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April 22, 2009

Frederick K. Ohlrich
Clerk of the Court
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

RE: Coral Construction, Inc. v. City & County of San Francisco; No. S152934

Dear Mr. Ohlrich:

On March 18, 2009, this Court requested that the Attorney General file a letter brief addressing the following two questions:

> (1) Does article I, section 31 of the California Constitution, which prohibits government entities from discriminating against, or granting preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in public contracting, violate federal equal protection principles by making it more difficult to enact legislation on behalf of minority groups? (See *Washington v. Seattle School Dist. No. 1* (1982) 458 U.S. 457; *Hunter v. Erickson* (1969) 393 U.S. 385.); and
>
> (2) If yes, is section 31 narrowly tailored to serve a compelling governmental interest?

Edmund G. Brown Jr., Attorney General of the State of California, respectfully submits this letter brief pursuant to this Court's request.[1] To the extent that the prohibitions against race- and gender-based discrimination in article I, section 31 of the California Constitution (hereafter referred to as section 31) are aligned with the prohibitions enforced under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, section 31 is constitutional. However, to the extent that section 31 is interpreted more broadly to bar race- or gender-conscious programs that would be permissible under the Fourteenth Amendment, it violates the Equal Protection Clause of the federal Constitution, pursuant to *Washington v. Seattle School Dist. No. 1* (1982) 458 U.S. 457 (*Seattle*) and *Hunter v. Erickson* (1969) 393 U.S. 385 (*Hunter*). To that extent, section 31 would create an unequal political structure based on race and gender that is not narrowly tailored to achieve a compelling governmental interest.

[1] The Attorney General expresses no opinion as to the merits of the underlying litigation.

ARGUMENT

I. THE *HUNTER-SEATTLE* DOCTRINE PROHIBITS THE DISCRIMINATORY RESTRUCTURING OF THE POLITICAL PROCESS

The *Hunter-Seattle* doctrine establishes that the Equal Protection Clause is violated by a discriminatory restructuring of governmental decisionmaking in a way that places a "special burden" on specific groups without a constitutionally sufficient justification. (*Hunter, supra*, 393 U.S. at p. 391; see also *Seattle, supra*, 458 U.S. at p. 470 [initiative prohibiting school busing for desegregation purposes is invalid because "it uses the racial nature of an issue to define the governmental decisionmaking structure," and thus imposes substantial and unique burdens on racial minorities.])

A. *Hunter v. Erickson*

In *Hunter*, an amendment to the charter of the City of Akron, Ohio, required that any city ordinance to regulate the "use, sale, advertisement, transfer, listing assignment, lease, sublease or financing of real property . . . on the basis of race, color, religion, national origin, or ancestry" had to be approved by the voters at a regular or general election before it could become effective. (*Hunter, supra*, 393 U.S. at p. 387.) Other city ordinances were subject to referendum only if 10% of the electors so requested by filing a proper and timely petition. (*Id.* at p. 390.) The amendment suspended the city's existing fair housing law until it was adopted through a referendum. (*Id*. at p. 388.) Suit was brought by an African-American woman who was unable to invoke the protections of the fair housing ordinance because it had not been approved by the voters. (*Id*. at pp. 386-387.)

The Supreme Court concluded that the charter amendment created an "explicitly racial classification treating racial housing matters differently from other racial and housing matters." (*Hunter, supra,* 393 U.S. at p. 389.) The Court pointed out that only laws directed at ending housing discrimination based on race, color, religion, national origin or ancestry were required to run the automatic referendum"gantlet." (*Id.* at p. 390.) As the Court noted:

> The automatic referendum system does not reach housing discrimination on sexual or political grounds, or against those with children or dogs, nor does it affect tenants seeking more heat or better maintenance from landlords, nor those seeking rent control, urban renewal, public housing, or new building codes.

(*Id*. at p. 391.) In this way, the charter amendment drew a distinction between "those groups who sought the law's protection against racial, religious, or ancestral discriminations in the sale and rental of real estate and those who sought to regulate real property transactions in the pursuit of other ends." (*Id*. at p. 390.)

The Court also recognized that even where the law, on its face, treats groups *identically*, it does not necessarily treat them equally. The Court held that "although the law on its face

treats Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact falls on the minority" and "places special burden on racial minorities within the governmental process." (*Hunter, supra,* 393 U.S. at p. 391.) The Court said this "is no more permissible than denying them the vote, on an equal basis with others." (*Ibid*.)

