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LEGAL PROCESS #2

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7  
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 COUNTY OF SACRAMENTO  
10

11 WARD CONNERLY, a citizen and taxpayer, )  
12 and AMERICAN CIVIL RIGHTS )  
FOUNDATION, a nonprofit public benefit )  
13 corporation, )

14 Plaintiffs and Petitioners, )

15 v. )

16 STATE OF CALIFORNIA, ELAINE M. )  
17 HOWLE, in her official capacity as the )  
STATE AUDITOR OF CALIFORNIA, and )  
18 the CALIFORNIA CITIZENS )  
REDISTRICTING COMMISSION, )

19 Defendants and Respondents. )  
20

CASE NO. 34-2011-80000966-CU-WM-GDS

**THE STATE AUDITOR'S  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
DEMURRER TO FIRST AMENDED  
COMPLAINT**

Date: June 1, 2012

Time: 9:00 a.m.

Dept: 31

Judge: The Honorable Michael P. Kenny

Action Filed: October 4, 2011

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I.

INTRODUCTION

California State Auditor Elaine M. Howle (“State Auditor”) demurs to Petitioners’ First Amended Complaint because the complaint fails to state a claim. The State Auditor also joins in the demurrer filed by the State of California and the California Citizens Redistricting Commission (collectively, the “Redistricting Commission”).

This case involves two voter initiatives – both of which amended the California Constitution – Proposition 11 and Proposition 209. Proposition 11 is a 2008 initiative, which amended the California Constitution to change the redistricting process by creating a fourteen member independent Redistricting Commission. (Cal. Const., art. XXI.) Proposition 11 also contains statutory provisions to implement the constitutional amendment. (See Gov. Code, §§ 8251 *et seq.*) The purpose of Proposition 11 was to reform the redistricting process and take it out of “the partisan battles of the Legislature.” (Proposition 11, § 2, subd. (d).) Under Proposition 11, the new independent Redistricting Commission would “draw districts based on strict, nonpartisan rules designed to ensure fair representation.” (*Ibid.*) The constitutional amendment requires the selection process for the members of the Redistricting Commission be “designed to produce a commission that is independent from legislative influence and reasonably representative of the State’s diversity.” (Cal. Const., art. XXI, § 2, subd. (c).)

Petitioners’ complaint is a facial challenge to Proposition 11’s statutory provision that implements the constitutional mandate for a “diverse” Redistricting Commission. Specifically, Petitioners challenge as unconstitutional the statute’s requirement that the eight initial members of the Redistricting Commission select the remaining six members “to ensure the commission reflects this state’s diversity, including, but not limited to, racial, ethnic, geographic, and gender diversity.” (Gov. Code, § 8252, subd. (g).) Petitioners base their challenge on Proposition 209, the 1996 initiative that amended the California Constitution and provides in relevant part:

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.

(Cal. Const., art. I, § 31, subd. (a) [hereinafter, “Proposition 209” or “Section 31”].)



1 In conjunction with conducting the application process, the State Auditor “shall establish  
2 an Applicant Review Panel consisting of three qualified independent auditors, to screen  
3 applicants.” (Gov. Code, § 8252, subd. (b).) The members of the Applicant Review Panel must  
4 be employed by the State and licensed by the California Board of Accountancy. (*Ibid.*) The  
5 Applicant Review Panel shall select “60 of the most qualified applicants,” consisting of 20 who  
6 are registered as Democrats, 20 who are registered as Republicans, and 20 who are not registered  
7 with either party. (Gov. Code, § 8252, subd. (d).) Each subpool of 20 applicants “shall be created  
8 on the basis of relevant analytical skills, ability to be impartial, and appreciation for California’s  
9 diverse demographics and geography.” (*Ibid.*) The names of the 60 applicants then are presented  
10 to the Legislature where the legislative leaders may strike up to eight applicants from each of the  
11 subpools. (Gov. Code, § 8252, subd. (e).) The State Auditor then randomly draws eight names  
12 from the remaining pool of applicants: three Democrats, three Republicans, and two who are not  
13 registered with either party. (Gov. Code, § 8252, subd. (f).) These eight individuals are appointed  
14 as the first eight members of the Redistricting Commission. (*Ibid.*)

