IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Case 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 TO FILE AMICUS CURIAE BRIEF AND PROPOSED BRIEF OF AMICUS CURIAE IN SUPPORT OF DEFENDANTS AND APPELLANTS CITY AND COUNTY OF SAN FRANCISCO, ET AL.

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INTRODUCTION

Pursuant to Rule 8.520, subdivision (f) of the California Rules of Court, Amici Curaie Council of Asian American Business Associations, Association of Asian American Attorney and CPA Firms, Chinese for Affirmative Action, Asian American Justice Center, Asian Law Caucus, and Asian American Bar Association of the Greater Bay Area respectfully request leave to file the attached brief in support of Respondent City and County of San Francisco.

STATEMENT OF INTEREST AND EXPLANATION OF HOW THIS BRIEF WILL ASSIST THE COURT

Amicus Council of Asian American Business Associations is a non-profit umbrella organization, with a membership of Asian American professional and business groups, that represents the interests of the Asian American business community in the San Francisco Bay Area and state-wide. Amicus Association of Asian American Attorney and CPA Firms, with a membership of Asian American owned law firms and CPA firms, seeks to increase opportunities for these firms to do work for major corporations and governmental entities. Amicus Chinese for Affirmative Action is a non-profit membership organization that advocates for equal opportunities for the Asian American community. Amici Asian American Justice Center is a national non-profit membership organization whose mission includes advancing the civil rights of Asian Americans and

educating the public on the importance of affirmative action to the Asian American Community. Amicus Asian Law Caucus is a non-profit organization dedicated to representing the legal and civil rights of the Asian American community. Amicus Asian American Bar Association of the Greater Bay Area is one of the largest minority bar associations in the State of California and strives to serve the needs of the Asian American community. The attached Brief, in the opinion of Amici, furthers the purposes of these organizations to advocate to increase participation by Asian American businesses in public and private sectors.

Amici believe that the interests of the Asian American business community are threatened by the Court of Appeal's affirmance of the injunction against San Francisco's MBE Ordinance in this case. The record before the Court includes many statements by representatives of Asian-American owned businesses that the MBE Ordinance was instrumental in assuring participation by Asian American businesses City contracting. (*See, e.g.*, JA VI:1460 ("The program allowed my firm a chance at doing business with the City."); JA VI:1417 ("Without the ordinance ISI would have been much less likely to have been invited to work as a subcontractor to larger firms or be able to compete with firms with more resources and experience."); JA VI:1448 ("We feel this ordinance has enabled our firm to grow and prosper by allowing us the opportunity to partake in the bidding/ contracting opportunities presented by the City.").)

Asian-American owned businesses also provided evidence to the trial court that discrimination against minority contractors continued during the implementation of the MBE Ordinance. (*See, e.g.*, JA VI:1474 ("On many occasions, OCC has been listed as a subcontractor on a contract that was subject to M/WBE requirements, but the prime contractor failed to give OCC the work."); JA VI:1486 ("As a minority, it has been difficult to obtain consulting engineering work from prime contractors in the Bay Area unless the prime contracts are subject to M/WE requirements. In my experience, many prime contractors will not hire minority consulting firms unless required to by ordinance or by contract.").)

Amici believe that the attached Brief will be of assistance to the Court for the following reasons: The Court has requested the parties to brief the question of whether "an ordinance that provides certain advantages to minority- and female-owned business enterprises with respect to the award of city contracts falls within an exception to Section 31 for actions required of a local government entity to maintain eligibility for federal funds under the federal Civil Rights Act (42 U.S.C. § 2000d)." In responding, Appellee Coral Construction, Inc. has erroneously argued that a violation of the Title VI regulations can only be established by a showing of intentional discrimination against minority contractors. In the attached Brief, Amici explain that Title VI's implementing federal regulations prohibit both disparate impact and intentional discrimination. *Alexander v.*

Choate, 469 U.S. 287, 293 (1985). Amici also argue that the evidence presented by Appellant City demonstrated both disparate impact and intentional discrimination in violation of Title VI such that the MBE Ordinance is permissible under Section 31(e) of the California Constitution.

