

**U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES
OFFICE FOR CIVIL RIGHTS**



OFFICE OF THE DIRECTOR

FAX TRANSMISSION COVER SHEET

TO

FROM

Name: Steve Warnath

Name: Dennis Argosia

Address:

Office for Civil Rights
Office of the Director
Room 5400, Cohen Building
330 Independence Avenue, SW
Washington, DC 20201

Phone: (202) 619-0403

FAX: (202) 619-3437

Pages: 40

Phone:

FAX #: 456-7028

MESSAGE:

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BAY AREA COALITION FOR CIVIL RIGHTS' ANALYSIS OF ACA 47

I. INTRODUCTION AND SUMMARY.

Assembly Constitutional Amendment 47 (hereinafter "ACA 47") is an inappropriate and unnecessary attempt to amend the California Constitution to eliminate the use of all voluntary affirmative action programs in public employment, education and contracting. These are programs which public entities, be they the state, school districts or municipalities, have voluntarily initiated in order to give meaning to the promise of equality to all in the state of California.

Under current federal law, state and local governments can voluntarily implement a race-conscious affirmative action plan only in one very narrow situation: where the plan is intended to address identified discrimination against specific racial groups. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). In addition, even where a preference program is determined to be justified, courts will further scrutinize the plan to ensure that it is narrowly tailored. Id. Therefore, federal law assures that only those affirmative action policies which protect against unjust and arbitrary preferences can be voluntarily undertaken. ACA 47 attempts to restrict affirmative action further by forbidding any voluntary attempts to address past discriminatory practices. If passed, it would halt over 50 years of progress towards creating equality in America.

Affirmative action in the United States encompasses a rich history of taking action to equitably integrate underrepresented groups into the mainstream culture. Such policies are rooted in the 13th and 14th Amendments to the United States Constitution and have received widespread bi-partisan support from Presidents, Congress, and the United States Supreme Court. Congress recognized the importance of affirmative action when it passed the first federal law forbidding employment discrimination based on sex, race, national origin, or religion. Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. This was followed by the issuance of Executive Order 11246 in 1965 which required federal contractors to undertake affirmative action procedures to increase minority representation in their workforce. The Nixon administration introduced the concept of using "goals and timetables" to make federal construction companies more racially diverse. In 1970, President Nixon added women to the list of those who should be included in affirmative action programs. Executive Order 11357.

While the most obvious indicia of discrimination have dissipated and signs in windows no longer read "Only Whites Need Apply," discrimination still has a powerful impact in our economy. For example, most women and minorities are still in the lowest paying jobs in our workforce and jobs remain predominantly gender segregated in the 1990s. In recognition of the need to break down historic barriers to a truly integrated

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society, businesses have embraced affirmative action as a tool to overcome centuries of discrimination. This support includes large corporations and manufacturers. In fact, in 1984, over 90% of Chief Executive Officers of large corporations said that their affirmative action policies were meant not only to meet government regulations but also to satisfy corporate objectives. An even higher percentage said they would continue to use goals and timetables to track the progress of women and minorities. Fortune, Sept. 16, 1985 at 28.

ACA 47 could have a major impact on voluntary employment, contracting, and educational policies that have been adopted within our state in order to equalize economic opportunities for the people of the state. It has the potential to affect every non-federal public entity in California, including every state agency and department; public schools and universities; local cities and counties; redevelopment agencies; transportation agencies; and other public entities such as hospitals, libraries, and airports.

Section II of this paper focuses on the potential impact of ACA 47 on the state and its subdivisions. The section describes the major state programs and local contracting policies that could be subject to legal challenge if ACA 47 is adopted.

Section III analyzes how the passage of ACA 47 would limit the ability of local governments to meet their obligation under the United States Constitution and federal statutory law to remedy discrimination, and also force these agencies to give up federal funds to avoid potentially costly litigation for claims of violating ACA 47. The amendment directly conflicts with the Equal Protection Clause of the Fourteenth Amendment because it significantly restricts the ability of state and local governments to conform to federal laws which allow and sometimes requires government entities to voluntarily identify and remedy past discrimination. Using the City and County of San Francisco as an example, we evaluate the impact of ACA 47 on local programs. We also discuss how ACA 47 is likely to lead to unnecessary and costly litigation because it restricts the ability of local governments to settle antidiscrimination lawsuits.

Finally, Section IV discusses how the proposed amendment violates the Equal Protection Clause of the U.S. Constitution. First, because the amendment embodies an explicit use of race, it is subject to strict scrutiny. Here, there is no evidence that the goal of ACA 47, namely the elimination of affirmative action programs, is compelled by any legitimate legislative end. No showing has been made that state and local affirmative action programs have to any extent adversely affected the state's nonminority population. Moreover, ACA 47 fails the second prong of the strict scrutiny test because the

amendment is not narrowly tailored. The amendment seeks to eliminate not only those specific programs which proponents believe may be causing injury to the state's

nonminority population, but all such programs, including those that may be required by federal law.

Second, the amendment violates equal protection because it is racially motivated and seeks to reduce the level of protection provided to racial minorities and women under the U.S. Constitution. A state cannot provide less protection than what is required by federal law.

Third, ACA 47 violates equal protection because it infringes upon the rights of minorities to participate on an equal basis in the political process. It removes the authority of local officials to address problems that specifically burden people of color and women while not similarly restricting the ability of these same officials to redress discrimination against others (e.g. older people, disabled people, lesbians and gays). By selecting out race and gender issues for differential treatment, ACA 47 violates the U.S. Constitution.

II. IMPACT.

Section II will discuss how the passage of ACA 47 may call into question the viability of numerous state and local affirmative action programs. Part A of this section will list major state employment, education, and public contracting programs that could be subject to challenge if the amendment passes. Part B analyzes the potential effect of ACA 47 on local contracting programs. It shows how the amendment may force local governments to dismantle existing minority and women business enterprise programs, thereby preventing them from addressing discriminatory forces in their procurement systems.

A. Major state programs which may be challenged by ACA 47.

1. Employment Programs.

The following laws pertaining to public employment are representative of the type of programs which potentially will be affected if the amendment passes:

- **Government Code Section 19790 et seq., STATE CIVIL SERVICE AFFIRMATIVE ACTION PROGRAM**, which provides that all state agencies and departments establish an effective affirmative action program, including the setting of goals and timetables to overcome any identified underutilization of minorities and women.
- **Government Code Section 12990, NONDISCRIMINATION AND COMPLIANCE EMPLOYMENT PROGRAMS**, which requires any employer who is or wants to become a contractor with the state for public works or for goods or services to submit a nondiscrimination program to the state for approval and certification. Submission of an affirmative action program may be filed with the state to satisfy compliance standards.
- **Labor Code Section 3075.1, APPRENTICESHIP PROGRAMS**, which encourages the utilization of apprenticeship as a form of on-the-job training, and which requires state and local public agencies having such programs to implement affirmative action goals.
- **Health & Safety Code Section 437.7, AREA HEALTH PLANNING AGENCY**, which requires all area health planning agencies to file with the Advisory Health Council an affirmative action employment plan.
- **Health & Safety Code Section 50735 et seq., RENTAL HOUSING CONSTRUCTION PROGRAM**, which requires that all contractors and subcontractors engaged in the construction of rental housing under this section use affirmative action in hiring.
- **Government Code Section 8546, STATE AUDITOR**, which requires the State Auditor to establish an affirmative action program in hiring.
- **Government Code Section 19400 et seq., UPWARD MOBILITY**, which requires all departments and agencies of state government to establish an effective program of upward mobility in low-paying occupations in order to help the state meet its affirmative action goals.

2. Education

The following are representative education statutes which may be impacted by
ACA 47:

- **Education Code Sections 87100-87107, Affirmative Action Hiring,** which requires community colleges to adopt affirmative action hiring policies and submit progress reports to the Board of Governors of Community Colleges.
- **Education Code Sections 44100-44105, Affirmative Action Employment,** which requires school districts to adopt policies to increase the hiring of women and minorities at all employment levels.
- **Education Code Section 71020 Power and Duties of Community Colleges,** which requires the Board of Governors of Community Colleges to submit affirmative action reports to the Governor every three years concerning its own membership, including an assessment of its representation of minorities, women, and people with disabilities.
- **Education Code Section 66952, Monitoring of Performance,** which allows the Legislature to monitor the efforts of University of California, California State University, and community colleges to diversify their student bodies, faculty, non-faculty academic staff, and administrative positions.
- **Education Code Section 263, Reports to Legislature and Governor,** which requires the California Postsecondary Education Commission to report to Legislature and Governor on the representation and utilization of ethnic minorities and women among academic, administrative, and other employees within the community college, California State University, and University of California systems.
- **Education Code Section 69560, Student Opportunity and Access Program,** which provides funding of projects designed to increase the accessibility of postsecondary educational opportunities to low income and ethnic minority students.

