

1 KAMALA D. HARRIS
Attorney General of California
2 TAMAR PACHTER
Supervising Deputy Attorney General
3 DANIEL J. POWELL
Deputy Attorney General
4 State Bar No. 230304
455 Golden Gate Avenue, Suite 11000
5 San Francisco, CA 94102-7004
Telephone: (415) 703-5830
6 Fax: (415) 703-1234
E-mail: Daniel.Powell@doj.ca.gov
7 Attorneys for State of California and the
California Citizens Redistricting Commission

12 APR 30 PM 2:49
LEGAL PROCESS #3

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

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

14 Plaintiffs and Plaintiffs,

15 v.

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

20 Defendants and Defendants.

Case No. 34-2011-80000966-CU-WM-GDS

**NOTICE OF HEARING AND
DEMURRER TO FIRST AMENDED
VERIFIED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF AND PETITION FOR WRIT OF
MANDATE ON BEHALF OF STATE OF
CALIFORNIA AND THE CALIFORNIA
CITIZENS REDISTRICTING
COMMISSION; MEMORANDUM OF
POINTS AND AUTHORITIES**

Date: June 1, 2012
Time: 9:00 a.m.
Dept: 31
Judge: Hon. Michael P. Kenny

21
22
23
24
25
26
27
28
FILED BY FAX

1 **NOTICE OF HEARING**

2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE that on June 1, 2012, at 9:00 a.m. or as soon thereafter as the
4 matter may be heard, in Department 31 of the Gordon D. Schaber Sacramento County
5 Courthouse, located at 720 9th Street, Sacramento, California, defendants State of California and
6 the California Citizens Redistricting Commission (collectively, defendants) will and hereby do
7 demur to each and every cause of action in plaintiffs' first amended complaint.

8 This demurrer is brought under Code of Civil Procedure sections 422.10 and 430.10(e), and
9 Rule 3.1320 of the California Rules of Court upon the ground that the first amended complaint in
10 its entirety does not, and cannot, state facts sufficient to constitute a cause of action against the
11 defendants. Accordingly, defendants pray that the demurrer be granted without leave to amend.

12 Pursuant to Local Rule 3.04, the court will make a tentative ruling on the merits of this
13 matter by 2:00 p.m., the court day before the hearing. You may access and download the court's
14 ruling from the court's website at <http://www.saccourt.ca.gov>. If you do not have online access,
15 you may obtain the tentative ruling over the telephone by calling (916) 874-8142 and a deputy
16 clerk will read the ruling to you. If you wish to request oral argument, you must contact the clerk
17 at (916) 874-6353 in Department 31 and the opposing party before 4:00 p.m. the court day before
18 the hearing. If you do not call the court and the opposing party by 4:00 p.m. on the court day
19 before the hearing, no hearing will be held.

20 The demurrer is based upon this notice of hearing, demurrer and memorandum of points
21 and authorities, all pleadings and papers on file herein, the hearing, and any other such matters as
22 may properly come before this Court.

23 //

24 //

25 //

26 //

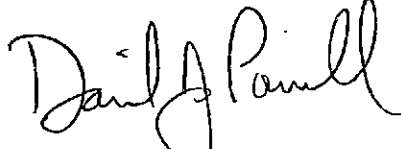
27 //

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: April 30, 2012

Respectfully Submitted,
KAMALA D. HARRIS
Attorney General of California
TAMAR PACHTER
Supervising Deputy Attorney General



DANIEL J. POWELL
Deputy Attorney General
*Attorneys for State of California and the
California Citizens Redistricting
Commission*

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DEMURRER

Defendants State of California and the California Citizens Redistricting Commission demur to the First Amended Verified Complaint for Declaratory and Injunctive Relief and Petition for Writ of Mandate on each of the following grounds:

Each and every cause of action fails to state facts sufficient to constitute a cause of action.

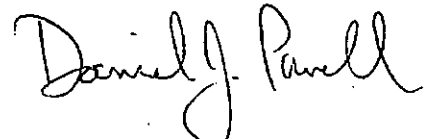
WHEREFORE, defendants, the State of California and the California Citizens Redistricting Commission, pray as follows:

1. That the demurrer be granted without leave to amend;
2. That plaintiffs take nothing by their complaint;
3. That judgment be entered in favor of the defendants;
4. That the defendants be awarded their costs; and
5. For such other and further relief as the Court deems proper.

Dated: April 30, 2012

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California
TAMAR PACTER
Supervising Deputy Attorney General



DANIEL J. POWELL
Deputy Attorney General
*Attorneys for State of California and the
California Citizens Redistricting
Commission*

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

Memorandum of Points and Authorities..... 1

Introduction..... 1

Background..... 2

 I. Proposition 11 2

 II. Summary of the complaint..... 4

Argument..... 5

 I. Legal standards..... 5

 II. Prop. 209 does not apply to the selection of public officers, including the
 members of the Redistricting Commission..... 5

 A. Members of the Redistricting Commission are public officers, not
 employees..... 6

 B. The selection and appointment of public officers is not governed by
 Prop. 209. 8

 1. By its terms Proposition 209 does not apply to public
 officers. 9

 2. Extending Proposition 209 to the selection of public officers
 would conflict with Article III, section 8. 10

 III. Even if prop. 209 applies to the appointment of a public officer, section
 8252(g) does not facially discriminate against any individual or group 11

