Dawn M. Chirwa 04/09/97 02:52:19 PM

Record Type: Record

To: Stephen C. Warnath/OPD/EOP

cc:
Subject: Prop. 209 talking point

This is what I sent out. I'm sorry I didn't include your name. I realize in looking at the list that I didn't, although I had intended to. The last line was all that DoJ was comfortable saying today without knowing what the plaintiffs in the case will do. Internally, we know that they'll stay in it if the plaintiffs stay in. I don't think that last line was ambiguous enough to raise concerns, but you may disagree -- (?)

---------- Forwarded by Dawn M. Chirwa/WHO/EOP on 04/09/97 02:50 PM ----------

Dawn M. Chirwa 04/09/97 02:03:02 PM

Record Type: Record

To: See the distribution list at the bottom of this message

cc:
Subject:

Talking Point on Prop. 209 -- Our official position at this time:

Yesterday, a three-judge panel of the Ninth Circuit Court of Appeals overturned a district court injunction which had stayed implementation of Proposition 209, ruling that the initiative was constitutional. Obviously, we are disappointed with the panel's decision. The U.S. is a party to the case as amicus curiae and had argued forcefully at the Preliminary Injunction stage that Prop. 209 was unconstitutional. The Department of Justice is considering what next steps can be taken by the U.S. in its role as amicus in the case.

Message Sent To:

Sylvia M. Mathews/WHO/EOP
Andrew J. Mayock/WHO/EOP
Richard L. Hayes/WHO/EOP
Maria Echaveste/WHO/EOP
Kumiki S. Gibson/OVP @ OVP
Elena Kagan/OPD/EOP
Robert B. Johnson/WHO/EOP
Mary E. Glynn/WHO/EOP
Janet Murguia/WHO/EOP
Tracey E. Thornton/WHO/EOP

Being considered to OGC.

FYI

AMERICAN CIVIL
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FOUNDATION OF
NORTHERN CALIFORNIA

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CHAIRMAN

VIA EXPRESS MAIL

November 21, 1996

Gilbert Casellas
Chairman
U.S. Equal Employment Opportunity Commission
1801 L. St., N.W.
Washington, D.C. 20507

C. Gregory Stewart
General Counsel
U.S. Equal Employment Opportunity Commission
1801 L. St., N.W.
Washington, D.C. 20507

Re: Coalition for Economic Equity v. Wilson, No. C96-4024 TEH

Dear Chairman Casellas and General Counsel Stewart:

As you are undoubtedly aware, the ACLU, along with a number of other public interest firms and attorneys, have brought suit on behalf of women and minority businesses, labor organizations, and other affected individuals and groups challenging the constitutionality of Proposition 209 recently passed by California voters. Although Proposition 209 purports generally to ban discrimination and preferences on the basis of race and sex, it adds nothing to existing civil rights laws and constitutional protections with one exception -- its sole effect is to bar race and gender-conscious affirmative action by all public agencies. Proposition 209 would bar even those affirmative action programs which comply with the rigorous standards established under Title VII in United Steel Workers of America v. Weber, 443 U.S. 193 (1979), Johnson v. Transportation Agency, 480 U.S. 616 (1987) and under the Equal Protection Clause in City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) and Adarand Contractors Inc. v. Pena, 115 S.Ct. 2097 (1995).

Our suit challenges Proposition 209 on two grounds. First, by disabling all state and local legislative bodies from establishing affirmative action programs, we argue the initiative impermissibly burdens participation in state and local political processes by erecting special barriers to the adoption of

Dick Grosboll, *Chairperson* • Luz Buitrago, Davis Riemer, Margaret Russell, Michelle Welsh, *Vice Chairpersons* • Nancy Pemberton, *Treasurer*
Ann Brick, Edward M. Chen, John M. Crew, Margaret C. Crosby, Kelli M. Evans, *Staff Counsel* • Alan L. Schlosser, *Managing Attorney*
Cheri Bryant, *Development Director* • Elaine Elinson, *Public Information Director* • Francisco Lobaco, *Legislative Director*
Dorothy M. Ehrlich, *Executive Director* • Stephen V. Bomse, *General Counsel*

legislation protective of and beneficial to women and minorities in violation of Equal Protection under Hunter v. Erickson, 393 U.S. 385 (1969) and Washington v. Seattle School Dist. No.1, 458 U.S. 457 (1982). While other groups are free to seek protective legislation from city councils, boards of supervisors, or the state legislature, only women and minorities are barred from seeking race and gender-conscious legislation needed to remedy discrimination and its effects. Cf. Romer v. Evans, 116 S.Ct. 1620 (1996).

Second, we contend Proposition 209's ban of affirmative action programs implemented in efforts to achieve voluntary compliance with Titles VI and VII of the 1964 Civil Rights Act and Title IX of the Educational Amendments of 1972 violates the Supremacy Clause. In particular, we contend that Proposition 209's sweeping ban on affirmative action impedes voluntary compliance with federal civil rights laws, compliance which often takes the form of race or gender-conscious action. It ignores the careful balance struck by the Court in interpreting Title VII in Weber and Johnson between the competing concerns of: (1) Title VII's purposes of eradicating traditional patterns of segregation and discrimination against minorities and encouraging voluntary employer compliance in achieving that goal, and (2) safeguarding against undo "reverse discrimination." In order to afford employers sufficient "breathing room" conducive to voluntary compliance, the Supreme Court has interpreted Title VII to permit voluntary race and gender-conscious affirmative action if it is designed to "eliminate a manifest racial imbalance" and does not "unnecessarily trammel the interests of the white employees." Johnson, 480 U.S. at 630 (quoting Weber). Proposition 209's absolute bar on affirmative action eviscerates that "breathing room," disregards the balance struck by the Court in Weber and Johnson, and thus impedes voluntary compliance. It also conflicts with the Commission's guideline encouraging and protecting voluntary affirmative action. 29 CFR 1608.1(c).

I write to invite the Commission to intervene in this action on behalf of the plaintiffs. We expect that the Commission shares our view that enforcement of the purposes and objectives of Title VII is significantly impeded by California's Proposition 209. It would seem particularly appropriate for the federal agency charged with its enforcement to enter this case to protect the full vitality and force of Title VII.

A hearing on Plaintiffs' TRO request against the Governor and Attorney General is scheduled for November 25, 1996 before U.S. District Judge Thelton Henderson. We plan to seek

certification of and a broader TRO against the defendant class consisting of all public agencies that have an affirmative action programs shortly thereafter. We anticipate the case will proceed to a hearing on preliminary injunction sometime in January. In our view, early intervention by the Commission at the District court level would be extremely helpful.

A copy of the plaintiffs' brief in support of our request for a Temporary Restraining Order, the Governor's and Attorney General's opposition, and our reply is enclosed for your reference. Please feel free to call me should you have any questions or desire additional materials.

Thank you for your attention and cooperation.

Very truly yours,

Edward M. Chen
Staff Counsel

cc: Mark Rosenbaum
ACLU of Southern California

William McNeill, III
Employment Law Center

encl.

EMC:el
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enc.

THE WALL STREET JOURNAL

DATE: 2/11/97

PAGE: A20

Prop 209 Won't 'Gut' Affirmative Action

By WARD CONNERLY
And THOMAS L. RHODES

Both before and after the passage of Proposition 209, the California Civil Rights Initiative, critics have been warning that affirmative action programs can't continue if racial and gender preferences are outlawed. But backers of 209 can point to powerful evidence to the contrary.

After the University of California Board of Regents voted in 1995 to end using race in the university's admission process, the regents reviewed the university's outreach programs to determine which ones would have to be "reconfigured." The regents were pleasantly surprised to find that, out of the $100 million that the university spends on outreach, 70% was going to programs that help disadvantaged youths, regardless of color. The university will be reforming the remaining 30% to comply with the regents' vote. But even if the university eliminated these programs outright, a hefty $70 million would remain for colorblind affirmative action.

This gives the lie to the claims of "No on 209" campaign leaders like Eleanor Smeal, president of the Feminist Majority, who told voters and the press that the initiative would "gut" affirmative action programs in California. The group's "media action kit" counseled volunteers to "pressure the media to stop using the term 'preference.' "

Opponents of 209 even took California Attorney General Dan Lungren to court because the state's voter-information pamphlet did not contain the words "affirmative action." But the court ruled that the words did not belong in the voter guide because "affirmative action" did not appear in the text of the initiative. According to the court, "Most definitions of the term [affirmative action] would include not only the conduct which Proposition 209 would ban, i.e. discrimination and preferential treatment, but also other efforts such as outreach programs." The court concluded that "any statement to the effect that Proposition 209 repeals affirmative action would be overinclusive and hence 'false and misleading.' "

That's exactly what proponents of 209 have been saying all along. Proposition 209 was never an attempt to end all affirmative action. Nor is that the intent of the American Civil Rights Institute, the national organization we formed recently to educate the public about the problems with racial preferences.

The debate that occurred in California, and that continues to occur nationally, is about racial and gender preferences, set-asides and quotas. Affirmative action programs, as originally intended, were meant to open opportunities to everyone. The intent was to ensure that society would be more inclusive. Clearly, when black, Hispanic and American Indian applicants to the University of California receive extra points toward admission that white and Asian students do not receive simply based on race, government is preferring—and excluding—some people on the basis of race.

The author of the Civil Rights Act of 1964, the late Sen. Hubert Humphrey, did not intend to introduce or permit preferential treatment in his landmark legislation. In a letter to the California State Senate, Ted Van Dyk, a senior assistant to Humphrey from 1964 to 1968, recalled that Humphrey expressed fundamental reservations about "affirmative action." According to Mr. Van Dyk, Humphrey "feared that it could be a dangerous crutch for minorities and an easy target for those who would deny them opportunity. Moreover, he thought it was diametrically at odds with the letter and the spirit of what he and others had fought for over a generation—namely, a color-, gender-, and race-blind society in which each citizen would have his or her equal chance at the starting line (but never a guaranteed outcome at the finish line)."

If 209 does not end all affirmative action programs, our critics ask, then what's left? The answer is any program which offers assistance that is not race- or gender-based.

There are other examples beside the University of California system. At a town hall forum during the battle over 209, Sacramento Mayor Joe Serna—an outspoken opponent of the measure—described the small business preferences his city employs. Instead of giving a preference to a business that is owned by a minority or woman, Sacramento gives a general boost to small businesses, achieving more "diversity" than the outright preference for women and minorities did.

Now that 209 has been temporarily halted by a federal judge, some argue that other states and the federal government should hold off enacting similar reforms until the final court judgment has been handed down. This is wrong. Our country must continue to reaffirm its commitment to a colorblind society, beginning with government programs and policies. Anti-preference reform, like 209, allows government to give special consideration to people who are disadvantaged, but doesn't allow government to presume disadvantage simply based on skin color or gender.

It is our hope that Congress will enact a federal ban on racial and gender preferences this year. It is time for America to live up to the colorblind commitment we made with the passage of the 1964 Civil Rights Act. As John F. Kennedy said during the debate preceding that law, "Race has no place in American life or law."

Mr. Connerly is co-chairman of the American Civil Rights Institute and a member of the University of California Board of Regents. Mr. Rhodes is co-chairman of the ACRI.

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The Washington Post

DATE: 2/11/97

PAGE: A3

Judge Hears Arguments on Tobacco Regulation

By John Schwartz
Washington Post Staff Writer

GREENSBORO, N.C., Feb. 10—The tobacco industry today asked a federal judge to block the Clinton administration's controversial plan to impose tough new federal regulations to reduce smoking among young people.

During a day-long hearing in a crowded U.S. District courtroom, attorneys representing the tobacco industry and other businesses that would be affected by the plan argued that the federal Food and Drug Administration had grossly overstepped its authority.

"We are dealing with a revolutionary expansion of FDA authority over a major industry that it has never before regulated," said Washington attorney Richard Cooper, representing the tobacco industry.

Meanwhile, attorneys for the government countered that FDA Commissioner David A. Kessler was well within his legal authority to take the action, which was necessary to counter a teenage smoking epidemic.

"The commissioner hasn't acted willy-nilly here," said Justice Department attorney Gerald Kell. Kessler, he said, "has looked at a serious health problem" and tried to fashion a reasonable response.

The arguments came during a one-day hearing on the first court test of the FDA action—a request by the tobacco, advertising, publishing, convenience store and other industries for Judge William L. Osteen Sr. to issue a summary judgment blocking the plan. If Osteen rules against the industry, a full trial will be held. Any outcome is likely to be appealed, perhaps as far as the Supreme Court.

Osteen said he would not announce a decision for five to 10 weeks.

In the meantime, the first phase of the FDA regulations—a federal requirement that young people buying tobacco products be required to produce photo identification to prove they are at least 18 years old—will go into effect Feb. 28.

Restrictions on tobacco advertising, including requirements that ads in magazines with a large youth readership be restricted to black-and-white text—are scheduled to go into effect in August. A ban on tobacco industry name-brand sponsorship of sporting events would take effect a year later.

The hearing focused on three broad issues: whether the FDA has jurisdiction over tobacco, whether it had applied its own rules properly and whether the agency's advertising restrictions violate the First Amendment.

On the first issue, tobacco industry attorneys argued that Congress had never granted the FDA authority to regulate tobacco and that the agency itself had expressly rejected requests in the past from anti-tobacco activists to assert such authority.

The industry attorneys relied largely on congressional deliberations from 1964 and 1965 after the first surgeon general's warning on tobacco's health risks. Congress gave some authority for tobacco to the Federal Trade Commission and took on the task of crafting cigarette warning labels itself.

Attorneys for the government contended that the agency must have the flexibility to change course when new evidence emerges. Recent revelations about tobacco industry practices and knowledge of nicotine's addictive qualities justified a shift, they argued.

"These are not the same products they were in 1938," when the federal Food, Drug and Cosmetics act was first passed, said Justice Department attorney George Phillips. "They are a highly manufactured, engineered product."

Even if Osteen finds that the agency has jurisdiction over tobacco products, the notion that cigarettes and smokeless tobacco can be classified as a combination drug and medical device was "truly strange" and "an amazing series of evasions and distortions," Cooper said.

It was absurd for the government to contend that the tobacco industry has shown its intent to sell tobacco because it contains nicotine—an essential element of the agency's jurisdictional claim—when the industry does not make explicit claims for its products' drug effects, Cooper said.

Some of the strongest language against the FDA rules concerned the advertising restrictions. Dan Troy, a Washington lawyer representing advertising companies, called the plan "patently over-broad" and said that the agency "cannot attack with a blunderbuss what it should attack with a scalpel."

Osteen prodded both sides with tough questions, often catching the attorneys off guard.

He interrupted Cooper's argument that the industry should be held accountable only for claims that it makes explicitly, saying: "That's a pretty tenuous line." And Osteen suggested that the government's substantial interest in protecting children helped justify the government's case.

But he also admonished a government attorney who alluded to his daughters in his argument. He told the lawyer to focus on the law and not emotional appeals.

At one point Cooper, who without saying himself that cigarettes are dangerous noted that the FDA had reached that conclusion, suggested

Cont'd

Prohibition Against Discrimination or Preferential Treatment by State and Other Public Entities Initiative Constitutional Amendment

Official Title and Summary Prepared by the Attorney General

PROHIBITION AGAINST DISCRIMINATION OR PREFERENTIAL TREATMENT BY STATE AND OTHER PUBLIC ENTITIES. INITIATIVE CONSTITUTIONAL AMENDMENT.

- Prohibits the state, local governments, districts, public universities, colleges, and schools, and other government instrumentalities from discriminating against or giving preferential treatment to any individual or group in public employment, public employment, public education, or public contracting on the basis of race, sex, color, ethnicity, or national origin.
- Does not prohibit reasonably necessary, bona fide qualifications based on sex and actions necessary for receipt of federal funds.
- Mandates enforcement to extent permitted by federal law.
- Requires uniform remedies for violations. Provides for severability of provisions if invalid.

Summary of Legislative Analyst's Estimate of Net State and Local Government Fiscal Impact:

- The measure could affect state and local programs that currently cost well in excess of $125 million annually.
- Actual savings to the state and local governments would depend on various factors (such as future court decisions and implementation actions by government entities).

Analysts by the Legislative Analyst

BACKGROUND

The federal, state, and local governments run many programs intended to increase opportunities for various groups—including women and racial and ethnic minority groups. These programs are commonly called "affirmative action" programs. For example, state law identifies specific goals for the participation of women-owned and minority-owned companies on work involved with state contracts. State departments are expected, but not required, to meet these goals, which include that at least 15 percent of the value of contract work should be done by minority-owned companies and at least 5 percent should be done by women-owned companies. The law requires departments, however, to reject bids from companies that have not made sufficient "good faith efforts" to meet these goals.

Other examples affirmative action programs include:

- Public college and university programs such as scholarship, tutoring, and outreach that are targeted toward minority or women students.
- Goals and timetables to encourage the firing of members of "underrepresented" groups for state government jobs.
- State and local programs required by the federal government as a condition of receiving federal funds (such as requirements for minority-owned business participation in state highway construction projects funded in part with federal money).

PROPOSAL

This measure would eliminate state and local government affirmative action programs in the areas of public employment, public education, and public contracting to the extent these programs involve "preferential treatment" based on race, sex, color, ethnicity, or national origin. The specific programs affected by the measure, however, would depend on such factors as (1) court rulings on what types of activities are considered "preferential treatment" and (2) whether federal law requires the continuation of certain programs.

The measure provides exceptions to the ban on preferential treatment when necessary for any of the following reasons:

- To keep the state or local governments eligible to receive money from the federal government.
- To comply with a court order in force as of the effective date of this measure (the day after the election).
- To comply with federal law or the United States Constitution.
- To meet privacy and other considerations based on sex that are reasonably necessary to the normal operation of public employment, public education, or public contracting.

FISCAL EFFECT

If this measure is approved by the voters, it could affect a variety of state and local programs. These are discussed in more detail below.

Public Employment and Contracting

The measure would eliminate affirmative action programs used to increase hiring and promotion opportunities for state or local government jobs, where sex, race, or ethnicity are preferential factors in hiring, promotion, training, or recruitment decisions. In addition, the measure would eliminate programs that give preference to women-owned or minority-owned companies on public contracts. Contracts affected by the measure would include contracts for construction projects, purchases of computer equipment, and the hiring of consultants. These prohibitions would not apply to those government agencies that receive money under federal programs that require such affirmative action.

The elimination of these programs would result in savings to the state and local governments. These savings would occur for two reasons. First, government agencies no longer would incur costs to administer the programs. Second, the prices paid on some government contracts would decrease. This would happen because bidders on contracts no longer would need to show "good faith efforts" to use minority-owned or women-owned subcontractors. Thus, state and local governments would save money to the extent they otherwise would have rejected a low bidder—because the bidder did not make a "good faith effort"—and awarded the contract to a higher bidder.

Based on available information, we estimate that the measure would result in savings in employment and contracting programs that could total tons of millions of dollars each year.

Public Schools and Community Colleges

The measure also could affect funding for public schools (kindergarten through grade 12) and community college programs. For instance, the measure could eliminate, or cause fundamental changes to, *voluntary* desegregation programs run by school districts. (It would not, however, affect *court-ordered* desegregation programs.) Examples of desegregation spending that could be affected by the measure include the special funding given to (1) "magnet" schools (in those cases where race or ethnicity are preferential factors in the admission of students to the schools) and (2) designated "racially isolated minority schools" that are located in areas with high proportions of racial or ethnic minorities. We estimate that up to $60 million of state and local funds spent each year on voluntary desegregation programs may be affected by the measure.

In addition, the measure would affect a variety of public school and community college programs such as counseling, tutoring, outreach, student financial aid, and financial aid to

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selected school districts in those cases where the programs provide preferences to individuals or schools based on race, sex, ethnicity, or national origin. Funds spent on these programs total at least $15 million each year.

Thus, the measure could affect up to $75 million in state spending in public schools and community colleges.

The State Constitution requires the state to spend a certain amount each year on public schools and community colleges. As a result, under most situations, the Constitution would require that funds that cannot be spent on programs because of this measure instead would have to be spent for *other* public school and community college programs.

University of California and California State University

The measure would affect admissions and other programs at the state's public universities. For example, the California State University (CSU) uses race and ethnicity as factors in some of its admissions decisions. If this initiative is passed by the voters, it would no longer do so. In 1995, the Regents of the University of California (UC) changed the UC's admissions policies, effective for the 1997-98 academic year, to eliminate all consideration of race or ethnicity. Passage of this initiative by the voters might require the UC to implement its new admissions policies somewhat sooner.

Both university systems also run a variety of assistance programs for students, faculty, and staff that are targeted to individuals based on sex, race, or ethnicity. These include programs such as outreach, counseling, tutoring, and financial aid. The two systems spend over $50 million each year on programs that probably would be affected by passage of this measure.

Summary

As described above, this measure could affect state and local programs that currently cost well in excess of $125 million annually. The actual amount of this spending that might be saved as a result of this measure could be considerably less, for various reasons:

- The amount of spending affected by this measure could be less depending on (1) court rulings on what types of activities are considered "preferential treatment" and (2) whether federal law requires continuation of certain programs.
- In most cases, any funds that could not be spent for existing programs in public schools and community colleges would have to be spent on other programs in the schools and colleges.
- In addition, the amount affected as a result of *this* measure would be less if any existing affirmative action programs were declared unconstitutional under the United States Constitution. For example, five state affirmative action programs are currently the subject of a lawsuit. If any of these programs are found to be unlawful, then the state could no longer spend money on them—regardless of whether this measure is in effect.
- Finally, some programs we have identified as being affected might be changed to use factors other than those prohibited by the measure. For example, a high school outreach program operated by the UC or the CSU that currently uses a factor such as ethnicity to target spending could be changed to target instead high schools with low percentages of UC or CSU applications.

Argument in Favor of Proposition 209

THE RIGHT THING TO DO!

A generation age, we did it right. We passed civil rights laws to prohibit discrimination. But special interests hijacked the civil rights movement, instead of equality, governments imposed quotas, preferences, and set-asides.

Proposition 209 is called the California Civil Rights Initiative because it restates the historic Civil Rights Act and proclaims simply and clearly: "The state shall not discriminate against, or grant preferential treatment to, any individual or group, on the basis of race, sex, color, ethnicity or national origin in the operation of public employment, public education, or public contracting."

"REVERSE DISCRIMINATION" BASED ON RACE OR GENDER IS PLAIN WRONG!

And two wrongs don't make a right! Today, students are being rejected from public universities because of their RACE. Job applicants are turned away because their RACE does not meet some "goal" or "timetable." Contracts are awarded to high bidders because they are of the preferred RACE.

That's just plain wrong and unjust. Government should not discriminate. It must not give a job, a university admission, or a contract based on race or sex. Government must judge all people equally, without discrimination!

And, remember, Proposition 209 keeps in place all federal and state protections against discrimination!

BRING US TOGETHER!

Government cannot work against discrimination if government itself discriminates. Proposition 209 will stop the terrible programs which are dividing our people and tearing us apart. People naturally feel resentment when the less qualified are preferred. We are all Americans. It's time to bring us together under a single standard of equal treatment under the law.

STOP THE GIVEAWAYS!

Discrimination is costly in other way. Government agencies throughout California spend millions of your tax dollars for costly bureaucrecies to administer racial and gender discrimination that masquerade as "affirmative action." They waste much more of your money awarding high-bid contracts and sweetheart deals based not on the low bid, but on unfair set-asides and preferences. This money could be used for police and fire protection, better education and other programs—for everyone.

THE BETTER CHOICE; HELP ONLY THOSE WHO NEED HELP!

We are individuals! Not every white person is advantaged. And not every "minority" is disadvantaged. Real "affirmative action" originally meant no discrimination and sought to provide opportunity. That's why Proposition 209 prohibits discrimination and preferences and allows any program that does not discriminate, or prefer, because of race or sex, to continue.

The only honest and effective way to address inequality of opportunity is by making sure that *all* California children are provided with the tools to compete in our society. And then let them succeed on a fair, color-blind, race-blind, gender-blind basis.

Let's not perpetuate the myth that "minorities" and women cannot compete without special preferences. Let's instead move forward by returning to the fundamentals of our democracy: individual achievement, equal opportunity and *zero tolerance for discrimination against-or for-any individual.*

Vote for FAIRNESS . . . not favoritism!

Reject preferences by voting YES on Preposition 209.

PETE WILSON
Governor, State of California

WARD CONNERLY
Chairman, California Civil Rights Initiative

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PAMELA A. LEWIS
Co-Chair, California Civil Rights Initiative

Rebuttal to Argument in Favor of Proposition 209

THE WRONG THING TO DO!

A generation ago, Rosa Parks launched the Civil Rights movement, which opened the door to equal opportunity for women and minorities in this country. Parks is against this deceptive initiative. Proposition 209 highjacks civil rights language and uses legal lingo to gut protections against discrimination.

Proposition 209 says it eliminates quotas, but in fact, the U.S. Supreme Court already decided—twice—that they are illegal. Proposition 209's real purpose is to eliminate affirmative action equal opportunity programs for qualified women and minorities including tutoring, outreach, and mentoring.

PROPOSTION 209 PERMITS DISCRIMINATION AGAINST WOMEN.

209 changes the California Constitution to permit state and local governments to discriminate against women, excluding them from job catagories.

STOP THE POLITICS OF DIVISION

Newt Gingrich, Pete Wilson, and Pat Buchanan support 209. Why? They are playing the politics of division for their own political gain. We should not allow their ambitions to sacrifice equal opportunity for political opportunism.

209 MEANS OPPORTUNITY BASED SOLELY ON FAVORITISM.

Ward Connerly has already used his influence to get children of his rich and powerful friends into the University of California. 209 reinforces the "who you know" system that favors cronies of the powerful.

"There are those who say, we can stop now, America is a color-blind society. But it isn't yet, there are those who say we have a level playing field, but we don't yet." Retired General Colin Powell [5/26/96].

VOTE NO ON 209!!!

PREMA MATHAI-DAVIS
National Executive Director YWCA of the U.S.A.

KAREN MANLLIS
President, California American Association of University Women

WADE HENDERSON
Executive Director, Leadership Conference on Civil Rights

Argument Against Proposition 209

VOTE NO ON PROPOSITION 209
HARMS EQUAL OPPORTUNITY FOR WOMEN AND MINORITIES

California law currently allows tutoring, mentoring, outreach, recruitment, and counseling to help ensure equal opportunity for women and minorities. Proposition 209 will eliminate affirmative action programs like these that help provide equal opportunity for women and minorities in public employment, education and contracting. Instead of referring affirmative action to make it fair for everyone, Proposition 209 makes the current problems worse.

PROPOSITION 209 GOES TOO FAR

The initiative's language is so broad and misleading that it eliminates equal opportunity programs including:
tutoring and mentoring for minority and women students;
affirmative action that encourages the hiring and promotion of qualified women and minorities;
outreach and recruitment programs to encourage applicants for government jobs and contracts; and programs designed to encourage girls to study and pursue careers in math and science.
The independent, non-partisan California Legislative Analyst gave the following report on the effects of Proposition 209:

The measure would eliminate a variety of public school Kindergarten through grade 12) and community college programs such as counseling, tutoring, student financial aid, and financial aid to selected school districts, where these programs are targeted based on race, sex, ethnicity or national origin. [*Opinion Letter to the Attorney General*, 10/15/95].

PROPOSITION 209 CREATES A LOOPHOLE THAT ALLOWS DISCRIMINATION AGAINST WOMEN

Currently, California women have one of the strongest state constitutional protections against sex discrimination in the country. Now it is difficult for state and local government to discriminate against women in public employment, education, and the awarding of state contracts because of their gender. Proposition 209's loophole will undo this vital state constitutional protection.

PROPOSITION 209 LOOPHOLE PERMITS STATE GOVERNMENT TO DENY WOMEN OPPORTUNITIES IN PUBLIC EMPLOYMENT, EDUCATION, AND CONTRACTING, SOLELY BASED ON THEIR GENDER.

PROPOSITION 209 CREATES MORE DIVISION IN OUR COMMUNITIES

It is time to put an end to politicians trying to divide our communities for their own political gain. "The initiative is a misguided effort that takes California down the road of division. Whether intentional or not, it pits communities against communities and individuals against each other."

—Reverend Kathy Cooper-Ladsoma
President, California Council of Churches.

GENERAL COLIN POWELL'S POSITION ON PROPOSITION 209:

"Efforts such as the California Civil Rights Initiative which poses as an equal opportunities initiative, but which puts at risk every outreach program, sets back the gains made by women and puts the brakes on expanding opportunities for people in need."

