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LEGAL PROCESS #3

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9 SUPERIOR COURT OF CALIFORNIA

10 COUNTY OF SACRAMENTO

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

14 Plaintiffs and Petitioners, )

15 v. )

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

18 Defendants and Respondents. )  
19

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

**FIRST AMENDED  
VERIFIED COMPLAINT  
FOR DECLARATORY AND  
INJUNCTIVE RELIEF  
AND PETITION FOR  
WRIT OF MANDATE**

Place: Department 31  
Judge: The Hon. Michael Kenny

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1 Plaintiffs and Petitioners Ward Connerly, a citizen and taxpayer residing in California, and  
2 American Civil Rights Foundation, a nonprofit public benefit corporation whose members include  
3 citizens and taxpayers residing in California (together Plaintiffs or Petitioners) bring this action  
4 against Defendants and Respondents State of California; Elaine M. Howle, in her official capacity  
5 as State Auditor; and the Citizens Redistricting Commission (together Defendants or Respondents)  
6 for declaratory and injunctive relief under Code of Civil Procedure sections 1060, 526, and 526a  
7 and a writ of mandate under Code of Civil Procedure section 1085 for violating Article I,  
8 section 31, of the California Constitution (Section 31 or Proposition 209).

9 **INTRODUCTION**

10 1. This action challenges, on its face, Government Code section 8252(g) as violating  
11 Article I, section 31, of the California Constitution. In 1996, the people of California adopted  
12 Proposition 209, adding Section 31 to the state constitution. In adopting this historic initiative, the  
13 people of California mandated that race, sex, color, ethnicity, or national origin can no longer be  
14 a factor in deciding who should and who should not receive the benefit of being appointed to state  
15 boards and commissions. Nevertheless, Government Code section 8252(g) requires that race, sex,  
16 color, ethnicity, or national origin be a factor in the selection process.

17 2. Section 8252(g) is unconstitutional in two ways. First, the final six members of the  
18 Citizens Redistricting Commission are selected after a consideration—by the first eight members  
19 of the Commission—of their race, ethnicity, and sex to ensure that the Commission reflects the  
20 state’s diversity. (For the sake of clarity, herein Plaintiffs use the term “sex” to include both the  
21 terms “sex” and “gender;” the former being the operative word in Section 31 and the latter being  
22 the word used by Government Code section 8252(g).) Second, the public employees of the  
23 Applicant Review Panel, when reviewing applications to the Citizens Redistricting Commission,  
24 must consider the race, ethnicity, and sex of the applicants so that the first eight members of the  
25 Commission can meet their statutory duties in appointing the final six members so that the  
26 composition of the Commission reflects the state’s race, sex, and ethnic diversity.

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**PARTIES**

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2           3.     Plaintiff and Petitioner Ward Connerly (Mr. Connerly) is a citizen and taxpayer of  
3 the State of California. He has a beneficial interest in ensuring that the State, its agencies,  
4 instrumentalities, and employees comply with the mandates and prohibitions set out in Section 31  
5 and in preventing the illegal and wasteful expenditure of public resources in connection with the  
6 enforcement of statutes that violate Section 31. Upon information and belief, Plaintiffs and  
7 Petitioners allege that Defendants and Respondents utilize public resources, including public  
8 monies, when they consider the race, ethnicity, and sex of applicants when appointing members  
9 to the Defendant Citizens Redistricting Commission in violation of Section 31. Mr. Connerly  
10 resides within the State's boundaries and has paid real property taxes and income taxes to the State  
11 of California within one year of the commencement of this action. At all times relevant to this  
12 action, Mr. Connerly has been a registered voter in the County of Sacramento and the State of  
13 California and is eligible to vote in any election involving amendments to the California  
14 Constitution. Mr. Connerly was the Petitioner in *Connerly v. State Pers. Bd.*, 92 Cal. App. 4th 16  
15 (2001), which held several California statutes unconstitutional under Section 31, and *Connerly v.*  
16 *State of California*, No. 34-2010-80000412 (Sacramento County Super. Ct. filed Jan. 6, 2010),  
17 which resulted in a writ of mandate ordering the Respondents to follow the mandates of Section 31  
18 by ceasing enforcement of several California statutes.

