

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S152934

**CORAL CONSTRUCTION, INC. and
SCHRAM CONSTRUCTION, INC.,
Plaintiffs and Respondents,**

v.

**CITY & COUNTY OF SAN FRANCISCO
And JOHN L. MARTIN,
Defendants and Appellants.**

*After an Opinion by the Court of Appeal,
First Appellate District, Division Four
(Case NO. A107803)*

*On Appeal from the Superior Court of San Francisco County
(Case No. 319549, Honorable James L. Warren, Judge)*

**APPLICATION FOR PERMISSION TO FILE
AMICUS CURIAE BRIEF AND
PROPOSED BRIEF IN SUPPORT OF
CITY AND COUNTY OF SAN FRANCISCO, ET AL.**

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TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE OF
THE CALIFORNIA SUPREME COURT:

Pursuant to California Rule of Court 8.520(f), the Mexican American Legal Defense and Educational Fund (MALDEF) respectfully requests permission to file the accompanying amicus curiae brief in support of Petitioners City and County of San Francisco, et al. This application is timely made within 30 days after the filing of the last reply brief by the parties.

THE AMICUS CURIAE

Founded in 1968, MALDEF is the leading national civil rights organization representing the 48 million Latinos living in the United States through litigation, advocacy, and educational outreach. MALDEF's mission is to foster sound public policies, laws and programs to safeguard the civil rights of Latinos living in the United States and to empower the Latino community to participate fully in our society. MALDEF has litigated many cases under state and federal law to ensure equal treatment of Latinos, and MALDEF sets as a primary goal ensuring that Latinos have meaningful participation in the political process and equal protection of the law.

NATURE OF INTEREST OF AMICUS CURIAE

MALDEF has an interest in ensuring that Latinos have equal access to the political process and that their rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution are adequately protected. MALDEF has a long history of protecting these rights in the courts, including challenges brought under the political structure doctrine of the Equal Protection Clause. Most recently in California, MALDEF represented the interests of Latino parents and

children in *Valeria v. Davis*, 320 F.3d 1014 (2001), challenging the constitutionality of Proposition 227 entitled “English Language in Public Schools,” which replaced existing bilingual education programs with a statewide program from which individual school districts could not deviate. MALDEF is interested in ensuring that the political structure doctrine of the Equal Protection Clause is correctly applied.

For the foregoing reasons, MALDEF respectfully requests that the Court accept the accompanying brief for filing in this case.

Dated: February 7, 2008 Respectfully submitted,

SONNENSCHN NATH & ROSENTHAL
LLP



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INTRODUCTION

This Court has directed the parties to brief and argue three specific issues. The third issue is whether Article I, Section 31 of the California Constitution violates the Equal Protection Clause under the standards articulated in *Hunter v. Erickson*, 393 U.S. 385 (1969) and *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982). Amicus curiae Mexican American Legal Defense and Educational Fund contends that Section 31 -- as interpreted by Plaintiffs -- violates the Equal Protection Clause because it alters California's political structure to prevent racial minorities from obtaining beneficial legislation in the areas of public employment, education and contracting.

The Fourteenth Amendment's Equal Protection Clause provides that "[n]o State shall . . . deny to any person within its jurisdiction equal protection of the laws." U.S. Const. amend. XIV, § 1. Enshrined in the Constitution shortly after the Civil War, this promise of equality was designed to heal the grievous national wounds of slavery and racial oppression. So simple in theory, equality has proven quite elusive in practice.

Twenty-eight years after the Fourteenth Amendment was ratified, the Supreme Court adopted the "separate but equal" doctrine in *Plessy v. Ferguson*, 163 U.S. 537 (1896). In *Plessy*, the Court embraced equality in theory but eviscerated it in practice. In the decades that followed, the United States adopted sweeping policies designed to ensure white supremacy in law, politics and economics. In virtually every aspect of American life -- from education, marriage and military service to housing, health care and employment -- the federal, state and local governments of the United States tolerated, encouraged and enforced the machinery of racial oppression.

In 1954, the Court rejected the hollow promise of theoretical equality and embraced the hope of practical, real-world equality:

Here . . . there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other “tangible” factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.

...

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other “tangible” factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

Brown v. Bd. of Educ., 347 U.S. 483, 492-95.

