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9 SUPERIOR COURT OF CALIFORNIA

10 COUNTY OF SACRAMENTO

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

14 Plaintiffs and Petitioners,

15 v.

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

18 Defendants and Respondents.
19

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

**PLAINTIFFS'
OPPOSITION
TO DEMURRER
BY STATE AUDITOR**

Place: Department 31
Judge: The Hon. Michael Kenny

DATE: 6-1-12
DEPT: 31 TIME: 9am

1 Demurrer at 2:21-7:9. Any work done by state employees to separate, classify, and discriminate
2 against individuals on the basis of race is both unconstitutional under Section 31, and an illegal use
3 of public resources.

4 Plaintiffs' Second and Fourth causes of action allege valid facial challenges to Government
5 Code section 8252(g). The plain language of the statute requires diversity among appointees to the
6 commission. The Applicant Review Panel is involved in a process that achieves diversity by
7 discriminating on the basis of race in violation of Section 31.

8 Lastly, Defendant attempts to manufacture a conflict between Section 31 and Article XXI,
9 Section 2(c)(1), of the state constitution. Auditor's Demurrer at 9:26-10:24. In fact, the two
10 provisions are easily reconciled by adopting the plain meaning of the word "diversity" in
11 Article XXI, Section 2(c)(1), to effectuate the voters' intent when adopting Proposition 209.

12 **LEGAL STANDARD ON DEMURRER**

13 Plaintiffs addressed the proper standard on demurrer in their Opposition to State's Demurrer
14 at 2:5-15. As mentioned, Plaintiffs incorporate by reference that Opposition in its entirety and for
15 the sake of brevity do not repeat the standard here.

16 **I**

17 **SECTION 31'S PROHIBITION ON RACIAL DISCRIMINATION 18 IN PUBLIC EMPLOYMENT COVERS THE CHALLENGED 19 ACTIONS OF THE REDISTRICTING COMMISSION**

20 Public Officers are, by definition, involved in public employment. It is hornbook California
21 law, and there is simply no case that states otherwise. *See, e.g.,* 52 Cal. Jur. 3d *Public Officers and*
22 *Employees* § 11 (2012); 63C Am. Jur. 2d *Public Officers and Employees* § 2 (2012); *Kirk*, 36 Cal.
23 App. 3d at 557 (public officers are engaged in public employment); *Leymel*, 105 Cal. App. at 701
24 (same); *Curtin v. State*, 61 Cal. App. 377 (1923) (same); *Mono County v. Indus. Accident Comm'n*,
25 175 Cal. 752, 755 (1917) (same); *Patton v. Bd. of Health of City & County of San Francisco*,
26 127 Cal. 388, 393 (1899) (same). The Auditor's argument that state officers are not employees is
27 irrelevant, since public officers are, like public employees, also involved in public employment.
28 Plaintiffs have addressed this claim in the opposition to the State's Demurrer, and need not repeat
those arguments here. Plaintiffs' Opposition to State's Demurrer at 2:21-4:11.

1 The remainder of the Auditor’s argument falls once this error is highlighted. The Auditor
2 precedes from the premise that officers are not engaged in public employment, and then argues that
3 Proposition 209 must be interpreted in accordance with its own terms. Auditor’s Demurrer
4 at 7:11-8:6. But, the legal and everyday understanding of “public employment” has always
5 included public officers. Neither the State nor the Auditor has found any authority that says
6 otherwise.

7 Similarly, the state appellate decisions applying Section 31 offer the Auditor no help. See
8 Auditor’s Demurrer at 6:22-7:10. Each decision cited by the Auditor demonstrates that California
9 courts interpret Section 31 strictly, and every race-based preference that the courts were presented
10 has fallen. See, e.g., *Coral Constr., Inc. v. City & County of San Francisco*, 50 Cal. 4th 315 (2010)
11 (striking down as unconstitutional under Section 31 San Francisco’s race-based contracting
12 programs); *Connerly v. State Pers. Bd.*, 92 Cal. App. 4th 16 (2001) (various state contracting and
13 employment statutes held unconstitutional under Section 31); *Kidd v. State*, 62 Cal. App. 4th 386
14 (1998) (holding supplemental certification program unconstitutional under Section 31). Of course,
15 that list is longer than the Auditor provided; Section 31, as interpreted by all California courts
16 provides no excuse for race-based preferential treatment. See, e.g., *C&C Constr., Inc. v.*
17 *Sacramento Mun. Util. Dist.*, 122 Cal. App. 4th 284 (2004) (race-based contracting program
18 unconstitutional under Section 31); *Crawford v. Huntington Beach Union High Sch. Dist.*, 98 Cal.
19 App. 4th 1275 (2002) (school district’s race-based student balancing violated Section 31);
20 *Hi-Voltage*, 24 Cal. 4th at 562 (race-based contracting program unconstitutional under Section 31).