CONCLUSION

For the foregoing reasons, Amici Council of Council of Asian American Business Associations, Association of Asian American Attorney and CPA Firms, Chinese for Affirmative Action, Asian American Justice Center, Asian Law Caucus, and Asian American Bar Association of the Greater Bay Area respectfully request that the Court accept the attached Brief for filing in *Coral Construction v. City and County of San Francisco*.

Dated: February 7, 2008

LEWIS, FEINBERG, LEE, RENAKER & JACKSON, P.C.

BILL LANN LEE

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I. INTRODUCTION AND SUMMARY OF ARGUMENT.

Amici incorporate by reference the arguments made by Respondent City and County of San Francisco in its several briefs, and limit their Brief to the third of the questions posed by the Court.

Plaintiff contractors erroneously argue that the record does not show a violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, sufficient to justify the City of San Francisco's MBE Ordinance as an "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" under § 31(e) of the California Constitution. (Plaintiffs and Respondents' Opening Brief ("POB"), at 42-47.) Plaintiff contractors, however, ignore both the relevant legal standards for demonstrating a violation of Title VI and material parts of the factual record that support a finding of an unrebutted prima facie Title VI violation.

Amici show in part II of this Brief that § 31 of the California Constitution expressly permits race conscious programs that avoid violations of Title VI lest eligibility for federal funding be jeopardized. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, is a federal statute that prohibits discrimination by federal fund recipients such as San Francisco and other California state entities subject to § 31. The purpose of Title VI and its implementing federal agency regulations is to eradicate discrimination on the basis of race by recipients of federal funds. Title VI

regulations are violated by a showing of intentional discrimination or disparate impact discrimination.

In Part III, Amici show that the factual record demonstrates that the City made out an unrebutted prima facie case of both disparate impact and intentional discrimination. Before enacting an earlier version of the MBE Ordinance in 1989, the City of San Francisco first found that there were severe disparities in the awarding of contracts to minority general contractors and flawed procurement practices. Notwithstanding the City's implementation of the Ordinance, the record shows that prior discrimination was perpetuated as demonstrated by continuing statistical disparities in contracting for minority contractors and continuing use of discriminatory practices as late as 2003 when the program was last studied. The record consists of more than statistics; studies were conducted and testimony taken that brought life to the "cold statistics." *See Teamsters v. United States*, 431 U.S. 324, 339 (1977). Based on this record, the City's Board of Supervisors properly concluded that "many City departments continue to operate under an 'old boy network,' dominated by Caucasian males, that creates a barrier to the entry of . . . minority-owned businesses and puts those firms at a competitive disadvantage in their efforts to secure City contracts." (JA III: 0769.)

II. SECTION 31 OF THE CALIFORNIA CONSTITUTION PERMITS APPROPRIATE RACE CONSCIOUS PROGRAMS IN ORDER TO MAINTAIN ELIBILITY FOR CONTINUED FEDERAL FUNDING TO THE STATE.

A. Section 31(e) of the California Constitution Provides That State Entities Should Not Risk Loss of Federal Funds In Complying With § 31.

Section 31(e) of the California Constitution provides that state entities seeking to obey the mandate of § 31 do so in a manner that does not risk "loss of federal funds to the state" for their activities:

> Nothing in this section shall be interpreted as prohibiting 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.

§ 31(e). In order to maintain eligibility for federal funding, the state entity receiving such funds must certify compliance with Title VI regulations regarding discrimination. *C&C Construction, Inc. v. Sacramento Municipal Utility District*, 122 Cal. App. 4th 284, 309 (2004). The *C&C Construction* court concluded that "the state governmental agency, before imposing race-based measures, need not obtain a federal adjudication that race-based discrimination is necessary to maintain federal funding. " *Id.* at 298. The entity's burden, instead, is to come forward with "substantial evidence that it will lose federal funding if it does not use race-based measures and must narrowly tailor those measures to minimize race-based discrimination" under federal law. *Id.*[1]

[1] *C&C Construction* is distinguishable from the instant appeal, as the government entity in *C&C Construction* failed to adequately employ race-neutral measures prior to implementing race-conscious measures. *See C&C*

B. Title VI Regulations Provide That Federal Fund Recipients Are Prohibited From Engaging In Either Disparate Impact Discrimination or Intentional Discrimination.

