NLWJC - Kagan

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Race-Proposition 209 Pleadings

Race-Proposition 209

cc: Bruce

THE WHITE HOUSE
WASHINGTON

Right recommendation. I hate the stuff in the last paragraph.

September 24, 1997

MEMORANDUM FOR THE PRESIDENT

FROM: CHARLES F.C. RUFF

SUBJECT: PROPOSITION 209 LITIGATION

As you are aware, a three-judge panel of the Court of Appeals for the Ninth Circuit has ruled that Proposition 209 is constitutional, overturning the ruling of the District Court. The Justice Department filed an amicus brief in the District Court and in the Court of Appeals, arguing forcefully that Proposition 209 is unconstitutional. After being denied a rehearing en banc, the plaintiffs in the litigation have asked the Supreme Court to review the case. The Court denied the plaintiffs' request for a stay pending its review.

The Department argued in the Ninth Circuit that Prop 209 violates the Equal Protection Clause by placing a special burden on minorities and women by requiring them to seek a constitutional amendment, rather than merely legislation, in order to pursue their interest in affirmative action. Its brief relied largely on the Supreme Court's 1982 ruling in Washington v. Seattle, a 5-4 decision holding that a Seattle ordinance banning busing to achieve school desegregation was unconstitutional.

The Department has given serious consideration to the question whether it should take the unusual step of filing an amicus brief in support of plaintiffs' petition for certiorari without being invited to do so by the Supreme Court. Such a brief would be due September 29. The Solicitor General (Walter Dellinger before he left and now Seth Waxman) has recommended strongly to the Attorney General that the government not file such a brief, but instead wait to see whether the Court agrees to hear the case. I concur in that recommendation.

The Solicitor General only rarely files an uninvited brief at the petition stage, and he advises that to do so in this case would, in all likelihood, be seen by the Court as a political rather than a legal statement. He believes that there is almost no prospect that this Court would hold Prop 209 invalid on its face and, thus, that we should do nothing to encourage it to take this case. He is convinced that the Court would use this opportunity to overrule its Seattle decision and that the case would invite the kind of sweeping rejection of affirmative action that we have sought to avoid in Piscataway. A government brief in favor of review would increase the chance that the Court will grant certiorari, at least to the extent that it undercuts the arguments of the justices who would otherwise oppose bringing this issue before the Court. Further, the SG is concerned

that filing a brief in which we emphasize (as we would have to) the disastrous implications of the Ninth Circuit's decision would seriously hamper our efforts to litigate individual "as applied" cases. That was the result in Hopwood, the Fifth Circuit's decision striking down affirmative action in admissions to Texas universities, where we filed an uninvited (and unsuccessful) brief at the petition stage making arguments about the potential impact of the decision that, in effect, have made it impossible for the government to argue for any form of non-remedial affirmative action in the Fifth Circuit.

Of course, if the Supreme Court grants certiorari, or seeks our views concerning the petition, we will argue strongly that Proposition 209 is unconstitutional. I am convinced, however, that the decision not to file an uninvited brief in support of the petition for certiorari is correct as a matter of litigation strategy. There is virtually no chance that the Court would overrule the Ninth Circuit, particularly in light of its failure to grant plaintiffs a stay. A formal blessing of Prop 209 by the Court will encourage similar referenda in other states, and will adversely affect future efforts to limit its scope as applied to specific programs in California. Moreover, filing an uninvited brief solely in order to make a public statement risks not only an adverse reaction by the Court but the creation of a temporary sideshow, as conservatives once again argue that we are seeking to overturn the popular will, rather than fighting in the democratic arena.

We recognize that the decision not to file will be read by some (both supporters and opponents of Prop 209) as a retreat from the position taken in the Ninth Circuit. To the audience of civil rights litigators, as well as the broader civil rights constituency, it is important that the Administration be seen as maintaining a consistent litigation position. Because the Administration filed amicus briefs in the lower courts in the 209 litigation, and because we have made public statements as to our intention to remain in the case, we must make it clear that we have not changed our position on the merits of the case. It is important, therefore, that we communicate to our supporters the distinction between our position on the merits -- which remains the same -- and the procedural decision not to file an extraordinary, uninvited brief in support of certiorari, including the lessons learned as the result of our filing in Hopwood.

