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

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

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

Plaintiffs and Plaintiffs,

v.

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

Defendants and Defendants.

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

NOTICE OF HEARING AND DEMURRER TO 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: March 23, 2012
Time: 9:00 a.m.
Dept: 31
Judge: Hon. Michael P. Kenny

NOTICE OF HEARING

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on March 23, 2012, at 9:00 a.m. or as soon thereafter as the matter may be heard, in Department 31 of the Gordon D. Schaber Sacramento County Courthouse, located at 720 9th Street, Sacramento, California, defendants State of California and the California Citizens Redistricting Commission (collectively, defendants) will and hereby do demur to each and every cause of action in plaintiff's complaint.

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

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

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

//

//

//

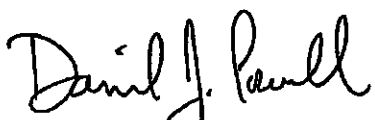
//

//

Dated: December 16, 2011

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

DEMURRER

Defendants State of California and the California Citizens Redistricting Commission demur to the 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: December 16, 2011

Respectfully Submitted,

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

Daniel J. Powell

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

Page

CONSTITUTIONAL PROVISIONS

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

In 2008, California voters adopted Proposition 11, which transferred from the Legislature to a 14-member Citizen Redistricting Commission (Redistricting Commission) the authority to draw election district lines for the Legislature and the Board of Equalization. The stated purpose of Prop. 11 was to eliminate the "partisan battles" of the Legislature and substitute an independent process that would be open and ensure "fair representation" of all Californians. (Ballot Pamp., Gen. Elec. (Nov. 4, 2008) text of Prop. 11, p. 137, sec. 2.) To ensure that Prop. 11 achieved these goals, it specifically amended the California Constitution to require that the members of the Redistricting Commission be "independent from legislative influence and reasonably representative of the State's diversity." (Cal. Const., art. XXI, § 2, subd. (c)(1).)

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

The complaint, however, fails to state a cause of action as a matter of law. First, by its terms Prop. 209 does not apply to the appointment of the members of the Redistricting Commission. There is a well-recognized legal distinction between public employees, the selection of whom is governed by Prop. 209, and public officers, the selection of whom is not. Under established case law, the Commissioners are public officers and not state employees. Thus, Prop. 209 does not apply to Section 8252(g) in the first instance. Second, even if Prop. 209 did

govern the appointment of public officers, plaintiffs cannot meet the demanding standard required to establish a facial violation. By its terms, Section 8252(g) does not give preferential treatment to or discriminate against any individual or group on the basis of race or gender. Section 8252(g) does precisely the opposite by encouraging participation by individuals of *all* races and genders. Moreover, the six Commissioners appointed pursuant to the criteria in Section 8252(g) are considered together as a slate of six rather than individually, so there is no preference given to (or discrimination against) any individual person. Because the plaintiffs cannot state a claim alleging a facial violation of Prop. 209, the State of California and the Redistricting Commission respectfully request that the Court dismiss the complaint, with prejudice.

BACKGROUND

I. PROPOSITION 11

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

The Redistricting Commission is a creature of the Constitution, which requires that it be comprised of fourteen members, five of whom must be registered Democrats,[2] five of whom must be registered Republicans, and four of whom may not be registered as neither. (Cal. Const., art.

---

[1] Initially, the Redistricting Commission had the authority to draw Senatorial, Assembly, and Board of Equalization district lines, while the Legislature retained the authority to draw Congressional boundaries. Prop. 20, however, extended the commission's authority to include Congressional boundaries. (Ballot Pamp., Gen. Elec. (Nov. 2, 2010) text of Prop. 20, pp. 95–97.)

[2] The constitutional and statutory provisions refer to the largest and second-largest political parties in California by registration. Those are currently the Democratic and Republican parties, respectively. (California Secretary of State, Odd-Numbered Year Report of Registration (Feb. 10, 2011) <http://www.sos.ca.gov/elections/ror/ror-pages/ror-odd-year-11/hist-reg-stats.pdf> [as of December 14, 2011].)

XXI, § 2, subd. (a)(2).) Each member must have been registered with the same political party (or unaffiliated with a political party) for the five years prior to being appointed, and must have voted in at least two of the last three statewide general elections. (*Id.*, subd. (c)(3).)