As part of a comprehensive effort to remedy discrimination against racial minorities, Congress passed the Civil Rights Act of 1964, including Title VI. *Guardians Assoc. v. Civil Service Comm'n*, 463 U.S. 582, 621-22 (1983). Section 601 of Title VI provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

CRA § 601; 42 U.S.C. § 2000d (1964). The purpose of Title VI was to guarantee that federal funds not support discrimination, as defined by federal agency regulations. Accordingly, Title VI expressly directed federal agencies that provided federal assistance to fund recipients to issue implementing regulations. 42 U.S.C. § 2000d-1 (1964) ("Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity . . . is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability . . . .").

Justice Marshall's opinion in *Guardians*, set forth the history of the

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Construction, 122 Cal. App. 4th at 300, 310, 312. The City exhausted available race-neutral measures prior to implementing the Ordinance, as detailed in its Reply Brief on the Merits of Issues Two and Three ("PRB"). (PRB, at 13-16.)

development of federal agency regulations implementing Title VI. *Guardians*, 463 U.S. at 615.[2]

Title VI gave the executive branch "substantial leeway" to interpret the meaning of the statutory term "discrimination" under Title VI, and authorized executive departments and agencies to adopt regulations with the antidiscrimination principle of Title VI "as a general criterion to follow." *Id.* at 622-23. A presidential task force was created to produce model Title VI enforcement regulations. *Id.* at 618. These enforcement regulations adopted a disparate impact approach that did not require proof of intentional discrimination, specifying that recipients of federal funds were prohibited from using "criteria or methods of administration which have the effect of subjecting individuals to discrimination." *Id.* (quoting 45 CFR § 80.3(b)(2) (1964)). Following their development, seven federal agencies and departments adopted the model regulations and published them in the Federal Register. *Id.* (citing 29 Fed. Reg. 16279-16305 (1964)). Soon after, every executive Cabinet department and approximately forty federal agencies also adopted regulations interpreting Title VI to ban programs with discrimination impact. *Id.* at 619.

In the two decades following the passage of Title VI, Congress enacted ten additional statutes modeled on Title VI. *Id* at 620. Indeed, the

[2] This portion of Justice Marshall's dissenting opinion was relied upon by the main opinion at *id.*, 463 U.S. at 592-93 n. 13, 14 and subsequently cited by *Alexander v. Choate*, 469 U.S. 287, 294 (1985).

California Legislature has passed legislation tracking Title VI regulations for recipients of state funds. Cal. Gov. Code § 11135 (2005); 22 Cal. Admin. Code §§ 98000 – 98413.

Although none of the opinions in *Guardians* commanded a majority, *Guardians*, 463 U.S. at 582, the United States Supreme Court subsequently ratified the federal agencies' implementing regulations, confirming that the Title VI regulations properly prohibit both disparate impact and intentional discrimination:

> No opinion commanded a majority in *Guardians* and Members of the Court offered widely varying interpretations of Title VI. Nonetheless, a two pronged holding on the nature of the discrimination proscribed by Title VI emerged in that case. First, the Court held that Title VI itself directly reaches only instances of intentional discrimination. Second, the Court held that actions having an unjustifiable disparate impact on minorities could be redressed through agency regulations designed to implement the purposes of Title VI. In essence, then, we held that Title VI had delegated to the agencies in the first instance the complex determination of what sorts of disparate impacts upon minorities constituted sufficiently significant social problems, and were readily enough remediable, to warrant altering the practices of the federal grantees that had produced those impacts.

