

SUPREME COURT OF THE STATE OF CALIFORNIA

CORAL CONSTRUCTION, INC., an
Oregon corporation, and SCHRAM
CONSTRUCTION, INC., a California
corporation,

Plaintiffs,

vs.

JOHN L. MARTIN, in his official
capacity as Director of the San
Francisco International Airport, and
CITY AND COUNTY OF SAN
FRANCISCO, a municipal
corporation,

Respondents.

S 152934

First Appellate District
No. A107803

(San Francisco Superior Court
Nos. 319549 and 421249)

APPLICATION TO FILE AMICUS BRIEF

BRIEF OF AMICI CURIAE

The Honorable James L. Warren
Superior Court for the City and County of San Francisco

CONSTANCE DE LA VEGA, State Bar #85199
FRANK C. NEWMAN INTERNATIONAL
HUMAN RIGHTS CLINIC
University of San Francisco, School of Law
2130 Fulton Street
San Francisco, CA 94117
Telephone: 415-422-2296
Facsimile: 415-422-5440

Attorney for Amici Curiae

APPLICATION TO FILE BRIEF OF AMICI CURIAE

Pursuant to California Rules of Court, rule 8.520, *Amici* law professors who teach in the area of international law and/or constitutional law as it pertains to race discrimination and various human rights organizations respectfully request leave to file the attached brief of amicus curiae in support of Respondent City and County of San Francisco. Both groups of *Amici* are concerned with the implementation of binding treaty law in the United States and abroad. *Amici* would like to bring to the Court's attention the treaty standards applicable to this case under the International Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights, specifically with regard to the implementation of the City of San Francisco's 1989 Minority/Women/Local Business Utilization Ordinance. *Amici* urge this Court to interpret the policy and the statutes in question so that it conforms to obligations under those duly ratified treaties which are the supreme Law of the Land under the United States Constitution.

THE APPLICANTS' INTEREST AND HOW THIS BRIEF WILL ASSIST THE COURT

The following professors join this brief.¹ These professors are experts in the area of international law or constitutional law as it pertains to

¹ Titles and affiliations to law schools are for identification purposes as the professors do not represent the views of the institutions listed.

race and the application of the race jurisprudence.

William Aceves, Associate Dean for Academic Affairs and Professor of Law, California Western School of Law

Lisa Crooms, Professor of Law, Howard University School of Law

Dolores Donovan, Professor of Law, University of San Francisco School of Law

Tim Iglesias, Professor of Law, University of San Francisco School of Law

Rhonda V. Magee, Professor of Law, University of San Francisco School of Law

Jordan Paust, Mike and Teresa Baker Law Center Professor, University of Houston Law Center

John Quigley, President's Club Professor of Law, Ohio State University

Naomi Roht-Arriaza, Professor of Law, University of California Hastings College of the Law

David Weissbrodt, Regents Professor and Frederickson & Byron Professor of Law, University of Minnesota Law School

Richard J. Wilson, Professor of Law, American University Washington College of the Law

The human rights organizations interested in this brief are all involved in the field of international human rights law and are concerned about the application of treaty law in the United States.

Equal Justice Society

Equal Justice Society (EJS) is a California-based national organization of scholars, advocates, and citizens, that seeks to promote human equality and enduring social change through law and public policy,

public education and research. The primary mission of EJS is to combat the continuing scourge of racial discrimination and inequality undermining human rights in America. Specifically, EJS works to ensure that U.S. antidiscrimination law and jurisprudence continues to adequately address racial and societal inequities. EJS has submitted *amicus curiae* briefs in state and federal cases addressing the issue of affirmative action, and sponsored public education and policy evaluation forums on issues related to affirmative action where international standards have informed interpretations of state and federal laws.

Human Rights Advocates

Human Rights Advocates, a California non-profit corporation, founded in 1978, with national and international membership, endeavors to advance the cause of human rights to ensure that the most basic rights are afforded to everyone. Human Rights Advocates has Special Consultative Status in the United Nations and has participated in meetings of its human rights bodies for 25 years. Human Rights Advocates has participated as *amicus curiae* in cases involving individual and group rights where international standards offer assistance in interpreting both state and federal law. Cases that it has participated in include: *Roper v. Simmons*, 543 U.S. 551 (2005); *Grutter v. Bollinger*, 539 U.S. 306 (2003); and *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987).