—Retired General Colin Powell, 5/25/96.

GENERAL COLIN POWELL IS RIGHT.

VOTE "NO" ON PROPOSITION 209—
EQUAL OPPORTUNITY MATTERS

FRAN PACKARD
President, League of Women Voters of California

ROSA PARKS
Civil Rights Leader

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MAXINE BLACKWELL
Vice President, Congress of California Seniors, Affiliate of the National Council of Senior Citizens

Rebuttal to Argument Against Proposition 209

Don't let them change the subject. Proposition 209 bans discrimination and preferential treatment—period. Affirmative action programs that don't discriminate or grant preferential treatment will be UNCHANGED. Programs designed to ensure that all persons—regardless of race or gender—are informed of opportunities and treated with equal dignity and respect will continue as before.

Note that Proposition 209 doesn't prohibit consideration of economic disadvantage. Under the existing racial-preference program, a wealthy doctor's son may receive a preference for college admission over a dishwasher's daughter simply because he is from an "underrepresented" race. THAT'S UNJUST. The program must remain free to help the economically disadvantaged, and not on the basis of race or sex.

The opponents mislead when they claim that Proposition 209 will legalize sex discrimination. Distinguished legal scholars, liberals and conservatives, have rejected that argument as ERRONEOUS. Proposition 209 adds NEW PROTECTION against sex discrimination on top of existing ones, which remain in full force and effect. It does NOTHING to any existing constitutional provisions.

Clause c is in the text for good reason. It uses the legally-tested language of the original 1964 Civil Rights Act in allowing sex to be considered only if a "bona fide" qualification. Without that narrow exception, Proposition 209 would require unisex bathrooms and the hiring of prison guards who strip-search inmates without regard to sex. Anyone opposed to Proposition 209 is opposed to the 1964 Civil Rights Act.

Join the millions of voters who support Proposition 209. Vote YES.

DANIEL E. LUNGREN
Attorney General, State of California

QUENTIN L. KOPP
State Senator

GAIL L. HERIOT
Professor of Laws

End of Text

End of Section

LEGAL TIMES
LAW AND LOBBYING IN THE NATION'S CAPITAL
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Why the Courts Will Uphold 209

No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.
—U.S. Constitution, Amendment XIV

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 . . . .
—California Civil Rights Initiative (added to state constitution by voters' adoption of Proposition 209 on Nov. 5)

The question presented is whether the second of these two laws violates the first. The question should answer itself, even for those who think the CCRI is bad policy. The notion that a state violates the 14th Amendment's prohibition of almost all racial discrimination when it prohibits all racial discrimination is absurd on its face.

CLOSING ARGUMENT

BY STUART TAYLOR JR.

But a little absurdity has not deterred civil rights groups, led by the American Civil Liberties Union, from rushing into federal court (and shopping for a sympathetic judge) with a claim that the CCRI must be enjoined as contrary to the equal protection clause. Nor has it prevented U.S. District Judge Thelton Henderson of San Francisco from issuing a temporary restraining order (on Nov. 27) finding that the plaintiffs have "a strong possibility of success on the merits."

How strong? Some predictions: Assuming that Judge Henderson grants a preliminary injunction, the U.S. Court of Appeals for the 9th Circuit will reverse him and uphold the CCRI's constitutionality. The Supreme Court will then either decline to hear the case or add an exclamation point by upholding the CCRI—unanimously.

The strategy of the ACLU and its allies represents "an Orwellian assault on democracy," in the words of columnist Charles Krauthammer.

Whether it is *wise* for the voters to tell a state and its subdivisions to stop discriminating against, for example, Asians and whites (and in favor of blacks and Latinos) in university admissions is debatable. But the notion that it *violates equal protection* for the voters to ban such racial preferences takes one's breath away.

This is not to deny that there may be rare cases in which federal law will override the CCRI by requiring racial preferences to remedy discrimination. Nor is it to deny that the plaintiffs and Judge Henderson have found a couple of Supreme Court precedents that give a surface plausibility to the effort to strike down the CCRI on its face. But their argument melts away on closer inspection of those precedents, and of other precedents and principles that limit their reach.

The plaintiffs' favorite precedent is *Washington v. Seattle School District* (1982), which struck down, by a vote of 5-4, a ballot initiative adopted by the state's voters to end the Seattle school board's use of mandatory busing to achieve racial integration of the schools. The Court held that the initiative would place "special burdens on the ability of minority groups to achieve beneficial legislation."

While noting that *the school board* would have been free to repeal the busing plan in favor of a neighborhood-schools policy, the Court held that *the state's voters* could not do so—at least, not in a fashion that "lodg[es] decisionmaking authority over the question at a new and remote level of government." This, the Court said, would violate the principle of its 1969 decision in *Hunter v. Erickson* (the plaintiffs' other key precedent) by forcing racial minorities who seek race-related benefits (such as integration through busing) "to surmount a considerably higher hurdle than persons seeking comparable legislative action."

The equal protection attack on the CCRI goes something like this: The CCRI, like the initiative in *Seattle*, would not only wipe out race-related policies that benefit certain minorities, but would also block *future* adoption of such policies unless their advocates could persuade "a new and remote level of government" to repeal the CCRI. This would make it harder for racial minorities than, say, the elderly, veterans, or children of alumni, to win preferential treatment through the political process.

But even assuming that *Seattle* is good law—which is dubious, given the internal incoherence of that opinion and the Court's more recent decisions curbing racial preferences—the plaintiffs are unpersuasive in seeking to stretch *Seattle* to void the CCRI.

cont-d

"Despite its facial neutrality," Blackmun wrote of Initiative 350, "there is little doubt that the initiative was effectively drawn for racial purposes."

The Prop 209 litigation may thus give a very different Supreme Court a chance to revisit its equal protection analysis in *Washington v. Seattle*. Justice Sandra Day O'Connor, always a key vote in the Court's center, joined a dissent from Blackmun's opinion in the Washington litigation.

California Deputy Attorney General Paul Dobson, the state's lead lawyer on Prop 209 litigation, did not return a phone call seeking comment on Henderson's order. However, in court papers, state lawyers insist that the Washington case is distinguishable.

"[Prop 209] changed the substantive rights of Californians generally, to guarantee equal opportunity in public education, employment and contracting," Dobson wrote in a recent brief. "It did not create racial classification. It is not subject to strict scrutiny or any level of scrutiny under an equal protection analysis because it does not establish a classification. What plaintiffs are arguing is that equal treatment for every race cannot be a legitimate goal of government. State defendants disagree and submit the Supreme Court has never so held."

Besides the equal protection argument, Henderson touched on other issues in his order. For example, the judge justified the need for a temporary restraining order by noting the haste with which California Gov. Pete Wilson and Attorney General Dan Lungren have moved to enforce Prop 209.

"The continuation for a few days of affirmative action programs already in place does not impose any undue hardship on the state of California," wrote Henderson, a former civil rights lawyer. "On the other hand, the public interest in remedying discrimination, which underlies existing governmental affirmative action programs, weighs in favor of granting a TRO."

In addition, the judge rejected the AG's request to defer to the state court hearing Prop 209-related litigation in Sacramento, and also agreed to certify the case as a class action.

Editor's note: Judge Henderson's ruling is available on Counsel Connect in the Hot Docs Section of the Library.

—Howard Mintz is a senior writer at The Recorder, *a San Francisco-based affiliate of* Legal Times. *This article was distributed by the American Lawyer News Service.*

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Steve -
EEOC staff starts around p. 51. Footnote limiting EEOC to amicus AC brief on p. 56.
I also include Ed Chen's letter for background.
Claire

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RICHARD W. WIEKING
U.S. DISTRICT COURT
NO. DIST. OF CALIF.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

COALITION FOR ECONOMIC EQUITY, et al., Plaintiffs, v. PETE WILSON, et al., Defendants.	No. C 96-4024 TEH FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER RE PRELIMINARY INJUNCTION

I. INTRODUCTION

This action presents a challenge to the constitutionality of newly-enacted Article 1, section 31 of the California Constitution. This measure, which appeared on the ballot as Proposition 209, was passed by the California electorate on November 5, 1996. It provides in relevant part as follows:

> The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

CAL. CONST. art. 1, § 31(a).[1]

It is important to note at the outset that much of this language simply reaffirms existing anti-discrimination protections already provided by the United States and California Constitutions, and by the 1964 Civil Rights Act. These laws have long-guaranteed all persons "equal protection of the law," and prohibited

[1] For the sake of brevity, the Court will use the term "race" to cover all of the categories identified in Proposition 209 other than sex.

discrimination in employment and in any program or activity receiving federal assistance.[2] This aspect of Proposition 209—which creates no change in existing law—is not at issue in this case. Indeed, it could hardly be more clear that a law that merely affirms the non-discrimination principles in our Constitution is, itself, constitutional.

It is also undisputed that the Constitution precludes voluntary, government-sponsored race and gender "preferences" except in the most limited circumstances. Thus, government entities were already barred, prior to Proposition 209, from using race-conscious "preferences," e.g. race-conscious affirmative action programs, unless they could pass the most exacting "strict scrutiny" required by the Fourteenth Amendment. Under this test, only those programs that are "*narrowly* tailored" and "*necessary* to break down patterns of *deliberate* exclusion" perpetuated by the enacting agency are permitted. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 509 (1989)(emphasis added).[3] Quotas are not permitted. *See, e.g., Regents of the Univ. of Calif. v. Bakke*, 438 U.S. 265 (1978). Gender-based programs, under existing law, are also subject to a heightened level of scrutiny. *U.S. v. Virginia*, 116 S.Ct. 2264, 2275 (1996).

In short, Congress and the courts had already prohibited discrimination, and sharply constrained government use of race and gender preferences, long before Proposition 209 was enacted on November 5, 1996. The parties do not dispute,

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[2] The Fourteenth Amendment and § 7(a) of the California Constitution both provide that no person may be denied "the equal protection of the laws." Titles VI and VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000d-e et seq. prohibit, respectively, discrimination in any project or activity receiving federal financial assistance on the basis of race, and in employment on the basis of race and sex. As the ballot argument in favor of Proposition 209 noted, the initiative "restates the historic Civil Rights Act." Pls. Exh. 2.

[3] The city of San Francisco, for example, adopted a race- and gender-conscious affirmative action program after finding that it was necessary to counter established discriminatory practices, including "old boy networks," that prevented minority and women contractors from obtaining city contracts. *Associated Gen. Contractors of Calif. v. Coalition for Economic Equity*, 950 F.2d 1401, 1413-18 (9th Cir. 1991).

however, that the people of California meant to do something more than simply restate existing law when they adopted Proposition 209. It is this "something more" that is the focus of this action.

To be sure, the outer boundaries of this "something more" have yet to be determined. It is clear, however, that the primary change Proposition 209 makes to existing law is to close that narrow but significant window that permits the governmental race- and gender-conscious affirmative action programs described above that are still permissible under the United States Constitution. Notably, defendants agreed at oral argument that Proposition 209 prohibits at least some of these constitutionally permissible programs. They also failed to identify any other programs that would be affected by Proposition 209.

It is thus essential to keep in mind that plaintiffs' constitutional challenge to Proposition 209 is not, in fact, a facial challenge to the entire initiative. Rather, it is much narrower in scope: it is a challenge only to that slice of the initiative that now prohibits governmental entities at every level from taking voluntary action to remediate past and present discrimination through the use of constitutionally permissible race- and gender-conscious affirmative action programs.[4]

Plaintiffs assert that *this specific aspect* of Proposition 209 violates the United States Constitution on two separate grounds. First, they allege that Proposition 209, although couched in neutral terms, violates the Fourteenth

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[4] We note that while the exact relationship between the terms "affirmative action" and "preferences" has yet to be determined, the following is clear. First, the term "preferences" includes, at a minimum, programs or policies that use racial or gender classifications. Second, the term "affirmative action" is generally understood to include, at a minimum, programs designed to remedy the continuing effects of past and/or present discrimination which contain a race- or gender-conscious component. The term "affirmative action" as used in this decision is intended to refer to such programs. However, to ensure clarity on this point, and because the term "affirmative action" may be used in other contexts to refer to programs that are not race- or gender-conscious, the Court will generally use the longer, but more precise, phrase "race- and gender-conscious affirmative action" to refer to programs affected by Proposition 209.

Amendment's equal protection guarantee of "the right to full participation in the political life of the community." *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457, 467 (1982); *see also Romer v. Evans*, 116 S. Ct. 1620, 1628 (1996) ("Central...to our own Constitution's guarantee of equal protection is the principle that government in each of its parts remain open on impartial terms to all who seek its assistance."). Proposition 209 violates this guarantee, they argue, because it restructures the political process in a nonneutral manner. Specifically, it erects unique political hurdles only for those seeking legislation intended to benefit women and minorities—who must now obtain a constitutional amendment—while allowing those seeking preferential legislation on any other ground unimpeded access to the political process at all levels.

Second, plaintiffs allege that Proposition 209 violates the Supremacy Clause of the United States Constitution because it interferes with Congress' intent that employers be afforded the option of utilizing constitutionally permissible race- and gender-conscious affirmative action to comply with their obligations under Titles VI and VII of the Civil Rights Act of 1964, and Title IX of the Education Amendments of 1972.

The immediate issue before the Court is whether plaintiffs[5] have satisfied their burden of demonstrating that defendants[6] should be preliminarily enjoined from enforcing or implementing Proposition 209 pending a final determination of the merits of this action. In weighing this matter, the Court is mindful that any challenge to a duly-enacted law should be met with caution and restraint. It is not for this or any other court to lightly upset the expectations of the voters. At the same time, our system of democracy teaches that the will of the people, important as it is, does not reign absolute but must be kept in harmony with our Constitution.

Thus, the issue is not whether one judge can thwart the will of the people; rather, the issue is whether the challenged enactment complies with our Constitution and Bill of Rights. Without a doubt, federal courts have no duty more important than to protect the rights and liberties of all Americans by considering and ruling on such issues, no matter how contentious or controversial they may be. This duty is certainly undiminished where the law under consideration comes directly from the ballot box and without the benefit of the legislative process. As the Supreme Court aptly noted in another socially-charged case:

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[5] Pursuant to this Court's Order of November 25, 1996, plaintiffs represent a class of all persons or entities who, on account of race, sex, color, ethnicity, or national origin, are or wi be adversely affected by Proposition 209's prohibition of affirmative action programs operate by the State of California, any state or municipal agency, or any other political subdivision or governmental instrumentality of the State of California.

The plaintiff class is represented by named plaintiffs Coalition for Economic Equity, California NAACP, Northern California NAACP, California Labor Federation, AFL-CIO, Council of Asian American Business Associations, California Chinese American Citizens' Alliance, California Chapter of the Women Construction Business Owners and Executives, United Minority Business Entrepreneurs, Chinese For Affirmative Action, Black Advocates i State Service, Asian Pacific American Labor Alliance, La Voz Chicana, Black Chamber of Commerce of California, and several named individuals.

[6] Pursuant to this Court's Order of December 16, 1996, defendants represent a class of all state officials, local government entities or other governmental instrumentalities bound by Proposition 209. The defendant class is represented by named defendants Governor Pete Wilson and Attorney General Daniel Lungren.

> Nor does the implementation of...change through popular referendum immunize it [from constitutional scrutiny]. The sovereignty of the people is itself subject to those constitutional limitations which have been duly adopted and remain unrepealed.

Hunter v. Erickson, 393 U.S. 385, 393 (1969).

It also cannot be overemphasized that this case does not call upon this Court to adjudicate whether affirmative action is right or wrong, or whether it is no longer an appropriate policy for addressing the continuing effects of past and present discrimination against racial minorities and women. Such questions, while they are most certainly of vital public policy interest, lie beyond the purview of this Court. Nor does this case implicate the ability of governmental entities to voluntarily repeal affirmative action policies, as the Regents of the University of California did earlier this year.

Rather, the substantive issues raised by this action are considerably more narrow, albeit no less important: whether the particular *method* chosen by Proposition 209 to curtail affirmative action is unlawful because it either (1) violates the rights of women and minorities to fully participate in our political system or (2) interferes with Congressional goals embodied in Titles VI and VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972.

In the discussion that follows, this Court first addresses the question of whether plaintiffs have standing to bring this action. The Court then turns to the appropriate standard governing plaintiffs' motion for a preliminary injunction, which is followed by this Court's Findings of Fact and Conclusions of Law, with respect to that motion, as required by FED. R. CIV. P. 65.

Based on these Findings and Conclusions, this Court rules that:

(1) Plaintiffs have standing to bring this action.

(2) Plaintiffs have demonstrated a probability of success on their claim that Proposition 209 violates the Fourteenth Amendment's equal protection guarantee to full participation in the political life of the community.

(3) Plaintiffs have failed to demonstrate a likelihood of success on their claim that Proposition 209 violates the Supremacy Clause because it conflicts with, and is thus preempted by, Title VI of the 1964 Civil Rights Act and Title IX of the Education Amendments of 1972.

(4) Plaintiffs have demonstrated a likelihood of success on their claim that Proposition 209 violates the Supremacy Clause because it conflicts with, and is thus preempted by, Title VII of the 1964 Civil Rights Act.

(5) Plaintiffs have demonstrated that a preliminary injunction is necessary to protect the plaintiff class from the possibility of irreparable injury.

Accordingly, the Court grants plaintiffs' Motion for Preliminary Injunction, and enjoins defendants, pursuant to the injunction following these Findings and Conclusions, from enforcing and implementing Proposition 209 pending trial or final judgment in this action.

II. STANDING

A "threshold question in every federal case [is] whether the plaintiff has stated a 'case or controversy' between himself and the defendant within the meaning of Article III." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). The core component of whether a case or controversy under Article III exists is the doctrine of standing. *Allen v. Wright*, 468 U.S. 737, 751 (1984). The Supreme Court has established three elements necessary to meet the Article III standing requirement. First, the plaintiff must have suffered an "injury in fact"—"[t]he plaintiff must show that he 'has sustained or is immediately in danger of sustaining some direct injury'...and the injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-102 (1983). Second, the injury must be a result of the challenged conduct. *See, e.g. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) ("The injury has to be 'fairly traceable to the challenged action of the defendant and not the result of the

independent action of some third party not before the court."). Finally, a plaintiff must show a likelihood that a favorable decision will redress the injury. *Id.*

Here, defendants assert that none of the plaintiffs shows an imminent threatened injury. Notwithstanding the limitations imposed by article 3, section 3.5 of the California Constitution,[7] however, Proposition 209 is a self-executing amendment to the California Constitution that imposes an affirmative duty to comply. "In this circumstance compliance is coerced by the threat of enforcement, and the controversy is both immediate and real." *Lake Carriers' Association v. MacMullan*, 406 U.S. 498, 508 (1972).

Plaintiffs have shown a real and immediate threat of injury. Proposition 209 is clearly applicable to statutes and programs that are currently benefitting the named plaintiffs and it is virtually certain to be enforced. The amendment was recently enacted and is not a statute that has lain dormant for years and likely to remain moribund. *See Poe v. Ullman*, 367 U.S. 497, 501 (1961). Further, the Governor has already made moves to employ article 1, section 31, to invalidate certain state statues in a pending civil action. *Wilson v. State Personnel Board*, 96-CS01082 (App. to File Mot. to Amend, Nov., 6 1996). Moreover, a conflict between the plaintiffs' interests and the challenged amendment is inevitable. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 297-305 (1979) ("One does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough."); *cf. Steffel v. Thompson*, 425 U.S. 452, 459 (1974) (a plaintiff need not first expose himself to

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[7] Section 3.5 of Article 3 of the California Constitution provides that an administrative agency is without power to declare a statute unconstitutional unless an appellate court has first made a determination that the statute is unconstitutional. Thus, state agencies may not declare a state statute invalid under Proposition 209, or otherwise refuse to enforce a state statute based on Proposition 209, absent a state appellate court ruling that the statute is unconstitutional.

actual arrest or prosection before challenging the constitutionality of a criminal statute).

The constitutional injury asserted by the plaintiffs is directly connected to the actions of the defendants. *See S. v. D.*, 410 U.S. 616, 618 (1973) (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923)) ("The party who invokes judicial power must be able to show that he has sustained or is immediately in danger of sustaining some direct injury as a result of a statute's enforcement."). Two of the defendants, and now class representatives, the California Governor and Attorney General, are explicitly charged with the task of enforcing the laws of the state. The other defendants are governmental entities that are under a duty to apply the amendment to existing statutes, ordinances, and regulations. Plaintiffs have shown that they will suffer the alleged constitutional injury when any one of the defendants enforces the constitutional amendment.

Finally, since the constitutional injury to the plaintiffs is allegedly caused by the enforcement of Proposition 209, plaintiffs' requested remedy, a declaration that the Proposition is unconstitutional and unenforceable, would unquestionably address the plaintiffs' alleged injuries. *See Allen v. Regan*, 468 U.S. 737, 753, n.19 (1984) (the redressability requirement "examines the causal connection between the alleged injury and the judicial relief requested").

By demonstrating imminent injury attributable to the actions of the defendants that will be redressed by a favorable decision by this Court, plaintiffs have met the requirements for standing under the Article III "case or controversy" clause.[8]

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[8] At the outset, this Court must address defendants' contention that these proceedings should be stayed under the "*Pullman* abstention" doctrine. *Railroad Comm'n of Tex. v. Pullman*, 312 U.S. 496 (1941). After having carefully reviewed the circumstances that defendants have forwarded in support of their request for abstention, this Court chooses not to abstain. Defendants have not presented an interpretation of

(continued...)

III. PRELIMINARY INJUNCTION STANDARD

According to Ninth Circuit precedent, in order to obtain a preliminary injunction, the moving party must demonstrate either (1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) that serious questions are raised and the balance of hardships tips sharply in favor of the movant. *Associated General Contractors*, 950 F.2d at 1410. These formulations are not different tests but rather two points on a sliding scale in which the degree of irreparable harm increases as the probability of success on the merits decreases. *Id.* In considering a request for a preliminary injunction, a court must remain mindful that such relief is aimed primarily at preserving the status quo pending trial. *See Los Angeles Mem. Coliseum Comm'n v. National Football League*, 634 F.2d 1197, 1200 (9th Cir. 1980) ("fundamental principle" governing preliminary injunctive relief is the need to maintain the status quo prior to determination on the merits). Under either formulation of the test, a court, in balancing the harms, must also take into account any public interests implicated by the injunctive relief sought. *Caribbean Marine Services Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988).

Because the plaintiffs here allege that they suffer constitutional injury at the hands of Proposition 209, the Court must evaluate the merits of their constitutional claims before it can meaningfully address the irreparability and imminence of any harm. *See Bery v. City of New York*, 906 F. Supp. 163, 166 (S.D.N.Y. 1995) (where constitutional injury is alleged, "the two prongs of the threshold showing

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[8](...continued)
challenged state law that this Court, in its discretion, believes warrants abstention. This Court, however, will revisit this area and consider all subsequent developments and arguments when it considers defendants' regularly noticed motion to abstain scheduled for January 6, 1997.

required for injunctive relief merge into one"), *rev'd on other grounds*, 97 F.3d 689 (2d Cir. 1996).

IV. FINDINGS OF FACT

The following Findings of Fact are based on the preliminary record presently before the Court.

A. Characterization of Proposition 209

After qualifying as an initiative constitutional amendment, Proposition 209 was placed on the California general election ballot for November 5, 1996.

Prior to the election, each registered voter received an official California Ballot Pamphlet prepared by the non-partisan California Legislative Analyst's Office ("LAO").[9] This Pamphlet, which provided an official description and analysis of each statewide initiative, portrayed Proposition 209 as a measure that would eliminate race- and gender-conscious affirmative action programs in the public sector.[10] Accordingly, the California Ballot Pamphlet explained to voters that:

> A YES vote on [Proposition 209] means: The elimination of those affirmative action programs for women and minorities run by the state or local governments in the areas of public employment, contracting, and education that give "preferential treatment" on the basis of sex, race, color, ethnicity, or national origin.
>
> A NO vote on this measure means State and local government affirmative action programs would remain in effect to the extent they are permitted under the United States Constitution.

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[9] The Legislative Analyst is required, pursuant to the California Elections Code, to prepare a "concise summary" of the general meaning of each initiative as well as an analysis. CAL. ELEC. CODE §§ 9085-86.

[10] In formulating this description, the LAO extensively reviewed materials pertaining to Proposition 209, including "documents from proponents and opponents, journal articles, media coverage, legislative hearings, numerous conversations with proponents, opponents, government officials and other experts." Pls. Exh. 2, Taylor Decl. ¶ 2.

Pls. Exh. 2 (emphasis in original).

In addition to this brief summary, the Ballot Pamphlet also provided voters with a more extensive analysis of Proposition 209, which underscored that the initiative would effectively eliminate race- and gender-conscious affirmative action programs. Specifically, the LAO explained Proposition 209 and its effects as follows:

> [F]ederal, state, and local governments run many programs intended to increase opportunities for various groups—including women and racial and ethnic minority groups. These programs are commonly called "affirmative action" programs....
>
> If [Proposition 209] is approved by the voters, it could affect [the following programs]....
>
> **Public Employment and Contracting**
> The measure would eliminate affirmative action programs used to increase hiring and promotion opportunities for state or local government jobs, where sex, race, or ethnicity are preferential factors in hiring, promotions, training or recruitment decisions. In addition, the measure would eliminate programs that give preference to women-owned or minority-owned companies on public contracts ....
>
> **Public Schools and Community Colleges**
> [T]he measure could eliminate, or cause fundamental changes to, *voluntary* desegregation programs run by school districts .... Examples of desegregation spending that could be affected by the measure include the special funding given to (1) "magnet" schools (in those cases where race or ethnicity are preferential factors in the admission of students to the schools), and (2) designated "racially isolated minority schools" that are located in areas with high proportions of racial or ethnic minorities....
>
> In addition, the measure would affect a variety of public school and community college programs such as counseling, tutoring, outreach, student financial aid, and financial aid to selected school districts in those cases where the programs provide preferences to individuals or schools based on race, sex, ethnicity, or national origin....
>
> **University of California and California State University**
> The measure would affect admissions and other programs at the state's public universities. For example, the California State University ("CSU") uses race and ethnicity as factors in some of its admissions decisions. If this initiative is passed by the voters, it could no longer do so....

Id. (emphasis in original). As the above reflects, the only programs identified by the LAO as potentially affected by Proposition 209 are race- and gender-conscious affirmative action programs.

The California Ballot Pamphlet also included partisan arguments submitted by proponents and opponents of the initiative. These arguments further established that the issue at stake in Proposition 209 was the continuation of public sector race- and gender-conscious affirmative action programs. The Argument In Favor Statement begins by instantly focusing the reader on the issue of affirmative action:

> A generation ago, we did it right. We passed civil rights laws to prohibit discrimination. But special interests hijacked the civil rights movement. Instead of equality, governments imposed quotas, preferences, and set-asides.

Pls. Exh. 3. The next paragraph quotes the facially-neutral language of the initiative but then immediately returns to the issue of affirmative action, with a particular emphasis on race-conscious affirmative action:

> "REVERSE DISCRIMINATION" BASED ON RACE OR GENDER IS PLAIN WRONG!.... [S]tudents are being rejected from public universities because of their RACE. Job applicants are turned away because their RACE does not meet some "goal" or "timetable." Contracts are awarded to high bidders because they are of the preferred RACE...Proposition 209 will stop [these] terrible programs....

Id. (emphasis in original).[11]

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[11] Ward Connerly, co-signer of this ballot argument, also made it clear in his public statements that Proposition 209 was intended to end affirmative action programs. In March 1996, for example, Connerly explained to reporters why he had decided against trying to end racial preferences in the University of California's ("UC") outreach programs for high school students and financial aid criteria: "Connerly said Wednesday that UC had already been torn apart by his successful push last summer to end racial preferences in admissions and hiring, and that affirmative action programs in California schools would most likely be banned anyway by [Proposition 209]. 'What do I gain by going ahead and forcing a showdown ...[?] The public's going to end affirmative action in November.'" Pls. Exh. 4. Governor Wilson, another co-signor of the ballot initiative, also told reporters in March of 1995 that although the California Legislature was unwilling to "confront the issue of reverse discrimination arising

(continued...)

The Argument Against Statement also focused attention on Proposition 209's impact on affirmative action programs beneficial to women and minorities. The argument warns that:

> Proposition 209 will eliminate affirmative action programs...that help achieve equal opportunity for women and minorities....

and concludes by stating that Proposition 209:

> poses as an equal opportunities initiative, but...[it] puts at risk every outreach program, sets back the gains made by women and puts the brakes on expanding opportunities for people in need.

