No. S080318

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CITY OF SAN JOSE, et al.,

Appellants

v.

HI-VOLTAGE WIRE WORKS, INC., et al.,

Respondents

APPEAL FROM THE SIXTH APPELLATE
DISTRICT COURT OF APPEAL

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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STATEMENT OF THE ISSUE PRESENTED

Whether the state court of appeals erred in interpreting Article I, Section 31 of the Constitution of the State of California, in such a manner effectively to prohibit a municipality from meeting its obligation to cure a violation of federal law.

INTEREST OF THE UNITED STATES

This case concerns a state constitutional challenge to a contracting program adopted by the City of San Jose to ensure that minority- and women-owned firms are not discriminated against in the award of subcontracts on municipal public works projects. The City created the program after finding that there was a statistically significant disparity between the number of subcontracts awarded by prime contractors to minority-owned firms and those awarded to non-minority-owned

firms, and anecdotal evidence of discrimination against minority- and women-owned firms on public works projects. The state court of appeals held that Article I, Section 31 of the state constitution (Proposition 209) prohibited the use of race- or gender-conscious measures under any circumstance, even to remedy the demonstrable effects of past discrimination.

The United States enforces the United States Constitution and federal statutes that prohibit state and local governments from engaging in racial discrimination. These legal provisions also require such entities fully to remedy the effects of discrimination.[1] The United States has an interest in this case because the lower court's ruling limits a municipality's ability to remedy its past discrimination which, in some instances, will conflict with federal obligations.

STATEMENT OF THE CASE

A. Background

This case involves the City of San Jose's efforts to

[1/] The United States enforces numerous federal statues that prohibit discrimination in various contexts, including Title VI (42 U.S.C. 2000d et seq.) (prohibits discrimination on the basis of race, color, or national origin by recipients of federal funds), Title VII (42 U.S.C. 2000e et seq.) (prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin), and Title IX (20 U.S.C. 1681 et seq.) (prohibits discrimination on the basis of sex by educational institutions receiving federal funds). The United States also enforces Executive Order 11,246, which prohibits discriminatory employment practices by prime- and sub-contractors on federal contracts. See Exec. Order No. 11,246, 3 C.F.R. 167 (1965 Supp.), as amended, Exec. Order No. 11,375, 3 C.F.R. 320 (1967 Comp.). These statutes and the Executive Order authorize district courts to provide equitable relief where discrimination is proven or admitted.

ensure that its contracting practices do not discriminate against minority- and women-owned business enterprises ("MBEs" and "WBEs"). Hi-Voltage Wire Works, Inc. v. City of San Jose, 84 Cal. Rptr. 2d 885 (Ct. App. 1999). In 1983, the City established a program to encourage participation by MBEs and WBEs in public works projects. Id. at 887-888. This program relied on the use of participation goals based on MBE and WBE availability. After the Supreme Court decided City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989), the City suspended the program and commissioned a study to determine whether there was a significant disparity in the number and dollar value of contracts and subcontracts that were awarded to MBEs and WBEs, as compared to those awarded to other firms. 84 Cal. Rptr. 2d at 888. The City's Disparity Study, released in 1990, found that there was a statistically significant disparity between the "dollar value" of subcontracts awarded to minority-owned firms and those awarded to nonminority-owned firms, and that "disparities in the number and dollar value of MBE prime contracts continue[d] to be statistically significant." See 3 BPA Economics et al., MBE/WBE Disparity Study for the City of San Jose (Vol. III) III-21 to III-22 (1990). The Study also found that the market share of public contracts for women-owned firms was "too small to allow meaningful statistical tests for [this] categor[y]" but that the "low market share itself might be attributable to discriminaotry [sic] practices." Id. at III-21.

In response to the 1990 Study, the City adopted the "MBE/WBE Construction Program" to encourage prime contractors to engage in nondiscriminatory subcontracting with minority- and women-owned firms. 84 Cal. Rptr. 2d at 888. The program included the use of goals and required prime contractors to document steps taken to meet the goals. Ibid.

In 1996, Proposition 209 amended the State of California's Constitution. The language of Proposition 209 is set out as Article I, Section 31 of the state constitution, and reads:

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

Subsection (e) of Section 31 states that the provision should not be interpreted to prohibit "action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state." Subsection (h) states that if any parts of the Section conflict with federal law or the United States Constitution, "the section shall be implemented to the maximum extent that federal law and the United States Constitution permit."