The State Auditor selects commissioners from a broad, diverse, and qualified pool of applicants. (Gov. Code, §§ 8251 et seq.) She removes from the applicant pool individuals with a conflict of interest (such as having served in or run for statewide elected office). (*Id.*, § 8252, subd. (a)(2).) An independent Applicant Review Panel, comprised of licensed independent auditors, then selects the sixty most qualified applicants, comprised of 20 Democrats, 20 Republicans, and 20 belonging to neither party. The statutory qualification criteria for these sixty are "relevant analytical skills, ability to be impartial, and appreciation of California's diverse demographics and geography." (*Id.*, § 8252, subd. (d).) Leaders of the Democratic and Republican parties in the Legislature then preview this group of 60 qualified applicants and may strike up to 8 individuals in each subset of 20 to further minimize perceived or actual partisan leanings. (*Id.*, § 8252, subd. (e).) From the remaining pool of candidates, the State Auditor randomly selects three Democratic, three Republican, and two unaffiliated candidates to be the first eight members of the Redistricting Commission. (*Id.*, § 8252, subd. (f).)

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

(d).) The candidates in each slate must reflect California's diversity and must also have the relevant analytical skills and ability to be impartial. (*Id.*, § 60860, subd. (f).)

All 14 members serve a ten-year term that ends upon the appointment of the first member of the succeeding Redistricting Commission. (Cal. Const., art. XXI, § 2, subd. (c)(4).) Members are prohibited from holding elected office for ten years following their appointment to the Commission, and cannot hold another appointed office or work as a lobbyist or political consultant for five years. (Cal. Const., art. XXI, § 2, subd. (c)(6).)

The Redistricting Commission is charged with drawing district lines and approving final maps in "an open and transparent process enabling full public consideration of and comment on the drawing of district lines." (*Id.*, art. XXI, § 2, subd. (b).) In drawing district lines, the members are directed to consider the following factors: compliance with the United States Constitution and the federal Voting Rights Act (42 U.S.C. § 1971 et seq.); geographic contiguity; geographic integrity of city, county, local neighborhood or local community of interest; geographic compactness; and, where possible, Senate districts comprised of two whole Assembly districts and Board of Equalization districts comprised of ten whole Senate districts. (Cal. Const., art. XXI, § 2, subd. (d).) Approval of the maps requires the vote of at least nine members, and must include three votes each from the Democratic, Republican, and unaffiliated members. (*Id.*, art. XXI, § 2, subd. (b)(5).) On August 15, 2011, the Commission certified to the Secretary of State the final maps for Congressional, Senatorial, Assembly, and Board of Equalization districts. (Ex. A-D to Request for Judicial Notice, see Cal. Const., art. XXI, § 2, subd. (g).) These maps are scheduled take effect for the June 20, 2012 primary election.

II. SUMMARY OF THE COMPLAINT

On October 4, 2011, plaintiffs Ward Connerly and the American Civil Rights Foundation filed a verified complaint for declaratory and injunctive relief and petition for writ of mandate. As alleged, the complaint "challenges, on its face, Government Code section 8252(g) as violating article I, section 31, of the California Constitution." (Compl., ¶ 1.) Plaintiffs claim that because Section 8252(g) requires the first eight Commissioners to consider race and gender as one of many factors in ensuring that the Commission reflects the diversity of California, it violates

article I, section 31. They seek a permanent injunction barring enforcement of Section 8252(g) (*id.*, ¶¶ 17–19), a declaration that Section 8252(g) violates article I, section 31 (*id.*, ¶¶ 21–25), and a writ of mandate compelling defendants to comply with article I, section 31 (*id.*, ¶¶ 28–37). In their complaint, plaintiffs do not ask the Court to invalidate the composition of the current Redistricting Commission or challenge the validity of the maps.

ARGUMENT

I. LEGAL STANDARDS

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

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

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

> The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public *employment*, public education, or public contracting.

(Cal. Const., art. I, § 31, subdivision (a) [emphasis added].) The selection of the members of the Redistricting Commission is not a matter of public employment or public contracting because as a matter of law the members are not state employees or contractors: they are public officers and their selection, like the selection of any other public officer, is not governed by Prop. 209.

A. The Law Has Long Distinguished Public Officers from State Employees.

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

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

(*Coulter, supra,* at pp. 186–187.) In addition, the Court noted that unlike a government employee, whose principal is some individual or entity, in the case of a public officer, it is the *public* who is his principal.