21 The appellate decisions interpreting Section 31 all point to the same conclusion: where any
22 “political subdivision or governmental instrumentality of or within the State”² discriminates or
23 grants preferential treatment on the basis of race, the courts have held the practice unconstitutional.
24 It is of no moment that the appellate decisions do not include express language invalidating the
25 actions of state officers—no state officer specific statute has, heretofore, so blatantly attempted to

26 _____
27 ² This language is quoted directly from Section 31. Cal. Const. art. I, § 31(f). Like the State
28 Demurrer, the Auditor provides no defense as to why the Redistricting Commission is not a
governmental instrumentality of the State. See Plaintiffs’ Opposition to State’s Demurrer
at 5:16-7:9.

1 flout the constitutional requirements of Section 31.³ It is the Auditor, like the State, who is trying
2 to carve out an exception to Section 31 where none previously existed. But, where the voters
3 intended Section 31 not to apply, they did so expressly. *See* Plaintiffs' Opposition to State's
4 Demurrer at 6:14-21.

5 The Auditor also claims that state employees are free to spend public time, money, and
6 resources separating applicants to the Redistricting Commission on the basis of race. Auditor's
7 Demurrer at 8:7-16. That is not true. Plaintiffs are bringing a taxpayer and citizen suit action
8 against the Auditor's illegal use of public resources. In assessing whether an alleged expenditure
9 of public funds is sufficient to allege a constitutional violation, it is "immaterial" that the amount
10 of the allegedly illegal expenditure is "small." *Wirin v. Parker*, 48 Cal. 2d 890, 894 (1957); *accord*
11 *Blair v. Pitchess*, 5 Cal. 3d 258, 268 (1971). Indeed, a plaintiff need not even show an actual
12 additional expenditure of funds; instead, it is sufficient that paid employees of a public entity have
13 expended their time in performing allegedly illegal acts. *Citizens for Uniform Laws v. County of*
14 *Contra Costa*, 233 Cal. App. 3d 1468, 1472-73 (1991). Put simply, any work done by state
15 employees to separate, classify, and discriminate against individuals on the basis of race is
16 unconstitutional under Section 31.

17 Like the State, the Auditor's vision of Section 31 would permit untold instances of
18 unconstitutional discrimination to go unchecked throughout California government. The Governor
19 could appoint judges to fill judicial vacancies pursuant to race-based criteria. *See* Cal. Const.
20 art. VI, § 16 (authorizing the Governor to appoint judges to fill judicial vacancies). The California
21 Coastal Commission could appoint its executive director based solely on race-conscious diversity
22 goals. *See* Pub. Res. Code § 30335 (authorizing the commission to appoint an executive director).
23 Or, a school board could hire and fire a Superintendent based on the individual's skin color.
24 According to the Auditor, each of these (and thousands of other untold) instances of discrimination
25 are simply not implicated by Section 31. This is clearly contrary to the language of Section 31 and
26 the intent of the voters when they enacted it. The Auditor's argument that Section 31's prohibition

27 _____
28 ³ However, it should be noted that in nearly every published decision involving Section 31, public
officers were party to the lawsuits. Plaintiffs' Opposition to State's Demurrer at 6:22-7:3.

1 on discriminatory treatment in public employment does not reach the race-based actions of public
2 officials is meritless. The demurrer should be overruled.