B. The City Program

After Proposition 209 became law, the City adopted a new program applicable to construction contracts in excess of $50,000. The new program was adopted through Resolution No.

67002. After the Hi-Voltage lawsuit was filed, the program was modified by Resolution No. 67005. Resolution No. 67005 (the "City Program") is at issue in this litigation. See 84 Cal. Rptr. 2d at 888.

The City Program prohibits discrimination by prime contractors. When contractors submit bids for City-funded public works projects, they must show that they have not discriminated against MBE or WBE subcontractors. Under the City Program, contractors do this by documenting either outreach efforts or actual participation by MBEs and WBEs. See 84 Cal. Rptr. 2d at 889.

1. Documentation of Outreach. Contractors can satisfy this option by maintaining written records showing that they engaged in the following in preparing their bid:

(a) sent solicitation letters to four MBE and/or WBE firms for each trade area on the project, and then

(b) contacted each of these firms to assess their interest, and then

(c) negotiated with these firms in good faith.

Under this option, contracting bidders are prohibited from "unjustifiably" rejecting a bid from a prospective MBE or WBE. See 84 Cal. Rptr. 2d at 889.

2. Documentation of Participation. Under this option the City determines the percentage of MBE or WBE firms that would be expected to participate in the project based on the number of potential subcontracting opportunities and the number of available MBE and WBE firms. The contractor can

then list a sufficient number of MBE or WBE participants in the bid; the number of MBEs or WBEs listed should be that amount that the City determines would be expected to participate on the project in the absence of discrimination. Meeting the standards set out in this option creates the presumption that the prime contractor has not discriminated against MBE and WBE subcontractors. See 84 Cal. Rptr. 2d at 889.

If a prime contractor submitting a bid cannot fulfill the terms of either option, the City considers the bid nonresponsive and rejects it. See 84 Cal. Rptr. 2d at 889.

C. Proceedings Below

1. In 1997, Hi-Voltage, a general contracting firm, had been the low bidder on a circuit switcher upgrade project for a water pollution control plant. Because Hi-Voltage intended to use its own workforce for the entire project, it failed to satisfy either subcontracting option set out in the City Program. The City thus rejected the bid as nonresponsive to the subcontracting program. Plaintiffs Allen Jones, a city taxpayer, and Hi-Voltage challenged the City Program as a violation of Article I, Section 31 of the California Constitution. See 84 Cal. Rptr. 2d at 889.

Plaintiffs alleged that the City Program required contractors to give "unlawful preferences" to minority- and women-owned firms on subcontracts. Plaintiffs sought declaratory and injunctive relief to prevent the City from

continuing the program. Both parties moved for summary judgment. The superior court held that both components of the program constituted classifications based on race and sex in violation of Article I, Section 31, and enjoined the City Program. See 84 Cal. Rptr. 2d at 889-890.

2. The state court of appeals affirmed. The court of appeals recognized that the purpose of the City Program is to "eradicate and prevent discrimination in public projects," and that the City's method of achieving this objective is to "require each bidding contractor to take concrete steps to prove he or she is not discriminating against minority or women subcontractors." 84 Cal. Rptr. 2d at 890. The court also recognized that by invalidating this kind of program, public entities may not have an "effective means of assuring [MBEs and WBEs] equal bidding opportunity in public works projects, and it thus may indirectly promote discrimination by prime contractors." Ibid.

The court, nonetheless, held that in seeking to remedy discrimination, the City of San Jose ran afoul of "the constitutional proscription of article I, section 31 [Prop. 209]." 84 Cal. Rptr. 2d at 891. "In effect, the adoption of article I, section 31, places governments seeking to eradicate discrimination in a no-win situation." Ibid. The court stated that to "determine the lawfulness of the [City] Program, [it] must determine whether the language of article I, section 31, accommodates the methods used by the City to

accomplish its goal of eradicating private discrimination in public projects." Ibid.

