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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,

vs.

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

Defendants.

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

[~~PROPOSED~~] AMICUS BRIEF OF CALIFORNIA COMMON CAUSE, LEAGUE OF WOMEN VOTERS OF CALIFORNIA, AND CALIFORNIA NAACP IN SUPPORT OF DEMURRER

[Application for Leave To File Amicus Brief and Proposed Order Granting Application for Leave To File Amicus Brief submitted concurrently herewith]

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATE STATUTES

TABLE OF AUTHORITIES
(continued)

[PROPOSED] AMICUS BRIEF OF CALIFORNIA COMMON CAUSE, LEAGUE OF WOMEN VOTERS OF CALIFORNIA, AND CALIFORNIA NAACP

Amici Curiae California Common Cause, League of Women Voters of California, and California NAACP ("Amici") urge the Court to sustain the demurrer filed by the Attorney General for two reasons.

First, Government Code section 8252(g) does not "inevitably pose a present total and fatal conflict with applicable constitutional prohibitions." (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084; see also *Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 180.) The section's requirement that the final six members of the Citizens Redistricting Commission ("the Commission") be "chosen to ensure the commission reflects this state's diversity" (Gov't Code § 8252(g)) does not inexorably conflict with Proposition 209's mandate that 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" (Cal. Const. art. I, § 31). A selection process that involves consideration of the State's "diversity" need not involve "preferential treatment" at all. Moreover, the section contains no requirement that race, sex, color, ethnicity, or national origin be considered in any fashion in creating the pool of applicants from which the members of the Commission are selected. Because Section 8252(g) does not on its face create an irreconcilable conflict with Proposition 209—and because Plaintiffs have declined to challenge Government Code section 8252(g) on the ground that there was actual discrimination or preferential treatment in the selection of commissioners—Plaintiffs' facial challenge to the statute must be rejected.

Second, even if the Court were to interpret Government Code section 8252 as facially in conflict with Proposition 209 (which it should not), basic canons of constitutional interpretation would still require that the challenged statute be upheld. When California voters established the Commission through Proposition 11, they amended Article XXI of the California Constitution to provide that this new entity must be "reasonably representative of this State's diversity." (Cal. Const. art. XXI, § 2(c)(1).) Other provisions of the initiative, such as the challenged Government Code section 8252, specified the particular procedures that would be used to select the Applicant Review Panel and ensure the Commission's diversity. These specific provisions must prevail in

any conflict with the earlier Proposition 209, which establishes a general prohibition against "discriminat[ion]" and "preferential treatment" in the broad fields of public employment, education, and contracting. (Cal. Const. art. I, § 31(a).) Thus, to the extent Proposition 11 is interpreted as necessarily "discriminating" or granting "preferential treatment" in violation of Proposition 209, the Court must give precedence to the subsequent and narrow "diversity" requirement of Article XXI of the Constitution, which applies solely and exclusively to the Commission. (*Izazaga v. Superior Ct.* (1991) 54 Cal.3d 356, 371 ["As a means of avoiding conflict, a recent, specific provision is deemed to carve out an exception to and thereby limit an older, general provision."].)

I. BACKGROUND

A. Voters Enacted Proposition 11 To Create the Independent Commission and Reform California's Redistricting System.

The Voters First Act, popularly known as Proposition 11, was ratified by California's electorate on November 4, 2008. The ballot measure "dramatically changed" the redistricting process, as described in greater detail below, by amending the California Constitution and adding several provisions to the Government Code to create an independent entity called the Citizens Redistricting Commission. (*Vandermost v. Bowen* (2012) 53 Cal.4th 421, 2012 WL 246627, at *5.) Amici include the authors and principal proponents of Proposition 11. (See RJN Ex. A at 72-73.[1])

The purpose of Proposition 11 is to strip legislators of the power to "draw their own political districts" and to "put the voters back in charge." (RJN Ex. A at 137.) As described in the ballot measure's factual findings, under the existing system "99 percent of incumbent politicians were reelected in the districts they had drawn for themselves in ... recent elections." (*Ibid.*) Districts were drawn in bizarre shapes solely "to protect incumbent legislators," with the result that legislators were "choosing their voters" rather than vice versa. (*Ibid.*) According to

[1] Citations to "RJN" refer to the Request for Judicial Notice in Support of Amicus Brief of California Common Cause, League of Women Voters of California, and California NAACP in Support of Demurrer, filed contemporaneously herewith.

