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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

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

Plaintiffs and Petitioners,

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 Respondents.

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

PLAINTIFFS' OPPOSITION TO DEMURRER BY STATE OF CALIFORNIA AND THE CALIFORNIA CITIZENS REDISTRICTING COMMISSION

Place: Department 31
Judge: The Hon. Michael Kenny

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

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INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs Ward Connerly and American Civil Rights Foundation (Plaintiffs) hereby oppose the demurrer of Defendants State of California and the California Citizens Redistricting Commission (Commission) (collectively State).[1] Plaintiffs' First Amended Complaint properly alleges violations of Article I, Section 31, of the California Constitution (Section 31 or Proposition 209), based on the State's implementation of a scheme to select members of the Commission that discriminates on the basis of race, ethnicity, and sex in the operation of public employment.[2] First Amended Complaint (FAC) at 2, 15-20.

The State admits to the discriminatory aspects of its program, State's Demurrer at 12:20-21, but asks this Court to carve out a judicial exception to Section 31 for public officers. *Id.* at 6:9-11:23. This Court should decline to do so. Section 31 covers all state actors and all actions taken "in the operation of public employment." Cal. Const. art. I, § 31(a). It "categorically prohibits discrimination and preferential treatment." *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537, 567 (2000). It is well established that public officers are engaged in public employment. *Kirk v. Flournoy*, 36 Cal. App. 3d 553, 557 (1974); *Leymel v. Johnson*, 105 Cal. App. 694, 701 (1930). No case holds otherwise. Section 31 does not contain a "public officer" exception, and the voters did not create one *sub silentio*.

The Supreme Court is clear that any "line drawn on the basis of race" violates Section 31. *Hi-Voltage*, 24 Cal. 4th at 563 (citation omitted). Thus, Government Code section 8252 (Section 8252), which requires the State to create a commission reflective of the state's racial diversity (Gov't Code § 8252(g)), violates Section 31 on its face as alleged in the First Amended Complaint. FAC ¶¶ 16, 20. Lastly, the State fails in its attempt to manufacture an irreconcilable conflict between Section 31 and Proposition 112. State's Demurrer at 10-11. Proposition 112 only

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[1] Plaintiffs also herein oppose the State Auditor's Demurrer to the extent it joins in the State's demurrer. State Auditor's Demurrer at 1:4-6. Plaintiffs have filed a separate Opposition to the State Auditor's Demurrer.

[2] For the sake of brevity, Plaintiffs will hereafter use the term "race" to include race, ethnicity, and sex, as Section 31 prohibits the State from discriminating, or granting preferences, based on all of these factors. Cal. Const. art. I, § 31(a).

asks the Governor to consider race as a criteria "insofar as practicable." In following the voters' intent, the two provisions are easily harmonized with the understanding that, after the adoption of Proposition 209, it is not practicable to consider racial diversity when appointing members of the Citizens Compensation Commission. The State's demurrer should be overruled.

LEGAL STANDARD ON DEMURRER

On demurrer, the complaint "must be liberally construed, with a view to substantial justice between the parties." Code of Civ. Proc. § 452; *Stevens v. Superior Court*, 75 Cal. App. 4th 594, 601 (1999). A demurrer lies only where a defect appears on the face of the challenged pleading. Code of Civ. Proc. § 430.30. Thus, "[a] demurrer tests the pleading alone, and not the evidence or the facts alleged." *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 68 Cal. App. 4th 445, 459 (1998). The demurrer "provisionally admits all material issuable facts properly pleaded, unless contrary to law or to facts of which a court may take judicial notice." *Id.* "To the extent there are factual issues in dispute, . . . [the] court must assume the truth not only of all facts properly pled, but also of those facts that may be implied or inferred from those expressly alleged in the complaint." *Id.*

ARGUMENT

I

SECTION 31 PROHIBITS DISCRIMINATION AND PREFERENTIAL TREATMENT IN PUBLIC EMPLOYMENT

Section 31 prohibits discrimination and preferential treatment on the basis of race in "public employment." Cal. Const. art. I, § 31(a). The State argues that this prohibition only extends to public employees. State's Demurrer at 6:9-11:23. This argument has no merit. The state's error lies in reading public "employees" as synonymous with public "employment." But the state's argument is contradicted by every California case that has addressed the issue. Accordingly, Section 31, by its plain language and express terms, prohibits the discriminatory public employment scheme established to select members of the Commission. Gov't Code § 8252(g).