Id. (quoting General Colin Powell).

B. Election Results and Response by Defendants

On November 5, 1996, the voters of California enacted Proposition 209 into law, with 4,736,180 votes (54%) cast in favor of the initiative and 3,986,196 votes (46%) cast in opposition.[12] Because the initiative is by its terms self-executing, public entities around the State faced the immediate question of implementation. Three of the defendants in this action responded by quickly acting to implement and enforce Proposition 209. On November 6, 1996, Governor Wilson issued an Executive Order (W-136-96) requiring state agencies to promulgate implementing

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(...continued)
from affirmative action programs...the people of California will get that opportunity at the ballot box." *Id.*

[12] The racial and gender breakdown of the vote was as follows:

VOTER	YES(%)	NO(%)
Male	61%	39%
Female	48%	52%
White	63%	37%
Black	26%	74%
Latino	24%	76%
Asian	39%	61%

Pinkus Decl. and attachment. As the above reflects, none of the above groups voted entirely for or against Proposition 209. However, "White voters were the only racial or ethnic group supporting 209." *Id.*

regulations and identify all state statutes and programs pertaining to employment, education or contracting that grant or encourage preferences based on race, sex, color, ethnicity or national original.[13] That same day, Attorney General Lungren instructed state agencies to comply immediately with Proposition 209 to the extent permitted by California law.[14] The University of California also promptly took steps to implement Proposition 209. *See* Dec. 6, 1996 Order at 2.[15] Other defendants expressed uncertainty and confusion regarding the appropriate response to the initiative. *See* Response of Defendant City of Pasadena to Plaintiffs' Request for Temporary Restraining Order at 2 ("[C]omplex questions now exist about how to reconcile the competing and seemingly conflicting requirements of federal, state and local affirmative action policies. These are issues which this City cannot resolve on its own.").

C. Effect of Proposition 209 on Affirmative Action Programs

Any California public entity that implements Proposition 209 is required to end voluntary race- and gender-conscious affirmative action programs in three

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[13] Prior to the November election, Governor Wilson filed suit in Sacramento Superior Court (96-CS01082) against state agencies challenging the constitutionality of certain affirmative action programs. After the election, Governor Wilson promptly moved to amend his suit to include Proposition 209 as a basis for invalidating the challenged programs. On November 14, 1996, the California Court of Appeal ruled that the amendment could not be made pending resolution of a writ petition on a judicial disqualification order. However, Governor Wilson intends to add a Proposition 209 claim to the case "at the earliest available opportunity." Defendants' Supplemental Memorandum in Opposition to Motion for Preliminary Injunction at 5 n.2.

[14] We also note that on November 25, 1996, the Governor and Attorney General both declined to agree to a moratorium on actions to enforce Proposition 209 pending further proceedings in this case. *See* Order Re Temporary Restraining Order, November 27, 1996, at 6.

[15] Given the self-executing nature of Proposition 209, all other members of the defendant class are also required to implement Proposition 209 immediately. *See* CAL. CONST. art. 1, § 31(h).

areas: contracting, employment, and education. We thus briefly review each of these areas in turn.[16]

1. Contracting

Race- and gender-conscious affirmative action programs in California in the area of public contracting have taken various forms, from requiring that prime contractors make good-faith efforts to utilize women- or minority-owned subcontractors to providing an advantage in evaluating bids. These 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. According to the evidence before the Court, their effect has been to provide such contractors with substantial opportunities not previously available.

The experience of Antonio Ruiz provides one such example. Mr. Ruiz owns Ruiz Construction Company & Associates which engages in general engineering and construction work. Amended Ruiz Decl. filed in support of *amicus* ¶ 2. It is Mr. Ruiz' experience that "contractors accept the bids of those contractors with whom they have established ties." *Id.* ¶ 8. In 1985, Ruiz qualified to participate in the city of San Francisco's voluntary affirmative action program, which was adopted to remedy past discriminatory practices by the city in its letting of contracts. Prior to this time, Ruiz was unable to "get many large contractors to even accept [his] bids for subcontract work," and he in fact had obtained "only one contracting job with the City." ¶¶ 7-8. By participating in the City's affirmative action program, he was able to break through the old patterns of doing business and obtain subcontracts. ¶¶ 10-11. The exposure he gained led to additional

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[16] The record in this case includes references to a range of affirmative action programs currently in effect in California. Some of these programs have been subjected to judicial challenge and found to be constitutionally permissible. *See, e.g., Assoc. General Contractors v. Coalition for Econ. Equity*, 748 F. Supp. 1443 (N.D. Cal. 1990), *aff'd*, 950 F.2d 1401 (9th Cir. 1991), *cert. denied*, 503 U.S. 985 (1992). Others have never been challenged. With respect to these latter programs, the Court does not, of course, make any judgment with respect to their constitutionality.

business with prime contractors, and allowed him to build his business substantially and "form joint ventures to bid as a prime contractor on City contracts." ¶¶ 12-14. *See also* Fung Decl. ¶ 4 (affirmative action in public contracting has reduced discrimination against Asian American contractors and made it possible for them to bid competitively for public contracts); Wu Decl. at 144-145 (affirmative action in public contracting has substantially benefitted Asian Americans); Burns Decl. ¶ 4 (women-owned painting and wallpapering company benefitted substantially from San Francisco affirmative action contracting program); Chavez Decl. ¶¶ 3-4 (describing how affirmative action in public contracting programs allowed him to break through the "old boy network" and obtain public contracts); Larson Decl. ¶ 16 (disparities between the availability of women- and minority-owned contractors and their use by public agencies "are noticeably reduced where government agencies implement affirmative action policies"), ¶ 20 (after Los Angeles adopted affirmative action programs, percentage of women businesses obtaining city contracts increased from 0.3% to 8% and percentage of minority businesses obtaining city contracts increased from 2% to 11.8%).

The record further demonstrates that implementation of Proposition 209 would substantially reduce opportunities in public contracting for women and minorities. Larson Decl. ¶ 17 (discussing studies showing that race or gender neutral programs designed to address underutilization of minority and women contractors were generally ineffective), ¶ 21; Chavez Decl. ¶ 5 (estimating that absent affirmative action program "his firm would lose up to 50 to 75% of" its public contracting work); Leonard Decl. ¶ 15 (discussing a study finding "not only a stagnation but a reversal of advances" for African-Americans under "weak" affirmative action programs).

2. **Employment**

Race- and gender-conscious affirmative action programs in California in the area of public employment generally allow an employer to consider the ethnicity or gender of an otherwise qualified applicant as one of many factors. Some programs may also utilize hiring goals. Such programs are typically designed to address the continuing effects of past or present bias against the hiring and/or promotion of women and minority employees. According to the evidence before the Court, their effect has been to provide such employees with substantial opportunities not previously available.

The use of voluntary affirmative action in California's civil service provides one such example. In 1971, then-Governor Ronald Reagan issued an Executive Order establishing voluntary affirmative action in the California civil service. Bielby Decl. ¶ 4. Subsequently, state agencies and departments began using hiring goals and timetables in an effort to correct the existing underutilization of women and minorities.[17] As a consequence, the "index of gender and race segregation in state agencies" declined by 11 and 16 percent respectively between 1979 and 1986. ¶ 5. *See also* Newmann Decl. ¶ 7 (period from 1979-85 showed substantial statistical increases in the rate of female representation in the California "civil service and an even greater increase in nonwhite representation"); Badget Decl. ¶ 6 ("After state and federal governments began to require that state and local employers execute affirmative action plans in the early 1970s, the representation of Latino and black women increased dramatically as did access to managerial and professional jobs for all women of color."); Grillo Decl. ¶¶ 1-4 (affirmative action guidelines have been "very

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[17] State civil service affirmative action programs "encourage some consideration of race, ethnicity and gender in hiring qualified civil service applicants and in choosing private firms to handle contracts for state services." California Senate Office of Research, The Status of Affirmative Action in California (1995), Pls. Exh. 5 at 2.

important" in enabling women and minorities to gain civil service positions in California).

The record also indicates that implementation of Proposition 209 would substantially reduce opportunities for women and minorities in public employment.

3. Education

Race- and gender-conscious affirmative action programs in California in the area of public education range from voluntary desegregation and "magnet school" programs at the elementary school level to financial aid and admissions programs at the college and graduate school level. The evidence before the Court demonstrates that, overall, these programs have benefited minorities and women.

The University of California provides one example. Where the number of eligible applicants exceeds the spaces available, the University of California campuses select between 40 and 60% of students based upon their grades, test scores and course work. The remaining selections are made using a combination of criteria including California residence, physical and learning disabilities, educational disadvantage, family income, ethnicity, leadership ability, public service, special athletic, artistic or musical ability, composition of a student's family (whether student comes from a single- or two-parent family) and a student's family's college history (whether student is first-generation college bound).

Under this system of admissions, the racial composition of the total University of California freshman class for the Fall of 1994 was as follows:

	number	percentage
American Indian	214	.96
African American	968	4.35
Latino	3,313	14.87
Filipino	949	4.26
Asian	7,191	32.28
White/other	9,643	43.28
total:	22,278	100.00

Conrad Decl. ¶ 15.

The record indicates that, without the present race- and gender-conscious affirmative action efforts, the number of African American enrollments "could be reduced across the system by as much as 40 to 50 percent while Chicano/Latino enrollments could be reduced by 5 to 15 percent.... American Indian enrollments could be reduced by 40 to 50 percent. Filipino enrollments could increase by 5 percent or decline by 5 percent." Pls. Exh. 7 at i. On the other hand, Asian American enrollments would increase by 15 to 25 percent. White enrollments would likely remain roughly the same. *Id.*[18]

The above estimates may well understate the actual decreases that would occur over time. As acceptance rates fall for African American, Latino and American Indian students, the applicant pool from these groups may fall as well, since high school students consider the probability of admission when deciding where to apply for college.

The record also suggests that, absent race- and gender-conscious admission programs, the admissions of African American, Latino, and American Indian students at California's public medical schools will significantly decrease. This in turn is likely to have a negative effect on the delivery of health care services in those communities. "On average, black physicians care for nearly six times as many black patients and Hispanics physicians care for nearly three times as many Hispanic patients as other physicians." Conrad Decl. ¶ 37; Drake Decl. ¶ 5.

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[18] An analysis of the estimated effects of Proposition 209 on enrollments at just the U.C. Berkeley campus showed similar results. Specifically, it estimated that African American enrollment would drop from 222 (6.5%) in the 1995 class to 85-119 (2.5 - 3.5%) in the 1998 class; Latino enrollment would drop from 531 (15.6%) to 205 - 287 (6 - 8.4%); Native American enrollment would drop from 63 (1.8%) to 20 - 28 (.6 - .8%), Asian American enrollment would increase from 1268 (37.2%) to 1516 - 1582 (44.5 - 46.4%), and White enrollment would increase from 1,018 (29.9%) to 1116 - 1164 (32.8 - 34.2%). Pls. Exh. 13.

D. Impact of Proposition 209 on the Political Process

Prior to the passage of Proposition 209, anyone seeking to petition his or her government representatives to adopt, amend, or retain race- or gender-conscious affirmative action programs faced the same burdens as those faced by any constituent seeking preferential treatment for any group in the area of contracting, employment or education.[19] Typically, this burden involves directly petitioning and lobbying the specific representatives or policymakers with authority to adopt such programs. Such programs can generally be approved by simple majority vote or by executive decision. *See e.g.* Hernandez Decl. ¶ 5 (describing constituents' successful effort to convince city of San Francisco to adopt affirmative action program to remedy discriminatory practices in city contracting). In other cases, a local initiative process may be required.

After the passage of Proposition 209, women and minorities who wish to petition their government for race- or gender-conscious remedial programs face a considerably more daunting burden.[20] Before such persons can approach their school district, city council, county government, or any other subdivision of government with such a proposal, they must first obtain an amendment to the California Constitution that would either (a) repeal Proposition 209, or (b) permit the specific government entity at issue to adopt a particular race- or gender-conscious affirmative action program.

The California Constitution can be amended through either an initiative constitutional amendment or a legislative constitutional amendment. Either method

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[19] This would include, for example, constituents seeking preferential treatment for veterans or the disabled in employment, for local businesses in contracting, or for athletes, artists or California residents in admissions to public schools.

[20] Defendants have not questioned the substantial evidence before the Court showing that women and minorities continue to face the effects of past and present discrimination and thus will continue to have an interest in using the political process to seek remedial action through affirmative action programs.

places a heavy burden on those seeking to advocate the use of constitutionally-permissible affirmative action programs in their local communities.

Under the first method—an initiative constitutional amendment—sponsors must first obtain signatures supporting the initiative equal to 8% of the previous gubernatorial vote. In 1996, this required the collection of 693,230 valid signatures. Cain Decl. ¶ 4. Since many signatures are disqualified, in order to ensure the requisite number of valid signatures, approximately 50% more "raw" signatures must be collected. Zimmerman Decl. ¶ 8. Because these signatures must be collected within a 150-day time limit, a campaign must typically collect up to 7,000 signatures during each of the 150 days. *Id.* ¶ 9. Given these requirements, and the size of California, hiring paid signature gatherers is a virtual necessity. The cost of obtaining signatures runs from $0.70 to $1.50 per signature. *Id.* ¶ 10. Thus, even where volunteers gather some portion of the required signatures, the cost of securing sufficient signatures, and minimally staffing a few offices, can run from $500,000 to $1.5 million. *Id.* ¶ 11; Cain Decl. ¶ 6. Once the initiative has qualified, it must gain majority approval by the voters.

Under the second method—legislative constitutional amendment—sponsors must secure a two-thirds vote of approval by both the California Senate and Assembly. A majority of the voters must then approve the amendment at the next statewide election.

In either case, substantial funds are required to organize and fund the statewide campaign that follows the initiative qualification procedure or requisite legislative approval. Again, the size of California makes this endeavor particularly expensive. To reach at least 10 million voters directly, a campaign would have to talk to 1,000 voters each day for 30 years. Zimmerman Decl. ¶ 12. Campaigns must thus generally reach voters through television, radio, print advertising, and direct mail. According to the California Commission on Campaign Financing, $109 million was spent on statewide initiatives on the 1990 ballot. Cain Decl. ¶ 6.

The campaign in support of Proposition 209 had spent $3.1 million by October 1996. Cain Decl. ¶ 6.

As a result of the new political-process hurdles erected by Proposition 209, members of the plaintiff class are effectively precluded from petitioning local and state policymakers and representatives to adopt, maintain, or expand race- or gender-conscious affirmative action programs. For example, the Coalition for Economic Equity (Coalition), a named plaintiff in this action, has proposed fifteen amendments to the City of San Francisco's affirmative action policy. Members of the Coalition have met with City Supervisors in preparation for a vote on the proposed legislation by the entire San Francisco Board of Supervisors. The Coalition is now precluded from further pursuing this legislation through the normal political channels that were available prior to the adoption of Proposition 209.

V. CONCLUSIONS OF LAW

A. Likelihood of Success on Plaintiffs' Equal Protection Claim

"The Equal Protection Clause of the 14th Amendment guarantees racial minorities the right to full participation in the political life of the community." *Seattle*, 458 U.S. at 467. This guarantee applies with equal force to women. *United States v. Virginia*, 116 S. Ct. at 2275. The Equal Protection Clause not only prohibits the outright exclusion of women and minorities from the political process, but also prohibits more subtle distortions of the political process. *Seattle*, 458 U.S. at 467. In the words of the Supreme Court, "the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote." *Id.* at 476 (quoting *Hunter*, 393 U.S. at 393).

Plaintiffs argue that Proposition 209, despite its facial neutrality, violates the Equal Protection Clause because it restructures the political process to

disadvantage only those seeking to enact legislation intended to benefit minorities and women. Relying on the Supreme Court opinions in *Seattle* and *Hunter*, plaintiffs emphasize that prior to the enactment of Proposition 209, supporters of race- and gender-conscious affirmative action programs were able to petition their state and local officials directly for such programs. After the passage of Proposition 209, however, these same advocates face the considerably more daunting task of mounting a statewide campaign to amend the California Constitution. At the same time, those seeking preferences based on any ground other than race or gender, such as age, disability, or veteran status, continue to enjoy access to the political process at all levels of government. Plaintiffs thus maintain that Proposition 209 denies them the equal protection of the laws by removing the authority to redress racial and gender problems—and only those problems—to a new and remote level of government, thereby singling out the interests of minorities and women for a special political burden.

For the reasons noted earlier, the Court in testing Proposition 209 against the Equal Protection Clause focuses on a relatively narrow question: does Proposition 209's prohibition of constitutionally-permissible race- and gender-conscious affirmative action violate plaintiffs' right to equal protection of the laws?

1. Does the Seattle-Hunter Doctrine Apply?

Plaintiffs rely primarily on two Supreme Court cases, *Hunter* and *Seattle*, to support their equal protection claim. "These cases yield a simple but central principle. ...[T]he political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action. [But] the State [may not] allocate governmental power nonneutrally by explicitly using the racial nature of a decision to determine the decisionmaking process." *Id.* at 470.

In *Hunter v. Erickson*, 393 U.S. 385 (1969), the Supreme Court addressed the efforts of citizens of Akron, Ohio, to overturn duly-enacted legislation prohibiting racial discrimination in housing. After the city council adopted a fair housing law, the citizens by referendum amended the city charter to require that fair housing ordinances be put to a citywide vote before they could take effect. This requirement, set out in § 137 of the charter, not only affected future fair housing efforts, but also reached back to suspend the previously-enacted ordinance. *See id.* at 387. The Supreme Court found that § 137 singled out local legislation of special interest to minorities for a unique political burden; while those seeking to enact ordinances regulating real estate on any basis other than race merely had to persuade the Akron City Council, "for those who sought protection against racial bias, the approval of the City Council was not enough." *Id.* at 390. The Supreme Court ultimately concluded that Akron's restructuring of the political process violated the 14th Amendment.

The Supreme Court's analysis of § 137 turned on two particular features of the measure. First, § 137 raised equal protection concerns because it singled out an issue of particular interest to racial minorities—racial discrimination in housing. Had the measure imposed a new political burden on all legislation, the Supreme Court was quick to point out, it would not have run afoul of the 14th Amendment. *Id.* at 393-95 (Harlan, J., concurring). Second, § 137 was suspect because it imposed a novel political burden on all future efforts to enact fair housing legislation. Had the citizens of Akron used the referendum process simply to repeal the fair housing ordinance previously adopted by the Akron City Council, this action alone would have raised no equal protection difficulty. *Id.* at 390 n.5; *see also Crawford*, 458 U.S. at 539. Although neither of these two features of § 137, standing alone, would have offended the 14th Amendment, the Supreme Court held that the confluence of the two factors—the targeting of a racial issue

and the reordering of the political process—constituted a racial classification that required the most exacting judicial scrutiny.

In *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982), the Supreme Court reaffirmed its ruling in *Hunter*, applying the rationale of that case to a statewide initiative designed to prohibit the mandatory busing of students to achieve racial integration in schools. After a Seattle school district took steps to establish a mandatory busing plan, the voters of Washington passed Initiative 350, which provided that "no school board...shall directly or indirectly require any student to attend a school other than the school which is geographically nearest or next nearest the student's place of residence." *Id.* at 462. Three school districts that had previously initiated busing efforts challenged the initiative in court, and these challenges ultimately presented the Supreme Court with an "extraordinary question: whether an elected school board may use the Fourteenth Amendment to *defend* its program of busing for integration from attack by the State." *Id.* at 459 (emphasis in original).

Despite its facially neutral language, the Supreme Court found that Initiative 350 in reality barred only busing plans aimed at achieving racial integration while permitting busing for other purposes. In striking down the initiative, the Court found that it, like the enactment in *Hunter*, singled out an issue of concern to minorities—racial busing—and imposed special political burdens on those who supported the issue. These features of Initiative 350 led the Court to find that the facially-neutral measure was, in reality, a racial classification subject to the most searching judicial scrutiny. *Id.* at 485. In the words of the Court, "It is beyond dispute...that the initiative was enacted 'because of,' not merely 'in spite of,' its adverse effects upon busing for integration." *Id.* at 471. As in *Hunter*, the Supreme Court concluded that, viewed in this light, Initiative 350 violated the 14th Amendment.

Before the Court applies these precedents to the case at bar, it notes that Proposition 209 shares several characteristics with the measures struck down in *Hunter* and *Seattle*. All three initiatives are facially neutral. All three grew from controversial efforts aimed at rolling back legislative gains that were intended as remedies for historical discrimination suffered by particular groups. Perhaps most importantly, in the wake of all three measures, those seeking to reenact such remedies could no longer use the same political mechanisms that had been available prior to the passage of the enactments.

As plaintiffs themselves concede, however, one difference between *Seattle* and *Hunter* and the matter at bar is readily apparent: *Seattle* and *Hunter* exclusively address racial issues,[21] whereas Proposition 209 addresses both race and gender preferences. Defendants urge this Court not to import the Supreme Court's *Seattle* and *Hunter* reasoning into the context of gender.

The Supreme Court "has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women, simply because they are women, full citizenship status." *United States v. Virginia*, 116 S. Ct. at 2275. Because "our Nation has had a long and unfortunate history of sex discrimination," equal protection jurisprudence requires that gender classifications must survive heightened judicial scrutiny. *J.E.B. v. Alabama ex rel T.B.*, 511 U.S. 127, 114 S. Ct. 1419, 1425 (1994) (quoting *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973)). Gender and racial classifications, however, do not receive identical treatment under the Equal Protection Clause; to date, the Supreme Court has reserved strict scrutiny for racial classifications. *United States v. Virginia*, 116 S. Ct. at 2275 n.6. Gender

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[21] The referendum at issue in *Hunter* also burdened the interests of religious minorities, *see* 393 U.S. at 386, but the Supreme Court's analysis of § 137 focused primarily on its racial component, *see id.* at 391.

classifications, meanwhile, are subject to less stringent intermediate scrutiny review. *Id.* at 2274.

The differing levels of judicial scrutiny accorded race and gender classifications, however, do not render the reasoning of *Seattle* and *Hunter* inappropriate in the context of gender. On the contrary, the doctrinal approach of those cases is wholly consonant with the heightened scrutiny applicable to gender classifications. When a measure is challenged under the Equal Protection Clause, a court is required, as a threshold matter, to determine whether the challenged measure contains a race or gender classification. *See Adarand Constructors, Inc. v. Pena,* 115 S. Ct. 2097, 2105 (1995) (noting that presence of a race classification made the *Arlington Heights* intent analysis unnecessary); *Personnel Adm'r. of Mass. v. Feeney,* 442 U.S. 256, 273-74 (1979) (noting different equal protection analysis when no explicit gender classification is present). It is this threshold question that the *Seattle-Hunter* analysis is meant to answer. Only after concluding that a racial classification was involved did the Supreme Court in *Seattle* and *Hunter* proceed to subject the challenged enactments to strict scrutiny. *Seattle,* 458 U.S. at 485; *Hunter,* 393 U.S. at 391-92. In the gender context, similarly, a court should first apply the *Seattle-Hunter* analysis to determine whether a gender classification exists, and then apply the appropriate intermediate equal protection scrutiny. It is precisely by applying the *Seattle-Hunter* doctrine in cases involving gender that a court fulfills its obligation to scrutinize gender classifications carefully.

Irrespective of the applicability of the rationale of *Seattle* and *Hunter* to gender, defendants maintain that the present case is not controlled by these precedents. Simply put, the defendants insist that because this case is different in kind from *Seattle* and *Hunter*, the *Seattle-Hunter* doctrine is wholly irrelevant.

First, defendants argue that Proposition 209, unlike the Washington and Akron initiatives, expressly *prohibits* classifications based on race and gender, and

thus cannot be read to *create* such classifications. Defendants essentially ask this Court to read the plain language of Proposition 209, which concededly contains no classification on its face, and go no further. While it would certainly streamline the inquiry, this approach is expressly disapproved in *Hunter* and *Seattle*. Despite the facial neutrality of the challenged enactments in both of those cases, the Supreme Court looked beyond the plain language of the measure in question and inquired whether, "*in reality*, the burden imposed by [the] arrangement necessarily falls on the minority." *Seattle*, 458 U.S. at 468 (emphasis added, internal quotations omitted); *see also Hunter*, 393 U.S. at 391.[22]

Defendants' argument, moreover, asks this Court to overlook the central purpose of the *Seattle-Hunter* doctrine: to determine whether facially neutral enactments in reality rest on "distinctions based on race" or gender. *Seattle*, 458 U.S. at 485. Defendants cannot use Proposition 209's facial neutrality as a shield against the application of the *Seattle-Hunter* analysis; it is precisely the measure's facial neutrality that makes application of those cases appropriate. *Compare id.* (applying *Hunter* to find that a facially neutral measure operated as a racial classification) *with Crawford*, 458 U.S. at 539 (applying the *Hunter* analysis to find that a facially neutral measure did not embody a racial classification). Defendants have simply mistaken the starting point of the equal protection analysis with its ending point.

Defendants next attempt to distinguish the *Seattle* and *Hunter* cases by shifting the focus of the inquiry from the initiatives themselves to the legislative efforts they effectively bar. From this standpoint, the defendants make two

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[22] Defendants' very argument, moreover, was before the Supreme Court in *Seattle*. As Justice Powell points out in his *Seattle* dissent, 458 U.S. at 491 n.5, Judge Wright, dissenting in the Ninth Circuit opinion in *Seattle*, concluded that "Initiative 350 does not treat persons differently on the basis of race." *Seattle Sch. Dist. No. 1 v. Washington*, 633 F.2d 1338, 1351 (9th Cir. 1980) (Wright, J., dissenting). This conclusion did not win the approval of the Supreme Court, however, which affirmed the Ninth Circuit majority.

arguments that are variations on a single theme to distinguish *Seattle* and *Hunter* from the case at hand.

In the first argument, defendants contend that neither the mandatory busing programs barred by Initiative 350 nor the fair housing legislation barred by Akron's § 137 placed a burden upon the equal protection rights of nonminorities. Defendants insist that Proposition 209, in contrast, would outlaw preferences that by their very nature inflict injury on nonminorities. *See Adarand*, 116 S. Ct. at 2114 ("[W]henever the government treats any person unequally because of his or her race, that person has suffered an injury...."); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280-83 (1986) (opinion of Powell, J.) (discussing the burden placed on nonminorities by affirmative action programs aimed at remedying past discrimination). On this theory, Proposition 209 is distinguishable from the initiatives in *Seattle* and *Hunter* because it only interferes with "zero-sum" antidiscrimination efforts—those that help minorities, but do so at the expense of nonminorities.

The second argument focuses on the judicial scrutiny that attends the efforts banned by the challenged initiatives. According to defendants, the affirmative action efforts prohibited by Proposition 209 are, under existing 14th Amendment principles, themselves constitutionally suspect and subject to heightened scrutiny. *See Adarand*, 115 S. Ct. at 2117. The fair housing ordinance and the busing programs that were overturned by the initiatives in *Seattle* and *Hunter*, defendants argue, did not themselves trigger heightened equal protection scrutiny.

Defendants' proposed distinctions, although not implausible on their face, both fail for the same reason: nothing in *Seattle* or *Hunter* suggests that the Supreme Court holdings turned on these features of the challenged amendments.[23]

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[23] The Court also notes that the defendants have not cited any authority addressing whether men suffer an equal protection injury of the sort set forth in *Adarand*, (continued...)

If the application of the *Seattle-Hunter* doctrine to Initiative 350 turned on whether or not Seattle's mandatory busing plan could be characterized as "zero-sum," as the defendants contend, the Supreme Court would presumably have addressed this difficult threshold issue. The opinion in *Seattle*, however, applied *Hunter* without examining whether mandatory busing presented a "zero-sum" scenario.[24] Similarly, the Supreme Court in *Seattle* expressly declined to reach the question of what level of equal protection scrutiny was applicable to Seattle's busing plan. *Seattle*, 458 U.S. at 472 n.15. Consequently, defendants' contention that *Seattle*'s holding turns on the scrutiny applicable to Seattle's busing program is unpersuasive.