Proposition 11, control of the redistricting process by self-interested politicians had harmed voters and silenced the "political voice" of many communities. (*Ibid.*)

To reform this dysfunctional system, Proposition 11 creates an independent body, the Commission, composed of fourteen individuals, to take responsibility for drawing California's electoral districts. (See generally *Vandermost*, *supra*, 2012 WL 246627, at *5-7.) The ballot measure promises to "make the redistricting process open so it cannot be controlled by the party in power." (RJN Ex. A at p. 137.) It sets forth specific criteria for the Commission to use in drawing new districts, including an emphasis on compliance with federal voting rights laws, geographical contiguity, and respect for the "geographic integrity" of California's cities, counties, neighborhoods, and communities of interest. (*Id.* at p. 138, codified as Cal. Const. art. XXI, § 2(d).) Proposition 11 requires the Commission to conduct all of its business "open to scrutiny by the public and the press." (*Id.* at p. 137.)

B. California's Constitution Requires the Commission To Be "Reasonably Representative of This State's Diversity."

Critical to fulfilling the promise of Proposition 11 was that the Commission itself be a representative body. The preamble to Proposition 11 states that the new system will entail participation from "an equal number of Democrats and Republicans" and guarantees the "full participation of independent voters." (RJN Ex. A at p. 137.) Indeed, the process for selecting the Commission's fourteen members is specifically designed to achieve balance across the political spectrum. Proposition 11 thus establishes an application and selection system to ensure that the fourteen members of the Commission will include five members from each of California's two largest political parties and four "who are not registered with either of the two largest political parties in California." (*Id.* at pp. 137-138, codified at Gov't Code §§ 8252(a)-(g).)

Equally important, Proposition 11 requires that the Commission be representative of other aspects of California's diversity as well. To that end, the ballot measure specifically amended Article XXI of the California Constitution to state that the Commission selection process is "designed to produce a Citizens Redistricting Commission that is independent from legislative influence and reasonably representative of this State's diversity." (*Id.* at p. 137, codified at Cal.

Const. art. XXI, § 2(c)(1).) To implement this constitutional "diversity" requirement, Proposition 11 added two new statutory provisions that are challenged in this action. First, Proposition 11 created Government Code section 8252(d), which provides that Commissioners must be drawn from a pool of the "most qualified" 60 applicants, as selected by an independent Applicant Review Panel, based on "relevant analytical skills, ability to be impartial, and appreciation for California's diverse demographics and geography." (*Id.* at p. 139.) Second, Proposition 11 created Government Code section 8252(g), which provides that, after the Commission's initial eight members are selected by lottery from this applicant pool, the remaining six members of the Commission must be "chosen to ensure the commission reflects this state's diversity, including, but not limited to, racial, ethnic, geographic, and gender diversity." (*Ibid.*) Section 8252(g) further states that "it is not intended that formulas or specific ratios be applied for this purpose" and that the remaining six members must "also be chosen based on relevant analytical skills and ability to be impartial." (*Ibid.*)

The ballot materials submitted to voters in the November 2008 election, relying on Proposition 11's diversity requirements, promised voters that the Commission would be an inclusive and diverse institution. The official analysis furnished by the California Secretary of State reiterated that the Commission's members would be picked "based on analytic skill, impartiality, and appreciation of California's diversity." (RJN Ex. A at 71.) The arguments submitted to voters in support of the ballot measure likewise stated that Proposition 11 would create "a diverse, qualified, independent commission that will draw fair districts that truly respect California's communities and neighborhoods." (RJN Ex. A at 73.)