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A. Public Officers Are Covered by Section 31

The State spends considerable effort arguing that Commissioners are public officers and not public employees. State's Demurrer at 6:9-8:19. Yet, even assuming that the Commissioners are public officers, the distinction has no relevancy here. As is clear throughout the State's Demurrer, the distinction between public employees and public officers is necessary for determining the scope of the individual's employment. In other words, both officers and employees are *employed*; they are both engaged in *employment*, and the distinction matters only towards determining the scope of that employment.

California courts have consistently held that officers are engaged in public employment. The Supreme Court held that it was "agreed by all" that an officer was engaged in employment. *Patton v. Bd. of Health*, 127 Cal. 388, 393 (1899). In *Kirk*, 36 Cal. App. 3d at 557, the court noted that every "office is 'an employment.'" (Quoting *United States v. Maurice*, 26 F. Cas. 1211, 1214 (C.C.D. Va. 1823) (No. 15,474).) And, in *Leymel*, 105 Cal. App. at 701, the court again noted that "[i]t must be conceded that . . . an office includes an employment." The uniformity of California courts on this point is dispositive of the State's argument. *See, e.g., Curtin v. State*, 61 Cal. App. 377, 386 (1923) (citation omitted) ("an office is an employment"); *Mono County v. Indus. Accident Comm'n*, 175 Cal. 752, 755 (1917) (same). The principle that officers are engaged in public employment is, and always has been, hornbook law in California. *See, e.g.*, 52 Cal. Jur. 3d *Public Officers and Employees* § 11 (2012) ("It is true that, in a sense, every office is an employment, but it does not follow that every public employment is a public office."); 63C Am. Jur. 2d *Public Officers and Employees* § 2 (2012) (same).

Plaintiffs are aware of no cases, and the State has certainly cited none, holding that officers are not engaged in public employment. The cases cited by the State do not dispute that both employees and officers are engaged in public employment. In *Coulter v. Pool*, 187 Cal. 181, 193 (1921), the California Supreme Court found the distinction between employees and officers relevant to the question of whether the Legislature violated the California Constitution's requirement of uniform county governments. The court analyzed the scope of employment of a county engineer and determined that it was more than that of a mere employee. *Id.* at 190.

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Similarly, in *Dibb v. County of San Diego*, 8 Cal. 4th 1200, 1210-13 (1994), the distinction between employees and officers was relevant to determining whether the scope of the Citizens Law Enforcement Review Board legally included the power to issue subpoenas. Nowhere in the cases cited by the State does the Court hold that officers are not "employed," or not engaged in "public employment."[3]

The State's argument that officers are not engaged in public employment strains credulity. Every California case that has addressed the issue has found that officers are engaged in public employment. In both *Coulter* and *Dibb* the Court was concerned with determining whether the scope of the officers' employment brought *heightened* duties upon the individuals. Conversely, here, the State is attempting to use the employee/officer distinction to *avoid* the constitutional mandate of equal treatment. The State's argument has no merit.

B. Section 31's Prohibition on Discriminatory Treatment in Public Employment Encompasses the Selection and Appointment of Public Officers

Section 31 speaks of no distinction between public employees and public officers; its prohibition covers all "public employment." Cal. Const. art. I, § 31(a). The State offers no meaningful defense to this point, it can only reiterate its unsupported assertion that public employment only covers public employees. State's Demurrer at 8:20-10:16. The entirety of the State's argument is contingent upon adopting this unique view—that public employment excludes the employment of public officers. Conversely, the view adopted by all California courts—that public employment includes public officers—is strengthened by reference to the plain language of Section 31, its ballot materials, and California courts' treatment of its scope.