Minnesota Advocates for Human Rights

Minnesota Advocates for Human Rights (“Minnesota Advocates”) is a volunteer-based non-profit organization committed to the impartial promotion and protection of international human rights standards and the rule of law. Minnesota Advocates conducts a broad range of innovative programs to promote human rights in the United States and around the world, including human rights monitoring and fact finding, direct legal representation, education and training, and publications. Minnesota Advocates has produced more than 50 reports documenting human rights practices in more than 25 countries; educated more than 10,000 students and community members on human rights issues; and provided legal representation to thousands of low-income individuals seeking asylum in the U.S. Minnesota Advocates previously has submitted amicus curiae briefs in numerous cases that raise issues of international human rights law.

National Law Center on Homelessness & Poverty

The National Law Center on Homelessness & Poverty (NLCHP) is the legal arm of the national movement to prevent and end homelessness while promoting the rights of homeless people in our society. Important elements of NLCHP’s work include increasing public awareness about the condition of homelessness, tracking appropriate social scientific research, investigating and promoting best practices, and supporting local litigation and policy efforts aimed at preserving the rights of those experiencing

homelessness. NLCHP strongly promotes the human right to housing and the use of human rights standards in interpreting and conducting U.S. policy.

Both *Amici* law professors and the aforementioned human rights organizations believe that a discussion of applicable international treaty standards is important to this court as it will provide a perspective that is beyond the scope of the parties' briefs.

Rights International, Center for International Human Rights Law, Inc.

Rights International is a volunteer, not-for profit organization.

Rights International provides legal assistance to victims of human rights and humanitarian law violations before domestic and international tribunals, including the European Court of Human Rights, the Inter-American Commission and Court of Human Rights, the African Commission on Human and Peoples' Rights, the International Criminal Tribunals, and U.S. courts. Rights International also has published numerous books and articles, including *INTERNATIONAL HUMAN RIGHTS & HUMANITARIAN LAW* (Cambridge University Press 2006) and *CHALLENGING HUMAN RIGHTS VIOLATIONS: USING INTERNATIONAL LAW IN U.S. COURTS* (Brill/Transnational Publishers 2001).

Society of American Law Teachers

Since 1973, the Society of American Law Teachers (SALT) has been an independent organization of law teachers that has worked to make

the legal profession more inclusive, to enhance the quality of legal education, and to extend the power of legal representation to under-served individuals and communities. SALT is committed to creating and maintaining a community of educators dedicated to making a difference through the power of law; using innovative styles of teaching to make our classrooms more inclusive; challenging faculty, staff, and students to develop legal institutions with greater equality, justice, and excellence; and organizing academics to promote core values of equality and justice and resist inequitable social policies.

CONCLUSION

For the foregoing reasons *Amici* respectfully requests that the court accept the accompanying brief for filing in this case.

Dated: February 5, 2008

Respectfully submitted,

CONSTANCE DE LA VEGA
Professor of Law Frank C. Newman
International Human Rights Law Clinic
University of San Francisco School of
Law Attorney for Amici Curiae

BRIEF OF AMICI CURIAE

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Introduction

In 1989, San Francisco adopted a Minority/Women/Local Business Utilization Ordinance based on evidence that private contractors and City agencies and employees were routinely discriminating against potential contracting partners on the basis of race and sex. *Associated General Contractors of California, Inc. v. Coalition for Economic Equity*, 950 F.2d 1401, 1416-1418 (9th Cir. 1991), *cert. denied*, 503 U.S. 985 (1992). The ordinance contained a number of remedial provisions including a bid-discounting program and a sub-contracting program that required certain bidders to demonstrate their good faith efforts to provide MBEs and WBEs an equal opportunity to compete for subcontracts. S.F., CAL., ADMIN. CODE § 12D.A.9(A)(1) – (2) (2007). The ordinance was renewed in 2003, following a third investigation based on evidence demonstrating that minorities and women were still subject to significant discrimination in City contracting by some City employees and majority-owned prime contractors. Joint Appendix in the Court of Appeal, Vol. III, p. 683-775. (“JA III: 683-775”).