3 **II**

4 **THE FIRST AMENDED COMPLAINT**
5 **ALLEGES FACTS SUFFICIENT TO SUPPORT**
6 **CLAIMS THAT THE APPLICANT REVIEW**
7 **PANEL'S PARTICIPATION IN A PROCESS REQUIRING**
8 **CONSIDERATION OF RACE VIOLATES SECTION 31**

9 The Auditor quotes the proper standard for a facial challenge, but misinterprets its
10 application. In *Sturgeon v. Bratton*, 174 Cal. App. 4th 1407, 1418 (2009), cited by the Auditor, the
11 court explained that a facial challenge considers only the text of the measure; it does not apply to
12 the particular circumstances of an individual. A challenger "must demonstrate that the act's
13 provisions inevitably pose a present and fatal conflict with applicable constitutional prohibitions."

14 *Id.* Plaintiffs' Second and Fourth Causes of Action meet each of those requirements.

15 Plaintiffs do not claim that the statute is unconstitutional as applied to the particular
16 circumstances of named individuals. Rather Plaintiffs allege that there is no set of circumstances
17 under which the provisions of Government Code section 8252(g) may be implemented without
18 running afoul of Section 31. The test is not whether the text of the measure expressly states the
19 nature of the constitutional violation; it is whether the requirements of the measure can be met
20 without violating the constitution. Plaintiffs allege that the act's provisions pose a fatal conflict
21 with Section 31. *See, e.g.*, FAC ¶ 20 ("Government Code section 8252(g) violates Section 31 to
22 the extent that Section 8252(g) requires, authorizes, or encourages public employees to participate
23 in a process that considers race, ethnicity, or sex as a factor in appointing six members to the
24 Commission."); *see also* ¶ 23 (seeking to enjoin ongoing violations of Section 31 implicit in the
25 selection process required by Section 8252(g)).

26 Plaintiffs allege in their Second and Fourth causes of action that Section 8252(g) requires
27 the Applicant Review Panel to grant preferences and discriminate on the basis of race, ethnicity,
28 and sex, when determining the 60 most qualified applicants to be included in the pool. FAC ¶¶ 31-
32; 48-50. There is no other method by which to ensure a sufficient pool of applicants to meet the
33 diversity requirements of Section 8252(g). FAC ¶¶ 2, 19.

1 In order for the eight commissioners to perform their statutory duties under Section 8252(g),
2 the public employees on the Applicant Review Panel must create a pool of 60 “of the most
3 qualified applicants.” FAC ¶ 19 (citing Gov’t Code § 8252(d)). The ultimate goal of Section
4 8252(g) is to have a Commission that “reflects the state’s diversity, including, but not limited to,
5 racial, ethnic, geographic, and gender diversity.” FAC ¶ 19 (citing Gov’t Code § 8252(g)). The
6 selection scheme requires public employees to consider the qualifications of all applicants,
7 including their race, sex, and ethnicity, in order to create an applicant pool of sufficiently diverse
8 candidates. FAC ¶ 19 (citing Gov’t Code § 8252(g)). Otherwise, the first eight commissioners will
9 be unable to carry out their statutory duty of forming a racially diverse Commission.

10 Plaintiffs also allege that it is not necessary for the Applicant Review Panel to have actually
11 considered race for the selection process to be unconstitutional. FAC ¶ 20. Under Section 31, state
12 actors may neither directly use race to assign benefits or burdens nor indirectly enable, facilitate,
13 or encourage other actors to do so. *Hi-Voltage*, 24 Cal. 4th at 570 (Mosk, J., concurring). State
14 actors cannot circumvent Section 31 by creating a process where the use of race is exported to a
15 third party. Plaintiffs allege that the Applicant Review Panel enables, facilitates, and encourages
16 a process where the final six Commissions are selected on the basis of race. FAC ¶¶ 15-20. These
17 factual allegations support a facial claim that the involvement of public employees in the selection
18 process mandated by Section 8252 is unconstitutional under Section 31. FAC ¶ 20.

19 Plaintiffs have plead valid facial claims, and the demurrer should be overruled.

20 III

21 PROPOSITION 11 DOES NOT 22 CONFLICT WITH PROPOSITION 209

23 The Auditor, like the State, argues that Article I, Section 31, must be harmonized with
24 another provision of the California Constitution in such a way as to allow the use of race and
25 gender in the circumstances leading to this litigation. The Auditor asserts a direct conflict between
26 Article XXI, Section 2(c)(1) (adopted by Proposition 11), and Article I, Section 31 (adopted by the
27 voters as Proposition 209). Article XXI involves a subject completely unrelated to that in Article I,
28 Section 31. Article XXI provides for a Citizens Redistricting Commission, and Section 2(c)(1)

1 explains that “[t]he selection process is designed to produce a commission that is independent from
2 legislative influence and reasonably representative of this State’s diversity.”