19           4.     Plaintiff and Petitioner American Civil Rights Foundation (Foundation) is a  
20 nonprofit, public benefit corporation headquartered in Sacramento, California. It is dedicated to  
21 eradicating practices of racial discrimination and preferences by government entities nationwide,  
22 and to enforcing Section 31's prohibition of racial, ethnic, and sex-based discrimination and  
23 preferences in the operation of public education, public employment, and public contracting at the  
24 State and local levels in California. The Foundation's members include individuals who are  
25 citizens, residents, taxpayers, and property owners in the State of California. The Foundation's  
26 members have paid taxes to the State of California and on real property located in California within  
27 one year of the commencement of this action. The Foundation is authorized by its members to  
28 bring litigation affecting the interests of citizens and taxpayers within the State of California. They

1 | have a beneficial interest in ensuring that the State, its agencies and instrumentalities, and its  
2 | employees comply with the mandates and prohibitions set out in Section 31, and in preventing the  
3 | illegal and wasteful expenditure of public resources by the State to comply with laws that violate  
4 | Section 31. On information and belief, Plaintiffs and Petitioners allege that Defendants and  
5 | Respondents are violating Section 31 by utilizing public resources, including public monies, when  
6 | they consider the race, ethnicity, and sex of applicants when appointing members to the Defendant  
7 | Citizens Redistricting Commission. The Foundation was petitioner in *American Civil Rights*  
8 | *Foundation v. Los Angeles Unified Sch. Dist.*, 169 Cal. App. 4th 436 (2008), in which the appellate  
9 | court found the school district's desegregation program was exempted from Section 31's  
10 | prohibitions on the use of race under an existing court order.

11 |         5. Defendant and Respondent State of California is the government entity responsible  
12 | for enforcement of the Constitution and laws of the State. State employees are required under  
13 | Government Code section 8252 to participate in an application process which distributes benefits  
14 | and burdens on the basis or race, ethnicity, and sex. Yet, under Section 31, the State has a  
15 | mandatory duty to prohibit discrimination and preferential treatment on the basis of race, ethnicity,  
16 | or sex in the operation of public employment, public education, and public contracting, by all state  
17 | departments, agencies, and instrumentalities, including boards and commissions and their  
18 | employees.

19 |         6. Defendant and Respondent Elaine M. Howle is sued in her official capacity as the  
20 | State Auditor. State Auditor Howle is responsible for overseeing the Citizens Redistricting  
21 | Commission application and selection process, including the creation of the initial applicant pool,  
22 | selecting the public employees who comprise the Applicant Review Panel, and selecting the first  
23 | eight members of the Commission. Gov't Code § 8252. In performing these duties, State Auditor  
24 | Howle has a mandatory duty to comply with the California Constitution, including Section 31, to  
25 | prohibit discrimination and preferential treatment on the basis of race, ethnicity, or sex in the  
26 | operation of public employment and public contracting. She has a duty to ensure that Section 31  
27 | is followed during the selection process of Commission members. She has a further duty to ensure  
28 | that public employees do not violate Section 31.



1 system, including the University of California, community college district, school district, special  
2 district, or any other political subdivision or governmental instrumentality of or within the state.”

3 Cal. Const. art. I, § 31(f).

4 11. Public employment or public contracting schemes that discriminate against or give  
5 preferential treatment to applicants on the basis of race, ethnicity, or sex in the operation of  
6 public employment or public contracting violate Section 31. *Hi-Voltage Wire Works, Inc. v.*  
7 *City of San Jose*, 24 Cal. 4th 537, 564 (2000). “Rather than classifying individuals by race . . .  
8 Proposition 209 *prohibits* the State from classifying individuals by race.” *Id.* at 561 (citation  
9 omitted).

