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14 THE UNITED STATES DISTRICT COURT  
15 FOR THE NORTHERN DISTRICT OF CALIFORNIA

17 COALITION FOR ECONOMIC EQUITY;  
18 CALIFORNIA NAACP; NORTHERN CALIFORNIA  
NAACP; CALIFORNIA LABOR FEDERATION,  
19 AFL-CIO; COUNCIL OF ASIAN AMERICAN  
BUSINESS ASSOCIATIONS, CALIFORNIA;  
20 CHINESE AMERICAN CITIZENS' ALLIANCE;  
WOMEN CONSTRUCTION BUSINESS OWNERS  
21 AND EXECUTIVES, CALIFORNIA CHAPTER;  
UNITED MINORITY BUSINESS  
22 ENTREPRENEURS; CHINESE FOR  
AFFIRMATIVE ACTION; BLACK ADVOCATES  
23 IN STATE SERVICE; ASIAN PACIFIC AMERICAN  
LABOR ALLIANCE; LA VOZ CHICANA; BLACK  
24 CHAMBER OF COMMERCE OF CALIFORNIA;  
MICHELLE BENNETT; NANCY BURNS; FLOYD  
25 CHAVEZ; CHRISTOPHER CLAY; DANA  
CUNNINGHAM through her next friend DIANA  
26 GRONERT; IRAN CELESTE DAVILA; SHEVADA  
DOVE through her next friend MELODIE DOVE;  
27 JESSICA LOPEZ; VIRGINIA MOSQUEDA;  
SALVADOR OCHOA; CLIFFORD TONG; and all  
28 those similarly situated,

Plaintiffs,

Case no. \_\_\_\_\_

COMPLAINT FOR  
INJUNCTIVE AND  
DECLARATORY RELIEF

Class Action

Civil Rights

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v.

PETE WILSON, GOVERNOR OF THE STATE OF CALIFORNIA, IN HIS OFFICIAL CAPACITY;  
DANIEL E. LUNGREN, ATTORNEY GENERAL FOR THE STATE OF CALIFORNIA, IN HIS OFFICIAL CAPACITY; JOANNE CORDAY KOZBERG, SECRETARY OF STATE AND CONSUMER SERVICES AGENCY AND CABINET MEMBER, IN HER OFFICIAL CAPACITY; DELAINE EASTON, SUPERINTENDENT OF PUBLIC INSTRUCTION, IN HER OFFICIAL CAPACITY; JAMES H. GOMEZ, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, IN HIS OFFICIAL CAPACITY; THE CITY AND COUNTY OF SAN FRANCISCO; THE COUNTY OF SAN DIEGO; THE COUNTY OF CONTRA COSTA; THE COUNTY OF MARIN; THE CITY OF PASADENA; and all those similarly situated;

Defendants.

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

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28 COMPLAINT FOR INJUNCTIVE  
AND DECLARATORY RELIEF

## INTRODUCTION

1  
2 1. This is an action by racial and ethnic minorities, women, and groups representing their  
3 interests, challenging the constitutionality of California state Proposition 209. By amending the  
4 state constitution to abolish the power and authority of state and local government in California  
5 to tightly and voluntarily fashion constitutionally-permissible race and gender conscious programs  
6 to redress discrimination in the areas of public education, employment and contracting,  
7 Proposition 209 impermissibly cuts off the plaintiffs' ability of to seek assistance and protection  
8 from the government on the same terms as everyone else. Accordingly, Proposition 209 is a  
9 denial of equal protection of the laws in the most literal sense.

10 2. No statewide measure in American history has ever come close in scope or effect to  
11 Proposition 209's chokehold on state and local government. Absent a judicial proceeding and  
12 court order, no matter the prevalence or virulence of discrimination in denying minority children  
13 and girls equal educational opportunity; minorities and women an equal shot at job, promotion  
14 or contract; or minorities and young women an equal break at attending colleges and graduate  
15 schools, California governments are barred, now and forever, from effectuating race- and gender-  
16 conscious programs meeting every federal constitutional test. Even more, Proposition 209  
17 requires state and local government to move apace to dismantle hundreds of effective,  
18 constitutionally-permissible programs which have at least made a dent in longstanding  
19 discriminatory practices and afforded minorities and women their first chance at equal  
20 opportunity.

21 3. This action, while surely implicating race and gender-conscious affirmative action  
22 programs, is actually constitutionally about access to the levers of government. In the same vein  
23 as poll taxes and literacy tests, Proposition 209 limits plaintiffs access to those levers.  
24 Implementation of Proposition 209 will have an unprecedented destructive impact not just on  
25 women and minorities but, more broadly on the democratic processes on which they rely for their  
26 protection. The State can demonstrate no countervailing interest -- indeed, its only conceivable  
27 interest is to end programs that are themselves tailored address compelling interests. Therefore,  
28

1 plaintiffs seek a preliminary and permanent injunction restraining any implementation or  
2 enforcement of Proposition 209, as well as a declaration that it is unconstitutional.

### 3 JURISDICTION AND VENUE

4 4. Jurisdiction. This action arises under the Constitution and laws of the United  
5 States, in that it states claims under the Fourteenth Amendment to the Constitution of the United  
6 States; the Supremacy Clause, Article VI, c1.2, with respect to Titles VI, VII and IX of the Civil  
7 Rights Act of 1964; and 42 U.S.C. § 1983. Jurisdiction of this Court is invoked pursuant to 28  
8 U.S.C. § 1343(a) (3) & (4), and 28 U.S.C. § 1331.

9 5. Venue. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391(b)(1) & (2).  
10 Defendants Wilson, Lungren, Kozberg and Easton, among others, perform their official duties  
11 in whole or in part of this district; Defendants City and County of San Francisco, County of  
12 Marin and County of Contra Costa, are located in this district; and a substantial part of the events  
13 or omissions giving rise to plaintiffs' claims have occurred, or will occur, in this district.

14 4. Intra-district Assignment. Assignment to the San Francisco division is proper.  
15 This action arises in the County of San Francisco in that Defendants Wilson, Lungren, Kozberg  
16 and Easton, among others, perform their official duties in whole or in part in San Francisco  
17 County; Defendant City and County of San Francisco, is located in this division; and a substantial  
18 part of the events or omissions giving rise to plaintiffs' claims have occurred, or will occur, in  
19 San Francisco County.

### 20 PARTIES

#### 21 Plaintiffs

22 5. Plaintiff, Coalition for Economic Equity is a coalition of 10 associations of women-  
23 and minority- owned business enterprises. Its primary mission is to ensure that minorities and  
24 women have adequate opportunities to participate in public contracts within the State of California,  
25 primarily in the San Francisco Bay Area. Various members of the Coalition for Economic Equity  
26 have received contracts from public entities pursuant to provisions that will be vitiated by  
27 Proposition 209, and members will continue to seek public contracting opportunities for public  
28 contracts but will find their opportunities severely restricted by Proposition 209.

1           6.       Plaintiffs, Northern California NAACP, (hereinafter, NCNAACP) and California  
2 State Conference of Branches of the NAACP (hereinafter, California NAACP) are both chartered  
3 entities of the National Association for the Advancement of Colored People (hereinafter NAACP),  
4 organized in 1909 under the Not-for-Profit Laws of the State of New York. The NAACP was  
5 created to confront and eradicate racial discrimination, prejudice and segregation in all walks of  
6 American life, including employment, education, housing, criminal justice, voting and all other  
7 areas of public accommodations. Both the NCNAACP and the California NAACP have adult and  
8 youth members who are directly and adversely affected by the application of Proposition 209.

9           7.       Plaintiff California Labor Federation, AFL-CIO ("the Federation") is an  
10 unincorporated association with its headquarters in San Francisco, California. Affiliated with the  
11 Federation are approximately 1,230 local unions and intermediate bodies. Through these  
12 affiliates, the Federation represents, for purposes of collective bargaining concerning wages,  
13 hours, and working conditions, approximately 2,000,000 employees in California, including  
14 approximately 385,000 persons employed by various state and local public agencies. The  
15 Federation and its affiliates represent employees at virtually all state agencies and departments,  
16 including employees of Caltrans, the California Highway Patrol, the office of the Secretary of  
17 State, and the Departments of Corrections, Insurance, and Fish & Game. Among the myriad  
18 local public agencies at which the Federation and its affiliates represent employees are the cities  
19 of San Francisco, Los Angeles, San Diego, Riverside, Richmond, San Jose, Sacramento, and  
20 Oakland, as well as the San Francisco Unified, Los Angeles Unified and Oakland Unified School  
21 Districts. The Federation's mission is to further the interests of California's public and private  
22 sector employees, including improving wages and working conditions for, and employment  
23 opportunities available to, women and members of racial minorities underrepresented in  
24 California's public and private sector occupations and workplaces. Employees represented by the  
25 Federation and its affiliates, including those employed in the state and local agencies described  
26 above, have benefited, and continue to benefit, from race- and/or gender- conscious programs,  
27 practices and policies designed ameliorate discrimination in public employment and education, and  
28 would be adversely affected by the elimination of such programs.

1           8. Plaintiff Council of Asian American Business Associations of California ("CAABA-  
2 CAL"), is a statewide organization of Asian American business and trade associations that have  
3 members that are ready and able to compete for public contracts throughout California and bid  
4 from governmental agencies currently operating public contracting affirmative action programs.  
5 Its members include Asian American Architects and Engineers (San Francisco), Asian American  
6 Architects and Engineers (Los Angeles), and California Chinese American Association of  
7 Construction Professionals (Orange County). Through its member organizations, CAABA-CAL  
8 represents over 700 Asian American Businesses across California. The membership of CAABA-  
9 CAL will be adversely affected by Proposition 209 in their ability to compete for public contracts.

10           9. Plaintiff Chinese American Citizens Alliance, is a one-hundred-and-one year old  
11 national membership organization with fourteen chapters throughout California dedicated to the  
12 protection of civil rights for Chinese and Asian Americans. Its members have benefitted from,  
13 and would continue to benefit from the various race- and gender- conscious affirmative action  
14 programs that will be vitiated by Proposition 209.

15           10. Plaintiff Women Construction Business Owners and Executives, California chapter  
16 is a statewide nonprofit organization that represents the interests of women construction owners  
17 and executives throughout California. The majority of WCBOE's 100 members are  
18 women-owned businesses that are ready and able to compete for public contracts throughout  
19 California. Women Construction Business Owners and Executives, California chapter has  
20 members which have benefitted from and would continue to benefit from the various race- and  
21 gender- conscious affirmative action programs that will be vitiated by Proposition 209.

22           11. Plaintiff United Minority Business Entrepreneurs (UMBE) is a statewide business  
23 organization for women and Minority Business Enterprises. It was incorporated on April 9, 1976  
24 and has chapters in San Jose and Sacramento, and members in southern California. The bulk of  
25 its membership has contracts with public agencies such as the state of California, various school  
26 districts or municipalities throughout the state. The membership has benefitted and will benefit  
27 from race- and gender- conscious affirmative action programs that will be vitiated by Proposition  
28 209.

1           12. Plaintiff Chinese for Affirmative Action (CAA) is a nonprofit membership  
2 organization in San Francisco. CAA's organizational mission is to defend and promote the  
3 political and civil rights of Chinese and Asian Americans within the context of, and with the goal  
4 of advancing, multiracial democracy in America. Included among its approximately 1,300  
5 members are Chinese and Asian Americans who have benefited from affirmative action policies  
6 in the areas of public employment, contracting, and education, and who would be harmed by their  
7 elimination. Race-conscious affirmative action policies in the public sector allow CAA's members  
8 to overcome barriers to opportunity. In addition, CAA receives funding from the San Francisco  
9 Mayor's Office of Community Development, to provide job recruitment and referrals to over  
10 1,500 low-income minorities each year. The elimination of race- and gender- conscious  
11 programs, and the funding for those programs, will severely diminish the services provided by  
12 CAA.

13           13. Plaintiff Black Advocates in State Service is an association of African Americans  
14 employed by agencies and departments of the State of California. Its members have received  
15 opportunities in state employment, and would continue to seek such opportunities, pursuant to  
16 programs that would be vitiated by Proposition 209. Said           14. Plaintiff Asian Pacific  
17 American Labor Alliance ("APALA") is an association of Asian Pacific American trade union  
18 employees of public and private entities. Members include employees of the Cities of Oakland  
19 and Berkeley, and the Bay Area Rapid Transit Authority. APALA advocates race- and gender-  
20 conscious affirmative action programs in its members workplaces and unions. Its members have  
21 benefitted from, and would continue to benefit from race conscious affirmative action programs  
22 in that will be vitiated by Proposition 209.

23           15. Plaintiff La Voz Chicana ("LVC"), is an outreach program funded by and run through  
24 the University of California at Los Angeles ("UCLA"). LVC is designed to increase the lack of  
25 representation of Chicanas in higher education, and its participants are: students from UCLA (who  
26 act as mentors); teacher assistants from two public elementary schools (who also act as mentors);  
27 and Latina students from a public high school, middle school, and elementary school. The  
28 mentors meet, first among themselves and then with the younger students, to discuss topics in

1 Chicano history, contemporary events and Chicana literature. They also meet with prominent,  
2 educated Chicana role models. In addition, the mentors work with the younger students on  
3 research projects, and the mentors administer pre and post attitude inventories to the students on  
4 topics including their interest in higher education and their aspirations toward going to college.  
5 If Proposition 209 goes into effect, LVC will be severely harmed, if not entirely eliminated,  
6 because it is a race- and gender- conscious program.

7 16. Plaintiff Black Chamber of Commerce of California ("Chamber") is a statewide  
8 organization that represents the interests of African Americans in business in California. Its  
9 primary mission is the economic empowerment of African Americans in business. Many of the  
10 Chamber's 6,000 members are contractors who regularly bid on contracts for California state and  
11 local agencies which have voluntary affirmative action programs. If Proposition 209 is put into  
12 effect, many of the public sector affirmative action programs which have benefitted African  
13 Americans in business will be prohibited. The elimination of these programs will seriously harm  
14 a substantial portion of the membership of the Chamber. The elimination of these programs will  
15 leave African American contractors vulnerable to significant discrimination and will make it much  
16 more difficult for these businesses to compete effectively.

17 17. Plaintiff Michelle Bennett is a custodian in the Grossmont Unified School District.  
18 Grossmont Unified has an affirmative action policy in effect that takes account of a person's race  
19 and gender in hiring and promotions within the district. Michelle has experienced and witnessed  
20 sex discrimination and harassment from her male supervisors and co-workers. She would very  
21 much like to advance to one of several available positions within the district and feels that without  
22 affirmative action, her chances for promotion are severely diminished.

23 18. Plaintiff Nancy Burns is the sole owner of Nancy Burns Painting and Wallpapering,  
24 Inc., a certified women-owned company located in San Francisco, California. Ms. Burns'  
25 company has been in existence 1976 and has performed both as a prime contractor and  
26 subcontractor with the City and County of San Francisco, the San Francisco Unified School  
27 District, Alameda County, University of California, San Francisco, and the Veterans' Hospital  
28 in San Francisco. Approximately 50% of the revenues earned by Ms. Burns' firm are from public

1 agencies which operate affirmative action contracting policies. Ms. Burns' firm is ready and able  
2 to compete for public contracts in the San Francisco Bay Area. She has benefited from and would  
3 continue to benefit from gender-conscious affirmative action programs that will be vitiated by  
4 Proposition 209.

5 19. Plaintiff Floyd Chavez is President and principal owner of Golden Bay Fence Plus  
6 Company, which is a certified minority business enterprise. Golden Bay Fence Plus receives  
7 approximately 60% of its revenues from public contracts and is ready and able to compete for  
8 public contracts from the State of California, and in San Francisco, Oakland, San Jose, Santa  
9 Clara County, Contra Costa County, and Alameda County, among others. He has benefited and  
10 would continue to benefit from various race-conscious affirmative action programs that will be  
11 vitiated by Proposition 209.

12 20. Plaintiff Christopher Clay is a 12th grade, African American student at Saint Mary's  
13 High School in Berkeley, California. He is a participant in the Early Academic Outreach  
14 Program ("EAOP"), which was established to increase the number of African American,  
15 Latino/Chicano, Native American, and low income students who become eligible for admission  
16 to the University of California. An active member of EAOP for 4 years, Chris has participated  
17 in programs such as EAOP's Saturday College program, where he attended classes every Saturday  
18 on the Contra Costa college campus. Currently, the EAOP program is helping Chris with his  
19 college search by providing workshops on such topics as how to prepare college applications,  
20 apply for financial aid, and determine the average grade requirements of various UC schools.  
21 Because EAOP's programs are extremely important in raising Christopher Clay's level of  
22 scholastic achievement, he will be harmed by the loss of the many services which EAOP provides  
23 him, if Proposition 209 goes into effect. Moreover, Chris is applying this year to several UC  
24 schools. If Proposition 209 goes into effect, Chris will also be harmed because his opportunity  
25 for college admission, financial aid, and entrance into retention and tutorial programs will be  
26 dramatically decreased if UC schools are prohibited from taking race into account.

27 21. Plaintiff Dana Cunningham is 16-years old, and is in the eleventh grade at Oakland  
28 Technical High School in Oakland, California. He brings this action through his mother, Diana

1 Gronert, acting as his next friend. He is half-black and half-white. He is currently enrolled in  
2 Oakland Tech's Health Academy, a specialized and selective course of study focussing on the  
3 health sciences. Among the criteria used in selecting students for the Health Academy are race  
4 and ethnicity. As a result of the Health Academy's admission policies, the classes Dana attends  
5 are racially and ethnically diverse. If Proposition 209 is implemented, and the Oakland School  
6 District is required to end the programs used to make sure classes are diverse, the quality of his  
7 education will be harmed. Moreover, Oakland schools will be threatened with the loss of more  
8 than \$8 million they receive each year for voluntary desegregation programs, decimating the  
9 extremely successful academy programs in that District.

10 22. Iran Celeste Davila is a 20-year old Latina, currently attending Rio Hondo  
11 Community College in Whittier California. She has received support services from the Equal  
12 Opportunity Program, which provides counseling and support services to minority students at two-  
13 and four- year colleges. She has applied for transfer to Mt. San Antonio College, and expects  
14 to be admitted to the EOP program there. Celeste does not believe she will be able to obtain her  
15 degree without the EOP, or some other program designed to serve the special needs of minority  
16 students like herself. She will be harmed if the EOP is eliminated.

17 23. Plaintiff Melodie Dove is Shevada Dove's mother and is acting as her next friend.  
18 Shevada is a nine-year old girl who attends McKinley School, which is in the Los Angeles Unified  
19 School District (LAUSD). McKinley is part of the Ten Schools Program and was selected  
20 because it was one of the lowest performing schools on the California Test of Basic Skills in the  
21 LAUSD that was predominantly African-American. Ten Schools increased the resources available  
22 to participating schools and was designed to increase the level of academic achievement of  
23 students. Shevada, and all those similarly situated, have benefited from and would continue to  
24 benefit from the various race- and gender- conscious affirmative action programs that will be  
25 vitiated by Proposition 209.

26 24. Plaintiff Jessica Lopez is a 12th grade, Peruvian American student at Berkeley High  
27 School in Berkeley, California. She is a participant in the Early Academic Outreach Program,  
28 through which she has taken special summer courses and received assistance with her college

1 application process: for instance, by giving her feedback on drafts of her college essays and by  
2 helping her to apply for fee waivers for college applications. Because EAOP's programs are  
3 extremely important in raising Jessica Lopez's level of scholastic achievement, she will be harmed  
4 by the loss of the many services which EAOP provides her, if Proposition 209 goes into effect.  
5 Moreover, Jessica is applying this year to several UC schools. If Proposition 209 goes into  
6 effect, Jessica will also be harmed because her opportunity for college admission, financial aid,  
7 and entrance into college retention and tutorial programs will be dramatically decreased if UC  
8 schools are prohibited from taking race and gender into account.

9       25. Plaintiff Virginia Mosqueda is a senior at UC Irvine and is a participant in the Pre-  
10 Graduate Mentorship Program ("PGMP"), which was established to increase the number of  
11 African American, Latino/Chicano, Native American, and low income students at the graduate  
12 school level within the University of California. Virginia is Chicana. An active participant in  
13 PGMP, Virginia has been assigned a PGMP mentor, Professor Claire Kim. Among other things,  
14 Professor Kim supervises Virginia's research project, counsels her on graduate programs, and  
15 suggests scholarships for which Virginia would be eligible. In addition, PGMP assists Virginia  
16 in the application process for graduate school and provides a stipend to help fund her research.  
17 Because PGMP's programs are extremely important in raising Virginia Mosqueda's level of  
18 scholastic achievement, she will be harmed by the loss of the many services which PGMP  
19 provides her, if Proposition 209 goes into effect. Moreover, Virginia is applying this year to  
20 several UC graduate schools. If Proposition 209 goes into effect, Virginia will be harmed: her  
21 opportunity for graduate school admission, financial aid, and entrance into graduate school  
22 retention and tutorial programs will all be dramatically decreased if UC schools are prohibited  
23 from taking race and gender into account.

24       26. Plaintiff Salvador Ochoa is a 12th grade Chicano student at Venice High School in  
25 Venice, California. He is the current student president of the Venice High Chapter of the  
26 Mathematics, Engineering, Science Achievement ("MESA") Program. MESA's purpose is to  
27 increase the number of students who are UC eligible and are prepared to complete degrees in  
28 math-based fields. An active member of MESA for nearly 6 years, Salvador has participated in

1 numerous MESA activities such as Junior MESA Day, Senior MESA Day, and USC  
2 Math/Science Day. Currently, MESA is providing Salvador with information regarding the  
3 college application process, financial aid, and careers in science-related fields. Because MESA's  
4 programs are extremely important in raising Salvador Ochoa's level of scholastic achievement,  
5 he will be harmed by the loss of the many services which MESA provides him, if Proposition 209  
6 goes into effect. Moreover, Salvador is applying this year to several UC schools. If Proposition  
7 209 goes into effect, Salvador will also be harmed because his opportunity for college admission,  
8 financial aid, and entrance into retention and tutorial programs will be dramatically decreased if  
9 UC schools are prohibited from taking race into account.

10 27. Plaintiff Clifford Tong is the sole owner of Small Business Connections, a certified  
11 Asian owned business located in Lafayette, California. Mr. Tong's business is ready and able to  
12 compete for public contracts in the San Francisco Bay Area. He has benefited from and would  
13 continue to benefit from various race-conscious affirmative action programs that will be vitiated  
14 by Proposition 209.

15 Defendants

16 28. Defendant Pete Wilson is the Governor of the State of California and as such is the  
17 supreme executive officer for the State of California charged with the duty of seeing that all  
18 provisions of the law of California are faithfully executed. Cal. Const. Art. V, §1. Defendant  
19 Wilson exercises control and authority over most statewide agencies, many of which administer  
20 programs which may conflict with Proposition 209. Plaintiffs are informed and believe and  
21 thereon allege that Defendant Wilson has asserted the power to enforce California constitutional  
22 law through court actions in his official capacity against state and local governmental entities.  
23 Plaintiffs are informed and believe and thereon allege that Defendant Wilson was and is a  
24 vigorous proponent of Proposition 209. He is sued in his official capacity.

25 29. Defendant Daniel E. Lungren is the Attorney General of the State of California.  
26 As such, he is the chief law officer of the state and is charged with the duty "to see that the laws  
27 of the state are uniformly and adequately enforced." Cal. Const. Art. V., § 13. Defendant  
28 Lungren also exercises control and authority over the Office of Attorney General which

1 administers programs which conflict with Proposition 209. Plaintiff is informed and believes and  
2 thereon alleges that Defendant Lungren has asserted the power to enforce California constitutional  
3 law through court actions in his official capacity against state and local governmental entities. On  
4 information and belief, plaintiffs allege that Defendant Lungren was and is a vigorous proponent  
5 of Proposition 209. He co-authored and/or signed the rebuttal to the argument in opposition to  
6 Proposition 209 presented in the official California Ballot Pamphlet and distributed to the  
7 electorate prior to the November 5, 1996 election. He is sued in his official capacity.

8         30. Defendant Joanne Corday Kozberg is the Cabinet member who is the Cabinet  
9 Secretary of State. As such, she is in charge of such state departments as the Department of  
10 General Services. One or more of the departments under her control has voluntary race- and  
11 gender- conscious programs that will be vitiated by Proposition 209. She is sued in her official  
12 capacity.

13         31. Defendant Delaine Easton is the Superintendent of Public Instruction of the State of  
14 California. As such, she exercises control and authority over various programs of the California  
15 Department of Education which conflict with Proposition 209. She is sued in her official  
16 capacity.

17         32. Defendant James H. Gomez is the Director of the California Department of  
18 Corrections. As such, he exercises control and authority over employment and contracting  
19 programs of the Department of Corrections which conflict with Proposition 209. He is sued in  
20 his official capacity.

21         33. The City and County of San Francisco is both a charter City, incorporated under  
22 the under state law, and a county, which administers programs jeopardized by Proposition  
23 209.

24         34. The County of San Diego is a county which administers programs jeopardized by  
25 Proposition 209.

26         35. The County of Contra Costa is a county which administers programs jeopardized  
27 by Proposition 209.

1           36. The County of Marin is a county which administers programs jeopardized by  
2 Proposition 209.

3           37. The City of Pasadena is a charter City, incorporated under the under state law,  
4 which administers programs jeopardized by Proposition 209.

5                           **CLASS ACTION ALLEGATIONS**

6 **Plaintiff class allegations**

7           38. Plaintiffs bring this action as a class action pursuant to F. R. Civ. P. 23(b) on their  
8 own behalf and on behalf of all other persons similarly situated. The class is composed of all  
9 persons or entities who, on account of race, sex, color, ethnicity, or national origin, are or will  
10 be adversely affected by Proposition 209's prohibition of "preferential treatment" based on "race,  
11 sex, color, ethnicity or national origin" in employment, education or contracting programs  
12 operated by the State of California, any state or municipal agency, or any other political  
13 subdivision or governmental instrumentality in the State of California.

14           39. On information and belief, the class defined in the foregoing paragraph exceeds  
15 fifty thousand persons. The members of the class are so numerous that joinder is impracticable.

16           40. Questions of law and fact common to the members of the plaintiff class predominate  
17 the legal and factual issues in this case. These common questions include:

18                   a. whether Proposition 209 is unconstitutional under the Equal Protection  
19 Clause of the Fourteenth Amendment to the United States Constitution and thus invalid in its  
20 entirety;

21                   b. whether, under the Supremacy Clause, article VI, clause 2 of the United  
22 States Constitution, the provisions of Proposition 209 are preempted by federal law and thus  
23 invalid in their entirety.

24           41. The claims of the named plaintiffs are typical of the claims of members of the class.

25           42. The named plaintiffs will fairly and adequately protect the interests of the class.  
26 The named plaintiffs have no interest which is now or may be potentially antagonistic to the  
27 interests of the class. The attorneys representing the plaintiffs are experienced civil rights  
28 attorneys and are considered able practitioners in federal constitutional and statutory adjudications.

1           43. Defendants have threatened to act and will continue to act on grounds generally  
2 applicable to the class, thereby making final injunctive and declaratory relief appropriate to the  
3 class as a whole.

4  
5 **Defendant Class Allegations**

6           44. Plaintiffs seek certification of a class of defendants pursuant to F. R. Civ. P.  
7 23(b)(1)(b) & 23(b)(2) to include all state officials and local governmental entities that (a)  
8 administer or may in future administer race- or gender- conscious programs designed to remedy  
9 discrimination or (b) seek to enforce Proposition 209's prohibition of "preferential treatment"  
10 based on "race, sex, color, ethnicity or national origin" in employment, education or contracting  
11 programs operated by the State of California, any state or municipal agency, or any other political  
12 subdivision or governmental instrumentality in the State of California.

13           45. The named Defendant state officials are persons who supervise and control the  
14 activities of various state instrumentalities and are under a constitutional duty to abolish any race-  
15 and gender- conscious programs that conflict with Proposition 209.

16           46. The named cities and counties have in place programs jeopardized by Proposition  
17 209, and are under a constitutional duty to abide by the limitations of Proposition 209 by  
18 abolishing those programs.

19           47. Defendants are so numerous that joinder is impracticable. Upon information and  
20 belief, the number of defendants is over one thousand.