15 The statute provides that the first eight members of the Redistricting Commission shall  
16 review the remaining names in the applicant pool and appoint six applicants to the commission.  
17 (Gov. Code, § 8252, subd. (g).) Section 8252, subdivision (g), the provision at issue here, reads as  
18 follows:

19 No later than December 31 in 2010, and in each year ending in the number zero  
20 thereafter, the eight commissioners shall review the remaining names in the pool  
21 of applicants and appoint six applicants to the commission as follows: two from  
22 the remaining subpool of applicants registered with the largest political party in  
23 California based on registration, two from the remaining subpool of applicants  
24 registered with the second largest political party in California based on  
25 registration, and two from the remaining subpool of applicants who are not  
26 registered with either of the two largest political parties in California based on  
27 registration. The six appointees must be approved by at least five affirmative  
28 votes which must include at least two votes of commissioners registered from  
each of the two largest parties and one vote from a commissioner who is not  
affiliated with either of the two largest political parties in California. The six  
appointees shall be chosen to ensure the commission reflects this state’s diversity,  
including, but not limited to, racial, ethnic, geographic, and gender diversity.  
However, it is not intended that formulas or specific ratios be applied for this  
purpose. Applicants shall also be chosen based on relevant analytical skills and  
ability to be impartial.

(Gov. Code, § 8252, subd. (g).)

1 **B. Procedural History**

2 On October 4, 2011, Petitioners filed their original complaint alleging that Government  
3 Code section 8252, subdivision (g), violates Proposition 209. (Complaint, ¶ 1.) Petitioners  
4 alleged that “in selecting the final six members to the Citizens Redistricting Commission,  
5 Government Code section 8252(g) requires the first eight members of the Commission to grant  
6 preferential treatment to applicants on the basis of race, ethnicity, and gender, and accordingly, to  
7 discriminate against other applicants on the same basis.” (*Ibid.*)

8 The Redistricting Commission filed a demurrer to the Complaint on the primary grounds  
9 that the members of the Redistricting Commission are public officers, not employees; thus,  
10 Proposition 209 does not apply. The State Auditor filed an answer to the original Complaint.

11 In response to the demurrer, Petitioners filed a First Amended Complaint which includes  
12 their original allegations and now alleges a second theory:

13 Second, the public employees of the Applicant Review Panel, when reviewing  
14 applications to the Citizens Redistricting Commission, must consider the race,  
15 ethnicity, and sex of the applicants so that the first eight members of the  
16 Commission can meet their statutory duties in appointing the final six members so  
that the composition of the Commission reflects the state’s race, sex, and ethnic  
diversity.

17 (First Amended Complaint, ¶ 2.) This second theory is set forth in the second and fourth causes of  
18 action. (See *id.*, ¶¶ 30-34, 46-51.) As discussed in detail below, this second theory is just as  
19 meritless as the first and fails to state a claim because it contains the same flaws as the allegations  
20 in the original Complaint.

21 **III.**

22 **GOVERNING LAW**

23 In considering the constitutionality of a legislative act, the Court presumes its validity and  
24 resolves all doubts in favor of the act. (*California Housing Finance Agency v. Elliott* (1976) 17  
25 Cal.3d 575, 594.) Unless conflict with a constitutional provision is “clear and unquestionable,”  
26 the Court must uphold the act. (*Ibid.*) Wherever possible, the Court will interpret a statute as  
27 consistent with the applicable constitutional provisions, seeking to harmonize the Constitution and  
28 the statute. (*Ibid.*)