10 12. Section 31 requires the entire screening process of applicants to the California  
11 Redistricting Commission to be conducted in a neutral manner without consideration of an  
12 applicant’s race, sex, or ethnicity. Section 31 prohibits the state from requiring that public  
13 employees, in the operation of their duties as public employees, consider an applicant’s race, sex,  
14 or ethnicity.

15 **Government Code § 8252**

16 13. On November 4, 2008, the voters of the State of California approved Proposition 11.

17 14. Proposition 11 transferred power over redrawing State Assembly, Senate, and Board  
18 of Equalization districts to a newly created Citizens Redistricting Commission. Proposition 11  
19 amended Article XXI of the State constitution to transfer the redistricting power. It also added  
20 Government Code sections 8251-8252.5. Proposition 20, adopted in November, 2010, gave the  
21 Commission authority to re-draw congressional districts as well.

22 15. Government Code section 8252 sets out the process for selecting members to the  
23 Commission. The State Auditor creates a “diverse and qualified applicant pool” by initiating an  
24 application process and removing any ineligible applicants. Gov’t Code § 8252(b). The State  
25 Auditor then randomly selects three auditors, chosen “from a pool consisting of all auditors  
26 employed by the state and licensed by the California Board of Accountancy,” to form an Applicant  
27 Review Panel. The public employees of the Applicant Review Panel review eligible applicants and  
28 select 60 “of the most qualified applicants.” Gov’t Code § 8252(d). Next, state legislative leaders

1 have an opportunity to further reduce the applicant pool by striking a certain number of applicants.  
2 Gov't Code § 8252(e). Thereafter the State Auditor randomly selects the first eight Commission  
3 members from the remaining applicant pool. Gov't Code § 8252(f). These eight Commission  
4 members then select the final six Commission members. Gov't Code § 8252(g).

5 **Government Code § 8252(g) and the Final Appointments to the Commission**

6 16. During the selection of the final six Commission members, Government Code  
7 section 8252(g) requires the first eight Commission members to discriminate against some  
8 applicants and grant preferential treatment to other applicants on the basis of race, ethnicity, and  
9 sex. Section 8252(g) provides in pertinent part:

10 No later than December 31 in 2010, and in each year ending in the number zero  
11 thereafter, the eight commissioners shall review the remaining names in the pool  
12 of applicants and appoint six applicants to the commission as follows: . . . . The  
13 six appointees *shall be chosen to ensure* the commission reflects this state's  
14 diversity, including, but not limited to, *racial, ethnic, geographic, and gender*  
15 *diversity*. However, it is not intended that formulas or specific ratios be applied for  
16 this purpose.

14 Gov't Code § 8252(g) (emphasis added).

15 17. Government Code section 8252(g) violates Section 31 to the extent that  
16 Section 8252(g) requires, authorizes, or encourages preferential or discriminatory treatment on the  
17 basis of race, ethnicity, or sex in the operation of public employment or public contracting when  
18 appointing six members to the Commission.

19 18. Citizens Redistricting Commission members are public employees. Commission  
20 members are chosen by a process initiated and overseen by the State of California and the State  
21 Auditor, with input from the leadership of the State Assembly and Senate. Gov't Code § 8252.  
22 Commission members are subject to removal by the Governor, with concurrence of the Senate.  
23 Gov't Code § 8252.5(a). Commission members are also subject to prosecution by the Attorney  
24 General for "substantial neglect of duty or gross misconduct in office." *Id.* Commission members  
25 are compensated by the state and eligible for reimbursement of personal expenses connected with  
26 their duties as members of the Commission. Gov't Code § 8253.5. Alternatively, the Commission  
27 members are public contractors appointed by the Defendants and Respondents based upon a  
28 selection process using race, ethnicity, and sex in violation of Section 31.

