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Debunking the Myth That Subdivision (c) of the California Civil Rights Initiative Lessens the Standard of Judicial Review of Sex Classifications in California

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I. Introduction

In November 1996, Californians will vote on Proposition 209, a proposed amendment to the California Constitution known as the

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California Civil Rights Initiative ("CCRI").[1] The CCRI provides in part that "[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."[2] The text of the CCRI also contains additional subdivisions which limit the effect of the amendment, including subdivision (c), which prevents the amendment from invalidating bona fide qualifications based on sex that are presently permitted under state or federal law.[3] Subdivision (c) of the CCRI states: "Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education,

1. Bill Jones, Secretary of State, Proposition 209, *in* CALIFORNIA BALLOT PAMPHLET, GENERAL ELECTION, NOV. 5, 1996 (forthcoming Sept. 1996).

2. *Id.* The full text of the CCRI is as follows:

PROPOSED AMENDMENT TO ARTICLE I

Section 31 is added to Article I of the California Constitution as follows:

Sec. 31. (a) The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

(b) This section shall apply only to action taken after the section's effective date.

(c) Nothing in this section shall be interpreted as prohibiting bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment, public education, or public contracting.

(d) Nothing in this section shall be interpreted as invalidating any court order or consent decree which is in force as of the effective date of this section.

(e) 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.

(f) For the purposes of this section, "state" shall include, but not necessarily be limited to, the state itself, any city, county, city and county, public university system, including the University of California, community college district, school district, special district, or any other political subdivision or governmental instrumentality of or within the state.

(g) The remedies available for violations of this section shall be the same, regardless of the injured party's race, sex, color, ethnicity, or national origin, as are otherwise available for violations of then-existing California antidiscrimination law.

(h) This section shall be self-executing. If any part or parts of this section are found to be in conflict with federal law or the United States Constitution, the section shall be implemented to the maximum extent that federal law and the United States Constitution permit. Any provision held invalid shall be severable from the remaining portions of this section.

Id.

3. *See supra* note 2.

or public contracting."[4] Opponents of the CCRI have seized upon the language in subdivision (c) regarding bona fide sex qualifications, and have argued that it will impact the judicial level of scrutiny applied generally to sex classifications.[5] That assertion is erroneous.

Subdivision (c) of the CCRI does not weaken the existing protections against sex discrimination provided by federal or state laws and constitutions. The bona fide qualification language in subdivision (c) is borrowed directly from the bona fide occupational qualification ("BFOQ") provision of the Civil Rights Act of 1964; BFOQs are also specifically recognized in California's own antidiscrimination laws.[6] The United States Supreme Court has made clear that such qualifications constitute "an extremely narrow exception to the general prohibition of discrimination on the basis of sex."[7] Subdivision (c) ensures that some vital and extremely narrow sex qualifications—having to do mainly with privacy interests—that are already permitted by existing law are not inadvertently preempted by the CCRI.[8]

This Article explores how the opposition has created a mythical "women's issue" in a purposeful attempt to instill fear in white middle-class women, the group the opposition considers the swing vote in the upcoming general election. It also discusses how BFOQs are a recognized and limited exception to antidiscrimination statutes. The Article's purpose is to dispel the myth that subdivision (c) of the CCRI impacts the level of judicial scrutiny afforded sex classifications under the Equal Protection Clause of the California Constitution.

4. *See supra* note 2.

5. *See, e.g.*, Erwin Chemerinsky & Laurie Levenson, *Sex Discrimination Made Legal; Affirmative Action: The Proposed Civil Rights Initiative Would Loosen the Government Standard*, L.A. TIMES, Jan. 10, 1996, at B9.

6. *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(e) (1994); California Fair Employment and Housing Act ("FEHA"), CAL. GOV'T CODE § 12940 (West 1992 & Supp. 1996).

7. Dothard v. Rawlinson, 433 U.S. 321 (1977).

8. *See* Healey v. Southwood Psychiatric Hosp., 78 F.3d 128 (3rd Cir. 1996) (hospital serving emotionally disturbed and sexually abused boys and girls could consider sex in making shift assignments to ensure same-sex supervision of personal hygiene activities); Hernandez v. University of St. Thomas, 793 F.Supp. 214 (D. Minn. 1992) (male custodian who sought employment in women's dorm denied summary judgment because factual considerations remained regarding bona fide occupational qualifications).