1 In interpreting a voter initiative, the Court applies the same principles that govern statutory  
2 construction. (*California Chamber of Commerce v. Brown* (2011) 196 Cal.App.4th 233, 248.)  
3 The court must “turn first to language of the statute, giving the words their ordinary meaning.”  
4 (*Ibid.*) The statutory language also must be construed in the context of the statute as a whole and  
5 the overall statutory scheme in light of the electorate’s intent. (*Ibid.*) When the language is  
6 ambiguous, the Court must “refer to other indicia of the voters’ intent, particularly the analyses  
7 and arguments contained in the official ballot pamphlet.” (*Ibid.*)

8 **IV.**  
9 **ARGUMENT**

10 **A. The State Auditor Joins in the Arguments of the Redistricting Commission.**

11 The State Auditor joins in the arguments made by the Redistricting Commission in support  
12 of its demurrer to the First Amended Complaint. (*See* Redistricting Commission’s MPA.) Those  
13 arguments are not repeated here for the sake of brevity.

14 **B. Section 8252, subdivision (g), Does Not Involve “The Operation of Public  
15 Employment, Public Education, or Public Contracting.”**

16 In their second and fourth causes of action, Petitioners contend that Government Code  
17 section 8252, subdivision (g), is unconstitutional because “section 8252(g) requires public  
18 employees on the Applicant Review Panel to grant preferences and discriminate against  
19 individuals on the basis of their race, ethnicity, and sex when determining the 60 most qualified  
20 applicants to be included in the pool.” (First Amended Complaint, ¶ 31; ¶ 48 [“the public  
21 employees of the Applicant Review Panel must take into consideration the race, ethnicity, and sex  
22 of the applicants when reviewing applications to the Commission.”].) Petitioners’ claims are  
23 without merit because section 8252, subdivision (g), does not involve “the operation of public  
24 employment, public education or public contracting.”

25 Proposition 209’s prohibition against discrimination and preferential treatment on the basis  
26 of race, sex, color, ethnicity, or national origin is limited to the arenas of public employment,  
27 public education, and public contracting. Proposition 209 provides, in relevant part, as follows:

28 ///

1 The state shall not discriminate against, or grant preferential treatment to, any  
2 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.

3 (Cal. Const., art. I, § 31, subd. (a).) Petitioners fail to state a claim because section 8252,  
4 subdivision (g), simply does not involve “public employment, public education, or public  
5 contracting.”

6 **1. Members of the Redistricting Commission Are Public Officers, Not Public**  
7 **Employees.**

8 As discussed in detail in the Redistricting Commission’s Memorandum of Points and  
9 Authorities, Proposition 209 does not apply to the selection of members of the Redistricting  
10 Commission. (Redistricting Commission’s MPA at p. 5.) Petitioners allege that the members of  
11 the Redistricting Commission are public employees. (First Amended Complaint, ¶ 18.) They are  
12 wrong. As a matter of law, members of the Redistricting Commission are public officers, not  
13 public employees. (See *Coulter v. Pool* (1921) 187 Cal. 181, 186-187; *Dibb v. County of San*  
14 *Diego* (1994) 8 Cal.4th 1200, 1204.) The selection of members of the Redistricting Commission  
15 is not a matter of public employment or public contracting. The members are public officers and  
16 their selection, like the selection of any other public officer, is not governed by Proposition 209.

17 **2. Even Though the Applicant Review Panel Is Comprised of State Employees,**  
18 **Proposition 209 Does Not Apply.**

19 Petitioners argue that because the members of the Applicant Review Panel are public  
20 employees, Proposition 209 applies. This argument cannot be reconciled with the language of  
21 Proposition 209 and has absolutely no support in the case law.