To address that issue, both the Solicitor General and we have met with representatives of the interest groups most involved in the Prop 209 litigation, including counsel for the plaintiffs. It is fair to say that the latter feel strongly that the government should file, while most of the others (e.g., NAACP Legal Defense Fund, Lawyers' Committee for Civil Rights, Women's Legal Defense Fund, National Women's Law Center) appreciate the serious litigation risks. A few would support the SG's decision, and the rest are prepared to accept it, if we are prepared to demonstrate our continuing commitment to affirmative action and our opposition to Prop 209. To that end, we must not only ensure that our public statements regarding the case reflect our vigorous support of affirmative action, but also take concrete steps to demonstrate that support.

Members of your senior staff (Sylvia Mathews, Maria Echaveste, Elena Kagan, Paul Begala, and I) have considered at some length how the Administration can convey concretely -- and implement -- its commitment to affirmative action if the Justice Department does not file a brief at this stage. We will be in touch with the civil rights constituency over the next few days to ensure that they understand our continuing commitment and the reasons for the decision not to file. In addition, although discussions are ongoing, two ideas have emerged from our preliminary meetings with the interest groups and our internal deliberations:

First, we believe that the Administration should devote time and resources to defeating the anti-affirmative action referendum in Houston scheduled for November 4. Not only would our efforts visibly reaffirm our commitment to affirmative action, but victory in Houston will help stem the tide of similar referenda scheduled to be on state ballots in 1998. We have been in touch with Congresswoman Sheila Jackson Lee and Mayor Lanier, both of whom agree that it would help galvanize their campaign against the referendum if you were to address the issue in your speech in Houston on Friday, and language is being drafted for that purpose. In addition, we have discussed, and they favor, the idea of having Cabinet members (perhaps Secretaries Slater, Herman, Pena and Daley) visit Houston in the next six weeks. And lastly, we will urge the interest groups to help get out the vote on election day.

Second, we have discussed how the Administration can best transform the public debate by articulating the need and justification for affirmative action, particularly in higher education. The interest group members we met with are enthusiastic about pursuing that idea. In particular, we have focused on how institutions of higher education assess the qualifications of applicants for admission -- that is, what constitutes "merit" and how can they best measure the potential success of all students. To that end, we are planning to meet with educators to discuss ways to increase minority admissions in the near term, including admissions to California and Texas universities, where, as you know, they have dropped off so sharply.

If you would like to discuss these or other affirmative action initiatives, we are prepared to do so at your convenience.

Civil Rts - Prop 209 pkg

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

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

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

Message Sent To:

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

Elena -
FYI
Sew

Nos. 97-15030, 97-15031

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COALITION FOR ECONOMIC EQUITY, et al.,

Plaintiffs-Appellees,

v.

PETE WILSON, Governor, et al.,

Defendants-Appellants,

CALIFORNIANS AGAINST DISCRIMINATION AND PREFERENCES, INC.,

Defendant-Intervenor-Appellant.

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

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

ISABELLE KATZ PINZLER
Acting Assistant Attorney General

WILLIAM R. YEOMANS
Acting Deputy Assistant Attorney General

DAVID K. FLYNN
SAMUEL R. BAGENSTOS
Attorneys
Department of Justice
P.O. Box 66078
Washington, D.C. 20035-6078
(202) 514-2174

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INTRODUCTION AND SUMMARY OF ARGUMENT

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

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

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

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

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

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

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

INTEREST OF THE UNITED STATES

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

STATEMENT OF THE CASE

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

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

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

[1/]It also exempts "action which must be taken to establish or maintain eligibility for any federal program, where ineligibility would result in a loss of federal funds to the state." Id. § 31(e).

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

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

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

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

STANDARD FOR GRANTING A STAY

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

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

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

ARGUMENT

I

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Applying that principle, the Court held Initiative 350 invalid, because "it uses the racial nature of an issue to define the governmental decisionmaking structure, and thus imposes substantial and unique burdens on racial minorities." Id. at 470.

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

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

> The initiative removes the authority to address a racial problem -- and only a racial problem -- from the existing decisionmaking body, in such a way as to burden minority interests. Those favoring the elimination of de facto school segregation now must seek relief from the state legislature, or from the statewide electorate. Yet authority over all other student assignment decisions, as well as over most other areas of educational policy, remains vested in the local school board.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II

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

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

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

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political means, legislation to overcome discrimination. See Seattle, 458 U.S. at 476-480; Hunter, 393 U.S. at 392-393.

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

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

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

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

CONCLUSION

The motion for stay should be denied.

Respectfully submitted,

ISABELLE KATZ PINZLER
Acting Assistant Attorney General

WILLIAM R. YEOMANS
Acting Deputy Assistant Attorney General

DAVID K. FLYNN
SAMUEL R. BAGENSTOS
Attorneys
Department of Justice
P.O. Box 66078
Washington, D.C. 20035-6078
(202) 514-2174