To the modern eye, *Brown* seems inescapably correct. At the time, however, the death of “separate but equal” was hardly a foregone conclusion. Had the Court ignored the practical realities of segregation and focused solely on a theoretical construct of equality, *Plessy* might well have stood as the law of the land.¹

¹ Though *Brown* was originally argued in 1952, it was not decided until 1954 because the court heard re-argument on “the circumstances surrounding the adoption of the Fourteenth Amendment in 1868[,]” including “then existing practices in racial segregation.” *Brown*, 347 U.S. at 489. Legal historians believe that the Court was prepared to uphold *Plessy* until Chief Justice Vinson died and was replaced by Earl Warren. See Cass R. Sunstein, “Did Brown matter?” *The New Yorker* p. 102 (May 3, 2004) (“In September of 1953, just before *Brown* was to be reargued,

In many ways, we are closer to the days of *Plessy* than seems possible. Our public schools have re-segregated at an alarming rate and, for many, the doors of educational and economic opportunity remain locked. And so today, this Court faces a choice much like the choice facing the United States Supreme Court in *Brown*. Like the majority in *Plessy*, Plaintiffs are quick to embrace the language of equality. In reality, however, Plaintiffs would relegate racial minorities to second-class citizenship. This Court can only adopt Plaintiffs' theoretical equality if it ignores the practical realities of racial discrimination and racial politics. Accordingly, MALDEF respectfully requests that this Court interpret Section 31 to be consistent with *Hunter* and *Seattle* and the letter and spirit of the Fourteenth Amendment.

ARGUMENT

Hunter and *Seattle* establish a principle of equal protection that protects racial minorities from discriminatory changes to the political process. This Court must decide whether *Hunter* and *Seattle* guarantee racial minorities the right to petition their state and local governments for race-based policies or legislation. This is an issue of first impression in the California Supreme Court, and Plaintiffs' brief is not helpful because it lacks any meaningful analysis of either decision. Rather, it simply parrots the conclusions of two federal circuit decisions -- *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1997) (hereinafter "*Coalition I*") and *Coalition to Defend Affirmative Action v. Granholm*, 473 F.3d 237 (6th Cir. 2006). (Pls.' Opening Br. 50-56.) These decisions are similarly unhelpful because their conclusions are not grounded in a genuine

Vinson died of a heart attack, and everything changed. 'This is the first indication that I have ever had that there is a God,' [Justice] Frankfurter told a former law clerk.'").

structural equal protection analysis. Instead, these courts ultimately rely on tautological political slogans regarding the supposed evils of so-called “racial preferences.” Neither Plaintiffs nor these lower courts properly acknowledge the distinction between a conventional equal protection analysis and the structural equal protection analysis required by *Hunter* and *Seattle*.

Under *Hunter* and *Seattle*, a law with a “racial focus” cannot alter a State’s political structure to the detriment of racial minorities. Plaintiffs interpret Section 31 as an absolute ban on all race-based programs and policies in the areas of public education, employment and contracting. (Pls.’ Opening Br. 15.) While Plaintiffs’ interpretation of Section 31 might survive a conventional equal protection analysis, it cannot survive an honest application of the *Hunter-Seattle* doctrine. As construed by Plaintiffs, Section 31 is a paradigmatic violation of the Equal Protection Clause as interpreted in *Hunter* and *Seattle*: it isolates racial issues in the areas of education, contracting and public employment, removes those from the hands of state and local governments, but leaves those governments free to regulate all other matters in those areas.

I. In *Hunter* and *Seattle*, The United States Supreme Court Established A Distinct Form Of Equal Protection Analysis For Laws Governing The Political Process.

The *Hunter-Seattle* doctrine guarantees racial minorities a fair political process. *Hunter*, 393 U.S. at 391 (holding that a law that “places [a] special burden on racial minorities within the governmental process” is unconstitutional); *Seattle*, 458 U.S. at 467 (“The Equal Protection Clause of the Fourteenth Amendment guarantees racial minorities the right to full participation in the political life of the community.”). Because *Hunter* and *Seattle* focus on process rather than results, they articulate a form of

“structural” equal protection analysis that is separate and distinct from a “conventional” equal protection analysis.

A structural equal protection analysis “focuses not on the substance of the legislation, but on whether and how the legislation affects political access.” *Coral Construction, Inc. v. San Francisco*, 149 Cal. App. 4th 1218, 1264 (Rivera, J., dissenting) (hereinafter “*Coral Construction*”). Structural equal protection cases are concerned with discriminatory access to the political process, as opposed to the discriminatory products of specific legislation. Daniel P. Tokaji & Mark D. Rosenbaum, *Promoting Equality by Protecting Local Power: A Neo-Federalist Challenge to State Affirmative Action Bans*, 10 Stan. L. & Pol’y Rev. 129, 137 (1999).

Applying these structural principles, the United States Supreme Court has invalidated laws requiring candidates to specify their races on the ballot (*Anderson v. Martin*, 375 U.S. 399 (1964)), laws requiring popular approval of fair housing legislation (*Hunter*), and laws prohibiting school boards from using busing as part of voluntary desegregation programs (*Seattle*). It makes no difference that the laws were even-handed in that they treated all races equally, e.g., requiring both whites and blacks to be identified on the ballot. Because the obvious purpose of these laws was to hinder minorities’ participation in the democratic process, the Court found that they were unconstitutional.