The fact that the charter provision was enacted through popular referendum did not immunize it from the requirements of the Fourteenth Amendment. (*Id.* at p. 392.) Rather, the Court affirmed that the "sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed." (*Ibid.*) Thus,the Court concluded that it is not permissible to "disadvantage any particular group by making it more difficult to enact legislation in its behalf." (*Id*. at p. 393.) Because that was the precise effect of Akron's charter amendment, the Court found that it constituted "a real, substantial, and invidious denial of the equal protection of the laws." (*Ibid.*)

B. *Washington v. Seattle School Dist. No. 1*

The Supreme Court provided further explanation of the *Hunter* doctrine in *Seattle,*which involved a statewide initiative that prohibited mandatory busing of school students to achieve desegregation. The initiative prohibited school boards from requiring students to attend a school other than the school nearest or next nearest to their place of residence but provided a number of broad exceptions that effectively allowed busing for any reason other than to effect racial balancing. (*Seattle, supra,* 458 U.S. at p. 462.) From this, the Supreme Court concluded that the initiative was directed solely at "desegregative busing in general" and, more particularly, to the specific desegregation plan adopted by Seattle School District No. 1 to counter the effects of de facto neighborhood segregation. (*Id*. at pp. 462-463.)

The Supreme Court reaffirmed that the "Equal Protection Clause of the Fourteenth Amendment guarantees racial minorities the right to full participation in the political life of the community." (*Seattle*, *supra*, 458 U.S. at p. 467.) This right to fully participate in the political life of the community may be violated, the Court said, by "'a political structure that treats all individuals as equals,' [citation], 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." (*Ibid.*) The initiative at issue in that case, the Court found, did precisely that by preserving the ability of those seeking busing for non-desegregative purposes (or seeking any other changes to educational policies) to address their concerns at the local level, while those seeking to remedy segregation through busing could only obtain relief from the legislature or the general electorate. Thus, passage of the initiative changed the locus of the decision-making process for student assignment for purposes of racial balancing, based on the racial nature of the decision:

> The initiative removes the authority to address a racial problem – and only a racial problem – from the existing decisionmaking body, in such a way as to burden minority interests. . . . [B]y specifically exempting from Initiative 350's proscriptions most of the nonracial reasons for assigning students away from their neighborhood schools, the initiative expressly requires those championing school integration to surmount a considerably higher hurdle than persons seeking

> comparable legislative action. As in *Hunter*, then, the community's political mechanisms are modified to place effective decisionmaking authority over a racial issue at a different level of government.

(*Id.* at p. 474.)

The Court thus found that the initiative involved the same kind of reallocation of power described in *Hunter* because it altered the process for addressing a racial problem – "and only a racial problem" – so as to burden minority interests. (*Seattle, supra,* 458 U.S. at p. 474.) This "comparative structural burden placed on the political achievement of minority interests," the Court found, was the fatal flaw in *Hunter* and in the initiative at issue in *Seattle*. (*Ibid.*)

The Court rejected the argument that because the initiative did not use the words "race" or "integration" it had no racial overtones. (cf., *Seattle, supra,* 458 U.S. at p. 471.) Rather, the Court reasoned that, "despite its facial neutrality there is little doubt that the initiative was effectively drawn for racial purposes" and was enacted "because of, not merely in spite of, its adverse effects upon busing for integration." (*Ibid.*, internal citations and quotation marks omitted.) In reaching this conclusion, the Court recognized that desegregation of public schools inures primarily to the benefit of the minority student community and is designed for that purpose. (*Id.* at p. 472.) The Court concluded that the *Hunter* doctrine was triggered because "minorities may consider busing for integration to be 'legislation that is in their interest.' *Hunter v. Erickson,* 393 U.S., at 395, 89 S.Ct., at 563 (Harlan, J., concurring.)." (*Id.* at p. 474.)