Alexander v. Choate, 469 U.S. 287, 293 (1985). *Choate* thus confirmed that federal fund recipients may not engage in disparate impact discrimination prohibited by federal Title VI regulations or intentional discrimination. *Id.*[3]

Federal Title VI regulations that prohibit "criteria or methods of

[3] *Choate* did not reach the issue of whether there is a private right of action for disparate impact claims under the federal regulations implementing Title VI. A later decision in *Alexander v. Sandoval*, 532 U.S. 275, 285 (2001), held that there is no private right of action under the federal regulations implementing Title VI. *Id.* at 293. The lack of a private right of action under the federal regulations has no effect on the present matter.

administration which have the effect of subjecting individuals to discrimination" have been construed as prohibiting the disparate impact discrimination identified in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). *See Choate*, 469 U.S. at 293. In *Griggs*, United States Supreme Court recognized that "practices, procedures, or tests neutral on their face, and even neutral in terms of intent," but which had discriminatory effects on an employer's workforce constituted "discrimination" under Title VII of the Civil Rights Act, 42 U.S.C. § 2000e, a sister provision to Title VI that prohibits employment discrimination. *Griggs*, 401 U.S. at 429-30.

The Court held that Title VII prohibits "not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Id.* at 431. A prima facie case of disparate impact discrimination is demonstrated by the identification of a practice that causes a disparate impact on the basis of race, color, or other prohibited basis without a showing of intentional discrimination. Once a prima facie case, often relying on statistical evidence, is made, the burden then shifts to the employer to demonstrate that the prima facie discrimination is nevertheless justified. Even then, a showing that a nondiscriminatory alternative exists to the challenged practice, trumps the justification. *See* 42 U.S.C. § 2000e-2(k)(1991 amendments to the Civil Rights Act); *Albermarle Paper v. Moody*, 422 U.S. 405, 425 (1975).

Aside from disparate impact discrimination, Title VI and its

regulations prohibit the intentional discrimination prohibited by the equal protection clause of the United States Constitution. *Guardians*, 463 U.S. at 589-90 ("Title VI on its own bottom reaches no further than the Constitution," and it also allows the type of race-based affirmative action remedies permitted by the Constitution). Intentional discrimination may be demonstrated by a "pattern or practice" of discriminatory treatment of a protected class, *Teamsters*, 431 U.S. at 335 (Title VII intentional discrimination case), by a showing of "a preponderance of the evidence that racial discrimination was the company's standard operating procedure, the regular rather than the unusual practice." *Id* at 336. Under the pattern or practice intentional discrimination paradigm, as with disparate impact discrimination, the primary evidence of actionable systemic discrimination is statistics, which "have served and will continue to serve an important role" in demonstrating the existence of discrimination. *Id.* at 339. The Court also noted that anecdotal evidence is persuasive to "[bring] the cold numbers convincingly to life." *Id.*

Moreover, Title VI prohibits not only a recipient of federal funds from engaging in discrimination on its own, but also from becoming a passive participant in local industry racial exclusion. State entities that receive federal funds have "a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice," thus prohibiting a state entity not only

from engaging in discrimination on its own, but also as "a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry." *City of Richmond v. Croson*, 488 U.S. 469, 492 (1989) ("[I]f the city could show that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system."); *see Concrete Works of Colo., Inc. v. City and County of Denver*, 321 F.3d 950, 958, 976 (10th Cir. 2003) ("The City can demonstrate that it is a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry by compiling evidence of marketplace discrimination and then linking its spending practices to the private discrimination."); *Coral Constr. Co. v. King County*, 941 F.2d 910, 916 (9th Cir. 1991) ("[T]he governmental actor enacting the set-aside program must have somehow perpetuated the discrimination to be remedied by the program. However, the governmental actor need not be an active perpetrator of such discrimination; passive participation will satisfy this sub-part of strict scrutiny review. Mere infusion of tax dollars into a discriminatory industry may be sufficient government involvement to satisfy this prong.")(internal citations omitted).