 A. Section 8252(g) does not require the Applicant Review Panel to
 consider race or gender. 12

 B. Section 8252(g) does not discriminate against any group. 13

 C. Section 8252(g) does not discriminate against any individual..... 14

Conclusion 15

TABLE OF AUTHORITIES

		Page
1		
2		
3	CASES	
4	<i>Blank v. Kirwan</i>	
5	(1985) 39 Cal.3d 311	5
6	<i>Board of Supervisors v. Lonergan</i>	
7	(1980) 27 Cal.3d 855	11
8	<i>Bowens v. Superior Court</i>	
9	(1991) 1 Cal.4th 36	9
10	<i>California Alliance for Utility Safety and Education v. City of San Diego</i>	
11	(1997) 56 Cal.App.4th 1024	5
12	<i>City and County of San Francisco v. County of San Mateo</i>	
13	(1995) 10 Cal.4th 554	11
14	<i>Coulter v. Pool.</i>	
15	(1921) 187 Cal. 181	6, 7, 8
16	<i>Dibb v. County of San Diego</i>	
17	(1994) 8 Cal.4th 1200	6, 7, 8
18	<i>Hi-Voltage Wire Works, Inc. v. City of San Jose</i>	
19	(2000) 24 Cal.4th 537	14
20	<i>Jackson v. Teachers Insurance Co.</i>	
21	(1973) 30 Cal.App.3d 341	5
22	<i>Knight v. Superior Court</i>	
23	(2005) 128 Cal.App.4th 14	9
24	<i>Legislature v. Eu</i>	
25	(1991) 54 Cal.3d 492	9
26	<i>Methodist Hosp. of Sacramento v. Saylor</i>	
27	(1971) 5 Cal.3d 685	9
28	<i>People v. Falsetta</i>	
	(1999) 21 Cal.4th 903	8
	<i>People v. Hulbert</i>	
	(1977) 75 Cal.App.3d 404	7
	<i>Picton v. Anderson Union High School</i>	
	(1996) 50 Cal.App.4th 726	5

TABLE OF AUTHORITIES
(continued)

		Page
1		
2		
3	<i>Powers v. City of Richmond</i>	
4	(1995) 10 Cal.4th 85	9
5	<i>Prof. Engineers in Cal. Government v. Kempton</i>	
6	(2007) 40 Cal.4th 1016	9
7	<i>Samples v. Brown</i>	
8	(2007) 146 Cal.App.4th 787	12, 13
9	<i>Santa Clara County Local Transportation Authority v. Guardino</i>	
10	(1995) 11 Cal.4th 220	9
11	<i>Serrano v. Priest</i>	
12	(1971) 5 Cal.3d 584	11
13	<i>Tobe v. City of Santa Ana</i>	
14	(1995) 9 Cal.4th 1069	5, 12
15	<i>Wilson v. John Crane, Inc.</i>	
16	(2000) 81 Cal.App.4th 847	9
17	STATUTES	
18	California Code of Regulations	
19	Title 2, § 60860, subd. (b)	3, 4, 15
20	Title 2, § 60860, subd. (d)	4
21	Title 2, § 60860, subd. (f)	4, 15
22	Title 2, § 60860, subd. (g)	15
23	Title 2, § 60805, subd. (a)	13
24	Title 2, § 60858, subd. (d)	3
25	Code of Civil Procedure	
26	§ 430.50	5
27	Government Code	
28	§ 1450 et seq	7
	§ 1850 et seq	7
	§ 3000 et seq	7
	§ 3060	7
	§§ 8251 et seq	3

TABLE OF AUTHORITIES
(continued)

		Page
1		
2		
3	Government Code	
	§ 8252.....	passim
4	§ 8252.5, subd. (a).....	8
	§ 8252(g).....	passim
5	§ 8252, subd. (a)(2).....	3
6	§ 8252, subd. (d).....	3, 11
	§ 60848, subd. (f).....	3, 13
7	§ 60850, subd. (e).....	3, 13
8	Proposition 11.....	1, 2
9	Proposition 112.....	10, 11
10	Proposition 209.....	passim
11	CONSTITUTIONAL PROVISIONS	
12	California Constitution	
13	Article I, § 31.....	passim
	Article I, § 31, subd. (a).....	6, 13
14	Article III, § 8.....	10, 11
	Article III, § 8, subd. (a).....	10
15	Article III, § 8, subd. (c).....	11
16	Article IV, § 7, subd. (c)(1)(A).....	10
	Article VII, § 4, subd. (d).....	10
17	Article XI, § 4, subd. (e).....	7
	Article XI, § 7 1/2.....	7
18	Article XXI, § 1.....	2
19	Article XXI, § 2.....	15
	Article XXI, § 2, subd. (a)(2).....	3
20	Article XXI, § 2, subds. (a), (c)(4).....	8
	Article XXI, § 2, subd. (b).....	4
21	Article XXI, § 2, subd. (b)(5).....	4
	Article XXI, § 2, subd. (c)(1).....	1
22	Article XXI, § 2, subd. (c)(4).....	4
	Article XXI, § 2, subd. (d).....	4
23	Article XXI, § 2, subd. (g).....	4
24	Article XXI, § 2, subd. (i).....	8
25		
26		
27		
28		

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 In 2008, California voters adopted Proposition 11, which transferred from the Legislature to
4 a 14-member Citizen Redistricting Commission (Redistricting Commission) the authority to draw
5 election district lines for the Legislature and the Board of Equalization. The purpose of Prop. 11
6 was to eliminate the “partisan battles” of the Legislature and substitute an independent process
7 that would be open and ensure “fair representation” of all Californians. (Ballot Pamp., Gen. Elec.
8 (Nov. 4, 2008) text of Prop. 11, p. 137, sec. 2.) To achieve these goals, Prop. 11 specifically
9 amended the California Constitution to require that the members of the Redistricting Commission
10 be “independent from legislative influence and reasonably representative of the State’s diversity.”
11 (Cal. Const., art. XXI, § 2, subd. (c)(1).) In 2010, the California voters adopted Proposition 20,
12 which expanded the Redistricting Commission’s authority to draw election district lines to
13 include the California congressional delegation.