22 The status of the members of the Applicant Review Panel as state employees does not  
23 cause the selection process to come within Proposition 209’s prohibition against discrimination  
24 and preferences in the operation of public employment or public contracting. The selection  
25 process still involves selecting applicants for service as public officers, not employees. All of the  
26 cases interpreting Proposition 209 have limited it to public employment, public education, and  
27 public contracting. (See, e.g., *Hi-Voltage Wire Works, Inc. v. City of San Jose* (2000) 24 Cal.4th  
28 537, 542 [holding that San Jose’s minority business enterprise and women business enterprise

1 (MBE/WBE) public contracting scheme violates Proposition 209]; *Coral Construction, Inc. v.*  
2 *City & County of San Francisco* (2010) 50 Cal.4th 315, 320 [applying Proposition 209 to the City  
3 of San Francisco’s public contracting ordinance]; *Connerly v. State Personnel Board* (2001) 92  
4 Cal.App.4th 16, 28 [holding that five “affirmative action” statutory schemes involving public  
5 contracting, state civil service, and employment at community colleges are unconstitutional under  
6 Proposition 209]; *Kidd v. State of California* (1998) 62 Cal.App.4th 386, 410 [finding violation of  
7 Proposition 209 where State Personnel Board had a policy of “supplemental certification” in  
8 hiring, which allowed certain minority and female applicants to be considered for state  
9 employment, even though they did not place in the top three ranks of the list of eligible  
10 candidates].)

11 “A constitutional amendment should be construed in accordance with the natural and  
12 ordinary meaning of its words.” (*Hi-Voltage Wire Works, Inc. v. City of San Jose, supra*, 24  
13 Cal.4th at p. 559 [quoting *Amador Valley Joint Union High School District v. State Board of*  
14 *Equalization* (1978) 22 Cal.3d 208].) Here, Petitioners seek an unnatural and unprecedented  
15 interpretation of Proposition 209 and the phrase “operation of public employment, public  
16 education, or public contracting.” The selection of members for the Redistricting Commission  
17 does not become the operation of public employment or public contracting simply because the  
18 Applicant Review Panel is comprised of state employees. As discussed in *Hi-Voltage Wire*  
19 *Works*, the proponents of Proposition 209 argued in the ballot pamphlet that “Government should  
20 not discriminate. It must not give a job, university admission, or a contract based on race or sex.”  
21 (*Hi-Voltage Wire Works*, at p. 561 [quoting Proposition 209 Ballot Pamphlet].)<sup>2</sup> Based on its  
22 review of the ballot arguments, the California Supreme Court concluded:

23 The ballot arguments – from which we draw our historical perspective – make clear  
24 that in approving Proposition 209, the voters intended section 31, like the Civil Rights  
25 Act as originally construed, *to achieve equality of public employment, education, and*  
*contracting opportunities* and to remove barriers that operate invidiously to  
discriminate on the basis of racial or other impermissible classification.

26  
27 <sup>2</sup> In the ballot pamphlet, the Legislative Analyst noted: “The measure would eliminate affirmative  
28 action programs used to increase hiring and promotion opportunities for state and local  
government jobs, where sex, race, or ethnicity are preferential factors in hiring, promotion,  
training, or recruitment decisions.” (*Kidd v. State of California, supra*, 62 Cal.App.4th at p. 407  
[quoting Ballot Pamphlet analysis for Proposition 209 by Legislative Analyst].)

1 (*Id.* at pp. 561-562 [internal citation and quotation marks omitted and emphasis added].)

2 Thus, the plain language of Proposition 209 and the case law confirm that its application is  
3 limited to public employment, public education, and public contracting. The selection of the  
4 members of the Redistricting Commission is not public employment or contracting – even though  
5 the Applicant Review Panel is made up of state employees. Accordingly, Proposition 209 does  
6 not apply.

7 **3. The Use of Public Resources in the Selection Process Does Not**  
8 **Convert It into the “Operation of Public Employment, Public**  
9 **Education, or Public Contracting.”**

10 Petitioners also allege, on information and belief, “that Defendants and Respondents are  
11 violating Section 31 by utilizing public resources, including public monies, when they consider  
12 race, ethnicity, and sex of applicants when appointing members to the Defendant Citizens  
13 Redistricting Commission.” (First Amended Complaint, ¶ 4.) No case supports this theory.  
14 Indeed, as discussed above, the cases interpreting Proposition 209 have limited it to public  
15 employment, public education, and public contracting. Quite simply, Proposition 209 has never  
16 been interpreted so broadly and in a manner so contrary to its plain language.