III. THE CITY'S FACTUAL RECORD--CONSISTING OF STATISTICS, EXPERT STUDIES AND TESTIMONY--SHOWS UNREBUTTED PRIMA FACIE DISPARATE IMPACT AND INTENTIONAL DISCRIMINATION.

Plaintiff contractors erroneously argue that the statistical evidence in the record fails to show a violation of Title VI, (*see, e.g.,* POB, at 22-23), an assertion that can only be made by wholly ignoring the full breadth of the statistical showing as well as the expert studies and testimony offered to bring to life the cold statistics.

Before the 1989 version of the Ordinance was enacted,[4] severe disparities were found in the awarding of City contracts, particularly prime contracts, to minority business enterprises ("MBEs"). The Board of Supervisors reviewed statistical evidence from comparing contracts awarded to available minority contractors, finding that "in almost all areas of contracting MBEs . . . continue to be awarded contract dollars that are disproportionately lower than the available numbers of MBEs . . . in San Francisco." San Francisco Municipal Code, Chapter 12D: Minority/Women/Local Business Utilization, available at http://www.municode.com/content/4201/14131/html/ch012D.html

[4] The City's Board of Supervisors (the "Board") initially passed the Ordinance in 1984. (JA III: 0685.) The Board enacted the 1984 Ordinance in order to combat its "own active and passive participation in discrimination against minority- and women-owned businesses, both in its own contracting for goods and services and in the private market for such goods and services." (JA III: 0685.) The Ninth Circuit Court of Appeals, in 1987, struck down the provisions of the 1984 Ordinance favoring MBEs. *See Associated Gen. Contractors of Cal. Inc. v. City and County of San Francisco,* 813 F.2d 922, 944 (9th Cir. 1987) ("*AGCC I*").

("Chapter 12D"), Sec. 12D.2(11) (last visited February 6, 2008). The Board of Supervisors found that the disparities were statistically significant and could not be attributed to chance. *Id.* ("Based upon the testimony and other evidence before the Board and the [Human Rights] Commission in 1983, 1984, 1988, and 1989, the Board finds that the statistical disparities can only be attributed to discriminatory procurement practices of the City against MBEs."); *see* Chapter 12D, Sec. 12D.10(A)(2) reviewing 1987-88 contract award data, the Board found that minority contractors "continue to be awarded contract dollars in certain categories of purchasing contracts in dollar amounts that are disproportionately lower than available number of MBEs. . . in the private sector.") and Chapter 12D, Sec. 12D.11 (summarizing statistical evidence of disparities in various contract award categories for 1987-88 and 1989-91)).

As the Ninth Circuit found, a 1989 study prepared by BPA Economics, Inc. showed that "the disparities between the number of available Asian, Black, and Hispanic owned locally based firms was statistically significant and supported an inference of discrimination." *Associated Gen. Contractors of California Inc. v. Coalition for Economic Equity,* 950 F.2d 1401, 1414 (9th Cir. 1991), *cert. denied*, 503 U.S. 985 (1992) ("*AGCC II*"). For example,

> in prime contracting for construction, although MBE availability was 49.5%, MBE dollar participation was only 11.1%; in prime contracting for equipment and supplies, although MBE availability was 36%, MBE dollar

> participation was only 17%; and in prime contracting for general services, MBE availability was 49% although MBE dollar participation was only 6.2%.

Id. (citing the plurality in *Croson*, 488 U.S. at 509 ("[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise")).