14 Plaintiffs contend that a statute included in Prop. 11, which implements its constitutional
15 diversity requirement, conflicts with Prop. 209, an earlier constitutional amendment that prohibits
16 discrimination in state employment, contracting, and education. (Cal. Const., art. I, § 31.)
17 Specifically, they challenge the validity of Government Code section 8252, subdivision (g)
18 (Section 8252(g)), which establishes the criteria for appointing six of the fourteen members of the
19 Redistricting Commission. (Ballot Pamp., Gen. Elec. (Nov. 4, 2008) text of Prop. 11, p. 139.) To
20 implement the constitutional requirement that the Redistricting Commission be “reasonably
21 representative of the State’s diversity,” Section 8252(g) requires these six members “be chosen to
22 ensure that the commission reflects this state’s diversity, including, but not limited to, racial,
23 ethnic, geographic, and gender diversity.” (Gov. Code, § 8252, subd. (g).) Plaintiffs claim that
24 this provision is a facial violation of Prop. 209 and is therefore invalid.

25 The operative First Amended Complaint (Complaint), however, fails to state a cause of
26 action as a matter of law. First, by its terms Prop. 209 does not apply to the appointment of the
27 members of the Redistricting Commission. There is a well-recognized distinction between public
28 employees, the selection of whom is governed by Prop. 209, and public officers, the selection of

1 whom is not. Under established case law, the Commissioners are public officers and not state
2 employees. Thus, Prop. 209 does not apply to Commissioners appointed pursuant to Section
3 8252(g). Second, even if Prop. 209 did govern the appointment of public officers, plaintiffs
4 cannot meet the demanding standard required to establish a facial violation. Section 8252(g) does
5 not govern the selection of the first eight Commissioners; their selection is governed by Section
6 8252, subdivision (b). This provision, as implemented by regulations promulgated by the State
7 Auditor, only requires that the first eight Commissioners appreciate "California's diverse
8 demographics and geography," and contains no requirement that the auditors consider either race
9 or gender when selecting the pool from which those first eight Commissioners are chosen.
10 Moreover, Section 8252(g) does not give preferential treatment to or discriminate against any
11 individual or group on the basis of race or gender. Section 8252(g) does precisely the opposite by
12 encouraging participation by individuals of *all* races and genders. Because the plaintiffs cannot
13 state a claim alleging a facial violation of Prop. 209, the State of California and the Redistricting
14 Commission request that the Court dismiss the complaint, without leave to amend.

15 BACKGROUND

16 I. PROPOSITION 11

17 Prop. 11 fundamentally altered the way in which California's legislative districts are drawn.
18 Prior to its passage, the Legislature had the power to adjust the boundary lines for Senatorial,
19 Assembly, Congressional, and Board of Equalization districts in the year following the national
20 census. (See former Cal. Const., art. XXI, § 1.) According to the proponents of Prop. 11, the
21 Legislature improperly exercised this redistricting power in a self-interested way to maximize the
22 likelihood that incumbents would be reelected. (Ballot Pamp., Gen. Elec. (Nov. 4, 2008)
23 argument in favor of Prop. 11, p. 72.) Prop. 11 addressed this problem by vesting redistricting
24 authority in an independent Commission, rather than in the Legislature.

25 The Redistricting Commission is a creature of the Constitution, which requires that it be
26 comprised of fourteen members, of whom five must be registered Democrats,¹ five must be

27 ¹ Prop. 11 refers to the largest and second-largest political parties in California by
28 registration. Those are currently the Democratic and Republican parties, respectively.

(continued...)

1 registered Republicans, and four must not be registered as a member of either party. (Cal. Const.,
2 art. XXI, § 2, subd. (a)(2).) The State Auditor selects commissioners from a broad, diverse, and
3 qualified pool of applicants. (Gov. Code, §§ 8251 et seq.) She removes from the applicant pool
4 individuals with a conflict of interest (such as having served in or run for statewide elected office).
5 (*Id.*, § 8252, subd. (a)(2).) An independent Applicant Review Panel, comprised of licensed
6 independent auditors, then selects the sixty most qualified applicants, who must include 20
7 Democrats, 20 Republicans, and 20 belonging to neither party. The statutory qualification criteria
8 for these sixty are “relevant analytical skills, ability to be impartial, and appreciation of
9 California’s diverse demographics and geography.” (*Id.*, § 8252, subd. (d).)

10 Once the auditors have chosen a group of the 60 most qualified applicants, leaders of the
11 Democratic and Republican parties in the Legislature may strike up to eight individuals in each
12 subset of 20 to further minimize perceived or actual partisan leanings. (*Id.*, § 8252, subd. (e).)
13 From the remaining pool of candidates, the State Auditor randomly selects three Democratic,
14 three Republican, and two candidates of neither party to be the first eight members of the
15 Redistricting Commission. (*Id.*, § 8252, subd. (f).)

16 The first eight members then select the final six members at public meetings conducted
17 according to the Bagley-Keene Open Meeting Act. (Cal. Code Regs., tit. 2, § 60858, subd. (d).)
18 The statutory criteria require the final six to be chosen “to ensure the commission reflects this
19 state’s diversity, including, but not limited to, racial, ethnic, geographic, and gender diversity” as
20 well as for “relevant analytical skills and the ability to be impartial.” (Gov. Code, § 8252, subd.
21 (g).) This statute implements section 2 of article XXI of the California Constitution, which
22 requires that the Commission be “reasonably representative of this State’s diversity.” Prop. 11
23 expressly forbids the use of formulas or specific ratios to achieve this diversity. (Gov. Code,
24 § 8252, subd. (g).) By regulation, when selecting the final six members, the first eight must vote
25 on a slate of six candidates. (Cal. Code Regs., tit. 2, § 60860, subd. (b).) Each slate of six must

26 (...continued)
27 (California Secretary of State, Odd-Numbered Year Report of Registration (Feb. 10, 2011)
28 <<http://www.sos.ca.gov/elections/ror/ror-pages/ror-odd-year-11/hist-reg-stats.pdf>> [as of
December 14, 2011].)