Defendants' view of Initiative 350, moreover, overlooks the raging controversy that surrounded the issue of mandatory busing in 1978 and that constituted the backdrop for the Supreme Court's decision in *Seattle*. *See Seattle Sch. Dist. No. 1 v. Washington*, 473 F. Supp. 996, 1005-10 (W.D. Wash. 1979), *aff'd*, 633 F.2d 1338 (9th Cir. 1980), *aff'd*, 458 U.S. 457 (1982) (findings regarding the political controversy surrounding Seattle's busing efforts). It is evident that many who supported Initiative 350 felt that Seattle's busing plan benefited minority students at the expense of the majority. This is borne out by the fact that shortly after the implementation of the plan, four school board members who supported the plan narrowly avoided recall. *Seattle*, 458 U.S. at 460 n.1. As a

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[23](...continued)
115 S. Ct. at 2114, when a governmental body adopts a gender-conscious affirmative action program.

[24] The Court also notes that the language of Proposition 209 itself undermines defendants' proposed "zero-sum" distinction. Defendants urge that *Seattle* ought not apply where the challenged measure interferes only with "zero-sum" antidiscrimination efforts. By its terms, however, Proposition 209 prohibits *all* race and gender preferences, not merely those that operate in a "zero-sum" fashion. Consequently, Proposition 209's reach may extend beyond mere "zero-sum" antidiscrimination efforts. Put another way, Proposition 209 itself appears to be oblivious to the very distinction urged by defendants on its behalf.

result, defendants' conclusion that the busing plan in *Seattle* did not burden majority interests is, at best, both factually and legally ambiguous. *Id.* at 495 n.9 (Powell, J., dissenting) (suggesting that busing aimed at desegregation might, in fact, be viewed as burdensome to nonminority students).

Finally, defendants' focus on the particular legislation barred by Initiative 350, Akron's § 137, and Proposition 209, rather than on the initiatives themselves, suffers from a more fundamental flaw. Accepting defendants' arguments would essentially require that this Court read *Seattle* and *Hunter* as cases about the limits on state-sponsored remedies for past discrimination. This is the inevitable conclusion that emerges from a primary focus on the legislation blocked, rather than on the blocking intiative. As this Court has pointed out, however, the instant case, as well as *Seattle* and *Hunter*, are more appropriately understood as cases about access to the political process.

Because the *Seattle-Hunter* doctrine is designed to determine whether facially neutral enactments single out race and gender issues for unique political burdens, and thus are suspect classifications, defendants' efforts to distinguish *Seattle* and *Hunter* must fail. If, in reality, Proposition 209 does not single out a racial or gender issue for unfavorable treatment in the political process, the initiative will emerge from the *Seattle-Hunter* analysis unscathed. *See Crawford*, 458 U.S. at 539 (simple repeal of antidiscrimination law raises no equal protection concern). If, on the other hand, Proposition 209's facial neutrality masks a racial or gender classification, the Equal Protection Clause requires that the measure be subjected to heightened scrutiny. *See Seattle*, 458 U.S. at 485. It is to this inquiry that this Court now turns.[25]

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[25] Counsel for defendants at oral argument suggested that, to the extent the present Supreme Court might not embrace the rationale of *Seattle* and *Hunter*, this Court is not bound by those opinions. The Court does not so interpret the law, and thus declines to adopt defendants' argument. It is not for this Court to decide whether the Supreme

(continued...)

2. Application of the Seattle-Hunter Doctrine

The *Seattle* opinion sets out the framework for analysis: if an "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," it must be examined for equal protection purposes as if it were a racial classification. *Id.* Keeping the earlier discussion regarding the extension of this analysis to the gender context in mind, the Court applies the *Seattle* test to Proposition 209.

a. Racial Focus

Just as the Supreme Court did in *Seattle*, this Court begins its analysis by asking whether Proposition 209, despite its facial neutrality, singles out an issue of special interest to minorities or women, and thus has a "racial [or gender] focus." *Id.* at 474.

In concluding that Initiative 350 had a racial focus, the Supreme Court relied in part on the perceptions of Washington voters. The Court found that despite Initiative 350's neutral language, proponents of the measure assured voters that it would affect only racial busing. *Id.* at 471. Given the nature of the political campaign that surrounded its passage and the measure's practical effect, the Supreme Court had no difficulty joining the District Court and Court of Appeals in concluding that Initiative 350 was "effectively drawn for racial purposes." *Id.*

The record likewise suggests that the campaign for Proposition 209 had a racial and gender focus. As described in the Findings of Fact, the independent LAO, as well as the supporters and opponents of Proposition 209, characterized Proposition 209 as a referendum on race- and gender-conscious affirmative action.

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[25](...continued)
Court might overturn its previous rulings. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989) (lower court must follow Supreme Court precedent until it is overturned).

Named defendant Governor Pete Wilson himself signed the Argument in Favor statement, which opens with the following:

> THE RIGHT THING TO DO!
> A generation ago, we did it right. We passed civil rights laws to prohibit discrimination. But special interests hijacked the civil rights movement. Instead of equality, governments imposed quotas, preferences, and set-asides.

Pls. Exh. 2. Just as the voters of Washington perceived Initiative 350 as a referendum on busing, the evidence presently before the Court indicates that people of California viewed Proposition 209 as a referendum on affirmative action.

The Supreme Court, in evaluating whether Initiative 350 had a racial focus, also considered the enactment's practical effect. In *Seattle*, despite Initiative 350's non-racial language regulating student transportation, the practical effect of the measure was to prohibit only busing for racial integration, while leaving school districts free to employ busing for other purposes. *Seattle*, 458 U.S. at 474-75. Similarly, while Proposition 209's general language barring discrimination merely duplicates existing state and federal law, and thus does not materially alter existing state practices, Proposition 209's prohibition on preferences will have a practical effect on existing programs. The California Legislative Analyst, for example, concluded that Proposition 209's ban on race and gender preferences would eliminate existing state and local race- and gender-conscious affirmative action efforts in contracting, employment, and education. Pls. Exh. 2. The defendants, moreover, despite repeated questioning by plaintiffs and the Court, have not yet identified a single existing program, other than race- and gender-conscious affirmative action programs, that would be affected by Proposition 209.[26]

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[26] Counsel for defendant-intervenor CADP suggested at oral argument that there may be municipal programs granting preferences to certain ethnic groups that might be barred by Proposition 209. Aside from counsel's oral representation, however, the Court has nothing on the record from which to conclude that Proposition 209 has a substantial

(continued...)

While all parties concede that Proposition 209, at the very least, will prohibit race- and gender-conscious affirmative action efforts, it is equally plain that preferences unrelated to race and gender remain unaffected by Proposition 209. The University of California, for example, remains free after Proposition 209 to continue its practice of considering in its admissions decisions "California residence..., physical and learning disabilities, educational disadvantage, family income, and whether a student comes from a two-parent or single-parent family, is first-generation college bound or has special talents (for example, artistic or athletic ability) or experiences." Young Decl. ¶ 13. Thus, the primary practical effect of Proposition 209 is to eliminate existing governmental race- and gender-conscious affirmative action programs in contracting, education, and employment and prohibit their creation in the future, while leaving governmental entities free to employ preferences based on any criteria other than race or gender.

The opinion in *Seattle*, after concluding that the practical effect of Initiative 350 was to prohibit racial busing, addressed whether racial busing was an issue of special interest to minorities. Satisfied that Proposition 209 singles out race- and gender-conscious affirmative action, the Court turns to a similar question: is affirmative action an issue of special interest to minorities and women? The Court finds that the record fully supports plaintiffs' contention that state-sponsored race- and gender-conscious affirmative action "inures primarily to the benefit of the minority, and is designed for that purpose." *Seattle*, 458 U.S. at 472. As discussed in the Findings of Fact, plaintiffs have produced extensive evidence documenting the dramatic effect that affirmative action has had on the opportunities available to minorities and women in public contracting, employment, and education.

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[26](...continued)
impact beyond the race- and gender-conscious affirmative action context.

Defendant-intervenor CADP stresses that, in recent years, the effectiveness and wisdom of race- and gender-conscious affirmative action programs have been called into question. In particular, CADP notes that as California becomes increasingly heterogeneous, affirmative action programs designed to benefit one racial minority can actually harm the interests of another racial minority. This insight, however, has no bearing on the "racial focus" inquiry mandated by *Seattle*. The fact that African Americans and whites could be found on both sides of the busing debate in that case did not prevent the Supreme Court from concluding that Initiative 350 addressed a racial issue. *Id.* at 472 (noting that "Negroes and whites may be counted among both the supporters and the opponents of Initiative 350").

In any event, the "racial focus" inquiry set down in *Seattle* does not depend on the wisdom or efficacy of any particular affirmative action program. "In the absence of a constitutional violation, the desirability and efficacy" of race- and gender-conscious affirmative action "are matters to be resolved through the political process." *Id.* at 474. Rather, the question posed by *Seattle* is whether the issue in question is generally perceived as one of special interest to minorities and women, and if the issue has been singled out for unfavorable political treatment. As the Supreme Court held in *Seattle*, an enactment is unconstitutional if it "removes the authority to address *a racial problem*—and only a racial problem—from the existing decisionmaking body, in such a way as to burden minority interests." *Id.* (emphasis added). This Court has no trouble concluding that affirmative action is appropriately understood as "racial problem" and, similarly, a "gender problem" in the sense meant by the Supreme Court. *Id.* ("For present purposes, it is enough that minorities may consider busing for integration to be legislation that is in their interest.")

For the foregoing reasons, the Court is satisfied that plaintiffs have demonstrated that Proposition 209 "was enacted 'because of,' not merely 'in spite

of,' its adverse effects upon" affirmative action, and thus that the measure was effectively drawn for racial purposes.[27] *Id.* at 471.

b. Restructuring the Political Process

The Court next must ask whether Proposition 209 restructures the political process to the detriment of the interests of minorities and women.

The Supreme Court in *Seattle* addressed this issue by comparing the political burden faced by those seeking race-based busing with the burden faced by those seeking student assignment policies for nonracial reasons. Prior to the passage of Initiative 350, the state left virtually all matters of education policy, including busing to achieve integration, to local school boards. *Id.* at 477-82. The Court found that, after Initiative 350, "[t]hose favoring the elimination of *de facto* school segregation now must seek relief from the state legislature, or from the statewide electorate." *Id.* at 474. Those interested in busing for other purposes, in contrast, could continue to petition their local school boards for such programs. The Court concluded that this restructuring of political authority imposed a "comparative burden...on minority participation in the political process." *Id.* at 480 n.23.

In evaluating Proposition 209, this Court employs the same comparative approach utilized in *Seattle.* The defendants here concede that prior to Proposition 209, those seeking preferences—whether based on race, gender, disability, veteran status, economic disadvantage, age, residency, or any other basis—in public contracting, employment, and education could directly petition their state and local governmental entities for such preferential treatment. After the enactment of

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[27] In so finding, the Court does not pass on whether any discriminatory intent lay behind the adoption of Proposition 209. The Supreme Court in *Seattle* made it plain that such an inquiry is not required under the *Seattle-Hunter* analysis. 458 U.S. at 484-86. The Court nevertheless notes that the Supreme Court in *Seattle* also suggested that any measure that ran afoul of the *Seattle-Hunter* analysis "inevitably raises dangers of impermissible motivation." *Id.* at 486 n.30.

Proposition 209, those seeking race- and gender-conscious affirmative action must first mount a statewide campaign to amend the state constitution, while those seeking preferential treatment on all other grounds need not surmount any new political hurdle.

The record compiled by plaintiffs indicates that this changed political landscape imposes a substantial burden on the interests of women and minorities. The Coalition, for example, has been instrumental in persuading the City and County of San Francisco ("San Francisco") to adopt contracting ordinances that include race- and gender-conscious provisions designed to remedy the city's history of discrimination in contracting ("MWBE Ordinance").[28] Since the adoption of the MWBE Ordinance, the Coalition has continued to support the program, periodically proposing modifications designed to enhance its effectiveness and ensure its conformity with federal and state law.[29]

After Proposition 209, the doors of San Francisco government are closed to groups like the Coalition. The Coalition thus faces not only the prospect that San Francisco's MBWE Ordinance might fall to a court challenge brought under

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[28] The MWBE Ordinance is codified at San Francisco Administrative Code § 12D and has been the subject of extensive litigation in this Court. *See, e.g., F.W. Spencer & Son, Inc. v. City and County of San Francisco*, C 95-4242 TEH; *Associated Gen. Contractors v. City and County of San Francisco*, 748 F. Supp. 1443 (N.D. Cal. 1990), *aff'd*, 950 F.2d 1401 (9th Cir. 1991), *cert. denied*, 503 U.S. 985 (1992).

[29] As CADP notes, the Equal Protection Clause itself imposes a considerable burden on governmental entities seeking to adopte race- and gender-conscious affirmative action programs, and thus indirectly places a considerable burden on organizations like the Coalition that lobby for such programs. *See Associated Gen. Contractors*, 950 F.2d at 1413-18 (after examining San Francisco's MWBE Ordinance using exacting equal protection scrutiny, holding that the ordinance does not offend the 14th Amendment). What the Equal Protection Clause does not do, however, is force organizations like the Coalition to take their petition to "a new and remote" level of government, as does Proposition 209.

Proposition 209,[30] but also must embark on a statewide campaign to repeal or amend Proposition 209 if they are to enact any similar legislation in the future. As detailed in the Findings of Fact, the evidence before the Court indicates that this additional political hurdle is a high one: the Coalition would need to collect approximately 700,000 valid signatures to qualify an initiative, and then would have to mount an expensive statewide media campaign to persuade voters to vote in its favor at the polls. This political burden stands in stark contrast to the local effort the Coalition faced prior to the passage of Proposition 209.

The example of San Francisco's MWBE Ordinance also demonstrates that Proposition 209, like Initiative 350, burdens minority interests by indiscriminately eliminating even programs that do not arouse popular opposition. Despite Proposition 209's statewide victory, the voters of San Francisco opposed the measure by a margin of 70.5% to 29.4%.[31] In the words of the Supreme Court,

> In such situations the initiative makes the enactment of racially beneficial legislation difficult, though the particular program involved might not have inspired opposition had it been promulgated through the usual legislative processes used for comparable legislation. This imposes direct and undeniable burdens on minority interests.

Seattle, 458 U.S. at 483-84 (internal footnote omitted); *see also Hunter*, 393 U.S. at 395-96 (noting that § 137 has its real impact only where fair housing ordinances do *not* arouse opposition, because truly controversial measures would presumably be repealed via the existing referendum procedure).

In response to plaintiffs' showing regarding political burden, defendants insist that Proposition 209 in no way reorders the political process with respect to race and gender preferences. In their view, the proper forum for addressing

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[30] San Francisco admits that legal challenges to its MWBE Ordinance based on Proposition 209 are imminent. The Court expresses no opinion on the merits of such a claim, should it ultimately be pressed by a party to this or any other suit.

[31] The Court takes judicial notice of these figures. *See* San Francisco Elections Commission election summary, available at http://www.ci.sf.ca.us/election/update.htm.

fundamental issues regarding individual rights has always been the state constitution, and Proposition 209 merely modifies the existing constitutional guarantee of equal treatment at the appropriate governmental level.

This argument has substantial merit with respect to Proposition 209's broad antidiscrimination provision—the general ban on invidious race and gender discrimination is certainly a matter of constitutional decisionmaking. As the Court has pointed out, however, it is Proposition 209's ban on preferences, not its general ban on discrimination, that is the focus of the instant suit. In this narrower context, defendants' argument falls short. Prior to the passage of Proposition 209, the discretion to adopt constitutionally-permissible race- and gender-conscious affirmative action programs was, as defendants' counsel conceded at oral argument, lodged with state and local government entities, not reserved at the constitutional level.

Moreover, the Supreme Court explicitly rejected defendants' argument in *Seattle*. In that case, Washington argued that it exercised plenary power over matters concerning public education, and that Initiative 350's ban on racial busing should thus be understood as change in policy by the body ordinarily charged with policymaking discretion. *Seattle*, 458 U.S. at 475-76. In rejecting this view, the Supreme Court emphasized that the issue was not whether the state had the power to ban race-based busing, but rather whether it had "exercised its power in such a way as to place special, and therefore impermissible, burdens on minority interests." *Id.* at 476 n.18. Similarly, in the instant case no one challenges California's power to modify its basic constitutional guarantees of individual rights. The "single narrow question" before this Court is whether the state has exercised that power in a manner that violates the 14th Amendment. *Id.*

The foregoing discussion also addresses defendants' contention that the present case is controlled by the Supreme Court's decision in *Crawford v. Board of Education*, 458 U.S. 527 (1982), which was handed down on the same day as

Seattle. That case involved a California constitutional amendment, Proposition 1, that the voters enacted in 1979. Proposition 1 aligned the authority of state courts to that of the federal courts with respect to court-ordered racial busing. In reviewing this initiative, the Supreme Court held that it merely repealed the prior constitutional language that had been interpreted to grant state courts more flexibility in ordering busing than was possessed by federal courts. *Id.* at 539. The Supreme Court further found that the repeal did not distort the political process—in the Supreme Court's view, what the people of California gave via the constitution, they chose to repeal via the same mechanism. *Id.* at 541; *id.* at 547 (Blackmun, J., concurring). Local school boards, which had been free to adopt certain busing programs aimed at desegregation, remained free after Proposition 1 to adopt such programs.[32] *Id.* at 535-536 (noting that this feature of Proposition 1 distinguished it from the initiative in *Seattle*).

As should be clear from the earlier discussion, the present case is dramatically different from *Crawford*. First, Proposition 209 cannot be characterized as a mere repeal. Proposition 209, by its terms, not only repeals all existing state and local affirmative action programs, but also prohibits the adoption of such programs in the future. In so doing, Proposition 209 displaces authority with respect to a race and gender issue to "a new and remote level of government," *Seattle*, 458 U.S. at 483, and thus reorders the political process to the detriment of women and minorities. Hence, rather than supporting defendants' position, *Crawford* underscores the troubling features of Proposition 209.

Because the Court finds, based on the foregoing, that Proposition 209 singles out an issue of special concern to minorities and women—race- and gender-conscious affirmative action—and alters the political process solely with

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[32] A number of such voluntarily adopted desegregation programs, in fact, may well be threatened by Proposition 209. *See* Pls. Exh. 8 (Los Angeles Unified School District, Fingertip Facts: Student Integration Services, 1995-96, Reference Guide No. 10 (Rev.)).

respect to this issue, it concludes that the initiative "plainly rests on distinctions based on race." *Id.* at 485 (internal quotes omitted).

c. **Heightened Scrutiny**

Where a governmental enactment rests on a racial or gender classification, a court must expose it to "a most searching examination." *Adarand*, 115 S. Ct. at 2111 (quoting *Wygant*, 476 U.S. at 273 (opinion of Powell, J.)). In examining race and gender classifications, however, the Supreme Court has employed two different standards, reserving the most exacting judicial scrutiny for situations involving race.[33] *United States v. Virginia*, 116 S. Ct. at 2275 n.6. Because this Court finds that Proposition 209 fails to survive the lesser scrutiny due its inherent gender classification, it need not apply the more stringent strict scrutiny test.[34]

In applying the intermediate scrutiny test appropriate to gender classifications, the Court is mindful of the Supreme Court's recent cases in this area. *See United States v. Virginia, supra*; *J.E.B. v. Alabama ex rel. T.B., supra*.

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[33] The Supreme Court has never squarely decided whether classifications based on gender are inherently suspect and thus deserving of strict scrutiny review. The rule drawn from the cases is that gender classifications must survive *at least* intermediate scrutiny. *See United States v. Virginia*, 116 S. Ct. 2264, 2275 (1996) (gender classifications must clear "at least" intermediate scrutiny); *J.E.B. v. Alabama ex rel. T.B.*, 114 S. Ct. 1419, 1425 n.6 (1994) (Court "need not decide whether classifications based on gender are inherently suspect"); *Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367, 373 (1993) (Ginsburg, J., concurring) (noting that "it remains an open question whether classifications based on gender are inherently suspect") (citations and internal quotes omitted). Because Proposition 209 fails to survive intermediate scrutiny, this Court need not decide whether gender classifications are inherently suspect.

[34] Other courts have suggested that *Seattle* and *Hunter* can be explained as cases involving the fundamental right of all citizens to participate equally in the political process. *See, e.g., Evans v. Romer*, 854 P.2d 1270, 1279-82 (Colo. 1993), *aff'd on other grounds*, 116 S. Ct. 1620 (1996). On this theory, any law that infringed this fundamental right would be subject to strict scrutiny, regardless of the race or gender focus of the enactment. This Court's application of intermediate scrutiny to the gender classification inherent in Proposition 209 is not meant as a rejection of the fundamental rights approach. Rather, because the parties have not argued this issue, the Court expressly declines to pass on the merits of this theory.

According to the Supreme Court, "Today's skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history." *United States v. Virginia*, 116 S. Ct. at 2274. In order to survive this scrutiny, a gender classification must be supported by an "exceedingly persuasive justification." *Id.* at 2275. The state has the burden of showing that the challenged classification "serves important governmental objectives" and that the means employed are "substantially related to the achievement of those objectives." *Id.*

In applying this demanding test, the Court asks a simple question: what important governmental interest is served by reordering the political process to the detriment of women's interests? With respect to this question, the defendants have not shouldered their burden. Defendants first suggest that Proposition 209 serves the important state interest of ending discrimination on the basis of race and gender. While undoubtedly important, however, this state interest is a non-sequitor with respect to Proposition 209. The Court fails to see how this purported interest is related to, much less justifies, the nonneutral reordering of the political process that is at issue in this case. As *Seattle* and *Hunter* make clear, it is *not* Proposition 209's prohibition on affirmative action that raises equal protection concerns; rather, it is the reordering of the political process that triggers exacting judicial scrutiny. Defendants have not identified any feature of the prior political process that was discriminatory, and thus their invocation of a state interest in eliminating discrimination cannot justify the nonneutral reordering of that process.

The defendants also suggest that Proposition 209 serves an important state interest in avoiding liability under the 14th Amendment for affirmative action programs that have not yet been tested in court. As an initial matter, the Court notes that defendants have cited no cases suggesting that a state's abundance of caution can, by itself, constitute an important interest that would justify a gender classification. Even assuming that such an interest could justify a gender classification, Proposition 209 is a hopelessly overbroad means to that end.

Proposition 209, far from being limited to affirmative action programs implemented by state agencies that have not been tested in court, prohibits all preferences, whether at the state or municipal level, and whether tested or untested in court.

3. Conclusion

The Court turns finally to defendants' *reductio ad absurdum* attack on the plaintiffs' equal protection argument. Defendants submit that the *Seattle* and *Hunter* cases cannot be read to invalidate Proposition 209, because such a reading would necessarily lead to an absurd reordering of the relationship between states and subordinate local government units. According to this argument, if the Court accepts plaintiffs' position, such a holding would, in effect, permit local governmental bodies to preempt state authority on any racial or gender issue, at least where the local entity has acted to confer a benefit on minorities or women.

In making this argument, defendants rely primarily on concerns expressed by Justice Powell in his dissenting opinion in *Seattle.* 458 U.S. at 494-95, 498 n.14. As the majority in that case pointed out, however, the difficult dilemma posed by Justice Powell was not presented by Initiative 350. *Id.* at 480 n.23. Similarly, the dilemma posed by defendants does not follow from plaintiffs' equal protection claim in the instant case. Nothing about plaintiffs' argument requires that the state of California be forever barred from addressing a race- or gender-conscious affirmative action program where a local authority has acted first. The *Seattle-Hunter* doctrine merely regulates the *manner* of any state intervention, preventing the state from nonneutrally reordering the political process to burden the interests of minorities or women. A state, for example, remains free to restructure the political process in a neutral manner, even where such a change indirectly burdens the political participation of women and minorities. A state may also intercede where it can articulate a justification that survives equal protection scrutiny. What a state may not do, according to the *Seattle-Hunter* doctrine, is

single out an issue of special interest to minorities and women and require that such legislation run a unique political gauntlet.

Plaintiffs' argument does not require that, once supporters of race- and gender-conscious affirmative action have suceeded at the ballot box, their victory can never be undone. Nothing in the Constitution requires that the political system guarantee victory to those who support affirmative action. The body that enacts an affirmative action measure is free, of course, to repeal it.[35] *See Crawford*, 458 U.S. at 539. In short, those who support race- and gender-conscious affirmative action must compete within the neutral rules of the political process—the 14th Amendment expects that in the democratic struggle, the interests of minorities and women will sometimes prevail, and will sometimes be defeated. *See Hunter*, 393 U.S. at 394 (Harlan, J., concurring) (noting that neutral rules structuring the political process "will sometimes operate in favor of one faction; sometimes in favor of another").

Once those who support race- and gender-conscious affirmative action prevail at one level of government, however, the Equal Protection Clause will not tolerate an effort by the vanquished parties to alter the rules of the game—solely with respect to this single issue—so as to secure a reversal of fortunes. Plaintiffs have borne their burden of showing that Proposition 209, by removing authority over race- and gender-conscious affirmative action to "a new and remote" level of government, has precisely such an effect. Such a reordering of the political process is tantamount to vote dilution in the most literal sense: the relevant voting pool is effectively expanded until the prior victory is undone. *Cf. Gomillion v. Lightfoot*,

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[35] The University of California, for example, has acted on its own accord to discontinue the use of race and gender preferences in admissions, contracting, and employment decisions. Pls. Exh. 11 (discussing Regents Resolutions SP-1 and SP-2). Governor Wilson has also issued an executive order repealing race- and gender-conscious affirmative action programs under his immediate control. Defendants' Request for Judicial Notice, Exh. 2 (Executive Order W-124-95, June 1, 1995).

364 U.S. 339 (1960) (holding that a state may not impair the voting rights of minorities under the guise of reapportionment). Where such a political restructuring is aimed at a subject of particular interest to minorities and women, it is particularly problematic, and the Equal Protection Clause demands that it be subjected to heightened judicial scrutiny. "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 in the most literal sense." *Romer v. Evans*, 116 S. Ct. 1620, 1628 (1996).

For the reasons set forth above, the Court finds that plaintiffs have demonstrated a probablity of success on the merits of their equal protection claim.

B. Likelihood of Success on Plaintiffs' Preemption Claims

1. Introduction

Plaintiffs assert that Proposition 209 violates the Supremacy Clause of the United States Constitution by proscribing governmental entities from voluntarily employing race- and gender-conscious affirmative action as a remedy for the effects of past and present discrimination. Plaintiffs base their contention on the hypothesis that Congress intended to preserve voluntary affirmative action as a means to attain the goals embodied in three federal civil rights acts—Titles VI and VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972.[36] By outlawing race- and gender-conscious affirmative action, plaintiffs argue, Proposition 209 conflicts and interferes with the objectives of the three

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[36] Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin in any program or activity receiving federal financial assistance. 42 U.S.C. § 2000d *et seq.*

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race, color, religion, sex or national origin. 42 U.S.C. § 2000e *et seq.*

Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in any education program or activity receiving federal financial assistance. 20 U.S.C. § 1681.

federal civil rights acts. Consequently, plaintiffs conclude that Proposition 209 must be invalidated by the Supremacy Clause of the United States Constitution.

Article VI of the United States Constitution states, in part, "[t]his Constitution and the Laws of the United States...shall be the supreme Law of the Land." In general, preemption is not to be lightly presumed under the Supremacy Clause. *California Federal Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272, 281 (1987). Nevertheless, the Supremacy Clause has been interpreted to require preemption of state laws in certain circumstances.[37] The Supreme Court has enunciated two basic doctrines of preemption: conflict preemption and field preemption.

2. Preemption of State Law by Title VII

a. Field Preemption

Plaintiffs raise no field preemption claim and Congress plainly did not intend to "fill the field" of employment antidiscrimination law when it enacted Title VII. 42 U.S.C. § 2000h-4 ("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..."); *See Guerra*, 479 U.S. at 282.[38]

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[37] Here, the state law being challenged under the Supremacy Clause is an amendment to the California Constitution, the most puissant of state laws; that fact however is irrelevant in a preemption analysis. Under the Supremacy Clause, "[t]he relative importance to the State of its own law is not material when there is a conflict with federal law....[a]ny state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." *Free v. Bland*, 369 U.S. 663, 666 (1962).

[38] The doctrine of field preemption commands that a state law yield when it operates in an area where the "'scheme of federal regulation...[is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,' or where an Act of Congress 'touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.'" *English v. General Electric Co.*, 469 U.S. 72, 79 (1990) (quoting *Rice v. Santa*

(continued...)

b. Conflict Preemption

Conflict preemption bars the application of any state law that contravenes federal law. This type of preemption occurs when an individual or entity cannot simultaneously conform to state and federal law. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963) When compliance with both federal and state law is impossible the state law must relent. *California v. ARC America Corp.*, 490 U.S. 93, 100 (1989) (quoting *Florida Lime*, 373 U.S. at 142-143).