The constitutional "diversity" provisions—along with the statutory provisions implementing them—are an important part of Proposition 11. The legitimacy of a democratic government rests on the premise that all segments of society may participate in the governing process and are represented in government institutions. (See, *e.g.*, *Grutter v. Bollinger* (2003) 539 U.S. 306, 332 [noting that a representative democracy such as ours requires "participation by members of all racial and ethnic groups in the civic life of our Nation"].) A central tenet underlying our system of representative government, widely held among the electorate and

articulated well by John Adams, is that the government should be a "portrait, in miniature, of the people at large, as it should think, feel, reason and act like them." (John Adams, "Letter to John Penn," *Works* (Boston, 1852-1865), IV, 205; cf. p. 195.) Indeed, as reflected by the Voting Rights Act of 1965 and the federal jurisprudence interpreting it, questions of race and ethnicity are especially salient in the electoral context, where there is paramount concern that specific demographic groups be able to participate and secure effective representation. (See, *e.g.*, *Miller v. Johnson* (1995) 515 U.S. 900, 905-06 [describing the federal Act's requirement that covered jurisdictions "preclear[]" redistricting plans in order to protect "the position of racial minorities with respect to their effective exercise of the electoral franchise"].)

The "diversity" provisions of Proposition 11 were included to ensure the legitimacy of the Commission in the eyes of the public as an inclusive and appropriately representative body. By mandating that the members of the Commission themselves be diverse, Proposition 11 ensures that the Commission, in both form and substance, reflects and is responsive to the diverse character of the electorate and the disparate viewpoints of California's many political communities. (Cf. Richard H. Pildes, *The Politics of Race*, 108 Harv. L. Rev. 1359, 1376 (1995) [discussing empirical studies showing that presence of members of minority groups in local governments correlated with greater representation of those groups' interests].) Guaranteeing the representative character of the Commission is all the more important because its members are not elected. Indeed, the "diversity" provisions of Proposition 11 were essential to counter arguments, such as those advanced on the ballot by opponents of the initiative, that sought to discredit the Commission on the ground that its members were "never elected by the people" and that the Commission would not "represent you or your neighbors." (RJN Ex. A at 73.) Without these provisions, Amici believe Proposition 11 might not have received the support among voters that led to its passage and might not have become widely accepted as a legitimate representative body.

II. ARGUMENT

Plaintiffs claim that Proposition 11 is unconstitutional and allege that Government Code Section 8252 impermissibly requires the Commission "to grant preferential treatment to applicants on the basis of race, ethnicity, and gender, and accordingly, to discriminate against

other applicants on the same basis." (Compl. ¶¶ 1, 6.) Their theory is that Proposition 11 therefore violates a previously enacted constitutional initiative known as Proposition 209, which prohibits the State from discriminating or providing preferential treatment on these bases in the fields of public employment, education, and contracting. (*Id.* ¶¶ 8-10, 15.) Significantly, however, Plaintiffs do not challenge Proposition 11 as it has actually been put into practice at the Commission. Instead, they challenge Government Code section 8252(g) "on its face." (*Id.* ¶ 1.)

Plaintiffs' facial attack on Proposition 11 is without merit and should be rejected. As an initial matter, and as the Attorney General's demurrer explains at length (in an argument that Amici support but do not repeat here), the Commission's members are public officials, not public employees, and so Proposition 209 does not apply in this context. (Mem. of Points & Auth. ISO Demurrer at 5-12.)[2] Amici submit that there are two additional and independent bases why Plaintiffs' challenge must be dismissed: first, Proposition 11 does not present an inevitable, total, and fatal conflict with Proposition 209; and second, even if the two initiatives are construed as necessarily conflicting, the more specific provisions of the later enacted measure, Proposition 11, trump the general terms of Proposition 209.