1 include two Democrats, two Republicans, and two candidates of neither party. (*Id.*, § 60860,
2 subd. (d).) The candidates in each slate must reflect California's diversity and must also have the
3 relevant analytical skills and ability to be impartial. (*Id.*, § 60860, subd. (f).) All 14 members
4 serve a ten-year term that ends upon the appointment of the first member of the succeeding
5 Redistricting Commission. (Cal. Const., art. XXI, § 2, subd. (c)(4).)

6 The Redistricting Commission is charged with drawing district lines and approving final
7 maps in "an open and transparent process enabling full public consideration of and comment on
8 the drawing of district lines." (Cal. Const., art. XXI, § 2, subd. (b).) In drawing district lines, the
9 members are directed to consider numerous factors, in decreasing order of importance. (*Id.*, art.
10 XXI, § 2, subd. (d).) Approval of the maps requires the vote of at least nine members, and must
11 include three votes each from the Democratic, Republican, and unaffiliated members. (*Id.*, art.
12 XXI, § 2, subd. (b)(5).) On August 15, 2011, the Commission certified to the Secretary of State
13 the final maps for Congressional, Senatorial, Assembly, and Board of Equalization districts. (Ex.
14 A-D to Request for Judicial Notice; see Cal. Const., art. XXI, § 2, subd. (g).) These maps took
15 effect for the June 20, 2012 primary election; a referendum on the Senatorial map has qualified
16 for the November 6, 2012 election.

17 **II. SUMMARY OF THE COMPLAINT**

18 On March 20, 2012, plaintiffs Ward Connerly and the American Civil Rights Foundation
19 filed a first amended verified complaint for declaratory and injunctive relief and petition for writ
20 of mandate. As alleged, the Complaint "challenges, on its face, Government Code section 8252(g)
21 as violating article I, section 31, of the California Constitution." (Compl., ¶ 1.) Plaintiffs claim
22 that because Section 8252(g) requires the first eight Commissioners to consider race and gender
23 as one of many factors in ensuring that the Commission reflects the diversity of California, it
24 violates article I, section 31. Plaintiffs further allege that Section 8252(g) requires the auditors to
25 consider the race and gender of applicants when choosing the initial pool of 60 qualified
26 applicants. They seek a declaration that section 8252(g) violates the California Constitution
27 (Compl., ¶¶ 24-29) and a declaration that to the extent section 8252(g) requires, authorizes, or
28 encourages the Audit Review Panel to grant preferential treatment to applicants when selecting

1 the pool of 60 qualified applicants, section 8252(g) violates Prop. 209. (Compl., ¶¶ 30–34.)
2 Plaintiffs further seek a writ of mandate compelling government officials—including the first
3 eight Commissioners in the selection of the final six Commissioners and the Applicant Review
4 Panel—to perform their duties in compliance with Prop. 209. (Compl., ¶¶ 35–51.) In their
5 Complaint, plaintiffs do not ask the Court to invalidate the composition of the current
6 Redistricting Commission or challenge the validity of the maps.

7 ARGUMENT²

8 I. LEGAL STANDARDS

9 A defendant may demur to a complaint as a whole or to any of the purported causes of
10 action within it. (Code Civ. Proc., § 430.50.) On demurrer, the trial court considers the properly
11 pled material facts together with those matters that may be judicially noticed and tests their
12 sufficiency. (*California Alliance for Utility Safety and Education v. City of San Diego* (1997) 56
13 Cal.App.4th 1024, 1028.) Courts treat as true all material factual allegations, but not contentions,
14 deductions, or conclusions of fact or law. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) The
15 court then determines if the complaint sufficiently states a cause of action. (*Picton v. Anderson*
16 *Union High School* (1996) 50 Cal.App.4th 726, 733.) A demurrer to an action for declaratory
17 relief may be sustained when the complaint fails to state a cause of action. (*Jackson v. Teachers*
18 *Insurance Co.* (1973) 30 Cal.App.3d 341, 344–345.) Moreover, a demurrer is particularly
19 appropriate in a facial challenge, as “[a] facial challenge to the constitutional validity of a statute
20 or ordinance considers only the text of the measure itself, not its application to the particular
21 circumstances of an individual.” (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084.)

22 II. PROP. 209 DOES NOT APPLY TO THE SELECTION OF PUBLIC OFFICERS, INCLUDING 23 THE MEMBERS OF THE REDISTRICTING COMMISSION

24 The Complaint fails to state a cause of action for the simple reason that by its own terms
25 Prop. 209 does not apply to the appointment of public officers, including the members of the
26 Redistricting Commission. Prop. 209 provides:

27 ² The Redistricting Commission and the State of California join in the arguments made by
28 the State Auditor in her demurrer.

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, subdivision (a) [emphasis added].) The selection of the members of the
4 Redistricting Commission is not a matter of public employment or public contracting because as a
5 matter of law the members are not state employees or contractors: they are public officers and
6 their selection, like the selection of any other public officer, is not governed by Prop. 209.