21           48. The defenses of the representative parties are typical of the defenses of the class.

22           49. On information and belief, plaintiffs allege that the named defendants will fairly  
23 and adequately protect the interests of the class. Defendants have no interest which is now or may  
24 be potentially antagonistic to the interests of the class and have an interest in retaining attorneys  
25 with sufficient experience and ability in federal constitutional and statutory adjudications to  
26 represent the interests of a defendant class.



- 1 (e) Nothing in this section shall be interpreted as prohibiting action which must be  
2 taken to establish or maintain eligibility for any federal program, where ineligibility  
3 would result in a loss of federal funds to the state.
- 4 (f) For purposes of this section, "state" shall include, but not necessarily be limited  
5 to, the state itself, any city, county, city and county, public university system,  
6 including the University of California, community college district, school district,  
7 special district, or any other political subdivision or government instrumentality of  
8 or within the state.
- 9 (g) The remedies available for violations of this section shall be the same, regardless  
10 of the injured party's race, sex, color, ethnicity, or national origin, as are  
11 otherwise available for violations of then-existing California antidiscrimination law.
- 12 (h) This section shall be self-executing. If any part or parts of this section are found  
13 to be in conflict with federal law or the United States Constitution, the section shall  
14 be implemented to the maximum extent that federal law and the United States  
15 Constitution permit. Any provision held invalid shall be severable from the  
16 remaining portions of this section.

17 55. While Proposition 209 purports to ban discrimination and "preferential treatment,"  
18 discrimination against women and minorities is already prohibited by existing federal and state  
19 laws. The only real impact of Proposition 209 is, accordingly, to eliminate affirmative action  
20 programs designed to redress discrimination and enhance gender, racial, and ethnic integration.

21 56. Though repeatedly challenged to do so, supporters of 209 have failed to identify  
22 anything that the initiative would ban -- other than race-, gender-, and ethnicity- conscious  
23 affirmative action programs -- that is not already illegal. As the neutral and independent  
24 California Legislative Analyst's Office ("LAO") concluded, after an exhaustive 18 month study  
25 of Proposition 209 and similar proposals: "The programs that would or could be affected by the  
26 proposition were commonly referred to as 'affirmative action' programs -- despite the fact that  
27 the measure itself does not contain the phrase 'affirmative action.'"

28 57. A report by the Legislative Analyst's Office describes affirmative action programs  
as "programs intended to increase the opportunities for various groups -- including women and  
racial and ethnic minority groups." Proposition 209 would eliminate a broad range of these  
programs, many of which have been in place for years. On information and belief, Plaintiffs  
allege that examples of affirmative action programs that may be eliminated by Proposition 209  
include the following:

- 1 ● Scholarship, tutoring, and outreach programs at colleges and universities targeted toward  
minority or women students.
- 2 ● Voluntary efforts by school districts to integrate their schools, by considering race,  
3 ethnicity, or gender as a factor for admissions in "magnet schools."
- 4 ● State and municipal contracting programs, requiring good-faith efforts by private  
5 companies to meet goals for women's and minorities' participation.
- 6 ● Goals and timetables aimed at encouraging the hiring and promotion of women and  
minorities for state and local government jobs.

7           58. Proposition 209 does not eliminate all "preferential treatment" in public education,  
8 contracting or employment, but only that which takes into account race, ethnicity, and gender.  
9 On information and belief, Plaintiffs allege that other forms of preferences, especially those which  
10 work to the disadvantage of minorities and women, would remain untouched. For example,  
11 public universities could still grant preferential treatment to some applicants over others based on  
12 whether their parents are alumni or have "connections" to high level university officials.  
13 Applicants for government contracts, public jobs, or admission at state universities could still be  
14 favored on the basis of veteran's status, (e.g., Cal. Education Code § 66202(b)(1); Cal. Govt.  
15 Code § 18973), even though women are obviously much less likely to benefit from this preference  
16 than men. Informal preferences that favor applicants based on factors other than "merit,"  
17 including both informal social networks and other mechanisms allowing the "by-pass" of formal  
18 selection processes would also remain intact. Minorities and women are often excluded from such  
19 networks, particularly in the area of public contracting, severely diminishing their opportunities  
20 to compete on an equal basis. Nor would Proposition 209 have any effect on state preferences  
21 for contractors based on the size of their workforce (Cal. Govt. Code § 4535.2(a)), or the length  
22 of time that they have owned their businesses. These preferences also disadvantage minority and  
23 women owned enterprises which, because of historic discrimination, are less likely to survive such  
24 exclusionary tests. In short, non-merit based preferences in a plethora of circumstances would  
25 stay legal. By comparison, constitutionally permissible distinctions based on race and gender are  
26 outlawed, even though necessary to remedy past and present discrimination against women and  
27 minorities.

**APPROPRIATENESS OF EQUITABLE RELIEF**

1  
2 59. Plaintiffs do not have an adequate remedy at law for the injuries alleged herein.  
3 Implementation of Proposition 209 would violate plaintiffs' constitutional right to equal protection  
4 of the laws guaranteed by the Fourteenth Amendment. By depriving women and minorities of  
5 their ability to protect their interests through the normal political process, Proposition 209  
6 constitutes a partial disenfranchisement of these constitutionally protected groups. The  
7 implementation of Proposition 209 would also cause sweeping and immeasurable harm to plaintiffs  
8 by the elimination of countless state and local affirmative action programs, affecting thousands  
9 of individuals throughout California, for which remedies at law are inadequate. Accordingly,  
10 preliminary and permanent injunctive relief are necessary to protect plaintiffs' rights.

11 60. Plaintiffs are also entitled to declaratory relief with respect to the constitutionality  
12 of Proposition 209. Such relief is necessary in that an actual and substantial controversy exists  
13 between plaintiffs, who contend that Proposition 209 is unconstitutional, and defendants, who deny  
14 such contention. Without such a declaration, plaintiffs will be unable to order their conduct due  
15 to uncertainty about their legal rights with respect to the availability of the benefits of race- and  
16 gender-conscious remedial programs.

17 **FIRST CAUSE OF ACTION**

18 (Equal Protection)

19 61. Plaintiffs reallege Paragraphs 1 through 60, and incorporate them by this reference  
20 as if fully set forth herein.

21 62. The 14th Amendment to the United States Constitution prohibits states from  
22 restructuring their political processes in such a way as to place a special burden on the ability of  
23 women or racial or ethnic minorities from participating in the political process in a reliable and  
24 meaningful manner, or that place special burdens on the ability of such minority groups or women  
25 to achieve beneficial legislation.

26 63. Plaintiff is informed and believes and thereon alleges that Proposition 209 prohibits  
27 all state and local legislative, executive and administrative bodies from entering into voluntary,  
28 race-conscious affirmative action programs designed to promote equal opportunity for minorities

1 and women and to redress past discrimination against minorities and women, in education,  
2 employment, and contracting. Such affirmative action programs clearly inure to the benefit of  
3 women and minorities.

4 64. By banning such programs by constitutional amendment, Proposition 209 singles  
5 out race and gender issues for special, adverse treatment and removes the race and gender issue  
6 of Affirmative action from normal political processes. By withdrawing from state and local  
7 officials and the state legislature, the authority to enact or implement race- and gender-conscious  
8 Affirmative action programs, which are of special importance to racial minorities and women,  
9 Proposition 209 impairs the ability of women and minorities to achieve beneficial legislation and  
10 to participate in normal political processes relative to other groups.

11 65. Proposition 209 thereby creates invidious classifications based on race and gender.  
12 There are no compelling or important state interests served by such classifications, and the  
13 classifications created are not necessary or narrowly tailored to accomplish any legitimate state  
14 purposes.

15 66. Proposition 209 therefore denies racial and ethnic minorities and women the equal  
16 protection of the laws guaranteed by the 14th Amendment.

17 67. Plaintiffs are entitled to a declaration that Proposition 209 is unconstitutional on its  
18 face, to an order temporarily and permanently enjoining its enforcement, and to their costs of suit  
19 and reasonable attorneys fees incurred herein.

## 20 SECOND CAUSE OF ACTION

### 21 (Supremacy Clause)

22 68. Plaintiffs reallege Paragraphs 1 through 60, and incorporate them by this  
23 reference as if fully set forth herein.

24 69. The Supremacy Clause of the United States Constitution, article VI, clause 2,  
25 provides in pertinent part that "[t]his constitution, and the laws of the United States which  
26 shall be made in pursuance thereof . . . shall be the supreme law of the land." Congress has  
27 established a program of anti-discrimination legislation under Titles VI and VII of the Civil  
28 Rights Act of 1964 and Title IX of the Educational Amendments of 1972, which cover public

1 employment, contracting and education. These provisions supplement the equal protection  
2 clause of the fourteenth amendment. One of Congress' goals is to encourage voluntary  
3 compliance with the federal civil rights laws. Federal policy also favors voluntary compliance  
4 with constitutional obligations under the 14th amendment. Affirmative action is an essential  
5 component of voluntary compliance, because it is necessary to overcome the effects of past  
6 practices that have perpetuated segregative patterns.

7 70. Congress also intended that public entities have wide discretion -- including the  
8 discretion to implement affirmative action programs that comport with constitutional  
9 requirements -- in order to accomplish compliance with the law and to avoid or resolve  
10 disputes under the laws without litigation.

11 71. Proposition 209 would forbid any state or local entity from adopting affirmative  
12 action programs on the basis of race or gender, even if determined that it was necessary to  
13 further the goal of federal legislation or the equal protection clause to eliminate the effects of  
14 discrimination by governmental agencies, or to avoid a costly and time-consuming litigation  
15 where the state entity determines that plaintiff(s) have a colorable claim under the federal  
16 statutes or the constitution.

17 72. Proposition 209 conflicts with the federal policy embodied in Titles VI and VII  
18 of the Civil Rights Act of 1964, Title IX of the Educational Amendments of 1972, and the  
19 equal protection clause of the 14th amendment by forbidding public entities from voluntarily  
20 implementing affirmative action programs.

21 73. Plaintiffs are therefore entitled to a declaration that Proposition 209 is  
22 unconstitutional on its face and to an order temporarily and permanently enjoining its  
23 enforcement.

### 24 THIRD CAUSE OF ACTION

25 (Violation of Civil Rights - 42 U.S.C. § 1983)

26 74. Plaintiffs reallege Paragraphs 1 through 73, and incorporate them by this  
27 reference as if fully set forth herein.



1           4.     That, after hearing, this court issue a Preliminary Injunction against  
2 defendants enjoining them from implementing and enforcing all sections of Proposition  
3 209 pending trial.

4           5.     That this court issue a Judgment permanently and forever enjoining  
5 defendants from implementing and enforcing all sections of Proposition 209.

6           6.     That this court award attorneys fees and costs incurred in this action under  
7 42 U.S. § 1988.

8           7.     That this court grant such other and further relief as may be just and proper.

9 Dated: November 6, 1996

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THEODORE HSIEN WANG  
WILLIAM C. McNEILL, III  
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12 THE UNITED STATES DISTRICT COURT  
13 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
14

15 COALITION FOR ECONOMIC EQUITY;  
16 CALIFORNIA NAACP; SAN FRANCISCO NAACP;  
CALIFORNIA LABOR FEDERATION, AFL-CIO;  
17 COUNCIL OF ASIAN AMERICAN BUSINESS  
ASSOCIATIONS, CALIFORNIA; CHINESE  
18 AMERICAN CITIZENS' ALLIANCE; WOMEN  
CONSTRUCTION BUSINESS OWNERS AND  
19 EXECUTIVES, CALIFORNIA CHAPTER; UNITED  
MINORITY BUSINESS ENTREPRENEURS; CHINESE  
20 FOR AFFIRMATIVE ACTION; BLACK ADVOCATES  
IN STATE SERVICE; ASIAN PACIFIC AMERICAN  
21 LABOR ALLIANCE; LA VOZ CHICANA; BLACK  
CHAMBER OF COMMERCE OF CALIFORNIA;  
22 MICHELLE BENNETT; NANCY BURNS; FLOYD  
CHAVEZ; CHRISTOPHER CLAY; DANA  
23 CUNNINGHAM through her next friend DIANA  
GRONERT; IRAN CELESTE DAVILA; SHEVADA  
24 DOVE through her next friend MELODIE DOVE;  
JESSICA LOPEZ; VIRGINIA MOSQUEDA;  
25 SALVADOR OCHOA; CLIFFORD TONG; and all  
those similarly situated,

26 Plaintiffs,

27 v.

28 PETE WILSON, GOVERNOR OF THE STATE OF  
CALIFORNIA, IN HIS OFFICIAL CAPACITY;  
DANIEL E. LUNGREN, ATTORNEY GENERAL FOR

No. \_\_\_\_\_

NOTICE OF RELATED CASE

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THE STATE OF CALIFORNIA, IN HIS OFFICIAL )  
CAPACITY; JOANNE CORDAY KOZBERG, )  
SECRETARY OF STATE AND CONSUMER )  
SERVICES AGENCY AND CABINET MEMBER, IN )  
HER OFFICIAL CAPACITY; DELAINE EASTON, )  
SUPERINTENDENT OF PUBLIC INSTRUCTION, IN )  
HER OFFICIAL CAPACITY; JAMES H. GOMEZ, )  
DIRECTOR, CALIFORNIA DEPARTMENT OF )  
CORRECTIONS, IN HIS OFFICIAL CAPACITY; THE )  
CITY AND COUNTY OF SAN FRANCISCO; THE )  
COUNTY OF SAN DIEGO; THE COUNTY OF )  
CONTRA COSTA; THE COUNTY OF MARIN; THE )  
CITY OF PASADENA; and all those similarly situated; )

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## INTRODUCTION

Plaintiffs in the above-styled action file this Notice of Related Case pursuant to Rule 3-12 of the Civil Local Rules for the Northern District of California ("Rule 3-12").

Plaintiffs respectfully suggest that the present action is related to the action pending in this Court styled as *F.W. SPENCER & SON, INC., a California corporation, v. CITY AND COUNTY OF SAN FRANCISCO, ET AL.*, No. C-95-4242 TEH (hereinafter "*Spencer*"), as the two cases present substantially overlapping legal and factual issues. All requirements of Local Rule 3-12 are met, and relation would conserve valuable judicial resources and promote efficient determination of this action.

### I. DESCRIPTIONS OF THE TWO CASES.

Following are brief descriptions of the relevant parties, facts, and legal claims in the present action and the *Spencer* case.

#### A. The Present Action.

The present action is a challenge to Proposition 209, a ballot initiative approved by California voters on November 5, 1996, as an amendment to the California Constitution. Proposition 209 threatens to invalidate a wide range of race- and gender-conscious programs throughout the state.

Plaintiffs are (1) individuals who currently benefit and will in the future benefit from programs jeopardized by Proposition 209; (2) organizations representing individuals and businesses which currently benefit and will in the future benefit from programs jeopardized by Proposition 209; and (3) a class of similarly situated individuals, organizations, and businesses. The Coalition for Economic Equity, a coalition of associations of minority- and woman-owned businesses, is a plaintiff, both individually and as a representative of the plaintiff class in the present action; it is also a defendant pursuing cross-claims and counterclaims in the *Spencer* case.

Defendants are (1) state officials who supervise and control the activities of various state agencies, and who may enforce Proposition 209; (2) local governmental entities which currently operate programs threatened by Proposition 209; and (3) a defendant class consisting

1 of all state officials and local governmental entities impacted by Proposition 209. The City  
2 and County of San Francisco is a defendant, both individually and as a representative of the  
3 defendant class in this action; it is also a defendant in the *Spencer* case.

4 The present action seeks declaratory and injunctive relief on grounds that Proposition  
5 209 violates several provisions of the Constitution and laws of the United States. Plaintiffs  
6 allege that Proposition 209 violates:

- 7 (1) the Equal Protection Clause of the Fourteenth Amendment to the United States  
8 Constitution, by imposing a unique procedural barrier to the enactment of  
9 legislation that inures primarily to the benefit of minorities and women; and
- 10 (2) the Supremacy Clause, Article VI, clause 2, of the United States Constitution,  
11 by interfering with the federal policy promoting use of certain race- and gender-  
12 conscious measures as a means of ensuring compliance with federal  
13 antidiscrimination statutes.

14 Plaintiffs seek a temporary restraining order prohibiting certain named defendants from  
15 taking actions to enforce Proposition 209.

#### 16 B. The *Spencer* Case.

17 The *Spencer* case is a challenge to the City of San Francisco's Minority and Women's  
18 Business Enterprise Ordinance ("MWBE Ordinance"), brought under the Constitutions of the  
19 United States and the State of California. Proposition 209 jeopardizes this ordinance, and is  
20 an essential component of plaintiff's challenge under the California Constitution. Pending  
21 motions and claims in the *Spencer* case attack the constitutionality of Proposition 209 on  
22 grounds similar to those raised in the present action.

23 Plaintiff in *Spencer* is a construction contractor owned by a white male. Defendants  
24 are the City and County of San Francisco ("the City") and the Coalition for Economic Equity,  
25 which intervened as a defendant.

26 Plaintiff in *Spencer* has raised claims under the Equal Protection clause of the  
27 Fourteenth Amendment to the United States Constitution and under the California Constitution.  
28 Analysis of both of these claims will require consideration of the operation of the MWBE  
Ordinance, the evidence of past discrimination supporting the MWBE Ordinance, and the legal  
significance of that evidence.

1 In addition, the Coalition for Economic Equity has filed two other claims with regard  
2 to the constitutionality of Proposition 209: a cross-claim for declaratory and injunctive relief  
3 against the City and County of San Francisco and a counterclaim for declaratory relief against  
4 plaintiff Spencer. Both of these actions contain, *inter alia*, allegations that Proposition 209  
5 violates:

- 6 (1) the Equal Protection Clause of the Fourteenth Amendment to the United States  
7 Constitution, by imposing unique procedural barrier to the enactment of  
8 legislation that inures primarily to the benefit of minorities and women; and
- 9 (2) the Supremacy Clause, Article VI, clause 2, of the United States Constitution,  
10 by interfering with the federal policy promoting use of certain race- and gender-  
11 conscious measures as a means of ensuring compliance with federal  
12 antidiscrimination statutes.

13 These claims are of course identical legal claims to those raised in the present action.

14 Proposition 209 is thus squarely at issue in the *Spencer* case. Indeed, even had the  
15 Coalition for Economic Equity not raised the above-described claims, Proposition 209 would  
16 still be at issue, as plaintiff Spencer's claims based on the California Constitution necessarily  
17 invoke Proposition 209; the Coalition for Economic Equity, and certainly the City, would raise  
18 similar legal arguments challenging the constitutionality of Proposition 209 in the process of  
19 defending against Spencer's claim.

20 *Spencer* was related to two previous cases, *Associated General Contractors v. City and*  
21 *County of San Francisco, et al.*, 619 F. Supp. 334 (N.D. Cal. 1984), rev'd in part, 813 F.2d  
22 922 (9th Cir. 1987), *petition dismissed*, 493 U.S. 928 (1989); and *Associated General*  
23 *Contractors of California v. City and County of San Francisco*, 748 F. Supp. 1443 (N.D. Cal.  
24 1990), *aff'd sub nom.*, *Associated General Contractors of California v. Coalition for Economic*  
25 *Equity*, 950 F.2d 1401 (9th Cir. 1991). As discussed below, these cases raised legal and  
26 factual issues relevant to resolution of the present action, as does *Spencer* itself.

27 **II. THIS ACTION AND SPENCER ARE RELATED BECAUSE THIS ACTION**  
28 **FULFILLS ALL OF THE REQUIREMENTS OF LOCAL RULE 3-12 OF THE**  
**LOCAL RULES OF THE NORTHERN DISTRICT OF CALIFORNIA.**

Rule 3-12 requires a party who files an action in this district to file a Notice of Related  
Case if that party knows or learns that the action is related to an action that has been filed

1 previously and which is currently pending in this district.<sup>1</sup> This action is related within the

2

3 <sup>1</sup> Rule 3-12 of the Local Rules provides as follows:

4 **RULE 3-12. NOTICE OF RELATED CASE**

5

6 (a) **Requirement to File Notice.** Whenever a party who files an action in or removes  
7 an action to this district, knows or learns that the action is related to another action  
8 which is currently pending in this district or which was filed and dismissed under the  
9 circumstances which invoke Civil L.R. 3-3(c), in the later filed action in which the  
10 party is appearing, the party shall promptly file and serve on all known parties to  
11 each related case a Notice of Related Case.

9

10 (b) **Definition of Related Case.** Any action is related to another when both concern:

10

- 11 (1) Some of the same parties and is based on the same or similar claims; or
- 12 (2) Some of the same property, transactions or events; or
- 13 (3) The same facts and the same questions of law; or
- 14 (4) When both actions appear likely to involve duplication of labor if heard  
15 by different judges, or might create conflicts and unnecessary expense  
16 if conducted by different judges.

16

17 (c) **Response to Notice.** A Notice of Related Case shall contain:

17

- 18 (1) The title and case number of each related case;
- 19 (2) A brief statement of the relationship of the actions according to the  
20 criteria set forth in Civil L.R. 3-3(b); and
- 21 (3) A statement by the party with respect to whether assignment of a single  
22 judge is or is not likely to conserve judicial resources and promote an  
23 efficient determination of the action.

23

24 (d) **Response to Notice.** No later than 10 days after service of a Notice of Related  
25 Case, any party may serve and file a statement to support or oppose the notice. Such  
26 statement will be specifically address the issues in Civil L.R. 3-12 (b) and (c).

25

26 (e) **Related Case Order.** After the time for filing support or opposition to the  
27 Notice of Related Case has passed, the clerk of the Court shall submit a copy of the  
28 notice and related responses to the judge assigned to the earliest filed case. That  
judge shall decide if the cases are or are not related and notify the clerk of his or her  
decision. If that judge decides that the cases are not related, no change in case  
assignment shall be made. If that judge decides that the cases are related, pursuant to

1 meaning of Rule 3-12 to the *Spencer* case because it fulfills all of the requirements set forth in  
2 that rule for related cases.

3       **A.       RELATION IS APPROPRIATE UNDER LOCAL RULE 3-12(b)(1), AS**  
4       **BOTH ACTIONS CONCERN SOME OF THE SAME PARTIES AND THE**  
5       **SAME OR SIMILAR CLAIMS.**

6       Local Rule 3-12(b)(1) allows relation of cases when both cases concern "[s]ome of the  
7 same parties and are based on the same or similar claims." That test is clearly satisfied here,  
8 where the City and County of San Francisco and the Coalition for Economic Equity are parties  
9 to both actions. Moreover, it is likely that the State Attorney General will defend the  
10 constitutionality of Proposition 209 in both suits. Thus the partial identity of parties required  
11 for relation under Local Rule 3-12 exists here.

12       In addition, both cases involve similar legal claims, as set forth in Section I, *ante*. The  
13 issue of Proposition 209's constitutionality will undoubtedly be litigated in the *Spencer* case --  
14 whether as part of defense to a claim brought by plaintiff *Spencer* or as the substance of the  
15 Coalition for Economic Equity's cross- and counter-claims. In either event, the Court in  
16 *Spencer* will consider the legal theories set forth in Section I.B, *ante*, which are of course  
17 identical to those in the present action.

18       Even in the hard-to-envision scenario in which the constitutionality of Proposition 209  
19 is not directly litigated in the *Spencer* case, there would still be overlapping legal issues.  
20 *Spencer*'s Fourteenth Amendment equal protection claim requires a determination of the legal  
21 significance of the evidence of past discrimination underpinning the City of San Francisco's  
22 MWBE Ordinance; this legal determination will likewise be made as part of analysis of the  
23 Supremacy Clause claim in the present action.

24       In addition, the Motions for Temporary Restraining Orders pending in both cases raise  
25 additional overlapping legal and factual issues. In both cases, these motions will require a  
26 determination of the likelihood of success on the merits of the constitutional claims regarding  
27 Proposition 209, and of the degree of irreparable injury suffered by those whose constitutional

28       the Assignment Plan, the clerk shall assign all related later filed cases to that judge  
and shall notify the parties and the affected judges accordingly.

1 rights would allegedly be violated by enforcement of Proposition 209. Succeeding Preliminary  
2 Injunction motions will raise similar claims and issues. It would clearly inconsistent with the  
3 purposes of the related case rule to have two judges holding simultaneous T.R.O. and/or  
4 Preliminary Injunction hearings requiring analysis of virtually identical claims. As parties,  
5 legal claims, and factual issues are substantially overlapping between the two cases, it is  
6 beyond cavil that relation under Local Rule 3-12(b)(1) is appropriate.

7 **B. RELATION IS APPROPRIATE UNDER LOCAL RULE 3-12(b)(2), AS**  
8 **THE SAME TRANSACTION AND EVENT ARE AT ISSUE IN BOTH**  
9 **CASES.**

10 Local Rule 3-12(b)(2) allows relation of cases when the both cases concern "[s]ome of  
11 the same property, transactions, or events." Both the *Spencer* case and the present action  
12 involve the same transaction and event, in that both involve the effect of the passage of  
13 Proposition 209 on San Francisco's MWBE Ordinance, the operation of that ordinance, and  
14 the factual record of past discrimination underpinning the ordinance. Both cases concern these  
15 factual circumstances, making relation proper under Local Rule 3-12(b)(2).

16 **C. RELATION IS APPROPRIATE UNDER LOCAL RULE 3-12(b)(3), AS**  
17 **BOTH ACTIONS CONCERN THE SAME FACTS AND THE SAME**  
18 **QUESTIONS OF LAW.**

19 Local Rule 3-12(b)(3) allows relation of cases when the both cases concern "[t]he same  
20 facts and the same questions of law." As described above, both cases involve the same  
21 underlying operative facts -- the nature and operation of San Francisco's MWBE program --  
22 and the same questions of law regarding the effect of Proposition 209 on The City of San  
23 Francisco's program and others like it. At least two identical legal claims are presented in the  
24 two cases, with several overlapping legal issues collateral to these claims. Relation is thus  
25 proper under Local Rule 3-12(b)(3).

26 **D. RELATION IS APPROPRIATE UNDER LOCAL RULE 3-12(b)(4), AS**  
27 **SEPARATE ACTIONS WOULD INVOLVE DUPLICATION OF LABOR.**

28 Due to the overlapping legal and factual issues described above, consideration of these  
two cases by separate judges would require substantial duplication of labor and holds the

1 potential for conflicting legal rulings on identical claims. Relation is thus proper under Local  
2 Rule 3-12(b)(4).

3 **E. BECAUSE THE SAME FACTS AND THE SAME QUESTIONS OF LAW**  
4 **ARE PRESENTED IN BOTH CASES, THE MOST EFFICIENT MEANS**  
5 **OF DECIDING THESE CASES WOULD BE THROUGH THE**  
6 **ASSIGNMENT OF THE CASES TO THE JUDGE IN *SPENCER*.**

7 As noted above, at least two Applications for Temporary Restraining Orders are  
8 pending before this Court which involve the impact of Proposition 209 on San Francisco's  
9 MWBE Ordinance and program. Having these applications heard and considered by two  
10 different judges would be inefficient and would waste valuable judicial resources. If two or  
11 more<sup>2</sup> judges were to consider the same issues and arguments as raised in these cases, there  
12 would certainly be the opportunity for conflicting judicial determinations with regard to each  
13 of these hearings. It is quite difficult to imagine a more prototypical situation for a related  
14 case where there are truly concerns about the saving of judicial resources and efficiency.

15 The Judge in the *Spencer* case is quite familiar with the City and County's MWBE  
16 ordinance because he has presided not only over the preliminary stages of the *Spencer* case,  
17 but over two earlier constitutional challenges to this ordinance: *Associated General*  
18 *Contractors v. City and County of San Francisco, et al.*, 619 F. Supp. 334 (N.D. Cal. 1984),  
19 rev'd in part, 813 F.2d 922 (9th Cir. 1987), *petition dismissed*, 493 U.S. 928 (1989); and  
20 *Associated General Contractors of California v. City and County of San Francisco*, 748 F.  
21 Supp. 1443 (N.D. Cal. 1990), *aff'd sub nom.*, *Associated General Contractors of California*  
22 *v. Coalition for Economic Equity*, 950 F.2d 1401 (9th Cir. 1991).