17 **C. Petitioners’ Second and Fourth Causes of Action Must Be Dismissed Because This Is**  
18 **a Facial Challenge and These Claims Contradict the Requirements of the Statute.**

19 This action is a facial challenge to Government Code section 8252, subdivision (g). (First  
20 Amended Complaint, ¶ 1.) Accordingly, as stated in *Sturgeon v. Bratton* (2009) 174 Cal.App.4th  
21 1407:

22 A facial challenge to the constitutional validity of a statute or ordinance considers  
23 only the text of the measure itself, not its application to the particular circumstances  
24 of an individual. To support a determination of facial unconstitutionality, voiding  
25 the statute as a whole, those challenging the statute or ordinance cannot prevail by  
26 suggesting that in some future hypothetical situation constitutional problems may  
possibly arise as to the particular *application* of the statute . . . Rather, the  
challengers must demonstrate that the act’s provisions inevitably pose a present  
total and fatal conflict with applicable constitutional prohibitions.

27 (*Id.* at p. 1418 [internal citations and quotation marks omitted, but emphasis in the original].)

28 ///

1 Here, Petitioners allege that the Applicant Review Panel is required to consider race and  
2 gender in order to provide the first eight Commissioners with a sufficiently diverse pool of  
3 applicants to meet the statutory requirements of ensuring that “the commission reflects the state’s  
4 diversity, including, but not limited to, racial, ethnic, geographic, and gender diversity.” (Gov.  
5 Code, § 8252, subd. (g); First Amended Complaint, ¶¶ 19, 22, 32, 48.) This allegation cannot be  
6 reconciled with the plain language of Government Code section 8252.

7 Under section 8252, subdivision (d), the Applicant Review Panel selects 60 of the “most  
8 qualified applicants,” consisting of 20 who are registered as Democrats, 20 who are registered as  
9 Republicans, and 20 who are not registered with either party. (Gov. Code, § 8252, subd. (d).) The  
10 statute requires that the Applicant Review Panel create the three subpools “on the basis of relevant  
11 analytical skills, ability to be impartial, and appreciation for California’s diverse demographics  
12 and geography.” (*Ibid.*). Thus, under the statute, the Applicant Review Panel is required to  
13 consider whether applicants have an “appreciation for California’s diverse demographics and  
14 geography.” Contrary to Petitioners’ allegations, the statute does not require the Applicant  
15 Review Panel to consider race or gender in selecting the 60 most qualified applicants. (*Ibid.*)  
16 Moreover, under section 8252, subdivision (g), the Applicant Review Panel does not have a role in  
17 selecting and appointing the final six members of the Redistricting Commission.

18 In sum, this is a facial challenge. Petitioners’ allegations are completely at odds with the  
19 statute’s directive to the Applicant Review Panel on how it must conduct the selection process.  
20 (See Gov. Code, § 8252, subd. (d).) Because a facial challenge considers only the text of the  
21 statute itself, and not its application, Petitioners’ claims must fail. (See *Sturgeon v. Bratton*,  
22 *supra*, 174 Cal.App.4th at p. 1418.) “Under a facial challenge, the fact that the statute, might  
23 operate unconstitutionally under some conceivable set of circumstances is insufficient to render it  
24 wholly invalid.” (*Ibid.* [internal quotation marks omitted].) Accordingly, the second and fourth  
25 causes of action are meritless and must be dismissed without leave to amend.