7 **A. Members of the Redistricting Commission are public officers, not**
8 **employees.**

9 Members of the Redistricting Commission are properly considered public officers, not
10 public employees, under established law. This distinction is dispositive in this case, as it has been
11 in many others. The leading opinion discussing the distinction between officers and employees is
12 *Coulter v. Pool*. ((1921) 187 Cal. 181, cited in *Dibb v. County of San Diego* (1994) 8 Cal.4th
13 1200.) At issue in *Coulter* was the constitutionality of the County Engineer Act, the resolution of
14 which turned on whether a county engineer appointed pursuant to that Act was a county employee
15 or a public officer. In making that determination, the Court explained:

16 A public office is ordinarily and generally defined to be the right, authority, and duty,
17 created and conferred by law, the tenure of which is not transient, occasional, or
18 incidental, by which for a given period an individual is invested with power to
perform a public function for the benefit of the public.

19 (*Coulter, supra*, at pp. 186–187.) In addition, the Court noted that unlike a government
20 employee, whose principal is some individual or entity, in the case of a public officer, it is the
21 *public* who is his principal. “[A] public duty is delegated and entrusted” to public officers, “the
22 performance of which is an exercise of a part of the governmental functions of the particular
23 political unit for which he, as agent, is acting.” (*Id.* at p. 187.)

24 The Court concluded that the engineers were public officers and not employees by
25 examining the nature of the position. The relevant factors included: the Act specified that the
26 engineer’s term of office was four years from the date of “appointment,” it provided for removal
27 by the Board of Supervisors “only in the event of inefficiency, malfeasance, or misconduct,” and
28 also provided that such removal would be from an “office.” (*Coulter, supra*, at pp. 187–188.)

1 The engineer's duties, moreover, included those of the county surveyor, which was also a public
2 office. (*Id.* at p. 188.) The Court held that because the engineer was a county officer the
3 Legislature erred in failing to set his salary because the Constitution "imposes upon the
4 Legislature, exclusively, the duty of regulating the compensation of all county officers." (*Id.* at p.
5 190 [citing former Cal. Const., art. XI, § 7 1/2].)

6 More recently, the California Supreme Court revisited the distinction between public
7 officers and employees in considering whether a board of supervisors had exceeded its
8 constitutional authority in creating a civilian review board vested with the power of subpoena.
9 (*Dibb v. County of San Diego, supra*, 8 Cal.4th 1200.) As in *Coulter*, resolving whether the
10 members of the review board were public officers or employees was dispositive. Under article XI,
11 section 4, subdivision (e), county charters may specify the powers and duties of county officers,
12 but not employees. (*Id.* at p. 1204.) Applying the *Coulter* analysis, the Court held that the
13 members of the review board were public officers rather than mere employees, such that the
14 board of supervisors acted within its constitutional authority.

15 The distinction between officers and employees has important consequences. Public
16 employees can be fired, but public officers can be removed from office only pursuant to statute.
17 For example, Government Code section 3060 allows a grand jury to file an accusation against any
18 officer alleging willful or corrupt misconduct in office. (*People v. Hulbert* (1977) 75 Cal.App.3d
19 404 [determining that deputy sheriff is a public officer, not an employee, and thus subject to Gov.
20 Code, § 3060].) Public officers may be removed from office for specified reasons, including
21 suffering conviction of designated crimes, being intoxicated while in discharge of her duties, or
22 making a false claim of receipt of a military decoration. (Gov. Code, § 3000 et seq.) Public
23 officers have specific rights that attach to their offices (*id.*, § 1850 et seq.) and may also be
24 required to pay a bond in order to assume office. (*Id.*, § 1450 et seq.) In short, the distinction
25 between officer and employee is well recognized in the law and has a significant impact on the
26 officeholder and for the Legislature's regulation of the office.

27 Applying to this case the analysis used in *Dibb* and *Coulter*, the court should find that
28 members of the Redistricting Commission are public officers, not employees. Their office is

1 created by the Constitution, and is for a fixed term. (Cal. Const., art. XXI, § 2, subs. (a), (c)(4).)
2 The Redistricting Commission also exercises a vital governmental function, indeed, one that is
3 central to our democracy. Just as the citizens review board in *Dibb* conducted investigations that
4 had previously been conducted by the Board of Supervisors, the members of Redistricting
5 Commission exercise power previously exercised by the Legislature: every ten years they redraw
6 the lines of electoral districts. (*Dibb v. County of San Diego, supra*, 8 Cal.4th at p. 1213.) As
7 with other public officers, the Commissioners are acting “only on behalf of [their] principal, the
8 public.” (*Coulter v. Pool, supra*, 187 Cal. at p. 187.) That the Commissioners answer directly to
9 the people is evidenced by the fact that the maps can be overturned by the voters utilizing the
10 power of referendum. (Cal. Const., art. XXI, § 2, subd. (i).) Membership in the Commission thus
11 meets the two criteria set forth in *Dibb*: “they are appointed under the law for a fixed term of
12 office and are delegated a public duty” to determine how the voters choose elected
13 representatives. (*Dibb v. County of San Diego, supra*, 8 Cal.4th at p. 1213.) Like other public
14 officers, the Commissioners are not hired or fired but rather appointed according to constitutional
15 and statutory provisions, and they can only be removed by the Governor with the concurrence of
16 two-thirds of the Senate based on “substantial neglect of duty, gross misconduct in office, or
17 inability to discharge the *duties of office*.” (Gov. Code, § 8252.5, subd. (a) [emphasis added]; see
18 also *Coulter v. Pool, supra*, 187 Cal. at p. 188.) The Commissioners are clearly public officers,
19 not state employees.