23 The judge's familiarity with San Francisco's program is especially pertinent in these  
24 two suits because the City of San Francisco's situation provides the prototypical context for

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25 <sup>2</sup> Counsel for NAACP et al. is informed that a minority prime contractor who has been  
26 awarded contracts pursuant to the City and County's M/WBE Ordinance will be filing  
27 an action concerning the impact of Proposition 209 on the City and County's MWBE  
28 Ordinance and is also going to seek a temporary restraining order in this district,  
thereby setting up the possibility of *three* requests for pretrial injunctive relief  
involving the same factual and legal considerations at approximately the same time --  
perhaps before three different judges if the cases are not related.

1 analysis of the Supremacy Clause claim in the present action. This claim will require legal  
2 and factual determinations as to the significance of evidence of past discrimination for a city  
3 required to comply with Proposition 209. The judge's familiarity with the legal and factual  
4 issues surrounding San Francisco's MWBE Ordinance will prove invaluable in analyzing the  
5 Supremacy Clause claim in the present action.

6 **III. THERE WOULD BE SUBSTANTIAL SAVING OF VALUABLE JUDICIAL**  
7 **RESOURCES AND A MORE EFFICIENT DETERMINATION OF THESE**  
8 **ACTIONS IF THE CASES WERE RELATED.**

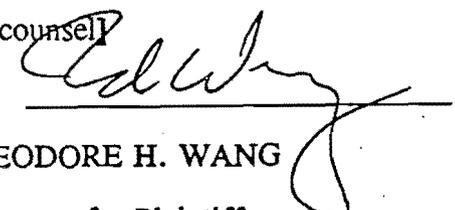
9 As contemplated by Local Rule 3-12(c)(3), assignment of the present action to the  
10 *Spencer* judge would conserve judicial resources and promote efficient determination of the  
11 action. As discussed at length above, there is substantial overlap of the legal and factual  
12 issues in the two cases, with identical legal claims and determinations to be made. Motions  
13 for temporary restraining orders are pending in both cases, and adjudication of these motions  
14 will require determination of identical legal issues and overlapping factual determinations.

15 In addition, as noted above, the district court judge in the *Spencer* case has similar  
16 challenges concerning the effect of Proposition 209 pending in the *Spencer* case and is familiar  
17 with the defendant City of San Francisco's ordinance. These factors combine to create the  
18 potential -- indeed the certainty -- of wasted of judicial resources if separate judges hear these  
19 two cases. Thus, not a single quibble can be contemplated that relation of these cases will  
20 promote increased efficiency and conservation if these actions are related.

21 Dated: November \_\_, 1996

Respectfully submitted,

[co-counsel]

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THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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;  
WOMEN CONSTRUCTION BUSINESS OWNERS  
AND EXECUTIVES, CALIFORNIA CHAPTER;  
UNITED MINORITY BUSINESS  
ENTREPRENEURS; CHINESE FOR  
AFFIRMATIVE ACTION; BLACK ADVOCATES  
IN STATE SERVICE; ASIAN PACIFIC AMERICAN  
LABOR ALLIANCE; LA VOZ CHICANA; BLACK  
CHAMBER OF COMMERCE OF CALIFORNIA;  
MICHELLE BENNETT; NANCY BURNS; FLOYD  
CHAVEZ; CHRISTOPHER CLAY; DANA  
CUNNINGHAM through his next friend DIANA  
GRONERT; IRAN CELESTE DAVILA; SHEVADA  
DOVE through her next friend MELODIE DOVE;  
JESSICA LOPEZ; VIRGINIA MOSQUEDA;  
SALVADOR OCHOA; CLIFFORD TONG; and all  
those similarly situated,

Case no. \_\_\_\_\_  
MEMORANDUM OF POINTS  
AND AUTHORITIES IN  
SUPPORT OF EX PARTE  
APPLICATION FOR  
TEMPORARY RESTRAINING  
ORDER AND ORDER TO  
SHOW CAUSE RE  
PRELIMINARY INJUNCTION

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**Plaintiffs,**

**v.**

**PETE WILSON, GOVERNOR OF THE STATE OF CALIFORNIA, IN HIS OFFICIAL CAPACITY;  
DANIEL E. LUNGREN, ATTORNEY GENERAL FOR THE STATE OF CALIFORNIA, IN HIS OFFICIAL CAPACITY; JOANNE CORDAY KOZBERG, SECRETARY OF STATE AND CONSUMER SERVICES AGENCY AND CABINET MEMBER, IN HER OFFICIAL CAPACITY; DELAINE EASTON, SUPERINTENDENT OF PUBLIC INSTRUCTION, IN HER OFFICIAL CAPACITY; JAMES H. GOMEZ, DIRECTOR, CALIFORNIA DEPARTMENT OF CORRECTIONS, IN HIS OFFICIAL CAPACITY; THE CITY AND COUNTY OF SAN FRANCISCO; THE COUNTY OF SAN DIEGO; THE COUNTY OF CONTRA COSTA; THE COUNTY OF MARIN; THE CITY OF PASADENA; and all those similarly situated;**

**Defendants.**

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26		
27	Wygant v. Jackson Bd. Of Educ., 476 U.S. 267, 106 S. Ct. 1842, 90 L. Ed. 2d 260 (1986) .....	passim
28	Xerox Corp. v. County of Harris, 459 U.S. 145, 103 S. Ct. 523, 4 L. Ed. 2d 23 (1982) .....	57

1	Zurn Constructors Inc. v. B.F. Goodrich, 685 F. Supp. 1172 (D.Kan 1988) .....	67
2		
3	<b>Statutes</b>	
4	U.S. Const. amdt. XIV .....	passim
5	U.S. Const. art. VI, cl. 2' .....	56
6	Title VI of the Civil Rights Act of 1964 .....	passim
7	Title VII of the Civil Rights Act of 1964 .....	passim
8	Title IX of the Educational Amendments of 1972 .....	passim
9	Wash. Rev. Code § 28A.26.010 .....	40
10	29 C.F.R. § 1608.1(c) .....	58
11	34 C.F.R. § 100.3(b) .....	59, 60
12	Cal. Const. art. XVIII .....	65
13	Cal. Educ. Code § 66202(b)(1) .....	9
14	Cal. Gov't Code § 18973 .....	9
15	Cal. Gov't Code § 4535.2(a) .....	10
16		
17	<b>Legislative History</b>	
18	H.R. Rep. No. 914(I) & (II), 88th Cong., 1st Sess. (1964) .....	59
19	S. Rep. No. 92-415, p. 10 (1971) .....	58
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21	<b>Miscellaneous</b>	
22	California Senate Office of Research, <u>Status of Affirmative Action</u> <u>in California</u> (March 1995) .....	passim
23	University of California Office of the President, <u>The Use of</u> <u>Socio-Economic Status in Place of Ethnicity in Undergraduate Admissions</u> (May 1995) .....	29
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1 **I. INTRODUCTION**

2 The United States Supreme Court has acknowledged as recently as last year that "[t]he  
3 unhappy persistence of both the practice and lingering effects of racial discrimination in this  
4 country is an unfortunate reality, and government is not disqualified from acting in response  
5 to it." Adarand Contractors Inc. v. Pena, 115 S. Ct. 2097, 2101 (1995). Proposition 209 so  
6 disqualifies government. By abolishing the power and authority of state and local government  
7 in California to tightly and voluntarily fashion constitutionally-permissible race and gender  
8 conscious programs to redress discrimination in the areas of public education, employment  
9 and contracting, Proposition 209 treats the unfinished business of rooting out discrimination  
10 as if it were none of government's. It impermissibly "places special burdens on racial  
11 minorities within the governmental process," cutting off their ability to seek assistance and  
12 protection from the government on the same terms as everyone else. Washington v. Seattle  
13 Sch. Dist., No. 1, 458 U.S. 457, 470 (1982) (quoting Hunter v. Erickson, 393 U.S. 385, 391  
14 (1969)). Accordingly, under the Court's holdings in Seattle, Hunter, and, most recently,  
15 Romer v. Evans, Proposition 209 is "a denial of equal protection of the laws in the most  
16 literal sense." 116 S. Ct. 1620, 1628 (1996).

17 No statewide measure in American history has ever come close in scope or effect to  
18 Proposition 209's chokehold on state and local government. Absent a judicial proceeding and  
19 court order, no matter the prevalence or virulence of discrimination in denying minority  
20 children and girls equal educational opportunity; minorities and women an equal shot at a  
21 job, promotion or contract; or minorities and young women an equal break at attending  
22 colleges and graduate schools, California governments are absolutely barred, now and forever,  
23 from effectuating race and gender conscious programs meeting every federal constitutional  
24 test. Even more, if Proposition 209 becomes state law, state and local government must move  
25 apace to dismantle hundreds of effective programs that have at least made a dent in  
26 longstanding discriminatory practices and afforded minorities and women their first chance  
27 at equal opportunity.

28 While Proposition 209 is breathtaking in its sweep, there is nothing new in its  
methodology. Albeit more ambitiously, Proposition 209 disenfranchises minorities and women

1 from reliable and effective participation in our political processes in exactly the same manner  
2 as other measures consistently struck down by the Court. While other groups may continue  
3 to advance their interests in securing preferential legislation at all levels and before all bodies  
4 of state and local government, racial minorities and women can only do so by first attaining  
5 a popular majority and amending the California Constitution. Imposition of such a special  
6 burden offends core values of our constitutional democracy. As the Court stated in  
7 Washington v. Seattle Sch. Dist., No. 1, a case a fortiori dispositive of this one, in invalidating  
8 a mini-version of Proposition 209:

9       Certainly, a state requirement that "desegregation or antidiscrimination laws,"  
10       and only such laws be passed by unanimous vote of the legislature would be  
11       constitutionally suspect. It would be equally questionable for a community to  
12       require that laws or ordinances "designed to ameliorate race relations or to  
13       protect racial minorities," be confirmed by popular vote of the electorate as a  
14       whole, while comparable legislation is exempted from similar procedure.

15       458 U.S. 457, 486-87, 102 S. Ct. 3187, 73 L.Ed. 2d 896 (1982) (emphasis added, citations  
16       omitted).

17       This case, then, while surely implicating race and gender-conscious affirmative action  
18       programs, is actually constitutionally about access to the levers of government. In the same  
19       vein as poll taxes and literacy tests, Proposition 209 keeps those levers out of the hands of  
20       disfavored groups.

21       There is also nothing new about the design of Proposition 209. Costumed as a race  
22       and gender neutral measure prohibiting all discrimination, in practical effect, it is anything  
23       but. As the neutral and independent California Legislative Analyst's Office ("LAO")  
24       concluded, after an intensive 18 month examination of Proposition 209 and similar proposals:  
25       "The programs that would or could be affected by the proposition were commonly referred  
26       to as 'affirmative action' programs -- despite the fact that the measure itself does not contain  
27       the phrase 'affirmative action.'" California Legislative Analyst's Office Report (hereinafter  
28       "LAO Report," Exhibit 2). Though repeatedly challenged to come up with a single example  
     of discrimination banned by Proposition 209 not already long ago forbidden by the federal  
     and state constitutions, proponents of the initiative never could do so. Inuring solely to the  
     detriment of minorities and women, Proposition 209's real-life impact is to restrain or undo

1 only race and gender-conscious programs that remediate discrimination and can survive the  
2 highest level of constitutional scrutiny.

3 In this action, plaintiffs are the participants and the intended future participants in  
4 these programs all across California. The following is a sampling of the nature and scope of  
5 constitutionally-permissible programs threatened by Proposition 209:

- 6 • The MESA program, which provides math and science assistance to minority students  
7 in communities throughout the State, and has increased their eligibility for admission  
8 to the University of California. See, e.g., decls. of Michael Aldaco, Dr. Glenn Seaborg,  
9 and Salvador Ochoa.
- 10 • State and municipal contracting programs designed to stamp out discrimination and  
11 its vestiges, by requiring good-faith efforts by private companies to meet goals for  
12 increasing women's and minorities' participation. See, e.g., decls. of Nancy Burns,  
13 Frank Fung, and Aileen C. Hernandez.
- 14 • Financial aid, tutoring, and outreach programs at public colleges, universities, and  
15 graduate schools targeted toward minority or women students. Decls. of Professor Lisa  
16 Alvarez, Iran Celeste Davila, Virginia Mosqueda, and Dr. Jean Peacock.
- 17 • The Ten Schools Program, which provides special assistance to low-performing,  
18 primarily African-American Schools in Los Angeles, to promote parental involvement  
19 and improve the schools' resources. Decl. of Melodie Dove; Exhibit 7.
- 20 • UCLA's modest affirmative action program for admissions which, even now, results  
21 in only 250 African Americans and 761 Latinos in an entering class of 3,974 students,  
22 decl. of Dr. C. Adolfo Bermeo, ¶3; if Proposition 209 is implemented, Latino and  
23 African American enrollment will be cut by more than 50%. Id., ¶5; decls. of  
24 Chancellor Charles Young and Cecelia Conrad; Exhibit 6.
- 25 • Voluntary efforts by police and fire departments to remedy their own past  
26 discrimination by hiring more women and minorities, and thereby ensuring that these  
27 agencies better reflect the communities that they serve. Decl. of Joanne Belknap,  
28 Ph.D.; decl. of Samuel Walker; decl. of Allan Parachini.
- Voluntary efforts by school districts to desegregate their schools, by considering race,  
ethnicity, or gender as a factor for admissions in "magnet schools" or college-  
preparatory programs. See, e.g., decl. of Dana Cunningham; decl. of Paul Cheng.
- Goals and timetables aimed at encouraging the hiring and promotion of women and  
minorities for state and local government jobs. See, e.g., decl. of Michelle Bennett;  
decl. of Jacquelyn E. Giles.
- The Early Academic Outreach (EAOP) program, providing supplemental instruction  
to African American, Latino/Chicano, Native American, and low-income students to  
help prepare them for the SATs and for college. Decl. of Jessica Lopez.

Both as a consequence of the unconstitutional disenfranchisement worked by  
Proposition 209 and the deep personal harm resulting from closure of the programs  
catalogued, the injury here is irreparable. Proposition 209's sweeping ban on race and

1 gender-conscious affirmative action programs would, moreover, impede the congressional  
2 policy of encouraging voluntary efforts to comply with civil rights law. In banning programs  
3 designed to ensure compliance with federal civil rights laws, Proposition 209 stands as a direct  
4 obstacle to the accomplishment and objectives of federal law, and is therefore preempted.

5 As demonstrated by the numerous declarations submitted with plaintiffs' motion, from  
6 experts throughout the Nation and from affirmative action beneficiaries throughout the State,  
7 implementation of Proposition 209 will have an extraordinary destructive impact on women,  
8 minorities, and children. Worse still, its implementation will distort the democratic processes  
9 on which they rely for their protection. The State can demonstrate no legitimate  
10 countervailing interest -- indeed, its only conceivable interest is to end programs that are  
11 themselves tailored to serve compelling interests. A Temporary Restraining Order should  
12 therefore issue against the Governor and Attorney General, immediately restraining them  
13 from any implementation or enforcement of Proposition 209.

## 14 II. SUMMARY OF ARGUMENT

15 Proposition 209 violates both the Equal Protection Clause of the Fourteenth  
16 Amendment and the Supremacy Clause of the United States Constitution -- provisions that  
17 limit state action in order to protect fundamental national policies. First, by restructuring the  
18 state's political process in a nonneutral manner -- one that creates unique procedural hurdles  
19 to the enactment of laws or policies that inure primarily to the benefit of racial minorities and  
20 women -- Proposition 209 violates the Equal Protection Clause. Second, by interfering with  
21 clearly established and well-defined congressional policy encouraging voluntary compliance  
22 by local governments with federal civil rights laws, Proposition 209 violates the Supremacy  
23 Clause. Either ground alone is sufficient for this Court to declare Proposition 209  
24 unconstitutional and to enjoin defendants from attempting to enforce its provisions.

25 A. The Fourteenth Amendment's guarantee of equal protection safeguards the  
26 participation of citizen groups in the democratic process at every level. It prohibits states  
27 from singling out issues of special concern to racial minorities or women, removing those  
28 matters from the ordinary political process and placing them at a more remote and therefore  
less accessible level of government decisionmaking. Washington v. Seattle Sch. Dist. No. 1,

1 458 U.S. 457 (1982) (invalidating state constitutional amendment, adopted by initiative,  
2 removing from local school boards authority to use racial bussing to facilitate school  
3 desegregation); Hunter v. Erickson, 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed. 2d 616 (1969)  
4 (invalidating city charter amendment requiring voter approval of fair housing ordinances); see  
5 Romer v. Evans, -- U.S. --, 116 S.Ct. 1620, 134 L.Ed. 2d 855 (1996) (invalidating state  
6 constitutional amendment withdrawing authority from local governments and state legislature  
7 to enact antidiscrimination laws for gays and lesbians).

8       B. Proposition 209's use of facially neutral language does not insulate it from  
9 constitutional scrutiny. The decisive factor in determining the "racial nature" of a law that  
10 restructures the political process is a real-world assessment of its impact: The critical question  
11 is whether the programs affected by the reallocation of governmental power "at bottom  
12 inure[] primarily to the benefit of the minority, and [are] designed for that purpose." Seattle,  
13 458 U.S. at 472. Here, there can be no doubt that Proposition 209 prohibits affirmative  
14 action programs benefitting minorities and women and uniquely disadvantages those who  
15 benefit from such programs. Politically dominant groups lose nothing by procedural hurdles  
16 that make the adoption of race- and gender- conscious remedial programs more difficult.  
17 Hunter, 393 U.S. at 391.

18       C. While Proposition 209 categorically prohibits state and local governments from  
19 enacting programs narrowly tailored to remedy race or gender-based discrimination, even  
20 where, as here, necessary to eradicate past or ongoing discrimination, it does not limit other  
21 types of "preferential treatment." In public education, for example, preferences can still  
22 constitutionally be granted to alumni children or on the basis of geography; in public  
23 employment, preferences may constitutionally be given to veterans and persons over 40; in  
24 public contracting, favored industries or those with regional political clout may continue to  
25 benefit from preferences. Advocates of all types of special interests may still seek benefits  
26 from government at all levels, from local water districts to the State Legislature. Only  
27 minority groups and women are relegated to the Herculean task of further amending the  
28 State Constitution to advance their interests. Proposition 209 thus impermissibly uses the  
racial nature of a decision to determine the decisionmaking process. Seattle, 458 U.S. at 470.

1 State action of this kind, making it more difficult for racial minorities to achieve legislative  
2 goals in their interest, is "no more permissible than [is] denying [members of a racial minority]  
3 the vote, on an equal basis with others." Id. at 471.

4 D. Proposition 209 serves no compelling government interest and is not narrowly  
5 tailored to accomplish its purported goal of limiting "reverse discrimination." Restricting  
6 normal legislative avenues for advocates of affirmative action is entirely unnecessary to  
7 protect white males from discrimination. Race-based affirmative action programs are now  
8 rigorously limited by the Fourteenth Amendment to those that themselves serve compelling  
9 interests and can survive strict scrutiny. It is manifestly unnecessary to restructure normal  
10 democratic processes to impede the ability of minorities and women to protect themselves -  
11 - doubly so, where many of the program eliminated are necessary to fulfill governments'  
12 constitutional duty to remedy past discrimination against them.

13 E. Local governmental entities throughout California have voluntarily implemented  
14 race and gender-conscious desegregation and affirmative action programs to meet their  
15 obligations under Titles VI and VII of the Civil Rights Act of 1964, Title IX of the  
16 Educational Amendments of 1972 and the Fourteenth Amendment. By prohibiting the  
17 creation and implementation of such programs at all levels of government within the state,  
18 Proposition 209 stands as an insurmountable obstacle to the accomplishment of Congress's  
19 objective of encouraging voluntary compliance with federal civil rights laws. Gade v. Nat'l  
20 Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 112 S.Ct. 2374, 120 L.Ed. 2d 73 (1992). In addition,  
21 Proposition 209 upsets the balance struck by Congress in this area by eliminating the  
22 discretion conferred by federal law upon local public agencies to make their own  
23 determination (subject to constitutional and statutory requirements) whether to adopt race  
24 or gender-conscious remedial programs. Proposition 209's ban on programs that remedy or  
25 prevent violations of federal civil rights laws thus violates the Supremacy Clause.

26 F. The immediate constitutional injury resulting from Proposition 209 requires  
27 immediate equitable relief. By its own terms, and under Article XVIII of the California  
28 Constitution, the measure is "self-executing" and takes effect the day after the election.  
Subsection (h); Cal. Const. art XVIII §6. The unconstitutional disenfranchisement of

1 minorities and women, who are locked out of the political process and prevented from  
2 seeking protective legislation, is presumptively an irreparable injury warranting a TRO.  
3 Compounding this constitutional injury are the manifold harms to thousands of people, arising  
4 from the abolition of a wide variety of programs throughout the State, only a handful of which  
5 can be described in the accompanying declarations.

6 **III. STATEMENT OF FACTS**

7 **A. PROPOSITION 209 BROADLY PROHIBITS RACE AND GENDER-CONSCIOUS**  
8 **AFFIRMATIVE ACTION PROGRAMS TAILORED TO REDRESS**  
9 **DISCRIMINATION**

10 Proposition 209 is an initiative that amends Article I of the California Constitution to  
11 prohibit affirmative action on the basis of race, sex, color, ethnicity, and national origin in  
12 public employment, education, and contracting. This constitutional amendment extends not  
13 only to state agencies, but also to cities, counties, police departments, school districts, public  
14 universities, and all other instrumentalities of state and local government. Proposition 209  
15 states:

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

20 (b) This section shall apply only to action taken after the section's effective  
21 date.

22 (c) Nothing in this section shall be interpreted as prohibiting bona fide  
23 qualifications based on sex which are reasonably necessary to the normal  
24 operation of public employment, public education, or public contracting.

25 (d) Nothing in this section shall be interpreted as invalidating any court order  
26 or consent decree which is in force as of the effective date of this section.

27 (e) Nothing in this section shall be interpreted as prohibiting action which must  
28 be taken to establish or maintain eligibility for any federal program, where  
ineligibility would result in a loss of federal funds to the state.

(f) for purposes of this section, "state" shall include, but not necessarily be  
limited to, the state itself, any city, county, city and county, public university  
system, including the University of California, community college district, school  
district, special district, or any other political subdivision or government  
instrumentality of or within the state.

(g) the remedies available for violations of this section shall be the same,  
regardless of the injured party's race, sex, color, ethnicity, or national origin, as  
are otherwise available for violations of then-existing California  
antidiscrimination law.

1 (h) This section shall be self-executing. If any part or parts of this section are  
2 found to be in conflict with federal law or the United States Constitution, the  
3 section shall be implemented to the maximum extent that federal law and the  
4 United States Constitution permit. Any provision held invalid shall be  
5 severable from the remaining portions of this section.

6 While Proposition 209 purports to ban "discriminat[ion]" and "preferential treatment,"  
7 discrimination against women and minorities is already illegal under existing federal and state  
8 laws. Accordingly, the only real impact of Proposition 209 is to eliminate affirmative action  
9 programs designed to enhance gender, racial, and ethnic integration: "The measure would  
10 eliminate affirmative action programs in the areas of public employment, public education,  
11 and public contracting to the extent these programs involve 'preferential treatment' based on  
12 race, sex, color, ethnicity, or national origin." LAO Report, Exh. 2, at 1 (emphasis added).  
13 As the neutral and independent California Legislative Analyst's Office concluded: "The  
14 extensive evidence reviewed including documents from proponents and opponents, journal  
15 articles, media coverage, legislative hearings, numerous conversations with proponents,  
16 opponents, government officials, and other experts all pointed to one conclusion. The  
17 programs that would or could be affected by the proposition were commonly referred to as  
18 'affirmative action' programs -despite the fact that the measure itself does not contain the  
19 phrase "affirmative action." Exh. 2, Decl. of Mac Taylor, Deputy Legislative Analyst, ¶2.<sup>1</sup>

20 <sup>1</sup> Accordingly, the Yes/No Statement prepared by the Legislative Analyst's Office,  
21 and published in the official pamphlet sent to all voters, states:

- 22 • A YES vote on this measure means: The elimination of those  
23 affirmative action programs for women and minorities run by  
24 the state or local governments in the areas of public  
25 employment, contracting, and education that give "preferential  
26 treatment" on the basis of sex, race, color, ethnicity, national  
27 origin.
- 28 • 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.

Exh. 2, Legislative Analyst Office's "Yes/No" Statement.

1 Proposition 209's supporters have repeatedly characterized the initiative as a ban on  
2 affirmative action programs for women and minorities. They have failed to identify anything  
3 that the initiative would ban -- other than race, gender, and ethnicity conscious affirmative  
4 action programs -- that is not already prohibited by existing law. Ward Connerly, Chairman  
5 of the California Civil Rights Initiative and one of the authors of the Argument in Favor  
6 appearing in the official ballot materials, asserted that by approving Proposition 209: "The  
7 public's going to end affirmative action in November." Exh. 4. Defendant Governor Pete  
8 Wilson, another author of the Argument in Favor, stated: "[Some legislators were] unwilling  
9 to confront the issue of reverse discrimination arising from affirmative action programs.  
10 Fortunately the people of California will get that opportunity at the ballot box." *Id.* The  
11 Argument in Favor of Proposition 209, authored by Mr. Connerly and Governor Wilson and  
12 sent to all voters, was limited to a criticism of various affirmative action programs that benefit  
13 "minorities and women." Exh. 3. Their arguments did not so much as intimate that the  
14 Proposition was intended to forbid any discrimination against women or minorities --  
15 presumably because they recognize that the measure would confer no additional protections  
16 for minorities and women, but would only eliminate affirmative action benefitting them.

17 Proposition 209 does not, of course, eliminate all "preferential treatment" in education,  
18 contracting, or employment, but only that which takes into account race, ethnicity, and gender.  
19 Other forms of preferences, especially those which work to the disadvantage of minorities and  
20 women, would remain untouched. For example, public universities could still grant  
21 preferential treatment to some applicants over others based on whether their parents are  
22 alumni or have "connections" to high level university officials. Applicants for government  
23 contracts, public jobs, or admission at state universities could still be favored on the basis of  
24 veteran's status, *e.g.*, Cal. Education Code § 66202(b)(1); Cal. Govt. Code § 18973, even  
25 though women are obviously much less likely to benefit from this preference than men.

26 Informal preferences that favor applicants based on factors other than "merit,"  
27 including both informal social networks and other mechanisms allowing the "by-pass" of  
28 formal selection processes would also remain intact. Decl. of Aileen Hernandez ¶10.  
Minorities and women are often excluded from such networks, particularly in the area of

1 public contracting, severely diminishing their opportunities to compete on an equal basis. E.g.,  
2 decl. of Eleanor Ramsey ¶14; decl. of Frank Fung ¶4; Hernandez decl. ¶¶3-4, 11. Nor would  
3 Proposition 209 have any effect on state preferences for contractors based on the size of their  
4 workforce Cal. Govt. Code § 4535.2(a), or the length of time that they have owned their  
5 businesses. Hernandez decl, ¶6. These preferences also disadvantage minority and women  
6 owned enterprises which, because of historic discrimination, are less likely to survive such  
7 exclusionary tests. Hernandez decl. ¶6; Ramsey decl., ¶14.

8 In short, non-merit based preferences in a variety of circumstances would stay legal.  
9 By comparison, constitutionally permissible distinctions based on race and gender are  
10 outlawed, even though necessary to remedy past and present discrimination against women  
11 and minorities.

12 **B. MINORITIES AND WOMEN POSSESS A VITAL INTEREST IN SEEKING**  
13 **AFFIRMATIVE ACTION TO REMEDY THE "PERSISTENCE OF BOTH THE**  
14 **PRACTICE AND LINGERING EFFECTS" OF RACE AND GENDER**  
15 **DISCRIMINATION**

16 **1. Historical Background**

17 Though our nation's "long and unfortunate history" of discrimination against racial  
18 minorities and women is well known, understanding the persistent discrimination that makes  
19 California's affirmative action vital requires a careful examination of the development of  
20 present-day discriminatory attitudes -- attitudes that continue to limit women and minorities  
21 in every sphere of activity.