A. A Facial Challenge Requires a Showing That a Statute Poses "a Present Total and Fatal Conflict With Applicable Constitutional Prohibitions"

A plaintiff who challenges a statute as "unconstitutional on its face" bears a "heavy burden of proof." (*Am. Civil Rights Foundation v. Berkeley Unified Sch. Dist.* (2009) 172 Cal.App.4th 207, 216.) "A facial challenge 'is the most difficult challenge to mount successfully, since the challenger must establish that *no set of circumstances exists under which the law would be valid.*'" (*T.H. v. San Diego Unified School Dist.* (2004) 122 Cal.App.4th 1267, 1281, quoting *Hatch v. Superior Ct.* (2000) 80 Cal.App.4th 170, 193.)

[2] As the Attorney General explains in its demurrer, Government Code section 8252(g) does not run afoul of Proposition 209 because it does not pertain to "public employment, public education, or public contracting." (Mem. of Points & Auth. ISO Demurrer at pp. 5-11.) Amici fully support this principal basis for the Attorney General's demurrer, which, if rejected, would impede the basic operation and function of the executive branch, and for that matter, the rest of our State government. Amici submit this brief to provide the Court with additional analysis regarding the Attorney General's further argument that the Commission should not be deemed invalid as an impermissible form of "discrimination" or "preferential treatment" under Proposition 209. (*Id.* at pp. 11-15.)

It is not enough for the plaintiff to show that the challenged law is *potentially* invalid; he must prove that it is *always* and *necessarily* so. "To support a determination of facial unconstitutionality, voiding the statute as a whole, [plaintiff] cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular application of the statute." (*Tobe*, *supra*, 9 Cal.4th at p. 1084.) "Under a facial challenge, the fact that the statute 'might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid.'" (*Sturgeon v. Bratton* (2009) 174 Cal.App.4th 1407, 1418, quoting *Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660, 679.) Stated differently, a plaintiff must demonstrate "that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions." (*Tobe*, *supra*, 9 Cal.4th at p. 1084.)

B. Proposition 11's Requirement that Commissioners Be Selected To Ensure "Racial, Ethnic, Geographic, and Gender Diversity" Does Not Pose a "Present Total and Fatal Conflict" with Proposition 209

Government Code section 8252(g)'s requirement that the final six members of the Commission be selected to ensure "racial, ethnic, geographic, and gender diversity does not pose a "present total and fatal conflict" with Proposition 209. Plaintiffs allege that Government Code section 8252(g) on its face requires both the Commissioners and the Applicant Review Panel to act in violation of Proposition 209. Proposition 11, however, in no way on its face mandates that either body engage in improper preferential treatment that would be unconstitutional.

1. Government Code Section 8252(g) Does Not Require Commissioners to Grant Preferential Treatment on the Basis of Race, Sex, Color, Ethnicity, or National Origin in Violation of Proposition 209

Government Code section 8252(g) does not require that the final six Commissioners be selected in a manner that violates Proposition 209. Under Proposition 209, the State is not permitted to "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(a).) The cases applying Proposition 209 have held, however, that the measure does not absolutely preclude the consideration of race, sex, or any other characteristic under all circumstances.

In *American Civil Rights Foundation v. Berkeley Unified School District*, for example, the Court of Appeal upheld a public school district's policy of assigning students to particular schools based on, among other things, the racial and ethnic makeup of four-block residential neighborhoods. (172 Cal. App. 4th at p. 221-222.) In that case, which was brought by the same plaintiffs that filed this action, the court rejected the notion that Proposition 209 prohibits the State from "'using race' in any fashion." (*Id.* at p. 218.) After reviewing the legislative history of Proposition 209, the court concluded that it "was not intended to preclude all consideration of race by government entities but rather was intended to prohibit only those state programs and policies that discriminate against or grant preferential treatment to any individual or group on the basis of race." (*Id.* at p. 220, citing *Hi-Voltage Wire Works, Inc. v. City of San Jose* (2000) 24 Cal.4th 537, 599-602.) Other California cases applying Proposition 209 have likewise concluded that consideration of characteristics such as race or sex, including in the context of policy to promote "diversity," are permissible. (*Los Angeles Cnty. Prof. Peace Officers Assn. v. Cnty. of L.A.* (June 20, 2002) 2002 WL 1354411, at *5 ["County's generalized Policy on Diversity does not either mandate preferential treatment or provide for racial or gender quotas and set asides"].)