Amici would like to bring to the Court's attention the treaty standards applicable to this case under the International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter “Race Convention”) (*opened for signature* March 7, 1966, 660 U.N.T.S. 195, *entered into force* January 4, 1969; *entered into force for the United States*

November 20, 1994) (attached hereto as Appendix 1), and the International Covenant on Civil and Political Rights (hereinafter “Civil and Political Covenant”) (*opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171, *entered into force* March 23, 1976; *entered into force for the United States* September 8, 1992). While both treaties elaborate on the basic principles of equality and nondiscrimination, the Race Convention focuses specifically on discrimination by addressing a wide range of categories of rights in which discrimination is prohibited and prescribing mandatory remedial provisions states must take to eradicate race discrimination within their borders. The Civil and Political Covenant provides protection to much broader categories of persons and establishes the necessary steps State Parties must take to give effect to the basic principle of equal protection set forth in the treaty text. *Amici* urge this Court to interpret the policy in question so that it conforms to obligations under those duly ratified treaties.

In its consideration of the facts before it, *Amici* urge the Court to decide consistently with the principle that treaty law is to be considered the supreme law of the land. The United States Constitution provides specifically that “*all* Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; *and the Judges in every State shall be bound thereby.*” U.S. Const. art.VI, § 2, cl. 2 (emphasis added). Following the guidance of treaty law, *Amici* advance several points for the Court’s consideration. First, following

canons of statutory interpretation, where a conflict in law exists between a treaty and a state law, the treaty law prevails. Thus, any conflict between Article I, Section 31 of the California Constitution and treaty law under the Race Convention and the Civil and Political Covenant are to be resolved in compliance with the applicable treaty standards. In this context, it is important to note that Article 50 of the Civil and Political Covenant mandates that all “the provisions of the present Covenant shall extend to all parts of States without any limitations whatsoever.” Civil and Political Covenant, art. 50. Second, with regard to any possible reference to the United States’ addition of the non self-executing clause in both the Race Convention and the Civil and Political Covenant, the defensive use of a treaty has been regarded as a judicially accepted means by which litigants have been successful in enforcing treaty provisions.

Finally, at a minimum, both the Race Convention and the Civil and Political Covenant should be used as an interpretive guide for the Court to determine the relevant binding principles under international law and the proper application of any necessary remedial measures in this case. A decision to the contrary could impair the ability of local and state governmental entities to institute measures designed to meet obligations under the treaties and the United States Constitution.

I. Constitutional Principles of Treaty Application and Interpretation

A. **Treaties are the Supreme Law of the Land Under the U.S. Constitution**

Under the United States Constitution Article VI, section 2 of clause 2, “*all* treaties made or which shall be made, under the authority of the United States shall be the Supreme Law of the Land, and the Judges in every State shall be bound thereby, anything in the Constitution or Law of any State to the contrary notwithstanding.” U.S. Const. art. VI, § 2, cl. 2 (emphasis added). When a treaty and state law conflict, the treaty controls. *See Zschernig v. Miller*, 389 U.S. 429, 441 (1968); *Clark v. Allen*, 331 U.S. 503, 508 (1947); *see also Missouri v. Holland*, 252 U.S. 416, 433-35 (1920) (concluding that there are no conflicting 10th Amendment powers at stake vis à vis the treaty power since the treaty power is expressly delegated to the federal government and is expressly denied to the states, and language in the 10th Amendment therefore requires recognition that there is no inhibiting state power under that amendment²). Also, courts should construe treaties “in a broad and liberal spirit, and when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred.” *Asakura v. City of Seattle*, 265 U.S. 332, 342 (1924). This and other California courts have

² This point has been reemphasized by the Supreme Court. *See Reid v. Covert*, 354 U.S. 1, 18 (1957); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) (“no state can add to or take from the force and effect of ...[a] treaty”).