26 **D. Proposition 209 Must Be Harmonized With Proposition 11.**

27 Proposition 11 includes both constitutional provisions and statutory provisions. Article  
28 XXI, section 2 of the California Constitution provides that “The selection process is designed to

1 produce a commission that is independent from legislative influence and *reasonably*  
2 *representative of the State's diversity.*" (Cal. Const., art. XXI, § 2, subd. (c)(1) [emphasis added].)  
3 Proposition 11's statutory provisions "implement[] Article XXI of the California Constitution by  
4 establishing the process for the selection and governance of the Citizens Redistricting  
5 Commission." (Gov. Code, § 8251.) Section 8252, subdivision (g) states: "The six appointees  
6 shall be chosen to ensure the commission reflects this state's *diversity*, including, but not limited  
7 to, racial, ethnic, geographic, and gender diversity." (Gov. Code, § 8252, subd. (g) [emphasis  
8 added].)

9 Petitioners contend that they only are challenging section 8252, subdivision (g), on  
10 grounds that it is unconstitutional under Proposition 209. However, their claims create a direct  
11 conflict between the constitutional provisions of Proposition 11 and Proposition 209 because the  
12 word "diversity" must mean the same thing in Proposition 11's constitutional mandate as it does in  
13 the section challenged by Petitioners – section 8252, subdivision (g). The law requires that the  
14 constitutional provisions in Proposition 11 and Proposition 209 must be harmonized. (*City &*  
15 *County of San Francisco v. County of San Mateo* (1995) 10 Cal.4th 554, 563 ["In choosing  
16 between alternative interpretations of constitutional provisions we are further constrained by our  
17 duty to harmonize various constitutional provisions in order to avoid the implied repeal of one  
18 provision for another."].)

19 Here, the two constitutional provisions can be harmonized by interpreting the plain  
20 language of Proposition 209 and appropriately limiting its application to "public employment,  
21 public education, or public contracting." When interpreted in this manner, consistent with the  
22 express language of Proposition 209, there is no conflict between the two constitutional  
23 provisions. For this additional reason, the First Amended Complaint fails to state a claim and the  
24 demurrer must be sustained.

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V.

**CONCLUSION**

For all the foregoing reasons and those set forth in the Redistricting Commission's Memorandum of Points and Authorities, the State Auditor respectfully requests that the demurrer be sustained in its entirety.

Dated: April 30, 2012

MENNEMEIER, GLASSMAN & STROUD LLP

By: Margaret Carew Toledo  
Margaret Carew Toledo  
Attorneys for Defendant and Respondent  
Elaine M. Howle, State Auditor of California

**PROOF OF SERVICE BY MAIL**  
(Code Civ. Proc. Secs. 1013(a), 2015.5)

I declare that I am employed with the law firm of Mennemeier, Glassman & Stroud LLP, whose address is 980 9<sup>th</sup> Street, Suite 1700, Sacramento, California 95814; I am not a party to the within cause; I am over the age of eighteen years and I am readily familiar with Mennemeier, Glassman & Stroud LLP's practice for collection and processing of correspondence for mailing with the United States Postal Service and know that in the ordinary course of Mennemeier, Glassman & Stroud LLP's business practice the document described below will be deposited with the United States Postal Service on the same date that it is placed at Mennemeier, Glassman & Stroud LLP with postage thereon fully prepaid for collection and mailing.

I further declare that on the date hereof I served a copy of:

**STATE AUDITOR'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPORT OF  
DEMURRER TO FIRST AMENDED COMPLAINT**

on the following by placing a true copy thereof enclosed in a sealed envelope addressed as follows for collection and mailing at Mennemeier, Glassman & Stroud LLP, 980 9<sup>th</sup> Street, Suite 1700, Sacramento, California 95814, in accordance with Mennemeier, Glassman & Stroud LLP's ordinary business practices:

Sharon L. Browne  
Ralph W. Kasarda  
Joshua Thompson  
Adam R. Pomeroy  
Pacific Legal Foundation  
930 G Street  
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San Francisco, CA 94102-7004

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

Executed at Sacramento, California, this 30<sup>th</sup> day of April, 2012.

  
Cindie Wilding