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CITY OF OAKLAND

ONE FRANK H. OGAWA PLAZA 6TH FLOOR OAKLAND, CALIFORNIA 94612

Office of the City Attorney
Barbara J. Parker
City Attorney

TEL: (510) 238-3601
FAX: (510) 238-6500
TDD: (510) 839-6451

November 15, 2011

HONORABLE CITY COUNCIL
Oakland, California

Subject: **RESOLUTION AUTHORIZING THE CITY ATTORNEY, ON BEHALF OF THE CITY OF OAKLAND, TO JOIN IN AN AMICUS (FRIEND OF THE COURT) BRIEF IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIUT CASE OF COALITION TO DEFEND AFFIRMATIVE ACTION, ET AL., V. REGENTS OF UNIVERSITY OF MICHIGAN (CASE NOS. 08-1387/1389/1534/09-111) ASKING THE COURT TO AFFIRM THE DECISION OF A THREE-JUDGE PANEL INVALIDATING MICHIGAN'S PROPOSAL 2, WHICH LIKED CALIFORNIA'S PROPOSITION 209 PROHIBTS CONSIDERATION OF RACE OR GENDER IN PUBLIC EMPLOYMENT, EDUCATION AND CONTRACTING**

Dear President Reid and Members of the City Council:

<u>Summary</u>

The law firm of Moscone, Emblidge & Sater LLP is filing an amicus (friend of the court) brief in the United States Court of Appeals for the Sixth Circuit. The brief supports the decision of the three-judge panel of the Sixth Circuit which ruled that State of Michigan's Proposal 2 was unconstitutional based on two United States Supreme Court cases that prohibit placing political barriers in the way of women and minorities seeking to achieve beneficial legislation. (Proposal 2 is virtually identical to California's Proposition 209.)

This is the same argument that the City and County of San Francisco, Alameda County and Oakland and others made in the United States Court of Appeals for the Ninth Circuit asking the court to strike down Proposition 209 more than a decade ago; the Ninth Circuit did not rule in our favor. The Sixth Circuit has granted en banc review of the three-judge panel's decision. The amicus brief explains why the Ninth Circuit's decision was poorly reasoned and urges the Sixth Circuit to affirm the three-judge panel's decision.

Discussion

City of Oakland and other local government entities in California have been subject to Proposition 209, which is virtually identical to Michigan's Proposal 2, since it was enacted by Califomia electorate in 1996. Like Proposition 209, Proposal 2 prohibits preferential treatment on the basis of race or sex in public education, government contracting and public employment. The brief will explain why the Ninth Circuit's opinion which refused to invalidate Proposition 209 is incorrect and the Sixth Circuit should not follow it. The Ninth Circuit's decision is the only potentially persuasive authority from a "sister circuit".

Several years ago, the State of Michigan passed Proposal 2, which like California's Proposition 209 prohibits consideration of gender or race in public education, public contracting and public employment. Several entities challenged the constitutionality of Proposal 2 focusing on the prohibition against affirmative action in education. The groups were unsuccessful in the United States District Court. They appealed to the Sixth Circuit Court of Appeals. A three-judge panel of the Sixth Circuit ruled that Proposal 2 was unconstitutional based on two United States Supreme Court cases that prohibit placing political barriers in the way of women and minorities seeking to achieve beneficial legislation. The theory is that any group that wants preferential treatment in contracting (veterans, disabled, etc.) can petition their local government for that preference. But after Proposal 2, women and minorities are prevented from doing the same thing in violation of the Equal Protection Clause of the United States Constitution.

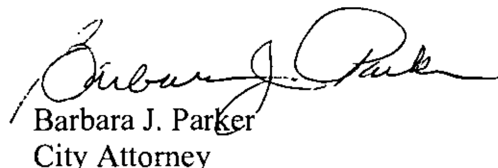
As we mentioned earlier, this is the same argument that San Francisco, Oakland and other public entities made in the Ninth Circuit regarding Proposition 209. Unfortunately, the Ninth Circuit ruled against us.