II. Creation of a (Mythical) "Women's Issue" Is Meant to Scare White Middle-Class Women, Who the Opposition Considers to Be the Swing Vote

Groups who oppose the CCRI consider white middle-class women the swing vote in the election.[9] Therefore, creating interest among such women in opposing the CCRI is critical to the opposition's efforts to defeat it.[10] It is not surprising then that CCRI opponents have tried to create fear about the CCRI's impact on women.

In particular, some opponents of the CCRI argue that the language contained in subdivision (c) regarding bona fide sex qualifications will lessen the standard of review in gender discrimination cases from strict scrutiny to rational basis.[11] In support of their view, they argue that the words "reasonably necessary"[12] contained in subdivision (c) are meant to precipitate a lower "rational basis" standard of review of sex classifications under the California Constitution.[13] That is simply not true.[14]

In fact, the words "reasonably necessary" in subdivision (c) have nothing to do with the constitutional level of scrutiny afforded classifications based on sex. These words are contained in the very definition of BFOQs, which are recognized exceptions to state and federal antidiscrimination statutes.[15]

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9. *See* Jorge Aquino, *East Bay Lawyer at Center of Affirmative Action Debate*, RECORDER, Mar. 29, 1996, at 1.

10. *See* Cathleen Decker, *Bid to Fight Affirmative Action Ban Announced*, L.A. TIMES, Feb. 23, 1996, at B1; Lawrence J. Siskind, *California Civil Rights Initiative Isn't for Men Only*, WALL ST. J., June 5, 1996, at A15; Stuart Taylor Jr., *Affirmative Deception: Supporters of Preferences Use Dishonest Arguments to Make Their Case*, RECORDER, May 15, 1996, at 1; *see also* Amy Chance, *Demo Anti-Initiative Drive Aimed at Women*, SACRAMENTO BEE, Apr. 15, 1996, at A1. However, by some reports, opponents claim that subdivision (c) lowers the standard of review from strict scrutiny, California's current standard of judicial review of classifications based on sex, to the intermediate level of scrutiny applied under the Equal Protection Clause of the federal constitution. *See infra* notes 11-13 and accompanying text.

11. *See* Aquino, *supra* note 9.

12. *See supra* note 2.

13. *See* Chemerinsky & Levenson, *supra* note 5.

14. *See Hokum vs. CCRI*, ORANGE COUNTY REG., Aug. 25, 1996, at 4; Sally Pipes & Eugene Volokh, *Women Need Not Fear the Civil Rights Initiative; CCRI: Its Language Strengthens Rather Than Weakens Laws Against Sex Discrimination*, L.A. TIMES, Jan. 24, 1996, at B9; *The California Civil Rights Initiative . . . Will It Discriminate Against Women? No—Clause C Won't Change the Laws That Already Prohibit It*, SAN JOSE MERCURY NEWS, July 14, 1996, at 6P; *see also* Linda Seebach, *Affirmative Action Excess Led to Drive*, CONTRA COSTA TIMES (Walnut Creek, Cal.), Mar. 31, 1996, at B7.

15. *See, e.g.*, 42 U.S.C. § 2000e-2(e) ("Notwithstanding any other provision of this subchapter . . . it shall not be an unlawful employment practice for an employer to hire . . . on

Thus, the opposition has taken the words entirely out of context. As will be shown below, BFOQs are recognized limited exceptions and defenses to state and federal antidiscrimination laws.[16] Moreover, even such limited exceptions are still subject to judicial review on equal protection principles.[17]

The following examination of California and federal law interpreting BFOQs shows that despite use of the words "reasonably necessary," stringent requirements must be met in order to sustain a bona fide qualification based on sex, and that sex classifications reviewed under the Equal Protection Clause of the California Constitution are subject to strict scrutiny.[18]

III. BFOQs Are a Recognized Limited Exception to State and Federal Antidiscrimination Statutes and Provide Vital Legal Safeguards for Both Men and Women

Bona fide occupational qualifications are a recognized limited exception to California and federal antidiscrimination statutes.[19] The availability of a BFOQ defense has been described as "an extremely narrow exception to the general prohibition of discrimination on the basis of sex."[20] Examples of BFOQs include qualifications concerning shift scheduling to ensure same-sex supervision of personal hygiene activities at a children's hospital,[21] male-only certifications for chaplain positions at a California Youth Authority training facility,[22] and male-only prison guards in "contact positions" in maximum security

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the basis of . . . sex . . . where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . . .").

16. *See generally* Dothard v. Rawlinson, 433 U.S. 321 (1977) (explaining application under Title VII); Bohemian Club v. Fair Employment & Hous. Comm'n, 187 Cal. App. 3d 1 (1986) (explaining similar application under FEHA, CAL. GOV'T CODE §§ 12940, 12945 (West 1992 & Supp. 1996)).

17. Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1 (1971) (finding no BFOQ and holding that prohibition against females from tending bar except in limited situations violates Equal Protection Clause of California and United States Constitutions).

18. *Id.* at 16-18 (finding sex a suspect classification subject to strict scrutiny); *see also* Long v. State Personnel Bd., 41 Cal. App. 3d 1000, 1015-18 (1974) (stating that stringent requirements that must be met to sustain BFOQ defense to sex discrimination claim often lead to same results as does strict scrutiny of classification in Equal Protection analysis under California Constitution).

19. *See* 42 U.S.C. § 2000e-2(e); CAL. GOV'T CODE §§ 12940, 12945.

20. Johnson Controls, Inc. v. Fair Employment & Hous. Comm'n, 218 Cal. App. 3d 517, 541 (1990) (citing *Dothard*, 433 U.S. at 324).

21. Healey v. Southwood Psychiatric Hosp., 78 F.3d 128 (3rd Cir. 1996).

22. *Long*, 41 Cal. App. 3d at 1000 (holding that personnel board's certification of male-only chaplain position at youth training center operated by California Youth Authority came within exception to sex discrimination under 42 U.S.C. § 2000e-2(e)).

prisons where the possibility of physical injury to a female guard would be particularly high.[23]

Courts have often found that certain purported sex-based qualifications are not bona fide. For example, courts have disallowed BFOQs in cases in which a fraternal organization claimed male-only gender qualifications for employees because its members preferred male employees;[24] in which a woman was denied a cook's position at a county sheriff's department;[25] in which only female liquor licensees, wives, daughters, or sisters were permitted to tend bar;[26] and in which an airline hired only female flight attendants.[27] Courts have also struck down weight-lifting restrictions for women[28] and exclusionary job categories.[29] "Fetal protection programs" have been invalidated as not supported by any bona fide occupational qualification that would allow classification of fertile women in employment.[30]

In fact, under existing caselaw, to find a valid BFOQ based on sex, the court must find that the qualification is reasonably necessary to the normal operation of the particular business *and* that "all or substantially all" members of that sex fail to satisfy the occupational qualification.[31] In cases involving male-only qualifications, the employer has the burden of proving that there is a reasonable cause to believe,

23. *See Dothard*, 433 U.S. at 334-35 (holding that women may be excluded from working as prison guards in "contact positions" in maximum security prisons because of possibility of attack by male inmates); *see also* County of Alameda v. Fair Employment & Hous. Comm'n, 153 Cal. App. 3d 499 (1984) (citing Smith v. Fairman, 678 F.2d. 52, 54 (7th Cir. 1982)) (limiting BFOQs to circumstances where possibility of physical injury to female applicant is high, and requiring governmental agency to make suitable accommodations where privacy interests of those served by employees clash with applicant's right to obtain job without sexual discrimination).

24. Bohemian Club v. Fair Employment & Hous. Comm'n, 187 Cal. App. 3d 1 (1986) (reversing trial court's judgment which had set aside a Fair Employment and Housing Commission order requiring club to cease its practice of refusing to consider women for employment).

25. *Alameda*, 153 Cal. App. 3d at 506 (finding county's reasons for not hiring woman as cook were pretextual and that gender-based classification was not BFOQ because security would not have been disrupted by female cook).

26. Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 14 (1971) (citing McCrimmon v. Daley, 2 Fair Empl. Prac. Cas. (BNA) 971 (N.D. Ill. 1970)).

27. Diaz v. World Airways, Inc., 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971).

28. Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969).

29. Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969).

30. Johnson Controls, Inc. v. Fair Employment & Hous. Comm'n, 218 Cal. App. 3d 517 (1990) (finding employer unable to sustain BFOQ defense to employment discrimination complaint by female applicant who was denied employment when she declined to produce medical evidence of infertility).