> The most general characteristic of a public officer, which distinguishes him from a mere employee, is that a public duty is delegated and entrusted to him, as agent, the performance of which is an exercise of a part of the governmental functions of the particular political unit for which he, as agent, is acting.

(*Id.* at p. 187.)

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

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

More recently, the California Supreme Court revisited the distinction between public officers and employees in considering whether a board of supervisors had exceeded its constitutional authority in creating a civilian review board vested with the power of subpoena. (*Dibb v. County of San Diego, supra*, 8 Cal.4th 1200.) As in *Coulter*, resolving whether the members of the review board were public officers or employees was dispositive. Under article XI, section 4, subdivision (e), county charters may specify the powers and duties of county officers, but not employees. (*Dibb, supra,* at p. 1204.)

Applying the *Coulter* analysis, the Court held that the members of the review board were public officers rather than mere employees. The review board was charged with reviewing complaints about the county sheriff and probation departments and was given the authority to hold hearings, administer oaths and issue subpoenas. (*Id.* at p. 1212.) This delegation of authority from the Board of Supervisors to the review board was sufficient to make them officers rather than mere employees. The high court also noted that a statute provided for appointment to a fixed term of office, another indicia of public officers. (*Ibid.*; see also *People v. Hulburt* (1977) 75 Cal.App.3d 404, 411 [noting that whether office was created by the Constitution or a statute was a primary consideration in determining whether an individual was an officer or an employee].)

The distinction between officers and employees has important consequences. Public employees can be fired, but public officers can be removed from office only pursuant to statute. For example, Government Code section 3060 allows a grand jury to file an accusation against any officer alleging willful or corrupt misconduct in office. (*People v. Hulbert, supra* 75 Cal.App.3d 404 [determining that deputy sheriff is a public officer, not an employee, and thus subject to Gov. Code, § 3060].) Public officers may be removed from office for specified reasons, including suffering conviction of designated crimes, being intoxicated while in discharge of her duties, or

making a false claim of receipt of a military decoration. (Gov. Code, § 3000 et seq.) Public officers have specific rights that attach to their offices (*id.*, § 1850 et seq.) and may also be required to pay a bond in order to assume office. (*id.*, art. 5, ch. 3, § 1450 et seq.) In short, the distinction between officer and employee is well recognized in the law and has a significant impact on the officeholder and for the Legislature's regulation of the office.

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

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

C. The Selection and Appointment of Public Officers Such As Members of the Redistricting Commission Is Not Governed by Prop. 209.

The text of Prop. 209 and principles of constitutional construction compel the conclusion that it does not apply to the selection of public officers such as members of the Redistricting Commission. When considering acts of the Legislature, or the voters exercising their power of initiative, courts must presume that a statute is valid "unless its unconstitutionality clearly, positively, and unmistakably appears." (*People v. Falsetta* (1999) 21 Cal.4th 903, 913.) "The electorate's legislative power is 'generally coextensive with the power of the Legislature to enact statutes.' (*Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 253.) Such statutes, moreover, like legislative enactments, are presumed to be valid. (*Legislature v. Eu* (1991) 54 Cal.3d 492, 501.)" (*Prof. Engineers in Cal. Government v. Kempton* (2007) 40 Cal.4th 1016, 1042.) This deference and the presumption of validity afforded all legislative acts arises because the Legislature (and voters) "may exercise any and all legislative powers which are not expressly . . . denied to it by the [California] Constitution." (*Methodist Hosp. of Sacramento v. Saylor* (1971) 5 Cal.3d 685, 691.) "In other words, [courts] do not look to the Constitution to determine whether the Legislature is authorized to do an act, but only to see if it is prohibited." (*Ibid.*) Any "restrictions and limitations [imposed by the Constitution] are to be construed strictly, and are not to be extended to include matters not covered by the language used." (*Ibid.*) Thus, "[i]f there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action." (*Ibid.*)

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

In light of the long-standing distinction between officers and employees, the failure of the drafters to specify that Prop. 209 applies to the appointment or selection of public officers is dispositive of plaintiffs' claims.