3. Public Contracting Programs.

The following public contracting programs are potentially subject to challenge if the amendment passes:

- **Public Contract Code Section 10115 et seq, MINORITY AND WOMEN BUSINESS PARTICIPATION GOALS FOR STATE**

CONTRACTS, which provides that all contracts awarded by any state agency, department, officer or other state governmental entity for construction, professional services, materials, supplies, equipment, alteration, repair or improvement shall have statewide participation goals of 15 percent for minority owned businesses, and 5 percent for women owned businesses. The act was substantially modified in 1992 to meet the requirements of City of Richmond v. J.A. Croson, 488 U.S. 469 (1989).

- **Government Code Section 14132 et seq., CONTRACTS FOR PROFESSIONAL AND TECHNICAL SERVICES**, which requires that public contracts awarded by the state for the services of engineers, architects, surveyors, planners, or environmental specialists comply with the provisions of California Public Contract Code section 10115 et seq. (supra).
- **California Education Code Section 71028, POSTSECONDARY EDUCATION**, which requires that public contracts awarded by any California Community College comply with the minority and women business enterprise goals set forth in Public Contract Code section 10115 (supra).
- **Public Contract Code Section 2000 et seq., RESPONSIVE BIDDERS**, which was drafted in response to litigation arising over city charter requirements that bids be given to "the lowest responsible bidder." This section provides that local agencies may require their "lowest responsible bidders" to meet minority and women business enterprise goals.
- **Public Utilities Code Section 8281 et seq., WOMEN AND MINORITY BUSINESS ENTERPRISES**, which requires regulated public utilities to make the efforts to award 30% or more of their contracts to women, minority and disabled veteran business enterprises.
- **Health & Safety Code Section 50900 et seq., CALIFORNIA HOUSING FINANCE AGENCY**, which requires all contracts for the management, construction or rehabilitation of low income housing developments be procured pursuant to an affirmative action program.
- **Public Contract Code Section 10470 et seq., MINORITY BUSINESS PARTICIPATION**, which requires that all public contracts awarded for state correctional facilities and programs have statewide participation goals

of 15 percent for minority business enterprises and 5 percent for women business enterprises.

- **Public Contract Code Section 10500 et seq., UNIVERSITY OF CALIFORNIA COMPETITIVE BIDDING**, which requires the University of California to adopt policies and procedures to ensure that a fair proportion of all university contracts be awarded to disadvantaged and women business enterprises.
- **Public Contract Code Section 20229, SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT**, which authorizes the San Francisco Bay Area Rapid Transit District to establish public contracting participation goals for minority-owned businesses and women-owned businesses.
- **Public Utilities Code Section 130239, POWERS AND FUNCTIONS**, which authorizes the Southern California Rapid Transit District to develop public contracting participation goals for minority-owned businesses and women-owned businesses.
- **California Public Utility Code Section 8281 et seq., WOMEN AND MINORITY BUSINESS ENTERPRISES**, which requires public utilities to develop plans to increase procurement from minority and women business enterprises.
- **California Government Code Section 8790.70 et seq., MINORITY AND WOMEN BUSINESS PARTICIPATION GOALS FOR STATE CONTRACTS**, which requires that all public contracts awarded pursuant to Chapter 9.7, SUPERCONDUCTING SUPER COLLIDER, shall have statewide participation goals of 15 percent for minority business enterprises and 5 percent for women business enterprises.

B. Local Contracting Programs.

In 1989 the United States Supreme Court restricted the ability of local governments to utilize race-conscious contracting programs. See City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). The Court held that state and local governments can implement these programs only when they serve a compelling governmental purpose

and if they are narrowly tailored to address the identified discrimination. Since the Crosby decision, at least 20 governmental agencies in Northern California have adopted or are in the process of adopting race- and gender-conscious contracting programs.¹ Before going forth with these programs, all of these jurisdictions hired private consultants to study whether discriminatory forces affected their procurement systems. After extensive statistical and anecdotal analysis, these studies concluded that systemic discrimination against minority and women business enterprises ("M/WBEs") continue to limit their ability to compete for contracts in a wide range of industries.² The methodology used to support these programs has been upheld by federal courts as consistent with the Equal Protection Clause of the United States Constitution. See, e.g., AGCC v. Coalition for Economic Equity, 950 F.2d 1401 (9th Cir. 1991) (refusing to enjoin San Francisco's contracting program); Coral Const. Co. v. King County, 941 F.2d 910 (9th Cir. 1991).

¹ The local agencies include: Alameda County; Contra Costa County; County and City of San Francisco; City of San Jose; Santa Clara County; San Francisco Redevelopment Agency; San Francisco Unified School District; Sacramento County; City of Sacramento; City of Hayward; City of Richmond; City of Oakland; Oakland Unified School District; Bay Area Rapid Transit District (BART); Alameda/Contra Costa Transit District (AC Transit); Central Contra Costa Transit Authority; Golden Gate Bridge, Highway and Transportation District; San Francisco Municipal Railway; San Mateo County Transit District, and Santa Clara County Transportation Agency.

The programs used by these jurisdictions range from conducting outreach to minority and women business enterprises ("M/WBEs"), providing them with preferences in the bidding process, and setting M/WBE participation goals.

² These studies analyzed the under-utilization of M/WBEs in both the public and private sectors for prime and subcontracts in construction, professional services, and the supply of goods and products. In addition, they summarize testimony by thousands of minority or women business owners who described specific examples of discrimination that they personally experienced while operating their businesses.

Because ACA 47 attempts to limit the power of local governments to address discrimination through voluntary affirmative action programs, its passage could call into question the legal basis of these contracting programs. Despite having strong evidence of discrimination in their procurement systems, and authority under the U.S. Constitution to take remedial action, many of these jurisdictions will be reluctant to implement programs that potentially open themselves up to challenges under state law. If these jurisdictions dismantle their programs, minority- and women-owned businesses, who were largely excluded from public contracting prior to the adoption of these programs, are likely to experience further discrimination.

III. THE AMENDMENT WOULD CREATE DIFFICULTIES FOR LOCAL GOVERNMENTS IN MEETING THEIR OBLIGATIONS UNDER FEDERAL LAW.

A. The amendment conflicts with the federal Equal Protection Clause because it restricts the ability of state and local governments to develop remedies that address discrimination.

State and local governments have a duty under federal law, as interpreted by the United States Supreme Court, to take affirmative measures to redress discrimination in their public contracting practices. City of Richmond v. Croson, 488 U.S. 469, 504 (1989), see also at 480, opinion of O'Connor, J. joined by the Chief Justice, White and Kennedy, JJ. Further, pursuant to the Equal Protection Clause, all public employers are under a clear command to eliminate every vestige of racial segregation and discrimination in the schools. Pursuant to that goal, race conscious remedial action may be warranted.

Wygant v. Jackson Board of Education, 476 U.S. 267, 277 (1986); see also Regents of the University of California v. Bakke, 438 U.S. 265, 300-304 (1978). This affirmative duty also arises from Title VII. Johnson v. Transportation Agency of Santa Clara, 480 U.S. 616, 637-638.

To illustrate what types of local programs will be affected by ACA 47, we will analyze its impact on programs that have been adopted by the City and County of San Francisco ("San Francisco"). Pursuant to the mandates of federal law, San Francisco, like numerous municipalities across the state, has implemented a variety of programs designed to remedy the effects of discrimination in a number of different areas. For example, the city promotes affirmative action in the hiring of city employees where it identifies areas of underutilization of minorities and women. See San Francisco Administrative Code section 16.9-24. The program has been successful in integrating San Francisco's workforce.

San Francisco also promotes greater diversity (and thus competition) in its public works contracting through its Minority/Women/Local Business Utilization Ordinance. San Francisco Administrative Code section 12D. The innovative program contains an outreach component, bid preferences for certain disadvantaged minority, women and locally-owned businesses, and participation goals for women and minority owned businesses. In the public procurement context, this program has succeeded in opening previously shut doors of economic opportunities for minorities and women.