A 1992-95 disparity study conducted by Mason Tillman Associates showed that significant disparities continued to exist in City contracting even after the Ordinance was approved and being implemented. (JA III: 0769; JA VIII: 1935-2229, IX: 2230-334.) In construction prime contracting, all minority groups received fewer construction prime-contracting dollars than would be expected. (JA VIII: 1987.) The study showed that, although African Americans represented 10.2 % percent of the available construction firms, they received only 1.4 % of the construction contract dollars. (*Id.*) Although Asian Americans represented 20.7 % of the available construction firms, they received only 3.0 % of the construction contract dollars. (*Id.*) On the other hand, while Caucasian males represented only 49.7 % of the available construction firms, they received 88.9 % of the prime construction contract dollars. (*Id.*)

The statistical findings were supported by testimonial and expert

study evidence about the City's discriminatory procurement practices:

> Some City departments continue to operate under the "old boy network" when awarding contracts. The City's "old boy network" constitutes a closed business system created and implemented by the City for all contracts, including those subject to the competitive bid process. Discrimination against and insensitivity to MBEs . . . continue to persist in the City's procurement process. The closed environment in which City businesses operate has excluded MBEs . . . and has placed them under a competitive disadvantage when competing for City prime contracts.

Chapter 12D, Sec. 12D.2(10) (1989 finding). This finding was reiterated in 1998. (JA III: 0769) (After determining that "the decision makers in the City contracting process—the City department heads and general and deputy managers—have been and continue to be overwhelmingly Caucasian males" and evidence from numerous witnesses, the Board reiterated that "many City departments continue to operate under an 'old boy network,' dominated by Caucasian males, that creates a barrier to the entry of . . . minority-owned businesses and puts those firms at a competitive disadvantage in their efforts to secure City contracts.)

In 2003, the Board summarized the findings of a Human Rights Commission report of discriminatory practices engaged in by City personnel:

> (1) attempts by City personnel to improperly influence contract selection panels to ensure that MBEs/WBEs do not obtain City prime contracts; (2) attempts by City personnel to blame MBEs/WBEs unjustifiably for project delays; (3) the imposition of unnecessary minimum requirements on City contracts that act as a barrier to MBEs/WBEs; (4) the failure by City departments to submit draft requests for proposals to

> HRC with sufficient time to permit the HRC to ensure that adequate MBE/WBE subcontracting goals have been set; (5) attempts by City departments to circumvent the requirements of this ordinance by extending or modifying existing contracts rather than putting new contracts out to bid; (6) the failure by City departments to comply with prompt payment provisions of this ordinance to ensure that MBEs/WBEs do not suffer unnecessary financial hardships; and (7) resistance by City prime contractors to provide the City with required subcontractor payment information, making it difficult for the City to ensure that MBE/WBE subcontractors receive prompt payment for their work on City contracts.

(JA III: 0706)

City officials were found to subject minority contractors to harms as members of minority groups beyond animus, "stereotyping, prejudging, discomfort in working with minorities, an absence of opportunities to prove one's skill and ability, exclusion, networking difficulties." (JA III: 0704). In short, there was such widespread hostility among City procurement personnel to implementation of the MBE Ordinance that the Board of Supervisors came to the frank assessment that "the City and County of San Francisco is *actively* discriminating against . . . minority groups in its contracting." (JA III: 0704(emphasis added)).

The Board also concluded that City "is passively participating in discrimination in the private sector." (*Id.*) The Commission found in 1998 that prime contractors listed minority-owned enterprises as subcontractors that they never used, using white subcontractors not listed on Commission forms, and creating fraudulent joint ventures of MBEs and majority firm. (JA III: 0705-6.) A survey conducted by Godbe Research among 266 MBE

and WBE firms found in 2003 that 21% of the firms had been denied "Bay Area subcontracting work that was not subject to affirmative action requirements by prime contractors who typically do award them work on contracts that are subject to the remedial subcontracting requirements of this Ordinance" an average of 13 times in the 1998-2003 period. (JA III: 0690.) In 2003, minority and women contractors reported that prime contractors gave them inadequate lead time to bid on projects, paid them late after a bid award, listed them on bids without permission, and reduced the scope of their work or canceled their participation after contract award. (JA III: 0704.) Another study by National Economic Research Associates found significant disparities in Bay Area business formation, earnings, and availability of credit between minority and white firms. (JA III: 0692-93.) Such evidence led the Board to conclude that the City "is passively participating in discrimination in the private sector" as while also discriminating against minority groups directly. (JA III: 0707.)

