICLE I, SECTION 31, OF THE CALIFORNIA CONSTITUTION, IN PROHIBITING GOVERNMENT ENTITIES FROM DISCRIMINATION OR PREFERENCE ON THE BASIS OF RACE, SEX, OR COLOR IN PUBLIC CONTRACTING, NEITHER DISADVANTAGES MINORITY GROUPS, NOR OTHERWISE VIOLATES EQUAL PROTECTION PRINCIPLES

The third issue framed by this Court questions whether Section 31, in prohibiting City from discriminating or granting preference on the basis of race, sex, or color, improperly disadvantages minority groups and violates federal equal protection principles by making it more difficult to enact legislation on their behalf. The Court cites *Seattle*, 458 U.S. 457, and *Hunter*, 393 U.S. 385 as guidelines.

This question has been addressed by both California and federal courts and those courts have all found no equal protection violation. The court of appeal majority opinion addressed this issue at length, Pet. Exh. 1 at 18-28. As the court below noted, City is arguing that the equal protection principles stated in *Hunter* and *Seattle* apply to "'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 18-19 (citing *Seattle*, 458 U.S. at 467 and *Hunter*, 393 U.S. at 390-391 (citation omitted)).

City's argument suffers from two critical flaws of assumption. First, City assumes that its favored beneficiaries of preferences are in fact minorities. Second, it assumes that its favored groups have a constitutional right to legislation bestowing preferences on the basis of race and sex.

A. Census Figures Show that City's Purported Minorities Are in Fact an Overwhelming Majority

The most recent statistics available from the U.S. Census Bureau, show that the disfavored ethnic group under City's scheme, the only group not entitled to preferences, "white persons not Hispanic," were 43.8% of the California population as of 2005. U.S. Census Bureau, California QuickFacts, *available at* http://quickfacts.census.gov/qdf/states/06000.html (last revised Aug. 31, 2007).[6] Female persons were 50.1% of the California population. *Id.* Assuming that the male/female ratio holds for white/non Hispanic persons, white males would be the true minority of 21.9% while the class favored by City's preferences, designated "minority" groups and women, would be 78.1% of the population. A claim that Section 31 places special burdens on the ability of 78.1% of the population to achieve beneficial legislation is therefore factually unsupportable.

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[6] A motion for judicial notice of these government statistics is being filed concurrently with this brief.

B. There Is No Constitutional Right to Preferences Based on Race or Sex, Rather Such Preferences Are Presumed to Be Invalid

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. *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 492 (citation omitted). On the cross-motions for summary judgment in the trial court City was unable to show the required "extraordinary justification" for its race and sex classifications and preferences.

Similarly, under state law, race and sex classifications are suspect and therefore presumed to be invalid. *Connerly*, 92 Cal. App. 4th at 33; *Sail'er Inn*, 5 Cal. 3d at 17. Thus City's race and sex classifications are presumptively invalid. By distinction, this Court held in *Hi-Voltage*, 24 Cal. 4th at 561, "Rather than classifying individuals by race or gender, Proposition 209 [enacting Section 31] *prohibits* the State from classifying individuals by race . . . ." (quoting *Wilson*, 122 F.3d at 702).

The *Hunter/Seattle* cases were well described in *Coal. to Defend Affirmative Action v. Granholm*, 473 F.3d 237 (6th Cir. 2006), *motion to vacate stay denied*, 127 S. Ct. 1146 (2007), cited with approval by the court

below, Pet. Exh. 1 at 22, 28. There the Sixth Circuit considered a challenge to Michigan's Proposal 2, an initiative modeled after Section 31.

> *Hunter* addressed an amendment to Akron's city charter requiring Akron's city council to obtain majority approval by the city before implementing housing ordinances dealing with racial, religious or ancestral discrimination. Although the provision purported on its face to treat all races equally, in "reality," the Court held, "the law's impact falls on the minority" because the "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[]. *Seattle* invoked *Hunter* to strike down a Washington State initiative preventing local school boards from using racially integrative busing. There the Court reasoned that the initiative "remove[d] 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." [*Seattle*,] 458 U.S. at 474[].

Granholm, 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.' [*Hunter*,] 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* . . . 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.*

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 Educ. of the City of L.A.*, 458 U.S. 527, 538 (1982)). The court quoted *Wilson*, 122 F.3d at 708, 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.

In upholding the constitutionality of Section 31, *Wilson* considered the *Hunter/Seattle* arguments against at length. The Ninth Circuit found:

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

122 F.3d at 707.

The *Wilson* rationale was adopted in *Kidd*.

> 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.*" ([*Wilson*,] 122 F.3d at pp. 701-702, italics added [by court].)

Kidd, 62 Cal. App. 4th at 408-09.

Seattle held that "'purposeful discrimination is "the condition that offends the Constitution."'" 458 U.S. at 484 (quoting *Pers. Admin. of Mass. v. Feeney*, 442 U.S. 256, 274 (1979)). The Court went on to hold that the flaw in the Washington law was its racial classification. "'A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification.'" *Id.* at 491 n.6 (quoting *Feeney*, 442 U.S. at 272). But as *Hi-Voltage* held, 24 Cal. 4th at 561: "'Rather than classifying individuals by race or gender, Proposition 209 *prohibits* the State from classifying individuals 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."

Kidd, 62 Cal. App. 4th at 409 (citing *Wilson*, 122 F.3d at 702).

Kidd continued its *Wilson* quotation in language applicable to the present case:

> "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."

Kidd, 62 Cal. App. 4th at 409 (citing *Wilson*, 122 F.3d at 708 (footnote omitted)).

City's argument that the Equal Protection Clause of the Federal Constitution permits the adoption of race-based programs to remedy racial imbalance 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."
>
> "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."

Kidd, 62 Cal. App. 4th at 409-10 (citing *Wilson*, 122 F.3d at 708-09).

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 noted in Section I.B.1(e) above, these preferences amount to "simple racial politics," and violate the Federal Equal Protection Clause as spelled out in *Croson*, 488 U.S. at 493.

CONCLUSION

For the reasons set forth above, the decisions of this Court and the courts of appeal cited herein should be upheld by affirming the judgment of the trial court in its entirety and without remand.

DATED: October 18, 2007.

Respectfully submitted,

JOHN H. FINDLEY
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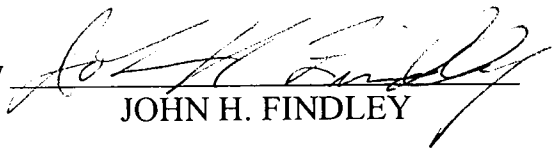
By 
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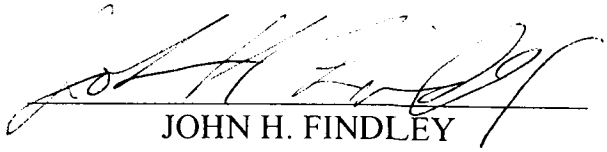
CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing PLAINTIFFS AND RESPONDENTS' OPENING BRIEF is proportionately spaced, has a typeface of 13 points or more, and contains 13,408 words.

DATED: October 18, 2007.



JOHN H. FINDLEY

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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)

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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 October 18, 2007, true copies of REQUEST FOR JUDICIAL NOTICE; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF REQUEST FOR JUDICIAL NOTICE; [PROPOSED] ORDER GRANTING REQUEST FOR JUDICIAL NOTICE; and PLAINTIFFS AND RESPONDENTS' OPENING BRIEF 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 October, 2007, at Sacramento, California.

Barbara A. Siebert
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