San Francisco's local law also prohibits employers who are awarded city contracts from discriminating in the hiring, promotion and treatment of their workforces. San Francisco Administrative Code Section 12B. In order to be eligible to bid on a city contract, potential contractors must submit an affirmative action program to the awarding agency. The program includes job training and apprenticeship activities as well as promoting the participation of all ethnic groups in the contractor's performance of the contract. See San Francisco administrative Code Section 12B-4.

The proposed amendment to the State Constitution would prohibit local governments from using "race, sex, color, ethnicity or national origin as a criterion" for "granting preferential treatment" to any group in the areas of public contracting, education or employment. As demonstrated below, local agencies will be caught between "a rock and a hard place." On the one hand, a local agency that fails to take affirmative steps to address discrimination may be violating federal law, but taking such affirmative steps may be a violation of ACA-47. This is an untenable position for local governments because whichever position is ultimately taken will surely result in litigation.

B. The amendment could endanger local governments' ability to obtain federal grants.

If ACA 47 is adopted, local governments which comply with the amendment may be forced to forego millions of dollars in federal grants. In particular, local governments rely heavily on federal grants to fund their public works projects. These federal grants, however, are awarded only if the grant recipient agrees to implement affirmative action

plans designed to increase minority and women participation. For instance, the San Francisco International Airport receives approximately \$24 million in federal grant monies from the Federal Aviation Administration ("FAA") for various capital improvement projects. San Francisco also receives millions of dollars in grant monies from the Federal Highway Authority and the Federal Transportation Authority. The Federal Department of Transportation requires that all contractors who participate in FAA, FTA and FHA funded contracts agree to ensure that disadvantaged business enterprises have the maximum opportunity to participate in the performance of contracts and subcontracts. 49 C.F.R. Part 23.³ Contractors are required to take all "reasonable and necessary" steps to increase the opportunities for these businesses to participate in the performance of the contract by utilizing policies that are clearly race- and gender-conscious.

As a recipient of federal funds, San Francisco also has a duty under Title VI of the Civil Rights Act of 1964 to not discriminate on the grounds of race, color or national origin in the administration of its programs. 42 U.S.C. Section 2000d. The Supreme Court has recognized that Title VI prohibits not only intentional discrimination but it can also prohibit practices that have the effect of discriminating against minorities unless the practices can be justified. Guardian Association v. Civil Service Commission, 463 U.S. 582 (1983). Although Section (f) of the proposed amendment allows local agencies to

³ A "disadvantaged business enterprise" includes all small business concerns which are owned and controlled by women, African-Americans, Hispanic Americans, Asian-Americans and Native Americans. 49 C.F.R. Part 23, Subpart D.

take action to maintain eligibility for federal programs, it is unclear exactly what types of actions are authorized by this provision. For instance, if an agency discovers that its programs unintentionally exclude participation by certain minority groups, does Section (f) authorize it to take race-conscious steps to address this disparate impact? Or does agency have to first exhaust all possible race-neutral alternatives, and thereby lose federal funds during the interim period, before it can take race-conscious measures? Because amendment severely limits the ability of local governments to address discriminatory effects, a local agency that tries to comply with Title VI is likely to run afoul of ACA 47 and face potential litigation. In short, the proposed amendment to the State Constitution would place all local governmental recipients of federal grants in a position where they may believe it is necessary to forgo federal grant monies in order to avoid costly litigation.

C. - ACA-47's prohibition against voluntary affirmative action will force state and local governments to engage in unwanted and unnecessary litigation

The proposed amendment would increase litigation because a public entity could undertake a race- or gender-conscious affirmative action policy under only one circumstance: when it is subject to a court order. ACA 47, therefore, requires public entities to wait to be sued before they can undertake affirmative action -- even if they aware that their entities have violated the law and a remedy is necessary. In these difficult economic times, requiring litigation to settle recognized social problems is a waste of tax payers' money and the precious resources of the courts.

In anti-discrimination litigation, both the plaintiff and defendant frequently have strong interests in settling lawsuits rather than pursuing a litigated judgment. Consent decrees, in particular, have become an effective and widely-used remedy for addressing discrimination in the public sector. See United States v. Armour & Co., 402 U.S. 673, 681 (1971). Consent decrees allow parties to be flexible and creative in developing settlements. Because consent decrees require mutual consent, they give parties more control over the nature of the obligations and duties that will arise from any settlement. By resolving a dispute through a consent decree or through other forms of voluntary agreement, the parties avoid the inherent risks and the enormous costs involved in pursuing a litigated judgment. See Rodi v. Ventelupo, 941 F.2d 22, 27 (1st Cir. 1991) ("By foregoing bitter end litigation, the parties save time, defray expense, and shield themselves from the risks of utter defeat...").

-- If adopted, ACA 47 will make it more difficult for state and local governments to settle discrimination claims through a race- or gender-conscious remedy even if the scope of the remedy is necessary to address the challenged harm. ACA 47 attempts to prohibit the State of California and its political subdivisions and agents from implementing in the future any race- or gender-conscious programs that do not arise out of a court order. By tying the hands of state and local agencies in this manner, governments will be unable to use an affirmative action remedy to settle even the most egregious lawsuits.⁴ Since some

⁴ For instance, if ACA 47 had been in effect when minority firefighters challenged the San Francisco Fire Department's ("SFFD") employment practices, the city would have been unable to (continued...)

courts have concluded that consent decrees are fundamentally voluntary in nature, such a prohibition would likely also apply to consent decrees.⁵

Because ACA 47 would no longer allow public entities to voluntarily remedy the effects of discrimination, state and local governments may be forced to divert scarce public funds to defend lawsuits that would otherwise never be brought or would otherwise settle. Not only will the proposed amendment increase courts' dockets, but it is also likely to have the effect of making it more difficult for victims of discrimination to vindicate their rights. Such a policy flies in the face of numerous Supreme Court decisions which strongly endorse the idea that public entities should voluntarily rectify the effects of discrimination and implement measures to prevent future discrimination. See, e.g., City of Richmond v. J.A. Croson, 109 S.Ct. at 729; Id. at 734 (Kennedy, J., concurring); Local No. 93, Int'l Assoc. of Firefighters v. City of Cleveland, 478 U.S. 501, 515-17 (1986).

(...continued)

settle the dispute through a race- and gender-conscious consent decree. Prior to the filing of the lawsuit, no women had ever been hired by SFFD, and of the few minorities who were hired, many were racially harassed. The district court had concluded that racial harassment was "out of control" and the SFFD was unwilling to prohibit such behavior in the workplace. U.S. v. City and County of San Francisco, 696 F.Supp. 1287, 1298 (N.D. Cal. 1988) (approval of the consent decree). Recognizing that the deep-rooted hostility against minorities and women could be eliminated from the SFFD only through a policy that takes race and gender into account, the city settled the lawsuit prior to trial.

⁵ See, e.g., Enslley Branch NAACP v. Seibels, 20 F.3d 1489, 1505 (11th Cir.1994) (court held that for equal protection purposes, the consent decrees in its case should be treated as voluntary affirmative action plans).

IV, THE PROPOSED CONSTITUTIONAL AMENDMENT VIOLATES THE FEDERAL EQUAL PROTECT CLAUSE.

- A. The proposed Amendment neither serves a compelling governmental purpose nor is it sufficiently narrowly tailored.

ACA 47 is unlikely to withstand a constitutional challenge based upon the Equal Protection Clause of the Fourteenth Amendment. ACA 47 is designed to abolish state-sponsored affirmative action programs; its passage would eliminate the ability of state and local governments to voluntarily ameliorate the effects of past discrimination. The proposed amendment embodies an explicit, although allegedly benign, use of race, prohibiting the state or any of its political subdivisions from using race (or other suspect classifications) as a criterion for granting preferential treatment to any individual in public employment, education or contracting. Therefore, it is subject to strict judicial scrutiny. In order to withstand the rigors of such scrutiny, the amendment must be justified by a compelling state interest and the means employed must be narrowly-tailored to further that interest. Croson, 488 U.S. at 493.