22 California and America before affirmative action each lacked even the semblance of  
23 equal opportunity for racial and ethnic minorities, much less for women. As summarized by  
24 Dr. Mary Frances Berry, currently chair of the United States Commission on Civil Rights,  
25 "[t]here were no merit standards for employing the white men who occupied the best jobs,  
26 because merit would have required accepting applications from all comers and picking the  
27 best people." Berry decl. ¶3. Discrimination was severe and pervasive, and government was  
28 an active player in perpetuating favorable treatment for Americans. Decl. of Martha S. West,  
¶9. And "though the Supreme Court overturned the legal justification for segregation in 1954,

1 segregation did not end overnight." Id.<sup>2</sup> Governmental contracting and employment  
2 programs continued to overwhelmingly favor whites.<sup>3</sup> Similarly, other federal programs,  
3 including several enacted during the Great Depression, reinforced racial segregation through  
4 social welfare, labor and housing policies, "systematically advantag[ing] whites" for generations  
5 through the present. Decl. of Troy Duster, ¶¶3-9.

6 Discriminatory laws and practices in California were frequently specifically aimed at  
7 Latinos and Asian-Americans as well. Asian-Americans were long cast as second-class  
8 citizens, and "associated with blacks in the racial imagination of white society." Decl. of  
9 Ronald Takaki, ¶¶ 27-29. Asian-Americans, along with Native-Americans and African-  
10 Americans, were excluded from California's public schools. Id., ¶32. In similar manner, as  
11 studied by Albert Camarillo, Associate Professor of History at Stanford, "[m]any of the forms  
12 of discrimination which prevented Mexican Americans from full participation as citizens in  
13 the political and socioeconomic life of California . . . in the nineteenth century continued into  
14 the twentieth century: political disenfranchisement and non-representation; social and cultural  
15

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16 <sup>2</sup> Prior to the mid-1960s there existed no legal prohibition on the practice even of  
17 relegating women and minorities to lower-paying jobs or refusing to hire them at all.  
18 California Senate Office of Research, Status of Affirmative Action in California 1 (March  
19 1995). "In fact, a ban on job discrimination against women seemed so far-fetched it was  
20 added to the [Civil Rights Act of 1964] by a Southern congressman who thought it could  
21 defeat the measure." Id.

22 <sup>3</sup> For example, the ten million workers on the payrolls of the one hundred largest  
23 defense contractors included few blacks in 1960. The \$7.5 billion in federal grants-in-aid  
24 to the states and cities for highway, airport, and school construction went almost  
25 exclusively to white businesses. Berry decl., ¶6. Dr. Berry states: "Essentially, using taxes  
26 paid in part by African-Americans, the government was directly subsidizing  
27 discrimination." Id.

28 The number of skilled black workers on public housing and slum clearance  
projects was minuscule. The U.S. Employment Service, which provided  
funds for state-operated employment bureaus, encouraged skilled blacks to  
register for unskilled jobs, accepted requests from lily-white employers, and  
made no effort to get employers to hire African-American workers. Black  
businesses had expanded and diversified since the days of slavery, but they  
were still excluded from competing on contracts offered by state and local  
governments.

Id.

1 ostracism; de jure and de facto residential and school segregation; discriminatory labor  
2 practices; and discrimination practices; and discrimination practiced against Mexican  
3 Americans in public places." Camarillo decl., ¶15-12; decl. of Ricardo Romo, ¶13; decl. of  
4 Rodolfo Acuna, ¶14-29.<sup>4</sup>

## 5 2. Persistence of Discrimination Today

6 The discriminatory attitudes that were both cause and effect of past legalized  
7 discrimination persist, albeit in altered form. It is the persistence of this bias that makes it  
8 necessary for women and minorities to seek remediation through democratic processes.  
9 "Although there has unquestionably been significant progress on matters of race, the color  
10 line between White Americans and African Americans persists." Decl. of John Hope  
11 Franklin, ¶2. As described, for example, by Donald Kinder of the Institute of Social Research  
12 at the University of Michigan, "[m]ost white Americans in fact subscribe to racial stereotypes,"  
13 believing blacks to be "less intelligent . . . , less hardworking . . . and more violent than whites."  
14 Kinder decl., ¶13. "Some whites see no difference between the races, but most of the  
15 variation among white Americans is in how inferior black Americans are, whether the racial  
16 superiority that whites enjoy in essential capacities and fundamental qualities is overwhelming  
17 or slight." *Id.* Such stereotyping, though sometimes manifest in different forms, extends to  
18 Latinos and Asian-Americans as well. Takaki decl., ¶70; Kang decl., exh. 2; Romo decl., exh.  
19 B.

20 These conclusions have been confirmed by the research within California and across  
21 the country by Lawrence Bobo, professor of sociology and director of the Survey Research  
22 Center at the University of California, Los Angeles. Professor Bobo found that "while overt  
23

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24 <sup>4</sup> Several declarations submitted in support of plaintiffs' application detail the history  
25 of discrimination against African-Americans (decls. of John Hope Franklin, Martha S.  
26 West, Troy Duster, Manning Marable), Asian-Americans (decls. of Ronald Takaki and  
27 Don Nakaniski) and Mexican-Americans. (Decls. of Albert Camarillo, Ricardo Romo,  
28 Rodolfo Acuna). The "long and unfortunate history of discrimination" against American  
women of all racial and ethnic backgrounds was recently traced by the Supreme Court in  
United States v. Virginia, 116 S.Ct. 2264, 135 L.Ed. 2d 735 (1996) and J.E.B. v. Alabama  
ex. rel. T.b., 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed. 2d 89 (1994); see also decls. of  
Deborah S. Rhode and Ruth M. Milkman.

1 bigotry has declined over time, negative stereotyping of African Americans and other  
2 racial/ethnic minorities remains prevalent throughout the United States." Bobo decl., ¶13.

3 This persistent negative stereotyping is associated with a tendency to blame  
4 minorities themselves for the gaps in socioeconomic standing, and a resistance  
5 to policy efforts to ameliorate racial bias in America's social conditions and  
6 institutions. There exists an abundance of evidence demonstrating the  
7 persistence of a relatively clear-cut racial/ethnic hierarchy or racial order in the  
8 United States, with Whites the historical and present dominant social group and  
9 African Americans the historical and present bottom group. . . . [F]or Whites,  
10 integration with other minority groups -- and especially with Blacks -- brings the  
11 threat of a loss of relative social advantages. These attitudes result in  
12 discrimination against minorities in many domains, including employment,  
13 education, and housing.

14 Id., ¶13; see also Kinder decl., ¶14 ("Results obtained imply that white Americans' objections  
15 to policies intended to diminish racial inequalities, including, especially, affirmative action,  
16 are expression, in large part, of racial resentment.")<sup>5</sup>

17 If anything, the powerful effects of racial resentment detected, including "white  
18 opposition to policies . . . provid[ing] opportunity and assistance to blacks," have enlarged  
19 since 1988. Kinder decl., ¶14.

20 Racial resentment remains a powerful force in white opinion. These results  
21 reflect the substantial political force of racial resentment: racial resentment is  
22 not the only thing that matters for race policy, but by a fair margin racial  
23 resentment is the most important.

24 Id. Still, today, "racial resentment is a coherent and stable system of beliefs and feelings,"  
25 extending to "subscri[ption] to derogatory racial stereotypes" and resistance to expressing it  
26 overtly in the presence of blacks. Id., ¶20.

27 Certainly there have been revolutionary changes in white Americans' racial  
28 attitudes, as, for example, the lessening of the idea of permanent, biological  
inferiority. Resentments rooted in racial difference however, continue to shape  
American opinion powerfully. It cannot be reasonably concluded, for example,  
that prejudice is no longer important or that race itself has somehow been  
removed from the politics of equal opportunity and affirmative action.

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29 <sup>5</sup> Professor Kinder specifically tested and ruled out the possibility that commitment to  
30 principles such as "individualism" or "egalitarianism" might explain whites' views on race-  
31 related policies: "White opposition to racial change appears to be motivated not by  
32 commitment to individualism in general, but by resentment directed against blacks in  
33 particular." Id.; see also id., ¶16 ("Specifically as to affirmative action, racial resentment is  
34 nearly the whole story for white opinion. The imprint of commitment to egalitarian ideals  
35 disappears entirely on the matter of affirmative action, as it does as to economic  
36 individualism and limited government.").

1 Id., ¶21.

2 As a consequence, racial attitudes shape not just beliefs by white Americans on issues  
3 such as desegregation and affirmative action: "[d]iscrimination also occurs in many other  
4 spheres of life ranging from interpersonal conduct in everyday settings. . . ." Bobo decl., ¶11.  
5 As Professor Franklin has discussed, "[t]he specter of race and racism is apparent even when  
6 it goes unmentioned, and it is all too often this force that influences both public policy and  
7 private relationships." Decl. of John Hope Franklin, ¶2.

8 Disparities between white Americans and African Americans exist in poverty  
9 rates, employment opportunities, education, life expectancy, and virtually every  
10 area of American life. These inequalities reflect both the long history of  
11 discrimination against African Americans, including segregation and other  
12 forms of discrimination by the government, and of present-day racial bias that  
13 persists throughout the United States.

14 Id. As Professor Franklin concludes: "A color-blind society does not exist in the United  
15 States and has never existed." Id., ¶16.

16 **3. Discrimination Directly Limits Opportunities of Women and Minorities in  
17 Social and Economic Life**

18 The real-world consequences of these discriminatory attitudes are powerfully illustrated  
19 in the growing body of research, focusing directly on the persistence of racial discrimination  
20 and antiminority stereotyping in employer hiring practices. Bobo decl., ¶12; see also decl. of  
21 Marc Bendick, Jr., Ph.D, ¶¶ 9-14; Franklin decl., ¶¶ 9-10 (discrimination in employment  
22 estimated to be approximately 3% of the gross national product). This "data calls into  
23 question the popular assumption that racial discrimination against minorities is now a  
24 relatively infrequent problem in the workplace." Bobo decl., ¶35. Numerous studies  
25 "continue to document direct labor market discrimination at both low-level entry level  
26 positions and more highly skilled positions." Id., ¶8 (citing studies). Thus, for example, a  
27 national study of employers found that "[s]tatistical discrimination and use of information  
28 based on negative group stereotypes . . . appeared to significantly hinder minority access to  
employment and subsequent chances for promotion. . . . Minority applicants are more likely  
to be hired for 'dead end' positions, which constrain or deny access to important on-the-job  
training and promotional opportunities." Id., ¶13. Recent auditing studies conducted by the  
Urban Institute involving matched pairs of minority and white job applicants, or "testers,"

1 likewise "showed widely disparate treatment and differential treatment of Blacks and  
2 Hispanics in several urban labor markets." *Id.*, ¶14; Bendick decl., ¶¶ 13-14; see also decl.  
3 of Alfred Blumrosen ¶10 Another study found that employers "categorize inner-city blacks  
4 overall as having inadequate skills, negative work attitudes and a poor work ethic." Bobo  
5 decl., ¶13.

6 Research specifically directed at the California labor market discloses the same  
7 patterns of employment discrimination and occupational segregation as the studies just cited.  
8 Bobo decl., ¶¶21-35. "Despite substantial progress in recent decades against racial/ethnic and  
9 gender discrimination, such discrimination continues importantly to affect employment  
10 outcomes for minorities and women in virtually every segment of the American labor market,  
11 including public sector employment in California." Bendick decl., ¶22; Milkman decl., ¶5.<sup>6</sup>  
12 Employment segregation in California is "at least as great as in the nation as a whole." *Id.*,  
13 ¶7.

14 A recent study specifically examined for California the relationship between wages  
15 paid to minority workers compared to minorities' educational gains, testing the validity of the  
16 argument that race-conscious programs are unnecessary because the labor market, if left to  
17 its own devices, rewards merit and does not discriminate on the basis of race. Martin Carnoy,  
18 professor of education and economics at Stanford University and co-author of the study,  
19 found "dramatic narrowing of education gaps" by California's young minority workers "did not  
20 produce a narrowing of wage gaps when these youths became employed." Carnoy decl., ¶8.  
21 Despite increases in the proportion of these workers graduating from college or obtaining  
22  
23  
24  
25

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26 <sup>6</sup> Discrimination in the workplace is also reflected in the substantial disparities  
27 existing between whites and minorities, particularly as to men. Conservative estimates  
28 indicate that young, well educated blacks earn 11% less annually than similarly-situated  
whites. Bobo decl., ¶8. For instance, among men with bachelor's degrees, blacks earn  
only \$764 for each \$1000 going to whites at the same level. Decl. of Andrew Hacker, ¶4.  
Blacks who finish college show a jobless rate twice that of whites with diplomas. *Id.*, ¶8.

1 some college experience, and greater academic achievement, relative wages for minorities fell  
2 compared with whites with comparable education. Id., ¶18-9.<sup>7</sup>

3 Discrimination against women in the workplace also remains prevalent. Women are  
4 promoted at a lower rate, and clustered in low-status and lower paying jobs. Decl. of Judy  
5 E. Rosener, Ph.D., ¶14-5; decl. of James Diego Vigil & Abel Valenzuela, Jr., ¶16; Milkman  
6 decl. ¶16. As Myra Strober, former Associate Dean and now Professor at the Stanford School  
7 of Education, has pointed out: "Men and women with equal educational attainments do not  
8 experience equal returns on their credentials." Strober decl., ¶11. Black women and Latinas  
9 are especially hard hit, facing the "double burdens" of race and gender discrimination. Vigil  
10 & Valenzuela decl., ¶19-10. Even within professions, women and men do not receive equal  
11 pay, with women on average earning 25% less than men. Decl. of Judith Rosener, ¶16;  
12 Milkman decl. ¶8. Further, "[w]omen are promoted at a lower rate than men in grade levels  
13 and occupations that are important gateways to advancement." Rosener decl., ¶14.  
14 Differences in the pool of eligible candidates, such as education and skill, cannot begin to  
15 account for such disparities. Strober decl. ¶11; decl. of Deborah Rhode, ¶14. Discriminatory  
16 attitudes of men, who often feel uncomfortable with women as their supervisors or peers,  
17 contribute to this result. Rosener decl., ¶17.<sup>8</sup>

18 The Federal Glass Ceiling Commission determined that employers commonly resorted  
19 to gender stereotypes: for example, "women are too emotional, indecisive, deficient in  
20 quantitative skills, and lacking in career commitment; African American women are  
21

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22 <sup>7</sup> For example, wages of young (25 to 34 years old) black male workers were, on  
23 average, 84% of white wages in 1980; 15 years later, blacks earned only 77% of white  
24 wages. For Latinas, average wages fell from 83% of white female wages in 1980, to 71%  
25 in 1995. Similar trends characterize the relative wages of black females and Latino males.  
26 Young black male workers with college degrees earned 94% of their white counterparts'  
27 earnings in 1980; by 1990, it had fallen to 86%. For Latina workers with college degrees  
28 earnings were 95% of comparable white females'; in 1980, but only 90% in 1990. Decl. of  
Martin Carnoy, ¶18-9.

<sup>8</sup> Only one woman is a CEO of a Fortune 500 company, and in Fortune 1000  
companies, women account for but 5% of senior management. Decl. of Deborah Rhode,  
¶15; decl. of Judith Rosener, ¶13. Only 9% of executive vice presidents in businesses overall  
are women. Decl. of Heidi Hartman, ¶17.

1 incompetent, lazy and hostile; Hispanic women are overly passive and undereducated; and  
2 Asian women are inflexible, unassertive and ineffective in interpersonal communications."  
3 Rhode decl., ¶12. Studies have demonstrated that stereotypical thinking leads employers to  
4 emphasize information that fits the stereotype, while discounting or reinterpreting information  
5 that does not. Rhode decl., ¶35. "Female achievements are also more likely than males' to  
6 be explained by luck rather than ability, to be overlooked, undervalued, or misattributed in  
7 the evaluation process." Rhode decl., ¶13. Social scientists have found time and again that  
8 unconscious biases infect even seemingly objective evaluation process, leading to systematic  
9 underrepresentation or exclusion of qualified minorities and women from employment and  
10 other opportunities. Bergman decl., ¶¶7-11; Vigil & Valenzuela decl., ¶10. "For example,  
11 many studies find that people rate the same work or resume lower if they think it belongs to  
12 a woman rather than a man." Rhode decl., ¶ 13.

13 **C. REVERSING GAINS AGAINST DISCRIMINATION:  
14 PROPOSITION 209'S DIRECT CONSEQUENCES**

15 **1. Employment**

16 The State Senate Office of Research study, Status of Affirmative Action in California,  
17 concluded that "affirmative action has paved the way for the arrival and advancement of  
18 record numbers of women and minorities in a plethora of careers and higher-paying  
19 positions." Id. at 2; see also decl. of William Bielby, ¶5 (California affirmative action  
20 programs "opened new opportunities for women and minorities, who moved into positions  
21 where they had been significantly underrepresented"). As the study emphasized, "affirmative  
22 action in state civil service, the largest employer in California other than the federal  
23 government, does not permit the hiring of unqualified candidates. If race and gender become  
24 factors in managerial decisions to hire or promote individuals, they come after candidates  
25 have met eligibility standards by performing satisfactorily on civil service exams." Id. at 8.  
26 Affirmative action has helped women and minorities "by creating career ladders, promotion  
27 opportunities, and educational opportunities." Id.

28 Data from the U.S. Equal Employment Opportunity Commission (EEOC) and the  
State Personnel Board support the study's findings that while "gains by minorities and women

1 have been steady and striking over the past 18 years," still "general labor force parity has not  
2 been wholly achieved in either the public or private sectors of California's workplaces. . . ."  
3 Id. at 5, 16. Thus, though "California's workplaces are far more integrated than in 1975, when  
4 black, Hispanic and Asian women accounted for only .8%, .9% and .6% of the management  
5 jobs in major California firms," whites held 79% of these positions in 1993, but represent only  
6 60.4% of the state's workforce. Id. White males, representing one-third of the workforce,  
7 occupied more than half (53.6%) of these managerial positions; by contrast, Hispanics held  
8 8.3% (against 23.6%). Id. at 6. In California's public jobs, white males controlled nearly the  
9 same extent of official and managerial positions as in the private sector, 48.9%: Hispanic  
10 officials and managers in public jobs constituted only 9.7%; Asian, only 5.5% (against 9% of  
11 the total workforce). Id. The study determined that "compared with their representation in  
12 the general population, whites were over-represented among new hires at the top of the  
13 career ladder in 1993;<sup>9</sup> blacks and Hispanics were over-represented at the bottom. Id. at p.  
14 30. It also concluded that "[i]t seems likely that curtailing public affirmative action in  
15 California would discourage private employers from continuing voluntary efforts in the same  
16 vein." Id.

17 Pay differences for minorities and women in California public jobs have diminished  
18 compared to white and males generally, but remain wide. The study found that "the bottom  
19 line is that public salaries overall still show blacks and Hispanics lagging significantly behind  
20 whites, and women significantly trailing men." Id. at pp. 7, 31-32. For example, the median  
21 overall income for blacks in California's public sector was only \$33,774, compared with  
22 \$40,313 for whites. Id. at pp. 7, 30-32. In 1975, the median salary for blacks in these jobs was  
23 80.5% of the median for whites; by 1993, it had risen to 83.8%, though still more than \$4,000  
24 below the median for all public employees. Id. at pp. 7, 31. In 1993, the median salary for  
25 Hispanics in public services was 81.8% of the white median salary, nearly \$5,000 below the  
26

27 <sup>9</sup> U.S. EEOC data for 1993 new hires by California State and local governments in  
28 official, as compared to administrative categories, show the same relative disparities: e.g.  
76% white as compared to 8.4% Hispanic; 62.7% male as compared to 37.3% women.  
Status of Affirmative Action, p. 30.

1 median for all public employees. The median public salary for women in 1993 was \$31,897,  
2 just 75% of the male median of \$42,556, though an increase from 67% in 1975. *Id.* at pp. 7-8.  
3 As of June 30, 1992, women had achieved labor force parity in state civil service in 8 of 19  
4 job categories; Hispanics, in 7 of 19; and Asians in 11 of 19. *Id.* at p. 26. At the higher salary  
5 levels of public employment, the percentage of Asians, blacks and Hispanics went from 3%  
6 or less per group in 1975 -- the year Governor Reagan made California's affirmative action  
7 program official -- to 9.9%, 9.3% and 11.7%, respectively, in 1993. *Id.* at p. 35. As the study  
8 concluded, deliberate affirmative action efforts "have had an impact on bringing more  
9 minorities into better-paying jobs -- the ultimate goal -- during the past decades. At the same  
10 time, however, significant disparities among median annual salaries for blacks, Hispanics and  
11 whites continue to persist." *Id.* at p. 35.<sup>10</sup>

12 Ending race and gender-conscious affirmative action will make it even more difficult  
13 for public entities to root out persistent race and gender discrimination. A recent study  
14 specifically examined the impact that the elimination of affirmative action would have on  
15 public sector employment opportunities for women and minorities. As the report's author,  
16 Professor M.V. Lee Badgett, states: "I concluded that the eradication of affirmative action  
17 policies from public employment will result in fewer public-sector employment opportunities  
18 for women and people of color." Badgett decl., ¶12. Professor Badgett notes that "[o]ver the  
19 past thirty years, research on gender and race discrimination on public-sector employment has  
20 consistently shown that women and people of color are at a disadvantage relative to white  
21 men," earning less and occupying lower level jobs. *Id.*, ¶13. Though affirmative action policies  
22 have helped narrow the gap (*id.*, ¶14), the work of "redressing and eliminating discrimination"  
23

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24 <sup>10</sup> Employment discrimination litigation has not made an appreciable dent in  
25 discriminatory practices in hiring and promotion practices nor can it somehow be expected  
26 to do so if race and gender-conscious programs are eliminated. Resources aside, relatively  
27 few complaints of discrimination are filed at the time of the initial hiring decision, since  
28 most persons who are not hired lack adequate information about the reasons for the  
decision even to formulate a complaint. Decl. of Alfred Blumrosen, ¶13. When  
antidiscrimination resources of government agencies have been exerted at all, they have  
focused primarily on larger employers and contractors, leaving smaller employers to  
continue discriminatory practices with impunity. *Id.*, ¶14; Rhode decl., ¶¶21-30.

1 is not complete, and elimination of these policies will result in "lower wages and barriers to  
2 advancement" for women and minorities. Id., ¶7; see also decl. of Andrew Newmann, ¶9 ("the  
3 abolishment of affirmative action programs in the California civil service would result in the  
4 cessation of a process, the absence of which is highly unlikely to be filled by other means").

5  
6 Declaration from plaintiffs confirm that ending affirmative action will have a dramatic  
7 negative impact on their prospects for advancement, particularly to the management level.  
8 As Raymond Quan, First Vice-President of Asian Pacific American Labor Alliance East Bay  
9 Chapter, states: "Management seeks to replicate itself, in terms of racial and gender  
10 characteristics, while overseeing an increasingly diverse and well-qualified labor pool." Quan  
11 decl., ¶6. Mary Grillo, Executive Director of Service Employees Industrial Union Local 2028,  
12 confirms that: "To the extent that racial and gender discrimination still exists, many  
13 employers simply will not promote women and minorities unless they are obligated to do so."  
14 Decl. of Mary Grillo ¶3. Eliminating race- and gender-conscious affirmative action programs  
15 will not only diminish chances of promotion id., ¶3, but "could lead to increased privatization  
16 and thus the lay-offs of many public-sector employees." Id., ¶4. Jacquelyn Giles, a San Diego  
17 County appraiser who has worked her way through the ranks, states that her chances for  
18 promotion will be adversely affected by the elimination of affirmative action. Giles decl. ¶¶2,  
19 4. Already passed over for promotions, "women generally have a harder time moving into  
20 supervisory positions" and "the elimination of affirmative action for gender would certainly  
21 make this harder." Id., ¶4.

## 22 2. Contracting

23 The Census Bureau in 1987 reported more than 884,000 businesses in California as  
24 owned by minorities and women. Id. at p. 36. According to the Office of Research study,  
25 California minority- and women-owned business enterprise laws were enacted with the  
26 announced intention of reaching these businesses." Id. at p. 36. State officials did not fully  
27 implement the California program as statutorily mandated at the outset. As reviewed in 1991  
28 by the state auditor general, a majority of state agencies were not consistently complying with  
the requirements of the 1988 legislation. Id. at p. 39. Even after this published review, in

1 1992, the program was still far short of meeting a 15% goal for minority-owned businesses,  
2 and a 5% goal for women-owned businesses. Id. at p. 40. In 1991-92, for example, 4.23%  
3 of all contracts went to minorities and 2.13% to women. Id. In the same fiscal year, minority  
4 contractors received only about 12 cents of every dollar spent by the state on construction  
5 projects; between July, 1991 and December, 1992, only about 4 cents of every dollar went to  
6 women-owned businesses for Department of Transportation (Caltrans), by far the state's  
7 largest builder, African-American male contractors received about a penny on every  
8 construction dollar spent, Latino males 8 cents, Asian males 4 cents and women-owned  
9 businesses 6 cents. Id.<sup>11</sup>

10 With increased efforts, the study found for the 1993-94 fiscal year "a marked increase  
11 in [state] contracting with minority- and women-owned firms in most areas." Id. at p. 43. For  
12 instance, the Department of General Services, the state's main purchasing arm, reported  
13 14.6% of its contract dollars contracted with minority-owned businesses, 8.8% to women-  
14 owned companies. Id. Still, not all state agencies have demonstrated similar improvement:  
15 the California Public Employees Retirement System, for example, awarded in 1993-94 only  
16 6.61% of its contracts to minority business enterprises, and 3.77% to women-owned  
17 businesses. Id.

18 Notwithstanding the changes reported, still "regional studies in California have turned  
19 up patterns of public failure to hire firms owned by minorities and women despite the  
20 presence and availability of those firms." Id. According to a study conducted by Los Angeles  
21 County of its own contracting practices, about 95 cents on every dollar of county public works  
22 spent went to white-owned construction firms in 1994. Id. at p. 45. By comparison, African-  
23 American contractors receive less than a penny for each dollar, Latino about 4 cents, Asian,  
24 Pacific Islander and Native American about half a cent. Women-owned businesses received  
25 about 6 cents for every county subcontracting dollar spent. Id. The study found that "[a]t the  
26

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27 <sup>11</sup> Likewise, of every California State University dollar spent in 1992 on construction,  
28 about 9 cents went to minority-owned companies and 4 cents to women contractors. For  
every dollar spent by the University of California system in fiscal years 1990-91 and 1991-  
92, minority contractors received about 10 cents and women-owned companies about 4  
cents. (Id. at p. 4.)

1 subcontracting level, where construction companies are smaller and more accessible to the  
2 often smaller companies owned by minorities, white-owned construction companies still  
3 received nearly 89 cents of every public works dollar spent." Id.<sup>12</sup>

4 Numerous other studies conducted in recent years show that discrimination continues  
5 to limit business opportunities for minorities and women in California. Tom Larson,  
6 Associate Professor of the Department of Economics and Statistics and Director of the  
7 Center for Minority Youth Employment Studies at California State University at Los Angeles,  
8 was recently commissioned by the California Policy Seminar, a state funded research  
9 institution, to examine the impact that affirmative action policies have had on minority and  
10 women business enterprises (MBE's and WBE's) and how such firms would be affected if  
11 affirmative action policies were suspended. Decl. of Tom Larson, ¶1.<sup>13</sup> Professor Larson  
12 analyzed the results of studies conducted by over 20 governmental agencies in California, in  
13 both northern and southern California. Id., ¶9. The studies "report[ed] extensive  
14 underutilization of MBE's and WBE's by governmental agencies, i.e., the MBE's and WBEs  
15 were awarded significantly fewer contracts and/or less contract dollars that he proportion of  
16 MBE's and WBE's who were interested and available. . . ." Id., ¶9.

17 [T]here was a strong and consistent trend throughout these studies that  
18 minorities and women received less contract dollars in the three major areas  
19 of public contracting -- construction, professional services, and purchasing --  
20 relative to their availability. This underutilization consistently occurred both  
21 at the prime contracting and subcontracting levels. In fact, several studies  
22 reported that some agencies, including the City of Sacramento, failed to award  
23 even a single prime construction contract to an MBE during the periods  
24 studied. Given that the minority populations within these jurisdictions are  
25 large, the absolute exclusion of minorities from the procurement process is  
26 quite striking.