Section 31 was written to prohibit all preferential and discriminatory treatment by the government. It is deliberately broad in scope. "[I]n approving Proposition 209 [California] voters intended . . . to achieve equality of [public employment, education, and contracting] opportunities."

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[3] The State fairs no better by providing statutes that treat public employees and public officers differently. *See* State's Demurrer at 7:15-26. Plaintiffs do not dispute that public officers and public employees differ on the scope of their duties or their eligibility for employment. The point to be proven is whether public officers are engaged in public employment, and, on that score, the statutes provide the State no help.

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Hi-Voltage, 24 Cal. 4th at 561-62 (citation omitted). "[S]ection 31 categorically prohibits discrimination and preferential treatment." *Id.* at 567. There is simply no evidence that this "categorical" prohibition, intending "to achieve equality of public employment," carved out an exception for public officers.

The ballot materials in support of Proposition 209 echo this understanding:

> Government should not discriminate. It must not give a job, a university admission, or a contract based on race or sex .... [L]et [California children] succeed on a fair, color-blind, race-blind, gender-blind basis .... Let's instead move forward by returning to the fundamentals of our democracy: individual achievement, equal opportunity and *zero tolerance for discrimination against—or for—any individual.*

Ballot Pamphlet, General Election (Nov. 5, 1996), argument in favor of Prop. 209, at 32, *quoted in Hi-Voltage*, 24 Cal. 4th at 560-31 (emphasis in original).

The ballot materials provide no indication that the voters intended public officers to be exempted from Section 31's protections. Put simply, "Proposition 209 prohibits the State from classifying individuals by race or gender." *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 702 (9th Cir. 1997). The ballot materials make clear that Section 31 does not permit the State to discriminate when selecting public officers.

The operative provision of Section 31 reads: "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(a). The plain language of this constitutional provision demonstrates that the *actor covered* by Section 31 is "the State." The *action covered* by Section 31 is "public employment." Fortunately, Section 31 defines "State":

> For the purposes of this section, "State" shall include, but not necessarily be limited to, the State itself, any city, county, city and county, public university system, including the University of California, community college district, school district, special district, or *any other political subdivision or governmental instrumentality of or within the State.*

Cal. Const. art. I, § 31(f) (emphasis added). The State does not dispute, nor could it dispute, that the Redistricting Commission is a governmental instrumentality of the State of California. Instead the State argues that "other constitutional provisions refer to both officers and employees," and that

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Section 31 should have done the same if it wanted to cover public officers. State's Demurrer at 10:3-16. Again, the State is making a distinction without a difference.

As noted above, "public employment" is a term of art that encompasses the action prohibited, not the actors covered. Each constitutional provision cited by the State uses officer and employee to denote only the actors covered under the relevant constitutional provision. *See, e.g.*, Cal. Const. art. VII, § 1(a) (officers and employees are both covered under civil service); Cal. Const. art. IV, § 7(c)(1)(A) (permitting the Legislature to go into closed session to discuss charges brought against officers or employees); Cal. Const. art. IV, § 17 (prohibiting the Legislature from granting additional compensation to officers or employees); Cal. Const. art XX, § 3 (requiring an oath of office for officers and employees). Section 31 is written differently than each of these constitutional provisions. The actor covered by Section 31 is the "State," and it is specifically defined. The Commission is clearly a government instrumentality, and it is prohibited from discriminating.

The plain language of Section 31 makes clear that where it was not intended to apply, it did so expressly. First, Section 31 permits "bona fide qualifications based on sex which are reasonably necessary to the normal operation of public employment." Cal. Const. art. I, § 31(c). Second, Section 31 permits preferential treatment on the basis of race when necessary to comply with "any court order or consent decree." Cal. Const. art. I, § 31(d). Third, Section 31 permits preferential treatment when necessary "to establish or maintain eligibility for any federal program." Cal. Const. art. I, § 31(e). Section 31 does not contain a "public officer" exception, and there is simply no plausible argument that the voters intended to create one *sub silentio*.