In 2003, after several years operating under the MBE Ordinance, the Board of Supervisors found that minority contractors "continue to receive a smaller share of certain types of contracts for the purchase of goods and services by the City than would be expected based on the number of able and available . . . minority-owned businesses," a result that "cannot be attributed to chance" but "is due to discrimination by the City and discrimination in the private market." (JA III: 0693-94.) The statistical

evidence relied upon by the City included a 2003 disparity study that showed between January 1998 and February 2003, Asian American businesses represented 13.7% of available prime contracting businesses but received only 6.0 % of available contracts, resulting in a disparity ratio[5] of 0.36. While African-Americans represented 4.5 % during that same time period, they only received 1.2 % of the available construction contracts, resulting in a disparity ratio of 0.22. (JA V: 1245.)

Acknowledging improvements in some areas of minority prime and subcontracting, the Board nonetheless concluded that the use of minority contractors "would plummet" if the MBE Ordinance were discontinued because discrimination had not been eradicated.

> Based on the studies and reports issued by NERA and Godbe Associates, the testimonial evidence, the history of discrimination against minority . . . contractors in City contracting programs and the other materials before the Board, the Board finds that these favorable minority utilization rates are attributable to the fact that the City has remedial contracting programs in place, and that the discrimination the City previously identified in its prime contracting and subcontracting programs has not yet been eradicated. In particular, the Board finds that if the City were to discontinue, at this time, the race- . . . conscious bid discount program or the subcontracting program authorized by this Ordinance, minority . . . utilization rates in City contracting would plummet.

(JA III: 0694.)

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[5] The disparity ratios used in the Commission study is the "4/5 rule" derived from the federal agencies' Uniform Guidelines on Employee Selection, 29 C.F.R. § 1607.4(D). In order to determine if a selection device has such severe disparate impact that federal enforcement activity, including enforcement litigation by the United States Department or the Equal Employment Opportunity Commission, is appropriate, the minority selection is compared to the white selection rate. A minority/white disparity ratio less than 4/5 or 0.8 is considered so severe that federal enforcement activity is considered appropriate.

The factual record marshaled in support of the MBE Ordinance constituted both *Griggs* disparate impact discrimination and *Teamsters* intentional discrimination. Significant statistical disparities established an unrebutted prima facie disparate impact case as well as establishing an uncontradicted case in which discrimination was the "standard operating procedure, the regular rather than the unusual practice." *Teamsters*, 431 U.S. at 336. The expert studies and anecdotal testimony plainly bring "the cold numbers convincingly to life" by showing how City personnel actively discriminated by operating an "old boys network" and participating in local industry racial exclusion.

The evidence as a whole establishes a broad pattern or practice of discrimination infecting the City's procurement process that is the equivalent of the "evil eye and [ ] unequal hand" condemned so long ago in *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886), as official discrimination against a minority group. Plaintiff contractors are clearly wrong in mischaracterizing the evidence of discrimination as isolated and discrete. The record is surely sufficient to establish a Title VI violation that risks ineligibility for federal funding that "would result in a loss of federal funds to the state." CAL. CONSTITUTION, Art. 1, § 31(e). The MBE Ordinance

should stand.

IV. CONCLUSION

For the reasons set forth above, the Court should rule on behalf of Respondent City and County of San Francisco.

Respectfully submitted,

Dated: February 7, 2008

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CERTIFICATE OF WORD COUNT

(Pursuant to California Rules of Court, Rule 8.520(c)(1))

The text of this Amicus Curiae Brief consists of 4,249 words as counted by the word count feature of the word processing program used to generate the brief, exclusive of materials not required to be counted.

Dated: February 7, 2008

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PROOF OF SERVICE

I, Candice Elder, declare:

My business address is 1330 Broadway, Suite 1800, Oakland, California 94612. I am over the age of 18 years and not a party to the above-entitled action.

On February 7, 2008, I served:

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

on the persons listed below by sending two true and correct copies thereof via first class United States mail, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on February 7, 2008, at Oakland, California.

Candice Elder