20 **B. The Selection and Appointment of Public Officers Is Not Governed by**
21 **Prop. 209.**

22 The text of Prop. 209 and principles of constitutional construction compel the conclusion
23 that it does not apply to the selection of public officers such as members of the Redistricting
24 Commission. When considering acts of the Legislature, or the voters exercising their power of
25 initiative, courts must presume that a statute is valid “unless its unconstitutionality clearly,
26 positively, and unmistakably appears.” (*People v. Falsetta* (1999) 21 Cal.4th 903, 913.) “The
27 electorate’s legislative power is ‘generally coextensive with the power of the Legislature to enact
28

1 statutes.’ (*Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th
2 220, 253.) Such statutes, moreover, like legislative enactments, are presumed to be valid.
3 (*Legislature v. Eu* (1991) 54 Cal.3d 492, 501.)” (*Prof. Engineers in Cal. Government v. Kempton*
4 (2007) 40 Cal.4th 1016, 1042.) This deference and the presumption of validity afforded all
5 legislative acts arises because the Legislature (and voters) “may exercise any and all legislative
6 powers which are not expressly . . . denied to it by the [California] Constitution.” (*Methodist*
7 *Hosp. of Sacramento v. Saylor* (1971) 5 Cal.3d 685, 691.) Any “restrictions and limitations
8 [imposed by the Constitution] are to be construed strictly, and are not to be extended to include
9 matters not covered by the language used.” (*Ibid.*) Thus, “[i]f there is any doubt as to the
10 Legislature’s power to act in any given case, the doubt should be resolved in favor of the
11 Legislature’s action.” (*Ibid.*)

12 **1. By its terms Proposition 209 does not apply to public officers.**

13 In light of the long-standing distinction between officers and employees, the failure of the
14 drafters to specify that Prop. 209 applies to the appointment or selection of public officers is
15 dispositive of plaintiffs’ claims. This court simply cannot rewrite Prop. 209 to extend it to an
16 entirely new class. “In construing constitutional provisions, the intent of the enacting body is the
17 paramount consideration. To determine that intent, courts first look to the language of the
18 constitutional text, giving their words their ordinary meaning.” (*Powers v. City of Richmond*
19 (1995) 10 Cal.4th 85, 91 [citations omitted].) Where the text is “clear and unambiguous” courts
20 “need look no further.” (*Bowens v. Superior Court* (1991) 1 Cal.4th 36, 48.) Because the
21 distinction between public and office and public employment was well-established at the time
22 Prop. 209 was drafted, had its drafters intended for section 31 to apply to the appointment of
23 public officers, they would have so indicated in the text. “When an initiative contains terms that
24 have been judicially construed, the presumption is almost irresistible that those terms have been
25 used in the precise and technical sense in which they have been used by the courts.” (*Wilson v.*
26 *John Crane, Inc.* (2000) 81 Cal.App.4th 847, 855; see also *Knight v. Superior Court* (2005) 128
27 Cal.App.4th 14, 24 [ban on marriage of same-sex couples did not ban domestic partnerships
28

1 where initiative only referenced marriage and where the state had enacted domestic partnerships
2 before passage of the initiative.)

3 That Prop. 209 was never intended to apply to the selection of public officers is borne out
4 by the fact that other constitutional provisions refer to both officers and employees where the
5 drafters intended the provision to apply to both. Article VII, section 1, for instance, specifies that
6 “[t]he civil service includes *every officer and employee* of the State except as otherwise provided
7 in this Constitution.” (Emphasis added.)³ The numerous constitutional provisions plainly stating
8 that they apply to both employees *and* public officers show that when drafters intend a provision
9 to apply to both, they expressly so state. (See Cal. Const., art. IV, § 7, subd. (c)(1)(A) [permitting
10 the Senate or Assembly to go into closed session to discuss evaluation of officer or employee]; *id.*,
11 art. IV, § 12, subd. (b) [requiring officers and employees to cooperate with the Governor and
12 Governor-elect in preparing a budget]; *id.*, art. IV, § 17 [prohibiting the Legislature and other
13 public bodies from granting additional compensation to officers, employees *or contractors* for
14 work that has already been performed]; *id.*, art. XX, § 3 [requiring officers and employees who
15 are not exempted by law to take the oath of office].) Against this legal backdrop, Prop. 209 does
16 not extend to public officers.

17 **2. Extending Proposition 209 to the selection of public officers would**
18 **conflict with Article III, section 8.**

19 Moreover, excluding public officers from the scope of article I, section 31 is to harmonize it
20 with another constitutional provision requiring the Governor to consider the racial, ethnic, and
21 gender diversity of the California Citizens Compensation Commission when selecting its
22 members. (Cal. Const., art. III, § 8; Ballot Pamp., Primary Elec. (June 5, 1990) text of Prop. 112.)
23 Prop. 112 uses almost identical language to Section 8252(g) and would, under plaintiff’s theory,
24 be invalid under the later-enacted Prop. 209. The Compensation Commission establishes the
25 annual salary, medical, dental, and other benefits for statewide officers. (See Cal. Const., art. III,
26 § 8, subd. (a).) Prop. 112 provides that, in appointing the seven member Commission, “the

27 ³ Many officers, including members of the Redistricting Commission, are specifically
28 exempted from civil service requirements, however. (Cal. Const., art. VII, § 4, subd. (d).)

1 Governor shall strive insofar as practicable to provide a balanced representation of the geographic,
2 gender, racial, and ethnic diversity of the State in appointing commission members.” (*Id.*, art III,
3 § 8, subd. (c).) If plaintiffs are correct that Section 8252(g) violates Prop. 209, then article III,
4 section 8, subdivision (c) would also be vulnerable.