The first prong of judicial scrutiny requires the state to show a compelling interest; that is, "a goal important enough to warrant the use of a highly suspect tool." Croson, 488 U.S. at 493. Here, there is no evidence that the ultimate goal of ACA 47, namely, the elimination of affirmative action programs, is compelled by, or is even reasonably related to, any legitimate legislative end. While proponents may argue that ACA 47 is designed to prevent special treatment of minorities, no showing can be made that state and local affirmative action programs, which are designed to overcome the continuing effects of

past discrimination, have to any extent adversely affected the state's nonminority population. Indeed, the parameters of permissible state and local affirmative action programs have been narrowly circumscribed by the Supreme Court, which requires a public entity's affirmative action efforts to be based on a showing of past discrimination and which limits the means adopted to measures that are intended to remedy only the remaining effects of that specific discrimination. See Ibid.; University of California Regents v. Bakke, 438 U.S. 265 (1978); Price v. Civil Service Commission, 26 Cal. 3d 257 (1980). Given the continuing existence of a racial imbalance in the public employment, education and contracting arenas, it stretches the imagination to imply a compelling state interest sufficient to warrant elimination of reasonable affirmative action mechanisms. Absent specific evidence of harm caused to innocent persons by implementation of such reasonably designed affirmative action programs, the state can show no compelling interest in eliminating their use.

Moreover, ACA 47 fails the second prong of the strict scrutiny test which requires it to be narrowly tailored. The amendment seeks to eliminate not only those specific programs which proponents believe may be causing injury to the state's nonminority population, but state and local affirmative action programs as a whole, at least those that are not dependent upon federal funding or that have not been put in place by court order. Needless to say, such wholesale elimination of the state's entire affirmative action system cannot be regarded as imposing the least restrictive means possible, as required by

caselaw. Hiatt v. City of Berkeley, 130 Cal. App. 3d 298, 319 (1982); Price 26 Cal.3d at 282.

B. ACA 47 violates the equal protection clause because it is motivated by a discriminatory purpose.

On its face, ACA 47 states that persons are not to be treated differently, either through discrimination or by preferential treatment, on account of their race. In cases such as Washington v. Davis, 426 U.S. 229 (1976), Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) and Personnel Administrator v. Feeney, 442 U.S. 256 (1979), the Supreme Court has established that a facially neutral law may still be unconstitutional if it is motivated by a discriminatory purpose. "In determining whether such a purpose was the motivating factor, the racially disproportionate effect of official action provides 'an important starting point'" Crawford v. Los Angeles Board of Education, 458 U.S. 527, 544, quoting Feeney, 442 U.S. at 274. See also Reitman v. Mulkey, 387 U.S. 369 (1967).⁶

In Crawford, the Court upheld a California initiative restricting the use of busing to achieve racial integration in the Los Angeles Unified School District. In doing so, the

⁶ In Reitman, the Supreme Court held that a facially neutral amendment to California's Constitution, Proposition 13, which would have prohibited the state from interfering with a private individual's right to sell or rent property to whomever he wanted, constituted discriminatory state action. In that case, the Court agreed with the California Supreme Court that the amendment was intended to authorize discrimination. Id. at 380. Since the amendment was neutral on its face, the Court reached this determination by examining its ultimate effect, which would be to allow those practicing discrimination to "invoke express constitutional authority, free from censure or interference of any kind from official sources." Id. at 377. Although Proposition 13 did not expressly encourage discrimination, the Court found the effects of the amendment to be invidious.

Court noted that a state is free to repeal an existing antidiscrimination law, so long as it continues to adhere to the standards of the Fourteenth Amendment. Id. at 538. Thus, Crawford stands for the proposition that a state is not required to "do more" than the Fourteenth Amendment requires. It is clear, however, that a state is not free to lower the federal constitutional standard, as ACA 47 would in prohibiting state and local governments from enacting race-conscious programs allowed by the Fourteenth Amendment.

Here, a court could easily conclude that the purpose of ACA 47 is to lower the level protection provided to racial minorities under the federal Equal Protection Clause by prohibiting state and local governments from voluntarily using race-conscious programs to address identified discrimination. Even supporters of ACA 47 must recognize that the amendment affects only affirmative action policies that benefit either racial minorities or women. It does not purport to ban affirmative action based on any other characteristic. Therefore, the only people who will be adversely affected by the amendment are racial minorities and women. Moreover, courts have clearly held that the equal protection provisions in both the California Constitution and the U.S. Constitution provide "any person the equal protection of laws in plain and unequivocal language and without qualification..." Hiatt, 130 Cal.App.3d at 308. Courts have frequently and repeatedly struck down affirmative action programs when they fail to address specifically identified

discrimination or if the scope of the race-conscious provisions is too broad.⁷ Given that nonminorities are protected by both the state and federal constitutions and the harm of the amendment is limited to only two protected groups (minorities and women), a court is likely to conclude that ACA 47 is motivated by a discriminatory purpose, thereby violating the Equal Protection Clause.

C. By Prohibiting the State and Other Public Entities From Implementing Remedial Race-Conscious Affirmative Action Policies, ACA 47 Would Place Special Burdens In the Political Process Upon Racial Minorities and Thus Violate the Federal Equal Protection Clause.

The right of citizens to participate equally in the political process is a core democratic value embodied in the U.S. Constitution.⁸ The Equal Protection Clause guarantees all citizens "the fundamental right to participate equally in the political process and [] any attempt to infringe on an independently identifiable group's ability to exercise that right is subject to strict judicial scrutiny." Evans v. Romer, 854 P.2d 1270, 1276 (Colo. S.Ct. 1993) (emphasis added).

⁷ See, e.g., Hiatt, 130 Cal App.3d 298; Croson, 488 U.S. 469; Assoc. Gen. Contr. of Cal. v. City and County of San Francisco, 813 F.2d 992 (9th Cir. 1987); Blilish v. City of Chicago, 989 F.2d 890 (7th Cir. 1993) (en banc); Milwaukee County Pavers Ass'n v. Fiedler, 922 F.2d 419 (7th Cir. 1991); O'Donnell Const. Co. v. District of Columbia, 963 F.2d 420 (D.C. Cir. 1992); H.K. Porter Co. v. Metropolitan Dade County, 975 F.2d (11th Cir. 1992); Associated General Contractors v. City of San Diego, 93-1152 (Sept. 9, 1993); Associated General Contractors v. New Haven, 791 F.Supp. 941 (D.Conn. 1992); F. Buddie Contracting Co. v. City Elyria, Ohio, 773 F.Supp. 1018 (N.D. Ohio 1991); Concrete General v. Wash. Suburban Sanitary Com'n, 779 F.Supp. 370 (D.Md. 1991); General Bldg. Contractors v. City of Philadelphia, 762 F.Supp. 1195 (E.D. Pa. 1991).

⁸ See Note, Developments in the Law: Elections, 88 Harv. L. Rev. 1111, 1114 (1975) ("no institution is more central to the United States' system of representative democracy than the election").

The right to participate equally in the political process has been established in a number of areas. The U.S. Supreme Court has invalidated schemes that directly impinge upon the right to vote. See, e.g., Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (poll tax); Carrington v. Rash, 380 U.S. 89 (1965) (civilians only); Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969) (property owners and parents only). The Court has struck down electoral systems which unequally dilute the voting power of identifiable groups, such as geographic groups in reapportionment cases. See, e.g., Reynolds v. Sims, 377 U.S. 533 (1964). It has also found unconstitutional restrictions on ballot access by candidates. See, e.g., Williams v. Rhodes, 393 U.S. 23 (1968); Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173 (1979).

The right to participate equally in the political process is also embodied in cases holding that government may not place special burdens upon identifiable groups, such as racial minorities, within the political process. For instance, in Hunter v. Erickson, 393 U.S. 385 (1969), the voters passed a referendum amending the city charter of Akron, Ohio to provide that any ordinance which regulates real property on the basis of race, national origin, or religion must first be approved by a majority of the voters. Because other laws regulating real property only needed the approval of the city council, the amendment singled out anti-discrimination laws for additional requirements. The Supreme Court invalidated the charter amendment as violative of equal protection because it placed "special burdens on racial minorities within the governmental process." 393 U.S. at 391. The charter amendment was passed with the "clear purpose of making it

more difficult for certain racial and religious minorities to achieve legislation that [was] in their interest." 393 U.S. at 395 (Harlan, J., concurring). The Court held:

A 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 or give any group a smaller representation than another of comparable size.