State law is also preempted when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *International Paper Co. v. Ouellette*, 479 U.S. 481, 492 (1987) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). As under other forms of preemption, the ultimate touchstone of an obstacle preemption analysis is the Congressional purpose embodied in the federal legislation. *Wisconsin Dept. of Industry, Labor and Human Relations v. Gould, Inc.*, 475 U.S. 282, 290 (1986). Obstacle preemption, however, further requires a court to examine the methods Congress has chosen to achieve its purposes. To the extent a state law interferes with the manner in which Congress intended the federal law to operate, the state law is preempted—even where the state and federal laws share common goals. *Gade v. National Solid Wastes Management Ass'n.*, 505 U.S. 88, 103 (1992).[39]

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[38](...continued)
Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

[39] The Court notes that many of the cases employing obstacle preemption involve federal laws in areas where Congress has so fully regulated that the courts could nearly conclude that Congress left no room for states to legislate. *See, e.g., Gade*, 505 U.S. at 104, n.2 ("Although we have chosen to use the term 'conflict' preemption, we could as easily have stated that the promulgation of a federal safety and health standard 'pre-empts the field...'"); *Hines*, 312 U.S. at 66 ("[F]ederal government, in the exercise of its superior authority in [the field of regulation of aliens] has enacted a complete scheme of
(continued...)

i. Actual Conflict Preemption

Plaintiffs contend that Proposition 209 is in actual conflict with Title VII. *See Florida Lime*, 373 U.S. at 142-143. To establish that an entity cannot simultaneously comply with both Title VII and Proposition 209, a plaintiff must demonstrate that some action required by Title VII simultaneously violates Proposition 209. Plaintiffs argue that, at times, voluntarily-adopted race- or gender-conscious remedies are the *sole* means of compliance with Title VII, and therefore Proposition 209 must be preempted under *Florida Lime*. Plaintiffs sole citation regarding this supposition is the First Circuit's review of the Boston Police Department's consent decree under the standard enunciated in *Croson*. *Stuart v. Roache*, 951 F.2d 446 (1st Cir. 1991). While *Stuart* presents a factual predicate that likely could have served as the basis for a successful Title VII action, it is by no means obvious that the development of an affirmative action plan was the *only* alternative available that would have allowed the police department to avoid liability. *Cf.* 42 U.S.C. 2000e-2(j).

Plaintiffs further argue that Proposition 209 is in actual conflict with Title VII because that an entity might not be able to comply simultaneously with Proposition 209 and a court order pursuant to Title VII that mandates a race- or

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[39](...continued)
regulation..."); *Gould*, 475 U.S. at 286 ("It is now commonplace that in passing the NLRA Congress largely displaced state regulation of industrial relations.").

It is apparent, however, that the application of obstacle preemption is not limited to circumstances where Congress has nearly filled the field. The Supreme Court has employed this form of preemption in fields where states are explicitly permitted to legislate. *See, e.g., Michigan Canners and Freezers Ass'n., Inc. v. Agricultural Marketing and Bargaining Bd.*, 467 U.S. 461, 469 (1984) (Michigan Agricultural Marketing and Bargaining Act preempted by Agricultural Fair Practices Act (AFPA), despite the fact that AFPA reflects no congressional intent to occupy the field); *Felder v. Casey*, 487 U.S. 131 (1988) (Wisconsin notice-of-claim statute interferes with the purpose of Congress in enacting § 1983); *Lawrence County v. Lead-Deadwood School Dist.*, 469 U.S. 256 (1985) (Payment in Lieu of Taxes Act preempts South Dakota statute which obstructs congressional purpose).

gender-conscious remedy.[40] Plaintiffs have not demonstrated that the "actual conflict" preemption doctrine of *Florida Lime* applies with equal force when an entity cannot concurrently obey the dictates of state law and a court order pursuant to a federal law.[41]

For the foregoing reasons the Court finds that plaintiffs have not demonstrated a likelihood of success on the merits of their claim that Proposition 209 actually conflicts with Title VII.

ii. Obstacle Preemption

Plaintiffs further urge this Court to find that Proposition 209 runs afoul of the obstacle preemption doctrine because it interferes with the congressional purposes embodied in Title VII. Before this Court can find that Proposition 209 "stands as an obstacle" to the fulfillment of Congressional purposes, it must determine that one of those purposes was to preserve voluntary race- and gender-conscious affirmative action as an option for employers under Title VII. Merely showing that such affirmative action is *permissible* under Title VII is insufficient to support a finding of preemption. If Congress did not intend to preserve voluntary affirmative action as an option, and if such affirmative action is simply one of several equally effective means available to reach the goals of Title VII,

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[40] Subdivision (d) of Proposition 209 permits race- and gender-conscious affirmative action pursuant to court orders and consent decrees predating the enactment of Proposition 209, but makes no exception for orders or consent decrees entered after the Proposition 209 effective date. CAL. CONST. art. 1, § 31(d) ("Nothing in this section shall be interpreted as invalidating any court order or consent decree which is in force as of the effective date of this section.").

[41] The Court's preliminary investigation of actual conflict preemption cases only reveals factual circumstances where an entity was trapped between a state and a federal law. No cases discussed the application of actual conflict preemption where an entity was unable to comply simultaneously with a state law and a remedy imposed by a court pursuant to a federal law. *See, e.g.*, *Hook v. State of Ariz.*, 907 F. Supp. 1326, 1340-41 (D.Ariz. 1995) (Court rejects defendants' defense that it was "legally impossible" to comply with federal court orders and an Arizona statute).

banning voluntary affirmative action would not impede the realization of Congress' purpose.

While plaintiffs must demonstrate more than the *permissibility* of voluntary race- and gender-conscious affirmative action, they need not, as defendants suggest, show that affirmative action is *mandated* by Title VII. Rather, demonstrating either that (1) the discretion to utilize voluntary affirmative action is necessary to achieve the objectives of Congress or (2) such affirmative action is a method Congress intended to preserve under Title VII is sufficient to establish that the prohibition of affirmative action would interfere with Congressional intent.

The primary source of Congressional intent is the plain language of the statute. Unfortunately, the statutory language of Title VII fails to address whether Congress intended to preserve the option of utilizing voluntary race- and gender-conscious affirmative action. The sole reference to race- and gender-based preferences in Title VII simply indicates that Title VII should not be construed to *require* the adoption of preferences. 42 U.S.C. § 2000e-2(j) ("Nothing contained in this subchapter shall be interpreted to require any [entity]...subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group...").[42]

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[42] The Supreme Court's consideration of Congress' intent regarding affirmative action under Title VII has been limited to determining whether affirmative action is, at times, required under the statute and whether Title VII permits affirmative action. *See, e.g.*, *Johnson v. Transportation Agency, Santa Clara County, Cal.*, 480 U.S. 616, 644 (1987) (Stevens, J., concurring) ("It remains clear that the Act does not *require* any employer to grant preferential treatment....") (emphasis in original); *United Steelworkers of America, AFL-CIO-CLC v. Weber*, 443 U.S. 193, 208 (1979) ("We therefore hold that Title VII's prohibition...against racial discrimination does not condemn all private, voluntary affirmative action programs."); *Local 28 of Sheet Metal Workers' Intern. Ass'n v. E.E.O.C.*, 478 U.S. 421, 464 (1986) ("Our examination of the legislative policy behind Title VII leads us to conclude that Congress did not intend to prohibit a court from [ordering affirmative action in appropriate circumstances]...").

Because Title VII is silent on the issue of Congress' intent regarding the role of voluntary race- and gender-conscious affirmative action under the Title VII schema, this Court must to turn to the Equal Employment Opportunity Commission's ("EEOC") interpretation of the statute. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984) ("If...the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute...the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

The EEOC Guideline explaining the role of voluntary affirmative action under Title VII states: "Voluntary affirmative action to improve opportunities for minorities and women must be encouraged and protected in order to carry out the Congressional intent embodied in title VII." 29 C.F.R. 1608.1(c). The EEOC guideline recognizes that Congress intended, as one of its central objectives, to encourage voluntary compliance with the statute. "The principle of nondiscrimination in employment...and the principle that each person subject to Title VII should take voluntary action to correct the effects of past discrimination...without awaiting litigation, are mutually consistent and interdependent methods of addressing social and economic conditions which precipitated the enactment of Title VII." *Id.* The EEOC has thus concluded that permitting voluntary affirmative action is crucial if entities are to comply voluntarily with Title VII: "The importance of voluntary affirmative action on the part of employers is underscored by Title VII of the Civil Rights Act of 1964, Executive Order 11246, and related laws and regulations—all of which emphasize voluntary action to achieve equal employment opportunity." 29 C.F.R. § 1607.17(1).

The EEOC guidelines, which were developed to clarify "uncertainty as to the meaning and application of Title VII, [which could] threaten the

accomplishment of the clear Congressional intent to encourage affirmative action," 29 C.F.R. 1608.1(a), reveal that Congress intended to safeguard the discretion to employ voluntary race- and gender-conscious affirmative action as a means to allow "flexibility in modifying employment systems to comport with the purposes of Title VII." 29 C.F.R. 1608.1(c).

A court must give substantial deference to all enforcing agency's reasonable explications of a statute. *NationsBank of North Carolina, N.A. v. Variable Annuity Life Ins. Co.*, 115 S. Ct. 810, 813 (1995) ("It is well settled that courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with enforcement of the statute."); *Chevron*, 467 U.S. at 845 (quoting *U. S. v. Shimer*, 367 U.S. 374, 382 (1961)). Courts have not hesitated to show deference to agencies in the context of a preemption analysis. The Supreme Court, for example, in finding that a South Dakota statute was preempted by the federal Payment in Lieu of Taxes Act, gave "substantial deference" to the Department of Interior's construction of the federal statute. *Lawrence County v. Lead-Deadwood School Dist.*, 469 U.S. 256 (1985); *See also Retirement Fund Trust of Plumbing v. Franchise Tax Bd.*, 909 F.2d 1266, 1284-1286 (9th Cir. 1990) (court places significant reliance on Treasury Department's interpretation of ERISA to find that federal law does not preempt California Employment Development Department's withholding procedure); *California Hosp. Ass'n v. Henning*, 770 F.2d 856 (9th Cir. 1985) (modified, 783 F.2d 946 (9th Cir. 1986)) (relying on Department of Labor's regulation clarifying Congress' intentions in adopting ERISA, court finds that California statute not preempted.); *cf. Southern Pacific Transp. Co. v. Public Service Com'n of Nevada*, 909 F.2d 352, 356 (9th Cir. 1990) (appellate court reverses district court's preemption analysis because "district court failed to accord sufficient deference to the Department of Transportation's construction of its own regulations").

The Supreme Court has generally given the same level of deference to the EEOC's interpretations of Title VII as it gives to other agency interpretations of statutes they are charged with enforcing. For example, in *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 761 (1979), the Supreme Court stated that the EEOC guidelines are entitled to "great deference." *See also Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975); *Espinoza v. Farah Mfg. Co., Inc.*, 414 U.S. 86, 94 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-434 (1971)). Those holdings were reaffirmed in *E.E.O.C. v. Commercial Office Products Co.*, 486 U.S. 107, 115 (1988) ("It is *axiomatic* that the EEOC's interpretation of Title VII, for which it has primary enforcement responsibility, need not be the best one by grammatical or any other standards...[it] need only be reasonable to be entitled to deference.") (emphasis added).[43]

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[43] In a subsequent case involving the EEOC guidelines, the Supreme Court drifted from its strong precedents requiring deference to agency interpretations. Justice Rehnquist, without reference to *Commercial Office Products* or the other post-*Chevron* holdings giving substantial deference to the EEOC guidelines, and solely drawing upon his own pre-*Chevron* opinion in *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976), determined that "the level of deference afforded [to an EEOC Guideline] 'will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *E.E.O.C. v. Arabian American Oil Co.*, 499 U.S. 244, 257 (1991). Justice Scalia, concurring, reproaches Justice Rehnquist for disregarding the Court's precedent: "In an era when our treatment of agency positions is governed by *Chevron* the 'legislative rules v. other action' dichotomy of *Gilbert* is an anachronism; and it is not even a correct description of that anachronism to say that *Gilbert* held that the EEOC...is not entitled to deference." *Id.* at 260.

For the reasons that follow, this Court determines that, in this context, the EEOC Guidelines must be accorded, under the *Arabian Oil* test, the same substantial deference as required by *Commercial Office Products*. There is no evidence that the EEOC gave the two guidelines at issue here, which are comprehensive statements on Congress' intent regarding the use of affirmative action under Title VII, anything less than thorough consideration. The reasoning of the EEOC is coherent and is supported by the plain language and legislative history of the statute. In the thirty years since the passage of Title VII no agency interpretation of Title VII has drawn a conclusion inconsistent with those reached in the current EEOC guidelines. Finally the persuasive value of the guidelines at issued is enhanced by the fact that they function as a legal safe harbor for any person

(continued...)

As explained below, the EEOC conclusion that Congress intended to preserve the option to utilize race- and gender-conscious affirmative action under Title VII surpasses the standard of reasonableness.[44] *See, e.g.*, *Local No. 93, Intern. Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. at 516.

The EEOC's conclusion is based on a two-tiered rationale: (1) Congress intended voluntary compliance to be a purpose of Title VII, and (2) that the preservation of voluntary affirmative action is central to that compliance. The EEOC rationale is consistent with court decisions that have found that permitting voluntary compliance is integral to the purposes of Title VII. *Local No. 93*, 478 U.S. at 515 ("Congress intended voluntary compliance to be the preferred means of achieving the objectives of Title VII."); *Weber*, 443 U.S. at 204 ("The very statutory words [were] intended as a spur or catalyst to cause 'employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.'").

The EEOC's corollary finding that voluntary affirmative action is not merely permissible, but essential to allow voluntary compliance is also buttressed

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[43](...continued)
taking action in good faith reliance on the Guidelines. The Court finds that the EEOC Guidelines at issue here amply fulfil the requirements under *Arabian Oil* and must be given substantial deference.

[44] The proposition that the EEOC Guidelines are indicative of Congress' intent is strengthened by the fact that Congress has made no effort to modify or overturn the Guidelines in the twenty years following their promulgation. This does not suggest that Congressional inaction is somehow determinative; the Supreme Court, however has "often taken Congress' subsequent inaction as probative to varying degrees." *Patterson v. McLean Credit Union*, 491 U.S. 164, 200 (1989) (Brennan, J., concurring in part, dissenting in part). In the context of Title VII, the Supreme Court has noted that the barriers of the legislative process do not adequately explain a failure of Congress to act. "[W]hen Congress has been displeased with our interpretation of Title VII, it has not hesitated to amend the statute to tell us so." *Johnson*, 480 U.S. at 629 n.7.

by Supreme Court interpretation of Title VII. According to the Supreme Court, "the imposition of a requirement that public employers make findings that they have engaged in illegal discrimination before they engage in affirmative action programs would severely undermine public employers' incentive to meet voluntarily their civil rights obligations.... This result would clearly be at odds with this Court's and Congress' consistent emphasis on 'the value of voluntary efforts to further the objectives of the law.'" *Wygant*, 476 U.S. at 290 (O'Connor, J., concurring); *accord Local 93*, 478 U.S. at 516 (quoting EEOC guideline that states voluntary affirmative action must be "encouraged and protected" in the context of a finding that "Congress intended voluntary compliance to be the preferred means of achieving the objectives of Title VII").

In sum, the EEOC Guidelines explicitly state that Congress intended to "encourage and protect" voluntary affirmative action as a method to achieve the objectives of Title VII. It is manifest from the Guidelines and the jurisprudence supporting their rationale that Congress meant to preserve the option to comply voluntarily with Title VII and that the capacity to utilize race- and gender-conscious affirmative action is fundamental to maintaining the potential of voluntary compliance. The EEOC's interpretation of Title VII compels this Court to find that Congress intended to preserve discretion for employers to utilize voluntary affirmative action.[45]

The Defendant-Intervenors argue that even if Congress intended to preserve the discretion to use race- and gender-conscious affirmative action under Title VII, Proposition 209 merely reflects California's decision not to exercise that discretion. The plain language of Title VII and the rationales behind voluntary affirmative action's role under the statute, however, necessitate the conclusion that

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[45] Recognizing the importance of the EEOC guideline in making this finding and the unique position held by the EEOC in interpreting Title VII, this Court invites the EEOC to submit an *amicus* brief.

Congress intended that the discretion to use race- and gender-conscious preferences be exercised employer level.

Congress created the alternative to use voluntary affirmative action as a method of voluntary compliance with Title VII that would not engender further liability. As noted on several occasions by the Supreme Court, Title VII could potentially have put employers in the untenable position between Title VII liability for past acts of discrimination and Title VII liability for future preferences to remedy discrimination. *See, e.g.*, *Wygant*, 476 U.S. at 291 (O'Connor, J., concurring) ("[P]ublic employers are trapped between the competing hazards of liability to minorities if affirmative action *is not* taken to remedy apparent employment discrimination and liability to nonminorities if affirmative action *is* taken."); *Weber*, 443 U.S. at 210 (Blackmun, J., concurring) ("If Title VII is read literally, on the one hand [employers] face liability for past discrimination against blacks, and on the other they face liability to whites for any voluntary preferences adopted to mitigate the effects of prior discrimination against blacks.").

While the plain language of Title VII places employers between these equally perilous alternatives, voluntary affirmative action affords a safe passage. *See Johnson*, 480 U.S. at 645 (Stevens, J., concurring) ("The logic of antidiscrimination legislation requires that judicial constructions of Title VII leave 'breathing room' for employer initiatives to benefit members of minority groups."). It follows that Congress intended the persons or entities potentially liable under Title VII to be entrusted with the power to avail themselves of the safe passage provided by voluntary affirmative action.[46]

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[46] Those liable under Title VII are limited to "employers." In general, an employer under Title VII is, at a minimum, a person who has a modicum of control over the statutorily required number of employees. *See Magnuson v. Peak Technical Services, Inc.*, 808 F. Supp. 500 (E.D.Va. 1992) (For the purposes of Title VII, "employer" encompasses those persons who control aspects of individual's compensation, terms, (continued...)

This conclusion is supported by the legislative history of Title VII. When enacting Title VII, Congress chose neither to mandate nor prohibit the use of affirmative action; instead it decided to leave determinations regarding the appropriateness of affirmative action to persons making the day-to-day employment decisions. "[T]he problems raised by these controversial questions [surrounding preferential treatment and quotas in employment] are more properly handled at a governmental level closer to the American people and by communities and individuals themselves." *Weber*, 443 U.S. at 207 n.7 (quoting 110 Cong. Rec. 15893 (1964)); *Local 93*, 478 U.S. at 520 (quoting H.R. Rep. No 914, 88th Cong., 1st Sess., pt. 2, p. 29 (1962)) (noting that key support for Title VII was only obtained after it was apparent that "management prerogatives, and union freedoms [were] to be left undisturbed to the greatest extent possible").[47]

The State of California is not subject to employer liability under Title VII for all past and present discriminatory actions taken against all state, local, and municipal public employees in the state nor does the State of California make the day-to-day decisions regarding the public employees in California. As a result, Congress could not have intended that the State of California would be the appropriate body to exercise, on behalf of every individual public employer in California, the discretion to use voluntary race- and gender-conscious affirmative action.

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[46](...continued)
conditions, or privileges of employment.); *Ryals v. Mobile County Sheriff's Dept.*, 839 F. Supp. 25 (S.D.Ala. 1993) (Alabama County not employer of deputy sheriff under Title VII absent evidence that county had any control over any area of deputy's employment. Fact that county issued checks for deputies was insufficient to confer employer status.).

[47] While these legislative comments occurred during the 1964 enactment of Title VII when it covered only private employers, "there is also no indication that Congress intended to leave governmental employers with less latitude under Title VII than had been left to employers in the private sector when Title VII was originally enacted." *Local 93*, 478 U.S. at 520 n.10.

c. **Conclusion**

In light of the EEOC Guideline and supporting case law, we conclude that Congress intended to protect employers' discretion to utilize race- and gender-conscious affirmative action as a method of complying with their obligations under Title VII. Proposition 209, by eliminating the discretion to utilize race- and gender-conscious affirmative action, contravenes this Congressional purpose. Further, Congress intended to allow employers to use affirmative action as a safe passage to compliance with Title VII. Proposition 209 obstructs the passageway and forces many employers into a place akin to the Strait of Messina where they confront the Scylla of Title VII and Charybdis of Proposition 209. Proposition 209, therefore, also contravenes Congress' intent regarding the use of affirmative action as a method to achieve the goals of Title VII.

For these reasons, this Court finds that plaintiffs have demonstrated a likelihood of prevailing on the theory that Proposition 209 violates the Supremacy Clause under the doctrine of obstacle preemption.[48]

3. **Preemption of State Law by Titles VI and IX**

Plaintiffs further contend that Proposition 209 violates the Supremacy Clause by interfering with the purposes and methods of Titles VI and IX. In order to establish a likelihood of prevailing on this theory, plaintiffs must show, just as they must show in the Title VII context, that Congress intended to accord voluntary race- and gender-conscious affirmative action a hallowed position within the structure of Titles VI and IX.

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[48] Subdivision (h) of Proposition 209 states "[i]f any part or parts of this section are found to be in conflict with federal law or the United States Constitution, the section shall be implemented to the maximum extent that federal law and the United States Constitution permit. Any provision held invalid shall be severable from the remaining portions of this section." The Court recognizes that Title VII only applies to employment relationships, while Proposition 209 applies to employment, contracting, and education. It would be premature, however, to address questions regarding severance at this preliminary stage of the proceedings.

As in the Title VII context, nothing on the face of Titles VI or IX indicates that Congress intended to maintain voluntary affirmative action under the two statutes.[49] As noted above, where a statute is silent, a court must look for guidance from the agencies charged with enforcing the statute. Agency interpretations of Titles VI and IX have addressed some aspects of affirmative action, but have not reached the question of whether Congress intended the statutes to preserve the option of using voluntary affirmative action.

Agency regulations, on the one hand, state that in some instances, Title VI and IX regulations *require* the use of affirmative action, "[i]n administering a program which the recipient has previously discriminated against persons...the recipient must take affirmative action to overcome the effects of prior discrimination." 34 C.F.R 100.3(b)(6)(i); 34 C.F.R. 106.3(a) ("[i]f the Assistant Secretary finds that a recipient has discriminated against persons on the basis of sex...such recipient shall take such remedial action as the Assistant Secretary deems necessary to overcome the effects of such discrimination.").

A showing that affirmative action is, at times, required under Title VI and IX cannot support a finding of preemption. Failure to comply with Titles VI and IX generally results in a cessation of federal funds. Consequently, affirmative action that is required by Titles VI and IX is permissible under Proposition 209.

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[49] The legislative history of Title VI contains one reference to the importance of voluntary compliance with the statute, but does not address whether voluntary affirmative action is central to compliance with Title VI. *See* H.R. REP. NO. 914(II), 88th Cong., 1st Sess. 25-26 (1964); H.R. REP. NO. 914(I), 88th Cong. 1st Sess. 25 (1964). The Supreme Court has only examined affirmative action under Titles VI and IX in limited contexts. Two pluralities have held that Title VI is not violated by a constitutionally permissible affirmative action program. *Fullilove v. Klutznick*, 448 U.S. 448, 492 n.77 (1980) (opinion of Burger, C.J.); *id.* at 517, n.15 (Powell, J., concurring); *id.* at 517, n.1 (Marshall, J., concurring); *Bakke*, 438 U.S. at 287 (opinion of Powell, J.); *id.* at 341, n.17 (Brennan, J., concurring in part, dissenting in part). In the context of Title IX, the First Circuit recently determined that "[l]ike other anti-discrimination statutory schemes, the Title IX regime permits affirmative action." *Cohen v. Brown University*, No. 95-2205, 1996 WL 665423 (1st Cir. Nov. 21, 1996).

CAL. CONST. art. 1, § 31(e) ("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."). Because Proposition 209 allows required actions under Titles VI and IX no conflict could transpire between actions required by the statutes and Proposition 209.

The regulations interpreting Title VI and IX also discuss the *permissive* use of affirmative action. "Even in absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin." 34 C.F.R. 100.3(b)(6)(ii); 34 C.F.R. 106.3(b) ("[i]n the absence of a finding of discrimination on the basis of sex...a recipient may take affirmative actions to overcome the effect of conditions which resulted in limited participation therein by persons of a particular sex.").

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. Simply obstructing an action that is allowed under federal law does not, in itself, raise preemption concerns unless there is some showing that the action is necessary to fulfilling the purposes of the federal law. The plain language and agency interpretations of Titles VI and IX do not establish that any Congressional purposes are thwarted by Proposition 209.

Recognizing the shortcomings of the typical sources of Congressional intent regarding the role of voluntary affirmative action under Titles VI and IX, plaintiffs attempt to employ interpretations of Title VII as a means to elucidate the legislative intent behind Titles VI and IX. It is apparent, however, that the intent and purposes of Titles VI and IX, which must be the central focus for preemption purposes, are not identical to those of Title VII. When Title VI was passed, "Congress was legislating to assure federal funds would not be used in an

improper manner. Title VII, by contrast, was enacted pursuant to the commerce power.... Title VII and Title VI, therefore, cannot be read *in pari materia*" in all contexts. *Weber*, 443 U.S. at 206 n.6. Likewise, Title IX was enacted under Congress' spending power and also cannot be read as precisely parallel to Title VII.[50]

It is especially clear that plaintiffs cannot rely on Title VII to establish Congress' intent regarding Titles VI and IX in the context of affirmative action. The Supreme Court has already noted that Congress had differing intentions for what constitutes permissible affirmative action under the three statutes: "[W]e do not regard as identical the constraints of Title VII and the Federal Constitution on voluntarily adopted affirmative action plans." *Johnson*, 480 U.S. at 632. Meanwhile, the constraints of Title VI parallel those established by the Constitution. *Bakke*, 438 U.S. at 285. Further, unlike under the Title VI paradigm, the standard for what constitutes permissible affirmative action under Title IX cannot be based on current Constitutional limitations.[51]

The statutory language, agency interpretation, and legislative history of Titles VI and IX do not establish that Congress intended to preserve voluntary race- and gender-conscious affirmative action as an option for entities covered by

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[50] Plaintiffs footnote two Ninth Circuit cases and several regulations which adopt Title VII's disparate impact test in the context of Titles VI and IX. *Larry P. v. Riles*, 793 F.2d 969 (9th Cir. 1984); *Jeldness v. Pearce*, 30 F.3d 1220 (9th Cir. 1994). While this may show that comparable actions will engender liability under Titles VI, VII, and IX, it does not reveal Congress' intent regarding the role of voluntary affirmative action under the three statutes.

[51] Congress' intent regarding affirmative action under Title IX was manifested when the statute was enacted in 1972—well in advance of the currently controlling Constitutional standard of heightened scrutiny for gender classifications. *See U.S. v. Virginia*, 116 S.Ct. at 2275-2276 (tracing history of heightened scrutiny for gender classifications). Consequently, unlike Title VI, where Congress intended to track the standards of the Fourteenth Amendment, Congress could not have intended to import the Fourteenth Amendment standards for gender into Title IX.

the two statutes. It is apparent, moreover, that plaintiffs cannot rely on the methods Congress chose to effectuate Title VII to establish that Proposition 209 is preempted by Titles VI and IX. Consequently, plaintiffs have failed to demonstrate to the Court a likelihood of success on the merits of their claim that Proposition 209 violates the Supremacy Clause because it stands as an obstacle to the methods Congress intended entities to employ in furthering the purposes of Titles VI and IX.

C. Irreparable Injury

As noted above, plaintiffs have demonstrated a probability of success on the merits of their equal protection claim. They have also demonstrated a likelihood of success on one of their preemption claims. Although some courts have held that this showing sufficiently demonstrates a possibility of irreparable harm, *see, e.g., Bery v. City of New York*, 97 F.3d 689, 693-94 (2d Cir. 1996), the Court will separately address this issue, focusing both on the irreparability and the immediacy of the harm alleged by plaintiffs.

Where the deprivation of a constitutional right is involved, courts generally hold that no further showing of irreparability is required. *See Associated Gen. Contractors*, 950 F.2d at 1412; 11A WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 2948.1. The Court is satisfied, at least with respect to plaintiffs' equal protection claim, that the deprivation of a constitutional right—"the right to full participation in the political life of the community"—is squarely at issue in the present case. *Seattle*, 458 U.S. at 467. To the extent Proposition 209 imposes a new and substantial political burden on those, and only those, who support race- and gender-conscious affirmative action, it inflicts an immediate and ongoing injury that is not amenable to monetary remedy. The very real threat that the enforcement and implementation of Proposition 209 may lead to the dismantling of existing, otherwise constitutional, affirmative action programs also constitutes an irreparable harm to members of the plaintiff class.