This principle is most clearly articulated in *Hunter* and *Seattle*. In *Hunter*, the Akron city charter was amended to require a citywide referendum for all fair housing ordinances. *Hunter*, 393 U.S. at 387. The Court held that this provision of Akron’s charter offended the Equal Protection Clause because it was “an explicitly racial classification treating racial housing matters differently from other racial and housing matters.” *Id.* at 389. As the Court noted, anyone in Akron could petition the Akron City Council for beneficial regulation of housing matters, but racial

minorities (and only racial minorities) were required to obtain the additional approval of the electorate. *Id.* at 390-91. The evident and obvious purpose of this law was to make it more difficult for racial minorities to obtain beneficial legislation.

The Court rejected the argument that the law was constitutional because it was enacted by referendum:

Even though Akron might have proceeded by majority vote at town meeting on all its municipal legislation, it instead chose a more complex system. Having done so, *the State may no more disadvantage any particular group by making it more difficult to enact legislation on its behalf than it may dilute any person's vote or give any group a smaller representation than another of a comparable size.*

Id. at 392-93 (emphasis added) (comparing to *Reynolds v. Sims*, 377 U.S. 533 (1964) and *Avery v. Midland County*, 390 U.S. 474 (1968)).

Thus, the Court's decision in *Hunter* is grounded in, and relies upon, the Court's decisions in voting rights cases.² In this sense, political structure claims can be understood as a new generation of voting rights claims that ensure meaningful participation in the political process and guarantee more than simple access to the ballot box. *See* Kristen Clarke, *Voting Rights & City-County Consolidations*, 43 *Hous. L. Rev.* 621, 640 (2006) (describing the latest "generation" of voting rights claims as

² Prior to the passage of the Voting Rights Act, 42 U.S.C. section 1973, voting rights claims were brought under both the Fourteenth and Fifteenth Amendments. *See Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (challenging, under the Fourteenth and Fifteenth Amendments, electoral systems that dilute voting strength by drawing boundaries to exclude African American voters).

those “aimed at policing those legislative voting rules whereby a majority consistently rigs the process to exclude a minority.”)

Racial vote dilution occurs when the political process limits the effectiveness of a racial minority’s vote. *See, e.g., Reynolds*, 377 U.S. at 555 (“[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.”) Political structures that place decision-making at a remote level can submerge minority voting power. For example, the Supreme Court has “long recognized that . . . at-large voting schemes may ‘operate to minimize or cancel out the voting strength of racial [minorities in] the voting population.’” *Thornburg v. Gingles*, 478 U.S. 30, 47-48 (1986) (*quoting Burns v. Richardson*, 384 U.S. 73, 88 (1966)). Thus, structural protections against vote dilution are central to the Fourteenth Amendment protection of racial minorities against discrimination. The *Hunter-Seattle* doctrine serves to protect against the vote dilution that occurs when racial issues are isolated in the political process.

Vote dilution will occur “where minority and majority voters consistently prefer different candidates, [because in these circumstances] the majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters.” *Id.* at 48. Just as at-large election systems can dilute the vote of racial minorities where minority and white voters consistently prefer different candidates, dilution in the context of the political structure doctrine occurs when the racial minority and majority have differing views on racial issues, as is often the case. When decisions concerning racial issues can only be made by the electorate, or when they are removed to a higher level of government, racial minorities’ policy preferences are less likely to prevail because the majority, by definition, has superior numbers. This places a special burdens on minorities that is “no

more permissible than denying them the vote, on an equal basis with others.” *Hunter*, 393 U.S. at 391.

A. The *Hunter-Seattle* Analysis Is A Two Part Test: Racial Focus And Alteration Of Political Structure.

In his concurring opinion in *Hunter*, Justice Harlan described his “constitutional approach to state statutes which structure the internal governmental process.” *Hunter*, 393 U.S. at 393 (Harlan, J., concurring). Justice Harlan divided these laws into two classes: (1) laws that “have the clear purpose of making it more difficult for racial . . . minorities to further their political aims,” and (2) laws that create “a just framework within which the diverse political groups in our society may fairly compete.” *Id.* To illustrate this principle, Justice Harlan contrasted Akron’s general referendum law (requiring any ordinance to be submitted for a citywide vote if 10 percent of the electorate signs an appropriate petition) with the specific law at issue in *Hunter* (requiring all fair housing ordinances to be approved by the electorate). *Id.* at 393-94.

While the general referendum law might burden racial minorities on any given issue, it did not burden them unfairly because the law applied to all issues and simply reflected general democratic principles. *Id.* at 394. The charter provision challenged in *Hunter* lacked this general application. It did not “allocate governmental power on the basis of any general principle.” *Id.* at 395. Rather, it had “the clear purpose of making it more difficult for certain racial and religious minorities to achieve legislation that is in their interest.” *Id.*

The Court explicitly adopted Justice Harlan’s approach in *Seattle*. There, the Court struck down a Washington State law (enacted by initiative) that prohibited the use of mandatory busing as part of a voluntary desegregation program. Unlike the Akron city charter provision in *Hunter*, the Washington initiative did not mention race and simply banned

mandatory busing except for certain enumerated purposes. These exceptions were sufficiently broad, however, to make it clear that the initiative's purpose was to ban busing as a method of integration. *Seattle*, 458 U.S. at 471. Accordingly, the Court rejected any suggestion that the law was racially neutral, holding that the "racial focus" of the initiative triggered the *Hunter* doctrine. *Id.* at 474.