1                                   **Government Code § 8252(g) and the Applicant Review Panel**

2           19.     State employees who have been selected to be on the Applicant Review Panel are  
3 required to perform their duties in a way that violates Section 31. In order for the eight  
4 Commissioners to perform their statutory duties under Section 8252(g), the public employees on  
5 the Applicant Review Panel must create a pool of 60 “of the most qualified applicants.” Gov’t  
6 Code § 8252(d). Plaintiffs are informed and believe, and therefore allege, that this requires the  
7 public employees to consider the qualifications of applicants, including their race, sex, and  
8 ethnicity, in order to provide the eight Commissioners with sufficiently diverse candidates to meet  
9 the statutory requirements of “ensur[ing] the commission reflects this state’s diversity, including,  
10 but not limited to, racial, ethnic, geographic, and gender diversity.” Gov’t Code § 8252(g).

11           20.     Government Code section 8252(g) violates Section 31 to the extent that  
12 Section 8252(g) requires, authorizes, or encourages public employees to participate in a process  
13 that considers race, ethnicity, or sex as a factor in appointing six members to the Commission.

14                                   **INJUNCTIVE RELIEF ALLEGATIONS**

15                                   **(Enforcement of Article I, Section 31, of the California Constitution)**

16           21.     Plaintiffs and Petitioners incorporate by reference and reallege each and every  
17 allegation set forth in this complaint.

18           22.     Plaintiffs and Petitioners contend that, unless enjoined by this Court, Defendants  
19 and Respondents will cause great and irreparable injury to Plaintiff Mr. Connerly and members of  
20 Plaintiff Foundation, who are taxpaying residents of California, in that:

21                   (a)     Defendants and Respondents will expend public monies and public  
22 resources to implement and administer Government Code section 8252(g), which requires  
23 eight members of the Commission to grant preferences as well as discriminate on the basis  
24 of race, ethnicity, and sex in the selection of six members to the Commission ; and

25                   (b)     Defendants and Respondents will expend public monies and public  
26 resources to implement and administer Government Code section 8252, in such a manner  
27 as to require public employees on the Applicant Review Panel to grant preferences as well  
28 as discriminate against individuals on the basis of their race, ethnicity, and sex when



1 determining the 60 most qualified applicants to be included in the pool of recommended  
2 applicants.

3 Such continued actions by Defendants and Respondents are unlawful and contrary to the  
4 obligations of Defendants' and Respondents' respective public offices and the trusts and duties  
5 arising therefrom.

6 23. Plaintiffs and Petitioners seek relief under Code of Civil Procedure sections 526 and  
7 526a. Plaintiffs and Petitioners have no adequate remedy at law, and pecuniary compensation  
8 would not provide adequate relief. On information and belief, Plaintiffs and Petitioners alleged  
9 that, without an injunction restraining the continued enforcement and administration of the  
10 offending portions of Government Code section 8252(g), Defendants and Respondents will  
11 continue to violate Section 31 by administering, implementing, maintaining, and enforcing  
12 Government Code section 8252(g) in a manner that requires discrimination against and preferential  
13 treatment to applicants, seeking to be chosen as a commissioner, in the operation of public  
14 employment or public contracting.

15 **FIRST CAUSE OF ACTION**

16 **RELATING TO GOVERNMENT CODE SECTION 8252(g)**

17 **Declaratory Relief for Violation of Article I, Section 31, of the California Constitution**

18 **(Code of Civ. Proc. § 1060)**

19 **(Against All Defendants)**

20 24. Plaintiffs incorporate by reference and reallege each and every allegation set forth  
21 in this complaint.

22 25. Defendants have a duty to comply with Section 31, which prohibits discrimination  
23 against or preferential treatment to any individual or group on the basis of race, sex, color,  
24 ethnicity, or national origin in the operation of public employment or public contracting.

25 26. Notwithstanding this duty, Defendants are required to follow and enforce  
26 Government Code section 8252(g), which uses race, ethnicity, and sex to select members to the  
27 Commission.

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1 27. An actual and justiciable controversy exists between the parties concerning the  
2 constitutionality of Government Code section 8252(g). Plaintiffs contend that Section 8252(g)  
3 violates Section 31 to the extent that it mandates racial, ethnic, or sex preferences or discrimination  
4 in the operation of public employment or public contracting.