Turning to the imminence of the alleged injury, the Court is also satisfied that plaintiffs have shown that injury to members of the plaintiff class is not only possible, but almost certain, in the absence of a preliminary injunction. Proposition 209 is self-executing, and thus immediately binding on all state and local governmental units. The defendant class representatives, Governor Wilson and Attorney General Lungren, have, for their part, made plain their intention to implement Proposition 209 as expeditiously as possible, and have taken a number of preliminary steps to that end. The University of California system has also indicated its intention, in the absence of a preliminary injunction, to implement Proposition 209 immediately. Other members of the defendant class have also announced their intention, in the absence of an injunction, to modify their activities in accordance with Proposition 209. In addition, a number of private suits have been brought against defendant class members in state court challenging existing affirmative action programs, including suits brought by Governor Wilson and defendant-intervenor CADP. Perhaps most importantly, the Court notes that the core equal protection injury identified by plaintiffs—impaired access to the political process at all levels of state and local government—would, in the absence of a preliminary injunction, be felt by the plaintiff class immediately.

The balance of hardships, moreover, tips decidedly in plaintiffs' favor. In contrast to the injury outlined above, a preliminary injunction would impose little hardship on members of the defendant class, who would merely be required to suspend their Proposition 209 implementation plans pending trial.[32]

The public interest also favors the entry of a preliminary injunction. As an initial matter, a number of named defendants have urged this Court to act swiftly

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[32] Defendants argue that a state has a strong interest in seeing that legitimate enactments, especially at the constitutional level, not be stymied. Defendants certainly cannot, however, contend that the state has a strong interest in enforcing a measure that violates the United States Constitution. Because that is the very issue of the present suit, defendants invocation of this strong state interest is somewhat premature.

and give clear guidance with respect to Proposition 209. This request, of course, is neutral with respect to the granting or denial of the present motion. Nonetheless, the Court believes the preservation of the pre-election status quo not only serves the public need for plain guidance, but also harmonizes that interest with the compelling interest in remedying discrimination that underlies existing constitutionally-permissible state-sponsored affirmative action programs threatened by Proposition 209.

VI. CONCLUSION

Based on the foregoing Findings and Conclusions, this Court rules that:

(1) Plaintiffs have standing to bring this action.

(2) Plaintiffs have demonstrated a probability of success on their claim that Proposition 209 violates the Fourteenth Amendment's equal protection guarantee to full participation in the political life of the community.

(3) Plaintiffs have failed to demonstrate a likelihood of success on their claim that Proposition 209 violates the Supremacy Clause because it conflicts with, and thus is preempted by, Titles VI and IX of the 1964 Civil Rights Act.

(4) Plaintiffs have demonstrated a likelihood of success on their claim that Proposition 209 violates the Supremacy Clause because it conflicts with, and thus is preempted by, Title VII of the 1964 Civil Rights Act.

(5) Plaintiffs have demonstrated that a preliminary injunction is necessary to protect the plaintiff class from the possibility of irreparable injury.

Accordingly, and good cause appearing, it is HEREBY ORDERED pursuant to FED. R. CIV. P. 65 that defendants Governor Pete Wilson and Attorney General Dan Lungren and all members of the defendant class that they represent, and their officers, agents, servants, employees and attorneys, and those in active concert or participation with them, are restrained and enjoined, pending trial or

final judgment in this action, from implementing or enforcing Proposition 209 insofar as said amendment to the Constitution of the State of California purports to prohibit or affect affirmative action programs in public employment, public education or public contracting.

The aforesaid preliminary injunction shall not preclude the following:

1. all defendants, including members of the defendant class, from identifying, reviewing and analyzing existing affirmative action programs.[53]

2. all defendants, including members of the defendant class, from defending private actions seeking remedies under Article 1, section 31 of the California Constitution.

3. proceedings in pending state court actions related to Article 1, section 31, including, *Wilson v. State Personnel Bd.*, Sacramento County Superior Court No. 96 CS01082 and *Californians Against Discrimination and Preferences, Inc. v. The Bd. of Governors of the Calif. Community Colleges*, Sacramento County Superior Court, No. 96 CS03010, and

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[53] The preliminary injunction does not, of course, interfere with the ability of any defendant or member of the defendant class to *voluntarily* adopt, retain, amend or repeal an affirmative action program. It does preclude any defendant or member of the defendant class from taking any action with respect to an affirmative action program in order to enforce, implement, or otherwise comply with, Proposition 209.

4. the California Attorney General from defending Article 1, section 31 in any legal proceeding challenging its validity under the United States Constitution.[54]

IT IS SO ORDERED.

DATED 12/23/96

THELTON HENDERSON, CHIEF JUDGE
UNITED STATES DISTRICT COURT

[54] Defendants have not requested that plaintiffs post a bond pursuant to FED. R. CIV. P. 65(c). This Court agrees that in this case it is appropriate to waive the bond requirement. *See generally Crowley v. Local No. 82*, 679 F.2d 978, 1000 (1st Cir. 1982); *Canterbury Career School, Inc. v. Riley*, 833 F. Supp 1097, 1106 (D.N.J. 1993).

Nos. 97-15030, 97-15031

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COALITION FOR ECONOMIC EQUITY, et al.,

Plaintiffs-Appellees,

v.

PETE WILSON, Governor, et al.,

Defendants-Appellants,

CALIFORNIANS AGAINST DISCRIMINATION AND
PREFERENCES, INC.,

Defendant-Intervenor-
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN OPPOSITION TO THE MOTION FOR STAY PENDING APPEAL

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 97-15030, 97-15031

COALITION FOR ECONOMIC EQUITY, et al.,

Plaintiffs-Appellees,

v.

PETE WILSON, Governor, et al.,

Defendants-Appellants,

CALIFORNIANS AGAINST DISCRIMINATION AND
PREFERENCES, INC.,

Defendant-Intervenor-
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
IN OPPOSITION TO THE MOTION FOR STAY PENDING APPEAL

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves a constitutional challenge to California's Proposition 209, which generally prohibits race- and gender-conscious affirmative action by state and local officials. The district court entered a preliminary injunction to preserve the status quo pending consideration of plaintiffs' claims on the merits. The court's order prohibits state and local officials from implementing Proposition 209 by eliminating affirmative action programs across the board, but it expressly permits those officials to reexamine or repeal particular affirmative action programs within their purview so long as they are doing so voluntarily and pursuant to authority that exists independently

of Proposition 209. Intervenor seeks a stay that would alter the status quo and cause Proposition 209 to become immediately enforceable. Intervenor has not established any significant injury to its interests that warrants disrupting the status quo and overturning the district court's narrow prohibitory order.

Nor has intervenor made the necessary "strong showing" that it is likely to succeed on the merits of this appeal. Hilton v. Braunskill, 481 U.S. 770, 776 (1987). Because this appeal arises from the entry of a preliminary injunction, intervenor can succeed on this appeal only if it shows that the district court fundamentally misapprehended -- not merely misapplied -- the governing legal rules. See Gregorio T. v. Wilson, 59 F.3d 1002, 1004 (9th Cir. 1995); Sports Form, Inc. v. United Press Int'l, Inc., 686 F.2d 750, 752 (9th Cir. 1982). To obtain a stay, intervenor must establish a likelihood that the district court abused its discretion in reaching the result it did. See Lopez v. Heckler, 713 F.2d 1432, 1436 (9th Cir. 1983).

Intervenor cannot satisfy that standard here. The district court properly concluded that the Supreme Court's decisions in Hunter v. Erickson, 393 U.S. 385 (1969), and Washington v. Seattle School District No. 1, 458 U.S. 457 (1982), govern this case. Under those decisions, a state may not "place[] unusual burdens on the ability of racial [or gender] groups to enact legislation specifically designed to overcome the 'special condition' of prejudice." Seattle, 458 U.S. at 486 (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4

(1938)). Hunter and Seattle prohibit states from singling out such legislation for uniquely burdensome treatment in the political process "by lodging decisionmaking authority over the question at a new and remote level of government." Seattle, 458 U.S. at 483; see id. at 469-470, 474-475. Proposition 209, like the ballot initiative invalidated in Seattle, singles out measures designed to overcome prejudice for unique and burdensome treatment. Women and minorities seeking narrowly tailored affirmative action programs to respond to discrimination in California must now obtain a state constitutional amendment first, while those seeking preferential treatment on any number of other bases may do so through ordinary state and local political processes. This disparate allocation of burdens violates the equal protection principles set forth in Hunter and Seattle.

The district court's decision does not mandate affirmative action or require its use by any level of government in California. To the contrary, under the terms of that ruling and the Seattle decision on which it is based, units of state and local government are free to decide for themselves, through their normal political processes, whether affirmative action is appropriate as a matter of law and policy, and to implement lawful affirmative action programs or repeal them. What the preliminary injunction prohibits, consistent with governing Supreme Court precedent, is Proposition 209's placement of minority groups and women at a unique disadvantage in the state's political structure. The district court surely did not abuse its discretion in

maintaining the status quo pending consideration of plaintiffs' claims, and this Court ought not alter that status quo by granting a stay.

INTEREST OF THE UNITED STATES

This case involves the question whether an amendment to California's Constitution prohibiting race- or gender-conscious affirmative action programs violates the federal Constitution's Equal Protection Clause. The United States has a strong interest in the enforcement of the Equal Protection Clause. That interest is reflected in Title IX of the Civil Rights Act of 1964, 42 U.S.C. 2000h-2, which vests the Attorney General with authority to intervene in cases "seeking relief from the denial of equal protection of the laws." Pursuant to that interest, the United States was a party in Washington v. Seattle School District No. 1, 458 U.S. 457 (1982), and it participated as amicus curiae in Hunter v. Erickson, 393 U.S. 385 (1969).

STATEMENT OF THE CASE

This case involves a constitutional challenge to California's Proposition 209, which was approved in a statewide referendum on November 5, 1996. Proposition 209 adds a new Section 31 to Article I of the state constitution. It broadly prohibits state affirmative action programs based on race or gender. The operative provision reads: "[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education,

or public contracting." Cal. Const. Art. I, § 31(a) (added November 5, 1996) (emphasis added). Proposition 209 defines "state" broadly to include any political subdivision or government instrumentality within California; the definitional provision specifically identifies local governments, public institutions of higher education, and school districts as among the entities included within the definition. Id. § 31(f). The proposition applies prospectively only and specifically exempts pre-existing court orders and consent decrees. Id. § 31(b),(d).[1]

On November 6, 1996, a group of plaintiffs (who have been certified as a class) filed suit in the United States District Court for the Northern District of California to challenge the constitutionality of Proposition 209. Defendants are "a class of all state officials, local government entities or other governmental instrumentalities bound by Proposition 209." Coalition for Econ. Equity v. Wilson, No. C 96-4024 TEH (N.D. Cal. Dec. 23, 1996), slip op. 5 n.6 (hereinafter slip op.). Plaintiffs contend that Proposition 209 violates the Equal Protection Clause by placing a special burden on the ability of women and minorities to obtain beneficial programs through the political process. They also contend that the proposition is preempted by federal law because it prohibits voluntary affirmative action efforts.

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[1]It also exempts "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." Id. § 31(e).

Slip op. 3-4.[2] The district court granted a temporary restraining order on November 27, 1996.

On December 23, 1996, the district court entered a preliminary injunction barring enforcement of Proposition 209 pending a trial on the merits. The court found that injunctive relief was necessary to protect the plaintiff class from irreparable injury. Slip op. 7. The court also concluded that plaintiffs had established a probability of success on their claim "that Proposition 209 denies them the equal protection of the laws by removing the authority to redress racial and gender problems -- and only those problems -- to a new and remote level of government, thereby singling out the interests of minorities and women for a special political burden." Id. at 24, 45. In addition, the district court ruled that plaintiffs were likely to succeed in their preemption challenge to Proposition 209's ban on affirmative action in employment on the ground that the initiative conflicted with Congress's intent "to protect employers' discretion to utilize race- and gender-conscious affirmative action as a method of complying with their obligations under Title VII." Id. at 59. The court found that plaintiffs had failed to establish a likelihood of success on their other preemption claims, however. Id. at 7. Accordingly, the court issued an order barring the defen-

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[2]Specifically, plaintiffs claim that Proposition 209 is preempted by Titles VI and VII of the Civil Rights Act of 1964, 42 U.S.C. 2000d et seq. (Title VI), and 42 U.S.C. 2000e et seq., as amended (Title VII). They also claim that the initiative is preempted by Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 et seq. Slip op. 4.

dants "from implementing or enforcing Proposition 209 insofar as said amendment to the Constitution of the State of California purports to prohibit or affect affirmative action programs in public employment, public education or public contracting." Id. at 66. However, the order expressly permits any of the defendants "to voluntarily adopt, retain, amend or repeal" any affirmative action programs, so long as the defendants are not acting to enforce or implement Proposition 209. Id. at 66 n.53.[3/]

STANDARD FOR GRANTING A STAY

In ruling on intervenor's application, this Court must consider whether intervenor has made a "strong showing" that it is "likely to succeed on the merits" of the appeal, as well as the effect a stay would have on the interests of the parties and the public. Hilton v. Braunskill, 481 U.S. 770, 776 (1987). Where a party seeks to stay a preliminary injunction, the Court must consider appellants' likelihood of success in light of the deferential standard of review governing preliminary injunction appeals. See Lopez v. Heckler, 713 F.2d 1432, 1436 (9th Cir. 1983). The Court should also consider that the basic purpose of a stay, like the basic purpose of a preliminary injunction, is to preserve the status quo pending consideration of the merits. See Tribal Village of Akutan v. Hodel, 859 F.2d 662, 663 (9th Cir. 1988). Where, as here, a stay would have the effect of upsetting the status quo, the request is "subject to a higher degree of

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[3/]On January 9, 1997, the district court issued a tentative ruling denying defendants' motion for abstention pursuant to Railroad Commission v. Pullman Co., 312 U.S. 496 (1941).

scrutiny." Stanley v. University of S. Cal., 13 F.3d 1313, 1320 (9th Cir. 1994) (applying preliminary injunction standard).

ARGUMENT

I

INTERVENOR HAS NOT MADE A "STRONG SHOWING" THAT IT IS LIKELY TO SUCCEED IN ESTABLISHING THAT THE DISTRICT COURT ABUSED ITS DISCRETION

This appeal involves the district court's entry of a preliminary injunction that preserves the status quo pending adjudication of plaintiffs' constitutional and statutory challenges to Proposition 209. Accordingly, intervenor faces a heavy burden in seeking a stay. Because the issue on appeal is not whether the district court's legal rulings were correct but simply whether those rulings constituted an abuse of discretion, intervenor cannot obtain a stay simply by showing that it is likely to succeed on the merits of the underlying litigation. See Gregorio T. v. Wilson, 59 F.3d 1002, 1004 (9th Cir. 1995); Sports Form, Inc. v. United Press Int'l, Inc., 686 F.2d 750, 752 (9th Cir. 1982); see also Associated Gen. Contractors v. Coalition for Econ. Equity, 950 F.2d 1401, 1419 (9th Cir. 1991) (O'Scannlain, J., specially concurring) ("Detailed consideration of the merits * * * is neither necessary nor appropriate" in a preliminary injunction appeal), cert. denied, 503 U.S. 985 (1992).

To obtain a stay, intervenor must demonstrate that it is likely to succeed in showing that the district court abused its discretion in finding plaintiffs' claims sufficiently meritorious to warrant maintenance of the status quo. See Lopez v. Heckler,

713 F.2d 1432, 1436 (9th Cir. 1983). Intervenor must show that the district court did not even "g[e]t the law right" -- that is, that it did not even apply the correct legal standards:

> As long as the district court got the law right, "it will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case. Rather, the appellate court will reverse only if the district court abused its discretion."

Gregorio T., 59 F.3d at 1004 (quoting Sports Form, 686 F.2d at 752). Here, the district court plainly "got the law right." It correctly concluded that Hunter v. Erickson, 393 U.S. 385 (1969), and Washington v. Seattle School District No. 1, 458 U.S. 457 (1982), provided the legal standards that govern this case.[4] The court also correctly applied those precedents. Intervenor has not made a "strong showing," Hilton v. Braunskill, 481 U.S. 770, 776 (1987), that the district court abused its discretion.

A. Hunter v. Erickson and Washington v. Seattle School District No. 1 Prohibit A State From Singling Out Racial And Gender Issues For Special Treatment In The Political Process And Thereby Imposing Unusual Burdens On The Ability Of Minorities And Women To Overcome The "Special Condition" Of Prejudice

1. The Fourteenth Amendment prohibits a state from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. Under the Equal Protection Clause, state action is invalid if on its face it invidiously classifies on the basis of race or gender. See,

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[4]Because the district court's preemption holding supports only the employment aspects of the preliminary injunction, and its equal protection holding is fully sufficient to uphold the entire order, for purposes of responding to this stay motion the United States will focus on the equal protection issue.

e.g., United States v. Virginia, 116 S. Ct. 2264, 2274-2276 (1996) (gender); Loving v. Virginia, 388 U.S. 1, 8-9 (1967) (race). Even facially race- or gender-neutral state action violates the Clause if it arises from an invidiously discriminatory motivation. See, e.g., J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 135-146 (1994) (gender); Hunter v. Underwood, 471 U.S. 222, 227-233 (1985) (race).

But these prohibitions do not exhaust the Fourteenth Amendment's safeguards. The Supreme Court has recognized that the right to "equal protection of the laws" necessarily requires that minorities and women retain equal access to the ordinary political process to obtain the "protection" of laws against discrimination and its effects. See, e.g., Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 467-470 (1982); Hunter v. Erickson, 393 U.S. 385, 389-391 (1969).[5] A state therefore may not "allocat[e] governmental power nonneutrally, by explicitly using the racial [or gender] nature of a decision to determine the decisionmaking process." Seattle, 458 U.S. at 470. This is true even if the state formally treats men and women and members of all racial groups identically. The Equal Protection Clause "reaches 'a political structure that treats all individuals as equals,' yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority

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[5] Seattle and Hunter dealt with enactments placing burdens on racial and religious minorities, not women. But the same analysis applies in the gender context. The Supreme Court has made clear that women have the same right of access to "our democratic processes" as do racial minorities. J.E.B., 511 U.S. at 146.

groups to achieve beneficial legislation." Id. at 467 (citation omitted; quoting City of Mobile v. Bolden, 446 U.S. 55, 84 (1980) (Stevens, J., concurring in the judgment)).

A state enactment that limits the ability of minorities and women to obtain measures responding to prejudice through ordinary political means is thus particularly questionable under the Equal Protection Clause. While a state is free under the Fourteenth Amendment to decline to pass beneficial legislation such as affirmative action -- and a state is free to repeal such programs after it has enacted them -- it may not remove those questions from the normal political process and thereby place a special burden on people seeking to overcome discrimination. As the Court has explained, "when the State's allocation of power places unusual burdens on the ability of racial groups to enact legislation specifically designed to overcome the 'special condition' of prejudice, the governmental action seriously 'curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities.'" Seattle, 458 U.S. at 486 (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938)). Such state action "inevitably raises dangers of impermissible motivation." Id. at 486 n.30. Like a facial racial classification, it is "inherently suspect." Id. at 485.

2. The Supreme Court has applied these principles in two cases that apply directly here. In Hunter v. Erickson, the Court invalidated Section 137, an amendment to the Akron, Ohio, city charter. Section 137 provided that any ordinance regulating

housing transactions "on the basis of race, color, religion, national origin or ancestry" would be invalid unless approved by a majority in a citywide referendum. Hunter, 393 U.S. at 387, 390. In striking down Section 137, the Court noted that the amendment did more than simply repeal the city's existing fair housing ordinance; it "also required the approval of the electors before any future ordinance could take effect." Id. at 389-390. Section 137 thus singled out proposed antidiscrimination measures for uniquely onerous treatment in the political process. While "[t]hose who sought, or would benefit from, most ordinances regulating the real property market remained subject to the general rule" requiring only a vote of the city council, those who sought antidiscrimination laws "must run § 137's gantlet." Id. at 390.

The Hunter Court considered it of no moment that the charter amendment "dr[ew] no distinctions among racial and religious groups" and subjected "Negroes and whites, Jews and Catholics * * * to the same requirements if there is housing discrimination against them which they wish to end." Ibid. For Section 137 "nevertheless disadvantage[d] those who would benefit from laws barring racial, religious, or ancestral discriminations as against those who would bar other discriminations or who would otherwise regulate the real estate market in their favor." Id. at 391; accord id. at 389. And "although the law on its face treat[ed] Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact [fell] on the minority," for non-minorities were unlikely to need legislative

protection against discrimination. Id. at 391. The Court therefore concluded that "§ 137 place[d] special burdens on racial minorities within the governmental process. This is no more permissible than denying them the vote, on an equal basis with others." Ibid. While the city was under no constitutional obligation to enact an antidiscrimination ordinance, it could not place unusual obstacles in the path of people lobbying for such an enactment.

Hunter thus established that "the equal protection of the laws" requires state governments to leave their ordinary lawmaking processes open on an equal basis to those who seek the "protection" of laws preventing discrimination against them. In Seattle, the Court made clear that the ordinary political process must similarly remain open to those who seek the "protection" of affirmative state action designed to overcome the effects of discrimination -- even if that action is itself race-conscious. Seattle involved Initiative 350, a Washington State measure that barred school districts from voluntarily enacting mandatory busing programs to overcome de facto school segregation. In evaluating the constitutionality of Initiative 350, the Court read its decision in Hunter as establishing "a simple but central principle" (Seattle, 458 U.S. at 469-470):

> [T]he political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action. But a different analysis is required when the State allocates governmental power nonneutrally, by explicitly using the racial nature of a decision to determine the decisionmaking process.

Applying that principle, the Court held Initiative 350 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." Id. at 470.

The Court engaged in a two-step analysis. First, the Court concluded that Initiative 350 singled out racial issues for special treatment. The initiative's text "nowhere mention[ed] 'race' or 'integration.'" Id. at 471. It simply enacted a general ban on mandatory busing in public schools. But because Initiative 350 contained numerous exceptions, the Court concluded that it effectively permitted busing for any purpose other than racial integration. See ibid. In practice, it would only affect busing for racial purposes. And while not all African-Americans opposed the initiative -- and not all whites supported it -- the Court concluded that integration "inures primarily to the benefit of the minority, and is designed for that purpose." Id. at 472.

Second, the Court held that "the practical effect of Initiative 350 is to work a reallocation of power of the kind condemned in Hunter" (id. at 474):

> 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. Those favoring the elimination of de facto school segregation now must seek relief from the state legislature, or from the statewide electorate. Yet authority over all other student assignment decisions, as well as over most other areas of educational policy, remains vested in the local school board.

Because the Constitution does not mandate a remedy for de facto school segregation, the Court stressed that Washington was free

to repeal any busing programs the state itself had enacted to address that problem (id. at 483) -- a point the Court relied upon in Crawford v. Board of Education, 458 U.S. 527, 538-539 (1982), decided the same day. But the state may not "burden[] all future attempts to integrate Washington schools in districts throughout the State, by lodging decisionmaking authority over the question at a new and remote level of government." Seattle, 458 U.S. at 483.

3. Hunter and Seattle establish a basic rule of equal protection. States are free to repeal measures they adopt to overcome discrimination -- including affirmative action -- so long as those measures are not themselves required by federal law. See Crawford, 458 U.S. at 538-539; Seattle, 458 U.S. at 483; Hunter, 393 U.S. at 390 n.5. In such a case, the beneficiaries of that legislation "would undoubtedly [have lost] an important political battle, but they would not thereby [have been] denied equal protection." Seattle, 458 U.S. at 483 (quoting Hunter, 393 U.S. at 394 (Harlan, J., concurring)) (internal quotation marks omitted; alterations in Seattle). But states may not go further and single out racial and gender issues for unique treatment in the political process, where that treatment effectively places a special burden on minorities and women by requiring them to repair to a new and more remote level of government before obtaining "legislation specifically designed to overcome the 'special condition' of prejudice." Id. at 486 (quoting Carolene Prods., 304 U.S. at 153 n.4). In such a case, the

majority has not merely won a political battle; it has altered the rules for all future political battles and thereby impermissibly entrenched its power. It has denied "the equal protection of the laws" by limiting the opportunity for minorities and women to seek the "protection" of meaningful responses to discrimination.

B. The District Court Did Not Abuse Its Discretion In Finding Hunter And Seattle Controlling Here

In ruling that the plaintiffs had established a likelihood of success on the constitutional issue, the district court properly recognized that "[t]he Seattle opinion sets out the framework for analysis." Slip op. 33. Under Gregorio T. and Sports Form, that recognition alone would be sufficient to uphold the preliminary injunction. It is certainly sufficient to warrant denial of a stay. Intervenor has not demonstrated a likelihood of success in showing that the district court abused its discretion in applying Hunter and Seattle. Under a straightforward application of those precedents, Proposition 209 is unconstitutional because it singles out racial and gender issues for unique treatment in the political process and thereby burdens the enactment of legislation designed to overcome prejudice.

1. As a formal matter, Proposition 209 appears simply to require race- and gender-neutrality in government programs. But the district court properly "looked beyond the plain language of the measure in question and inquired whether, 'in reality, the burden imposed by [the] arrangement necessarily falls on the minority.'" Slip op. 29 (quoting Seattle, 458 U.S. at 468

(emphasis and alteration added by district court)). While Proposition 209, like the measures invalidated in Seattle and Hunter, "on its face treats Negro and white, [male and female] in an identical manner, the reality is that the law's impact falls on * * * minorit[ies]" and women. Hunter, 393 U.S. at 391. Despite its general language, the only meaningful impact of Proposition 209 will fall on narrowly-tailored affirmative action programs that promote the inclusion of qualified minorities and women. As the district court found, "the primary practical effect of Proposition 209 is to eliminate existing governmental race- and gender-conscious affirmative action programs in contracting, education, and employment and prohibit their creation in the future, while leaving governmental entities free to employ preferences based on any criteria other than race or gender." Slip op. 35. The state could not identify "a single existing program, other than race- and gender-conscious affirmative action programs, that would be affected by Proposition 209." Id. at 34. But "all parties concede" that it "will prohibit race- and gender-conscious affirmative action efforts." Id. at 35.

Proposition 209 is thus precisely targeted at "legislation specifically designed to overcome the 'special condition' of prejudice." Seattle, 458 U.S. at 486 (quoting Carolene Prods., 304 U.S. at 153 n.4). Even before Proposition 209, both race- and gender-conscious state affirmative action programs were required to satisfy rigorous constitutional scrutiny. Such programs are generally lawful only where they respond to historic

or present exclusion. See, e.g., City of Richmond v. J.A. Croson Co., 488 U.S. 469, 509 (1989) (plurality opinion). In Adarand Constructors v. Pena, 115 S. Ct. 2097 (1995), the Court emphasized that race-based action would survive strict scrutiny if it was narrowly tailored to eliminate the effects of discrimination. The Court reasoned that "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." Adarand, 115 S. Ct. at 2117; see also Coral Constr. Co. v. King County, 941 F.2d 910, 931-932 (9th Cir. 1991) (applying similar analysis in gender context), cert. denied, 502 U.S. 1033 (1992).[6]

Affirmative action programs that satisfy these rigorous standards are an important means of eradicating discrimination and its effects. Thus, while not all minorities and women favor affirmative action, it "inures primarily to the[ir] benefit" and "is designed for that purpose." Seattle, 458 U.S. at 472. Because the only practical effect of Proposition 209 falls on affirmative action programs that are justified by a compelling predicate, the initiative eliminates an important response to "the 'special condition' of prejudice." Id. at 486.

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[6]In addition to the interest in addressing past discrimination, states also have a compelling interest in achieving diversity in certain circumstances. See, e.g., Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 311-315 (1978) (opinion of Powell, J.); see also Seattle, 458 U.S. at 472-473 (programs aimed at achieving racial diversity are designed to overcome the special condition of prejudice).