Having determined that the initiative had a "racial focus," the Court evaluated its impact on the political structure of Washington State. *Id.* The Court found that "the practical effect of [the initiative] is to work a reallocation of power of the kind condemned in *Hunter*." *Id.*

Those favoring the elimination of *de facto* segregation now must seek relief from the state legislature, or from the statewide electorate. Yet authority over all other student assignment decisions, as well as over most other areas of education policy, remains vested in the local school board. . . . As in *Hunter*, then, the community's political mechanisms are modified to place effective decisionmaking authority over a racial issue at a different level of government.

Id. at 474-75.

Taken together, *Hunter* and *Seattle* establish a distinct Equal Protection doctrine. First, courts must determine whether a law has a "racial focus." Then, courts must determine whether a law alters the political structure to the detriment of minorities.

The *Hunter-Seattle* doctrine is a sensible and practical one. It does not subordinate real world equality to formal equality. It recognizes that, by a *selective* application of direct democracy, the majority can manipulate the "rules of the game" to the detriment of the minority. *See generally*, Julian N. Eule, *Judicial Review of Direct Democracy*, 99 Yale L.J. 1503 (1990) (urging courts to pay special attention to the way in which initiatives have the potential to circumscribe minority rights and individual liberties).

By definition, the majority has the advantage in the democratic process, but so long as the process operates in a race-neutral manner, the Equal Protection Clause is not offended. Where the majority manipulates democratic structures to further disadvantage minority voters, however, the Equal Protection Clause is violated.

II. As Construed By Plaintiffs, Article I, Section 31 Violates The Equal Protection Clause Because It Reallocates Power Within California's Political Structure To Disadvantage Minorities On Racial Issues.

Plaintiffs advance a sweeping and unyielding interpretation of Section 31. According to Plaintiffs, Section 31 prohibits all race-based affirmative action programs under any and all circumstances. Plaintiffs construe Section 31 to prohibit race-based affirmative action programs even when those programs are narrowly tailored to combat identifiable patterns of past and ongoing race discrimination and even when race-neutral policies are inadequate. Accordingly, if construed in that fashion, Section 31 would violate the Equal Protection Clause under the standards articulated in *Hunter* and *Seattle*.

A. Article I, Section 31 Has A "Racial Focus."

On its face and as construed by Plaintiffs, Section 31 is directed at a specifically racial issue. Section 31 provides:

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

...

(c) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the

normal operation of public employment, public education, or public contracting.

By its own terms, Section 31 purports to govern the use of racial classifications in public employment, public education, and public contracting. It does not purport to regulate all public employment, education and contracting matters. Rather, it governs racial (and gender) matters exclusively. In this respect, Section 31 is identical to the provision of the Akron city charter that was struck down in *Hunter*, and it is more explicitly racial than the initiative in *Seattle*.

More importantly, Plaintiffs urge this Court to adopt an interpretation of Section 31 that is even more explicitly racial. Under Plaintiffs' construction, the purpose of Section 31 is to prohibit any and all consideration of race for the benefit of racial minorities in public employment, education and contracting even if such considerations are the only effective remedy for past and ongoing race discrimination. (*See* Pls.' Opening Br. 15.)

Plaintiffs contend that the flaw in the Washington law was its "racial classification." (Pl's Brief at p. 54.) They argue that, because Section 31 prohibits racial classifications, it cannot embody a racial classification itself. Plaintiffs are confusing the concept of a racial classification with the concept of a racial focus. The laws that were invalidated in *Hunter* and *Seattle* contained no racial classifications. In fact, the Washington state initiative that was invalidated in *Seattle* did not even mention race. It was the "racial focus," i.e., the isolation of a racial issue, that triggered the structural analysis.

Racial focus alone, of course, does not render a law unconstitutional. A state or local government is free to pass legislation concerning racial issues so long as it does not violate the second prong of the *Hunter-Seattle* doctrine, i.e., so long as the legislation does not alter the political structure

to disadvantage minorities. In *Hunter*, for example, the City of Akron could have passed or repealed fair housing legislation by either City Council vote or citywide referendum. Similarly, the school board in *Seattle* might have altered or eliminated its busing program. Thus, it was not merely the racial focus of the legislation that violated the Equal Protection Clause, it was the concurrent change to the political structure which removed racial issues from the normal political process.