3 When analyzing a constitutional provision, the first step is to construe its meaning from
4 the natural and ordinary meaning of the words, starting with the plain meaning of the words
5 included in the proposition understood in their common usage. The natural and ordinary meaning
6 of the word “diversity” is “to make diverse: give variety to; to balance.” *Merriam-Webster’s*
7 *Collegiate Dictionary* 366 (11th ed. 2003). Diversity means many things when discussing a large
8 state like California. It can mean economic, political, or geographic diversity, but under Article 31,
9 it cannot mean race, ethnicity, or gender. Thus, the two provisions of the Constitution can be
10 reconciled by interpreting the word “diversity” in Article XXI, Section 2(c)(1), to include all of the
11 types of diversity, except those prohibited by Article I, Section 31. As discussed above, there is
12 no support for the Auditor’s suggestion that Section 31 is not applicable to the process for selecting
13 commissioners.

14 The Auditor claims that “diversity” in Article XXI, Section 2(c)(1), must have the same
15 meaning as it does in Government Code section 8252(g). The Auditor offers no authority for this
16 interpretation, nor does the statement find any support in the rules of constitutional and statutory
17 construction.

18 The fundamental objective of statutory interpretation is to ascertain and effectuate the
19 intent of the enacting body. *In re Lance W.*, 37 Cal. 3d 873, 889 (1985) (“[T]he intent of the
20 enacting body is the paramount consideration.”). Although Section 8252 implements the
21 provisions of Article XXI, there is no evidence that either the Legislature or the voters intended the
22 constitutional portion of the proposition to mirror the language of the statute. “Where different
23 language is used in different parts of the same statute, it must be presumed that the Legislature
24 intended a different effect.” *Demchuk v. State Dep’t of Health Servs.*, 4 Cal. App. 4th Supp. 1, 4
25 (1991) (citing *Charles S. v. Bd. of Educ.*, 20 Cal. App. 3d 83, 95 (1971)). “[I]t must also be
26 presumed that the Legislature ‘knew that it was saying and meant what it said.’” *Id.* (citation
27 omitted). Thus, it must be presumed in this case that the Legislature would have included the same
28 language in the constitutional and statutory portions of Proposition 11 had that been its intent. And

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1 because the Legislature is presumed to know existing law, it is more likely that the Legislature
2 purposefully refrained from including language in Article XXI, Section 2(c)(1), that it knew would
3 conflict with Section 31.

4 There is no evidence that the voters gave any thought to the different meanings of diversity
5 in Article XXI, Section 2(c)(1) and Section 8252(g). Proposition 11 amended the constitution to
6 “change the redistricting process for the state Legislature, BOE, and California members of the
7 U.S. House of Representatives, beginning with the 2010 census.” *Legislative Analyst’s Analysis*
8 at 70, attached as Exhibit 2 to Plaintiffs’ Request for Judicial Notice. The Legislative Analyst
9 explained that an Applicant Review Panel would narrow the applicants down to 60, and “[t]he
10 panel would pick the most qualified applicants based on analytic skill, impartiality, and
11 appreciation of California’s diversity.” *Id.* Other Proposition 11 ballot materials do not even
12 discuss the word “diversity” or the language of Section 8252(g).

13 Section 8252(g) conflicts with Article I, Section 31, of the constitution. The constitutional
14 provision must prevail. *Arden Carmichael, Inc. v. County of Sacramento*, 79 Cal. App. 4th 1070,
15 1077 (2000) (“Wherever statutes conflict with constitutional provisions, the latter must prevail.”)
16 (quoting *People v. Navarro*, 7 Cal. 3d 248, 260 (1972)).

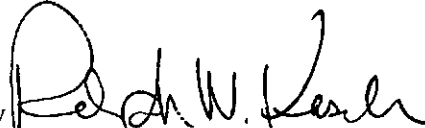
17 **CONCLUSION**

18 For all of the foregoing reasons, Plaintiffs Ward Connerly and American Civil Rights
19 Foundation respectfully request that this Court overrule the Demurrer of the State Auditor of
20 California.

21 DATED: May 18, 2012.

22 Respectfully submitted,

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