393 U.S. at 393.

Similarly, in Washington v. Seattle School District No. 1, 458 U.S. 457, the Court struck down a state initiative prohibiting local school boards from implementing race-conscious busing policies on grounds that the measure had impermissibly interfered with the political process and unlawfully burdened the efforts of minority groups to secure such legislation. The initiative prohibited local school boards from requiring any student to attend a facility other than the school geographically nearest to his or her place or residence, but it contained exceptions for virtually all other purposes except racial desegregation. Subsequent to passage of the initiative, desegregation could only be obtained from the state legislature. Like the ACA 47, the effect of the Washington initiative was to prohibit local entities from carrying out voluntarily enacted race-conscious programs to further integration. The Court, relying on Hunter v. Erickson, found that the initiative did "not attempt to allocate governmental power on the basis of any general principle," but instead used the "racial nature of an issue to define the governmental decision-making structure, and thus impose[d] substantial and unique burdens on racial minorities." Washington, 458 U.S. at 470. Rather than affecting the "mere repeal" of an existing desegregation law, the initiative burdened all future attempts

to integrate Washington's schools "by lodging decision-making authority at a new and remote level of government," thereby subjecting racial minorities to "direct and undeniable burdens." *Id.* at 483-84. While "one group cannot always be expected to win," by the same token one group cannot be subjected to debilitating and often insurmountable disadvantage." *Id.* at 484 (citation omitted).

Like the initiatives invalidated in Hunter and Washington, ACA 47 would place "special burdens" upon racial minorities' within governmental processes by making it very difficult, if not impossible, to obtain race-conscious remedial programs in the areas of public education, contracting, and employment. ACA 47 would prohibit state and local entities from using "race, sex, color, ethnicity, or national origin" in these areas as a criterion for discriminating against or granting preferential treatment. The only exceptions to this general prohibition are when a public entity is subject to: (1) a consent decree or court order that is in force on the date the proposed amendment takes effect (Section (e)); (2) a future court order that remedies the effect of a government's own discrimination (Section (g)); and (3) federal funding requirements (Section (f)).

Thus under ACA 47, racial minorities cannot seek remedial race-conscious policies or legislation establishing race-conscious policies for the executive or legislative

Although we only argue that ACA 47 infringes on the right of racial minorities to participate on an equal basis in the political process, courts have recognized that this doctrine protects other groups. Gordon v. Lance, 403 U.S. 1 (1971); Evans v. Romer, 854 P.2d 1270 (Colo. S.Ct. 1993). These cases indicate that strict scrutiny will be applied to any legislation or state constitutional amendment which infringes upon the right of an identifiable class of persons to participate equally in the political process. Because ACA 47 also restricts the ability of government entities to address gender discrimination, the analysis discussed in this section would likewise apply to any claim made on the behalf of women.

branches even if they are entitled to such programs under the federal Constitution. See Assoc. Gen. Contr of Cal. v. City and County of S.F., 813 F.2d 922, 929 (9th Cir. 1987) (state and political subdivisions have the constitutional duty to ascertain whether they are denying citizens equal protection and to take corrective steps). Nor could they seek a remedial order of the state judiciary requiring race-conscious relief absent a finding of a federal mandate or an exception contained in Sections (e) or (g). Barred from the normal political process, racial minorities could only obtain relief by amending the California Constitution and repealing in whole or pro tanto ACA 47's provisions, an effort that must be approved by the voters of the state. "[B]y lodging decisionmaking authority over the question at a new and remote level of government," ACA 47 "burdens all future attempts" by racial minorities to obtain legislation to address the effects of discrimination. Washington, 458 U.S. at 483. As in Washington, the right of minorities to participate equally in the political process is clearly affected by ACA 47 because it bars them from having an effective voice in governmental affairs insofar as they seek beneficial legislation or regulations. Rather than withdrawing antidiscrimination issues (or issues involving public sector contracting, education, and employment) as a whole from state and local control, ACA 47 singles out certain forms of discrimination¹⁰ and removes its redress from consideration by the normal political processes. In doing so, the amendment

¹⁰ ACA 47 attempts to limit voluntary efforts by the state and other public entities to address the effects of race and gender discrimination.

fails to "allocate political power on the basis of any general principles," and instead, uses the racial nature of an issue to define the decision-making structure.

ACA 47 also "expressly fences out [] independently identifiable group[s]." Evans v. Romer, 854 P.2d at 1285. Like Hunter, which singled out people "who would benefit from laws barring racial, religious, or ancestral discriminations," 393 U.S. at 391, ACA singles out racial minorities and women as the classes of persons who would be unable to obtain remedial programs through the normal political processes. No other groups that face discrimination are required to obtain a constitutional amendment before state and local entities can develop such remedial programs. For instance, even if ACA 47 is adopted, gays, lesbians, people with physical or mental disabilities, veterans, and others who face discrimination will be able to seek beneficial policies in the areas of public contracting, education and employment. By constitutionalizing the requirement that no government entity can voluntarily provide race- or gender-conscious remedies in these areas, ACA 47 singles out and prohibits these classes of people from participating equally in the political process. Because such a prohibition violates the Equal Protection Clause of the U.S. Constitution, ACA 47 is unlikely to survive judicial scrutiny."¹¹

¹¹ The fact that ACA 47 on its face is race- and gender-neutral is irrelevant to the analysis of whether it infringes upon equal protection rights of these identifiable group members. In invalidating Akron's charter amendment, the Hunter Court recognized that the amendment also drew "no distinctions among racial and religious groups." Hunter, 393 U.S. at 390. However, the Court recognized that in "reality," the burden imposed by the amendment necessarily fell "on the minority." Id. at 391. In effect, the court recognized that the amendment served as an "explicitly racial classification treating racial housing matter differently from other racial and housing matters." Id. at 389. See also Reitman v. Mulkey, 387 U.S. 369, 373 (1967) (in evaluating an equal protection challenge to a law, courts should review the law in light of its immediate objective, its ultimate effect, its historical context, and the conditions

(continued...)

Conclusion

Based on our analysis of ACA 47, we believe the amendment is unnecessary, would seriously harm the interests of minorities and women, and is also unconstitutional. For all the foregoing reasons, we believe that ACA 47 should not be submitted to the voters of California as a ballot measure.

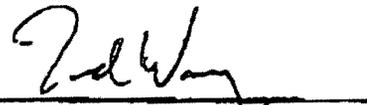
Dated: August 2, 1994

Respectfully submitted

Judith Kurtz
Equal Rights Advocates
1663 Mission St, Suite 550
San Francisco, CA 94103
Tel. (415) 621-0672

Theodore Hsien Wang
Lawyers' Committee for Civil Rights of the San
Francisco Bay Area
301 Mission St, Suite 400
San Francisco, CA 94105
Tel. (415) 543-9444

By:



Theodore Hsien Wang
Attorneys for the Bay Area Coalition for
Civil Rights

(...continued)

existing prior to its enactment). Like the amendment in Hunter, ACA 47 also creates classifications subject to strict scrutiny and treats race and gender discrimination in public sector contracting, education and employment differently both from other issues in these sectors and from other antidiscrimination matters.

C.C.R.I.

California Civil Rights Initiative

P.O. Box 11795 • Berkeley, CA 94701-2795 • (510) 644-4256

March 11, 1994

MAR 24 1994
RECEIVED

Dear Friend:

We write to bring you up to date on CCRI, the proposed initiative constitutional amendment to prohibit preferences and discrimination on the basis of race, sex and ethnicity in all of California's public contracting, public education and public employment. We also write to request your support in our effort to place CCRI before the voters in 1996.

Qualifying a constitutional amendment initiative in California is a difficult and expensive undertaking. Some 615,000 qualified signatures are required, which usually costs about \$750,000. Although we did not succeed in raising the money to qualify CCRI for the November 1994 ballot, momentum is building rapidly towards qualifying it for 1996.

Several recent developments are particularly noteworthy:

- On October 15 of last year, CCRI was filed with the State Attorney General, who is required by law to provide initiatives with an official title and summary. Our summary estimated the potential tax savings from passage of CCRI in the tens and hundreds of millions of dollars annually. This estimate has drawn the interest of the Howard Jarvis Taxpayer's Association, which intends to contribute \$75,000 towards a 100,000 piece trial direct mailing for CCRI shortly after the November 1994 elections. We have contacted specialists in direct mail and political campaigning who are convinced that CCRI does in fact have enormous direct mail potential. If the response from the HJTA-financed trial direct mailing is what these specialists expect, they are prepared to bankroll a large rollout of 2-3 million mailings early next year, and another of the same size after the initiative has been refiled (probably in March of 1995) for the 1996 ballot.

- CCRI recently received official endorsements from the Libertarian and Republican parties of the State of California. The Executive Committee of the Libertarian Party voted to endorse CCRI in principle on February 21, and will be taking up the actual text at its next meeting. The General Assembly of the Republican Party's statewide convention in Burlingame voted to endorse CCRI on February 27.

The petition for endorsement by the California Republican Party was signed by four state legislators: Rob Hurtt, Bill Leonard, Tom Campbell and John Lewis. Sen. Tom Campbell (R-Stanford) presented the petition to two committees which endorsed CCRI unanimously. The endorsement by the General Assembly was also unanimous.