27 Id., ¶9. In addition to Dr. Larson's own research, the "numerous studies" demonstrate "that  
28 discrimination continues to limit business opportunities for minorities and women." Id., ¶9.

Similarly, Eleanor Ramsey, principal owner of Mason Tillman & Associates, which  
undertakes such studies for governmental entities across the country, concluded that:

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12 The population of Los Angeles County is 62% minority. (Id. at p. 45.)

13 A copy of Dr. Larson's paper, "California Policy Seminar Paper," is attached to his  
declaration.

1 "Numerous disparity studies conducted for local governments in California have documented  
2 that discriminatory barriers still prevent MBEs and WBEs from competing for public  
3 contracts on an equal basis with other contractors." Ramsey decl., ¶9.<sup>14</sup> As explained by  
4 Professor Larson, "disparities between MBE/WBE utilization and availability are noticeably  
5 reduced where government agencies implement affirmative action programs." Decl, ¶16.

6 **MBE/WBE CONTRACTING BEFORE AND AFTER AFFIRMATIVE ACTION**  
7 **Contract Utilization Rates**

8 <u>City</u>	<u>Before</u>	<u>After</u>
9 Los Angeles	2%	14%
Sacramento	0%	25%
San Jose	8%	24%

10 Id. By comparison, "use of race or gender neutral programs to address the underutilization  
11 of MBEs and WBEs was generally ineffective," resulting in "little or no effect in increasing  
12 the number of contracts awarded to MBEs and WBEs." Id., ¶17; see also Leonard decl., ¶15  
13 (noting "reversal" of progress made by black contractors, after federal affirmative action  
14 programs in contracting were weakened.)

15 The experience of Asian Americans in San Francisco provides a potent example of the  
16 importance of affirmative action -- and the likely impact of its elimination. A study  
17 conducted in 1991, prior to the initiation of affirmative action programs, found that:

18 Asian Pacific American construction contractors--about 20% of the available  
19 pool of San Francisco construction firms--were receiving only 5% of the total  
20 contracting dollars awarded for the school district's construction contracts. This  
21 study found that: 1) minority contracts were repeatedly rejected even when they  
22 submitted the lowest bid, 2) the district had no clear and consistent contracting  
23 procedure, 3) district staff manipulated the procedures to favor certain  
24 contractors, and the staff withheld information from minority contractors,  
25 ignoring its own outreach policies. Two years later, with the assistance of  
26 mandated affirmative action programs, Asian contractors received 17.35% of  
27 the school districts' prime contracts.

28 Decl. of Gena Lew, ¶21.

If Proposition 209 is implemented, women and minority contractors throughout the  
State will be dramatically affected. Floyd Chavez, owner of a fence company in San Lorenzo,

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<sup>14</sup> Ms. Ramsey or her staff interviewed nearly 400 contractors in eight California jurisdictions, preparing studies involving the Alameda County Transportation Authority, Sacramento Municipal Utilities District, and the cities of Oakland, San Jose, and Richmond. Id., ¶¶13-21.

1 California, is typical. Mr. Chavez receives approximately 50% of his business from public  
2 contracts. Chavez decl., ¶12. In the business for 30 years, Mr. Chavez states that the  
3 construction industry "remains largely segregated" and "network" driven. Id. ¶13. Women and  
4 minority owned enterprises given "limited opportunities to enter this network, [and] they often  
5 are not informed of bidding opportunities unless there are programs that require their  
6 notification." Id. Without affirmative action, Mr. Chavez's business will be "seriously  
7 harmed," and "could cause me to layoff a substantial portion of the firm's employees." Id. ¶15.

8 Mr. Chavez's experience corresponds to that of thousands of women and minority  
9 contractors throughout California. As stated by Aubry Stone, Chief Executive of the Black  
10 Chamber of Commerce of California, ending affirmative action "will leave African-American  
11 contractors vulnerable to significant discrimination and will make it much more difficult for  
12 these businesses to compete effectively." Stone decl. ¶14; see also Fung decl., ¶14. In addition  
13 to hurting existing companies, eliminating affirmative action will close the door to the  
14 formation of new minority and women owned businesses: "fewer minorities will view forming  
15 their own company as a viable option." Tong decl. ¶17.

16 3. Public Education - Elementary and Secondary

17 a. Voluntary desegregation

18 The Legislative Analyst's Office and the Office of Research studies both concluded  
19 that Proposition 209 "could eliminate voluntary desegregation (also called voluntary  
20 integration) programs in local school districts." Status of Affirmative Action in California  
21 48.<sup>15</sup> Voluntary desegregation is widespread throughout California. For example, the 1994-  
22 95 state budget includes \$122.1 million in General Fund support for voluntary desegregation  
23 proposals in 46 school districts. Id. The Office of Research concluded: "Under [Proposition  
24 209], this money could no longer be spent on the programs, which seek to integrate students  
25 on the basis of race and ethnicity." Id.; see also LAO Report ("the measure could eliminate,  
26 or cause fundamental changes to, voluntary desegregation programs run by school districts".)

27  
28 <sup>15</sup> Court-ordered desegregation, as specifically mandated by court orders or consent  
decrees already in force, are the only desegregation programs exempted from prohibition.

1           The voluntary integration program in the Oakland Unified School District is typical.  
2 In an effort to ensure a diverse student body, Oakland Technical High School takes into  
3 consideration the race and ethnicity of students in determining eligibility for their "academies"  
4 -- specialized programs focusing on such areas as health sciences, pre-engineering, and  
5 computer science. Cunningham decl. ¶2, 4; Gronert decl. ¶¶2, 4. The Oakland School  
6 District overall receives over \$8 million in voluntary integration money, which it uses to  
7 improve its educational program and diversify classes for the over 52,000 students it serves.  
8 Gronert decl. ¶3, 6; Odgers decl., exh. B. The loss of these integrative programs would harm  
9 urban school districts, and especially the Black and Latino students within those districts,  
10 "immeasurably." Gronert decl., ¶7.

11           Other examples of race-conscious programs, elimination of which would devastate  
12 California's children, are those operated by the Los Angeles Unified School District  
13 (LAUSD). As described by the Office of Student Integration Services, the LAUSD "operates  
14 a magnet program which provides opportunities for voluntary integrated education by  
15 attracting students to 132 programs designed to fit students' interests or needs."<sup>16</sup> During  
16 1995-96, the program served over 42,000 students; each year, over 40,000 applications are  
17 received for approximately 10,000 openings, and waiting lists typically average between 20,000  
18 and 25,000 students. *Id.* The reality of demographics in Los Angeles is that absent the  
19 magnet program and other voluntary integration efforts, an integrated education is not  
20 otherwise possible. *Id.*<sup>17</sup> One criterion for selection for a magnet program is the race and  
21 ethnicity of the student applicant as relating to the need to maintain an integrated  
22  
23  
24

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25           <sup>16</sup> The programs are summarized in Exhibit 8.

26           <sup>17</sup> The racial and ethnic target composition of students enrolled in the magnet  
27 program is 60% non-white, 40% Anglo. These percentages do not reflect the full extent  
28 of racial and ethnic diversity within each magnet school or center. By contrast, the racial  
and ethnic composition of schools which are not part of the magnet program is 89% non-  
white, 11% Anglo.

1 environment within the particular magnet. Id.<sup>18</sup> see also decl. of Paul Cheng (race- and  
2 ethnicity- conscious admissions policy needed to ensure diversity at magnet high school).

3 **b. Programs to alleviate the harms of racial isolation**

4 The Office of Research study also determined that "special programs targeting ethnic  
5 minority students would be affected" by Proposition 209. Status of Affirmative Action 49.)  
6 Examples of the educational programs targeting women and minorities are described below.

7 **i. Mathematics, Engineering, Science Achievement (MESA)**

8 Founded more than 25 years ago, MESA is an intersegmental program designed to  
9 increase the number of under-represented students who succeed in math and science and  
10 graduate with degrees in math-based fields from four year universities. Status of Affirmative  
11 Action 66; Decl. of Michael Aldaco, Executive Director of MESA; decl. of Glenn Seaborg;  
12 decl. of Dr. Reginald Wilson, ¶5. The program serves nearly 30,000 students through 64  
13 program centers, located at 49 institutions throughout California. Aldaco decl., ¶3. The  
14 results of MESA are impressive: 98% of MESA graduates attend college; they graduate with  
15 better than a B average; 79% enroll in four year universities; 27% enroll in UC campuses;  
16 MESA has produced 82% of all BS degrees in engineering to underrepresented students with  
17 a graduation rate for these students (62%) more than three times that of similar students not  
18 affiliated. Id., ¶4.

19 The Office of Research study concluded that MESA programs including its Secondary  
20 Program, to encourage an interest in science and math as early as elementary school;  
21 Minority Engineering Program, to support university-level students in engineering and  
22 computer science; Community College Program; and Success Through Collaboration Program  
23 for Native Americans, would be affected by Proposition 209. Office of Research p. 66.

24  
25 <sup>18</sup> The LAUSD also operates a voluntary integration program, Permits With  
26 Transportation ("PWT") which provides students with an integrated education by placing  
27 Hispanic, African-American, Asian and other non-Anglo students to attend predominantly  
28 non-Anglo schools. Id. Since 1978, PWT has provided an integrated experience for  
278,180 students who would have otherwise attended racially segregated schools, in  
addition to students at receiving schools also benefitting from the program. Id. Other  
voluntary integration transportation programs, taken in combination with PWT, have  
transported over one million students for integration purposes since 1978. Id.

1                   ii.     Ten Schools Program (TSP)

2                   As described in LAUSD documents, the objective of the TSP in Los Angeles is "to  
3 provide an instructional program and organizational design that is language instruction  
4 intensive to reverse the pattern of poor academic achievement" within the ten lowest  
5 achieving schools with a predominantly African-American student enrollment. Exh. 8. One  
6 component of the TSP includes training parents of participating students (grades K-5) to assist  
7 in their children's academic progress. Id. TSP has produced "significant growth in test scores  
8 of students at the predominantly African-American schools participating." (Id.)

9                   Shevada Dove is a nine-year old student in the gifted program at McKinley School,  
10 one of the schools in the TSP. Decl. of Shevada Dove, ¶1. Funds from the program  
11 permitted the reopening of the library at Shevada's school, which had previously been closed  
12 for years. Decl. of Melodie Dove, ¶5. While children formerly left McKinley after the fifth  
13 grade unable to read, they now learn to read in the first grade, and have increased parental  
14 involvement. Id., ¶¶10, 12. If the TSP were eliminated, Shevada's parents would likely be  
15 compelled to try sending her to private school -- a prospect that would "create severe financial  
16 hardship" and may therefore be impossible. Id., ¶14.

17                   4.     School employment

18                   Gender imbalance in the ranks of employees has been addressed by many school  
19 districts. Status of Affirmative Action p. 51. For example, the LAUSD's Commission for Sex  
20 Equity has studied district hiring practices and taken steps to enable more qualified women  
21 to be hired as employees and contractors. Id. As Michelle Bennett of Grossmont Unified  
22 School District, states:

23                   I am very concerned that were [the district's] affirmative action program to end, I  
24 would never be promoted within the district. I worry about this because there is a  
25 great deal of discrimination against women in this job. Without affirmative action  
policies, I am quite certain that the supervisors who make hiring decisions would not  
promote me or my female peers.

26 Bennett decl., ¶12.

1           **5. Post-secondary Undergraduate Education**

2                   **a. Admissions**

3           When there are more eligible applicants than spaces available, University of California  
4 (UC) campuses rely upon course work, grades and test scores to select between 40 and 60%  
5 of those accepted. Status of Affirmative Action, at 61. Each campus then uses a combination  
6 of academic and supplemental criteria to select remaining admittees. According to Charles  
7 Young, the Chancellor of UCLA, the criteria used include: "California residence, ethnic  
8 identity, physical and learning disabilities, educational disadvantage, family income, and  
9 whether a student comes from a two-parent or single-parent family, is first-generation college  
10 bound or has special talents (for example, artistic or athletic ability) or experiences." Young  
11 decl., ¶13; see also Status of Affirmative Action 61.

12           Currently, all but 4.6% of UC freshman have satisfied minimum entrance  
13 requirements. Id. As stated in the study,

14           the admission of a few students who do not meet these requirements allows the  
15 enrollment of students with special talents, including athletic and academically  
16 promising students who, due to health, family or school circumstances, did not  
17 perform up to these standards in high school, but who show promise of  
18 succeeding at the university and benefitting from a higher education. No  
19 student is admitted on the basis of race or ethnicity alone.

20           Id. at 61-62. Chancellor Young confirms that "no student is admitted solely on the basis of  
21 race or ethnicity" Young decl., ¶13 and that:

22           Minority outreach and recruitment does not lead to students on campus who are not  
23 qualified to be here. Less than 3% of the entire freshman class [at UCLA] are  
24 students who did not meet UC's minimum academic requirements and who were  
25 admitted by exception. More than 60% of such exceptions are for athletes.

26           Young decl., ¶14, emphasis in original.

27           Although there has been some increase over time, from 1980 to 1993, in the  
28 enrollment of under-represented students as UC freshmen, Latinos and African-Americans  
remain severely under-represented. Status of Affirmative Action, at p. 62. For example, even  
now, within the UCLA 1995 entering freshman class of 3,523 students, there were but 259  
African-Americans and 790 Latinos: blacks make up just over 4%, or 5016 students, of all  
1995 undergraduate students within the entire UC statewide system; Latinos, only 14%.

1 Termination of race and gender-conscious admission programs would dramatically  
2 reduce Latino, African-American and Native American enrollment throughout the UC system.  
3 Wilson decl., ¶18.<sup>19</sup> A May 1995 report by the University of California Office of the  
4 President, The Use of Socio-Economic Status in Place of Ethnicity in Undergraduate  
5 Admissions, concluded that African-American enrollments could be reduced across the system  
6 by as much as 40 to 50%, Latino enrollments by 5 to 15% and Native American by 40 to  
7 50%. University of California Office of the President, The Use of Socio-Economic Status in  
8 Place of Ethnicity in Undergraduate Admissions 3-5 (May, 1995). Exh. 7, at 3-5.; see also  
9 decl. of Cecilia Conrad, ¶18-17; decl. of Dr. C. Adolfo Bermeo, ¶5. Professor Conrad cites  
10 "empirical evidence that, holding constant performance, African-American students gain  
11 substantially more than white students from attending a more selective college or university."  
12 Id., ¶9.

13 Although Blacks now make up just 4.35% and Latinos 14.87% of the University of  
14 California enrollment, Conrad decl., ¶15, Proposition 209 dictates that the University's modest  
15 effort at inclusion goes too far. Even more important, it cuts off any further dialogue on the  
16 subject. As Chancellor Young puts it:

17 Proposition 209, which for the first time in the State's history prescribes  
18 University admissions policies in the California Constitution, effectively silences

19 <sup>19</sup> Although SP-1, a resolution approved by the University of California Regents in  
20 July 1995, ordered that race, gender, and ethnicity no longer be used in admissions, the  
21 impact of Proposition 209 extends well beyond SP-1. First, as Chancellor Young points  
22 out, issues surrounding affirmative action are "an on-going source of great interest and  
23 vigorous debate for the Regents, the Chancellors of the nine campuses and the UC  
24 Faculty," and "University policy regarding affirmative action could be (and undoubtedly  
25 will be) adjusted periodically." Young decl., ¶17. Proposition 209 would stifle this  
26 continuing debate, by withdrawing authority for admissions policy from the Regents and  
27 Administration, and removing that authority to the most distant level of State Government  
28 -- the Constitution. Second, the University Admissions policy decreed by SP-1 is not  
scheduled to go into effect until the 1997-98 school year; Proposition 209, however,  
purports to go into effect on enactment, and would thus require the immediate abolition  
of those admissions programs that fall within its scope. See LAO's Report. Third, as the  
Legislative Analyst report also notes, the University of California runs "a variety of  
assistance programs for students, faculty, and staff that are targeted to individuals based  
on sex, race, or ethnicity," including "programs such as outreach, tutoring and financial aid  
... that probably would be affected by passage of this measure." Id.; see also Kang decl.,  
¶15

1 all future debate on the legitimate role of affirmative action in higher  
2 education. By mandating an absolute ban on any affirmative action program,  
3 Proposition 209 eliminates the opportunity for a healthy exchange of ideas, and  
thereby does a great disservice to the people of California.

4 Young decl., ¶18.

5 b. Medical School

6 Admissions policies for medical schools within the UC system are directed at  
7 "select[ing] a class that will produce doctors who serve the needs of society." Conrad decl.,  
8 ¶25 (quoting Michael Drake, M.D., Associate Dean of Medicine at the UC San Francisco  
9 Medical School). Thus, "[a]lthough there are variations across campuses in admissions  
10 procedures, all of the medical schools stress that students with high grades and scores could  
11 be rejected in favor of students with lower grades and scores based on other criteria including  
12 patient orientation and clinical experience." *Id.* Typically, admissions committees considered  
13 the race and ethnicity of the candidate. *Id.* Professor Conrad concluded that absent any  
14 race-conscious considerations, and substituting in economic criteria, there would result "lower  
15 acceptance rates for African-Americans, Mexican-Americans and American Indians." *Id.*, ¶30.

16 Professor Conrad stated that "a reduction in the number of African American, Mexican  
17 American . . . medical students could deteriorate the quality of medical . . . education  
18 received by all students." *Id.*, ¶31; see also decl. of Dr. Herbert Nickens, Vice President for  
19 Community and Minority Programs, Association of Amer. Medical Colleges, ¶8 (collecting  
20 studies); Wilson decl., ¶4. To end race conscious affirmative action programs would therefore  
21 hurt the education and training of all physicians. Conrad, ¶¶ 32-33; Nickens decl., ¶7.

22 Even worse, "a reduction in the number of African American, Mexican American and  
23 American Indian students in medical schools will have a negative effect on the delivery of  
24 health care services in those communities. An especially rich body of literature documents  
25 the link between the training of minority doctors and the delivery of health care services to  
26 minority communities." Conrad decl., ¶37; Nickens decl., ¶ 8.<sup>20</sup> Minority communities in

27  
28 <sup>20</sup> Professor Conrad summarized that literature as follows:

(continued...)

1 California are notoriously underserved. Drake decl., ¶15. Ending policies designed to increase  
2 the number of minority physicians would, accordingly, "exacerbate the physician  
3 maldistribution problem that plagues California today and would worsen the disparate burden  
4 of poor health suffered by the underserved." *Id.*, ¶19.

5 c. Law School

6 UC Law School admissions will be affected in much the same way as medical school  
7 admissions within the UC system. Presently, UCLA admits up to 40% of its entering class  
8 on the basis of academic criteria combined with other factors, including institutional diversity;  
9 Boalt Hall, up to 50%. Conrad decl., ¶23. Eliminating the use of race and ethnicity as  
10 factors for admission would diminish the number of African American, Latino and Native  
11 American students at these institutions. Professor Conrad summarizes the resulting  
12 consequences on legal education as follows:

13 Legal educators argue that diversity of intellectual tradition and background  
14 helps students identify areas where the law is "inconsistent, inappropriate, or

15 <sup>20</sup>(...continued)

16 All physicians tend to care for patients of their own race and ethnicity, but  
17 this is especially true for black and Hispanic physicians. Miriam Komaromy  
18 et al, The Role of Black and Hispanic Physicians in Providing Health Care  
19 for Underserved Populations, The New England Journal of Medicine, p.  
20 1305-1310 (1996). On average, black physicians care for nearly six times as  
21 many black patients and Hispanics physicians care for nearly three times as  
22 many Hispanic patients as other physicians. *Id.* African American, Asian  
23 and Hispanic physicians are more likely to serve patients who are Medicaid  
24 recipients. *Id.*; Association of American Medical Colleges, Minority  
25 Students in Medical Education: Facts and Figures IX (1995). According to  
26 the Association of American Medical Colleges' (AAMC), nearly 40% of  
27 underrepresented minority physicians practice in deprived areas. Less than  
28 10% of non-URM's do. the AAMC also reported that URM students were  
more likely to participate in public health screening clinics, deliver medical  
services to underserved populations outside clinical rotations, and volunteer  
to educate high school and college students about science and medicine.  
(Association of American Medical Colleges, Project 3000 By 2000: Progress  
to Date: Year Four Progress Report (1996) Doctors admitted under a  
special admissions program at UC San Diego saw more patients per day and  
were more likely to have poor clientele than were their classmates. Nolan  
Penn et al, Affirmative Action at Work: A Survey of Graduates of the  
University of California, San Diego, Medical School, Vol. 76, No. 9  
American Journal of Public Health, (1986).

Conrad decl., ¶13.

1 unresponsive to the needs of society." They cite the role of minority students  
2 in improving the cultural competence of their nonminority classmates.  
3 Furthermore, legal educators stress the importance of the presence of a critical  
4 mass of underrepresented minority students. The report of the Admissions  
5 Policy Task Force at Boalt Hall argues that a critical mass of minority students  
6 are enrolled in small numbers, they often experience feeling of alienation and  
7 isolation that make them less likely to participate in class discussions.  
8 Tokenism, according to the report, can "silence the very voices that are crucial  
9 to building a diverse and intellectually stimulating law school."

6 Id., ¶12 (citations omitted).

7 **d. Outreach programs/Student development**

8 The Office of Research study noted that "[e]ducational and economic disadvantages  
9 have been cited as reasons for the underrepresentation of some minorities in full-time student  
10 enrollments" in California higher education. Status of Affirmative Action, p. 62. Far fewer  
11 African-American and Latino students emerge from high school eligible for the California  
12 State University or University of California systems, compared to their white counterparts.  
13 Hart decl., ¶24; Garcia decl. ¶13. A growing body of research suggests that African-American  
14 and Latino students are "sorted" into less academically challenging tracks, "in the belief that  
15 they are more 'suited' for vocational occupations." Johnson decl., ¶8; Hart decl., ¶138-39.

16 The California Postsecondary Education Commission in 1992 studied the effectiveness  
17 of nine programs designed to improve the preparation of secondary-school students for  
18 college, concluding that "[a] common characteristic of the programs was 'an emphasis on  
19 student participants who are from racial, ethnic, or socioeconomic backgrounds that are  
20 historically under-represented in postsecondary education.'" Status of Affirmative Action 62.  
21 For example, the Early Academic Outreach Program (EAOP) involves 176 school districts  
22 and the eight campuses of UC, administered through the office of the UC president. Id. at  
23 p. 57. In 1992-93, EAOP served 56,775 students; almost 80% were from underrepresented  
24 minority groups. Id. at p. 62. The accomplishments of the program have been impressive:

25 UC claims a high level of success for this program, reporting that, overall, 48  
26 percent of the graduating seniors in EAOP became either fully or potentially  
27 eligible for admission to UC. More dramatically, the change over time shows  
28 that under-represented students now comprise 18.8 percent of in-state  
undergraduates, compared to only 9.8 percent in the fall of 1980. To cite the  
example of one group, new freshmen Chicanos/Latinos have increased in  
number from 5,355 in 1980 to 15,496 in 1993.

1 Id.; see also Garcia decl., ¶8. Also exemplary is the Professional Development Program  
2 which, as stated by its faculty director Professor Stanley Prussin of U.C. Berkeley's  
3 Department of Nuclear Engineering, has assisted minority students in mathematics, math-  
4 based sciences, and engineering with "remarkable success." Prussin decl., ¶3. Professor  
5 Prussin concludes that "Proposition 209 would likely prevent targeting of resources by the very  
6 programs that have proven effective in addressing the imbalances in educational levels and  
7 participation in the professions that plague California's society." Id., ¶13.

8 While plaintiffs have submitted over 70 declarations, describing in detail the likely  
9 consequences of ending particular programs, these can only begin to illuminate the  
10 breathtaking destructive sweep of Proposition 209. To the extent that programs like the ones  
11 described are eliminated, countless women and minorities throughout the State will be  
12 immediately and irreparably affected -- and the futures of thousands of California's children  
13 and young people dramatically limited.

14 **D. REVERSING GAINS AGAINST DISCRIMINATION: BROADER SOCIAL IMPACT**  
15 **OF PROPOSITION 209**

16 The end to race and gender-conscious programs in the areas of public education,  
17 contracting and employment would leave California alone among states as "casting aside a  
18 major tool for overcoming the perpetuation of discrimination -- a tool that has worked when  
19 it has been enforced. . . ." Berry decl., ¶17.

20 Affirmative action was never intended to substitute for jobs, nutritional aid for  
21 poor families, and other social problems. But it has lifted many out of poverty  
22 by providing enhanced job and entrepreneurial opportunities, and their success  
23 sends out a ray of hope to the poor that if they make the effort, they will be  
24 able to better themselves.

25 Id.; see also decl. of Yvonne Y. Lee, U.S. Commission on Civil Rights, ¶73 ("The very means  
26 identified by the Glass Ceiling Report as successfully combating this persistent discrimination  
27 would be outlawed by Proposition 209 in the public sector.) When during the early 1980s,  
28 the federal government dismantled many affirmative action plans, blacks not only ceased to  
make economic progress; advances made under previous affirmative action programs were  
reversed. Decl. of Jonathan Leonard, ¶15. During this period, minority employment among  
contractors actually grew more slowly than among noncontractors. Id.

1           Such backsliding demonstrates that there is no substitute or even near-substitute for  
2 race and gender conscious programs, as a means to combat discrimination. Decl. of John J.  
3 Donohue III ("As demonstrated by the effects of curtaining federal affirmative action in the  
4 1980's, the elimination of race-conscious programs in California is likely to have an adverse  
5 effect on black Americans' economic position"); id., ¶5 ("The best available evidence suggests  
6 that black progress has flowed from a combination of strong governmental antidiscrimination  
7 and affirmative action measures.") As Professor William Bielby states: "[A] prohibition  
8 against the use of affirmative action goals and other proactive efforts will halt and probably  
9 reverse gains made since the late 1970s by women and members of historically  
10 underrepresented minority groups." Bielby decl., ¶9.

11           Even if the political will existed to somehow attempt to replace the broad catalogue  
12 of programs extinguished by Proposition 209 with new ones based entirely on economic  
13 disadvantage, "race and sex discrimination are one thing and poverty is another." Berry decl.,  
14 ¶18.

15           There is no reason not to support targeted efforts to relieve poverty, but that  
16 does not preclude relieving discrimination based on race or sex, which may or  
17 may not be accompanied by poverty. For example, affirmative action can help  
middle-class African-American employees to break through the glass ceiling  
when they seek promotions in the workplace.

18 Id., ¶18. The experience of communities like Oakland, Berkeley and Los Angeles; the  
19 assessments by Professor Conrad and Chancellor Young as to the racial and ethnic  
20 composition of students in the UC system absent any race-conscious programs; and the  
21 analyses by Larson, Ramsey, and Bendick as to the likely effects of abolishing affirmative  
22 action in public employment and contracting, all underscore that there is no indirect way at  
23 getting at past and persistent discrimination.

24           Nor can the result of the initiative's enforcement be confined simply to the programs  
25 implicated. Though it is by now sound law enforcement policy to staff police and sheriff  
26 departments with minority and women to form community relationships of trust and  
27 confidence, prohibiting race and gender-conscious programs assures that this objective cannot  
28 be met. Decl. of Samuel Walker, Professor of Criminal Justice, Univ. of Nebraska, ¶¶ 36, 40,  
43; decl. of Assoc. Prof. Joanne Belknap, Div. of Criminal Justice, Univ. of Cincinnati, ¶5;

1 decl. of Allan Parachini, ¶6; Kang decl. ¶4. Nor can the health care needs of underserved  
2 communities be met without affirmative action at medical schools. Drake decl., ¶5; Conrad  
3 decl. ¶¶37-38. Even more broadly, because "the economic progress of all Californians is  
4 linked to the economic, and, therefore, the educational progress of minority groups," decl. of  
5 Steve Levy, Director of the Center for Continuing Study of the California Economy, ¶¶6-7,  
6 elimination of race-conscious programs at all levels of public education will redound to the  
7 detriment of the entire state.