Finally, the Court explained that not all laws structuring political institutions or allocating political power "are subject to equal protection attack," even though they may make it more difficult "'for minorities to achieve favorable legislation.' [*Hunter, supra,* 393 U.S. at p. 394.]" (*Seattle, supra,* 458 U.S. at p. 470.) Restructuring according to neutral principles that place the same obstacles in the path of everyone seeking to secure the benefits of governmental action, such as the executive veto or requirements for amending the constitution, is permitted. (*Ibid.*) But equal protection concerns arise "when the State allocates governmental power nonneutrally, by explicitly using the racial nature of a decision to determine the decisionmaking process." (*Ibid.*) Because the Court found that the initiative "use[d] the racial nature of an issue to define the governmental decisionmaking structure, and thus impose[d] substantial and unique burdens on racial minorities," it struck down the law. (*Ibid.*)

C. *Crawford v. Board of Education*

On the same day that the Supreme Court decided *Seattle,* it also decided *Crawford v. Board of Education* (1982) 458 U.S. 527 (*Crawford*). While seemingly appearing to limit the reach of the *Hunter-Seattle* doctrine, in reality *Crawford* "represents an unexceptional application of the 'mere repeal' rule." (See Amar & Caminker, *Equal Protection, Unequal Political Burdens, and the CCRI* (1996) 23 Hastings Const. L. Q. 1019, 1049-1050.)

In *Crawford*, the voters of California had amended article I, section 7 of the California Constitution to limit the power of state courts to order school busing to that exercised by federal

courts under the Fourteenth Amendment. (*Crawford, supra,*458 U.S. at pp. 531-532.) The initiative amendment, Proposition 1, had been proposed and adopted after this Court held that the equal protection guarantee of the California Constitution, unlike the Fourteenth Amendment, requires school boards to take reasonable steps to desegregate public schools, whether the segregation is "de facto" or "de jure." (*Id*. at pp. 530-531; see *Crawford v. Board of Education* (1976) 17 Cal.3d 280, 290.) Proposition 1 declared that "nothing contained [in article I, section 7(a)] or elsewhere in this Constitution imposes upon the State . . . or any public entity . . . any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation." (See Cal. Const., art. I, § 7, subd. (a).) The measure concomitantly prohibited state courts from imposing busing obligations on the state or any public entity except to remedy a violation of the Equal Protection Clause of the Fourteenth Amendment. (*Crawford, supra,* 458 U.S. at p. 532.) However, the initiative amendment specifically allowed school boards to *voluntarily* continue or commence a school integration plan involving busing. (*Ibid*.) Moreover, this Court had determined that Proposition 1 "'neither release[d] school districts from their State Constitutional obligation to take reasonably feasible steps to alleviate segregation regardless of its cause, nor divest[ed] California courts of authority to order desegregation measures other than pupil school assignment or pupil transportation.' [Citation.]" (*Id*. at p. 536; see *McKinny v. Oxnard Union High School District Board of Trustees* (1982) 31 Cal.3d 79, 92-93.)

The High Court viewed the initiative amendment as essentially repealing the broader equal protection remedies that had been recognized as available under the California Constitution in regard to school desegregation. (*Crawford, supra,* 458 U.S. at p. 539.) The Court explained that "the simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification." (*Ibid*.)[2] To so hold, the Court explained, "would limit seriously the authority of States to deal with the problems of our heterogeneous population" and commit states "irrevocably to legislation that has proved unsuccessful or even harmful in practice." (*Ibid.*)

The Supreme Court distinguished *Hunter*, noting that it involved "more than a 'mere repeal.'" (*Crawford, supra,* 458 U.S. at p. 541.) The charter provision in *Hunter* provided that "persons seeking anti-discrimination housing laws – presumptively racial minorities – were 'singled out for mandatory referendums while no other group … face[d] that obstacle.' [Citation.]" (*Ibid.*) In *Crawford,* however, the constitutional amendment at issue did nothing more than re-align judicial remedies available under the state Constitution with those of the Fourteenth Amendment in respect to racial desegregation. Moreover, unlike the charter provision at issue in *Hunter*, Proposition 1 did not alter the political processes on the basis of race. The *Crawford* Court pointed out that, even after Proposition 1 was passed, "the State Constitution still place[d] upon school boards a greater duty to desegregate than does the

[2] However, the Court acknowledged that repealing legislation for the purpose of disadvantaging a racial minoritywould be unconstitutional. (*Id.* at p. 539, n. 21, citing *Reitman v. Mulkey* (1967) 378 U.S. 369.)