B. Section 31 Alters California's Political Structure To Disadvantage Racial Minorities.

Before Section 31 was enacted, the various subdivisions of the California government were free to enact race-based policies or legislation in the area of public employment, education and contracting (so long as the policies or legislation did not violate the Equal Protection Clause). As the law now stands, Section 31 does exactly what *Hunter* and *Seattle* forbid: it prevents racial minorities from petitioning the government for beneficial legislation and it places decisions on racial issues solely in the hands of the statewide electorate. As Judge Henderson in *Coalition for Economic Equity v. Wilson* recognized:

Proposition 209, by removing authority over race- and gender-conscious affirmative action to 'a new and remote' level of government, has precisely such an effect. Such a reordering of the political process *is tantamount to vote dilution in the most literal sense*: the relevant voting pool is effectively expanded until the prior victory is undone.

946 F.Supp. 1480, 1510 (N.D. Cal. 1996) (emphasis added) (hereinafter "*Coalition I*").

Under Plaintiffs' construction of Section 31, to obtain beneficial policies or legislation from the State in areas of public employment, education and contracting, racial minorities must first amend the California

Constitution through a lengthy, expensive and burdensome ballot initiative process. *See* Cal. Const. art. II, § 10(c); *Rossi v. Brown*, 9 Cal. 4th 688, 715-716 (1995) (holding that initiative measure may be amended only by electorate unless initiative measure expressly provides otherwise).

There are three stages to amending the California Constitution by the initiative process. The first stage is obtaining a title and summary of the initiative measure from the Attorney General. CAL. ELEC. CODE § 9002; *see also* Cal. Const. art. II § 10(d). The second stage consists of circulating the petition and gathering signatures. CAL. ELEC. CODE §§ 9008, 9009, 104; *see also* CAL. ELEC. CODE §§ 9607, 9608(a), 9609(a), 9610(a). The petition must be signed by registered voters equal in number to eight (8) percent of the votes for all candidates for Governor at the last gubernatorial election. Cal. Const. art. II, § 8(b); CAL. ELEC. CODE § 9035. The third stage consists of preparing the initiative for submission to the electorate. Cal. Const. art. II, § 8(c); CAL. ELEC. CODE §§ 9013, 9051, 9034.

Each stage is time-consuming and expensive:

Under . . . an initiative constitutional amendment--sponsors must first obtain signatures supporting the initiative equal to 8% of the previous gubernatorial vote. . . . Given these requirements, and the size of California, hiring paid signature gatherers is a virtual necessity. . . . Thus, even where volunteers gather some portion of the required signatures, the cost of securing sufficient signatures, and minimally staffing a few offices, can run from \$500,000 to \$1.5 million.

....

[S]ubstantial funds are required to organize and fund the statewide campaign that follows the initiative qualification procedure or requisite legislative approval. Again, the size of California makes this endeavor particularly

expensive. To reach at least 10 million voters directly, a campaign would have to talk to 1,000 voters each day for 30 years.

Coalition I, 946 F.Supp. at 1498-99.

These are, of course, enormous hurdles to overcome for any group. More importantly, on issues relating to public employment, education and contracting, they are hurdles placed solely in the path of women and racial minorities. All other groups may petition their various governmental representatives for beneficial legislation in these areas. Veterans, the elderly, religious minorities, parents, dog-owners, and vegetarians may all seek legislation to advance their interests in those areas. According to Plaintiffs, however, racial minorities are the only group that cannot obtain such benefits without amending the California Constitution.

The courts in California generally have adopted Plaintiffs' interpretation of Section 31, and the effect has been felt throughout the state in a variety of contexts from public contracting (*Hi-Voltage Wire Works, Inc. v. San Jose*, 24 Cal. 4th 537 (2000)) to local school policy (*Crawford v. Huntington Beach Union High Sch. Dist.*, 98 Cal. App. 4th 1275 (2002) (hereinafter "*Huntington Beach*") to public employment (*Connerly v. State Pers. Bd.*, 92 Cal. App. 4th 16, 53-57 (2001)). In each of these cases, duly constituted arms of the State enacted programs to benefit racial minorities. Because the courts interpreted Section 31 without considering the application of *Hunter* and *Seattle*, however, these programs were invalidated.

Racial minorities can no longer petition their local school board to implement race-based desegregation policies (*cf. Huntington Beach*, 98 Cal. App. 4th at 1278-79; *Seattle*, 458 U.S. at 461-62; *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 127 S. Ct. 2738, 2789 (2007) (Kennedy, J., concurring)), or elect a city council willing to address

ongoing discrimination in city contracting (*cf. Hi-Voltage*, 24 Cal. App. 4th 537 and *Coral Construction*, 149 Cal. App. 4th 1218, with *Adarand Constructors v. Peña*, 515 U.S. 200 (1995)), or attempt to get the University of California Board of Regents to enact policies that would attempt to increase diversity in the UC System. Now, minorities' only recourse is a statewide initiative. Thus, the removal of local decision-making power has diluted racial minorities' voting strength.