This court simply cannot rewrite Prop. 209 to extend it to an entirely new class. "In construing constitutional provisions, the intent of the enacting body is the paramount consideration. To determine that intent, courts first look to the language of the constitutional text, giving their words their ordinary meaning. " (*Powers v. City of Richmond* (1995) 10 Cal.4th 85,

91 [citations omitted].) Where the text is "clear and unambiguous" courts "need look no further." (*Bowens v. Superior Court* (1991) 1 Cal.4th 36, 48.) Because the distinction between public and office and public employment was well-established at the time Prop. 209 was drafted, had its drafters intended for section 31 to apply to the appointment of public officers, they would have so indicated in the text. Where an initiative contains terms that have been previously been construed or have a technical meaning, it is presumed that the drafters of an initiative measure intended to use those terms in a similar manner. (*Knight v. Superior Court* (2005) 128 Cal.App.4th 14, 24 [ban on marriage of same-sex couples did not ban domestic partnerships where initiative only referenced marriage and where the state had enacted domestic partnerships before passage of the initiative]; *Wilson v. John Crane, Inc.* (2000) 81 Cal.App.4th 847, 855 ["When an initiative contains terms that have been judicially construed, the presumption is almost irresistible that those terms have been used in the precise and technical sense in which they have been used by the courts."].)

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

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

application to public employment, contracting, and education should not be expanded to include public officers.

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

Another reason to excluding public officers from the scope of article I, section 31 is to harmonize it with another constitutional provision requiring the Governor to consider the racial, ethnic, and gender diversity of the California Citizens Compensation Commission when selecting its members. (Cal. Const., art. III, § 8; Ballot Pamp., Primary Elec. (June 5, 1990) text of Prop. 112.) Prop. 112 uses almost identical language to Section 8252(g) and would, under plaintiff's theory, be invalid under the later-enacted Prop. 209. The Compensation Commission establishes the annual salary, medical, dental, and other benefits for statewide officers. (See Cal. Const., art. III, § 8, subd. (a)) Prop. 112 provides that, in appointing the seven member Commission, "the Governor shall strive insofar as practicable to provide a balanced representation of the geographic, gender, racial, and ethnic diversity of the State in appointing commission members." (Cal. Const., art III, § 8, subd. (c).) If plaintiffs are correct that Section 8252(g) violates Prop. 209, then article III, section 8, subdivision (c) would also be vulnerable.

Instead, the Court should decline the invitation to set up a conflict between Prop. 112 and Prop. 209. "Elementary principles of construction dictate that where constitutional provisions can reasonably be construed to avoid a conflict, such an interpretation should be adopted." (*Serrano v. Priest* (1971) 5 Cal.3d 584, 596.) This gives effect to the presumption against implied repeal. (*City and County of San Francisco v. County of San Mateo* (1995) 10 Cal.4th 554, 563.) "So strong is the presumption against implied repeals that when a new enactment conflicts with an existing provision, 'In order for the second law to repeal or supersede the first, the former must constitute a revision of the entire subject, so that the court may say that it was intended to be a substitute for the first.' [Citation]" (*Board of Supervisors v. Lonergan* (1980) 27 Cal.3d 855, 868.) As Prop. 112 was enacted six years prior to Prop. 209, if Prop. 209 is read in the manner suggested by plaintiffs, it would impliedly repeal article III, section 8, subd. (c). Prop. 209 was

not revision, however, and a court would be required to harmonize article I, section 31 with article III, section 8 and give effect to both provisions.[4] The only way to do so would be to limit the application of article I, section 31 to its text and recognize that it is inapplicable to the selection of public officers. Since the provision requiring the Governor to consider the racial, ethnic, and gender diversity of members of the Compensation Commission is virtually identical to the requirement that the first eight Redistricting Commissioners consider those same factors (as well as others), harmonizing section 31 with article III, section 8 necessitates adopting an interpretation of section 31 that also harmonizes it with Section 8252(g).

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

Even if this court holds that Prop. 209 governs the appointment or selection of public officers such as the members of the Redistricting Commission, Section 8252(g) does not on its face violate Prop. 209. In a facial challenge to the statute, the plaintiff must "demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions." (*Samples v. Brown* (2007) 146 Cal.App.4th 787, 799, quoting *Tobe v. City of Santa Anna, supra*, 9 Cal.4th 1069, 1084.) Petitioners cannot meet this standard in this case.