2. Although affirmative action is an important means of overcoming discrimination, states are generally free to decide whether or not to adopt affirmative action programs -- just as they are free to decide whether or not to adopt antidiscrimination laws or race-conscious busing plans. States are also generally free to repeal affirmative action programs they have enacted. See p. 15, supra. By enacting Proposition 209, however, California has done more than simply repeal its existing affirmative action programs. Not only does Proposition 209 single out programs designed to overcome prejudice, it also effectively limits the access of minorities and women -- the primary beneficiaries of affirmative action -- to the levers of government. It does so by "lodging decisionmaking authority over [affirmative action programs] at a new and remote level of government." Seattle, 458 U.S at 483.

Prior to the passage of Proposition 209, minorities and women who sought narrowly tailored race- or gender-conscious relief to overcome the effects of discrimination were free to lobby their city council or school board for that relief. See slip op. 21. Under Proposition 209, that has all changed. Now, "women and minorities who wish to petition their government for race- or gender-conscious remedial programs face a considerably more daunting burden." Ibid. Instead of obtaining relief through the political processes of their local government or school district, or even the state legislature, women and minorities seeking lawful and constitutional affirmative action pro-

grams must undertake the extraordinarily difficult step of amending the state constitution. See slip op. 21-23, 37-39 (noting the extensive burdens that step would entail). In contrast, persons seeking other kinds of special consideration can simply do so through the normal administrative, legislative, and judicial processes. Many of the forms of preferential treatment Proposition 209 does not reach -- such as preferences based on veteran's status or residency in employment and alumni or athletic preferences in state universities -- are not designed to respond to instances of discrimination. Thus, the initiative imposes significant barriers to the enactment of important responses to discrimination, while leaving other preference schemes wholly untouched. In this respect, Proposition 209 cannot be distinguished from the enactment rejected in Seattle. See Seattle, 458 U.S. at 480. Like Initiative 350, Proposition 209 effectively distorts the political process for minorities and women only.[7]

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[7] Intervenor contends that the district court's analysis would invalidate state Equal Rights Amendments or any other state-law requirement subjecting gender classifications to strict scrutiny. App. for Stay 12. For the reasons explained in the text, that is incorrect. Proposition 209 is infirm because it places unusual burdens on women and minorities in obtaining "legislation specifically designed to overcome the 'special condition' of prejudice." A requirement of strict scrutiny for gender classifications does not suffer from that infirmity. Not only would such a requirement afford women greater protection, but strict scrutiny analysis also expressly permits the use of a suspect classification where necessary to overcome discrimination or serve some other compelling interest. Nor would the district court's analysis invalidate 42 U.S.C. 2000e-2(l). Cf. App. for Stay 16. That statute prohibits the race- or gender-based alteration of valid and job-related test scores but does not prohibit affirma-

(continued...)

Intervenor makes several arguments against the application of Hunter and Seattle. None demonstrates that the district court abused its discretion in choosing to apply those cases here. First, intervenor argues that Proposition 209 simply mandates race- and gender-neutrality and therefore only eliminates programs that are already constitutionally suspect. App. for Stay 9-12. That argument is foreclosed by Seattle. Like Proposition 209, Washington's Initiative 350 simply mandated formal race-neutrality: it generally prohibited race-conscious busing programs designed to overcome de facto school segregation. In his dissent in Seattle, Justice Powell made this parallel explicit. He observed that "when a State or school board assigns students on the bases of their race, it acts on the basis of a racial classification, and we have consistently held that '[a] racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification.'" Seattle, 458 U.S. at 492 n.6 (Powell, J., dissenting) (quoting Personnel Adm'r v. Feeney, 442 U.S. 256, 272 (1979)). To the Court, Initiative 350 was not saved by the fact that it targeted only race-conscious programs. Rather, the crucial points were that busing "at bottom inures primarily to

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[2/](...continued)
tive action in employment generally; it leaves intact, for example, the practice of "banding" closely related scores. See Sims v. Montgomery County Comm'n, 887 F. Supp. 1479, 1484-1485 (M.D. Ala. 1995). It targets only a particular means of implementing affirmative action that may be regarded as too blunt an instrument, and too often unnecessary, ever to be narrowly tailored. It is thus a proper exercise of congressional authority under Section 5 of the Fourteenth Amendment.

the benefit of the minority, and is designed for that purpose," Seattle, 458 U.S. at 472, and that the Washington initiative "place[d] unusual burdens on the ability of racial groups to enact legislation specifically designed to overcome the 'special condition' of prejudice," id. at 486 (quoting Carolene Prods., 304 U.S. at 153 n.4). As we have explained, those points apply with equal force here. Because Proposition 209 singles out legislation "designed to overcome the 'special condition' of prejudice" for unique and more burdensome treatment in the political process, Seattle dictates that it be treated as equivalent to a racial or gender classification. See id. at 485.

Intervenor contends that the Seattle Court expressly rejected any parallel between busing and affirmative action by stating, in a footnote, that "the horribles paraded by the dissent * * * -- which have nothing to do with the ability of minorities to participate in the process of self-government -- are entirely unrelated to this case." Seattle, 458 U.S. at 480 n.23 (citing id. at 498-499 n.14 (Powell, J., dissenting)); see App. for Stay 14-15. But the "horribles" referred to by the Court did not relate to the mere application of the Seattle principle to affirmative action; by its terms, the Seattle decision plainly covers affirmative action programs "designed to overcome the 'special condition' of prejudice." Id. at 486; see id. at 486-487. Rather, the Court was evidently referring to the dissent's suggestion that the Seattle principle might extend to the lowest levels of an administrative hierarchy. For example, the dissent

read the Court's opinion as preventing a state law school's dean from overruling a school admissions committee's decision to employ affirmative action. See id. at 498-499 n.14 (Powell, J., dissenting). The Court correctly concluded that such a hypothetical case has "nothing to do with the ability of minorities to participate in the process of self-government." Id. at 480 n.23. But Proposition 209's foreclosure of the ability to obtain affirmative action through state and local legislative processes -- like Initiative 350's foreclosure of the ability to obtain busing through local school boards -- has everything to do with access to self-government.

Intervenor also contends that Crawford, supra, precludes application of Seattle here. That is incorrect. Crawford, which the Court decided on the same day as Seattle, involved only the question whether the repeal of a law benefitting racial minorities violated the Equal Protection Clause. Crawford, 458 U.S. at 538. In Crawford, the Court upheld Proposition I, which amended the California Constitution to prohibit state courts from imposing mandatory busing remedies under the state constitution except in situations where a federal court could do so under the Fourteenth Amendment. Id. at 532. Distinguishing Seattle, the Court noted that, even after the passage of Proposition I, "[t]he school districts themselves retain a state-law obligation to take reasonably feasible steps to desegregate, and they remain free to adopt reassignment and busing plans to effectuate desegregation."

Id. at 535-536 & n.12.[8] The provision did nothing more than repeal the judicial enforceability of the prior constitutional obligation to adopt busing programs, and "the simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification." Id. at 538-539; id. at 547 (Blackmun, J., concurring).

Crawford is inapposite here. Unlike Proposition I, Proposition 209 does much more than simply repeal existing state-law programs that mandate more than the Fourteenth Amendment requires. Rather, Proposition 209 invalidates most public affirmative action programs in California -- whether created by the state constitution, state legislation, local ordinances, or other state action -- and it prevents anyone from seeking new affirmative action programs through ordinary political means. Accordingly, it is precisely the type of distortion of the political process invalidated in Seattle and Hunter.[9] Intervenor has not

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[8]Intervenor simply mischaracterizes Crawford by stating that Proposition I "not only repealed existing de facto busing programs, it amended the California Constitution to prohibit any such program in the future." App. for Stay 18. To the contrary, Proposition I merely prohibited state courts from requiring localities to adopt such busing programs. Unlike Proposition 209, it did not prohibit local school boards from voluntarily adopting them. The Crawford Court distinguished Seattle on precisely this basis. See Crawford, 458 U.S. at 536 & n.12.

[9]Intervenor's reliance on the state's general latitude in arranging its internal structure is therefore misplaced. As the Court explained in Seattle and Hunter, the state's power to order its internal governmental processes must give way when the state exercises that power in a manner that places extraordinary burdens on the ability of minorities to obtain, through ordinary

(continued...)

made a "strong showing," Hilton, 481 U.S. at 776, that the district court likely abused its discretion in finding that Seattle and Hunter apply here.

II

BOTH THE BALANCE OF HARDSHIPS AND THE PUBLIC INTEREST TIP SHARPLY AGAINST UPSETTING THE STATUS QUO BY GRANTING A STAY

As we have explained, the narrow order issued by the district court merely serves the traditional purpose of a preliminary injunction -- "to preserve the status quo ante litem pending a determination of the action on the merits." Los Angeles Memorial Coliseum Comm'n v. National Football League, 634 F.2d 1197, 1200 (9th Cir. 1980) (citing cases). In this context, entry of a stay would contravene the basic purpose of the Court's stay power, for it would disrupt the status quo. Intervenor has not demonstrated that the equities justify such an extraordinary step. Indeed, the district court found that the balance of hardships "tips decidedly in plaintiffs' favor." Slip op. 64.

A stay is not necessary to protect intervenor from irreparable harm. District court orders suspending enforcement of Proposition 209 have been in place since November, and this Court has already expedited consideration of the appeal from the preliminary injunction pursuant to 9th Cir. R. 3-3. Intervenor has not "shown that [it] will suffer significant harm during the pendency of such an expedited hearing on the merits." Warm

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[9] (...continued)
political means, legislation to overcome discrimination. See Seattle, 458 U.S. at 476-480; Hunter, 393 U.S. at 392-393.

Springs Dam Task Force v. Gribble, 565 F.2d 549, 551 (9th Cir. 1977).[10] Indeed, the district court endeavored to minimize the disruption its order would cause. While defendants may not enforce Proposition 209 pending trial, they remain free voluntarily to decide to eliminate affirmative action programs within their purview. See slip op. 66 n.53. To the extent intervenor believes itself aggrieved by the continuing existence of affirmative action programs, the voluntary repeal permitted by the preliminary injunction can fully protect its interests. The limited nature of the restrictions imposed by the district court underscores the minor burden that leaving the preliminary injunction in place entails.

Should the preliminary injunction be stayed, by contrast, plaintiffs and the public interest will suffer significant harm. Once the district court's order is lifted, Proposition 209 will be binding state law; any affirmative action program that violates Proposition 209 may be immediately terminated. "[T]he hardships that would be caused to women and minorities" by Proposition 209's elimination of affirmative action programs were detailed by the district court, see slip op. 16-20, 63, and these hardships "must be weighed" in determining whether to grant the

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[10]Indeed, a serious question exists regarding intervenor's Article III standing to file an appeal and seek a stay. While intervenor would appear to have standing under this Court's decision in Yniguez v. Arizona, 939 F.2d 727, 733 (9th Cir. 1991), the United States has urged reversal of that decision in the Supreme Court. See Brief for the United States as Amicus Curiae Addressing Standing, Arizonans for Official English v. Arizona, No. 95-974 (U.S. argued Dec. 4, 1996).

stay. See Associated Gen. Contractors, 950 F.2d at 1411. Moreover, implementation of Proposition 209 would restrict access to the political process -- "an immediate and ongoing injury that is not amenable to monetary remedy." Slip op. 63. In this context, plaintiffs' substantial claim of the violation of constitutional rights itself may constitute irreparable harm. See Associated Gen. Contractors, 950 F.2d at 1412. In light of the significant harm that the plaintiffs and the public interest will suffer in the absence of preliminary relief, and the relatively minor burden on defendants imposed by the court's narrowly drawn order, the district court properly "perceive[d] a need to preserve the status quo" pending resolution of plaintiffs' claims. Republic of the Philippines v. Marcos, 862 F.2d 1355, 1362 (9th Cir. 1988) (en banc), cert. denied, 490 U.S. 1035 (1989). This Court should not stay the order and disrupt the status quo.

CONCLUSION

The motion for stay should be denied.

Respectfully submitted,

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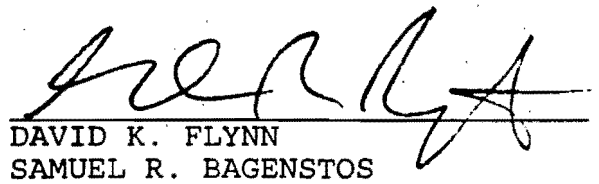

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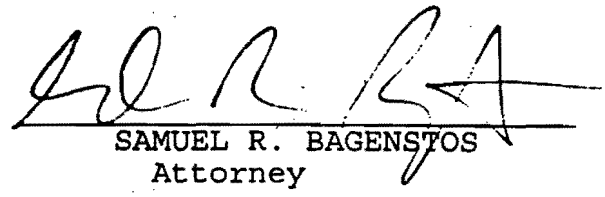

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Nos. 97-15030, 97-15031

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COALITION FOR ECONOMIC EQUITY, et al.,

Plaintiffs-Appellees,

v.

PETE WILSON, Governor, et al.,

Defendants-Appellants,

CALIFORNIANS AGAINST DISCRIMINATION AND
PREFERENCES, INC.,

Defendant-Intervenor-
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
IN OPPOSITION TO THE MOTION FOR STAY PENDING APPEAL

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The Washington Times

DATE: 1/30/97

PAGE: A1

Proposition 209 faces administration's fire

Brief calls measure unfair to minorities

By Frank J. Murray
THE WASHINGTON TIMES

The Clinton administration yesterday formally attacked California's initiative against affirmative action, charging that it is a ploy that locks in majority power at the expense of racial minorities and women.

"States may not ... single out racial and gender issues for unique treatment in the political process, where that treatment effectively places a special burden on minorities and women," the Justice Department said in a 28-page brief.

The 9th U.S. Circuit Court of Appeals has scheduled an unusually early Feb. 10 hearing on whether to lift a lower-court injunction imposed Dec. 23 and allow the voter-passed law to take effect.

"In such a case the majority has not merely won a political battle. It has altered the rules for all future political battles and thereby impermissibly entrenched its power," said the Justice Department, which seeks to keep California from carrying out the will of the voters in Proposition 209.

The brief, signed by acting Assistant Attorney General Isabelle Katz Pinzler, said that leaving the injunction in place causes no irreparable harm because public officials may voluntarily suspend or eliminate programs so long as they are not compelled to act by Proposition 209.

The administration's decision to file a friend-of-the-court brief, rather than try to intervene and become a party to the case as White House Press Secretary Michael McCurry announced Dec. 21, is something of a retreat. During detailed proceedings later, the government may want to be a party to be fully heard.

The widely watched Nov. 5 vote amended Article I of the California Constitution to ban all favoritism in government jobs, education and contracting on the basis of race, sex, color, ethnicity or national origin. It restated opposition to "reverse" discrimination on those same grounds.

The administration, which has been torn over how to respond to a series of court decisions that undermine affirmative-action programs, says Proposition 209 appears to require neutrality.

But the Justice Department said that because the measure changes the state constitution, it puts those it affects, primarily racial minorities and women, at a disadvantage compared with those, such as veterans and the elderly, who get benefits set by statute. Racial minorities and women, the department said, would be denied equal protection under the U.S. Constitution's 14th Amendment because they would have to work harder to enact changes.

The Justice Department thus supported U.S. District Judge Thelton Henderson, who blocked enforcement of Proposition 209. The plaintiffs' lawyers jockeyed to make sure Judge Henderson would handle the case in the expectation he would favor their viewpoint.

California Gov. Pete Wilson, a Republican, issued a statement denouncing the federal brief as a perversion of the Justice Department's argument of equal protection and calling President Clinton's decision to oppose the initiative a "historical setback."

"The Clinton administration now has the dubious distinction of being the first administration since the enactment of the Civil Rights Act of 1964 to contend that a law prohibiting all race- and gender-based discrimination is itself unconstitutional," he said.

The Justice Department said Mr. Wilson could not identify a single program, other than affirmative action, that would be restricted by Proposition 209.

The measure would invalidate new programs and block actions under existing state and local affirmative-action plans. It would exempt any program under court order or consent decree and any action necessary to receive federal funds.

A prime mover behind the measure plans to take the campaign nationwide.

The American Civil Liberties Union filed the suit in the name of the Coalition for Economic Equity against all state and local officials in California. Californians Against Discrimination and Preferences obtained permission to intervene on the state's side to defend the voters' intentions.

While the battle over the California Civil Rights Initiative is waged in the courts, a prime mover behind the measure, Ward Connerly, recently announced he is taking the campaign nationwide.

DATE: 1/30/97

PAGE: 3A

NATIONLINE

Justice Dept. takes sides against Calif.'s Prop. 209

The Clinton Justice Department weighed in on the side of affirmative action Wednesday in the legal battle over Proposition 209, approved in November by California voters to end race- and gender-based state affirmative-action efforts.

"It is disturbing that the president would take sides in a lawsuit that thwarts the will of the people of California," said Jennifer Nelson of the American Civil Rights Institute, which supports the initiative. A federal judge in December halted enforcement of Prop. 209, but supporters appealed. The Justice Department brief filed with the U.S. Court of Appeals for the Ninth Circuit says the initiative "effectively limits the access of minorities and women . . . to the levers of government." The appeals court hears the case Feb. 10.

Los Angeles Times

DATE: 1-30-97
PAGE: B-1

U.S. Details Its Legal Arguments Against Prop. 209

By DAVID G. SAVAGE
TIMES STAFF WRITER

WASHINGTON—California's Proposition 209 is flawed not because it repeals the official use of race and gender as factors in government programs but because it does so through a binding statewide vote, Clinton administration lawyers said Wednesday.

That vote unfairly prevents anyone from seeking new affirmative action programs "through ordinary political means," such as appealing to city councils, county boards or the state Legislature, the lawyers said in a friend-of-the-court brief filed with the U.S. 9th Circuit Court of Appeals.

The appeals court is considering whether to lift an order by a federal judge based in San Francisco that has blocked enforcement of the anti-affirmative action measure before a trial determines its legality.

Last month, President Clinton signaled that his administration would join those who are opposing the state initiative. The brief filed Wednesday marks the administration's first attempt to explain the legal basis for its opposition:

"A state is free under the 14th Amendment to decline to pass beneficial legislation such as affirmative action and a state is free to repeal such programs after it has enacted them, but it may not remove those questions from the normal political process," the brief states.

In recent years, the U.S. Supreme Court has cast a skeptical eye on affirmative action programs and ruled that "racial classifications" by public agencies are almost always unconstitutional. For that reason, administration lawyers could not assert that California's local and state agencies must, or even should, give preferences to minorities and women.

Instead, the attorneys were forced to rely on high court precedents from an earlier era involving state laws that blocked cities from adopting anti-discrimination measures. Those opinions, many of them passed by 5-4 majorities, suggested that states must leave local agencies the option of adopting anti-discrimination ordinances.

Affirmative action policies are not exactly the same as anti-discrimination laws, the brief concedes, but they are one possible remedy for discrimination. And that remedy must always be available through "the normal political process," the brief argues.

Proposition 209 is "a distortion of the political process" because it "effectively limits the access of minorities and women to the levers of government," the brief argues.

Under Proposition 209, minorities and women may not win affirmative action policies, except by winning a new statewide vote of the people, it says.

The state initiative, which passed in November by a 54%-46% vote, says local and state agencies may not "grant preferential treatment" to anyone based on race, sex, color, ethnicity or national origin.

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The Washington Post

DATE: 1-30-97

PAGE: A-8

Justice Dept. Brief Opposes California Affirmative Action Ban

By Michael A. Fletcher
Washington Post Staff Writer

The Clinton administration yesterday waded into the legal battle over California's recently approved ballot initiative outlawing affirmative action, arguing that the new law is unconstitutional and should not be allowed to take effect.

In a brief filed to the U.S. Court of Appeals in San Francisco, the Justice Department said it opposes Proposition 209 and believes its implementation has rightly been blocked by a court pending a trial on its constitutionality.

The state has sought to lift the judge's order and allow the measure to take effect while the legal battle goes forward.

Clinton administration attorneys have said they fear Proposition 209 could undermine federal civil rights policies and spur other states to follow California's lead. Proponents of the new law have joined with conservative activists nationwide to take their anti-affirmative action message to states across the country, where previous efforts to outlaw affirmative action have failed almost unanimously.

The measure, approved last November, prohibits preferences based on sex and race in state and local government contracting, hiring and university admissions.

In its brief to the 9th U.S. Circuit Court of Appeals, the Justice Department argues that Proposition 209 violates the equal protection clause of the 14th Amendment by putting women and minorities who seek relief from discrimination at a disadvantage. It also says the court injunction blocking the law from taking effect should stay in place to protect women and minorities from the harm they would face if affirmative action programs were dismantled before the case is fully adjudicated.

Gov. Pete Wilson (R), calling the Clinton administration action "deeply regrettable," said in a statement: "The Department of Justice is contending that the equal protection clause bars a state from prohibiting in its constitution discrimination against all races and only allows the state to prohibit discrimination against some races, turning the equal protection clause into the unequal protection clause."

The administration's position also angered conservatives who think the measure reflects the will of the people. "We are disappointed that the Clinton administration is out of step with the majority of Americans who feel racial preferences are wrong and ought to be ended," said Ward Connerly, the black Sacramento businessman who led the Proposition 209 effort.

In deciding to fight the law, the federal government joins the civil rights groups that filed to block the law. During the final days of the fall campaign, some of those groups had criticized Clinton and the Democratic Party for not doing enough to oppose Proposition 209, which enjoyed strong financial backing from national Republicans.

"I'm extremely pleased that the Justice Department has taken this action," said Wade Henderson, executive director of the Leadership Conference on Civil Rights. "The Constitution guarantees equal protection under the law to all Americans and that can't be eliminated, even by a majority vote of the electorate."

While the administration's filing of a brief in the case pleased civil rights groups, the action fell short of one option considered by the administration: becoming an actual party to the litigation.

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Section 137, Charter of the City of Akron, Ohio 11, 12

RULES:

9th Cir. R. 3-3 25

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 97-15030, 97-15031

COALITION FOR ECONOMIC EQUITY, et al.,

Plaintiffs-Appellees,

v.

PETE WILSON, Governor, et al.,

Defendants-Appellants,

CALIFORNIANS AGAINST DISCRIMINATION AND
PREFERENCES, INC.,

Defendant-Intervenor-
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
IN OPPOSITION TO THE MOTION FOR STAY PENDING APPEAL

INTRODUCTION AND SUMMARY OF ARGUMENT

This case involves a constitutional challenge to California's Proposition 209, which generally prohibits race- and gender-conscious affirmative action by state and local officials. The district court entered a preliminary injunction to preserve the status quo pending consideration of plaintiffs' claims on the merits. The court's order prohibits state and local officials from implementing Proposition 209 by eliminating affirmative action programs across the board, but it expressly permits those officials to reexamine or repeal particular affirmative action programs within their purview so long as they are doing so voluntarily and pursuant to authority that exists independently

of Proposition 209. Intervenor seeks a stay that would alter the status quo and cause Proposition 209 to become immediately enforceable. Intervenor has not established any significant injury to its interests that warrants disrupting the status quo and overturning the district court's narrow prohibitory order.

Nor has intervenor made the necessary "strong showing" that it is likely to succeed on the merits of this appeal. Hilton v. Braunskill, 481 U.S. 770, 776 (1987). Because this appeal arises from the entry of a preliminary injunction, intervenor can succeed on this appeal only if it shows that the district court fundamentally misapprehended -- not merely misapplied -- the governing legal rules. See Gregorio T. v. Wilson, 59 F.3d 1002, 1004 (9th Cir. 1995); Sports Form, Inc. v. United Press Int'l, Inc., 686 F.2d 750, 752 (9th Cir. 1982). To obtain a stay, intervenor must establish a likelihood that the district court abused its discretion in reaching the result it did. See Lopez v. Heckler, 713 F.2d 1432, 1436 (9th Cir. 1983).

Intervenor cannot satisfy that standard here. The district court properly concluded that the Supreme Court's decisions in Hunter v. Erickson, 393 U.S. 385 (1969), and Washington v. Seattle School District No. 1, 458 U.S. 457 (1982), govern this case. Under those decisions, a state may not "place[] unusual burdens on the ability of racial [or gender] groups to enact legislation specifically designed to overcome the 'special condition' of prejudice." Seattle, 458 U.S. at 486 (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4

(1938)). Hunter and Seattle prohibit states from singling out such legislation for uniquely burdensome treatment in the political process "by lodging decisionmaking authority over the question at a new and remote level of government." Seattle, 458 U.S. at 483; see id. at 469-470, 474-475. Proposition 209, like the ballot initiative invalidated in Seattle, singles out measures designed to overcome prejudice for unique and burdensome treatment. Women and minorities seeking narrowly tailored affirmative action programs to respond to discrimination in California must now obtain a state constitutional amendment first, while those seeking preferential treatment on any number of other bases may do so through ordinary state and local political processes. This disparate allocation of burdens violates the equal protection principles set forth in Hunter and Seattle.

The district court's decision does not mandate affirmative action or require its use by any level of government in California. To the contrary, under the terms of that ruling and the Seattle decision on which it is based, units of state and local government are free to decide for themselves, through their normal political processes, whether affirmative action is appropriate as a matter of law and policy, and to implement lawful affirmative action programs or repeal them. What the preliminary injunction prohibits, consistent with governing Supreme Court precedent, is Proposition 209's placement of minority groups and women at a unique disadvantage in the state's political structure. The district court surely did not abuse its discretion in

maintaining the status quo pending consideration of plaintiffs' claims, and this Court ought not alter that status quo by granting a stay.

INTEREST OF THE UNITED STATES

This case involves the question whether an amendment to California's Constitution prohibiting race- or gender-conscious affirmative action programs violates the federal Constitution's Equal Protection Clause. The United States has a strong interest in the enforcement of the Equal Protection Clause. That interest is reflected in Title IX of the Civil Rights Act of 1964, 42 U.S.C. 2000h-2, which vests the Attorney General with authority to intervene in cases "seeking relief from the denial of equal protection of the laws." Pursuant to that interest, the United States was a party in Washington v. Seattle School District No. 1, 458 U.S. 457 (1982), and it participated as amicus curiae in Hunter v. Erickson, 393 U.S. 385 (1969).

STATEMENT OF THE CASE

This case involves a constitutional challenge to California's Proposition 209, which was approved in a statewide referendum on November 5, 1996. Proposition 209 adds a new Section 31 to Article I of the state constitution. It broadly prohibits state affirmative action programs based on race or gender. The operative provision reads: "[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education,

or public contracting." Cal. Const. Art. I, § 31(a) (added November 5, 1996) (emphasis added). Proposition 209 defines "state" broadly to include any political subdivision or government instrumentality within California; the definitional provision specifically identifies local governments, public institutions of higher education, and school districts as among the entities included within the definition. Id. § 31(f). The proposition applies prospectively only and specifically exempts pre-existing court orders and consent decrees. Id. § 31(b),(d).[1/]

On November 6, 1996, a group of plaintiffs (who have been certified as a class) filed suit in the United States District Court for the Northern District of California to challenge the constitutionality of Proposition 209. Defendants are "a class of all state officials, local government entities or other governmental instrumentalities bound by Proposition 209." Coalition for Econ. Equity v. Wilson, No. C 96-4024 TEH (N.D. Cal. Dec. 23, 1996), slip op. 5 n.6 (hereinafter slip op.). Plaintiffs contend that Proposition 209 violates the Equal Protection Clause by placing a special burden on the ability of women and minorities to obtain beneficial programs through the political process. They also contend that the proposition is preempted by federal law because it prohibits voluntary affirmative action efforts.

[1/]It also exempts "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." Id. § 31(e).

Slip op. 3-4.[2/] The district court granted a temporary restraining order on November 27, 1996.