III. Plaintiffs' Attempts To Circumvent The *Hunter-Seattle* Doctrine Are Unavailing.

A. No California Court Has Held That Section 31 Can Survive A *Hunter-Seattle* Challenge.

Whether Section 31 can survive a *Hunter-Seattle* challenge is an issue of first impression in California courts. The constitutionality of Proposition 209 was not at issue in any of the California state cases cited by Plaintiffs. See *Hi-Voltage*, 24 Cal. 4th at 541 (considering whether the city's program violates Proposition 209); *Huntington Beach*, 98 Cal. App. 4th at 1277 (considering whether the District's transfer policy violates Proposition 209); *Connerly*, 92 Cal. App. 4th at 27 (considering whether five statutory programs violate principles of equal protection and Proposition 209); *Kidd v. State*, 62 Cal. App. 4th 386, 407-08 (1996) (considering whether Proposition 209 applied because voters had approved the Proposition while the appeal was pending).

B. The California Supreme Court must follow the United States Supreme Court Precedent in *Hunter* and *Seattle*.

The Supremacy Clause of the United States Constitution binds state courts to United States Supreme Court decisions on questions of constitutional law. U.S. Const. art. VI, cl. 2; see also *Cooper v. Aaron*, 358 U.S. 1, 18 (1958); *Rohr Aircraft Corp. v. San Diego*, 51 Cal. 2d 759, 764 (1959), *rev'd on other grounds*, 362 U.S. 628 (1960). Thus, the California

Supreme Court must follow the United States Supreme Court precedent in *Hunter and Seattle*.

In addition, the California Supreme Court is not bound by lower federal court precedents; it must make an independent determination of federal law when lower federal court decisions are divided or lacking. *Barrett v. Rosenthal*, 40 Cal. 4th 33, 58 (2006); *Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J., concurring); *Steffel v. Thompson*, 415 U.S. 452, 482, n.3 (1974) (Rehnquist, C.J., concurring); see *Ohio v. Burnett*, 93 Ohio St. 3d 419, 423-24 (Ohio 2001) (holding that Ohio state courts are not bound by federal district court decisions); see also *Elliott v. Albright*, 209 Cal. App. 3d 1028, 1034 (1989) (stating that where the federal circuits are in conflict, the authority of the Ninth Circuit is entitled to no greater weight than decisions from other Circuits). The structure of the Constitution itself implies that state courts are not bound by lower federal courts because the United States Supreme Court has appellate jurisdiction over State Supreme Court decisions while lower federal courts do not. See U.S. Const. art. III, § 2, cl. 2; *Martin v. Hunter's Lessee*, 14 U.S. 304, 351 (1816). Additionally, state courts have concurrent jurisdiction with lower federal courts on constitutional questions. See *Tafflin v. Levitt*, 493 U.S. 455, 458-59 (1990). Because state courts have inherent authority to adjudicate constitutional questions, and because their decisions are not reviewable by lower federal courts, they should not be bound by the decisions of those lower courts.

C. Even As Persuasive Authority, *Coalition II* Has Little Relevance Because It Concerned A Facial Attack On Section 31 And Applied A Conventional Equal Protection Analysis Rather Than A Distinct *Hunter-Seattle* Analysis.

Plaintiffs rely heavily on *Coalition II*. Even as persuasive authority, however, *Coalition II* has little relevance to this appeal because of the distinct legal posture of the appeal and because the three-judge panel in

Coalition II misunderstood the nature of the *Hunter-Seattle* doctrine. As a threshold matter, *Coalition II* is inapplicable because it resolved a facial attack on Section 31 before the California courts had interpreted it. Accordingly, the Ninth Circuit Court of Appeals was called upon to decide whether Section 31 was unconstitutional under any and all possible interpretations. Here, of course, the Plaintiffs are urging this Court to adopt a specific interpretation of Section 31, i.e., that it operates as a complete ban on all so-called “racial preferences” under all circumstances.

Even if *Coalition II* had decided the same issue as the one presented to this Court, it does little to illuminate the *Hunter-Seattle* issue. Plaintiffs are fond of quoting *Coalition II*'s admonishment that “the Fourteenth Amendment does not require what it barely permits.” In the context of a *Hunter-Seattle* analysis, however, this statement is a non-sequitur.

Hunter and *Seattle* do not require States to enact any particular remedy for racial discrimination. The City of Akron was not required to enact fair housing legislation, and the Seattle School District was not required to enact a mandatory busing program. *Hunter* and *Seattle* do not stand for the proposition that any particular race-based remedy is forbidden or required. Rather, they stand for the proposition that majorities cannot place constitutionally-permissible remedies out of reach by manipulation of the political process.

Application of the political structure doctrine is separate from application of “conventional” political structure doctrine to “the substance of legislation.” *Coral Construction*, 149 Cal. App. 4th at 1264 (Rivera, J., dissenting). The fundamental mistake of the Ninth Circuit was their creation of an exception to the *Hunter-Seattle* doctrine, an exception that does not appear in either *Hunter* or *Seattle*. Essentially, the *Coalition II* court held that, because some race-based legislation is unconstitutional, a complete ban on race-based legislation must be permissible. This

completely confuses the purpose of a structural analysis with a conventional analysis.