By contrast, in cases where specific programs or governmental actions have been held unconstitutional under Proposition 209, the conduct in question has involved a specific numerical goal or requirement for a favored group, including that the participation or hiring of minority and other "disadvantaged" groups be "maximized." For example, in *Hi-Voltage Wire Works*, the California Supreme Court held that the City of San Jose's public contracting program was unconstitutional because it "compelled" the solicitation of minority- and women-owned businesses and established "participation goals" that, in the view of the Court, "amount[ed] to discriminatory quotas or set-asides, or at least race- and sex-conscious numerical goals." (24 Cal.4th at pp. 562-563.) Similarly, in *Kidd v. State of California* (1998) 62 Cal.App.4th 386, the Court of Appeal invalidated a "certification" program whose explicit goal was to ensure that six of ten new state agency employees were "minorities, females and/or disabled persons." (*Id.* at p. 395.) In the same vein, in *Connerly v. State Personnel Board* (2001) 92 Cal.App.4th 16, the Court of Appeal struck down five different race-conscious programs that employed specific goals,

timetables, and ratios to promote, hire, or benefit women and racial minorities. (*Id.* at pp. 47-63.) The court in *Connerly* held that it was impermissible for a state agency to adopt policies and practices designed to "maximiz[e] the level of participation" of specific "disadvantaged" groups according to race, ethnicity, and gender. (*Id.* at p. 47.) Finally, in *Crawford v. Huntington Beach Union High School District* (2002) 98 Cal.App.4th 1275, the Court of Appeal struck down a school district's policy that approved or denied "one-to-one" transfer requests based solely on a student's race. (*Id.* at pp. 1284-85.)

Government Code section 8252(g)—the statute challenged here—is very different. It does not require the Commissioners to consider or employ race or sex in any type of rigid formula, nor is race or sex the sole or determinative criterion for selecting Commission members, as was the case in other government programs that have been held invalid under Proposition 209. It does not establish a set-aside or quota. It does not use numerical goals or timetables. Indeed, it does not use race or sex as a determinative factor in any applicant's appointment to the Commission. Quite the opposite is true: Government Code section 8252(g) explicitly eschews the type of rigid calculations that have been held impermissible under Proposition 209 and states that, in considering the diversity of the Commission's membership, "it is not intended that formulas or specific ratios be applied." (Gov't Code § 8252(g).) Proposition 11 requires only that the Commission be "reasonably representative of this State's diversity" (Cal. Const. art XXI § 2(c)(1),). Moreover, this requirement is part of a carefully crafted scheme pursuant to which Commission members are also selected based on their "relevant analytical skills, ability to be impartial, and appreciation for California's diverse demographics and geography." (Gov't Code § 8252(d) & (g); see also Mem. of Points & Auth. ISO Demurrer at pp. 2-4.) It is thus fundamentally different from—indeed, apparently intentionally drafted to be different from—the programs held unconstitutional in *Hi-Voltage*, *Connerly*, *Kidd*, and *Crawford*, all of which either involved numerical goals and timetables or were designed to maximize or allocate a specific benefit to particular demographic groups. (See *Brown*, *supra*, 29 Cal.3d at p. 180 ["[T]he presumption of constitutionality accorded to legislative acts is particularly appropriate when the Legislature has enacted a statute with the relevant constitutional prescriptions clearly in mind."].)