5 28. Plaintiffs are informed and believe, and therefore allege, that Defendants dispute  
6 that Section 8252(g) violates Section 31 to the extent it mandates, encourages, or authorizes  
7 preferential treatment to or discrimination against applicants based on race, ethnicity, or sex in the  
8 operation of public employment and public contracting.

9 29. A judicial determination of rights and responsibilities arising from this actual  
10 controversy is necessary and appropriate at this time.

11 WHEREFORE, Plaintiffs pray for judgment as hereinafter set forth.

12 **SECOND CAUSE OF ACTION**

13 **RELATING TO PUBLIC EMPLOYEES**  
14 **OF THE APPLICANT REVIEW PANEL**

15 **Declaratory Relief for Violation of Article I, Section 31, of the California Constitution**

16 **(Code of Civ. Proc. § 1060)**

17 **(Against All Defendants)**

18 30. Plaintiffs incorporate by reference and reallege each and every allegation set forth  
19 in this complaint.

20 31. Notwithstanding Defendants' duty under Section 31, Defendants are required to  
21 follow and enforce Government Code section 8252, which requires public employees on the  
22 Applicant Review Panel to grant preferences to and discriminate against individuals on the basis  
23 of their race, ethnicity, and sex when determining the 60 most qualified applicants to be included  
24 in the pool.

25 32. An actual and justiciable controversy exists between the parties concerning the  
26 constitutionality of Government Code section 8252(g). Plaintiffs are informed and believe, and  
27 therefore contend that Section 8252(g) violates Section 31 to the extent that it requires, authorizes,  
28 or encourages public employees, of the Applicant Review Panel, to grant preferential treatment to

1 and discriminate against applicants to the Citizens Redistricting Commission on the basis of race,  
2 ethnicity, or sex.

3 33. Plaintiffs are informed and believe, and therefore allege, that Defendants dispute  
4 that Section 8252 violates Section 31 to the extent it mandates, encourages, or authorizes public  
5 employees to grant preferential treatment to or discriminate against any applicant based on race,  
6 ethnicity, or sex in the operation of public employment.

7 34. A judicial determination of rights and responsibilities arising from this actual  
8 controversy is necessary and appropriate at this time.

9 WHEREFORE, Plaintiffs pray for judgment as hereinafter set forth.

10 **THIRD CAUSE OF ACTION**

11 **WRIT OF MANDATE RELATING TO GOVERNMENT CODE**  
12 **SECTION 8252(g) TO COMPEL ALL RESPONDENTS**  
13 **TO PERFORM THEIR DUTIES UNDER ARTICLE I,**  
14 **SECTION 31, OF THE CALIFORNIA CONSTITUTION**

15 **(Mandamus—Code of Civ. Proc. § 1085)**

16 **(Against All Respondents)**

17 35. Petitioners incorporate by reference and reallege each and every allegation set forth  
18 in this petition.

19 36. California Code of Civil Procedure section 1085 permits this Court to issue a writ  
20 of mandate to compel actions required of the State of California, state boards or commissions, and  
21 state officers and employees.

22 37. Section 31 prohibits the State and its political subdivisions or governmental  
23 instrumentalities from granting preferential treatment to, or discriminating against, any group or  
24 individual on the basis of race, color, ethnicity, sex, or national origin in the operation of public  
25 employment and public contracting. Cal. Const. art. I, § 31(a), (f). Section 31 prohibits the State  
26 and all its political subdivisions or governmental instrumentalities from classifying applicants for  
27 public benefits, including public employment or public contracting, by race. *Hi-Voltage*, 24 Cal.  
28 4th at 561 (citation omitted) (“Rather than classifying individuals by race . . . Proposition 209  
*prohibits* the State from classifying individuals by race.”).

1 38. Respondent Commission is a political subdivision or an instrumentality of the state  
2 government. Cal. Const. art. I, § 31(f); Cal. Const. art. XXI, § 1; Gov't Code § 8251, *et seq.*

3 39. Respondents are under a clear and present duty to comply with Section 31, which  
4 prohibits discrimination against or preferential treatment to any individual or group on the basis  
5 of race, sex, color, ethnicity, or national origin in the operation of public employment or public  
6 contracting.