8 Proposition 209's sweeping ban on state affirmative action will have ramifications far  
9 beyond the public sector. Private sector affirmative action has tended to follow, but lag  
10 behind the public sector. As documented by Professor Jonathan Leonard of the Haas School  
11 of business at U.C. Berkeley, government affirmative action programs have also played a  
12 significant role in increasing minority and women employment in private sector jobs, plus  
13 helping these groups to ascend the career ladder. Leonard decl., ¶¶6-7; see also Hacker decl.,  
14 ¶11. Not only has government been at the forefront in hiring women and minorities, but it  
15 has also given direct inducements to private sector employers to hire minorities. In the  
16 contracting arena, for example, affirmative action often takes the form of awarding public  
17 contracts to private enterprises that have increased their outreach to women and minorities.  
18 See, e.g., Larson decl., ¶13

19 At the same time, all of the available evidence refute allegations of extensive "reverse  
20 discrimination." Leonard decl., ¶10; Blumrosen decl., ¶¶3-11. An exhaustive analysis of  
21 discrimination charges filed between 1987 and 1994 found that "the problem of 'reverse  
22 discrimination' is not widespread and that, in those situations where it does occur, the courts  
23 have provided relief." Blumrosen decl., ¶3. Direct testing, involving matched pairs of white  
24 and minority job seekers, confirms that "the number of instances of reverse discrimination is  
25 small." Bendick decl., ¶25 Research on overall productivity also refutes the conclusion that  
26 affirmative action leads to reverse discrimination. Hiring more women and minority has not  
27 resulted in a decline in productivity; to the contrary, "as minorities and women increased their  
28 employment share in American industry, their estimated productivity actually went up."

1 Leonard decl., ¶12; see also Carnoy decl. ¶11 ("It is simply not the case that affirmative action  
2 distorts an otherwise efficient labor market").

3 "Although the social conditions that occasioned affirmative action have improved . .  
4 . and for more than a generation American law has prohibited race, national origin and  
5 gender discrimination, discrimination is far from over." Berry decl., ¶19; Blumrosen decl.,  
6 ¶15. Yet, no matter the nature or extent of the harms this discrimination creates and spreads,  
7 Proposition 209 leaves state and local governmental entities effectively powerless to strike  
8 back with race and gender-conscious remedies which meet rigorous Fourteenth Amendment  
9 standards, or to respond to those of their constituents who seek such programs.

#### 10 IV. ARGUMENT

11 In determining whether injunctive relief, including a Temporary Restraining Order,  
12 should issue, the Ninth Circuit has stated:

13 The moving party must show "either 1) a combination of probable success on  
14 the merits and the possibility of irreparable harm, or 2) the existence of serious  
15 questions going to the merits the balance of hardships tipping sharply in its  
16 favor, and at least a fair chance of success on the merits.

17 Miller v. Cal. Pacific Med. Ctr., 19 F.3d 449, 456 (9th Cir. 1994 (en banc)); see also Lockheed  
18 Missile and Space Co. v. Hughes Aircraft, 887 F.Supp. 1320, 1322 (N. Dist. Cal. 1995) (TRO  
19 appropriate where movant meets either standard set forth in Miller). "These formulations  
20 are not different tests but represent two points on a sliding scale in which the degree of  
21 irreparable harm increases as the probability of success on the merits decreases." Big Country  
22 Foods Bd. of Ed. of Anchorage School Dist., 868 F.2d 1085, 1088 (9th Cir. 1989); see also  
23 Alaska v. Native Village of Venetie, 856 F.2d 1384, 1389 (9th Cir. 1988).

24 In this case, implementation of the self-executing Proposition 209 will result in  
25 substantial and immediate irreparable harm, in the form of an unconstitutional cut-off of  
26 plaintiffs' ability to protect themselves through the political process. Moreover, as the  
27 voluminous declarations from experts and affected people attest, the balance of hardships tips  
28 strongly in their favor. Although plaintiffs need not show as strong a likelihood of success  
on the merits as when the balance tips less strongly in their favor (Venetie, 856 F.2d at 1389),  
there is, for the reasons explained below, a high likelihood of their prevailing on the merits.

1 **A. PROPOSITION 209 IMPERMISSIBLY BURDENS PARTICIPATION IN STATE**  
2 **AND LOCAL POLITICAL PROCESSES, IN VIOLATION OF THE EQUAL**  
3 **PROTECTION CLAUSE, BY ERECTING SPECIAL BARRIERS TO THE**  
4 **ADOPTION OF LEGISLATION BENEFICIAL TO MINORITIES**

5 Proposition 209 is designed to strip state and local government of all authority to adopt  
6 and implement race conscious affirmative action programs in public education, employment  
7 or contracting, regardless of their necessity, objective, or actual operation.<sup>21</sup> The initiative  
8 specifically targets those integrative programs that are permissible under strict constitutional  
9 scrutiny, going further than any statewide measure in our Nation's history to ban all programs  
10 that are narrowly tailored to remedy demonstrated discrimination. By declaring an entire  
11 class of beneficial legislation off-limits to racial minorities, Proposition 209 places an  
12 unconstitutional burden on their ability to protect their interests and leaves them at a  
13 "debilitating and . . . insurmountable disadvantage." Washington v. Seattle School Dist. No.  
14 1, 458 U.S. 457, 484 (1982). While other groups may continue to pursue their interests in  
15 attaining beneficial legislation and policies at every level of state and local government -- such  
16 as city councils, school boards and state commissions -- racial minorities, under Proposition  
17 209, may now only do so by securing a popular majority and amending the state constitution.  
18 Such a near ironclad restriction upon minorities' access to state and local political processes  
19 fundamentally reorders the decisionmaking structure of government in California. It is  
20 precisely the type of enactment the United States Supreme Court has repeatedly and  
21 consistently found to offend 14th amendment principles.

22 The 14th Amendment's guarantee of equal protection safeguards the participation of  
23 citizen groups in democratic processes at every level -- local, state, and national. See, e.g.,  
24 Reynolds v. Sims, 377 U.S. 533, 563, n.40, 84 S.Ct. 1362, 12 L.Ed. 2d 506 (1964) (equal

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25 <sup>21</sup> Specifically, subdivision (a) bans "preferential treatment to any individual" based on  
26 "race, sex, color, ethnicity or national origin." For conciseness, this brief uses the term  
27 "race" or "racial minority" to refer to groups categorized by "race...color, ethnicity or  
28 national origin." Because all such classifications are regarded as constitutionally suspect  
and are subject to "strict scrutiny," they are legally indistinguishable for purposes of this  
argument. "Sex" classifications, which are subject to a different level of scrutiny, are also  
treated differently by Proposition 209. See subdivision (c). Accordingly, gender-based  
affirmative action is analyzed separately in this brief. See infra part IV.B.

1 protection clause prohibits districting schemes that give same numbers of representatives to  
2 widely differing numbers of voters).<sup>22</sup> Thus, "[i]t is beyond dispute, of course, that given  
3 racial or ethnic groups may not be . . . precluded from entering into the political process in  
4 a reliable and meaningful manner." Seattle, 458 U.S. at 467. The 14th Amendment not only  
5 guarantees equal voting rights, but extends more broadly to ensure "a just framework within  
6 which diverse political groups in our society may fairly compete[.]" Id. at 470 (quoting Hunter  
7 v. Erickson, 393 U.S. 385, 393 (Harlan J., concurring)).<sup>23</sup> Just last term, for example, the  
8 Supreme Court broadly reaffirmed the 14th Amendment's commitment to protection of  
9 citizen groups' free and equal access to the channels of government:

10 Central both to the idea of the rule of law and to our own Constitution's  
11 guarantee of equal protection is the principle that government and each of its  
12 parts remain open on impartial terms to all who seek its assistance. . . . A law  
13 declaring that in general it shall be more difficult for one group of citizens than  
14 for all others to seek aid from the government is itself a denial of equal  
15 protection of the laws in the most literal sense.

16 Romer v. Evans, 116 S. Ct. 1620, 1628, 134 L.Ed. 2d 855, 866-67 (1996).

17 The Court has twice before struck down laws far less sweeping in scope than  
18 Proposition 209, precisely because they "remove[ed] the authority to address a racial problem  
19 -- and only a racial problem -- from the existing decision making body in such a way as to  
20 burden minority interests." Seattle, 458 U.S. at 474 (emphasis added). In Hunter v. Erickson,  
21 393 U.S. 385, 89 S.Ct. 557, 21 L.Ed. 2d 616 (1969), the Court first gave "clear[] expression" to

22 <sup>22</sup> The principle underlying those decisions traces back at least to Justice Stone's  
23 famous Carolene Products footnote four. See United States v. Carolene Products Co., 304  
24 U.S. 144, n. 4, 58 S.Ct. 778, 82 L.Ed. 2d 1234 (1938) ("Nor need we enquire . . . whether  
25 prejudice against discrete and insular minorities may be a special condition, which tends  
26 seriously to curtail the operation of those political processes ordinarily to be relied upon  
27 to protect minorities, and which may call for a correspondingly more searching judicial  
28 inquiry.").

29 <sup>23</sup> See also Citizens Against Rent Control v. Berkeley, 454 U.S. 290, 294, 102 S.Ct.  
30 434, 70 L.Ed. 2d 492 (1981) ("The practice of persons sharing common views banding  
31 together to achieve a common end is deeply embedded in the American political  
32 process"); decl. of Robert Dahl, Prof. of Political Science Emeritus, Yale University, ¶16  
33 ("By withdrawing from state and local officials and the state legislature the authority to  
34 enact or implement a program of core importance to a particular group, the potential  
35 efficacy of that group's political participation in normal political processes is thereby  
36 diminished.")

1 the principle that equal protection may be violated by such "subtle distortions [in]  
2 governmental processes [that operate to] place special burdens on the ability of minority  
3 groups to achieve beneficial legislation." Seattle, 458 U.S. at 467 (describing origins of  
4 Hunter doctrine).

5 The distortion worked by Proposition 209 is by no stretch a subtle one. The  
6 referendum in Hunter made it more difficult for minorities to secure fair housing legislation,  
7 and in Seattle, school desegregation. Here, the initiative dwarfs the legislation struck down  
8 in those cases in its aggregate effects on minorities and issues inuring to their benefit. It  
9 knocks out in one fell swoop the ability of minorities to obtain from state and local  
10 governmental entities race-conscious relief to erase discrimination and its continuing effects  
11 in public education at all levels, employment and contracting. Seattle is therefore directly on  
12 point:

13 Certainly, a state requirement that "desegregation or antidiscrimination laws,"  
14 and only such laws be passed by unanimous vote of the legislature would be  
15 constitutionally suspect. It would be equally questionable for a community to  
16 require that laws or ordinances "designed to ameliorate race relations or to  
17 protect racial minorities," be confirmed by popular vote of the electorate as a  
18 whole, while comparable legislation is exempted from similar procedure.

19 Seattle, 458 U.S. at 486-87 (emphasis added, citations omitted).

20 1. The Equal Protection Clause Prohibits States from Requiring Racial  
21 Minorities to Run a Special Legislative Gauntlet to Enact Beneficial Policies

22 In Hunter v. Erickson, the Court invalidated a referendum adopted by a majority of  
23 voters of the City of Akron that had overruled a fair housing ordinance previously enacted  
24 by the City Council. Akron voters passed a referendum amending the city charter to block  
25 implementation of any fair housing ordinance that had not first gained the express approval  
26 of a majority of Akron voters. In facially neutral terms similar to Proposition 209, the charter  
27 amendment purported to require popular approval of any ordinance regulating real estate  
28 transactions "on the basis of race, color, religion, national origin or ancestry . . . ." Hunter,  
393 U.S. at 387. The charter amendment not only repealed the recently enacted ordinance  
prohibiting housing discrimination, "but also required approval of the voters before any future  
housing discrimination ordinance could take effect." Id. at 389-90.

1 By a vote of 8-1, the Court struck down the Akron amendment as violative of the  
2 Equal Protection Clause. The Court deemed it unnecessary to rest its decision on a finding  
3 of invidious motive or intent. Instead, the Court reasoned, the amendment was subject to  
4 strict scrutiny, which it could not survive, because it effectively "drew a distinction between  
5 those groups who sought the law's protection against racial, religious, or ancestral  
6 discriminations in the sale or rental of real estate and those who sought to regulate real  
7 property transactions in the pursuit of other ends." Id. at 390. The Court saw through the  
8 facial neutrality of the charter amendment -- which "draws no distinctions among racial and  
9 religious groups" -- to find that it would nonetheless uniquely disadvantage those who benefit  
10 from race-conscious fair housing laws, i.e., minorities, by forcing them to run a legislative  
11 gauntlet of popular approval that other laws -- and thus other interest groups -- are spared.  
12 "The reality is that the law's impact falls on the minority." Id. at 391.

13 The Court applied and extended Hunter in Washington v. Seattle School District No.  
14 1, 458 U.S. 457 (1982). In order to cure widespread de facto racial segregation in Seattle  
15 area schools, the Seattle school district voluntarily adopted a race-conscious integration plan  
16 that made extensive use of pupil reassignment and busing. This plan prompted the enactment  
17 of Initiative 350 by the Washington state electorate. On its face, the Initiative made no  
18 mention of race; it provided broadly that "no school board . . . shall directly or indirectly  
19 require any student to attend a school other than [the geographically closest school]." Wash.  
20 Rev. Code § 28A.26.010 (1981). The initiative then set out, however, a number of exceptions  
21 to this prohibition -- so many exceptions that the real-life effect on local school boards was  
22 to prohibit them only from ordering reassignment or busing for the purpose of racial  
23 integration, but to permit them to order reassignment and busing for all other educationally  
24 valid reasons. Seattle, 458 U.S. at 463.

25 The Supreme Court invalidated this referendum. As in Hunter, the Court declined  
26 to rest its holding on a finding of invidious intent, but focused instead on the fact that  
27 Initiative 350 "explicitly us[ed] the racial nature of a decision to determine the decision  
28 making process." Seattle, 458 U.S. at 471. Specifically, the Initiative removed racial busing -  
- a policy and goal of particular importance to racial minorities -- from the control of local

1 decision-making bodies and shifted it to central management at the statewide level, where  
2 minorities would have much less likelihood of democratic success.

3 State action of this kind, . . . "places special burdens on racial minorities within  
4 the governmental process," thereby "making it more difficult for certain racial  
5 and religious minorities [than for other members of the community] to achieve  
6 legislation that is in their interest." Such a structuring of the political process,  
7 the Court said, was "no more permissible than [is] denying [members of a racial  
8 minority] the vote, on an equal basis with others."

9 Id. (quoting Hunter, 393 U.S. at 391).

10 Initiative 350 thereby "removes the authority to address a racial problem -- and only  
11 a racial problem -- from the existing decision making body in such a way as to burden  
12 minority interests." Id. at 474-75.

13 [W]hen the State's allocation of power places unusual burdens on the ability of  
14 racial groups to enact legislation specifically designed to overcome the "special  
15 condition" of prejudice, the governmental action seriously "curtail[s] the  
16 operation of those political processes ordinarily to be relied upon to protect  
17 minorities" [quoting Carolene Products]. In a most direct sense, this implicates  
18 the judiciary's special role in safeguarding the interests of those groups that are  
19 "relegated to such a position of political powerlessness as to command  
20 extraordinary protection from the majoritarian political process." [quoting San  
21 Antonio Independent School District v. Rodriguez, 411 U.S. 1, 28] (1993).

22 Seattle, 458 U.S. at 486. This selective and unfavorable procedural treatment of legal  
23 programs that were beneficial to minorities thus denied such minorities the protected right  
24 to "full participation in the political life of the community." Id. at 467.

25 Hunter and Seattle thus hold that a state law unconstitutionally burdens the political  
26 participation of racial minorities when it singles out racial issues for removal from the  
27 ordinary political process, to less numerous and accessible units of government.<sup>24</sup> The

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28 <sup>24</sup> By comparison, states are always free to make the enactment of policies easier or more  
difficult generally, so long as the rules imposed are to be applied across-the-board. The bar  
may be lifted or dropped to nearly any level, but not tilted:

As Justice Harlan noted while concurring in the Court's opinion  
in Hunter, laws structuring political institutions or allocating  
political power according to "neutral principles" -- such as the  
executive veto, or the typically burdensome requirements for  
amending state constitutions -- are not subject to equal protection  
attack, though they may "make it more difficult for minorities to  
achieve favorable legislation." Because such laws make it more

(continued...)

1 impact of such law on racial minorities' ability to protect their interests is readily apparent.  
2 The Supreme Court has consistently taken it as a given that the ability of any minority group  
3 to use normal democratic processes to influence decision-making is typically greater at the  
4 local level, or even before the state legislature, than at the level of an amendment to a state  
5 constitution. See Romer, 116 S.Ct. 1620 (1996), (striking down state constitutional  
6 amendment withdrawing authority from local governments and the state legislature to enact  
7 antidiscrimination laws for gays and lesbians); id., at 1634 (Scalia, J., dissenting) (referendum  
8 amendment to state constitution withdrawing power of local government to enact gay rights  
9 ordinances sought to counter both the geographic concentration and the disproportionate  
10 political power of homosexuals by (1) resolving the controversy at the statewide level and (2)  
11 making the election a single-issue contest for both sides ); Seattle, 458 U.S. at 486; Reitman  
12 v. Mulkey, 387 U.S. 369, 377, 87 S.Ct. 1627, 18 L.Ed.2d 830 (1967) (striking down state  
13 constitutional amendment that effectively made private housing discrimination "immune from  
14 legislative, executive, or judicial regulation at any level of the state government.")<sup>25</sup>

15 It is therefore the constitutional rule that "a different analysis is required when the  
16 State allocates governmental power nonneutrally, by explicitly using the racial nature of a  
17 decision to determine the decision making process." Seattle, 458 U.S. at 471.

18  
19

20 <sup>24</sup>(...continued)

21 difficult for every group in the community to enact comparable  
22 laws, they "provid[e] a just framework within which the diverse  
23 political groups in our society may fairly compete." Thus, the  
24 political majority may generally restructure the political process  
25 to place obstacles in the path of everyone seeking to secure the  
26 benefits of governmental action.

27 Seattle, 458 U.S. at 469-70.

28 <sup>25</sup> Hunter did not involve a statewide constitutional amendment, but an amendment to  
a city charter, the municipal equivalent of a state constitution. Thus, like the amendments  
at issue in Seattle, Reitman, and Romer, the amendment in Hunter removed decisionmaking  
authority to a relatively inaccessible unit of government, thereby disadvantaging racial  
minorities. As a result of the Akron amendment, racial minorities seeking to protect their  
interest in fair housing were precluded from seeking an ordinance from the city council, but  
would instead have been compelled to secure the votes of a majority of electors.

1           The principle that a law may not create "special burdens" for minorities is not, of  
2 course, the same thing as protecting them from losing a particular political contest. In  
3 contrast to the withdrawal of a racial issue to a more remote level of government decision-  
4 making, the "mere repeal" of a law advantaging racial minorities does not trigger equal  
5 protection scrutiny. That was the holding in Crawford v. Los Angeles Bd. of Education, 458  
6 U.S. 457, 102 S.Ct. 3187, 73 L.Ed. 2d 896 (1982), a companion case to Seattle. There, a  
7 statewide initiative amended the California constitution to repeal a judicial interpretation of  
8 the state constitution that held racial busing to be mandated for school integration, even  
9 where not required by the 14th amendment. The Court upheld the initiative on the grounds  
10 that it did not restructure political process to the disadvantage of a minority group, in contrast  
11 to Hunter, where "racial minorities . . . were 'singled out for mandatory referendums while  
12 no other group . . . face[d] that obstacle.'" Crawford, 458 U.S. at 541 (quoting James v.  
13 Valtierra, 402 U.S. 137, 142 91 S.Ct. 1331, 28 L.Ed. 2d 678 (1971)).<sup>26</sup>

14           Unlike the amendments in Hunter and Seattle, the Crawford initiative erected no  
15 obstacles to the adoption of legislation benefitting minorities, at either the state or the local  
16 level. Thus, the California initiative did not alter or distort the political process in any way.  
17 Only the constitutional mandate for a busing remedy was repealed. Minorities were left free  
18 to seek busing, or any other remedy for de facto segregation, through ordinary political  
19 processes.

20           In sum, the Hunter and Seattle cases "yield a simple but central principle:" Any law  
21 that creates unique procedural hurdles against the enactment of laws or policies that "inure[  
22 ] primarily to the benefit of the [racial] minority," Seattle, 458 U.S. 472, must be subject to  
23 strict scrutiny and "can be upheld only upon an extraordinary justification." Seattle, 458 U.S.  
24 at 485 (quoting Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 272 99  
25 S.Ct. 2282, 60 L.Ed. 2d 870 (1979)); see Hunter, 393 U.S. at 389-90 ("here, there was a . . .  
26 racial classification [that] treats racial housing matters differently" and subjects them to a

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<sup>26</sup> See also Seattle, 458 U.S. at 483; Dayton Board of Education v. Brinkman, 443  
U.S. 526, 531 n.5, 99 S.Ct. 2971, 61 L.Ed. 2d 720 (1979).

1 unique "procedural gauntlet"). Such a law has the impermissible effect of "work[ing] a major  
2 reordering of the State's decisionmaking process" to the detriment of minorities. Seattle, 458  
3 U.S. at 479. Thus, Akron voters were prohibited from locking out of the city council blacks  
4 who wished to pursue fair housing laws, by requiring majority approval for any such law.  
5 Similarly, Washington voters could not prevent minorities from appealing to their local school  
6 boards, and asking those boards to ameliorate long-standing discriminatory practices or their  
7 vestiges. In both cases, the capacity of minorities for "entering into the political process in  
8 a reliable and meaningful manner" was shut down. Seattle, 458 U.S. at 467. By contrast, the  
9 amendment at issue in Crawford placed no impediment to the ability of minorities to seek  
10 a busing remedy from their local school boards, or even from the California legislature. The  
11 amendment merely withdrew the constitutional mandate for this remedy, but -- as exemplified  
12 by the many desegregation plans all over the state in existence today -- left school boards and  
13 legislatures free to pursue race-conscious remedial efforts through ordinary political processes.

14           2.       **The Constitutionally Permissible Affirmative Action Programs Targeted By**  
15                   **Proposition 209 "Inure Primarily to the Benefit of the Minority" Within the**  
                  **Meaning of the Hunter-Seattle Doctrine**

16           It is even more true of Proposition 209 than of Initiative 350 in Seattle, that "there is  
17 little doubt that the initiative was effectively drawn for racial purposes." Seattle, 458 U.S. at  
18 471. Race neutral language within the initiative affords no automatic shield from equal  
19 protection scrutiny (id.); instead, what is important is the real-world impact on minorities.  
20 Id. at 474 ("practical effect of Initiative 350 is to work a reallocation of power," emphasis  
21 added); id. at 470 (law "imposes . . . unique burdens on minorities"); id. at 476, n.18 ("single  
22 narrow question before us is whether the State has exercised its power in such a way as to  
23 place a special, and therefore impermissible, burden on minority interests"). Similarly, in  
24 Hunter, the Court saw through the textual veneer of that amendment, holding that while its  
25 "procedural gauntlet" facially applied to whites as well as blacks, and to gentiles as well as  
26 Jews, "the reality is that the law's impact falls on the minority." Hunter, 393 U.S. at 391.  
27 That was so, the Court reasoned, because politically dominant majorities ordinarily do not  
28 need the protection of antidiscrimination laws, and thus lose nothing by an amendment that  
makes such laws less likely to be enacted. Id.; see also Romer, 116 S.Ct. at 1627 (Colorado

1 amendment prohibiting antidiscrimination laws based on sexual orientation did not deprive  
2 gays and lesbians of "special benefits" but "impose[d] a special disability upon those persons  
3 alone").

4 In both Hunter and Seattle, the Court emphasized that the decisive factor in  
5 determining the "racial nature" of a facially neutral law is neither the presence of explicit  
6 references to race nor the facial "equality" of the law's application to all racial and ethnic  
7 groups. Instead, the Court required a real-world assessment identifying the groups hurt by  
8 the challenged law. After rejecting defendants' argument that Hunter is necessarily inapposite  
9 because Initiative 350 nowhere mentioned "race" or "integration," the Court rejected the  
10 contention that "busing for integration, unlike the fair housing ordinance involved in Hunter,  
11 is not a peculiarly 'racial' issue at all." Seattle, 458 U.S. at 471-72. The Court recognized that  
12 both whites and blacks were on each side of the Initiative 350 debate, and that both whites  
13 and blacks may well benefit from school integration. Id. at 472. But the Court defined the  
14 critical question as whether "desegregation of public schools, like the Akron open housing  
15 ordinance, at bottom inures primarily to the benefit of the minority, and is designed for that  
16 purpose." Seattle, 458 U.S. at 472 (emphasis added). It then held that busing to achieve  
17 integration, though more "controvers[ial] than . . . the sort of fair housing ordinance debated  
18 in Hunter, . . . is legislation that is in [minorities'] interest." Id. at 474 (quotations  
19 omitted).<sup>27</sup>

20 Like the proponents of the Akron Amendment and Initiative 350, supporters of  
21 Proposition 209 have made the claim that one of its components, the anti-discrimination

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23 <sup>27</sup> That "affirmative action" may, in some of its forms, be a "controversial" remedy for  
24 race discrimination, or that it may be opposed by some African-Americans, Latinos or  
25 members of other minority groups who are the intended beneficiaries of "preferences," is  
26 irrelevant to the inquiry. Such an argument was explicitly considered, and rejected, by the  
27 Court in Seattle, 458 U.S. at 472. The Court acknowledged that blacks and whites could  
28 be counted on both sides of the Initiative 350 debate, and even that whites stood to gain  
from the racially integrative effects of busing. Id. The same, of course, can be said about  
preference programs, insofar as they are controversial across racial lines and that even  
whites and males stand to benefit from the diversifying effects of the programs. But these  
do not change the fundamentally racial character of Proposition 209's ban on preferences.  
Again, the test is whether the burdened category of policies is one that "inures primarily to  
the benefit of the minority, and is designed for that purpose." Seattle, 458 U.S. at 472.

1 provisions, aids minorities. Such help is altogether illusory. It adds nothing to existing  
2 constitutional and statutory protections already available to minorities and women; there is  
3 no such thing as discrimination against racial minorities that is lawful under existing law, but  
4 newly prohibited by the Proposition 209. During the political campaign over the Proposition  
5 209, proponents were repeatedly challenged to identify even one such example, and never  
6 could do so. As the LAO concluded, the only programs targeted by the initiative are race  
7 and gender conscious affirmative action programs. (Taylor decl., ¶2; see also Legislative  
8 Analyst's Yes/No Statement.) The sole effect is to ban race and gender conscious affirmative  
9 action programs which benefit women and minorities.<sup>28</sup> Like the Akron ordinance and  
10 Initiative 350, the textual color-blindness of Proposition 209 masks its "practical effect"  
11 (Seattle, 458 U.S. at 474): to prohibit affirmative action programs benefitting minorities and  
12 women.

13 Despite its general language, Proposition 209 unequivocally eliminates affirmative  
14 action programs designed to remedy the effects of discrimination against women and  
15 minorities. As in Hunter, the initiative deals in "explicitly racial terms with legislation  
16 designed to benefit minorities 'as minorities,' not legislation intended to benefit some larger  
17 group of underprivileged citizens among whom minorities were disproportionately  
18 represented." Seattle, 458 U.S. at 485. As in Seattle, Proposition 209 "places unusual burdens  
19 on the ability of racial groups to enact legislation specifically designed to overcome the  
20 'special condition' of prejudice." Seattle, 458 U.S. at 486. Because the initiative thus  
21 "curtail[s] the operation of those political processes ordinarily to be relied upon to protect  
22

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23 <sup>28</sup> Moreover, even if Proposition 209 did, counter to reality, ban some form of  
24 "discrimination" against minorities that is presently legal, that could not remotely save the  
25 initiative. Analogous theoretical defenses could certainly have been made for the Akron  
26 charter amendment and for Initiative 350. The Akron amendment covered all legislation  
27 dealing with discrimination "on the basis of race," and therefore "helped" minorities by  
28 making enactment of Jim Crow housing segregation ordinances more difficult. Likewise,  
Initiative 350 "helped" minorities by making it more difficult for a locality to use busing to  
resegregate Seattle schools. Yet these hypothetical benefits to minorities did not forestall  
the Court from finding harm to minorities in Hunter and Seattle. They cannot do so here  
either since, as in both those cases, minorities must bear the full brunt of the amendment  
at issue.

1 minorities," it is on its face presumptively unconstitutional. Id. (quoting United States v.  
2 Carolene Products, 304 U.S. at 153 n.4 (1938)).