Furthermore, Government Code section 8252(g) does not place a thumb on the scale in favor of any particular group. To the contrary, the statute requires only that the final six members of the Commission are chosen to "ensure the commission reflects this state's diversity, including, but not limited to, racial, ethnic, geographic, and gender diversity." (Gov't Code § 8252(g).) This "diversity" requirement does not necessarily favor women over men. It does not absolutely privilege racial minorities. In fact, on the face of the statute, Government Code section 8252(g) neither favors nor disfavors any particular applicant or group. Its operation depends entirely on context—namely, whether an applicant's unique characteristics enhance or detract from the diversity of the Commission, as compared to the identities of the eight initial members of the Commission who are selected by random lottery. (Gov't Code § 8252(f).) Thus, although Government Code section 8252(g) calls for the consideration of an applicant's race, the statute is on its face neutral with respect to the race of any particular applicant and does not establish race or sex as a determinative factor in the selection of any applicant. In contrast to programs that have been held unconstitutional under Proposition 209, therefore, the statute does not grant "preferential treatment" to any particular individual or group, as that constitutional term has been interpreted. (*Berkeley*, *supra*, 172 Cal.App.4th at p. 222 ["While race-conscious decision-making that prefers individuals of one race over individuals of another race is unconstitutional, decision makers remain free to recognize that our society is composed of multiple races with different histories, to gather information concerning geographic distribution of the races, and to adopt race-neutral policies in an effort to achieve a fair allocation of resources."].)

Given its limited use of race and sex and the fact that Government Code section 8252(g) does not establish a preference for any particular group, Amici contend that it could *never* be applied by the Commissioners in a manner that runs afoul of Proposition 209's prohibition on "discrimination" or "preferential treatment." Indeed, this Court is obligated to reasonably construe Proposition 209 and Article XXI section 2(c)(1)'s diversity mandate, as implemented by Government Code section 8252(g),[3] to not conflict. (See, e.g., *Serrano v. Priest* (1971) 5 Cal.3d

[3] Because Article XXI section 2(c) and Government Code section 8252(g) were enacted jointly as part of Proposition 11, there can be no dispute that the drafters of Proposition 11 and the voters who enacted it specifically contemplated that Article XXI section 2(c)'s diversity command

584, 596 ["Elementary principles of construction dictate that where constitutional provisions can reasonably be construed to avoid a conflict, such an interpretation should be adopted."]; *City & County of San Francisco v. County of San Mateo* (1995) 10 Cal.4th 554, 563 [same].)

Regardless, whether Government Code section 8252(g) could ever be applied by the Commissioners in a manner that violates Proposition 209 is not the question before the Court. Plaintiffs have deliberately declined to allege that "race, sex, color, ethnicity, or national origin" actually played a role in the appointment of any Commission member and have instead brought only a facial challenge to Government Code section 8252(g). "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*, *supra*, 9 Cal.4th at p. 1084; see also *Dillon v. Mun. Ct.* (1971) 4 Cal.3d 860, 865-866 [facial challenge "is directed solely to the language of the enactment and not to its application in the particular case"].) Accordingly, the question here is only "whether the statute can constitutionally be applied." (*Arcadia Unified Sch. Dist. v. State Dept. of Educ.* (1992) 2 Cal.4th 251, 267.) Because Government Code section 8252(g) is capable of being applied by the Commissioners in any number of ways that do not discriminate or grant preferential treatment in violation of Proposition 209, the complaint is insufficient to establish that Government Code section 8252(g) is unconstitutional on its face.

2. Government Code Section 8252(g) Does Not Require the Applicant Review Panel To Consider Race, Sex, Color, Ethnicity, or National Origin in Creating the Pool of 60 "Most Qualified" Applicants

Plaintiffs' First Amended Complaint adds new allegations that the selection process for the Applicant Review Panel (as opposed to the separate process of selecting the final six Commissioners) also violates Proposition 209. (First Am. Compl. ¶ 19.) This new theory is similarly without merit.

Contrary to Plaintiffs' allegations, Government Code section 8252(g) does not apply to or govern the Applicant Review Panel. Instead, the Applicant Review Panel is governed by

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would be implemented by Government Code section 8252(g)'s mandate. (Cf. *City & Cnty. of San Francisco, supra*, 10 Cal.4th at p. 563 [constitutional provisions enacted by initiative should be interpreted by "contemporaneous constructions . . . made by the Legislature"]; *Amador Valley Joint Union High School Dist. v. State Bd. of Equalization* (1978) 22 Cal.3d 208, 245 [same].)