As the regulations implementing Section 8252(g) make clear, that section is consistent with the requirements of Prop. 209. This is bessause the statute requires the first eight Commissioners to select a slate of six candidates that, *as a group*, reflect the state's diversity. Choosing a group based on characteristics, including, but not limited to, racial, ethnic, geographic and gender diversity does not result in discrimination against or in favor of any particular individual or group within the meaning of Prop. 209. Unlike quotas or affirmative action programs that give preference to minority owned businesses, Section 8252 is race- and gender-neutral. Moreover, since the final six Commissioners are chosen as a slate that as a whole is judged by its diversity,

[4] If Prop. 209 were construed to be a revision it would be invalid. Revisions must be proposed by the Legislature and then approved by the electorate. (Cal. Const,. art. XVIII, §1; *Strauss v. Horton* (2009) 46 Cal.4th 364, 386 ["although the initiative process may be used to propose and adopt *amendments* to the California Constitution, under its governing provisions that process may not be used to *revise* the state Constitution"].)

among other factors, there is no identifiable individual who is discriminated against on the basis of race, ethnicity or gender.

A. Section 8252(g) Does Not Discriminate Against Any Group.

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

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

The race- and gender-conscious programs cited in the ballot materials to Prop. 209, by contrast, did discriminate against particular groups and in favor of others, and illustrate how Section 8252(g) is different than those programs that motivated the passage of Prop. 209. The Legislative Analyst mentioned three types of "affirmative action" programs that could be eliminated under Prop. 209. They included:

- Specific goals for the participation of women-owned and minority-owned companies on work involved in state contracts, which required that at least 15 percent of the value of contract should be done by minority-owned companies and at least 5 percent should be done by women-owned companies
- Public college and university programs that are targeted toward minority or women students
- Goals and timetables to encourage the hiring of members of "underrepresented" groups for state government jobs

(Ballot Pamp., Gen. Elec. (Nov. 5, 1996), Analysis by the Legislative Analyst p. 30.) In each of these cases, specific minority or gender groups received the benefit of the particular program, while white men did not. Indeed, it was this perceived "reverse-discrimination" that was the focal point of the argument in favor of Prop. 209. (See *Hi-Voltage Wire Works, Inc. v. City of San Jose* (2000) 24 Cal.4th 537, 560–61 [quoting ballot materials].) Section 8252, by contrast, does not discriminate against any particular group or require "reverse-discrimination" since *all* racial, ethnic, and gender groups, whether majority or minority, are included within it.

B. Section 8252(g) Does Not Discriminate Against Any Individual.

Nor does Section 8252(g), on its face, require discrimination in favor of or against any individual on the basis of their race, ethnicity or gender. In selecting the final six members, the first eight judge whether a proposed slate of six should be added rather than whether an individual Commissioner should be seated. The regulations implementing Section 8252(g) provide:

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

(Cal. Code Regs., tit. 2, § 60860, subd. (b). In considering whether to approve a slate, the first eight members are required to determine whether the slate *as a whole* ensures that the Redistricting Commission reflects the diversity of California and that it includes members having the relevant analytical skills. (*Id.*, § 60860, subd. (f).) Whenever a slate is created or modified by a Commission member, specific formulas or ratios are prohibited. (*Id.*) The first slate of six candidates that is approved by at least five of the first eight members as required by section 8252(g) are seated as the final six Commissioners. (Cal. Code Regs., tit. 2, § 60860, subd. (g).)

Thus, the first eight members are never required to judge an individual applicant on the basis of his or her race, ethnicity, or gender. Rather, they are required to consider, as one factor, whether a particular slate of six applicants, when added to the existing eight members of the Redistricting Commission, reflects the diversity of the State as required by article XXI, section 2 of the California Constitution. As Section 8252(g) does not grant preferential treatment to any particular race, ethnicity, or gender and does not discriminate against any individual on the basis of his or her race, ethnicity, or gender, it does not violate article I, section 31 on its face.

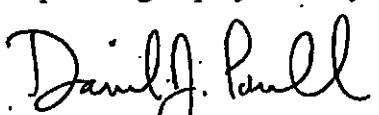
CONCLUSION

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

Dated: December 16, 2011

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

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 December 16, 2011, I served the attached

NOTICE OF HEARING AND DEMURRER TO 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

Margaret Carew Toledo
Attorney at Law
Mennemeier, Glassman & Stroud, LLP
980 9th Street, Suite 1700
Sacramento, CA 95814

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 December 16, 2011, at San Francisco, California.

Susan Chiang
Declarant

Signature

SA2011102775 ; 20555703.doc