upheld the supremacy of the treaty clause in addressing conflicts between state statutes and treaties. *See In re Heikich Terui*, 187 Cal. 20, 24-25 (1921) (treaty prevails over state alien poll tax); *People ex rel. Att’y Gen. v. Gerke*, 5 Cal. 381, 381 (1855) (treaty prevails over state inheritance law); *Taiheiyo Cement Corp. v. Superior Court*, 117 Cal. App. 4th 380, 394 (2004) (peace treaty that formally ended World War II between United States and Japan preempted state statute that would have otherwise permitted claim against Japanese company); *Suzuki Motor Co. v. Superior Court*, 200 Cal. App. 3d 1476, 1484 (1988) (“a California court may not exercise jurisdiction in violation of an international treaty”); *Baldwin-Lima-Hamilton Corp. v. Superior Court*, 208 Cal. App.2d 803, 819-20 (1962) (treaty primacy over state law regarding bidding rights).

The United States ratified the Race Convention on November 20, 1994. 140 CONG. REC. 14326 (1994). As of November 26, 2007, 173 countries have become parties to the Race Convention and pledged to eradicate racial discrimination within their borders. *See* the United Nations High Commissioner on Human Rights status of treaty ratifications (last modified Nov. 26, 2007), available at <http://www.ohchr.org>. Previously, the United States had become a party to the International Covenant on Civil and Political Rights on September 8, 1992. 138 CONG. REC. 8070 (1992). The United States is now one of 160 countries that are parties to that treaty. *See* the United Nations High Commissioner on Human Rights status of

treaty ratifications (last modified Nov. 26, 2007), available at <http://www.ohchr.org>.

The Race Convention and the Civil and Political Covenant, as ratified treaties, are the supreme Law of the Land. The United States is now bound to protect the rights enumerated in those treaties. Both treaties establish committees to monitor compliance with treaty provisions. Under the Race Convention, this body is called the Committee on the Elimination of Racial Discrimination. Race Convention, art. 8-15. The enforcement body established by the Civil and Political Covenant is the Human Rights Committee. Civil and Political Covenant, art. 28-45.

B. The Non Self-Executing Doctrine and Declaration are Inapplicable

The judiciary developed the doctrine of “self-executing” treaties to limit the Constitutional rule that treaties are the law of the land. *See Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829). Under that doctrine, only clauses of treaties that specify duties which directly confer rights may be enforced directly with the courts. Courts have applied various theories when discussing that doctrine. *See* Carlos Manuel Vázquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695 (1995); *see also* Jordan Paust, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 71-78 (Carolina Academic Press 2d ed. 2003) (noting the actual tests used over time).

Under one test, a self-executing clause is “equivalent to an act of the legislature whenever it operates by itself without the aid of any legislative provision.” *Foster*, 27 U.S. (2 Pet.) 253 at 314. Another test looks for the “intent of the parties” reflected in the treaty's words and, when the words are unclear, in circumstances surrounding the treaty's execution. *See Comm. of U.S. Citizens Living in Nicar. v. Reagan*, 859 F.2d 929, 937 (D.C. Cir. 1988); *Cook v. United States*, 288 U.S. 102, 112 (1933); *Jones v. Meehan*, 175 U.S. 1, 10-12 (1899); *Chew Heong v. United States*, 112 U.S. 536, 539-43 (1884); *U.S. v. Percheman*, 32 U.S. (7 Pet.) 51, 65-68 (1833); *Foster*, 27 U.S. (2 Pet.) 253 at 310-16. Other Supreme Court cases have recognized that rights that are implied can be enforced directly. *See e.g. Edye v. Robertson*, 112 U.S. 580, 598-99 (1884) (“whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined”); *Owings v. Norwood’s Lessee*, 9 U.S. (5 Cranch) 344, 348 (1809) (“Whenever a right grows out of, or is protected by, a treaty, it is sanctioned against all the last and judicial decisions of the states, and whoever may have this right, it shall be protected.”).