5 Instead, the Court should decline the invitation to set up a conflict between Prop. 112 and
6 Prop. 209. “Elementary principles of construction dictate that where constitutional provisions can
7 reasonably be construed to avoid a conflict, such an interpretation should be adopted.” (*Serrano v.*
8 *Priest* (1971) 5 Cal.3d 584, 596.) This gives effect to the presumption against implied repeal.
9 (*City and County of San Francisco v. County of San Mateo* (1995) 10 Cal.4th 554, 563.) “So
10 strong is the presumption against implied repeals that when a new enactment conflicts with an
11 existing provision, ‘In order for the second law to repeal or supersede the first, the former must
12 constitute a revision of the entire subject, so that the court may say that it was intended to be a
13 substitute for the first.’” (*Board of Supervisors v. Lonergan* (1980) 27 Cal.3d 855, 868.) As Prop.
14 112 was enacted six years prior to Prop. 209, if Prop. 209 is read in the manner suggested by
15 plaintiffs, it would impliedly repeal article III, section 8, subd. (c). Prop. 209 was not revision,
16 however, and a court would be required to harmonize article I, section 31 with article III, section
17 8 and give effect to both provisions. The only way to do so would be to limit the application of
18 article I, section 31 to its text and recognize that it is inapplicable to the selection of public
19 officers. Since the provision requiring the Governor to consider the racial, ethnic, and gender
20 diversity of members of the Compensation Commission is virtually identical to the requirement
21 that the first eight Redistricting Commissioners consider those same factors (as well as others),
22 harmonizing section 31 with article III, section 8 necessitates adopting an interpretation of section
23 31 that also harmonizes it with Section 8252(g).

24 **III. EVEN IF PROP. 209 APPLIES TO THE APPOINTMENT OF A PUBLIC OFFICER, SECTION**
25 **8252(g) DOES NOT FACIALLY DISCRIMINATE AGAINST ANY INDIVIDUAL OR GROUP**

26 Even if this court holds that Prop. 209 governs the appointment or selection of public
27 officers such as the members of the Redistricting Commission, Section 8252(g) does not on its
28

1 face violate Prop. 209. In a facial challenge to the statute, the plaintiff must “demonstrate that the
2 act’s provisions inevitably pose a present total and fatal conflict with applicable constitutional
3 prohibitions.” (*Samples v. Brown* (2007) 146 Cal.App.4th 787, 799, quoting *Tobe v. City of*
4 *Santa Anna, supra*, 9 Cal.4th 1069, 1084.) Petitioners cannot meet this standard in this case.

5 As the regulations implementing Section 8252 make clear, the selection of the
6 Commissioners is consistent with the requirements of Prop. 209. In selecting the initial pool of
7 60 qualified applicants, the Applicant Review Panel is required to consider whether the applicants
8 have an appreciation of California’s diverse demographics and geography. The statute does not
9 require the Panel to consider the race, ethnicity, or gender of an applicant. Rather, they must
10 simply have an understanding of the fact that California is diverse. Moreover, in selecting the
11 final six Commissioners, the first eight Commissioners must select a slate of six candidates that,
12 *as a group*, reflect the state’s diversity. Choosing a group based on characteristics, including, but
13 not limited to, racial, ethnic, geographic and gender diversity does not result in discrimination
14 against or in favor of any particular individual or group within the meaning of Prop. 209. Unlike
15 quotas or affirmative action programs that give preference to minority-owned businesses, Section
16 8252 is race- and gender-neutral. Moreover, since the final six Commissioners are chosen as a
17 slate that as a whole is judged by its diversity, among other factors, there is no identifiable
18 individual who is discriminated against on the basis of race, ethnicity or gender.

19 **A. Section 8252(g) Does Not Require the Applicant Review Panel to Consider**
20 **Race or Gender.**

21 While Section 8252(g) does require the first eight Commissioners to consider race and
22 gender as one of many factors in choosing a slate of six final Commissioners, it imposes no such
23 requirement on the Applicant Review Panel. In selecting the pool of 60 qualified applicants, the
24 Applicant Review Panel is directed to create this pool “on the basis of relevant analytical skills,
25 ability to be impartial, and appreciation for California’s diverse demographics and geography.”
26 (Gov. Code, § 8252, subd. (d).) The implementing regulations define “appreciation of
27 California’s diverse demographics and geography” to mean an understanding that California’s
28 population consists of individuals sharing certain demographic characteristics, who reside in

1 many localities, and that California benefits from the effective participation of individuals in all
2 demographic and geographic categories. (Cal. Code Regs., tit. 2, § 60805, subd. (a).) An
3 applicant may demonstrate appreciation for California's diverse demographics and geography in
4 one of three ways: by working on one or more projects that involve or affect Californians having
5 different backgrounds or residing in different areas; by studying the voting behavior of
6 Californians in various areas; or by traveling through California and meeting with people of
7 different backgrounds in order to recruit them for employment or some other endeavor. (*Id.*, §
8 60805, subd. (b).) Rather than actually *be* diverse, the pool of 60 qualified applicants must
9 simply have an *appreciation for* California's diverse demographics. As Section 8252(g) on its
10 face does not apply to the actions of the Applicant Review Panel, causes of action 2 and 4 fail as a
11 matter of law.⁴

12 **B. Section 8252(g) Does Not Discriminate Against Any Group.**

13 Prop. 209 does not prohibit any governmental decisionmaking that uses race, ethnicity or
14 gender as a factor. Rather, Prop. 209 requires that the State not "discriminate against, or grant
15 preferential treatment to, any individual or group" on the basis of race, ethnicity or gender. (Cal.
16 Const., art. I, § 31, subd. (a).) Unlike many of the race-conscious programs that motivated the
17 passage of Prop. 209, Section 8252(g) does not require the preferential treatment of or
18 discrimination against any particular group. Rather, it simply requires that the Redistricting
19 Commission "reflect the State's diversity" which includes its racial, ethnic and gender diversity.
20 It does not require that members of specific groups be included in the slate, and as a result does
21 not discriminate in favor of or against any group.