A conventional equal protection analysis is always available to prevent the inappropriate use of race-based legislation. If the law employs a suspect classification, such as race, or if it burdens a fundamental right, it will be subject to strict scrutiny, (*Plyler v. Doe*, 457 U.S. 202, 216-218, n.14, n.15) (1982), and will only be upheld if it is narrowly tailored to promote a compelling governmental interest (*Johnson v. California*, 543 U.S. 499, 505 (2005)). A structural analysis, by contrast, protects racial minorities' access to the political process. Because *Coalition II* fails to recognize this distinction, the decision is not useful to this Court and should not be followed.

D. The Inclusion of Gender in Section 31 Does Not Preclude the Application of *Hunter-Seattle*.

According to Plaintiffs, any law that burdens women is acceptable under the *Hunter-Seattle* doctrine because women are a majority of the population. Taking this argument to its logical conclusion, all gender discrimination laws are unnecessary because women are a numerical majority. Amicus curiae do not concede that women are not entitled to the protections afforded under the *Hunter-Seattle* doctrine. In any event, this is not the issue here. The issue is whether racial minorities are entitled to the protection of the *Hunter-Seattle* doctrine, and there is no reason why racial minorities should not be entitled to that protection simply because gender is also included in Section 31.

The *Hunter-Seattle* doctrine is forward-looking because it protects the ability of minorities to achieve beneficial legislation in the future. The inclusion of gender in Section 31 does not lessen its impact on racial minorities: racial minorities still lack the ability to petition their state and

local governments for relief from racial discrimination, which is fundamentally distinct from gender discrimination.

As a practical matter, the presence of racially polarized voting, the size of the minority electorate and the lack of political cohesiveness between women and minorities mean that racial minorities and women cannot be considered a single group. In 1996, Proposition 209 passed because white voters, the electoral majority, supported it despite the overwhelming opposition of racial minorities. While 63% of white voters supported its passage, 74% of black voters, 76% of Latino voters and 61% of Asian voters opposed it. *Coalition I*, 946 F. Supp. at 1495 n.12. As the court in *Coalition I* found, “[w]hite voters were the only racial or ethnic group supporting 209.” *Id.*

The minority electorate in California, measured by the eligible voting population, does not comprise a majority of the electorate. In 2000, Latinos, African Americans, and Asians *combined* constituted slightly over 36% of the California citizen voting age population.³ According to the data proffered by Plaintiffs, Latinos comprised 36% of California’s total population in 2006.⁴ (*See* Pls.’ Opening Br. 49) (citing 2006 raw population data). The appropriate measure of electoral voting strength is eligible voting population and not the total population. Failure to adequately account for age and citizenship status will affect the statewide percentage of eligible minority voters.

³ 2000 U.S. Census figures for California’s citizen voting age population are as follows: Asians 1,850,180 (9.3%); African Americans 1,495,075 (7.5%); Hispanic 3,888,220 (19.5%); California’s total population based on 2000 U.S. Census data is 20,011,574. In 2000, a federal district court noted that Latinos constituted approximately 17% of the statewide citizen voting age population. *Cano*, 211 F. Supp. 2d at 1234.

⁴ The proper year for comparison is 1996, the year that Proposition 209 appeared on the California ballot and not 2000, which Plaintiffs assert.

In the context of voting rights cases, courts have recognized that a numerical majority is not equal to an electoral majority for purposes of providing minority voters with the opportunity to elect a candidate of their choice. *African Am. Voting Rights Legal Def. Fund v. Villa*, 54 F.3d 1345, 1348 n.4 (8th Cir. 1995) (“We conclude that either 60% of the voting age population or 65% of the total population is reasonably sufficient to provide black voters with an effective majority.”); *Cano v. Davis*, 211 F. Supp. 2d 1208, 1233 (C.D. Cal. 2002) (finding that every circuit to consider the issue has held that citizen voting age population is the appropriate measure to determine whether an additional effective majority-minority district can be created) (citing *Romero v. City of Pomona*, 883 F.2d 1418, 1426 (9th Cir. 1988), *abrogated on other grounds*, *Townsend v. Holman Consulting Co.*, 914 F.2d 1136, 1141 (9th Cir. 1990) (*en banc*)).

Further, racial minorities and women did not act as a cohesive political unit in the context of Proposition 209, and they should not be treated as one for purposes of a challenge based on the political structure doctrine. Two minority groups may be considered one cohesive unit where they behave in a politically cohesive manner in the context of vote dilution cases filed under section 2 of the Voting Rights Act, 42 U.S.C. section 1973. In these cases, courts will determine whether different groups are politically cohesive when determining whether to combine their voting strength for determining their ability to comprise a majority-minority district. *See Concerned Citizens v. Hardee County Bd.*, 906 F.2d 524, 526 (11th Cir. 1990) (“Two minority groups . . . may be a single section 2 minority if they can establish that they behave in a politically cohesive manner.”).