The intent of the parties may be difficult to ascertain when multilateral treaties such as the Race Convention and the Civil and Political Covenant are involved, and it is questionable whether the intent of only one of the parties would determine the effect of a particular clause. Multilateral treaties rarely make clear the process by which parties are to incorporate its

provisions into national law. See FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 586 (2d ed. 1996). Many countries, such as the United States, incorporate treaties without separate action by the legislature. See Stefan A. Riesenfeld & Frederick M. Abbott, *The Scope of U.S. Senate Control Over the Conclusion and Operation of Treaties*, 67 CHI.-KENT L. REV. 571, 575 (1991). Indeed, the original purpose of the Supremacy Clause was to alter the British rule that all treaties are “non-self-executing” in order to require the state courts as well as the federal courts to enforce treaties directly. See Carlos Manuel Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT’L L. 695, 698-699 (1995); see also Paust, *supra*, at 67-71.

Despite the clarity of many of the provisions in the Civil and Political Covenant, the Senate gave consent to ratification with a declaration that articles 1 through 27 were not self-executing. 138 CONG. REC. 8071 (1992). A declaration of non-self-execution was also attached to the Race Convention. 140 CONG. REC. 14326 (1994). It is questionable whether the Senate, instead of the courts, can make such a determination. See Connie de la Vega & Jennifer Fiore, *The Supreme Court of the United States Has Been Called Upon to Determine the Legality of the Juvenile Death Penalty in Michael Domingues v. State of Nevada*, 21 WHITTIER L. REV. 215, 220 n. 33 (1999). Further, such a declaration should not be given effect because it runs counter to the object and purpose of the treaty, which

is to protect the individual rights enumerated therein. *See* Stefan Riesenfeld & Frederick M. Abbott, *The Scope of U.S. Senate Control Over the Conclusions and Operations of Treaties*, 67 CHI.-KENT L. REV. 571, 608 (1991).

This Court, however, need not address those points since the legislative history of the declaration indicates that the Senate merely intended to prohibit private and independent causes of action. Senate Committee on Foreign Relations Report on the International Covenant on Civil and Political Rights, 31 Int'l Legal. Mat. 645, 657 (January 30, 1992). In cases such as this one, the governmental entity is not using the treaties to assert a private cause of action. They would use it defensively and thus are not invoking a separate cause of action. *See* John Quigley, *Human Rights Defenses in U.S. Courts*, 20 HUM. RTS. Q. 555, 581-82 (1998); Paust *supra*, at 78-80, 97, 115-16, 118-20, 362, 371-72 (non-self-executing treaties can be used defensively and as interpretive aids).

Litigants may use a treaty defensively regardless of whether the treaty provision is self-executing. *See e.g., Kolovrat v. Oregon*, 366 U.S. 187 (1961) (allowing defensive use of a treaty in escheat proceeding under Oregon law); *Ford v. United States*, 273 U.S. 593 (1927) (allowing use of a treaty as a defense to personal jurisdiction); *Patsone v. Pennsylvania*, 232 U.S. 138 (1914) (recognizing the defensive use of a treaty in a criminal case, but ultimately holding that there was no conflict between the treaty

and state law). Hence, the non-self-executing declarations in the ratification documents for the Race Convention and the Civil and Political Covenant do not forestall mandatory application of the treaty provisions to this case.

II. Treaty Provisions

A. **The Race Convention**

The Race Convention addresses a wide range of categories of rights and remedial provisions in pursuit of its goal to end race discrimination.

The critical definition of racial discrimination is set forth in Article 1(1) of the Race Convention:

[A]ny distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Race Convention, art. 1(1). Under the treaty, State Parties must attempt to prohibit and to eliminate racial discrimination and to guarantee the equal right to enjoyment of civil, political, and economic, social and cultural rights. Race Convention, art. 5. The Race Convention also outlines that state parties must take special measures:

[F]or the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights or fundamental freedoms.

Race Convention, art. 2(2). These and the other measures states must take to further the aims of the treaty are explicitly excluded from the treaty's definition of discrimination. Race Convention, art. 1(4).