These endorsements are important milestones in our efforts to build a multipartisan coalition of men and women of good will and of all races and ethnicities. We are currently working on getting the endorsement of other organizations and political figures, including prominent Democrats.

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• CCRI has attracted a great deal of favorable media coverage, particularly in the last four weeks. Important items in this area include a Scripps-Howard news story by Tom Elias, and nationally syndicated columns by William F. Buckley, Paul Greenberg and Pat Buchanan. (The first nationally syndicated column to draw attention to CCRI was by William Rusher.) Proponents for the initiative have also appeared on a San Francisco Bay Area public television talk show (KQED's Face-to-Face) as well as a number of radio talk shows around the country.

• As a result of the publicity, our database has been growing rapidly. To date 1,512 individuals have contacted us by phone or mail. Of these, 1,085 are California residents, and 427 are from other states. Significantly, the rate of growth in the database is accelerating: 667 individuals, or 44%, have responded within the last four weeks. Of these 667 individuals, 401 are California residents, and 266 are non-residents.

We all need to work to keep the momentum building toward 1996. A number of action items are particularly urgent, though how many of them can be managed depends largely on whether we are able to raise enough funds to open a statewide office. Important action items include:

- Starting the statewide office itself, which is badly needed. Currently, all work on the initiative has been done by 2-3 individuals working on a part-time basis. This arrangement is no longer adequate. For the last four weeks, in particular, we have been strained far beyond our resources.
 - Continue to aggressively pursue media coverage.
 - Start a monthly newsletter to keep supporters of the initiative informed about important developments and in touch with each other.
 - Assist individuals in other states who have contacted us about qualifying CCRI-like initiatives in their own states. (The twenty-two other states that permit initiatives like California's are: Arizona, Arkansas, Colorado, Florida, Idaho, Illinois, Maine, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington and Wyoming.)
 - Use the statewide office as a clearinghouse for news and developments affecting the initiative in California and in other states.
 - Start Usenet discussion groups and bulletin boards about CCRI and similar initiatives on the nation's electronic information superhighway.
 - Put CCRI supporters in different areas around the state in touch with each other so they can start local CCRI action groups. At first, we will try to organize these groups by area codes. As the movement builds, we will try to organize them by electoral districts.
 - Line up a speakers bureau.
 - Line up an editorial bureau to produce written material about CCRI in the form of articles, op-ed pieces, press releases etc.
 - Contact trade, professional, political, educational, civic, philanthropic and other organizations to enlist their support.
 - Organize CCRI supporters around the state into political action groups. We have already contacted several state legislators who are considering attaching hostile amendments to

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preferential and discriminatory legislation that comes to the floor of the state legislature. It is important to have an organized, grassroots movement to back up their legislative efforts.

From the foregoing list, the two most important items of business are: (1) fundraising for the purpose of starting a statewide office, and (2) organizing CCRI's supporters at the local level around the state. We are currently hard at work on the first project, and if all goes well on that front, will be moving on the second within the next several weeks. **NOTE: If you want to be put in touch with other CCRI supporters in your area—or if you are a resident of one of the twenty-two states listed above, with supporters of the initiative idea in your state—check the appropriate box on the return form which you will find in the enclosed flyer, detach and mail it to us. Let us know also if you would like to take the lead in the organizing effort in your area.**

There are other important ways you could help, including:

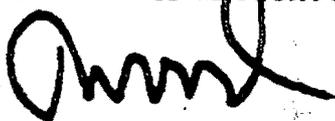
- Financial contributions (consider making monthly or quarterly donations).
- Volunteer work (e.g., participating in telephone trees to keep information flowing).
- Fundraising.
- Sending to CCRI news clippings and other items that may be of interest to others.
- Contributing articles, op-ed pieces and news items to a CCRI newsletter; or to a newsletter for your local action group.
- Providing professional and consulting assistance (editorial, financial, computer and database work, graphics design, mass mailing services, etc.)

As we have mentioned, all of the work on the initiative to date has been done by a very small group of part-time volunteers. That we have come so far so fast is a measure of the power and timeliness of the idea behind CCRI. Events, in fact, are outstripping our ability to keep up with them. Until recently, for example, we were able to keep the turn-around time on phone and mail inquiries to less than two weeks, but recently this has extended to five weeks, for which we apologize.

We need now to broaden our base of activities and to enlist the support of large numbers of people. I hope that you will decide to join with us in our historic effort to recapture for California—and eventually for the entire nation—the original meaning and purpose of the U.S. Civil Rights Act of 1964.

Sincerely,

CALIFORNIA CIVIL RIGHTS INITIATIVE



THOMAS E. WOOD

Enclosure

Fact Sheet #1**Equal Rights Advocates**

1663 Mission Street, Suite 550
San Francisco, California 94103
415/621-0672 Fax: 415/621-6744

Questions & Answers About
Assembly Constitutional Amendment 2

What is the goal of Assembly Constitutional Amendment 2?

To amend the California Constitution in order to eliminate all voluntary affirmative action programs in public employment, education and contracting.

Do government entities have the right to develop and implement voluntary affirmative action programs under all circumstances and whenever they chose?

No. Under current federal law, state and local governments can only voluntarily implement a race-conscious affirmative action plan when the plan is intended to address identified discrimination against specific racial groups. Even where a preference program is determined to be justified, courts will further scrutinize the plan to ensure that it is narrowly tailored.

If ACA 2 is passed what government agencies could be restricted in their ability to equalize economic and educational policies through voluntary affirmative action programs?

All non-federal public entities in California, including every state agency and department; all public schools and universities; local cities and counties; redevelopment agencies; transportation agencies; public hospitals, libraries and airports; etc.

What types of programs that seek to remedy past discrimination could be dismantled if ACA 2 is passed?

Employment programs, such as: State Civil Service Affirmative Action Program whose purpose is to overcome any identified underutilization of minorities and women in all state agencies and departments; Education programs, such as: Student Opportunity and Access Program that provides funding to increase access to postsecondary education for low income and ethnic minority students; State Contracting programs, such as: Women and Minority Business Enterprises which requires regulated public utilities to make efforts to award 30% or more of their contracts to women, minority and disabled veteran business enterprises; and Local Contracting programs being adopted throughout California that address the systemic discrimination against minority and women business enterprises.

Fact Sheet #2

Equal Rights Advocates

1663 Mission Street, Suite 550
San Francisco, California 94103
415/621-0672 Fax: 415/621-6744

A HISTORY OF AFFIRMATIVE ACTION

"In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently."

—Justice Harry A. Blackmun
University of California Regents v. Bakke

Starting in the 1940s, the federal government took the lead in promoting workplace equality with a series of measures prohibiting discrimination in federal employment. Twenty years later, the Civil Rights Act of 1964 was enacted to prohibit employment discrimination based on sex, race, national origin, or religion. The following year, in 1965, President Lyndon Johnson signed an executive order that required federal contractors to undertake affirmative action to increase the number of minorities they employed.

In 1969, after Department of Labor hearings uncovered widespread race discrimination in the construction industry, the Nixon administration developed the concept of using "goals and timetables" to measure the progress federal construction companies were making in increasing the number of blacks on their payrolls. A year later, President Nixon extended the use of goals and timetables to all federal contractors, and four years later declared that such affirmative action programs should also include women. Today, federal regulations require any federal contractor with fifty or more employees or a federal contract worth more than \$50,000 to adopt an affirmative action program.

Over the past twenty-five years, the most blatant forms of discrimination have become less common. No longer do we see help-wanted ads divided into "men's" and "women's" jobs, nor do we see signs in store windows stating that "Only Whites Need Apply" for available jobs. However, racism and sexism still have a powerful impact on the structure of the U.S. work force and economy. Most women and people of color are still relegated to the lowest-paying jobs, while the better jobs—including the vast majority of lucrative government contracts—go disproportionately to white people and men.

Today's affirmative action programs fit into a proud history of people struggling not only to open doors to individuals, but to change the structure of the U.S. work force and economy to redistribute jobs and resources according to merit rather than custom.

Fact Sheet #3**Equal Rights Advocates**

1663 Mission Street, Suite 550
San Francisco, California 94103
415/621-0672 Fax: 415/621-6744

Why Affirmative Action Is Good Public Policy

Affirmative action benefits everyone.