Where groups vote together consistently, courts have been willing to aggregate their political voice, but in instances where cohesiveness does not exist, they will not be considered one unit. Minorities voted

overwhelmingly to defeat Proposition 209. *See discussion supra*. Forty-eight percent of women voted in support of Proposition 209 and 52% voted to oppose it. *Coalition I*, 946 F. Supp. at 1494. Because women as a group and racial minorities as a group do not exhibit voting cohesiveness, it is inappropriate to aggregate the groups.

IV. This Court Can Interpret Section 31 To Make It Consistent With The Equal Protection Clause.

Courts should construe laws in a manner consistent with the United States Constitution. *Commodity Futures Trading Com'n v. Schor*, 478 U.S. 833, 841 (1986) (“Federal statutes are to be so construed as to avoid serious doubt of their constitutionality.”) (*citing and quoting Machinists v. Street*, 367 U.S. 740, 749 (1961)); *see also People ex rel. Reisig v. Broderick Boys*, 149 Cal. App. 4th 1506, 1522-23 (2007) (“We must avoid a statutory construction raising serious constitutional doubts.”). Accordingly, the *Hunter-Seattle* doctrine does not require this Court to invalidate Section 31 entirely. Rather, the Court may simply interpret Section 31 to repeal any provisions of the California Constitution that might require the State to take action beyond that required by the Equal Protection Clause. Construed in this way, Section 31 would be a “mere repeal” of anti-discrimination laws previously enshrined in the California Constitution.

The propriety of this construction is best illustrated by *Crawford v. Bd. of Education of Los Angeles*, 458 U.S. 527 (1982). In *Crawford*, the Court upheld a California initiative that “conform[ed] the power of state courts to order busing to that exercised by federal courts under the Fourteenth Amendment.” *Id.* at 532. The initiative was designed to reverse a California Supreme Court decision holding that the California Constitution required school districts to remedy *de facto* segregation as well as *de jure* segregation. In *Crawford*, the United States Supreme Court held

that the initiative was a “mere repeal” of existing law and did not restructure the political process to hinder racial minorities.

The distinction between a repeal and a prospective prohibition is critical. A repeal establishes the present scope of State constitutional law, but it does not prevent racial minorities from using the political process to advance their interests. Under the initiative upheld in *Crawford*, racial minorities were free to petition their local school boards for busing programs; they simply could not use the California Constitution to require school boards to enact such programs. If interpreted as a repeal of existing state Constitutional law rather than a prospective prohibition on state and local race-based policies and programs, Section 31 would conform to the *Hunter-Seattle* doctrine as illustrated by *Crawford*.

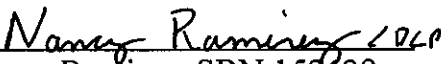
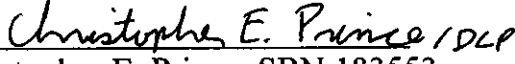
CONCLUSION

For the foregoing reasons, amicus curiae MALDEF respectfully requests that this Court interpret Section 31 in a manner that is consistent with the *Hunter-Seattle* doctrine.

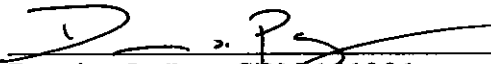
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**CERTIFICATE OF COMPLIANCE WITH CALIFORNIA RULE OF COURT
8.204(c)(1)**

I certify that pursuant to California Rule of Court 8.204(c)(1), the attached brief contains less than 14,000 words.

Dated: February 7, 2008

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PROOF OF SERVICE

I, Sandy LeCompte, hereby declare:

I am employed in the City and County of San Francisco, California in the office of a member of the bar of this court whose direction the following service was made. I am over the age of eighteen years and not a party to the within action. My business address is Sonnenschein Nath & Rosenthal LLP, 525 Market Street, 26th Floor, San Francisco, California 94105.

On February 7, 2008, I served a copy of

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND PROPOSED BRIEF IN SUPPORT OF CITY AND COUNTY OF SAN FRANCISCO, ET AL.

on the interested parties in this action by placing a true copy thereof, on the above date, enclosed in a sealed envelope, following the ordinary business practice of Sonnenschein Nath & Rosenthal LLP, as follows:

- U.S. MAIL: I am personally and readily familiar with the business practice of Sonnenschein Nath & Rosenthal LLP for collection and processing of correspondence for mailing with the United States Postal Service, pursuant to which mail placed for collection at designated stations in the ordinary course of business is deposited the same day, proper postage prepaid, with the United States Postal Service.
- FACSIMILE TRANSMISSION: I caused such document to be sent by facsimile transmission at the above-listed fax number for the party.
- FEDERAL EXPRESS: I served the within document in a sealed Federal Express envelope with delivery fees provided for and deposited in a facility regularly maintained by Federal Express.
- HAND DELIVERY: I caused such document to be served by hand delivery.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on February 7, 2008 at San Francisco, California.



Sandy LeCompte

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