The Race Convention outlines the fundamental obligations of State Parties to take steps to erase discrimination within their borders and obligates States Parties to “undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms.” Race Convention, art. 2(1). It also requires State Parties to ensure protection of rights within social, economic, cultural and other fields by taking “special and concrete measures ... for the purpose of guaranteeing [racial groups or individuals belonging to them] the full and equal enjoyment of human rights and fundamental freedoms.” Race Convention, art. 2(2). However, these remedial measures “shall not be continued after the objectives for which they were taken have been achieved.” Race Convention, art. 1(4). Thus, once discriminatory hiring practices cease or equality in the enumerated rights has been attained, the measures are no longer required under the Convention.

The jurisprudence of the Committee on the Elimination of Racial Discrimination, the Race Convention’s monitoring body, has affirmed that these affirmative measures to correct race discrimination are mandatory. The Committee’s reports disclose that the treaty’s measures are designed to eliminate structural inequalities and should address *both de jure* and *de facto* discrimination. For instance, in its 2001 review of the second and third periodic reports of the United States, the Committee expressed concern with the United States’ position “that the provisions of the

convention permit, but do not require State parties to adopt affirmative action measures.” CERD Annual Report 59th Session, U.N. Doc. A/56/18(SUPP) (CERD, 2001) at para. 399.

The Committee has expressed similar concern with Colombia’s lack of legal provisions addressing persistent structural discrimination problems relating to housing and the right to health (among others). CERD Annual Report, 51st Session, U.N. Doc A/51/18 (CERD, 1996) at para. 48. In its 2001 review of the second and third periodic reports of the United States, the Committee commented favorably on the 1997 “Initiative on Race” and the Minority Business Development Agency and noted the increase in the number of minorities “in fields of employment previously occupied by whites,” particularly within the police forces. CERD Annual Report 59th Session, U.N. Doc. A/56/18(SUPP) (CERD, 2001) at para. 388.

It also commended Brazil for its adoption of the National Affirmative Action Program in 2002, but renewed its concern with the de facto segregation of black, mestizo, and indigenous peoples in rural and urban areas. *Concluding Observations of the Committee on Elimination of Race Discrimination: Brazil*, 64th Session, U.N. Doc. CERD/C/64/CO/2 (2004), para. 4, 13.

Finally, in its 2003 report on Fiji, the Committee commended the inclusion of the Social Justice Chapter in the 1997 Constitution calling for programs designed to achieve effective equality in access to education and

training as well as other rights for all groups or categories of persons who are disadvantaged. *Concluding Observations of the Committee on Elimination of Race Discrimination: Fiji*, 62nd Session, U.N. Doc. CERD/C/62/CO/3 (2003), para. 8. Many of the measures approved by the Committee are race based but were not considered as a violation of the treaty. Indeed, the United States in its recent compliance report to the Committee notes that special measures may be race based. U.S. Department of State, *Periodic Report of the United States of America to the U.N. Committee on the Elimination of Racial Discrimination Concerning the International Convention on the Elimination of All Forms of Racial Discrimination* (April 2007), para. 334. Found at http://www.state.gov/g/drl/rls/cerd_report/.

B. The Civil and Political Covenant

The provisions in the Civil and Political Covenant provide protection to much broader categories of persons and define the civil and political rights in greater detail. Part II establishes the general duties of State Parties, which include the obligation to “take the necessary steps ... to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.” Civil and Political Covenant, art. 2(2). Articles 2, 3 and 26 set forth the basic principle of equal protection of the laws. Article 2(1) requires that State Parties provide the enumerated rights to all individuals within their jurisdiction without regard to “race, color,

sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Article 3 specifically guarantees “the equal right of men and women to the enjoyment of all civil and political rights set forth in the ... Covenant.” Article 26 reinforces the equal protection language in Article 2 by stating that all persons are equal before the law and are entitled to equal protection regardless of any of the specified bases.

The Human Rights Committee, which is the jurisprudential arm of the Covenant has also considered whether distinctions are permissible under the Civil and Political Covenant which requires that the rights under the treaty be provided without regard to “race, colour, sex, language, religion, birth or other status.” Civil and Political Covenant, art. 2(1). The Committee recognized that “not all differentiation of treatment constitutes discrimination if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.” *General Comment No. 18: Non-Discrimination*, U.N. GAOR, 37th Sess., 984th mtg., (October 11, 1989), at para. 13.