The City argued that federal law permits race-conscious affirmative action under limited conditions, and that in fact the City Program is "race-neutral" affirmative action and permissible under Article I, Section 31. 84 Cal. Rptr. 2d at 894. Disagreeing, the court observed that the Program is not race-neutral, and that Article I, Section 31 "does not permit discrimination whenever federal standards are met." Ibid. The court stated that the state constitutional provision affords "'greater protection to members of the gender and races otherwise burdened by the preference.'" Ibid. (quoting Coalition for Econ. Equity v. Wilson, 122 F.3d 692, 709 n.18 (9th Cir.), cert. denied, 522 U.S. 963 (1997)).

Analyzing the validity of the City Program under the state constitutional provision, the court held that the first option is not race neutral. 84 Cal. Rptr. 2d at 895. The court observed that the outreach option violates the state constitution because it requires notification to four MBEs and/or WBEs, personal contact with these firms, that prime contractors negotiate with these firms, and that prime contractors may not "unjustifiably" reject bids from MBEs or WBEs. The court found that these requirements (even the last requirement alone) "grant[] a distinct preference" to women and minorities in violation of the state constitution. Ibid.

The court also found the second option, which requires

documenting MBE/WBE participation, in violation of the state constitution because prime contractors have a "strong economic motive to list MBE/WBEs in the bid or to document efforts to obtain their participation," or risk having their bid rejected. 84 Cal. Rptr. 2d at 896. The court also stated that whether option two is labeled a "screening device" or a goal, it cannot serve as a viable alternative to option one because it "involves the kind of discrimination and preferential treatment" Proposition 209 prohibits. Id. at 897.

The City tried to validate the plan as being "narrowly tailored to serve a compelling governmental interest." 84 Cal. Rptr. 2d at 897. The court of appeals rejected this as the appropriate standard for evaluating the City Program. The court stated that Article I, Section 31 of the state constitution requires only a determination whether the program "discriminate[s] against or grant[s] preferential treatment to individuals based on their race [or] sex." Ibid. The court stated that the state constitutional provision "does not offer a loophole for discrimination based on the government's objectives, even when those objectives are themselves consistent with the provision," and that "it is the conduct, not the underlying intent, that determines whether governmental activity complies with this [state] constitutional mandate." Id. at 897.

Finally, the court rejected the City's argument that the

program was required by Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d et seq. The court held that the City failed to demonstrate a conflict between Title VI and Article I, Section 31, because Title VI does not require recipients of funding to implement remedial affirmative action programs that result in discrimination or preferential treatment. 84 Cal. Rptr. 2d at 898.

STANDARD OF REVIEW

The state court of appeals' interpretation of the validity of the City Program under Article I, Section 31 of the state constitution, is a pure question of law subject to this Court's independent or de novo review. Ghirardo v. Antonioli, 8 Cal. 4th 791, 799, 883 P.2d 960, 965, 35 Cal. Rptr. 2d 418, 423 (1994).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Where a state or local government has been found by a federal court to have discriminated in violation of federal law, it must fully remedy that violation. Similarly, where a state or local government itself finds that it has engaged in discriminatory action, or has passively perpetuated discrimination of private actors, these governmental entities may have a similar obligation under the United States Constitution and federal statutes to remedy that violation.

Despite the City's findings, the state court of appeals ruled that Article I, Section 31 of the state constitution absolutely prohibits the City from using race- or gender-based

criteria to remedy the effects of discrimination. This aspect of the court of appeals' ruling is erroneous. The lower court's enforcement of Article I, Section 31 of the state constitution, as prohibiting any use of race- or gender-based criteria regardless of the circumstance, may conflict with federal obligations of municipalities or the State to cure the effects of discriminatory action. Because federal law requires, in some circumstances, that race- and/or gender-conscious criteria be used to provide an effective remedy to a constitutional or statutory violation, in those circumstances Article I, Section 31 of the state constitution must yield to the City's federal obligations.

ARGUMENT

THE STATE COURT OF APPEALS' INTERPRETATION OF THE CONSTITUTIONALITY OF THE CITY PROGRAM MAY, IN SOME CIRCUMSTANCES, CONFLICT WITH FEDERAL LAW

A. The United States Constitution Requires That Municipalities Fully Remedy Documented Discrimination And Its Effects

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall * * * deny to any person within its jurisdiction the equal protection of the laws." This proscription brings the obligation to remedy violations. States or localities that document their own discrimination have the "power to eradicate racial discrimination and its effects in both the public and private sectors, and the absolute duty to do so where those wrongs were caused intentionally by the State itself." City of Richmond v. J.A.