Fourteenth Amendment." (*Ibid.*) And, as noted above, the amendment expressly allowed school boards to *voluntarily* continue or commence a school integration plan that involved busing. (*Id.* at p. 532.) Important for purposes of this analysis is the *Crawford* Court's observation that "[i]t would be paradoxical to conclude that by adopting the Equal Protection Clause of the Fourteenth Amendment, the voters of the State thereby had violated it." (*Id.* at p. 535.)

II. SECTION 31'S VALIDITY TURNS ON THE SCOPE OF ITS PROHIBITIONS

Although section 31 impacts legislation that may be in the interest of people of color and women, and alters the established political process with respect to such legislation, the Attorney General believes that, in light of *Crawford*, the Supreme Court would not find section 31 to be invalid under the *Hunter-Seattle* doctrine to the extent it merely adopts the proscriptions of the federal Equal Protection Clause. However, to the extent that section 31 bars race- or gender-conscious programs that would be permissible under the Fourteenth Amendment, it restructures California's political system regarding affirmative action in a way that unequally burdens women and members of racial or ethnic groups that have traditionally been subjected to discrimination. Thus, under the *Hunter-Seattle* doctrine, it would violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

A. Section 31 would not likely implicate the *Hunter-Seattle* doctrine to the extent that it merely conforms to the Equal Protection Clause of the Fourteenth Amendment.

To the extent that section 31 bars race- and gender- based discriminatory preferences that would not be allowable in any event under the Fourteenth Amendment, i.e. those that are not justified by a compelling governmental interest or that are not narrowly tailored to achieve such an interest,[3] it would "seek[] only to embrace the requirements of the Federal Constitution." (*Crawford*, 458 U.S. at p. 535.) Any burden it could be said to impose on women and people of color would be shared by all other groups because no one may obtain relief barred by the U.S. Constitution. As the *Crawford* Court observed, "[i]t would be paradoxical to conclude that by adopting the Equal Protection Clause of the Fourteenth Amendment, the voters of the State thereby had violated it." (*Crawford, supra,* 458 U.S. at p. 535.) Accordingly, to the extent that section 31 bars discriminatory race- and gender-based preferences that are unconstitutional under

[3] The United States Supreme Court has articulated a slightly different standard with respect to laws that classify individuals with respect to gender: they must be "substantially and directly related" to an "exceedingly persuasive justification." (*Mississippi University for Women v. Hogan* (1982) 458 U.S. 718, 730–31.) While there may be some difference between this standard and the compelling-interest standard, for simplicity this letter brief refers simply to the compelling-interest standard.

the Equal Protection Clause, it would not violate the Equal Protection Clause under *Hunter-Seattle* doctrine.[4]

B. To the extent that section 31 is interpreted to prohibit race- or gender-conscious programs that are allowable under the Fourteenth Amendment, the provision violates the Equal Protection Clause under the *Hunter-Seattle* doctrine.

Under Supreme Court jurisprudence, the universe of allowable race- or gender-conscious programs narrowed. The Court has held that:

> all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.

(*Adarand Constructors, Inc. v. Pena* (1995) 515 U.S. 200, 227.) To date, no California court has invalidated under section 31 a program designed to remedy racial or sex discrimination or segregation that it found would have been permissible under the Fourteenth Amendment.

Nevertheless, though race- or gender-based programs are carefully scrutinized under the Fourteenth Amendment, and will be upheld only when narrowly tailored to serve a compelling governmental interest, such programs are not categorically prohibited. Moreover, some race- or gender-conscious outreach programs may not implicate Fourteenth Amendment strict scrutiny at all. (See *Parents Involved in Community Schools v. Seattle School Dist. No. 1* (2007) 127 S.Ct. 2738, 2792 (conc. opn. of Kennedy, J.) [noting the improbability that some "race-conscious" remedies for school desegregation "would demand strict scrutiny to be found permissible."].)

1. Section 31 effectively treats race or gender differently from other classifications , by requiring that race- or gender-based remedies, uniquely, be obtained only through a constitutional amendment.