It is persuasive that in nearly every published case concerning Section 31, public officers were directly involved in the lawsuit. Mayor of San Jose, Susan Hammer, was a party to *Hi-Voltage*. Mayors are public officers. *Albright v. City of South San Francisco*, 44 Cal. App. 3d 866, 870 (1975). In *Am. Civil Rights Found. v. Berkeley Unified Sch. Dist.*, 172 Cal. App. 4th 207 (2009), William Huyett, Superintendent of the Berkeley Unified School District, was a party. Superintendents are public officers. *Ghafur v. Bernstein*, 131 Cal. App. 4th 1230, 1240 (2005). And in *Connerly v. State Pers. Bd.*, 92 Cal. App. 4th 16 (2001), Thomas Nussbaum, Chancellor

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of the public community college system, was a party. Indeed, the State's argument permits public officials from the Governor to the UC-President to any local sheriff to grant preferential treatment on the basis of race. That is not what California voters intended.

Fortunately, for California voters who voted overwhelmingly in favor of a government devoid of racial discrimination and preferences, Section 31 covers any "political subdivision or governmental instrumentality of or within the State." Cal. Const. art. I, § 31(f). It prohibits racial discrimination in "public employment." Cal. Const. art. I, § 31(a). The Redistricting Commission and its officers are covered by Section 31, and they may not discriminate on the basis of race. The demurrer should be overruled.

II

CALIFORNIA GOVERNMENT CODE SECTION 8252 MANDATES A DISCRIMINATORY SCHEME TO SELECT REDISTRICTING COMMISSIONERS IN VIOLATION OF SECTION 31

Government Code section 8252 sets out the process for selecting members to the Redistricting Commission (Commission). FAC ¶¶ 13-20. In essence, Section 8252 requires the State to create a Commission that must reflect "this state's diversity." Gov't Code § 8252(g). Since diversity is specifically defined by Section 8252(g) to include race, Section 8252's selection scheme violates Section 31 on its face. FAC ¶ 16.

As the First Amended Complaint sets forth, Government Code section 8252(g) violates Section 31 in at least two ways. First, Section 8252(g) "requires the first eight Commission members to discriminate against some applicants and grant preferential treatment to other applicants on the basis of race." FAC ¶ 16. Second, Section 8252(g) "requires, authorizes, or encourages public employees to participate in a process that considers race" in appointing members to the Commission. FAC ¶ 20.

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A. The Discriminatory Process by Which Government Code Section 8252(g) Requires the First Eight Commissioners to Select the Last Six Commissioners Based on Race Violates Section 31

1. Section 31 Prohibits the State from Using Any Form of Quotas or Goals to Ensure Racial Diversity

The State concedes that the first eight Commissioners must "consider race and gender" in selection of the "six final Commissioners," State's Demurrer at 12:20-21, but denies this admitted consideration of race violates Section 31. *Id.* at 13. The State is wrong.

It is well settled that even the "establishment of goals and timetables to overcome underutilization of minorities" violates principles of equal protection and Section 31. *Connerly*, 92 Cal. App. 4th at 55. As the supreme court noted, a participation goal differs from a quota or set-aside only in degree; it remains a line drawn on the basis of race and gender. *Hi-Voltage*, 24 Cal. 4th at 563.

Thus, the establishment of "hiring goals" based on race are "the establishment of hiring preferences" in violation of Section 31. *Connerly*, 92 Cal. App. 4th at 55. It makes no difference what label the government places on its program—whether it is labeled "quota," "goal," or "ensuring diversity,"—this Court must look beyond the label. A program that accords an advantage to certain individuals or groups based on their race violates Section 31. "[T]he relevant question is not whether a statute requires the use of such measures, but whether it authorizes or encourages them." *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 711 (9th Cir. 1997) (citation omitted).