Croson Co., 488 U.S. 469, 518 (1989) (Kennedy, J., concurring) (emphasis added); id. at 492 (public entities must assure that public dollars "do not serve to finance the evil of private prejudice"). This obligation is most readily apparent in the context of school desegregation, where the Supreme Court has made clear that remedies for intentional discrimination by a state or locality should "restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." Milliken v. Bradley, 418 U.S. 717, 746 (1974); Missouri v. Jenkins, 515 U.S. 70, 110 (1995) (O'Connor, J., concurring) (where school district had separated students by race, court "should order restorations and remedies that would place previously segregated black * * * students at par with their white * * * counterparts"). States and localities are thus obligated to use any means appropriate, including racial classifications, to "dismantle [a] dual [school] system" and its effects. Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 458 (1979); see also Croson, 488 U.S. at 524 ("States may act by race to 'undo the effects of [their own] past discrimination'") (Scalia, J., concurring in judgment). The failure to do so "continues the violation of the Fourteenth Amendment." Columbus, 443 U.S. at 459. Indeed, in North Carolina State Board of Education v. Swann, 402 U.S. 43, 46 (1971), the Supreme Court invalidated a state law that would have prohibited the use of race in student assignments, even where necessary to fully remedy the

effects of school segregation, stating that the state law "conflict[s] with the duty of school authorities to disestablish dual school systems."

Where a municipality can identify discrimination with particularity, it has not only the power but the duty under the federal Constitution to eradicate the effects of that discrimination. Where necessary, it must adopt race-conscious measures. Croson, 488 U.S. at 504, 509. See also Palmore v. Sidoti, 466 U.S. 429, 432 (1984) ("A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race.") (footnote omitted); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986); Missouri v. Jenkins, 495 U.S. 33, 57-58 (1990) (a State cannot prevent a local government from implementing a remedy in cases where it is necessary to redress a constitutional violation). Moreover, as Justice O'Connor stated in Croson, "if [a municipality] could show that it had * * * become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry," the City is obligated under the Constitution to take measures to "dismantle such a system." 488 U.S. at 492.

The court of appeals took the absolutist position that the express language of Article I, Section 31 of the state constitution prohibits a municipality from ever voluntarily adopting remedial measures that utilize race- and gender-conscious measures to correct specific findings that

discrimination has adversely affected minorities and women. The court stated that the state constitutional provision "does not offer a loophole for discrimination based on the government's objectives," 84 Cal. Rptr. 2d at 897, thus placing local governments "seeking to eradicate discrimination in a no-win situation." Id. at 891. Local governments, however, are not in a "no-win situation." Not only does the United States Constitution require that state-sponsored discrimination be remedied; the Supremacy Clause requires that Article I, Section 31 yield to the City's federal obligations. Moreover, the state constitution itself recognizes this principle, and calls for the provisions of Proposition 209 to recede where federal law demands. Cal. Const. Art. I, § 31(h); see discussion at p. 24, infra.

The federal constitutional obligations of a municipality to remedy its own discrimination cannot be undermined by state law. The Constitution and laws of the United States are "the supreme Law of the Land," and the constitution or laws of any State "shall be bound thereby." U.S. Const. Art. VI, Cl. 2. State law is preempted when it conflicts with obligations demanded of the United States Constitution or federal law. Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88, 108 (1992) ("any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield"). A conflict will be found when it is impossible to comply with both state and federal law.

Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963). In this case, the court of appeals' interpretation of Article I, Section 31 of the state constitution may make it impossible for states or municipalities to comply fully with federal obligations to remedy discrimination in an effective and meaningful way, contrary to federal law and apparently contrary to provisions of the state constitution (see p. 24, infra).