To the extent that section 31 prohibits race- or gender-conscious programs that would be permissible under the Fourteenth Amendment, it could not be said merely to incorporate the proscriptions of the Fourteenth Amendment, as was the case with Proposition 1 in *Crawford,* and, therefore, would be subject to strict scrutiny analysis under the *Hunter-Seattle* doctrine. As in *Seattle* and *Hunter,* those seeking a remedy for discrimination that would be allowable under the federal constitution would be treated differently from those seeking a similar remedy for discrimination based on other characteristics, such as religion or disability. The latter

[4] If such preferences were required by the federal Constitution to cure on-going discrimination, they would be allowable under section 31. *See* Cal. Const., art. I, §31, subd. (h); U.S. Const., art. VI, § 2.

groups and others are free to urge their local governing bodies, school boards or the Legislature to adopt remedial or preference programs that affirmatively take religion, disability, or military service into account, while the former must undertake the extraordinary effort to *amend the Constitution* to achieve a similar remedy with respect to race or gender.

Contrary to the urging of then Attorney General Lockyer, this Court in *Hi-Voltage Wire Works, Inc. v. City of San Jose* (2000) 24 Cal.4th 537 (*Hi-Voltage*) construed section 31 quite broadly and, indeed, in a way that takes section 31's proscriptions beyond those imposed by the Fourteenth Amendment .[5] In particular, the Court held that there is "no 'compelling state interest' exception" to the proscriptions of section 31. (*Hi-Voltage, supra,* 24 Cal.4th at p. 567.) This Court stated:

> 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.

(*Ibid.*) Thus, under the *Hi-Voltage* construction, section 31 cannot be said to merely adopt the requirements of the Fourteenth Amendment. On the contrary, it closes a door to race- and gender-conscious programs that the Fourteenth Amendment leaves open. In doing so, section 31 implicates the federal Constitution's equal protection guarantees as recognized in *Hunter* and *Seattle* and must be justified by a constitutionally sufficient reason.

The Fourteenth Amendment violation here is not the denial of "a right to seek preferential treatment from the lowest level of government," as reasoned by the Ninth Circuit. (See *Coalition for Economic Equity v. Wilson* (9th Cir. 1997) 122 F.3d 692, 702-703.)[6] Rather, it is the unique denial of the right to seek lawful remedies on the same basis as others who suffer discrimination in public contracting -- *only* when the remedy is sought to cure race or gender

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[5] The question of section 31's constitutional validity – under *Hunter-Seattle* or otherwise -- does not appear to have been before the Court in *Hi-Voltage*. The Court there described the question under consideration as a narrow one, viz., whether San Jose's program, specifically, contravened section 31. (*Id*. at p. 541-542.) Thus, broader discussion of the reach of section 31's prohibitions beyond that necessary to determine the validity of the specific program may be dictum. Nonetheless, the sweep of the opinion does suggest the *Hi-Voltage* Court's belief that section 31 bars even race- or gender-conscious targeted outreach programs that do not violate the Fourteenth Amendment. (But see *id.* at p. 565 ["Although we find the City's outreach option unconstitutional under section 31, we aknowledge that outreach may assume many forms, not all of which would be unlawful."].) Of course, the question whether or not a race- or gender-conscious "targeted" outreach program violates the Fourteenth Amendment is a question requiring case-by-case consideration.

[6] The Ninth Circuit considered only discriminatory race- or gender-based preferences in *Coalition;* it did not have occasion to opine on the question whether a prohibition on targeted outreach programs would violate the *Hunter-Seattle* doctrine. (*Coalition, supra,* 122 F.3d. at p. 705 ["The legal question for us to decide is whether a burden on achieving race-based or gender-based preferential treatment can deny individuals equal protection of the laws."].)

discrimination. The relevant point is that the Fourteenth Amendment *allows* such remedies in limited circumstances and, therefore, requires that all groups be accorded equal access to the political process to obtain those remedies, without regard to race or gender.

2. Section 31's race- and gender-based discrimination is not justified by a constitutionally sufficient reason.

"A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." (*Romer v. Evans* (1996) 517 U.S. 620, 633.) When the basis for that unequal treatment is a racial classification, the Supreme Court has determined it must be analyzed under strict scrutiny; that is to say, such a classification is constitutional only if it is narrowly tailored to further a compelling governmental interest. (*Adarand Constructors, Inc. v. Pena* (1995) 515 U.S. 200, 227.)

It is unclear precisely what governmental interest section 31 was intended to serve. If it is the interest in protecting all Californians from discrimination based on race or gender, that is concededly a compelling governmental interest. However, there appears to be no factual basis to support a governmental interest in denying preferences that are permissible under the Fourteenth Amendment. Ironically, by effectively disadvantaging racial minorities and women in the political process, 7 without an evident compelling governmental reason for doing so, section 31 seems to accomplish the very evil it purported to eliminate, viz. racial and gender discrimination.