7 40. Petitioners have a clear, present, legal right to enforce Respondents' performance  
8 of their duties under Section 31. Furthermore, Petitioners have a beneficial interest in assuring that  
9 the most qualified applicants be appointed to the Commission, free from any government  
10 discrimination or preferential treatment based upon race, sex, color, ethnicity, or national origin  
11 in the operation of public employment or public contracting.

12 41. Government Code section 8252(g) requires the first eight Commission members to  
13 use race, ethnicity, and sex in selecting the final six members to the Commission. This requirement  
14 violates Section 31 because it classifies and treats individuals differently on the basis of race,  
15 ethnicity, and sex in the operation of public employment or public contracting.

16 42. With the adoption of Government Code section 8252(g), Respondents are prohibited  
17 from performing their legal duties as required by Section 31, they exceed their lawful powers and  
18 authority, and abuse their discretion in their use of race, ethnicity, or sex in the selection process  
19 of six Commission members.

20 43. To the extent Government Code section 8252(g) subjects individuals or groups  
21 to unequal and disadvantageous treatment on the basis of race, ethnicity, or sex when competing  
22 for public benefits, including public employment or public contracting, it violates Section 31.  
23 Section 8252(g) requires the first eight Commission members to discriminate against potential  
24 Commission members on the basis of race, ethnicity, and sex. An applicant who does not make  
25 the Commission "diverse" is punished by having his or her application rejected because of race,  
26 ethnicity, or sex.

27 44. Respondents' continued enforcement of Government Code section 8252(g), which  
28 mandates racial, ethnic, and sex-based preferences in the operation of public employment or public





1           3.       For a permanent prohibitory injunction enjoining Defendants and Respondents, and  
2 each Defendant and Respondent individually, from enforcing or attempting to enforce Government  
3 Code section 8252(g), to the extent that it discriminates against or grants preferential treatment to  
4 any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation  
5 of public employment or public contracting now and in the future;

6           4.       For this Court to issue a writ of mandate and/or prohibition compelling Respondents  
7 to perform their duties under Article I, section 31, of the California Constitution by commanding  
8 the Respondents, their agents, employees, officers, and representatives to stop enforcing, or  
9 attempting to enforce, Government Code section 8252(g) to the extent that it mandates the use of  
10 racial, ethnic, or sex-based discrimination or preferential treatment in the operation of public  
11 employment or public contracting, now and in the future;

12           5.       For this Court to issue a writ of mandate and/or prohibition compelling Respondents  
13 to perform their duties under Article I, section 31, of the California Constitution by commanding  
14 the Respondents, their agents, employees, officers, and representatives to stop enforcing, or  
15 attempting to enforce, Government Code section 8252 to the extent that it requires, authorizes, or  
16 encourages public employees on the Applicant Review Panel to grant preferential treatment or  
17 discriminate on the basis of race, ethnicity, or sex, when considering applications to the Citizens  
18 Redistricting Commission, now and in the future;

19           6.       That the Court sever and find invalid, unenforceable, and unconstitutional that  
20 portion of Government Code section 8252(g), which requires the State of California, its agencies,  
21 departments, officers, public employees, and political subdivisions or governmental  
22 instrumentalities to discriminate against or grant preferential treatment on the basis of race,  
23 ethnicity, or sex in the operation of public employment or public contracting in violation of  
24 Article I, section 31, of the California Constitution;

25           7.       For costs of suit;

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- 8. For attorneys' fees; and
- 9. For such other and further relief as the Court may deem proper.

DATED: March 15, 2012.

Respectfully submitted,

MERIEM L. HUBBARD  
RALPH W. KASARDA  
JOSHUA P. THOMPSON  
ADAM R. POMEROY

By   
ADAM R. POMEROY

Attorneys for Plaintiffs and Petitioners