The United States Supreme Court has permitted state and local governments to adopt race-conscious relief for constitutional violations where there is a "'strong basis in evidence for [their] conclusion that remedial action [is] necessary.'" Croson, 488 U.S. at 500 (quoting Wygant, 476 U.S. at 277). The governmental entity can demonstrate a compelling interest for the use of race-based criteria by showing "'gross statistical disparities'" between the racial composition of its workforce, for instance, and the racial composition of the relevant qualified labor pool. Croson, 488 U.S. at 501 (quoting Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 307 (1977)).[2] The use of racial criteria is

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[2/] Indeed, the Supreme Court has stated: "[S]tatistics can be an important source of proof in employment discrimination cases, since 'absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.'" Hazelwood, 433 U.S. at 307 (quoting International Bhd. of Teamsters v. United States, 431 U.S. 324, 340 n.20 (1977)).

further justified where a governmental entity corroborates its statistical evidence with significant anecdotal evidence of racial discrimination. See International Bhd. of Teamsters v. United States, 431 U.S. 324, 338 (1977) ("The Government bolstered its statistical evidence with the testimony of individuals who recounted over 40 specific instances of discrimination."). State or local governments that make sufficient findings of discrimination are obligated to use criteria that may be race-conscious and are narrowly tailored to cure the violation and its effects and ensure against future racial discrimination. Croson, 488 U.S. at 507-508; United States v. Paradise, 480 U.S. 149, 172-175, 183 (1987). Achieving a narrowly tailored remedy requires consideration of race-neutral means as a less restrictive option, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237-238 (1995), but where race-neutral means prove unsuccessful, race-based measures must be used as a last resort to remedy fully the effects of past discrimination. Croson, 488 U.S. at 509; Adarand, 515 U.S. at 237. See Walker v. City of Mesquite, 169 F.3d 973, 982-983 (5th Cir. 1999); Williams v. Babbitt, 115 F.3d 657, 666 (9th Cir. 1997), cert. denied, 523 U.S. 1117 (1998); Alexander v. Estepp, 95 F.3d 312, 316 (4th Cir. 1996), cert. denied, 520 U.S. 1165 (1997).

Under this framework, the Supreme Court has recognized the necessity of narrowly tailored, race-conscious remedial action to remedy a violation of the Constitution, when race-

neutral measures are not effective. For instance, in Paradise, the Supreme Court approved a remedial plan requiring a state agency to promote one black trooper for every white trooper until the ranks were 25% black, in order to remedy nearly four decades of "blatant and continuous" exclusion of blacks from employment as state troopers. 480 U.S. at 154, 167. In these egregious circumstances of discriminatory action by public employers, federal courts have found that race-based measures were the only way that the effects of discrimination could be remedied. See Billish v. City of Chicago, 962 F.2d 1269, 1278-1279 (7th Cir. 1992) (statistically significant racial disparity in the hiring and promotion practices of city fire department provided a "strong basis in evidence" that race-based remedial action was necessary to remedy prior discrimination), rev'd, 989 F.2d 890 (7th Cir. 1993); Boston Police Superior Officers Fed'n v. City of Boston, 147 F.3d 13, 19-23 (1st Cir. 1998) (discriminatory entry-level testing procedures, coupled with gross racial disparity within ranks of city police department, provided a strong basis in evidence for race-based remedy).

B. The Court Of Appeals' Interpretation Of Article I, Section 31 Of The State Constitution Limits The City's Ability To Remedy The Effects Of Its Past Discrimination In Conflict With Federal Statutory Law

The lower court's interpretation of Article I, Section 31 of the state constitution would also impede a municipality's ability to correct actions that have discriminatory effects

that are illegal under Title VII (42 U.S.C. 2000e et seq.), or Title VI (42 U.S.C. 2000d et seq.). "[F]ederal law may pre-empt state law to the extent that the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Coalition for Econ. Equity v. Wilson, 122 F.3d 692, 709 (9th Cir.) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)), cert. denied, 522 U.S. 963 (1997). Because the lower court's ruling significantly limits the City's ability to remedy its findings of discrimination in these instances, its ruling is in direct conflict with federal statutory, as well as Constitutional, law.

1. Title VII prohibits "unlawful employment practices" that cause intentional discrimination, or neutral employment practices that have a disparate impact on protected groups. 42 U.S.C. 2000e-2(a) and (k). While employers are not required by Title VII to grant "preferential treatment" to any person or group because of race or gender on account of a racial or gender imbalance in any community (42 U.S.C. 2000e-2(j)), any employer that otherwise engages in unlawful employment practices that violate Title VII may be "enjoin[ed]" from continuing that unlawful practice and ordered to undertake "affirmative action as may be appropriate." 42 U.S.C. 2000e-5(g)(1).