The State's first hypothetical illustrates Section 8252(g)'s discriminatory selection process. State's Demurrer at 14. The State argues that the first eight Commissioners "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." *Id.* at 14:6-8. This example shows that if the selection process creates a racial disparity because the first eight Commissioners all happened to be from the same racial group, those eight Commissioners must give preferences to applicants who are not from that racial group when they select the next six Commissioners. In effect, the selection scheme assigns the first eight Commissioners the affirmative duty of

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maximizing participation of applicants from underrepresented groups. By requiring the first eight Commissioners to classify the remaining applicants by race, and give preferences to some applicants according to race, Section 8252(g) violates Section 31's ban on racial preferences.[4]

Section 8252(g) requires more than a participation goal—which would violate Section 31—it imposes a duty to select Commissioners based on race. The first eight Commissioners must choose the final six Commissioners "to ensure the commission reflects this state's diversity," which includes race. Gov't Code § 8252(g). *Connerly* held that having "overall and continuing hiring goal[s]" of making a given workforce "proportionately reflect the adult population of the state" was a violation of Section 31. 92 Cal. App. 4th at 59. Such a goal "unquestionably would discriminate against some individuals and grant preferences to others on the basis of race." *Id.* at 57. By requiring the final six Commissioners to be chosen so that the Commission reflects the racial composition of the state, Section 8252(g) "unquestionably" violates Section 31.

Section 31 is not limited to prohibiting government action only when one person or group is favored with corresponding detriment to others similarly situated. State's Demurrer at 14:11-12; 23-25. Section 31 is stated in the disjunctive: "[t]he State shall not discriminate against, **or** grant preferential treatment to." Cal. Const. art. 1, § 31(a) (emphasis added). Thus, as the California Supreme Court noted: "An overt act of discrimination against one person does not require the granting of preferential treatment to another." *Hi-Voltage*, 24 Cal. 4th at 560 n.13. "Preferential treatment may, but does not necessarily, involve overt discrimination." *Id.*

The State's argument that Section 8252 does not violate Section 31 because a racial preference may be granted to any racial group, whether majority or minority, demonstrates a lack of understanding of Section 31. The judicially recognized scope of the term "preferential treatment" is broad. "[P]references includes, at a minimum, programs or policies that use racial . . . classifications." *Hi-Voltage*, 24 Cal. 4th at 560 n.13 (citations omitted). Section 31 "*prohibits* the State from classifying individuals by race." *Id.* at 561 (citing *Coal. for Econ. Equity*, 122 F.3d at 702).

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[4] This selection process also violates the Fourteenth Amendment, because of the "absence of any identification of past discrimination" by the Commission. *Connerly*, 92 Cal. App. 4th at 48.

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The selection of the final six Commissioners must involve classifying applicants by race to comply with Section 8252(g)'s mandate that the Commission be selected to reflect racial diversity. On its face, the provision violates Section 31.

2. Section 31 Prohibits a Multi-Factored Holistic Approach to the Selection of Commissioners If Race Is One Factor

Citing no authority, the State claims that Section 8252(g) does not discriminate because the use of race is but one of among many factors to be considered in the selection of Commissioners. State's Demurrer at 15:13-17. This argument also lacks merit. The State misreads Section 31.

Section 31 contains no multi-factored holistic analysis exception. It prohibits the State from considering race in a public employment selection process. The State attempts to improperly extend the ruling from a Fourteenth Amendment case, *Grutter v. Bolinger*, 539 U.S. 306 (2003), to Section 31. *Grutter* upheld a law school affirmative action program that used race as one factor in a multi-factored holistic approach to admissions. *Id.* at 337. The majority found the school's holistic approach to admissions was narrowly tailored to the compelling state interest of diversity in higher education. *Id.* at 343.