III. Application of the Treaty Standards to this Case

A. The Minority/Women/Local Business Utilization Ordinance is required under the Race Convention and the Civil and Political Covenant

Under the circumstances documented in the legislative record underlying the City’s Ordinance, measures to ensure the adequate development and protection of certain racial groups are required under the

Race Convention and the Civil and Political Covenant. The record includes evidence that the City adopted the Ordinance because of on-going, widespread complaints and substantial evidence that private contractors and city agencies were routinely discriminating against potential contractors on the basis of race and sex. (JA III:685-719.) Disparities in the City's construction bidding process, supported by three reports commissioned by the City, require the measures that are mandated under Article 2 of the Race Convention, including those of section 2 which contemplate "special and concrete measures to ensure the ... protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights ...". Race Convention, art. 2(2). The WBE/MBE ordinance represents reasonable and objective differentiation, not impermissible discrimination, for a legitimate if not mandatory treaty purpose, as discussed below.

It is important to note that the United States Supreme Court has commented that it has "never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination." *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003). Indeed, complying with the dictates of a treaty which is the "supreme Law of the Land" is a compelling interest that justifies the race based program that is the subject of this case. *See* Connie de la Vega, *Civil Rights During the 1990s: New Treaty Law Could Help Immensely*, 65 U. CIN. L. REV. 423, 468 (1997).

B. To the extent that there is a conflict between Article I, Section 31 of the California Constitution and treaty law, the treaty prevails

Where the Minority/Women/Local Business Utilization Ordinance is in conflict with Article I, Section 31 of the California Constitution, the treaty must prevail over the state law in determining the City's legal obligations. So long as discriminatory contracting practices exist, corrective measures are mandated under the Race Convention's provisions and prohibiting race-conscious affirmative action programs directly conflicts with the obligation of the United States as a party to the Race Convention. As discussed above, Article 2(2) requires parties to take "special and concrete measures ... for the purpose of guaranteeing [racial groups or individuals belonging to them] the full and equal enjoyment of human rights and fundamental freedoms." Conversely, if race discrimination in the sector has ceased, then such measures are no longer required under the Race Convention.

To eliminate the City's ability to institute such corrective measures also impermissibly impinges on the City's obligation under the Civil and Political Covenant to take "necessary steps ... to adopt such laws or other measures as may be necessary to give effect to the rights recognized" in that treaty. Civil and Political Covenant, art. 2(2). Indeed, the Human Rights Committee in 1995, after considering a progress report from the United States on the steps it had taken to ensure the enjoyment of rights

under the Covenant, made the specific recommendation that affirmative action should be adopted in order to eliminate discriminatory attitudes and prejudice toward minority groups and women. *See* Consideration of Reports: Comments of the Human Rights Committee, United States of America, U.N. GAOR, 53rd Sess., U.N. Doc. CCPR/C/79/Add.50 (1995), at para. 295.

C. The treaties should be used as interpretive guides for evaluating the ordinance

International human rights standards have often been useful tools for interpreting laws in the United States. *See e.g. Roper v. Simmons*, 543 U.S. 551, 576-578 (2005) (citing treaties and international law as one of the reasons for ruling that the death penalty for juveniles is unconstitutional); *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsberg, J. concurring opinion) (referring to the Race Convention as a reason to uphold the affirmative action program of the University of Michigan law school). *See generally* Gordon A. Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses*, 52 U. CIN. L. REV. 3 (1983); Ruth Bader Ginsburg & Deborah Jones Merritt, *Affirmative Action: An International Human Rights Dialogue*, 1 RUTGERS RACE & L. REV. 193 (1999). Indeed, this Court cited to international authority in support of the conclusion that the state has compelling interests in preventing inhumane treatment of the mentally disturbed. *Conservatorship of Hofferber*, 28 Cal.3d 161, 172 (1980).