The Supreme Court has made clear that Title VII's prohibition against racial discrimination does not condemn

voluntary race-conscious affirmative action plans where such programs are adopted to remedy past discrimination. In United Steelworkers of America v. Weber, 443 U.S. 193 (1979), the Court evaluated a plan implemented by a private employer to remedy the effects of the exclusion of blacks as craftworkers.[3] After reviewing Title VII's legislative history, the Court concluded that Congress did not intend to prohibit employers from implementing programs directed toward eradicating discrimination and its effects from the workplace. Id. at 204. In Weber, the Supreme Court reviewed the extensive legislative history of Title VII, and the historical context from which the Act arose, and concluded that Congress' purposes behind the statute are twofold: first, to "assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens" (443 U.S. at 201-203; see also McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973)), and secondly to end the segregative effects of discrimination (see Johnson v. Transportation Agency, 480 U.S. 616, 630 (1987)).

[3/] Prior to the affirmative action plan, the company in Weber only hired craftworkers with prior craft experience. Black workers were unable to qualify for craftworker positions because they had been intentionally excluded from craft unions. As a result, while the local labor force was 39% black, the employer's workforce was less than 15% black, and its crafts-workforce was less than 2%. The plan was challenged by a white production worker alleging that the plan discriminated against white employees in violation of Title VII. 443 U.S. at 198-199.

"The significance of this second corrective purpose cannot be overstated." Taxman v. Board of Educ., 91 F.3d 1547, 1557 (3d Cir. 1996), cert. granted, 521 U.S. 1117, and cert. dismissed, 522 U.S. 1010 (1997). "It is only because Title VII was written to eradicate not only discrimination per se but the consequences of prior discrimination as well, that racial preferences in the form of affirmative action can co-exist with the Act's anti-discrimination mandate." Ibid.

In Johnson, the Court held that Title VII permitted affirmative action plans that sought to remedy a "'manifest imbalance' that reflected [an] under-representation of women in 'traditionally segregated job categories,'" which, in some circumstances, considered race or sex in personnel decisions. 480 U.S. at 631. These affirmative, remedial measures are permissible under Title VII where the measures do not unnecessarily trammel the rights of non-minorities or men, or create an absolute bar to their advancement. Id. at 637-640; Weber, 443 U.S. at 208-209. Based on this statutory interpretation of Title VII, the Supreme Court and lower federal courts have approved consent decrees that embody "race-conscious relief" in order to settle or avoid further Title VII litigation by victims of discrimination, since "Congress intended voluntary compliance to be the preferred means of achieving the objectives of Title VII." Local No. 93 v. City of Cleveland, 478 U.S. 501, 515 (1986). In Local No. 93, the Court approved the use of minority hiring and

promotion goals adopted by a city fire department pursuant to a consent decree to remedy "a historical pattern of racial discrimination," and to settle a Title VII class action suit filed by black and Hispanic firefighters. Id. at 511-512. See also Edwards v. City of Houston, 37 F.3d 1097, 1111 (5th Cir. 1994) (consent decree containing race-based relief entered to settle Title VII class action), rev'd in part on other grounds, 78 F.3d 983 (5th Cir. 1996); Officers for Justice v. Civil Serv. Comm'n, 979 F.2d 721, 726 (9th Cir. 1992) (court approves Title VII consent decree that permits consideration of race in promotions, where discriminatory entrance examination, city's admission of past discrimination, and continued evidence of discriminatory impact of these policies creates a "strong basis in the evidence" supporting relief), cert. denied, 507 U.S. 1004 (1993).

The lower court's decision prohibiting any race-based remedial measures in any context pursuant to Article I, Section 31 of the state constitution, flies in the face of a public employer's Title VII duty to take corrective action to remedy discrimination in a way that is effective, meaningful, and properly tailored to the statutory violation.