Grutter does not apply here. *Grutter* was decided under the Fourteenth Amendment, not Section 31. *Id.* at 317. Although the Fourteenth Amendment "allows discrimination and preferential treatment whenever a court determines they are justified by a compelling state interest and are narrowly tailored to address an identified remedial need," Section 31 "admits no compelling state interest exception." *Hi-Voltage*, 24 Cal. 4th at 567. All government acts that would survive review under the Fourteenth Amendment's *Grutter* exception are prohibited by Section 31. Indeed, even the *Grutter* court acknowledged that the exception it adopted was inconsistent with Section 31's ban on racial preferences. *See Grutter*, 539 U.S. at 342 (noting that California prohibits racial preferences). Thus, *Grutter* does not apply to Section 31's statewide ban on discrimination or preferences based on race. *See Coal. to Defend Affirmative Action v. Brown*, Nos. 11-15100 & 11-15241, 2012 U.S. App. LEXIS 6574, at *15 (9th Cir. Apr. 2, 2012) (*Grutter* did not affect the meaning or scope of Section 31).

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The fact that Section 8252(g) uses race as a factor among many does not save the scheme from Section 31's reach. Section 31 prohibits the State from discriminating against, or granting preferential treatment to, any individual or group on the basis of race, no matter how small the discrimination or preference, and no matter how many other factors are considered.[5]

B. Government Code § 8252's Overarching Purpose to Create a Racially Diverse Commission Imposes a Duty on State Employees to Discriminate and Grant Preferences Based on Race in Violation of Section 31

Government Code section 8252 mandates a discriminatory scheme by which State employees, supervised by the State Auditor, review applications and classify applicants according to race, in violation of Section 31.

The use of the phrase "in the operation of" makes it clear that Section 31's ban on discrimination is not limited to the final decisionmaking process. Section 31 prohibits "governmental actors from improperly burdening or benefitting any individual or group in the operation of public employment, public education, or public contracting." *Hi-Voltage*, 24 Cal. 4th at 570 (Mosk, J., concurring). The prohibition is not limited to the final hiring decision, but it also bars all government actors from "enabling," "facilitating," or "encouraging" discriminatory treatment based on race. *Id.*

In *Connerly*, the court applied Section 31 to the state civil service. State agencies were supposed to establish "goals and timetables to overcome identified underutilization of minorities and women." 92 Cal. App. 4th at 55. The court held that the duty imposed on "every managerial employee, from first line supervisors on up, to attempt to achieve the agency or departmental goals" of eliminating the "underutilization" violated Section 31. *Id.* Similarly, Section 31 bans state actors from improperly burdening or benefitting any individual or group in the selection of Commissioners. Any use of race by public employees, in any step of the selection process, is prohibited. Even if public employees do not use race at all, they are prohibited from participating in a process that does.

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[5] The Ninth Circuit held in *Monterey Mech.*, 125 F.3d at 712, that there is no *de minimis* exception to the Equal Protection Clause. "Race discrimination is never a 'trifle.'" *Id.*

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The First Amended Complaint alleges sufficient facts to constitute this cause of action for a violation of Section 31. In order for the eight Commissioners to perform their statutory duties under Section 8252(g), the public employees on the Applicant Review Panel must create a pool of 60 "of the most qualified applicants." FAC ¶ 19 (citing Gov't Code § 8252(d)). The ultimate goal of Section 8252(g) is to have a Commission that "reflects the state's diversity, including, but not limited to, racial, ethnic, geographic, and gender diversity." FAC ¶ 19 (citing Gov't Code § 8252(g)). The selection scheme requires public employees to consider the qualifications of all applicants, including their race, sex, and ethnicity, in order to create an applicant pool of sufficiently diverse candidates. FAC ¶ 19 (citing Gov't Code § 8252(g)). Otherwise, the first eight commissioners will be unable to carry out their statutory duty of forming a racially diverse Commission. Government Code section 8252(g) violates Section 31 by requiring, authorizing, or encouraging public employees to participate in a process that considers race, ethnicity, or sex as a factor in appointing six members to the Commission. FAC ¶ 20.

Plaintiffs have properly pled facts sufficient to constitute a cause of action for the violation of Section 31. Indeed, the State admits that Section 8252's implementing regulations call for the Applicant Review Panel to consider the diversity of applicant pools. State's Demurrer at 13 n.4 (citing Cal. Code Regs. tit. 2, §§ 60848(f), 60850(e)).[6] "All that is necessary as against a general demurrer is to plead facts entitling the plaintiff to some relief." *M. G. Chamberlain & Co. v. Simpson*, 173 Cal. App. 2d 263, 267 (1959).