In 1995, the United States' delegation to the Human Rights Committee stated that “courts of the [United States] could refer to the Covenant and take guidance from it.” Statement of Conrad Harper, Legal Advisor, U.S. Department of State, to the United Nations Human Rights Committee, Human Rights Committee, 53d Sess., 1405th mtg., U.N. Doc. CCPR/C/SR.1405 (Apr. 24, 1995) at para. 8. Hence, as a means to ensure compliance with the treaty obligations, the courts of this country should seek guidance from the Civil and Political Covenant in interpreting United States laws. Similarly, courts could seek the same interpretive guidance from Race Convention provisions. Failure to do so will undermine the United States credibility as a State Party to these, as well as other treaties.

The treaty obligations above are useful for interpreting the Constitution as well as federal statutory provisions that encourage state and local governments to voluntarily remedy past discrimination voluntarily. For example, the United States Supreme Court has recognized that in passing Title VII, Congress intended to encourage public and private employers to voluntarily enact race- and gender-based affirmative action programs in order to accomplish the national goal of “break[ing] down old patterns of racial segregation and hierarchy.” *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979). By denying state and local entities the power voluntarily to redress past discrimination through race- and gender-conscious means, courts will not only impede the furtherance of

congressionally mandated goals, but will also impede the goal of eradicating racial and gender discrimination mandated by the Race Convention and the Civil and Political Covenant. Therefore, ratified international treaties should at the very least be used as a tool for this Court to determine whether City's remedial program is narrowly tailored.

The primary consideration for whether the Ordinance is narrowly tailored under both the Race Convention and the Civil and Political Covenant is not whether nonracial alternatives are available, but whether or not discrimination still exists in the City's bidding process. Race Convention, art. 1(4). The treaty standards may help to assess the City and County of San Francisco's argument that the measures in question in this case are necessary because of the unavailability of non-racial alternatives and the fact that the use of the classification is limited by scope and duration. Since racial measures are required under the Race Treaty and are not considered race discrimination when used to address discrimination or attain equality they should be upheld as long as they are limited in scope and duration to accomplish those goals.

Conclusion

Amici urge this Court to consider the Race Convention and The Civil and Political Covenant when reviewing the applicable standards to this case as is required by the United States Constitution Article VI, section 2 of

clause 2. To the extent that Proposition 209 conflicts with the standards of those treaties it should be held unconstitutional.

Dated: 5 February 2008

Respectfully submitted,

CONSTANCE DE LA VEGA
Professor of Law
Frank C. Newman International Human
Rights Law Clinic³
University of San Francisco School of
Law

Attorney for Amici Curiae

³ The following students worked on this brief: Nicole Skibola and Erika Dahlstrom.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 4,531 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on February 5, 2008.

Constance de la Vega
Attorney for Amici Curiae

PROOF OF SERVICE

I declare that I am over 18 years of age and not a party to this action. I am employed at the University of San Francisco School of Law, whose address is 2130 Fulton Street, San Francisco, California.

I further declare that on February 5, 2008, I served the following document:

APPLICATION TO FILE AMICUS BRIEF BRIEF OF AMICI CURIAE

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OFFICE OF ATTORNEY GENERAL
455 Golden Gate Ave., Ste 11000
San Francisco, CA 94102-3658
SUPERIOR COURT

CALIFORNIA COURT OF APPEAL
DIVISION 4
350 McAllister St.
San Francisco, CA 94102

DENNIS J. HERRERA
City Attorney
WAYNE K. SNODGRASS
SHERRI SOKELAND KAISER
Deputy City Attorneys
City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102-4682

THE HONORABLE JAMES L. WARREN
JUDGE OF THE SUPERIOR COURT
SAN FRANCISCO

400 McAllister St., Dept. 301
San Francisco, CA 94102

G. SCOTT EMBLIDGE
RACHEL J. SATER
MICHAEL P. BROWN
MOSCONE, EMBLIDGE & QUADRA, LLP
220 Montgomery St., Ste 2100
San Francisco, CA 94104-4238

SHARON L. BROWNE, ESQ.
JOHN H. FINDLEY
PAUL J. BEARD, II
PACIFIC LEGAL FOUNDATION
3900 Lennane Dr., Ste 200
Sacramento, CA 95834

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed February 5, 2008, at San Francisco, California.

Teresa Martinez