3 **3. Proposition 209 Imposes a Peculiar Disadvantage On Racial Minorities' Ability**  
4 **To Participate in the Political Process by Restricting Race-Conscious**  
5 **Affirmative Action -- But Not Other Categories of Government Preferences --**  
6 **to the Remotest Level of Governmental Decisionmaking**

7 Proposition 209 singles out "racially conscious legislation" for "peculiar and  
8 disadvantageous treatment," to which other types of legislation are not subject. Seattle, 458  
9 U.S. at 485. It thus suffers from precisely the same constitutional failing that invalidated the  
10 referenda in Hunter and Seattle: barring all units of state and local government, all the way  
11 up to the state legislature, from enacting race-conscious affirmative action permissible under  
12 the United States Constitution to redress racial discrimination. In the words of Seattle,  
13 Proposition 209 "require[s] that laws . . . 'designed to ameliorate race relations or to protect  
14 racial minorities' be confirmed by popular vote of the electorate as a whole, while comparable  
15 legislation is exempted from similar procedure." Id. at 486-87; see also Hunter, 393 U.S. at  
16 387 (amendment language required that housing ordinances benefitting minorities "first be  
17 approved by a majority of the electors").

18 While Proposition 209 ties the hands of state and local governments, preventing them  
19 from enacting programs narrowly tailored to remedy discrimination, it does not limit any  
20 other kind of "preferential treatment" they might wish to bestow. Notwithstanding the  
21 compelling interest in addressing "the unhappy persistence of discrimination" against women  
22 and minorities Adarand Constructors, Inc. v. Pena, -- U.S. --, 115 S.Ct. 2097, 2101, 132 L.Ed.  
23 2d at 188, it is only in the area of race and gender that "preferential" programs are made off-  
24 limits. In the area of public employment, for example, preferences may constitutionally be  
25 granted to veterans, to persons over 40, to the disabled, or even to those who are simply well-  
26 connected. Nor is there any prohibition on preferences for persons within commuting  
27 distance of an area whose state legislators exert sufficient influence over their colleagues. In  
28 public education, preferences can still constitutionally be granted to alumni children, or based  
on geographical considerations. In public contracting, preferences may be granted to favored  
industries, utilities, or growers; they may also be based on regional political clout. Only

1 "preferential treatment" based on race and gender -- even where necessary to remedy past or  
2 ongoing discrimination -- is forbidden.

3 Proposition 209 is thus far less constitutionally defensible than either the Akron charter  
4 amendment or Initiative 350. The Seattle Court, building upon Hunter, recognized that the  
5 ability of racial minorities to participate "equally" and "in a reliable and meaningful manner"  
6 in the political process could be crippled by the implicit as well as explicit elimination of an  
7 existing political channel for redress of racial issues:

8 It surely is an excessively formal exercise, then to argue that the procedural  
9 revisions at issue in Hunter imposed special burdens on minorities, but that the  
10 selective allocation of decision making authority worked by Initiative 350 does  
11 not erect comparable political obstacles. Indeed, Hunter would have been  
12 virtually identical to this case had the Akron charter amendment simply barred  
13 the City Council from passing any fair housing ordinance, as Initiative 350  
14 forbids the use of virtually all mandatory desegregation strategies. Surely,  
15 however, Hunter would not have come out the other way had the charter  
16 amendment made *no* provision for the passage of fair housing legislation [at  
17 all], instead of subjecting such legislation to ratification by referendum.

18 Seattle, at 474-75. In Seattle, the Court "graphically demonstrated" its point by noting that  
19 under Initiative 350, "longstanding desegregation programs" in three Washington cities  
20 would be "swept away" and "[a]s a practical matter, it seems most unlikely that proponents  
21 of desegregative busing . . . will be able to obtain the statewide support now needed to  
22 permit them to desegregate the schools in their communities." Id. at 484 n.27.

23 Proposition 209 similarly threatens desegregation programs up and down the state, along  
24 with hundreds of other programs set up by the state, by cities, by school boards, and by  
25 other instrumentalities of state and local government. Critically, it leaves no possibility  
26 whatsoever for resurrection of these programs -- absent a statewide constitutional  
27 amendment repealing Proposition 209.

28 In the absence of Proposition 209, the normal channels of state and local  
government are, of course, fully open to the proponents of affirmative action. See, e.g.,  
Young decl., ¶17 ("issues surrounding the University's academic policy toward affirmative  
action is an on-going source of great interest and vigorous debate for the Regents, the  
Chancellors of the nine campuses and the UC Faculty"). The Supreme Court has in fact

1 expressly recognized that the authority removed by Proposition 209 otherwise clearly  
2 belongs to state and local governments.

3 It would seem equally clear . . . that a state or local subdivision . . .  
4 has the authority to eradicate the effects of private discrimination within its  
own legislative jurisdiction. . . .

5 Thus, if the [governmental entity] could show that it has essentially  
6 become a "passive participant" in a system of racial exclusion practiced by  
elements of the local construction industry, we think it clear that the [entity]  
7 could take affirmative steps to dismantle such a system.

8 City of Richmond v. J.A. Croson Co., 488 U.S. 469, 491-92, 109 S.Ct. 706, 102 L.Ed. 2d  
9 854 (1989) (footnote omitted). See also id. at 486 (squarely rejecting the suggestion that a  
10 municipality is constitutionally required to "limit any race-based remedial efforts to  
11 eradicating the effects of its own prior discrimination"); United States v. Paradise, 480 U.S.  
12 149, 166-67, 107 S.Ct. 1053, 94 L.Ed. 2d 203 (1987) (plurality opinion) ("It is now well  
13 established that government bodies, including courts, may constitutionally employ racial  
14 classifications essential to remedy unlawful treatment of racial or ethnic groups subject to  
15 discrimination. . . . The government unquestionably has a compelling interest in remedying  
16 past and present discrimination by a state actor.") (citation omitted); Adarand, 115 S.Ct. at  
17 2117 ("Finally, we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal  
18 in fact.' The unhappy persistence of both the practice and the lingering effects of racial  
19 discrimination against minority groups in this country is an unfortunate reality, and  
20 government is not disqualified from acting in response to it.") (citation omitted); Freeman  
21 v. Pitts, 503 U.S. 467, 484, 112 S.Ct. 1430, 118 L.Ed. 2d 108 (1992) ("[t]he duty and  
22 responsibility of a school district once segregated by law is to take all steps necessary to  
23 eliminate the vestiges of the unconstitutional de jure segregation.").

24 Notwithstanding the traditional and even mandatory duty of state and local  
25 government to remedy discrimination, Proposition 209 dictates that no constitutionally  
26 permissible interest in ending or alleviating discrimination can ever warrant race or gender  
27 conscious measures. Other groups may freely pursue preferential policies in any area they  
28 please, no matter their triviality or limited application. Yet racial minorities are  
categorically barred from pursuing any race-conscious relief, even where it is necessary to

1 eradicate past or ongoing discrimination -- an interest the Supreme Court has specifically  
2 held to be compelling.<sup>29</sup> Proposition 209 thereby carves out racial minorities out of the  
3 political process at the very juncture where it is most vital to them.

4           **4. Proposition 209 Is Not Narrowly Tailored to Achieve a Compelling State  
5 Interest**

6           Where the process for addressing race-conscious legislation "is singled out for  
7 peculiar and disadvantageous treatment, the governmental action plainly 'rests on  
8 "distinctions based on race.'" Seattle, 458 U.S. at 485, (quoting James v. Valtierra, 402  
9 U.S. at 141 (quoting Hunter, 393 U.S. at 391).) Because Proposition 209 impedes the  
10 ability of racial minorities to obtain beneficial legislation, it is "inherently suspect," Seattle,  
11 458 U.S. at 485 and subject to "the most rigid scrutiny." Id.; see also Adarand, 115 S.Ct. at  
12 2106. To survive this strict scrutiny, the initiative's defenders must show that it is narrowly  
13 tailored to achieve a compelling state interest. This they cannot remotely do.

14           Already existing constitutional restrictions on race-based affirmative action refute  
15 any conceivable attempt to argue that Proposition 209 serves an interest in eliminating  
16 reverse discrimination. The only race-conscious programs permissible under existing laws  
17 are those that are themselves narrowly tailored to serve compelling interests. See e.g.,

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18           <sup>29</sup> Nor, under Proposition 209, can the constitutionally permissible interest of  
19 promotion of racial diversity in education ever be sufficiently compelling for state or local  
20 educational entities to institute appropriate compensatory programs or measures. See  
21 Regents of the University of California v. Bakke, 438 U.S. 265, 320, 98 S.Ct. 2733, 57  
22 L.Ed. 2d 750 (1978) (opinion of the Court per Powell, J.) ("In enjoining petitioner from  
23 ever considering the race of any applicant, however, the courts below failed to recognize  
24 that the state has a substantial interest that legitimately may be served by a properly  
25 devised admissions program involving the competitive consideration of race and ethnic  
26 origin. For this reason, so much of the California court's judgment as enjoins petitioner  
27 from any consideration of race must be reversed."); id. at 328 (opinion of Brennan, J.,  
28 joined by White, Marshall, and Blackmun, JJ., concurring in part and dissenting in part);  
Wygant v. Jackson Bd. Of Educ., 476 U.S. 267, 286, 106 S. Ct. 1842, 90 L.Ed. 2d 260  
(1986) (O'Connor, J., concurring) id. at 288 n.\*; North Carolina State Bd. of Educ. v.  
Swann, 402 U.S. 43, 45 91 S.Ct. 1284, 28 L.Ed. 2d 586 (1971) ("school authorities have  
wide discretion in formulating school policy, and . . . as a matter of educational policy,  
school authorities may well conclude that some kind of racial balance in the school is  
desirable quite apart from any constitutional requirements"); Sweatt v. Painter, 339 U.S.  
629, 634 (1950); Crawford v. Bd. of Education of City of Los Angeles, 17 Cal. 3d 280, 295-  
96 (1976).

1 Croson, 488 U.S. at 491-93, 509-11. Those programs are, accordingly, the only ones that  
2 would be eliminated by Proposition 209. There can be no compelling interest in  
3 eliminating programs that are themselves narrowly tailored to serve compelling interests.

4 By the same token, the State can have no compelling interest in a "colorblind"  
5 system of public contracting, employment, or education, where such system conflicts with  
6 the recognized compelling interest in eradicating "the unhappy persistence of both the  
7 practice and the lingering effects of racial discrimination." Adarand 115 S.Ct. at 2101.  
8 "Color-blindness" can become a constitutional virtue only where and when discrimination  
9 and its vestiges are eradicated. Otherwise, as the Supreme Court recognized, government  
10 necessarily has a compelling interest justifying carefully crafted race-conscious affirmative  
11 action to remedy "the practice and lingering effects of racial discrimination against  
12 minority groups." Id.; Croson, 488 U.S. at 509-11.

13 To compound the absence of any conceivable interest justifying the restructuring of  
14 the political process accomplished by Proposition 209, the measure fails the "narrow  
15 tailoring" requirement of strict scrutiny. Lower federal courts, especially the Ninth Circuit,  
16 have held in the most explicit terms that "[l]ike the federal government, a state or its  
17 political subdivision not only has the authority -- indeed the 'constitutional duty' -- to  
18 ascertain whether it is denying its citizens equal protection of the laws and, if so, to take  
19 corrective steps." Associated Gen. Contractors of Cal. v. Coalition for Economic Equity,  
20 813 F.2d 922, 929 (9th Cir. 1987) (hereinafter "AGC I") (citation omitted). Even more,  
21 these cases emphasize that exercise of this power is "deeply rooted" as a responsibility of  
22 government at these levels. Associated Gen. Contractors of Cal. v. Coalition for  
23 Economic Equity, 950 F.2d 1401, 1406 (9th Cir. 1991) (quoting AGC I, 813 F.2d 922.);  
24 Coral Const. Co. v. King County, 941 F.2d 910, 920 (9th Cir. 1991) ("the State has the  
25 power to eradicate racial discrimination and its effects in both the public and private  
26 sectors, and the absolute duty to do so where those wrongs were caused intentionally by  
27  
28

1 the State itself" (quoting Croson, 488 U.S. at 518 (Kennedy, J., concurring)).<sup>30</sup> As  
2 specifically stated by Judge O'Scannlain in Coral Construction:

3 A state or municipality, when presented with evidence of its own culpability  
4 in fostering or furthering race discrimination, might be remiss if it failed to  
act upon such evidence. \* \* \*

5 The remedy for intentional discrimination often calls for race-specific relief.  
6 941 F.2d at 921, 920.<sup>31</sup>

7 Proposition 209's ban on race "preferences" is sweeping and virtually absolute. It  
8 excepts retrospectively only "court order[s] and consent decree[s] which [are] in force as of  
9 the effective date" (subsection (d)) -- nothing in the law excepts court orders or decrees  
10 entered thereafter. Nor does Proposition 209 make any exception for good faith voluntary  
11 efforts to comply with federal civil rights laws by eliminating the vestiges of  
12 discrimination;<sup>32</sup> instead, it bans such efforts, no matter how compelling the evidence of  
13 past discrimination and no matter how narrowly tailored the plan. Proposition 209's  
14 indiscriminate reach "undermines public employers' incentive to meet voluntarily their civil  
15 rights obligations" (Wygant, 476 U.S. at 290 (O'Connor, J. concurring)), and "diminishes  
16 the constitutional responsibilities of the political branches to say they must wait to act  
17

18 <sup>30</sup> See also Freeman, 503 U.S. at 484 (school districts have "duty and responsibility" to  
19 eradicate effects of *de jure* segregation); McDaniel v. Barresi, 402 U.S. 39, 41, 91 S.Ct.  
20 1287, 28 L.Ed. 2d 582 (1971) (remedying desegregation "will almost invariably require that  
21 students be assigned 'differently because of their race.'"); Green v. New Kent County Bd.  
22 of Education, 391 U.S. 430, 437, 88 S.Ct. 1689, 20 L.Ed. 2d 716 (1968) (school districts  
responsible for segregation must remove vestiges "root and branch"); cf. Swann, 402 U.S.  
43, 45-46, 91 S. Ct. 1284, 1286 (1971) (striking down state anti-busing law that "operates to  
hinder vindication of federal constitutional guarantees).

23 <sup>31</sup> See also United States v. Paradise, 480 U.S. 149, 167 (1987); Local 28 Sheet Metal  
24 Workers v. EEOC, 478 U.S. 421, 445, 106 S.Ct. 3019, 92 L.Ed. 2d 344 (1986); Peightal v.  
25 Metropolitan Dade County, 26 F.3d 1545, 1553 (11th Cir. 1994); Concrete Works v. City  
26 and County of Denver, 36 F.3d 1513, 1521 (10th Cir. 1994), cert. denied, 115 S.Ct. 1315  
(1995); Donaghy v. City of Omaha, 933 F.2d 1448, 1458 (8th Cir.), cert. denied, 502 U.S.  
27 1059 (1991), O'Donnell Constr. Co. v. District of Columbia, 963 F.2d 420, 424 (D.C. Cir.  
1992); Stuart v. Roache, 951 F.2d 446, 450 (1st Cir. 1991) (Breyer, J.); Cone Corp. v.  
28 Hillsborough County, 908 F.2d 908, 915 (11th Cir.), cert. denied, 498 U.S. 983 (1990).

<sup>32</sup> Proposition 209's incompatibility with federal statutes promoting voluntary  
affirmative action is described in detail *infra*, part IV.C.

1 until ordered to do so by a court." Croson, 488 U.S. at 519 (Stevens, J., concurring); see  
2 Coral Construction, 941 F.2d at 921. Far from being narrowly tailored to serve a  
3 compelling interest, it forbids state and local government from serving the interest in  
4 remedying discrimination -- an "compelling state interest[] of highest order." Roberts v.  
5 United States Jaycees, 468 U.S. 609, 624, (1984). It thus fails strict scrutiny.

6 **B. PROPOSITION 209 VIOLATES THE EQUAL PROTECTION CLAUSE, BY**  
7 **IMPOSING AN UNJUSTIFIABLE BURDEN ON THE ABILITY OF**  
8 **WOMEN TO OBTAIN PROTECTIVE LEGISLATION**

9 Proposition 209 cuts off normal political channels to women, by categorically  
10 prohibiting gender-conscious affirmative action programs. Just as the constitutional  
11 amendments in Hunter and Seattle "place[d] special burdens on the ability of minority  
12 groups to achieve beneficial legislation" (Seattle, 458 U.S. at 467), Proposition 209 places  
13 special burdens on women seeking beneficial legislation. And just as the constitutional  
14 amendment in Romer "made it more difficult for [gays and lesbians] . . . to seek aid from  
15 the government" Romer, 116 S.Ct. at 1628, Proposition 209 makes it more difficult for  
16 women to seek gender-conscious aid from the government, even where necessary to  
17 remedy discrimination against them.<sup>33</sup> Proposition 209 thus constitutes a gender-based  
18 classification subject to heightened scrutiny, which it cannot remotely satisfy. It is not  
19 substantially related to important state interests; to the contrary, it would prevent state  
20

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21 <sup>33</sup> In theory, of course, Proposition 209 would prohibit affirmative action programs  
22 designed to benefit men as well as those designed to benefit women. However, neither  
23 the State nor the proponents of Proposition 209 have identified a single example of an  
24 affirmative action program inuring to the benefit of men, though repeatedly challenged to  
25 do so. Accordingly, the Legislative Analyst concluded that the impact of Proposition 209  
26 would be on affirmative action programs benefitting "women and minorities." See LAO's  
27 Yes/No Statement ("A YES vote on this measure means: The elimination of those  
28 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.")  
Moreover, even if there did exist some affirmative action programs for men that would be  
eliminated by Proposition 209, there can be no question that the gender-conscious  
programs abolished by Proposition 209 "inure[] primarily to the benefit" of women. See  
Seattle, 458 U.S. at 472.

1 and local governments from addressing the compelling interest in remedying  
2 discrimination against women.<sup>34</sup>

3 The level of scrutiny required for laws that impose a burden on women, though not  
4 quite as strict as that which applies to race-based classifications, is greater than that  
5 applied by the Romer Court. Because gays and lesbians, unlike women, have never been  
6 deemed a "suspect class," the Court applied only rational basis review. Romer, 116 S.Ct.  
7 at 1627 (stating that "if a law neither burdens a fundamental right nor targets a suspect  
8 class, we will uphold the legislative classification so long as it bears a rational relation to  
9 some legitimate end," but that "Amendment 2 fails, indeed defies, even this conventional  
10 inquiry.") In this case, by contrast, heightened scrutiny applies to Proposition 209's  
11 restriction on programs designed to benefit women. "Parties who seek to defend gender-  
12 based government action must demonstrate an exceedingly 'persuasive justification' for  
13 that action." United States v. Virginia, 116 S. Ct. at 2267 (1996) (quoting J.E.B., 511 U.S.  
14 at 136-37; Mississippi University for Women v. Hogan, 458 U.S. 718, 724, 102 S.Ct. 3331,  
15 73 L.Ed. 2d 1090 (1982)).

16  
17  
18  
19 <sup>34</sup> This burden on women is not lessened by demographics that may make women a  
20 numerical majority. Although women have presumably been such a theoretical voting  
21 majority since winning the right to vote, Supreme Court precedent nevertheless recognizes  
22 that laws "denying rights or opportunities" to women must receive "skeptical scrutiny." See  
23 United States v. Virginia, 116 S.Ct. at 2274. Thus, the courts have never upheld sex-based  
24 classifications on the ground that women could have formed a voting majority against the  
25 challenged law. It is the history of sex discrimination that the Court has found decisive in  
26 applying heightened scrutiny to gender classifications. See J.E.B., 511 U.S. at 136-37, 128  
27 L.Ed.2d at 101-02. Moreover, any argument that laws targeting a numerical majority are  
28 not constitutionally suspect fails to address Hunter, in which the burdened groups included  
racial minorities, ethnic minorities, religious minorities, and those of non-U.S. origin or  
descent. Although a voting bloc of racial minorities, Catholics, Jews, and foreign-born  
people may well have constituted a voting majority in Akron, heightened scrutiny of a  
discriminatory law has never depended on whether all the people targeted by the law,  
taken together, would constitute a numerical majority. Indeed, recent equal protection  
cases apply precisely the same level of scrutiny to race-based classifications that burden  
the white racial majority as to those that burden racial minorities. See, e.g., Adarand, 132  
L.Ed.2d 158 )

1           There exists no "exceedingly persuasive justification" for imposing a blanket barrier  
2 to the enactment of affirmative action laws benefitting women.<sup>35</sup> As the Supreme Court  
3 has long recognized, "our Nation has had a long and unfortunate history of sex  
4 discrimination." United States v. Virginia, 116 S. Ct. at 2274-75 (quoting Frontiero v.  
5 Richardson, 411 U.S. 677, 684, 93 S.Ct. 1764, 36 L.Ed. 2d 583 (1973)). Through a century  
6 plus three decades and more of that history, women did not count among voters  
7 composing "We the People"; not until 1920 did women gain a constitutional right to the  
8 franchise. And for a half century thereafter, it remained the prevailing doctrine that  
9 government, both federal and state, could withhold from women opportunities accorded  
10 men so long as any "basis in reason" could be conceived for the discrimination. United  
11 States v. Virginia, 116 S. Ct. at 2275. As the Supreme Court has stated: "Reduction in  
12 the disparity in economic condition between men and women caused by the long history of  
13 discrimination against women has been recognized as such as an important governmental  
14 objective." Califano v. Webster, 430 U.S. 313, 317 (1977) (citing cases).

15           It is this history of sex discrimination that "warrants the heightened scrutiny we  
16 afford all gender-based classifications today." J.E.B., 511 U.S. at 1425. There is no  
17 important, or even legitimate, reason to impose peculiar burdens on women seeking  
18 affirmative action remedies. Any purported interest in "gender-blindness" fails for the  
19 same reasons as the purported interest in color-blindness. Far from serving an important  
20 purpose, Proposition 209 would defeat the high governmental interest in eradicating the  
21 vestiges of discrimination against women.

22   **C.   PROPOSITION 209'S BAN ON AFFIRMATIVE ACTION PROGRAMS WHICH**  
23   **REMEDY OR PREVENT VIOLATIONS OF FEDERAL CIVIL RIGHTS LAWS**  
24   **VIOLATES THE SUPREMACY CLAUSE**

25           Throughout California, cities, school districts and other governmental agencies faced  
26 with evidence of past or present discrimination have implemented race and gender-conscious  
27

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28           <sup>35</sup> Furthermore, any purported "gender-blind" rationale is undercut by clause (d),  
which would permit sex-based classifications deemed "reasonably necessary."

1 desegregation and affirmative action programs to remedy the effects of that discrimination.<sup>36</sup>  
2 Such affirmative action programs represent voluntary efforts by public agencies to meet their  
3 obligations under Titles VI and VII of the Civil Rights Act of 1964, Title IX of the  
4 Educational Amendments of 1972, and the Constitution. These efforts comport with  
5 Congress' goal of encouraging voluntary compliance with federal civil rights laws and  
6 affording public agencies discretion to utilize affirmative action as a means of accomplishing  
7 such compliance. By outlawing all race and gender-conscious policies in public employment,  
8 contracting, and education, including those implemented specifically to remediate the effects  
9 of prior or present race and sex discrimination, Proposition 209 "stands as an obstacle to the  
10 accomplishment and execution of the full purposes and objectives of Congress" (Hines v.  
11 Davidowitz, 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 2d 581 (1941)) embodied in federal civil rights  
12 laws and is thus preempted.

13 1. A State Law Is Preempted If It Stands As An Obstacle To Congressional  
14 Purposes or Interferes With the Methods Chosen By Congress to Serve Those  
Purposes

15 Under the Supremacy Clause (Article VI, Cl. 2), a state law is preempted, absent an  
16 express statement in a federal statute, when it "stands as an obstacle to the accomplishment  
17 and execution of the full purposes and objectives of Congress." Gade v. National Solid  
18 Wastes Management Association, 505 U.S. 88, 98, 112 S.Ct. 2374, 120 L.Ed.2d 73 (1992).  
19 State law "stands as an obstacle" to the full implementation of federal law if its operation  
20 contravenes federal policy or even if it shares the same goal but "interferes with the methods  
21 by which the federal statute was designed to reach th[at] goal." Gade, 505 U.S. at 103,  
22 quoting International Paper Co. v. Ouellette, 479 U.S. 481, 494, 107 S.Ct. 805, 93 L.Ed. 2d  
23

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24 <sup>36</sup> For instance, the City and County of San Francisco enacted MBE and WBE  
25 programs after an exhaustive disparity study showed that women and minority contractors  
26 have been substantially underutilized in the award of public contracts by San Francisco  
27 and that they had been subject to discrimination in the industry. See Associated General  
28 Contractors of California v. Coalition for Economic Equity, 950 F.2d 1401 (9th Cir. 1991).  
Likewise, the County of Santa Clara implemented an affirmative action plan when it was  
clear that women and minorities had long been substantially underrepresented in craft and  
other positions within various county agencies. See Johnson v. Transportation Agency, 480  
U.S. 616, 107 S.Ct. 1442, 94 L.Ed. 2d 615 (1987).

1 883 (1987). Such interference may be an indirect "chilling effect" on the federal policy rather  
2 than a complete bar. See, e.g., Felder v. Casey, 487 U.S. 131, 108 S.Ct. 2302, 101 L.Ed. 2d  
3 123 (1988) (state statute requiring plaintiffs to serve a notice of claim on a state or local  
4 government defendant and wait 120 days before filing suit was preempted by the federal Civil  
5 Rights Act); Xerox Corp. v. County of Harris, 459 U.S. 145, 103 S.Ct. 523, 4 L.Ed. 2d 23  
6 (1982) (local imposition of personal property taxes on goods store in federally created duty-  
7 free zones preempted as inconsistent with Congress' purpose of encouraging use of American  
8 ports); Nash v. Florida Industrial Comm'n, 389 U.S. 235, 88 S.Ct. 362, 19 L.Ed. 2d 438 (1967)  
9 (Florida law refusing unemployment insurance to claimants who file unfair labor practices  
10 preempted by national Labor Relations Act); Farmers Educational and Cooperative Union  
11 of America v. WDAY, 360 U.S. 525, 79 S.Ct. 1302, 3 L.Ed. 2d 1407 (1950) (state libel law  
12 preempted by Federal Communications Act which required radio stations to afford equal time  
13 to competing candidates without editorial control).

14 2. In Order To Eradicate Discrimination and Its Vestiges, Federal Law  
15 Encourages State and Local Entities to Adopt Voluntary Affirmative Action  
Plans for Women and Minorities

16 The centerpiece of the Civil Rights Act of 1964 is Title VII, whose prohibition against  
17 discrimination in employment, was designed to "break down old patterns of racial segregation  
18 and hierarchy." United Steel Workers of America v. Weber, 443 U.S. 193, 208, 99 S. Ct. 2721,  
19 61 L.Ed.2d 480 (1979). In accomplishing this goal, "Congress intended voluntary compliance  
20 to be the preferred means of achieving the objectives of Title VII." Local No. 93,  
21 International Association of Firefighters v. Cleveland, 478 U.S. 501, 515, 106 S.Ct. 3063, 92  
22 L.Ed. 2d 405 (1986).<sup>37</sup> Title VII was intended to serve as a

23 catalyst to cause "employers and unions to self-examine and to self-evaluate  
24 their employment practices and to endeavor to eliminate, so far as possible, the  
25 last vestiges of an unfortunate and ignominious page in this country's history."  
26

27 <sup>37</sup> See generally, EEOC v. Hiram Walker & Sons, 768 F.2d 884, 889 (7th Cir. 1985)  
28 (accord); Bushey v. N.Y. St. Civil Service Comm., 733 F.2d 220, 226 (2d Cir. 1984);  
Moore v. City of San Jose, 615 F.2d 1265, 1271 (9th Cir. 1980); Pettway v. American Cast  
Iron Pipe Co., 576 F.2d 1157, 1183 (5th Cir. 1978), cert. denied, 439 U.S. 1115 (1979).