Califomia has seen the ravages of Proposition 209 as admissions of people of color to public universities such as the University of Califomia at Berkeley have plummeted. Public universities continue to be able to consider preferences for any group, including but not limited to, children of alumnae, athletes, children of wealthy individuals who make significant financial contributions; politically connected individuals; yet these public schools that rely on tax payer dollars from all of us are prohibited from considering race or gender in admissions policies. Considering race and gender is sound public policy and a vital tool in remedying past and ongoing discrimination, leveling the playing field.

Action Requested

For the reasons discussed above, we request authorization for this Office to sign onto the amicus brief in the Sixth Circuit supporting the Sixth Circuit's three-judge panel's decision invalidating Proposal 2.

Respectfully submitted,



Barbara J. Parker
City Attorney

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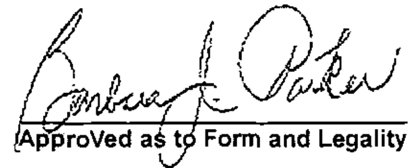

Approved as to Form and Legality

Oakland City Council

RESOLUTION NO. ____________ C.M.S.

RESOLUTION AUTHORIZING THE CITY ATTORNEY, ON BEHALF OF THE CITY OF OAKLAND, TO JOIN IN AN AMICUS (FRIEND OF THE COURT) BRIEF IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT CASE OF COALITION TO DEFEND AFFIRMATIVE ACTION, ET AL., V. REGENTS OF UNIVERSITY OF MICHIGAN (CASE NOS. 08-1387/1389/1534/09-111) ASKING THE COURT TO AFFIRM THE DECISION OF A THREE-JUDGE PANEL INVALIDATING MICHIGAN'S PROPOSAL 2, WHICH LIKED CALIFORNIA'S PROPOSITION 209 PROHIBITS CONSIDERATION OF RACE OR GENDER IN PUBLIC EMPLOYMENT, EDUCATION AND CONTRACTING

WHEREAS, City of Oakland and other local government entities in California have been subject to Proposition 209, which is virtually identical to Michigan's Proposal 2, since it was enacted by the California electorate in 1996; and

WHEREAS, several years ago, the State of Michigan passed Proposal 2, which like California's Proposition 209 prohibits consideration of gender or race in public education, public contracting and public employment; and

WHEREAS, several entitles (the "plaintiffs") challenged the constitutionality of Proposal 2 focusing on the prohibition against affirmative action In education; and

WHEREAS, the plaintiffs were unsuccessful in the United States District Court and appealed to the Sixth Circuit Court of Appeals; and

WHEREAS, a three-judge panel of the Sixth Circuit ruled that Proposal 2 was unconstitutional based on two United States Supreme Court cases that prohibit placing political barriers in the way of women and minorities who seek to achieve beneficial legislation; and

WHEREAS, the plaintiffs' theory which the three-judge panel embraced, is that any group that wants preferential treatment in contracting (veterans, disabled, etc.) has the right to petition their local government for that preference, and that Proposal 2's preclusion of that right to women and minorities violates the Equal Protection Clause of the United States Constitution; and

WHEREAS, this is the same argument that San Francisco, Oakland and other public entities made in the United States Court of Appeals for the Ninth Circuit regarding Proposition 209; however the Ninth Circuit ruled against us; and

WHEREAS, the Sixth Circuit has granted en banc review of the three-judge panel's decision, and the amicus brief explains why the Ninth Circuit's decision was flawed and urges the Sixth Circuit to affirm the three-judge panel's decision; now therefore be it

RESOLVED, that the City Council authorizes the City Attorney on behalf of the City of Oakland to join in and sign onto an amicus brief in the Sixth Circuit asking the Court of Appeals to affirm the decision of the Sixth Circuit's three-judge panel striking down Michigan's Proposal 2 on equal protection grounds.

IN COUNCIL, OAKLAND, CALIFORNIA,

PASSED BY THE FOLLOWING VOTE:

BROOKS, BRUNNER, DE LA FUENTE, KAPLAN, KERNIGHAN, NADEL, SCHAAF AND PRESIDENT REID

AYES-
NOES –
ABSENT –
ABSTENTION –

ATTEST:

LATONDA SIMMONS
City Clerk and Clerk of the Council of
the City of Oakland, California