While there are numerous practical and economic reasons why affirmative action is the right thing to do, the most fundamental reason is that justice demands it. It is simply not fair that, for decades, women and minorities have been shut out of educational opportunities and have had to settle for the lowest-paying and least-desirable jobs. Affirmative action works to correct these injustices, to create a future in which jobs and opportunities are distributed more equitably.

Affirmative action brings the diverse skills, knowledge, and abilities of women and minorities into the U.S. labor market and increases competitiveness. For example, because minority- and woman-owned business enterprise (MBE/WBE) programs increase the number of bidders for government contracts, the government will often pay less and receive higher-quality goods and services. Affirmative action also increases productivity. It's no secret that motivated workers are productive workers. Living with harassment, feeling unwelcome, and believing that there is no chance for advancement take a heavy toll on a worker's motivation. Affirmative action works to eliminate such feelings in the workplace and in the business community. Furthermore, affirmative action increases opportunities for people who are not disadvantaged to expand and improve business. For example, studies show that minority-owned businesses make investments and provide jobs in urban areas that other businesses ignore. When minority businesses develop, they improve the conditions of our least-developed communities.

Finally, affirmative action provides role models. The presence of minorities and women in jobs and businesses from which they have been traditionally excluded tells young people that the future can look different. It inspires them to seek new skills and become better prepared for the job market.

These kinds of benefits have generated broad-based support for affirmative action in the private sector. In May of 1985, the directors of the National Association of Manufacturers endorsed a policy statement that supported affirmative action, with its goals and timetables, as "good business policy."

Coalition for Civil Rights

A coalition of individuals and organizations committed to the development and realization of a progressive national agenda for civil and human rights

For Immediate Release August 10, 1994

Contact: Gail Kaufman 415/621-0672

Coalition for Civil Rights Defends Voluntary Affirmative Action at California Assembly Judiciary Committee Hearings

Persons Testifying:

*Eva J. Paterson, Chair, Bay Area Coalition for Civil Rights
Executive Director, Lawyers' Committee for Civil Rights
of the San Francisco Bay Area*

Judith E. Kurtz, Managing Attorney, Equal Rights Advocates

*Frederick Jordan, California Business Council of Organizations
for Equal Opportunities*

Rolando Arango, California Hispanic Professionals Association

*Harold Yee, Council of Asian American Business Associations
and Asian Business Associations*

Manuel Rosales, California Hispanic Chamber of Commerce

SACRAMENTO, August 10 1994—At hearings before the California Assembly Judiciary Committee, the Bay Area Coalition for Civil Rights will testify against a proposed amendment to California's Constitution that would prohibit voluntary affirmative action programs in California. The amendment's goal is to eliminate all voluntary affirmative action programs in public employment, education and contracting. A myriad of affirmative action programs currently in existence would be eliminated or threatened; such as programs in school districts, police departments, or local municipalities that have been developed to address identified discrimination against specific racial groups.

In its testimony the Coalition argues that the proposed amendment is unnecessary due to the fact that federal law assures that only those affirmative action policies which protect against unjust and arbitrary preferences can be voluntarily undertaken and that the bill would restrict or deny women and people of color their rights as provided by the U.S. Constitution.

Judith Kurtz, Managing Attorney for Equal Rights Advocates, laments that, "It is a sad day for the people of California when our representatives are spending their time trying to dismantle longstanding efforts to remedy the discrimination faced by women and minorities — especially when California will become the only state where minorities will be a majority of the population in the next five years."

Eva Paterson, Chair of the Coalition for Civil Rights, is adamant about the fact that, "Study after study in the past few years has proved that discrimination against people of color and women is alive and well in this society. I myself am a success story of affirmative action — if women and people of color are not even allowed to get through the door, how are they going to achieve their potential?"

301 Mission Street, Suite 400, San Francisco, California 94105

American Civil Liberties Union of
Northern California

Asian Law Caucus

Bay Area Lawyers for Individual
Freedom

Center for Affirmative Action

Coalition for Economic Equity

Committee to Defend
Reproductive Rights

Communications Workers of America—
Local 9410

Community Labor Education
and Research Project (CLERP)

Employment Law Center of the
Legal Aid Society of San Francisco

Equal Rights Advocates

Mexican-American Legal Defense
and Education Fund

NAACP

National Center for Lesbian Rights

National Lawyers Guild,
San Francisco Bay Area Chapter

Northern California Coalition of
Black Trade Unions

Rainbow Coalition - Oakland, Berkeley

San Francisco Black Panthers

San Francisco Lawyers' Committee
for Urban Affairs

San Francisco Women Lawyers' Alliance

United Student Workers—
S.S.L.U. Local 1800

Women's International League
for Peace and Freedom

EQUAL RIGHTS ADVOCATES

1663 MISSION ST., STE.550 SAN FRANCISCO CA 94103 415/621-0672 FAX: 415/621-6744

August 3, 1994

Assemblymember Phillip Isenberg
Assembly Judiciary Committee
State Capitol, Room 6005
P.O. Box 942848
Sacramento, CA 94248-0001

Dear Assemblymember Isenberg:

Equal Rights Advocates and the Lawyers Committee for Civil Rights of the San Francisco Bay Area are writing to ask you to oppose Assembly Constitutional Amendment 47 (hereinafter "ACA 47") which will be heard in the Assembly Judiciary Committee on August 10, 1994. ACA 47 is an inappropriate and unnecessary attempt to amend the California Constitution to eliminate the use of all voluntary affirmative action programs in public employment, education and contracting.

As you may know, ERA and the Lawyers Committee have been in the forefront of the fight to end race and sex-based discrimination through both litigation and public policy over the past twenty years. Both organizations are members of the Coalition for Civil Rights (CCR) and on behalf of CCR prepared an extensive position paper analyzing the legality of this proposed amendment. In this letter we summarize, for your information, that paper and would be happy to make the entire paper available to you at your request.

If ACA were to be enacted, a myriad of affirmative action programs currently in existence would be eliminated or threatened. These are programs which public entities, be they the state, school districts, police departments, or local municipalities, have voluntarily initiated in order to give meaning to the promise of equality to all in the state of California. Some examples of programs which could be affected by ACA 47 include minority and women business contracting policies like that found in Public Contract Code section 10115 et seq.; the state civil service affirmative action program established by Government Code section 19790 et seq.; and Education Code section 69560 - the student opportunity and access program which is intended to make postsecondary educational opportunities available to low income and ethnic minority students.

Board of Directors: Suzanne Lampert, Chair; Nelly Martin, Vice Chair; Ann Brack, Ruffin B. Chipper, III, Cassandra M. Flipper, Lillian Laloja Ovelo, Miriam Gordin, Irma D. Mazon, Mercedes E. Melton, Norma Hill Kim, Irving Pfeiffer, Glenda Robinson, Diane Schuman, Deborah Schmitt, Kathleen Ouyang Turner, Staff: Nancy L. Davis.
Executive Director: Paula Blaney, Staff Attorney: Tracy Cline, Development Assistant: Betty L. Cotton, Fellow: Mary Anne Courtney, Finance Director: Russ B. Fusi, Staff Attorney: Sandra Gubara, Receptionist: Onil M. Kaufman, Associate Director: Catherine A. Kline, Director, Foundation Relations and Special Events: Judith E. Kurtz, Managing Attorney: Maria Salazar, Administrative Assistant: Dawn Tyler, Legal Secretary.

August 3, 1994

2

As you already may know, under current federal law, state and local governments can voluntarily implement a race-conscious affirmative action plan only in one very narrow situation: where the plan is intended to address identified discrimination against specific racial groups. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). In addition, even where a preference program is determined to be justified, courts will further scrutinize the plan to ensure that it is narrowly tailored. Therefore, this proposed Constitutional Amendment is unnecessary due to the fact that federal law assures that only those affirmative action policies which protect against unjust and arbitrary preferences can be voluntarily undertaken. ACA 47 attempts to restrict affirmative action further by forbidding any voluntary attempts to address past discriminatory practices. If passed, it would halt over 50 years of progress towards creating equality in America.

As Justice Harry A. Blackmun once said, "In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently." Regents of University of California v. Bakke, 438 U.S. 265, 407. ACA 47 attempts to make taking account of race and gender impossible, thereby limiting the government's ability to create equality.