31. *See id.* at 540.

described as a factual basis for believing, that all or substantially all women would be unable to perform the duties of the job safely and efficiently.[32] In addition, with respect to asserted qualifications based on sex, the employer must prove that it is not possible to rearrange job responsibilities to eliminate the need for a sex-based qualification.[33]

The requirements for establishing a BFOQ under California's Fair Employment and Housing Act[34] are viewed as generally analogous to the requirements articulated in federal precedent interpreting the Civil Rights Act of 1964.[35] The California Code of Regulations sets out specific situations in which the Fair Employment and Housing Commission has determined that BFOQs are not justified. Factors deemed as not justifying a BFOQ include:

> (1) A correlation between individuals of one sex and physical agility or strength;
> (2) A correlation between individuals of one sex and height;
> (3) Customer preference for employees of one sex;
> (4) The necessity for providing separate facilities for one sex or
> (5) The fact that members of one sex have traditionally been hired to perform the particular type of job.[36]

Moreover, personal privacy considerations may provide justification only where:

> (1) The job requires an employee to observe other individuals in a state of nudity or to conduct body searches, and
> (2) It would be offensive to prevailing social standards to have an individual of the opposite sex present, and
> (3) It is detrimental to the mental or physical welfare of individuals being observed or searched to have an individual of the opposite sex present.[37]

Therefore, although the words "reasonably necessary" are contained within subdivision (c), much more than a "rational basis" review is required to sustain such sex-based qualifications. Indeed, this stringent standard regarding BFOQs often leads to the same results as

32. Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 14 (1971) (citing *Weeks*, 408 F.2d at 235).

33. *See* Hardin v. Stynchcomb, 691 F.2d 1364, 1370-71 (11th Cir. 1982); *Johnson Controls*, 218 Cal. App. 3d at 541.

34. CAL. GOV'T CODE §§ 12900-12996 (West 1992 & Supp. 1996).

35. 42 U.S.C. §§ 2000e-2000e-17 (1994 & Supp. 1995); *see* Carr v. Barnabey's Hotel Corp., 23 Cal. App. 4th 14 (1994) (using federal precedent in interpretation of FEHA because FEHA deemed analogous to Title VII); Bohemian Club v. Fair Employment & Hous. Comm'n, 187 Cal. App. 3d 1, 20 (1986) (explaining requirements for establishment of bona fide occupational qualifications).

36. CAL. CODE REGS. tit. 2, § 7290.8 (1990).

37. *Id.; Bohemian Club*, 187 Cal. App. 3d at 20.

the strict scrutiny standard of review under the Equal Protection Clause of the California Constitution.[38]

IV. The Strict Scrutiny Standard of Review for Classifications Based on Sex Under the Equal Protection Clause of the California Constitution Is Not Impacted by Subdivision (c)

While the United States Constitution has been interpreted as requiring intermediate review of classifications based on sex, the California Supreme Court has interpreted the California Constitution as requiring strict scrutiny of sex classifications.[39] Under the strict scrutiny standard applied to sex classifications under the California Constitution, "the state bears the burden of establishing not only that it has a *compelling* interest which justifies the law but that the distinctions drawn by the law are *necessary* to further its purpose."[40] This would remain unchanged by the CCRI because subdivision (c) expressly contains the qualification, *"[n]othing in this section."* If adopted, the CCRI will become another section of the California Constitution. The words "[n]othing in this section," contained in subdivision (c), will limit its effect to matters contained within the new section—Article I, Section 31.[41] Therefore, it will have no effect on the level of constitutional scrutiny that courts apply to sex-based classifications under the Equal Protection provisions of the California Constitution. Consequently, any purported BFOQs or sex classifications that are presently prohibited under the California Constitution will remain prohibited or restricted after the adoption of the CCRI.

V. Conclusion

As shown above, the words "reasonably necessary" within subdivision (c) do not relate to the level of judicial scrutiny applied to sex-based classifications. Rather, the words are taken directly from the definition of the BFOQ provision of the Civil Rights Act of 1964, which qualifications are recognized in California's own antidiscrimina-

38. *See* Long v. State Personnel Bd., 41 Cal. App. 3d 1000, 1018 (1974); Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1 (1971).

39. *Sail'er Inn,* 5 Cal. 3d at 13, 15, 16-18 n.15; *see also* Craig v. Boren, 429 U.S. 190 (1976) (intermediate standard of review of sex classifications under the Equal Protection Clause of the United States Constitution).

40. Long v. State Personnel Bd., 41 Cal. App. 3d 1000, 1008 (1974) (citing *Sail'er Inn,* 5 Cal. 3d at 16-18).

41. *See supra* note 2.

tion laws. BFOQs are recognized exceptions to state and federal antidiscrimination laws. Because the CCRI is an additional prohibition on certain discrimination, it is important and appropriate to include subdivision (c) to ensure that such necessary exceptions, already recognized in other antidiscrimination laws, are not inadvertently preempted by subdivision (a) of the text. Most importantly, however, because subdivision (c) relates only to the provisions of the CCRI—"*[n]othing in this section*"—it has absolutely no impact on the strict level of scrutiny applied to sex classifications under the Equal Protection Clause of the California Constitution.