Moreover, to satisfy the Fourteenth Amendment mandate that racial classifications be narrowly tailored to serve a compelling governmental purpose, there must have been some consideration of "the use of race-neutral means" to achieve the governmental goal and of "whether the program was appropriately limited such that it 'will not last longer than the discriminatory effects it is designed to eliminate.'" (*Adarand, supra,* 515 U.S. at pp. 237-238.) This does not appear to have occurred with respect to section 31's apparent prohibition of race- or gender-conscious remedies that are permissible under the Fourteenth Amendment.

The ballot materials supporting adoption of Proposition 209, which enacted section 31, explain neither the need to nor the factual basis for prohibiting preferences that are permissible under the Fourteenth Amendment. Accordingly, there is no basis for believing that the *race-neutral* alternative of simply prohibiting what is prohibited by the Fourteenth Amendment could not adequately serve any purportedly compelling governmental interest. Likewise, because section 31 is part of the California Constitution, it cannot effectively be re-evaluated from time to time to ensure that it lasts no longer than the discriminatory effects it is designed to eliminate. Thus, to the extent that section 31 violates equal protection principles under *Hunter* and *Seattle* the discrimination cannot be said to be narrowly tailored to serve a compelling governmental interest.

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[7] Remedial preferences or targeted outreach programs based on race or gender primarily benefit people of color or women. Thus, just as in *Hunter*, "the reality is that the law's impact falls on the minority." (*Hunter, supra,* 393 U.S. at p. 391.)

The Attorney General is aware that the position advanced herein means that section 31 can have no constitutionally permissible practical effect independent of the Fourteenth Amendment. And, the Attorney General is aware of this Court's observation in *Hi-Voltage* that "[i]f the electorate had determined merely to reiterate [the] status quo, an initiative amending the state Constitution would be unnecessary." (*Hi-Voltage, supra*, 24 Cal.4th at 566.) Nevertheless, such a construction is necessary so as not to render section 31 entirely unconstitutional. As Justice Rivera observed in her dissenting opinion below, if section 31 disadvantages racial minorities or women in the political processes more than the Fourteenth Amendment itself can be said to "disadvantage" all persons equally who would desire to be "preferred" in public contracting, then to that extent section 31 is unconstitutional. (See e.g., *Coral Construction, Inc. v. City and County of San Francisco*,57 Cal.Rptr.3d 781, 811 (dis. opn. of Rivera, J.) (italics in original, internal quotation marks and citation omitted)) ["[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 benefitting all others – is 'no more permissible than [is] denying [minorities] the vote, on an equal basis with others.'"].)

In fact, this office has consistently urged that section 31 be construed to permit race- or gender-conscious programs that are permissible under the Fourteenth Amendment. "Such programs have always been viewed as race- and gender-neutral because their use is triggered not by considerations of race or gender *per se* but by underrepresentation reflective of discriminatory exclusion. Such programs are 'prejudice' conscious, rather than race- or gender- conscious . . . . Their purpose is to overcome whatever subtle barriers of prejudice may be operating to exclude members of any underrepresented group from vying for the opportunity in issue, whatever the race or sex of those people may be." (Amicus Brief of the Attorney General, *Hi-Voltage Wire Works, Inc. v. City of San Jose*, No. S080318, citations and footnotes omitted.) It should not be presumed that, by adopting a superficially neutral proscription against racial or gender-based preferences, the voters intended nevertheless to effectively disadvantage women and racial minorities in their efforts to achieve equal opportunity in public contracting.

Conclusion

In light of *Crawford*, to the extent that article I, section 31 prohibits only discriminatory race- and gender-based preferences that are prohibited by the Fourteenth Amendment, it would be constitutional even under the *Hunter-Seattle* doctrine. However, if this Court's decision in *Hi-Voltage* means that section 31 also prohibits programs that do not violate the Equal Protection Clause, then, to that extent, section 31 would run afoul of the *Hunter-Seattle* doctrine and would be unconstitutional for lack of any apparent constitutionally sufficient justification for the discriminatory treatment.

Sincerely,

MANUEL M. MEDEIROS
State Solicitor General

For EDMUND G. BROWN JR.
Attorney General

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