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April 8, 2009

The Honorable Edmund G. Brown, Jr.  
Attorney General of the State of California  
California Department of Justice  
P.O. Box 944255  
Sacramento, CA 94244-2550

Re: Unconstitutionality of Proposition 209; Coral Construction, Inc. v. City and County of San Francisco, California Supreme Court No. S152934

Dear Attorney General Brown:

On behalf of the Hispanic Association of Colleges and Universities, I am pleased to see that the Court has asked for your office to file a letter-brief in the *Coral* case addressing the constitutionality of Proposition 209. As explained below, the initiative does indeed violate equal protection principles, and its impact on California over the past decade has been devastating. We hope that you, as the State's top attorney, will argue forcefully that the California Supreme Court should take this opportunity to strike down this initiative that has wrought so much harm on minority communities, women, and California as a whole.

I. **Proposition 209 Violates Federal Equal Protection**

Under the precedent that the U.S. Supreme Court set forth in *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982) and *Hunter v. Erickson*, 393 U.S. 385 (1969), it is plain that Proposition 209 violates federal equal protection principles by making beneficial race- and gender-based legislation more difficult to enact than similar legislation benefiting other groups. Whereas, for example, disabled individuals or veterans or other groups may all petition their local government to enact laws in their favor, minorities and women in California cannot. Their only recourse to achieve such legislation is to go to "the most inaccessible political level" and to seek a state constitutional amendment overturning Proposition 209. See *Coral Construction v. City and County of San Francisco*, 57 Cal.Rptr.3d, 781, 804-20 (2007) (Rivera, J., concurring and dissenting) (review granted 65 Cal.Rptr.3d 761 (August 22, 2007)).

Proposition 209 thus unquestionably reallocates political power in a manner that operates to the disadvantage of minorities and women: precisely the type of "political structure" distortion that the U.S. Supreme Court has held violates federal equal protection principles. See *Hunter*, 393 U.S. at 393 ("the State may no more disadvantage any particular group by making it more difficult to enact legislation in its behalf than it may dilute any person's vote...."); *Seattle*, 458 U.S. at 467 (laws may not "subtly distort[] governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation").

I do not repeat here all of the detailed legal arguments that have demonstrated the unconstitutionality of the initiative under these principles. As Proposition 209 cases have wound their way through the court system, many distinguished jurists on both the state and federal benches have eloquently stated why this is so. See, e.g., *Coral Construction, supra*, at 804-20 (Rivera, J., concurring and dissenting); *Coalition for Economic Equity et al. v. Wilson*, 122 F.3d 692, 711-17 (9th Cir. 1997) (Schroeder, Pregerson, Norris, Tashima, JJ., dissenting from denial of rehearing en banc); *id.* at 717-18 (Hawkins, J., commenting on denial of rehearing en banc); *Coalition for Economic Equity et al. v. Wilson*, 946 F. Supp. 1480, 1506-10 (N.D. Cal. 1996) (Henderson, J.). Numerous pre-eminent legal scholars have also concluded that the initiative is fatally flawed. See *Coral, supra*, Appendix to Concurring and Dissenting Opinion (collecting scholarly analysis).

A letter-brief from your office asserting Proposition 209's unconstitutionality on federal equal protection grounds would be fully in line with this wealth of well-respected constitutional analysis.

## **II. California's Experience Since Proposition 209's Passage Confirms That The Initiative Violates Equal Protection**

We believe that Proposition 209 is invalid on its face, and that this was clear from the moment it was passed. But the experience of California since Proposition 209's passage demonstrates even more clearly how the measure has distorted the political process by placing remedial legislation out of the reach of minorities and women, and the devastating effect that this has had on California as a whole.

In the public contracting arena – the context in which the *Coral* case arises – minority- and women-owned businesses have been decimated by Proposition 209. Without the ability to appeal to their local or state representatives to enact legislation to remediate demonstrated discrimination and exclusion, minority- and women-owned businesses have seen a return to the “old boys’ network” where majority-owned firms monopolize virtually all of the contracting work and often do not even allow minority- and women-owned firms to compete for contracting opportunities.

For example, a comprehensive study of the California Department of Transportation's contracting showed that after passage of Proposition 209, minority businesses experienced a greater than 50% reduction of total awards and contracts on Caltrans projects. See *Free to Compete? Measuring the Impact of Proposition 209 on Minority Business Enterprises* (Discrimination Research Center 2006), Executive Summary, 20-25. This translates to millions of dollars in lost revenues. *Id.* Not surprisingly given these precipitous declines, only one-third of certified transportation construction minority businesses that existed in California in 1996 are even still in business today. See *id.* Women-owned businesses have been similarly adversely affected, experiencing a 40 percent decline in Caltrans contract dollars over the past decade. See *A Vision Fulfilled? The Impact of Proposition 209 on Equal Opportunity for Women Business Enterprises* (Henderson Center for Social Justice, UC Berkeley School of Law 2007); see also *id.* (documenting that only 36 percent of women-owned businesses certified to do business with Caltrans in 1996 even exist today).

The effect of Proposition 209 has been devastating in other arenas as well. As has been well-documented, the repeal of inclusive admissions policies in the University of California system has led to dramatic decreases in under-represented minority student enrollment, particularly at the flagship campuses of UC

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Berkeley and UCLA. For example, in the fall of 2006, the freshman class at UCLA had only 96 African-American students, the lowest number since the early 1970s. See Rebecca Trounson, *A Startling Statistic at UCLA*, *Los Angeles Times*, June 3, 2006.

The situation at the State's graduate schools is equally bleak. Entering black law students at Berkeley, Davis and UCLA in 2005 comprised less than 3% of the entering class, far below their enrollment levels in 1970 (let alone in the early 1990s). See William C. Kidder, *The Struggle for Access from Sweatt to Grutter: A History of African American, Latino and American Indian Law School Admissions, 1950-2000*, *19 Harvard Black Letter L.J.*, 1, 10, tbl. 1 (2003); *Univ. of California Office of the President, University of California's Law Schools* (Oct. 2005). Latino enrollment at these law schools likewise dropped by nearly 50% in the wake of Proposition 209. *Id.* At the UC medical schools, Proposition 209 led to a 43% drop in under-represented minority enrollment between 1995-1996 and 2001-2002. *U.S. Comm'n on Civil Rights, Beyond Percentage Plans*, tbl. 2.6 (Nov. 2002).

These numbers are troubling on many different levels. For individual minority students, they mean fewer educational opportunities overall and increased feelings of isolation for those who find themselves in non-diverse educational settings. On a broader level, these declines mean that many UC campuses are no longer even close to reflective of the State as a whole. This in turn undermines one of the primary missions of the taxpayer-funded UC system – to train the State's future leaders.

In sum, the real-world impact of Proposition 209's distortion of equal protection principles is profound and is felt every day in neighborhoods and communities throughout California. That all of these decreases in opportunity have come at a time when California itself is becoming increasingly diverse only serves to highlight how severely Proposition 209 has skewed the political structure of the State.

### III. Conclusion

For all of the foregoing reasons, I respectfully request that your office argue forcefully to the California Supreme Court that Proposition 209 violates equal protection and should be invalidated. Thank you in advance for your consideration of this issue of vital importance to all Californians who care about justice and equity.

If we can be of any assistance, Erica Romero, our Executive Director of Western States Legislative Affairs, would be happy to help your office. Erica may be reached at eromero@hacu.net or (916) 442-0392.

Sincerely,



Antonio Flores  
President and CEO

cc: Erica Romero, Executive Director of Western States Legislative Affairs, HACU