On December 23, 1996, the district court entered a preliminary injunction barring enforcement of Proposition 209 pending a trial on the merits. The court found that injunctive relief was necessary to protect the plaintiff class from irreparable injury. Slip op. 7. The court also concluded that plaintiffs had established a probability of success on their claim "that Proposition 209 denies them the equal protection of the laws by removing the authority to redress racial and gender problems -- and only those problems -- to a new and remote level of government, thereby singling out the interests of minorities and women for a special political burden." Id. at 24, 45. In addition, the district court ruled that plaintiffs were likely to succeed in their preemption challenge to Proposition 209's ban on affirmative action in employment on the ground that the initiative conflicted with Congress's intent "to protect employers' discretion to utilize race- and gender-conscious affirmative action as a method of complying with their obligations under Title VII." Id. at 59. The court found that plaintiffs had failed to establish a likelihood of success on their other preemption claims, however. Id. at 7. Accordingly, the court issued an order barring the defen-

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[2/]Specifically, plaintiffs claim that Proposition 209 is preempted by Titles VI and VII of the Civil Rights Act of 1964, 42 U.S.C. 2000d et seq. (Title VI), and 42 U.S.C. 2000e et seq., as amended (Title VII). They also claim that the initiative is preempted by Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 et seq. Slip op. 4.

dants "from implementing or enforcing Proposition 209 insofar as said amendment to the Constitution of the State of California purports to prohibit or affect affirmative action programs in public employment, public education or public contracting." Id. at 66. However, the order expressly permits any of the defendants "to voluntarily adopt, retain, amend or repeal" any affirmative action programs, so long as the defendants are not acting to enforce or implement Proposition 209. Id. at 66 n.53.[3]

STANDARD FOR GRANTING A STAY

In ruling on intervenor's application, this Court must consider whether intervenor has made a "strong showing" that it is "likely to succeed on the merits" of the appeal, as well as the effect a stay would have on the interests of the parties and the public. Hilton v. Braunskill, 481 U.S. 770, 776 (1987). Where a party seeks to stay a preliminary injunction, the Court must consider appellants' likelihood of success in light of the deferential standard of review governing preliminary injunction appeals. See Lopez v. Heckler, 713 F.2d 1432, 1436 (9th Cir. 1983). The Court should also consider that the basic purpose of a stay, like the basic purpose of a preliminary injunction, is to preserve the status quo pending consideration of the merits. See Tribal Village of Akutan v. Hodel, 859 F.2d 662, 663 (9th Cir. 1988). Where, as here, a stay would have the effect of upsetting the status quo, the request is "subject to a higher degree of

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[3]On January 9, 1997, the district court issued a tentative ruling denying defendants' motion for abstention pursuant to Railroad Commission v. Pullman Co., 312 U.S. 496 (1941).

scrutiny." Stanley v. University of S. Cal., 13 F.3d 1313, 1320 (9th Cir. 1994) (applying preliminary injunction standard).

ARGUMENT

I

INTERVENOR HAS NOT MADE A "STRONG SHOWING" THAT IT IS LIKELY TO SUCCEED IN ESTABLISHING THAT THE DISTRICT COURT ABUSED ITS DISCRETION

This appeal involves the district court's entry of a preliminary injunction that preserves the status quo pending adjudication of plaintiffs' constitutional and statutory challenges to Proposition 209. Accordingly, intervenor faces a heavy burden in seeking a stay. Because the issue on appeal is not whether the district court's legal rulings were correct but simply whether those rulings constituted an abuse of discretion, intervenor cannot obtain a stay simply by showing that it is likely to succeed on the merits of the underlying litigation. See Gregorio T. v. Wilson, 59 F.3d 1002, 1004 (9th Cir. 1995); Sports Form, Inc. v. United Press Int'l, Inc., 686 F.2d 750, 752 (9th Cir. 1982); see also Associated Gen. Contractors v. Coalition for Econ. Equity, 950 F.2d 1401, 1419 (9th Cir. 1991) (O'Scannlain, J., specially concurring) ("Detailed consideration of the merits * * * is neither necessary nor appropriate" in a preliminary injunction appeal), cert. denied, 503 U.S. 985 (1992).

To obtain a stay, intervenor must demonstrate that it is likely to succeed in showing that the district court abused its discretion in finding plaintiffs' claims sufficiently meritorious to warrant maintenance of the status quo. See Lopez v. Heckler,

713 F.2d 1432, 1436 (9th Cir. 1983). Intervenor must show that the district court did not even "g[e]t the law right" -- that is, that it did not even apply the correct legal standards:

> As long as the district court got the law right, "it will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case. Rather, the appellate court will reverse only if the district court abused its discretion."

Gregorio T., 59 F.3d at 1004 (quoting Sports Form, 686 F.2d at 752). Here, the district court plainly "got the law right." It correctly concluded that Hunter v. Erickson, 393 U.S. 385 (1969), and Washington v. Seattle School District No. 1, 458 U.S. 457 (1982), provided the legal standards that govern this case.[4/] The court also correctly applied those precedents. Intervenor has not made a "strong showing," Hilton v. Braunskill, 481 U.S. 770, 776 (1987), that the district court abused its discretion.

A. Hunter v. Erickson and Washington v. Seattle School District No. 1 Prohibit A State From Singling Out Racial And Gender Issues For Special Treatment In The Political Process And Thereby Imposing Unusual Burdens On The Ability Of Minorities And Women To Overcome The "Special Condition" Of Prejudice

1. The Fourteenth Amendment prohibits a state from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. Under the Equal Protection Clause, state action is invalid if on its face it invidiously classifies on the basis of race or gender. See,

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[4/]Because the district court's preemption holding supports only the employment aspects of the preliminary injunction, and its equal protection holding is fully sufficient to uphold the entire order, for purposes of responding to this stay motion the United States will focus on the equal protection issue.

e.g., United States v. Virginia, 116 S. Ct. 2264, 2274-2276 (1996) (gender); Loving v. Virginia, 388 U.S. 1, 8-9 (1967) (race). Even facially race- or gender-neutral state action violates the Clause if it arises from an invidiously discriminatory motivation. See, e.g., J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 135-146 (1994) (gender); Hunter v. Underwood, 471 U.S. 222, 227-233 (1985) (race).

But these prohibitions do not exhaust the Fourteenth Amendment's safeguards. The Supreme Court has recognized that the right to "equal protection of the laws" necessarily requires that minorities and women retain equal access to the ordinary political process to obtain the "protection" of laws against discrimination and its effects. See, e.g., Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 467-470 (1982); Hunter v. Erickson, 393 U.S. 385, 389-391 (1969).[5] A state therefore may not "allocat[e] governmental power nonneutrally, by explicitly using the racial [or gender] nature of a decision to determine the decisionmaking process." Seattle, 458 U.S. at 470. This is true even if the state formally treats men and women and members of all racial groups identically. The Equal Protection Clause "reaches 'a political structure that treats all individuals as equals,' yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority

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[5] Seattle and Hunter dealt with enactments placing burdens on racial and religious minorities, not women. But the same analysis applies in the gender context. The Supreme Court has made clear that women have the same right of access to "our democratic processes" as do racial minorities. J.E.B., 511 U.S. at 146.

groups to achieve beneficial legislation." Id. at 467 (citation omitted; quoting City of Mobile v. Bolden, 446 U.S. 55, 84 (1980) (Stevens, J., concurring in the judgment)).

A state enactment that limits the ability of minorities and women to obtain measures responding to prejudice through ordinary political means is thus particularly questionable under the Equal Protection Clause. While a state is free under the Fourteenth Amendment to decline to pass beneficial legislation such as affirmative action -- and a state is free to repeal such programs after it has enacted them -- it may not remove those questions from the normal political process and thereby place a special burden on people seeking to overcome discrimination. As the Court has explained, "when the State's allocation of power places unusual burdens on the ability of racial groups to enact legislation specifically designed to overcome the 'special condition' of prejudice, the governmental action seriously 'curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities.'" Seattle, 458 U.S. at 486 (quoting United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938)). Such state action "inevitably raises dangers of impermissible motivation." Id. at 486 n.30. Like a facial racial classification, it is "inherently suspect." Id. at 485.

2. The Supreme Court has applied these principles in two cases that apply directly here. In Hunter v. Erickson, the Court invalidated Section 137, an amendment to the Akron, Ohio, city charter. Section 137 provided that any ordinance regulating

housing transactions "on the basis of race, color, religion, national origin or ancestry" would be invalid unless approved by a majority in a citywide referendum. Hunter, 393 U.S. at 387, 390. In striking down Section 137, the Court noted that the amendment did more than simply repeal the city's existing fair housing ordinance; it "also required the approval of the electors before any future ordinance could take effect." Id. at 389-390. Section 137 thus singled out proposed antidiscrimination measures for uniquely onerous treatment in the political process. While "[t]hose who sought, or would benefit from, most ordinances regulating the real property market remained subject to the general rule" requiring only a vote of the city council, those who sought antidiscrimination laws "must run § 137's gantlet." Id. at 390.

The Hunter Court considered it of no moment that the charter amendment "dr[ew] no distinctions among racial and religious groups" and subjected "Negroes and whites, Jews and Catholics * * * to the same requirements if there is housing discrimination against them which they wish to end." Ibid. For Section 137 "nevertheless disadvantage[d] those who would benefit from laws barring racial, religious, or ancestral discriminations as against those who would bar other discriminations or who would otherwise regulate the real estate market in their favor." Id. at 391; accord id. at 389. And "although the law on its face treat[ed] Negro and white, Jew and gentile in an identical manner, the reality is that the law's impact [fell] on the minority," for non-minorities were unlikely to need legislative

protection against discrimination. Id. at 391. The Court therefore concluded that "§ 137 place[d] special burdens on racial minorities within the governmental process. This is no more permissible than denying them the vote, on an equal basis with others." Ibid. While the city was under no constitutional obligation to enact an antidiscrimination ordinance, it could not place unusual obstacles in the path of people lobbying for such an enactment.

Hunter thus established that "the equal protection of the laws" requires state governments to leave their ordinary lawmaking processes open on an equal basis to those who seek the "protection" of laws preventing discrimination against them. In Seattle, the Court made clear that the ordinary political process must similarly remain open to those who seek the "protection" of affirmative state action designed to overcome the effects of discrimination -- even if that action is itself race-conscious. Seattle involved Initiative 350, a Washington State measure that barred school districts from voluntarily enacting mandatory busing programs to overcome de facto school segregation. In evaluating the constitutionality of Initiative 350, the Court read its decision in Hunter as establishing "a simple but central principle" (Seattle, 458 U.S. at 469-470):

> [T]he political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action. But a different analysis is required when the State allocates governmental power nonneutrally, by explicitly using the racial nature of a decision to determine the decisionmaking process.

Applying that principle, the Court held Initiative 350 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." Id. at 470.

The Court engaged in a two-step analysis. First, the Court concluded that Initiative 350 singled out racial issues for special treatment. The initiative's text "nowhere mention[ed] 'race' or 'integration.'" Id. at 471. It simply enacted a general ban on mandatory busing in public schools. But because Initiative 350 contained numerous exceptions, the Court concluded that it effectively permitted busing for any purpose other than racial integration. See ibid. In practice, it would only affect busing for racial purposes. And while not all African-Americans opposed the initiative -- and not all whites supported it -- the Court concluded that integration "inures primarily to the benefit of the minority, and is designed for that purpose." Id. at 472.

Second, the Court held that "the practical effect of Initiative 350 is to work a reallocation of power of the kind condemned in Hunter" (id. at 474):

> 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. Those favoring the elimination of de facto school segregation now must seek relief from the state legislature, or from the statewide electorate. Yet authority over all other student assignment decisions, as well as over most other areas of educational policy, remains vested in the local school board.

Because the Constitution does not mandate a remedy for de facto school segregation, the Court stressed that Washington was free

to repeal any busing programs the state itself had enacted to address that problem (id. at 483) -- a point the Court relied upon in Crawford v. Board of Education, 458 U.S. 527, 538-539 (1982), decided the same day. But the state may not "burden[] all future attempts to integrate Washington schools in districts throughout the State, by lodging decisionmaking authority over the question at a new and remote level of government." Seattle, 458 U.S. at 483.

3. Hunter and Seattle establish a basic rule of equal protection. States are free to repeal measures they adopt to overcome discrimination -- including affirmative action -- so long as those measures are not themselves required by federal law. See Crawford, 458 U.S. at 538-539; Seattle, 458 U.S. at 483; Hunter, 393 U.S. at 390 n.5. In such a case, the beneficiaries of that legislation "would undoubtedly [have lost] an important political battle, but they would not thereby [have been] denied equal protection." Seattle, 458 U.S. at 483 (quoting Hunter, 393 U.S. at 394 (Harlan, J., concurring)) (internal quotation marks omitted; alterations in Seattle). But states may not go further and single out racial and gender issues for unique treatment in the political process, where that treatment effectively places a special burden on minorities and women by requiring them to repair to a new and more remote level of government before obtaining "legislation specifically designed to overcome the 'special condition' of prejudice." Id. at 486 (quoting Carolene Prods., 304 U.S. at 153 n.4). In such a case, the

majority has not merely won a political battle; it has altered the rules for all future political battles and thereby impermissibly entrenched its power. It has denied "the equal protection of the laws" by limiting the opportunity for minorities and women to seek the "protection" of meaningful responses to discrimination.

B. The District Court Did Not Abuse Its Discretion In Finding Hunter And Seattle Controlling Here

In ruling that the plaintiffs had established a likelihood of success on the constitutional issue, the district court properly recognized that "[t]he Seattle opinion sets out the framework for analysis." Slip op. 33. Under Gregorio T. and Sports Form, that recognition alone would be sufficient to uphold the preliminary injunction. It is certainly sufficient to warrant denial of a stay. Intervenor has not demonstrated a likelihood of success in showing that the district court abused its discretion in applying Hunter and Seattle. Under a straightforward application of those precedents, Proposition 209 is unconstitutional because it singles out racial and gender issues for unique treatment in the political process and thereby burdens the enactment of legislation designed to overcome prejudice.

1. As a formal matter, Proposition 209 appears simply to require race- and gender-neutrality in government programs. But the district court properly "looked beyond the plain language of the measure in question and inquired whether, 'in reality, the burden imposed by [the] arrangement necessarily falls on the minority.'" Slip op. 29 (quoting Seattle, 458 U.S. at 468

(emphasis and alteration added by district court)). While Proposition 209, like the measures invalidated in Seattle and Hunter, "on its face treats Negro and white, [male and female] in an identical manner, the reality is that the law's impact falls on * * * minorit[ies]" and women. Hunter, 393 U.S. at 391. Despite its general language, the only meaningful impact of Proposition 209 will fall on narrowly-tailored affirmative action programs that promote the inclusion of qualified minorities and women. As the district court found, "the primary practical effect of Proposition 209 is to eliminate existing governmental race- and gender-conscious affirmative action programs in contracting, education, and employment and prohibit their creation in the future, while leaving governmental entities free to employ preferences based on any criteria other than race or gender." Slip op. 35. The state could not identify "a single existing program, other than race- and gender-conscious affirmative action programs, that would be affected by Proposition 209." Id. at 34. But "all parties concede" that it "will prohibit race- and gender-conscious affirmative action efforts." Id. at 35.

Proposition 209 is thus precisely targeted at "legislation specifically designed to overcome the 'special condition' of prejudice." Seattle, 458 U.S. at 486 (quoting Carolene Prods., 304 U.S. at 153 n.4). Even before Proposition 209, both race- and gender-conscious state affirmative action programs were required to satisfy rigorous constitutional scrutiny. Such programs are generally lawful only where they respond to historic

or present exclusion. See, e.g., City of Richmond v. J.A. Croson Co., 488 U.S. 469, 509 (1989) (plurality opinion). In Adarand Constructors v. Pena, 115 S. Ct. 2097 (1995), the Court emphasized that race-based action would survive strict scrutiny if it was narrowly tailored to eliminate the effects of discrimination. The Court reasoned that "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." Adarand, 115 S. Ct. at 2117; see also Coral Constr. Co. v. King County, 941 F.2d 910, 931-932 (9th Cir. 1991) (applying similar analysis in gender context), cert. denied, 502 U.S. 1033 (1992).[6]

Affirmative action programs that satisfy these rigorous standards are an important means of eradicating discrimination and its effects. Thus, while not all minorities and women favor affirmative action, it "inures primarily to the[ir] benefit" and "is designed for that purpose." Seattle, 458 U.S. at 472. Because the only practical effect of Proposition 209 falls on affirmative action programs that are justified by a compelling predicate, the initiative eliminates an important response to "the 'special condition' of prejudice." Id. at 486.

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[6]In addition to the interest in addressing past discrimination, states also have a compelling interest in achieving diversity in certain circumstances. See, e.g., Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 311-315 (1978) (opinion of Powell, J.); see also Seattle, 458 U.S. at 472-473 (programs aimed at achieving racial diversity are designed to overcome the special condition of prejudice).

2. Although affirmative action is an important means of overcoming discrimination, states are generally free to decide whether or not to adopt affirmative action programs -- just as they are free to decide whether or not to adopt antidiscrimination laws or race-conscious busing plans. States are also generally free to repeal affirmative action programs they have enacted. See p. 15, supra. By enacting Proposition 209, however, California has done more than simply repeal its existing affirmative action programs. Not only does Proposition 209 single out programs designed to overcome prejudice, it also effectively limits the access of minorities and women -- the primary beneficiaries of affirmative action -- to the levers of government. It does so by "lodging decisionmaking authority over [affirmative action programs] at a new and remote level of government." Seattle, 458 U.S at 483.

Prior to the passage of Proposition 209, minorities and women who sought narrowly tailored race- or gender-conscious relief to overcome the effects of discrimination were free to lobby their city council or school board for that relief. See slip op. 21. Under Proposition 209, that has all changed. Now, "women and minorities who wish to petition their government for race- or gender-conscious remedial programs face a considerably more daunting burden." Ibid. Instead of obtaining relief through the political processes of their local government or school district, or even the state legislature, women and minorities seeking lawful and constitutional affirmative action pro-

grams must undertake the extraordinarily difficult step of amending the state constitution. See slip op. 21-23, 37-39 (noting the extensive burdens that step would entail). In contrast, persons seeking other kinds of special consideration can simply do so through the normal administrative, legislative, and judicial processes. Many of the forms of preferential treatment Proposition 209 does not reach -- such as preferences based on veteran's status or residency in employment and alumni or athletic preferences in state universities -- are not designed to respond to instances of discrimination. Thus, the initiative imposes significant barriers to the enactment of important responses to discrimination, while leaving other preference schemes wholly untouched. In this respect, Proposition 209 cannot be distinguished from the enactment rejected in Seattle. See Seattle, 458 U.S. at 480. Like Initiative 350, Proposition 209 effectively distorts the political process for minorities and women only.[7]

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[7]Intervenor contends that the district court's analysis would invalidate state Equal Rights Amendments or any other state-law requirement subjecting gender classifications to strict scrutiny. App. for Stay 12. For the reasons explained in the text, that is incorrect. Proposition 209 is infirm because it places unusual burdens on women and minorities in obtaining "legislation specifically designed to overcome the 'special condition' of prejudice." A requirement of strict scrutiny for gender classifications does not suffer from that infirmity. Not only would such a requirement afford women greater protection, but strict scrutiny analysis also expressly permits the use of a suspect classification where necessary to overcome discrimination or serve some other compelling interest. Nor would the district court's analysis invalidate 42 U.S.C. 2000e-2(l). Cf. App. for Stay 16. That statute prohibits the race- or gender-based alteration of valid and job-related test scores but does not prohibit affirma-

(continued...)

Intervenor makes several arguments against the application of Hunter and Seattle. None demonstrates that the district court abused its discretion in choosing to apply those cases here. First, intervenor argues that Proposition 209 simply mandates race- and gender-neutrality and therefore only eliminates programs that are already constitutionally suspect. App. for Stay 9-12. That argument is foreclosed by Seattle. Like Proposition 209, Washington's Initiative 350 simply mandated formal race-neutrality: it generally prohibited race-conscious busing programs designed to overcome de facto school segregation. In his dissent in Seattle, Justice Powell made this parallel explicit. He observed that "when a State or school board assigns students on the bases of their race, it acts on the basis of a racial classification, and we have consistently held that '[a] racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification.'" Seattle, 458 U.S. at 492 n.6 (Powell, J., dissenting) (quoting Personnel Adm'r v. Feeney, 442 U.S. 256, 272 (1979)). To the Court, Initiative 350 was not saved by the fact that it targeted only race-conscious programs. Rather, the crucial points were that busing "at bottom inures primarily to

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[2/] (...continued)
tive action in employment generally; it leaves intact, for example, the practice of "banding" closely related scores. See Sims v. Montgomery County Comm'n, 887 F. Supp. 1479, 1484-1485 (M.D. Ala. 1995). It targets only a particular means of implementing affirmative action that may be regarded as too blunt an instrument, and too often unnecessary, ever to be narrowly tailored. It is thus a proper exercise of congressional authority under Section 5 of the Fourteenth Amendment.

the benefit of the minority, and is designed for that purpose," Seattle, 458 U.S. at 472, and that the Washington initiative "place[d] unusual burdens on the ability of racial groups to enact legislation specifically designed to overcome the 'special condition' of prejudice," id. at 486 (quoting Carolene Prods., 304 U.S. at 153 n.4). As we have explained, those points apply with equal force here. Because Proposition 209 singles out legislation "designed to overcome the 'special condition' of prejudice" for unique and more burdensome treatment in the political process, Seattle dictates that it be treated as equivalent to a racial or gender classification. See id. at 485.

Intervenor contends that the Seattle Court expressly rejected any parallel between busing and affirmative action by stating, in a footnote, that "the horribles paraded by the dissent * * * -- which have nothing to do with the ability of minorities to participate in the process of self-government -- are entirely unrelated to this case." Seattle, 458 U.S. at 480 n.23 (citing id. at 498-499 n.14 (Powell, J., dissenting)); see App. for Stay 14-15. But the "horribles" referred to by the Court did not relate to the mere application of the Seattle principle to affirmative action; by its terms, the Seattle decision plainly covers affirmative action programs "designed to overcome the 'special condition' of prejudice." Id. at 486; see id. at 486-487. Rather, the Court was evidently referring to the dissent's suggestion that the Seattle principle might extend to the lowest levels of an administrative hierarchy. For example, the dissent

read the Court's opinion as preventing a state law school's dean from overruling a school admissions committee's decision to employ affirmative action. See id. at 498-499 n.14 (Powell, J., dissenting). The Court correctly concluded that such a hypothetical case has "nothing to do with the ability of minorities to participate in the process of self-government." Id. at 480 n.23. But Proposition 209's foreclosure of the ability to obtain affirmative action through state and local legislative processes -- like Initiative 350's foreclosure of the ability to obtain busing through local school boards -- has everything to do with access to self-government.

Intervenor also contends that Crawford, supra, precludes application of Seattle here. That is incorrect. Crawford, which the Court decided on the same day as Seattle, involved only the question whether the repeal of a law benefitting racial minorities violated the Equal Protection Clause. Crawford, 458 U.S. at 538. In Crawford, the Court upheld Proposition I, which amended the California Constitution to prohibit state courts from imposing mandatory busing remedies under the state constitution except in situations where a federal court could do so under the Fourteenth Amendment. Id. at 532. Distinguishing Seattle, the Court noted that, even after the passage of Proposition I, "[t]he school districts themselves retain a state-law obligation to take reasonably feasible steps to desegregate, and they remain free to adopt reassignment and busing plans to effectuate desegregation."

Id. at 535-536 & n.12.[8] The provision did nothing more than repeal the judicial enforceability of the prior constitutional obligation to adopt busing programs, and "the simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification." Id. at 538-539; id. at 547 (Blackmun, J., concurring).

Crawford is inapposite here. Unlike Proposition I, Proposition 209 does much more than simply repeal existing state-law programs that mandate more than the Fourteenth Amendment requires. Rather, Proposition 209 invalidates most public affirmative action programs in California -- whether created by the state constitution, state legislation, local ordinances, or other state action -- and it prevents anyone from seeking new affirmative action programs through ordinary political means. Accordingly, it is precisely the type of distortion of the political process invalidated in Seattle and Hunter.[9] Intervenor has not

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[8]Intervenor simply mischaracterizes Crawford by stating that Proposition I "not only repealed existing de facto busing programs, it amended the California Constitution to prohibit any such program in the future." App. for Stay 18. To the contrary, Proposition I merely prohibited state courts from requiring localities to adopt such busing programs. Unlike Proposition 209, it did not prohibit local school boards from voluntarily adopting them. The Crawford Court distinguished Seattle on precisely this basis. See Crawford, 458 U.S. at 536 & n.12.

[9]Intervenor's reliance on the state's general latitude in arranging its internal structure is therefore misplaced. As the Court explained in Seattle and Hunter, the state's power to order its internal governmental processes must give way when the state exercises that power in a manner that places extraordinary burdens on the ability of minorities to obtain, through ordinary

(continued...)

made a "strong showing," Hilton, 481 U.S. at 776, that the district court likely abused its discretion in finding that Seattle and Hunter apply here.

II

BOTH THE BALANCE OF HARDSHIPS AND THE PUBLIC INTEREST TIP SHARPLY AGAINST UPSETTING THE STATUS QUO BY GRANTING A STAY

As we have explained, the narrow order issued by the district court merely serves the traditional purpose of a preliminary injunction -- "to preserve the status quo ante litem pending a determination of the action on the merits." Los Angeles Memorial Coliseum Comm'n v. National Football League, 634 F.2d 1197, 1200 (9th Cir. 1980) (citing cases). In this context, entry of a stay would contravene the basic purpose of the Court's stay power, for it would disrupt the status quo. Intervenor has not demonstrated that the equities justify such an extraordinary step. Indeed, the district court found that the balance of hardships "tips decidedly in plaintiffs' favor." Slip op. 64.

A stay is not necessary to protect intervenor from irreparable harm. District court orders suspending enforcement of Proposition 209 have been in place since November, and this Court has already expedited consideration of the appeal from the preliminary injunction pursuant to 9th Cir. R. 3-3. Intervenor has not "shown that [it] will suffer significant harm during the pendency of such an expedited hearing on the merits." Warm

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[9] (...continued)
political means, legislation to overcome discrimination. See Seattle, 458 U.S. at 476-480; Hunter, 393 U.S. at 392-393.

Springs Dam Task Force v. Gribble, 565 F.2d 549, 551 (9th Cir. 1977).[10] Indeed, the district court endeavored to minimize the disruption its order would cause. While defendants may not enforce Proposition 209 pending trial, they remain free voluntarily to decide to eliminate affirmative action programs within their purview. See slip op. 66 n.53. To the extent intervenor believes itself aggrieved by the continuing existence of affirmative action programs, the voluntary repeal permitted by the preliminary injunction can fully protect its interests. The limited nature of the restrictions imposed by the district court underscores the minor burden that leaving the preliminary injunction in place entails.

Should the preliminary injunction be stayed, by contrast, plaintiffs and the public interest will suffer significant harm. Once the district court's order is lifted, Proposition 209 will be binding state law; any affirmative action program that violates Proposition 209 may be immediately terminated. "[T]he hardships that would be caused to women and minorities" by Proposition 209's elimination of affirmative action programs were detailed by the district court, see slip op. 16-20, 63, and these hardships "must be weighed" in determining whether to grant the

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[10] Indeed, a serious question exists regarding intervenor's Article III standing to file an appeal and seek a stay. While intervenor would appear to have standing under this Court's decision in Yniquez v. Arizona, 939 F.2d 727, 733 (9th Cir. 1991), the United States has urged reversal of that decision in the Supreme Court. See Brief for the United States as Amicus Curiae Addressing Standing, Arizonans for Official English v. Arizona, No. 95-974 (U.S. argued Dec. 4, 1996).

stay. See Associated Gen. Contractors, 950 F.2d at 1411. Moreover, implementation of Proposition 209 would restrict access to the political process -- "an immediate and ongoing injury that is not amenable to monetary remedy." Slip op. 63. In this context, plaintiffs' substantial claim of the violation of constitutional rights itself may constitute irreparable harm. See Associated Gen. Contractors, 950 F.2d at 1412. In light of the significant harm that the plaintiffs and the public interest will suffer in the absence of preliminary relief, and the relatively minor burden on defendants imposed by the court's narrowly drawn order, the district court properly "perceive[d] a need to preserve the status quo" pending resolution of plaintiffs' claims. Republic of the Philippines v. Marcos, 862 F.2d 1355, 1362 (9th Cir. 1988) (en banc), cert. denied, 490 U.S. 1035 (1989). This Court should not stay the order and disrupt the status quo.

CONCLUSION

The motion for stay should be denied.

Respectfully submitted,

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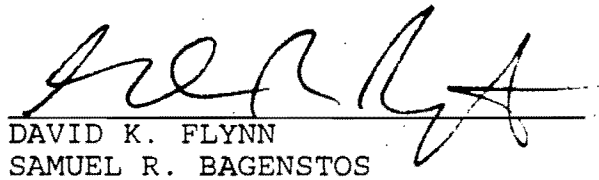

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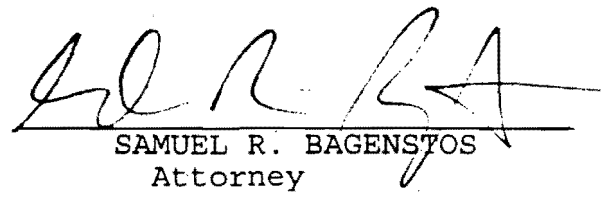

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