22
23
24 ⁴ Sections 60848, subdivision (f) and 60850, subdivision (e) do allow the Applicant
25 Review Panel to consider the diversity of the pools of 120 and 60 qualified applicants,
26 respectively. For the reasons stated in Section III.C, these regulations do not violate Prop. 209.
27 Further, in the context of a facial challenge, the plaintiff must "demonstrate that the act's
28 provisions inevitably pose a present total and fatal conflict with applicable constitutional
prohibitions." (*Samples v. Brown* (2007) 146 Cal.App.4th 787, 799.) As a result, while a
regulation can show how a statute may be applied in a constitutional manner, the potential
invalidity of a regulation does not in and of itself show that the statute is inevitably in conflict
with the constitution.

1 For example, the first eight members, who are drawn by lottery, could by random chance
2 include no male Commissioners. In that event, application of Section 8252(g) would suggest that
3 the first eight members consider a slate of six that would include one or more male candidates,
4 provided that they met the other qualifications and possessed “relevant analytical skills and [the]
5 ability to be impartial.” As this example illustrates, application of Section 8252(g) does not
6 benefit one particular group over another: the first eight members must consider *any* group that is
7 under-represented in the first eight in selecting a slate of the final six members, regardless of
8 whether that group is a minority or a majority. The fact that no particular gender, racial, or ethnic
9 group benefits from Section 8252(g) shows that it does not discriminate against a group on the
10 basis of race, ethnicity, or gender on its face.

11 The race- and gender-conscious programs cited in the ballot materials to Prop. 209, by
12 contrast, did discriminate against particular groups and in favor of others, and illustrate how
13 Section 8252(g) is different than those programs that motivated the passage of Prop. 209. The
14 Legislative Analyst mentioned three types of “affirmative action” programs that could be
15 eliminated under Prop. 209. They included specific goals for participation of women-owned and
16 minority-owned companies; public college and university programs that are targeted toward
17 minority or women students; and goals and timetables to encourage hiring of underrepresented
18 groups by the state. (Ballot Pamp., Gen. Elec. (Nov. 5, 1996), Analysis by the Legislative
19 Analyst p. 30.) In each of these cases, specific minority or gender groups received the benefit of
20 the particular program, while white men did not. Indeed, it was this perceived “reverse-
21 discrimination” that was the focal point of the argument in favor of Prop. 209. (See *Hi-Voltage*
22 *Wire Works, Inc. v. City of San Jose* (2000) 24 Cal.4th 537, 560–61 [quoting ballot materials].)
23 Section 8252, by contrast, does not discriminate against any particular group or require “reverse-
24 discrimination” since *all* racial, ethnic, and gender groups, whether majority or minority, are
25 included within it.

26 **C. Section 8252(g) Does Not Discriminate Against Any Individual.**

27 Nor does Section 8252(g), on its face, require discrimination in favor of or against any
28 individual on the basis of their race, ethnicity or gender. In selecting the final six members, the

1 first eight judge whether a proposed slate of six should be added rather than whether an individual
2 Commissioner should be seated. The regulations implementing Section 8252(g) provide:

3 As the final six members of the commission shall be chosen to ensure the commission
4 reflects California's diversity, as well as on the basis of relevant analytical skills and
5 ability to be impartial, the first eight members of the commission shall vote to select
6 the final six members of the commission as a slate of six applicants.

6 (Cal. Code Regs., tit. 2, § 60860, subd. (b). In considering whether to approve a slate, the first
7 eight members are required to determine whether the slate *as a whole* ensures that the
8 Redistricting Commission reflects the diversity of California and that it includes members having
9 the relevant analytical skills. (*Id.*, § 60860, subd. (f).) Whenever a slate is created or modified by
10 a Commission member, specific formulas or ratios are prohibited. (*Id.*) The first slate of six
11 candidates that is approved by at least five of the first eight members as required by section
12 8252(g) are seated as the final six Commissioners. (Cal. Code Regs., tit. 2, § 60860, subd. (g).)
13 Thus, the first eight members are never required to eliminate or seat an individual applicant on the
14 basis of his or her race, ethnicity, or gender. Rather, they are required to consider, as one factor,
15 whether a particular slate of six applicants, when added to the existing eight members of the
16 Redistricting Commission, reflects the diversity of the State as required by article XXI, section 2
17 of the California Constitution. As Section 8252(g) does not grant preferential treatment to any
18 particular race, ethnicity, or gender and does not discriminate against any individual on the basis
19 of his or her race, ethnicity, or gender, it does not violate article I, section 31 on its face.

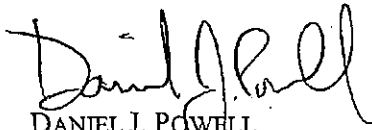
20 CONCLUSION

21 For the foregoing reasons, defendants request that the court sustain the demurrer, without
22 leave to amend.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: April 30, 2012

Respectfully Submitted,
KAMALA D. HARRIS
Attorney General of California
TAMAR PACTHER
Supervising Deputy Attorney General


DANIEL J. POWELL
Deputy Attorney General
*Attorneys for State of California and the
Redistricting Commission*

SA2011102775

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: *Connerly v. State of California, et al.*

No.: 34-2011-80000966-CU-WM-GDS

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On April 30, 2012, I served the attached **NOTICE OF HEARING AND DEMURRER TO FIRST AMENDED VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND PETITION FOR WRIT OF MANDATE ON BEHALF OF STATE OF CALIFORNIA AND THE CALIFORNIA CITIZENS REDISTRICTING COMMISSION; MEMORANDUM OF POINTS AND AUTHORITIES** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Adam R. Pomeroy
Attorney at Law
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
Counsel for Plaintiffs

Margaret Carew Toledo
Attorney at Law
Mennemeier, Glassman & Stroud, LLP
980 9th Street, Suite 1700
Sacramento, CA 95814
*Counsel for Defendant Elaine M. Howle,
State Auditor of California*

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 30, 2012, at San Francisco, California.

Susan Chiang

Declarant



Signature