While the most obvious indicia of discrimination have dissipated and signs in windows no longer read "Only Whites Need Apply," discrimination still has a powerful impact in our economy. For example, most women and minorities are still in the lowest-paying jobs in our workforce and jobs remain predominantly male or female in the 1990s. In recognition of the need to break down historic barriers to a truly integrated society, businesses have embraced affirmative action as a tool to overcome centuries of discrimination. This support includes large corporations and manufacturers. In fact, in 1984, over 90% of Chief Executive Officers of large corporations said that their affirmative action policies were meant not only to meet government regulations but also to satisfy corporate objectives. An even higher percentage said they would continue to use goals and timetables to track the progress of women and minorities. Fortune Magazine, September 16, 1985 at 28.

The passage of ACA 47 would limit the ability of local governments to meet their obligation under the United States Constitution and federal statutory law to remedy discrimination, and also force these agencies to forgo federal funds to avoid potentially costly litigation for claims of violating ACA 47. The Amendment directly conflicts with the Equal Protection Clause of the Fourteenth Amendment because it significantly restricts the ability of state and local governments to conform to the federal law which allows and sometimes requires government entities to identify and remedy past discrimination voluntarily. Furthermore, ACA 47 is likely to lead to unnecessary and costly litigation because it restricts the ability of local governments to settle anti-discrimination lawsuits.

August 3, 1994

Additionally, the proposed Amendment violates the Equal Protection Clause because it embodies an explicit use of race making it subject to strict scrutiny. Crosby, 488 U.S. 469. Here, there is no evidence that the goal of ACA 47, namely the elimination of affirmative action programs, is compelled by any legitimate legislative end. No showing has been made that state and local affirmative action programs have to any extent adversely affected the state's non-minority population. Moreover, ACA 47 fails the second prong of the strict scrutiny test because the amendment is not narrowly tailored. It seeks to eliminate not only those specific programs which proponents believe may be causing injury to the state's non-minority population, but all such programs, including those that may be required by federal law.

Second, the amendment violates the Equal Protection Clause because it is racially motivated and seeks to reduce the level of protection provided to racial minorities and women under the U.S. Constitution. A state cannot provide less protection than what is required by federal law. Crawford v. Los Angeles Board of Education, 458 U.S. 527 (1982).

Third, ACA violates equal protection because it infringes upon the rights of minorities to participate on an equal basis in the political process. It removes the authority of local officials to address problems that specifically burden people of color and women while not similarly restricting the ability of these same officials to redress discrimination against others (e.g. older people, disabled people, lesbians and gays). By selecting out race and gender problems for differential treatment, ACA 47 violates the Constitution. Washington v. Seattle School District No. 1, 458 U.S. 457 (1982).

We urge you to vote against ACA 47. It is both bad public policy because it takes out of the hands of local authorities the ability to remedy previous discrimination and illegal under the federal constitution. We would be happy to answer any additional questions you may have.

Sincerely,

Judith E. Kurtz
Judith E. Kurtz
Equal Rights Advocates
(415) 621-0672

Theodore Hsien Wang/JK
Theodore Hsien Wang
Lawyers Committee for Civil Rights
(415) 543-9444

cc: Assemblymember Richter

The next freight train

WHEN THE "three strikes" package of crime legislation was unveiled last year - and later when it went on the ballot - Democratic legislative leaders Willie Brown and Bill Lockyer and Democratic gubernatorial candidates Kathleen Brown and John Caramendi jumped out of the way. They could spot a freight train barreling down the track, and felons don't vote.

It was harder when Proposition 187 came along. That measure, which passed by a 3-2 margin, would, if deemed constitutional, deny education and nonemergency health benefits to illegal immigrants. It was fueled by voter rage at taxpayer money being used to pay for these services, and that rage was stoked by Gov. Pete Wilson's re-election campaign, which highlighted the theme.

But Proposition 187 struck at some of the core values of Democratic activists, civil libertarians and Hispanic groups, many of whom don't believe children should be denied access to health and education because of where their parents choose to live. Most Democratic candidates opposed the measure and for many, including Kathleen Brown, the issue contributed to their defeat.

Now comes a measure, the California Civil Rights Initiative, aimed right at the heart of the Democratic Party's core constituencies: liberals, minorities and public employee unions.

INTRODUCED AS a constitutional amendment last year by Assemblyman Bernie Richter, R-Chico, the measure would "prohibit the state or any of its political subdivisions from using race, sex, color, ethnicity or national origin as a criterion for either discriminating against, or granting preferential treatment to, any individual or group in the operation of the state's system of public employment, public education or public contracting."

What this means, in short, is no discrimination. But more important, no affirmative action programs for women or minorities, either. No preferences for minority contractors (a Republican-appointed state Supreme Court just affirmed the validity

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By John Jacobs
Political Editor

of such programs last week in a 6-1 decision); no special programs for admission of minorities to college; no special race-based programs for government jobs, including police and firefighting. Polls have shown that such programs are highly unpopular with voters.

If 'three strikes' and Proposition 187 were freight trains, this initiative could be a heat-seeking missile that, if it's not disarmed, explodes the Democratic Party coalition.

If "three strikes" and Proposition 187 were freight trains, this initiative could be a heat-seeking missile that, if it's not disarmed, explodes the Democratic Party coalition. Richter plans to introduce it again in the new session. Republicans see it as a wedge issue that they would love to put on the November 1996 ballot if the Legislature does not approve it (and possibly even if it does). Last week Wilson came close to endorsing it.

Democratic incumbents would be forced to choose between voting to protect race-based programs, which would infuriate many voters, including angry white males, whose overwhelming Republican votes last November gave the GOP control of Congress and possibly the state Assembly. Or they could vote against such programs and draw the ire of minority activists, who would punish them.

"We believe very strongly,"

said Richter staffer David Reads, "that this will be the defining issue for all candidates running in 1996, particularly Democrats in moderate and conservative districts. Does this help us solidify a Republican majority? I believe it does."

WHEN RICHTER'S measure came up last year, it died in the Assembly Judiciary Committee. The Legislative Black Caucus and Hispanic Caucus both opposed it. "There's little doubt in my mind that if this bill goes forward," Assemblywoman Barbara Lee, D-Oakland, chair of the Legislative Black Caucus, said at the time, "We will have turned the clock back 30, 40 or 50 years." Maybe so, but most voters don't see it that way, including Democrats.

"There ought to be a Democratic response to this immediately," said one top legislative staffer. "Either we deal with the issue or embrace it. But we can't be out there just saying we're against it and defending the status quo. These are programs we have supported and funded and many have been successful. But they are very hard to defend. It's like 'three strikes,' which sounds so logical to the public."

One option would be to liberate Democrats to vote their districts and provide enough votes to approve several bills in the Assembly and Senate to end these programs. If Wilson signed them into law in 1996, it would be hard to argue that an initiative would be necessary the following year.

There is a huge problem with this strategy, however. Richter's constitutional amendment that would supplement the bills would require 54 votes, which means at least 14 Assembly Democrats would have to swallow it.

If a significant number of Democrats split over race and over whether to repudiate affirmative action programs they have sponsored for 20 years, the retribution to follow could make the current speakership war, by comparison, look like a walk in the park.

2nd town

ACA 2

- 2 -

1 State of California that the Constitution of the State be
2 amended by adding Section 31 to Article I thereof, to
3 read:

4 SEC. 31. (a) Neither the State of California nor any
5 of its political subdivisions or agents shall use race, sex,
6 color, ethnicity, or national origin as a criterion for either
7 discriminating against, or granting preferential
8 treatment to, any individual or group in the operation of
9 the State's system of public employment, public
10 education, or public contracting.

11 (b) This section shall apply only to state action taken
12 after the effective date of this section.

13 (c) Allowable remedies for violation of this section
14 shall include normal and customary attorney's fees.

15 (d) Nothing in this section shall be interpreted as
16 prohibiting classifications based on sex that are
17 reasonably necessary to the normal operation of the
18 State's system of public employment or public education.

19 (e) Nothing in this section shall be interpreted as
20 invalidating any court order or consent decree that is in
21 force as of the effective date of this section.

22 (f) Nothing in this section shall be interpreted as
23 prohibiting state action that is necessary to establish or
24 maintain eligibility for any federal program, where
25 ineligibility would result in a loss of federal funds to the
26 State.

27 (g) Nothing in this section shall be construed as
28 prohibiting a public agency from obeying a court order
29 requiring the consideration of racial, ethnic, national
30 origin, gender, or religious characteristics to remedy the
31 effects of its own past discriminatory practices.

32 (h) If any part or parts of this section are found to be
33 in conflict with federal law or the United States
34 Constitution, the section shall be implemented to the
35 maximum extent permitted by federal law and the
36 United States Constitution. Any provision held invalid
37 shall be severable from the remaining portions of this
38 section.

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