Government Code section 8252(d), which directs the panel to create a pool of sixty of the "most qualified" applicants. Although Plaintiffs have alleged that the Applicant Review Panel must consider the "qualifications of applicants, including their race, sex, and ethnicity, in order to provide the eight Commissioners with sufficiently diverse candidates to meet the statutory requirements" (First Am. Compl. ¶19), this allegation is contradicted by the judicially-noticeable text of the statute that Plaintiffs purport to challenge on its face. (*See* Evid. Code § 451(a).) Government Code section 8252(d) explicitly mandates that the Applicant Review Panel create the sixty applicant pool "on the basis of relevant analytical skills, ability to be impartial, and appreciation for California's diverse demographics and geography." Nowhere does the statute provide that the race, gender, or ethnicity of applicants must be considered by the Applicant Review Panel in selecting the most qualified applicants. Rather, Government Code section 8252(d) only requires that applicants' *appreciation for* California's diverse demographics be considered.[4] As explained above, because the complaint fails to establish that Government Code section 8252(g) creates an unavoidable and irreconcilable conflict with respect to Proposition 209, the court cannot find Proposition 11 facially unconstitutional.

C. To the Extent Proposition 209 and Proposition 11 Unavoidably Conflict, the Specific and Later Enacted Provisions of Proposition 11 Should Control.

Even if the Court were to conclude that Government Code section 8252(g) necessarily and fatally conflicts with Proposition 209, Plaintiffs' facial challenge to the statute still must be rejected. This is because well-established canons of statutory construction require courts (i) to give precedence to later enacted provisions over those enacted earlier and (ii) to privilege

[4] As the State notes in its Demurrer, the implementing regulations for Government Code section 8252 provide that the Applicant Review Panel may consider the diversity of the pool of 60 qualified applicants in precisely the same manner that Section 8252(g) provides the eight randomly chosen Commissioners may consider the diversity of the Commission in selecting the final six Commissioners. (Cal. Code Regs., tit. 2, § 60850, subd. (e).) Because the regulations' diversity mandate operates identically to Government Code section 8252(g), it does not violate Proposition 209 for the reasons stated in Section II.B.1. Moreover, because the First Amended Complaint brings only a facial challenge to Government Code section 8252(g), the implementing regulations are not at issue here. (See *Tobe v. City of Santa Ana* (1995) 9 Cal. 4th 1069, 1084 [court's consideration of facial challenge to the constitutional validity of a statute is limited to "only the text of the measure itself."]; *Cal. Farm Bureau Federation v. State Water Resources Control Board* (2011) 51 Cal. 4th 421, 436-446 [rejecting facial challenge to statute and analyzing implementing regulations under an as-applied analysis].)

specifically applicable constitutional provisions over more general ones. In this case, these principles of construction require the Court to uphold Proposition 11 and its constitutional mandate for "diversity" among the Commission's membership, even in the face of a putative conflict with the earlier enacted Proposition 209, which has general application to the broad fields of public contracting, education, and employment.

California courts have frequently recognized that, where two constitutional provisions are in apparent conflict, the later enacted provision should be "deemed to carve out an exception to and thereby limit" the earlier enacted provision. (*Greene v. Marin Cnty. Flood Control and Water Conservation Dist.* (2010) 49 Cal.4th 277, 290; see also *Serrano v. Priest*, *supra*, 5 Cal.3d at p. 596 [holding that constitutional provision "adopted more recently" would prevail over earlier enacted provision if they were in conflict]; *Crawford*, *supra*, 98 Cal.App.4th at p. 1286 ["It is a firmly established rule of constitutional jurisprudence that where two constitutional provisions conflict, the one that was enacted later in time controls."].) The precedence given to later enacted legislation flows from the presumption that lawmakers, whether they pass laws through the Legislature or the ballot box, are "aware of existing laws and judicial constructions in effect at the time legislation is enacted" and necessarily intend for the legislation they enact to not be rendered invalid by existing law. (*Hobbs v. Mun. Ct.* (1991) 233 Cal.App.3d 670, 682-683 [internal quotation marks and citation omitted].)