Moreover, the lower court's reliance on Coalition for Economic Equity to support its interpretation of Article I, Section 31 is overbroad and, in the context of employment, can adversely affect a municipality's obligations under Title VII to remedy fully the effects of discrimination. In Coalition,

the Ninth Circuit held that Title VII did not preempt Proposition 209. 122 F.3d at 709-710. Citing to Section 708 of Title VII, 42 U.S.C. 2000e-7, the court observed that the statute preempts only state laws that "require or permit the doing of any act which would be an unlawful employment practice under this subchapter." 122 F.3d at 710. Finding that Proposition 209 did not purport to require the doing of any act that would be an unlawful employment practice under Title VII, the court of appeals in Coalition concluded that "Title VII, therefore, does not pre-empt Proposition 209." Ibid. Based on that holding, the lower court in Hi-Voltage held that Article I, Section 31 prohibits "all discriminatory treatment based on the identified categories," and thus "'provides greater protection to members of the gender and races otherwise burdened by the preference.'" 84 Cal. Rptr. 2d at 894 (quoting Coalition, 122 F.3d at 709 n.18).

The Ninth Circuit in Coalition, however, did not hold that state law was not preempted in those limited circumstances where the federal law required action inconsistent with Proposition 209. Rather, the court of appeals held only that Proposition 209 was not preempted by Title VII because, it held, Section 2000e-2(j) of Title VII states that Title VII does not require preferential treatment. As explained below, when a remedial obligation requires the use of race to fully remedy proven discrimination, however, Section 2000e-2(j) does not preclude the use of such a remedy.

Therefore, Coalition does not establish that Title VII and other federal law can never conflict with a prohibition on all race-conscious remedies.

2. The lower court held that Article I, Section 31 does not conflict with Title VI because "[n]either Title VI nor its implementing regulations impose a duty on public entities to implement remedial affirmative action programs that result in discrimination or preferential treatment." 84 Cal. Rptr. 2d at 898. Contrary to the lower court's holding, Title VI was designed by Congress to enforce the equal protection requirements of the Fourteenth Amendment. The legislative history of the statute shows that the "real objective" of Title VI was "the elimination of discrimination in the use and receipt of Federal funds." 110 Cong. Rec. 6544 (1964) (Sen. Humphrey). See also id. at 7062 (Sen. Pastore). While Title VI prohibits acts of discrimination, the Supreme Court and lower federal courts have held that the statute "cannot be read to forbid remedies which are constitutionally required and unavoidably race-conscious" to remedy the effects of discrimination. Detroit Police Officers' Ass'n v. Young, 608 F.2d 671, 691 (6th Cir. 1979), cert. denied, 452 U.S. 938 (1981); see Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); id. at 348-350 (opinion of Brennan, White, Marshall & Blackmun, JJ.); Fullilove v. Klutznick, 448 U.S. 448, 492 (1980) (Burger, C.J.); id. at 517 n.15 (Powell, J.); id. at 517 n.1 (Marshall, J.). Since this remedial obligation

also applies in the context of Title VI, the lower court's interpretation of Article I, Section 31 of the state constitution conflicts with this statute as well.

C. Subsection (h) Of Article I, Section 31 Establishes That Proposition 209 Recedes When Federal Law Requires Race-Based Action

The lower court's interpretation not only conflicts with federal constitutional law, but also ignores Subsection (h) of Article I, Section 31 of the state constitution itself, which states that the provision prohibiting preferences will be implemented only to the extent "that federal law and the United States Constitution permit." If the lower court's ruling is permitted to stand, the prohibition against the use of race-based remedial measures in circumstances where such measures are required under federal law to cure a constitutional or statutory violation creates a direct conflict with federal law; Subsection (h) clearly was intended to avoid such a conflict.

Indeed, the Supreme Court and federal appellate courts charged with the responsibility for enforcing the United States Constitution have imposed race-based measures on recalcitrant public employers who have failed to put into place effective remedies (see pp. 16-17, supra). The state court of appeals' overbroad ruling prohibiting any use of race for remedial measures regardless of the effects of the violation can directly conflict with the federal obligations of state and local governments seeking to remedy the effects

of past discrimination, and therefore is inconsistent with Article I, Section 31, Subsection (h), of the state constitution which allows the use of race-based measures when necessary to avoid this precise kind of conflict.

CONCLUSION

For the foregoing reasons, if this Court does find that the City Program is a race-based remedial measure constituting a "preference" under Article I, Section 31 of the state constitution, and reaches the question presented by the United States, the Court should vacate the lower court's decision and remand for further proceedings to give the state district court the initial opportunity to evaluate the City Program and the City's findings of prior discrimination.

Respectfully submitted,

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