1 Weber, 443 U.S. at 204 (quoting Albemarle Paper Co. v. Moody, 422 U.S. at 418.)<sup>38</sup>

2 Voluntary compliance has special significance in the public sector. As Justice  
3 O'Connor has observed,

4 The value of voluntary compliance is doubly important when it is a public  
5 employer that acts, both because of the example its voluntary assumption of  
6 responsibility sets and because the remediation of governmental discrimination  
7 is of unique importance.

8 Wygant, 476 U.S. at 290 (O'Connor, J., concurring in part and concurring in the judgment).

9 In extending coverage of Title VII to state and local public entities, Congress similarly found  
10 that

11 Discrimination by government . . . serves a doubly destructive purpose. The  
12 exclusion of minorities from effective participation in the bureaucracy not only  
13 promotes ignorance of minority problems in that particular community, but also  
14 creates mistrust alienation, and all too often hostility toward the entire process  
15 of government.

16 S. Rep. No. 92-415, p. 10 (1971), quoted in Wygant, 476 U.S. at 290.

17 The EEOC guidelines specifically endorse voluntary affirmative action as consistent  
18 with Congress' purpose:

19 The principle of nondiscrimination in employment because of race, color,  
20 religion, sex, or national origin, and the principle that each person subject to  
21 Title VII should take voluntary action to correct the effects of past  
22 discrimination and to prevent present and future discrimination without  
23 awaiting litigation, are mutually consistent and interdependent methods of  
24 addressing social and economic conditions which precipitated the enactment of  
25 Title VII. Voluntary affirmative action to improve opportunities for minorities  
26 and women must be encouraged and protected in order to carry out the  
27 Congressional intent embodied in Title VII.

28 29 C.F.R. §1608.1(c) (emphasis added). That guideline was quoted by the Supreme Court  
with approval in Local No. 93, 478 U.S. at 516, and is thus entitled to great deference.  
Griggs, 401 U.S. at 433-34; EEOC v. Commercial Office Products Co., 486 U.S. 107, 115  
(1988).

In light of Title VII's emphasis on voluntary compliance as the preferred means of  
attaining those objectives, the Supreme Court has held that voluntary affirmative action "can

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<sup>38</sup> Congress recognized that voluntary compliance has the obvious advantages of  
reducing the cost of litigation, promoting judicial economy, and vindicating an important  
societal interest by promoting equal opportunity. Kirkland v. N.Y. State Dept. of  
Correctional Services, 711 F.2d 1117, 1128-29, n.14 (2d Cir. 1983).

1 play a crucial role in furthering Title VII's purpose of eliminating the effects of discrimination  
2 in the workplace, and that Title VII should not be read to thwart such efforts." Johnson v.  
3 Transportation Agency, 480 U.S. 616, 630 (1987). Accordingly, the Court has rejected  
4 interpretations of Title VII which would unduly limit affirmative action and thus "create a  
5 significant disincentive for voluntary action." Id. at 630 n.8; Bushey v. N.Y. St. Civ. Serv.  
6 Comm'n, 733 F.2d 220, 227 (2d Cir. 1984) (requiring employer to wait to be sued by minority  
7 candidates before implementing affirmative action "would serve no purpose other than to  
8 impede the process of voluntary compliance with Title VII and cause the proliferation of  
9 litigation in all such cases, thereby generating litigation costs and favoring litigious over  
10 nonlitigious employees").<sup>39</sup>

11 The federal policy of encouraging voluntary compliance with civil rights laws applies  
12 with equal force to Titles VI and IX. In enacting Title VI, Congress expressed its preference  
13 for voluntary compliance. Title VI directs federal agencies to attempt to secure compliance  
14 "by voluntary means" before terminating funds to recent programs. 42 U.S.C. §2000d-1; see  
15 Brown v. Califano, 627 F.2d 1221, 1232 n.64 (D.C. Cir. 1980) ("Voluntary compliance was the  
16 method most obviously encouraged by Title VI and HEW's regulations"); Hardy v. Leonard,  
17 377 F. Supp. 831, 837-38 (N.D. Cal. 1974).<sup>40</sup> As with Title VII, affirmative action is an  
18 important means of obtaining voluntary compliance. Regulations promulgated under Title  
19 VI expressly encourage, and in some instances, mandate affirmative action "to overcome the  
20 effects of prior discrimination." 34 C.F.R. Section 100.3(b)(6). Likewise, Title IX regulations  
21

22 <sup>39</sup> See also Detroit Police Officers' Association v. Young, 608 F.2d 671, 690 (6th Cir.  
23 1979) ("a principle purpose of Title VII is to induce voluntary solutions to racial  
24 discrimination, one form of which is race-conscious affirmative action employment");  
25 Higgins v. City of Vallejo, 823 F.2d 351, 355 (9th Cir. 1987) (voluntary affirmative action  
26 was "consistent with Title VII, for it embodie[d] the contribution that voluntary employer  
27 action can make in eliminating the vestiges of discrimination); In re Birmingham Reverse  
Discrimination Employment Litigation, 29 F.3d 1525, 1537 (11th Cir. 1994) (voluntary  
affirmative action is "well established" as a means to "further Title VII's purpose of  
eliminating the effects of discrimination in the workplace").

28 <sup>40</sup> The legislative history contains specific reference to Congress' preference for  
voluntary 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).

1 explicitly authorize affirmative action "to overcome the effects of conditions which resulted  
2 in limited participation therein by persons of a particular sex." 34 C.F.R. Section 106.3(b).  
3 Thus, Titles VI, VII, and IX share common policies,<sup>41</sup> including that of encouraging  
4 voluntary compliance through affirmative action where appropriate.

5 Where practices neutral on their face, such as seniority rankings and promotions based  
6 on experience, have the effect of perpetuating segregative patterns, affirmative action may be  
7 necessary to the vindication of federal objectives. See e.g. United States v. Paradise, 480 U.S.  
8 149, 168-69 (1987) (where "[d]iscrimination at the entry level necessarily precluded blacks  
9 from competing for promotions, and resulted in a department hierarchy dominated exclusively  
10 by non-minorities . . . [the Department cannot] segregate the results achieved by its hiring  
11 practices and those achieved by its promotional practices"); Johnson v. Transportation Agency,  
12 480 U.S. at 640 (affirmative action in promotion warranted where job categories had been  
13 "traditionally segregated by race and sex"); Weber, 443 U.S. at 197 (blacks had been excluded  
14 from craft union and made up less than 2% of skilled craft workers); Stuart v. Roache, 951  
15 F.2d 446, 452 (1st Cir. 1991) ("One obvious reason . . . why there may have been few black  
16 sergeants in the Boston Police Force in 1978 is that the Department has not hired many black  
17 police officers before 1970"); see also Higgins v. City of Vallejo, 823 F.2d 351 (9th Cir. 1987).  
18 In many situations, race-neutral alternatives are not effective in breaking the pattern of  
19 segregation. See e.g. Stuart, 951 F.2d at 448-49, 455 (police department's efforts failed to  
20 produce fair testing procedures or reduce the impact of seniority on promotions). In these  
21 circumstances, race and gender conscious measures are vital to achieving the congressional  
22 objectives of eradicating discrimination and its vestiges.

23 **3. Proposition 209 Is Preempted Because It Interferes With The Congressional**  
24 **Objective of Eradicating Discrimination and Its Vestiges, and Because It**  
25 **Undermines the Means Chosen By Congress To Accomplish This Objective**

26 Proposition 209 would bar all race and gender-conscious affirmative action programs  
27 by governmental agencies, including those voluntarily implemented to remedy the effects of

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28 <sup>41</sup> Cf. Larry P. v. Riles, 793 F.2d 969, 982 n.9 (9th Cir. 1984) (court looks to Title VII cases for guidance in Title VI disparate impact cases); Jeldness v. Pearce, 30 F.3d 1220, 1229 (9th Cir. 1994) (Title VI disparate impact standard applied in Title IX cases).

1 prior discrimination, irrespective of how compelling, necessary or narrowly tailored the  
2 program may be -- and even where it can be demonstrated that race and gender-neutral  
3 alternatives would be ineffective in breaking down traditional patterns of segregation. The  
4 effect of Proposition 209's ban will be to perpetuate rather than eradicate segregative patterns  
5 by public agencies. Such a result is clearly at odds with federal policy, which has drawn a  
6 careful balance between the more extreme courses of requiring employers to adopt  
7 affirmative action, and barring race and gender conscious measures.<sup>42</sup> Where Congress has  
8 engaged in such balancing, a state law which upsets that balance by adopting a more extreme  
9 course is preempted. See Hines v. Davidowitz, 312 U.S. at 73-74 (Pennsylvania alien  
10 registration law was preempted by the federal Alien Registration Act because it imposed  
11 requirements and disabilities beyond those imposed by the federal Act and thus upset the  
12 "middle path" between civil rights and the need for national security struck by Congress);  
13 Wisconsin Dept. of Industry v. Gould Inc., 475 U.S. 282, 286-87, 106 S.Ct. 1057, 89 L.Ed. 2d  
14 223 (1986) (state statute preventing three-time violators of the National Labor Relations Act  
15 from doing business with the State is preempted even though state law was designed to  
16 reinforce the requirements of the federal law).

17 Proposition 209 also undermines a policy corollary to the goal of encouraging voluntary  
18 compliance with federal civil rights laws -- the policy of preserving managerial discretion and  
19 "a relatively large domain for voluntary employer action." Johnson v. Transportation Agency,  
20 480 U.S. at 630, n.8; see Local No. 93, 478 U.S. at 520 (congressional votes were obtained  
21 based on assurances that "management prerogatives, and union freedom are to be left  
22 undisturbed to the greatest extent possible"; legislators "were far more concerned to avoid the  
23 intrusion into business autonomy that a rigid color-blind standard would entail") (citations  
24 omitted). Preservation of managerial discretion is integral to Title VII's enforcement. As  
25

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26 <sup>42</sup> Proposition 209 also contravenes the federal policy of encouraging voluntary  
27 compliance with the Fourteenth Amendment. See Wygant, 476 U.S. at 290-91 (O'Connor,  
28 J. concurring) (citing the Court's "consistent emphasis on 'the value of voluntary efforts to  
further the objectives of the law'"); Coral Construction, 941 F.2d at 920-21 (voluntary  
affirmative action may be supported by evidence developed after the adoption of  
program).

1 Justice Stevens observed, "The logic of antidiscrimination legislation requires that judicial  
2 constructions of Title VII leave 'breathing room' for employer initiatives to benefit members  
3 of minority groups." Johnson, 480 U.S. at 645 (concurring opinion).<sup>43</sup>

4 Proposition 209 eviscerates that "breathing room." Public entities faced with firm  
5 evidence of past or current discrimination are "trapped between the competing hazards of  
6 liability to minorities if affirmative action is not taken to remedy apparent employment  
7 discrimination and liability to non-minorities if affirmative action is taken." Wygant, 476 U.S.  
8 at 291 (O'Connor, J., concurring in part and concurring in the judgment) (emphasis added).  
9 It leaves public employers on a "high tightrope without a net beneath them" (Weber, 443 U.S.  
10 at 210 (Blackmun, J., concurring) (citations omitted)) in choosing between complying with  
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18 <sup>43</sup> The fact that public employers may be subject to stricter requirements in  
19 establishing affirmative action than private employers because of the additional constraints  
20 imposed by the Equal Protection Clause (cf. Weber and Johnson's "manifest imbalance"  
21 test with Wygant's "firm basis in evidence" requirement) does not gainsay the managerial  
22 discretion public agencies continue to possess under Title VII and the Constitution. Even  
23 after Adarand Constructors, Inc v. Pena, 132 L.Ed.2d 158, 115 S.Ct. 2097, 2117 (1995),  
affirmative action, though subject to strict scrutiny, is constitutionally permissible in  
appropriate circumstances:

24 The unhappy persistence of both the practice and the lingering effects of  
25 racial discrimination against minority groups in this country is an unfortunate  
26 reality, and government is not disqualified from acting in response to it. . . .  
27 When race-based action is necessary to further a compelling interest, such  
28 action is within constitutional constraints if it satisfies the "narrow tailoring"  
test this Court has set out in previous cases

Adarand, 115 S.Ct. at 2117. The CCRI would remove all discretion to implement  
affirmative action programs including discretion countenanced by the Court under Wygant,  
Crosen and Adarand.

1 federal versus state law.<sup>44</sup> This result is clearly at odds with Congress' desire to afford  
2 employers a "large domain" in voluntarily complying with federal civil rights laws.<sup>45</sup>

3 Because Proposition 209 interferes with the discretion that federal law confers upon  
4 public agencies, it is preempted. In Lawrence County v. Lead Deadwood School District, 469  
5 U.S. 256, 105 S.Ct. 695, 83 L.Ed. 2d 635 (1985), a school district sought to compel the county  
6 to distribute funds received under the federal Payment in Lieu of Taxes Act (which  
7 compensates local governments for loss of tax revenues resulting from tax-immune status of  
8 federal lands) in accordance with a South Dakota statute. That statute required such federal  
9 funds be distributed in the same way general tax revenues are distributed. The County  
10 claimed it had complete discretion under the federal law to spend the funds on any  
11 governmental purpose, and that the state law was preempted by the federal Act. The Court  
12 agreed that Congress intended to endow local governments with discretion and flexibility in  
13 spending the federal money as they saw fit. It thus concluded that the attempt of the state  
14 law to limit that discretion "obstructs this congressional purpose and runs afoul of the  
15 Supremacy Clause." Lead Deadwood, 469 U.S. at 270; see also San Diego Unified Port

16  
17 <sup>44</sup> This dilemma is sharpened by the fact that policies which have a disparate impact  
18 upon women and minorities may violate Titles VI, VII and IX even in the absence of  
19 intentional discrimination. Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.  
20 2d 158 (1971); Guardians Association v. Civil Service Commission of the City of New  
21 York, 463 U.S. 582, 103 S.Ct. 3221 (1983).

22 <sup>45</sup> Of course, the discretion afforded to employers and recipients of federal funds  
23 subject to federal civil rights laws includes the discretion to refuse to implement  
24 affirmative action and risk federal liability. However, Proposition 209 is not simply a  
25 decision by a particular municipality or public agency to discontinue or refuse to establish  
26 an affirmative action program. Rather, it constitutes a restraint extraneous to the  
27 executive authority of governmental agencies which have direct obligations under federal  
28 civil rights laws and are subject to correlative federal policies, including the policy of  
affording discretion to and encouraging voluntary compliance by all covered employers  
and programs. Cf. Lead-Deadwood and Gianturco. Despite its status as an amendment  
to the state constitution, Proposition 209 is subject to federal law. See Gomillion v.  
Lightfoot, 364 U.S. 339, 345, 81 s.Ct. 125, 5 L.Ed. 2d 110 (1960) (state "[l]egislative control  
of municipalities, no less than other state power, lies within the scope of relevant  
limitations imposed by the United State Constitution"); Seattle, 458 U.S. at 476 ("The  
issue here . . . is not whether Washington has the authority to intervene in the affairs of  
local school boards; it is, rather, whether the State has exercised that authority in a  
manner consistent with the Equal Protection Clause").

1 District v. Gianturco, 651 F.2d 1306 (9th Cir. 1981), cert denied, 455 U.S. 1000 (1982) (state's  
2 attempt to impose a stricter curfew upon airport landings and takeoffs preempted by federal  
3 aircraft noise regulations that permitted airports to establish operating hours); cf. Fidelity  
4 Federal Savings & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 155, 102 S.Ct. 3014, 73 L.Ed.  
5 2d 664 (1982) (California common law forbidding enforcement of due-on-sale clause by  
6 federal savings and loan deprived lender of flexibility given it by federal regulations).  
7 Proposition 209 interferes with the discretion Congress conferred upon employers and  
8 recipients of federal funds -- including state and local government entities -- to utilize  
9 affirmative action in order to comply with Titles VI,<sup>46</sup> VII and IX. Proposition 209  
10 interferes with public agencies' discretion protected by federal law and is thus preempted.

11 **D. PLAINTIFFS HAVE DEMONSTRATED THE LIKELIHOOD OF IRREPARABLE**  
12 **CONSTITUTIONAL HARM IF PROPOSITION 209 IS IMPLEMENTED BY**  
13 **DEFENDANTS**

14 Any implementation of Proposition 209 would violate plaintiffs constitutional right to  
15 equal protection of the laws guaranteed by the Fourteenth Amendment. By depriving women  
16 of their minorities of their ability to protect their interests through the normal legislative  
17 process, Proposition 209 constitutes a partial disenfranchisement of these constitutionally  
18 protected groups. Furthermore, even putting aside plaintiffs' interests, a speedy determination  
19 of Proposition 209's constitutionality is vital to the public interest. See Lopez v. Heckler, 713  
20 F.2d 1432, 1437 (9th Cir. 1983) ("It is not only the harm to individuals involved that we must  
21 consider in assessing the public interest" but also the harm to "society as a whole"). Without  
22 an immediate determination, every state and local agency in California will be left uncertain  
23 as to whether they must at once abandon race and gender conscious programs and policies.  
24 Thus, it is not just the plaintiffs but entire communities everywhere in the State that will be  
25 left in the lurch.

26  
27 <sup>46</sup> Although paragraph (e) of the Initiative permits action which "must be taken" to  
28 maintain eligibility for a federal program where ineligibility "would" result in loss of  
federal funds, the exception is of little help to recipient agencies where there would be an  
arguable but not certain violation of Title VI in the absence of affirmative action.

1            Preservation of the status quo requires issuance of a TRO. Proposition 209, by its own  
2 terms, is "self-executing" (subsection (h)), and applies to "action taken after the section's  
3 effective date." Subsection (b). Under the California Constitution, an initiative amendment  
4 "takes effect the day after election unless the measure provides otherwise." Cal. Const. art  
5 XVIII, §6. Thus, as of Wednesday, November 6, 1996, all California state agencies, cities,  
6 counties, public universities, school districts, and other political subdivisions are commanded  
7 to at once discontinue their programs, on pain of liability to private entities and enforcement  
8 by the Attorney General. See subsections (d) & (g). Moreover, every decisionmaker and  
9 policymaker within every one of these entities is bound to adhere to Proposition 209. Thus,  
10 Proposition 209 will have the additional effect of altering the decisionmaking process at all  
11 levels of government in countless ways, to the detriment of women and minorities throughout  
12 the State.

13            The mere prospect of enforcement by officials will paralyze governmental bodies -- not  
14 to mention the women and minorities effectively disenfranchised by Proposition 209. This  
15 is more than just a "chilling effect" on speech; it is a total freeze on constitutional rights at  
16 all levels of government. See, e.g., Elrod v. Burns, 427 U.S. 347, 373, 96 S. Ct. 2666, 49  
17 L.Ed.2d 614 (1976) (plurality opinion) (irreparable injury shown where plaintiffs deprived of  
18 free speech rights "for even minimal periods of time"). Without a speedy decision, school  
19 boards will be left uncertain as to whether they must discontinue magnet programs, and  
20 parents in the dark as to the decisions they must make regarding their children's educations.  
21 See, e.g., decls. of Shevada Dove ¶8 and Melodie Dove ¶14. Local governments, not to  
22 mention women and minority owned companies, will be without guidance as to how the  
23 bidding process for government contracts should proceed, and cities may even be subject to  
24 damage actions. See, e.g., Fung decl., ¶4; Larson decl., ¶21. College students will lack  
25 information they need in deciding where to attend school, or whether to transfer in order to  
26 secure the vital services provided by race and ethnicity conscious support programs. See, e.g.,  
27 decl. of Iran Celeste Davila, ¶9. Public employers and employees alike will be without  
28 guidance as to the standards that govern ongoing hiring, promotion, and lay-off decisions

1 (Grillo decl., ¶13-5), and as to how collective bargaining on equal employment opportunity  
2 issues should proceed. See, e.g., decl. of Jerry Fillingham, SEIU Local 535, ¶4.

3 The immediate constitutional violation resulting from Proposition 209 by itself suffices  
4 to meet plaintiffs' burden of showing irreparable injury. See Elrod, 427 U.S. at 373-74;  
5 Mitchell v. Cuomo, 748 F.2d 804, 806 (2d Cir. 1984) (citing 11 Wright & Miller, Federal  
6 Practice and Procedure, § 2948, at 440 (1973) ("When an alleged deprivation of a  
7 constitutional right is involved, most courts hold that no further showing of irreparable injury  
8 is necessary.")); Association of General Contractors v. City and County of San Francisco, 748  
9 F.Supp. 1443, 1447 (N.D.Cal. 1990) aff'd, 950 F.2d 1401 (9th Cir. 1991). The harm resulting  
10 from this constitutional violation goes far beyond the termination of affirmative action  
11 programs and the opportunities they provide to underrepresented groups in our society. The  
12 most grievous injury is the closing off the political process to women and minority groups --  
13 stripping them of the opportunity to go to local and state legislative bodies to encourage  
14 adoption of effective solutions to past and continuing discrimination. As Ailene Hernandez  
15 states, "the passage of Proposition 209 will prevent minority and women business owners from  
16 working through the local political process to adopt beneficial legislation." Hernandez decl.,  
17 ¶16.

18 Implementation of Proposition 209 would, of course, also have sweeping effects in the  
19 areas of public education, employment, and contracting, as explained above, causing  
20 additional irreparable harm to the plaintiff class. The declarations submitted along with  
21 plaintiffs' TRO request demonstrate only a small fraction of the immeasurable harm that  
22 would flow from Proposition 209's categorical elimination of countless state and local  
23 affirmative action programs, affecting thousands of individuals throughout California.

24 Proposition 209 threatens two types of irreparable injury for women and minorities in  
25 employment and contracting. Both will face an increase in discrimination against, which was  
26 reduced by affirmative action programs. Contractors, in particular, will face severe financial  
27 hardship, including the inability of many to remain in business. The termination of  
28 affirmative action policies such as the requirement that contractors make "good faith efforts"  
to meet MBE and WBE participation goals will dramatically cut the these contractors'

1 opportunities to obtain public contracts in California. Larson decl. ¶2. Without affirmative  
2 action policies, government agencies and prime contractors will make it more difficult for  
3 MBEs and WBEs to become informed about contracting opportunities. Hernandez decl., ¶14.  
4 This reduction of opportunity will not only reduce the profitability of these firms, (Burns decl.,  
5 ¶10 (best case scenario is that her business will be cut in half if Proposition 209 is  
6 implemented)); it may force many of out of business. Hernandez decl. ¶14; Burns decl., ¶11.  
7 The possibility that minority contractors will be driven out of business by the implementation  
8 of Proposition 209 constitutes irreparable injury. Tri-State Generation v. Shoshone River  
9 Power, Inc., 805 F.2d 351, 356 (10th Cir. 1986); Zurn Constructors Inc. v. B.F. Goodrich, 685  
10 F.Supp. 1172, 1181 (D.Kan 1988) ("[T]hreats to a business' viability can constitute irreparable  
11 harm.") (collecting cases). The effect of the termination of race and gender conscious  
12 programs will be exacerbated by the fact that "the use of race or gender neutral programs to  
13 address the underutilization of MBEs and WBEs [has been] generally ineffective." Larson  
14 decl. ¶17. Similarly, in public employment, women and minorities who have benefitted from  
15 affirmative action programs will face increased discrimination and reduced opportunities for  
16 promotion. Bennett decl. ¶¶4-6; Wong decl. ¶¶ 4-5.

17 In the area of education, Proposition 209 threatens 53 voluntary school integration  
18 programs statewide, such as magnet schools, which use race and ethnicity as criteria in  
19 admissions in order to provide students of all races and national origins the opportunity to  
20 attend an integrated school. If Proposition 209 were implemented, the Berkeley school  
21 system would likely become highly segregated, as it was before the Berkeley school district  
22 made classroom assignments on a race-conscious basis. Roach decl. ¶4. Achieving diversity  
23 in the classroom -- one important component of which is racial and ethnic diversity -- is a  
24 compelling interest. Bakke, 438 U.S. at 314-15 (opinion of the Court per Powell, J.) By  
25 preventing school boards from using the means necessary to ensure many students the  
26 opportunity to attend a racially and ethnically diverse, integrated school, the implementation  
27 of 209 would deny many students the opportunity for an integrated education. Office of  
28 Research Study, ¶¶4-5 (absent magnet and other voluntary desegregation programs integrated  
education not possible in Los Angeles) The loss of such an opportunity clearly constitutes

1 an irreparable injury. E.g. Brown v. Bd. of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed.  
2 873 (1954).

3 The implementation of Proposition 209 would do more than end efforts to achieve  
4 voluntary integration; it would threaten the very existence of programs throughout the State,  
5 which use racial and ethnic criteria in order to address educational disadvantages in minority  
6 communities. According to plaintiff Dana Cunningham, an Oakland high school student,  
7 ending race-conscious efforts to integrate selective programs like the Health Academy at  
8 Oakland Tech would "hurt the quality of my education." Cunningham decl., ¶11. More  
9 broadly, the loss of funds used for voluntary desegregation of schools would "decimate the  
10 very successful academy programs in the Oakland School District" (Gronert decl., ¶7), and  
11 similar programs up and down the State. The Ten Schools Program in LAUSD has produced  
12 "significant growth in test scores of students at the predominantly African-American schools  
13 participating." Exh. 8. Minority students involved in MESA constitute 80% of the minority  
14 students who receive Bachelor of Science degrees in engineering. MESA students are three  
15 times more likely to graduate than similar students who are not affiliated with the program.  
16 Termination of these programs poses the threat of irreparable harm to academic  
17 opportunities of students like Dana Cunningham, Shevada Dove, and minority students  
18 interested in pursuing higher education in engineering and other math and science fields. See  
19 Cunningham decl. ¶14, 11; Gronert decl. ¶14, 6-7; Melodie Dove decl. ¶¶13-14; Garcia decl.,  
20 ¶12. These harms are immeasurable and irreparable because monetary damages are an  
21 inadequate form of remedy. E.g., Los Angeles Memorial Coliseum Comm'n v. National  
22 Football League, 634 F.2d 1197, 1202 (9th Cir. 1980) (where injury is merely monetary and  
23 therefore compensable at a later date, there is no irreparable harm).

24 Not only have plaintiffs shown a strong likelihood of severe irreparable injury,  
25 defendants' interests are also insubstantial. As demonstrated above, Proposition 209 would  
26 have no effect on eliminating discrimination against minorities and women. Such  
27 discrimination is already prohibited by the federal and state constitutions and numerous  
28 federal and state anti-discrimination laws. The state's interest in preventing so-called "reverse  
discrimination" is grossly outweighed by the interests asserted by plaintiffs because reverse

1 discrimination is not a wide spread problem. Blumrosen decl. ¶¶6-11; Leonard decl. ¶¶10-11.  
2 Jonathan Leonard, Professor at the Haas School of Business at University of California at  
3 Berkeley, who has done extensive empirical research on the effects of affirmative action  
4 programs stated, "I am aware of no statistically significant evidence of substantial reverse  
5 discrimination against white males in the US labor force. The overwhelming balance of  
6 evidence suggests that blacks and other minorities are victims of discrimination far more often  
7 than are whites." Leonard decl., ¶10.

8 Moreover, the Supreme Court and Ninth Circuit have many times reaffirmed the  
9 lawfulness of affirmative action programs. Lawful programs run by state and local entities  
10 must be narrowly tailored to address the compelling state interest in eliminating "the unhappy  
11 persistence of both the practice and the lingering effects of racial discrimination," Adarand,  
12 115 S.Ct. at 2117, or carefully crafted to meet the exacting test governing gender based  
13 discrimination.

14 In sum, plaintiffs have demonstrated the likelihood of a serious constitutional injury,  
15 in addition to the threat of irreparable harms such as loss of educational and employment  
16 opportunities and severe threats to the viability of minority contractors' businesses. The  
17 state's only interest is in preventing "reverse discrimination" -- an interest of little weight in  
18 light of the fact that any lawful affirmative action program newly forbidden by Proposition  
19 209 is narrowly tailored to address a compelling state interest, such as eradicating the vestiges  
20 of our long and unhappy history of racial and gender discrimination. Thus, the balance of  
21 hardships tips overwhelmingly in plaintiffs' favor.

1 V. CONCLUSION

2 Plaintiffs have demonstrated a likelihood of success on the merits, a strong possibility  
3 of irreparable harm, and a balance of hardships that tips heavily in their favor. Accordingly,  
4 a Temporary Restraining Order should issue forthwith.

5  
6 DATE: November 6, 1996

Respectfully submitted,

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