Equally well recognized is the rule that "a provision that specifically addresses a particular subject takes precedence over a provision that is general." (*Hobbs*, *supra*, 233 Cal.App.3d at pp. 682-683.) "If it is impossible to harmonize or reconcile portions of a constitution, special provisions control more general provisions, and the general and special provisions operate together, neither working the repeal of the other." (*People v. Western Air Lines* (1954) 42 Cal.2d 621, 636-37; see also *Morales v. Trans World Airlines, Inc.* (1992) 504 U.S. 374, 384-385 ["[A] commonplace of statutory construction [is] that the specific governs the general."].) This rule of interpretation is in fact codified in the Code of Civil Procedure: "In the construction of a statute the intention of the Legislature . . . is to be pursued, if possible; and when a general and particular provision are inconsistent, the latter is paramount to the former." (Code Civ. Proc. § 1859.)

The Court of Appeal has previously relied on these two canons of interpretation to hold that a later enacted initiative on a specific subject trumps a preexisting, general constitutional prohibition. In *Hobbs*, the court held that the newly enacted Proposition 115, which created a constitutional requirement of reciprocal criminal discovery, trumped the general preexisting privilege against self-incrimination found in Article I, Section 15 of the California Constitution. The court rested this determination on the fact that Proposition 115 "directly addresses the issue of discovery while article I, section 15" is of only general application. (233 Cal.App.3d at p. 682.) The court further found that, since the drafters of Proposition 115 and the voters who enacted it were presumptively aware of the California Constitution's existing privilege against self-incrimination, Proposition 115 must be read to supersede that privilege, at least insofar as discovery was concerned. "A contrary conclusion," said the *Hobbs* court, "would largely render the new constitutional provision nugatory—a result that should be avoided." (*Id.* at p. 683.)

Similarly, Article XXI section 2(c)(1) specifically states that the Commission should be "independent from legislative influence and reasonably representative of this State's diversity." This constitutional mandate, as implemented by Government Code section 8252(g), is directed to the Commission's "selection process." (Cal. Const. art XXI, § 2(c)(1).) In the narrow institutional context of the Commission, this constitutional command, as in *Hobbs*, must be given precedence over Proposition 209's general prohibition on "preferential treatment." Moreover, as in *Hobbs*, the drafters of Article XXI section 2(c) and Government Code section 8252(g) must be deemed to have been aware of Proposition 209's preexisting ban on preferential treatment and to have intended for Article XXI section 2(c)'s mandate of diversity, as well as Government Code section 8252(g)'s implementation of that mandate, to operate outside of that ban. A contrary interpretation of Proposition 11 would render the "diversity" requirement of Article XXI section 2(c) "nugatory." (*Hobbs*, *supra*, 233 Cal.App.3d at p. 683.) Thus, to the extent that a conflict between the two ballot measures exists, this Court, like the court in *Hobbs*, must avoid this unintended result by interpreting Article XXI section 2(c) as superseding Proposition 209 and holding that Government Code section 8252(g) therefore does not violate Proposition 209's ban on preferential treatment.

III. CONCLUSION

Proposition 11 took redistricting "out of the partisan battles of the Legislature" and put responsibility for drawing the political map in the hands of a new entity, the Commission. (RJN Ex. A at p. 137.) That new entity's legitimacy is founded not only on the fact that it draws the map according to "strict, nonpartisan rules," but also on the fact that it is "independent from legislative influence and reasonably representative of this State's diversity." (*Ibid.*) For the reasons set forth above, Proposition 11's mandate that the State's diversity be considered in selecting the Commission's members poses no "present total and fatal conflict" with the requirements of Proposition 209. (*Tobe, supra*, 9 Cal.4th at p. 1084). Even in the event that the Court perceives such a conflict, the later enacted and specific provisions of Proposition 11 trump the earlier enacted and general prohibitions of Proposition 209 in the specific institutional context of the Commission. (*Hobbs, supra*, 233 Cal.App.3d at pp. 682-683.) Accordingly the demurrer of the Attorney General should be sustained.

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