III

SECTION 31 INCLUDES PUBLIC OFFICERS; IT IS ARTICLE III, SECTION 8(c), THAT MUST BE READ TO EXCLUDE CONSIDERATION OF RACE AND SEX

Section 31 (approved by the voters in 1996 as Proposition 209) prohibits discrimination against or preferential treatment to "any individual or group on the basis of race, sex, color, ethnicity, or national origin" in the operation of public employment. Article I, Section 31, conflicts

[6] Although the regulations provide that the Applicant Review Panel is to consider racial diversity, the State argues the regulations do not violate Section 31. State's Demurrer at 13 n.4. However, it is clear that Section 31 prohibits the State from classifying individuals by race. *Hi-Voltage*, 24 Cal. 4th at 561. Both Section 8252 and its implementing regulations violate Section 31.

with Article III, Section 8(c) (Proposition 112, approved by the voters in 1990), to the extent that it requires the Governor to "strive insofar as practicable to provide a balanced representation of geographic, gender, racial, and ethnic diversity of the State" in appointing members to the California Citizens Compensation Commission. The State argues that the only way to harmonize the two constitutional provisions is to find that Section 31 does not apply to the selection of public officers. State's Demurrer at 12:1-4. But the State offers no support for its proposal to resolve the conflict. Nor does the State provide any evidence that its proposed solution would effectuate the intent of the voters. Plaintiffs suggest that a better choice for harmonizing the provisions would be to determine that, after the adoption of Proposition 209, it is not practicable to consider gender, race, and ethnic diversity when appointing members of the Citizens Compensation Commission.

The fundamental objective of statutory interpretation is to ascertain and effectuate the intent of the enacting body, which is in this case the voters. *In re Lance W.*, 37 Cal. 3d 873, 889 (1985) ("[T]he intent of the enacting body is the paramount consideration."). A careful review of the text of Proposition 209 and the accompanying ballot pamphlet demonstrates that the voters intended to remove race and sex considerations from the operation of state government. The language of Proposition 209 is unambiguous: the State *shall not* discriminate on the basis of race or sex in the operation of public employment. Cal. Const. art. I, § 31. And the ballot materials are clear that Proposition 209 precludes the State from classifying individuals by race or gender. The California Supreme Court explained that the ballot arguments "make it clear that in approving Proposition 209, the voters intended section 31 . . . to achieve equality of [public employment, education, and contracting] opportunities." *Hi-Voltage*, 24 Cal. 4th at 561-62 (citations omitted). "'Rather than classifying individuals by race or gender, Proposition 209 *prohibits* the State from classifying individuals by race or gender.'" *Id.* at 561 (citing *Coal. for Econ. Equity*, 122 F.3d at 702) (emphasis in original).

The voters were informed that Proposition 209 "would eliminate state and local government affirmative action programs in the areas of public employment, public education, and public contracting to the extent these programs involve 'preferential treatment' based on race, sex, color, ethnicity or national origin." Analysis of Proposition 209 by the Legislative Analyst at 30, attached

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as Exhibit E to the State's request for judicial notice. Limited exceptions to the ban on preferential treatment were specifically and clearly set out in the ballot materials. *Id.*

Given the clear and definite language of Proposition 209, the ballot materials, and court decisions, it is unlikely that the voters intended to exempt the State's elected and appointed officials from the prohibition against considering race, sex, and ethnicity in conducting the State's business. California's elected and appointed officials comprise the most powerful people in the State, with the ability to make policy and effectuate its implementation. Any suggestion that the voters intended to allow those State officials to consider race and gender, while prohibiting all others engaged in the State's work from doing so, is both unreasonable and unsupportable.

Unlike the language of Article I, Section 31, the language in Article III, Section 8(c), is imprecise and equivocal. The Governor shall strive to consider race and gender when appointing members of the Citizens Compensation Commission, but only "to the extent practicable to provide balanced representation." Cal. Const. art. III, § 8(c). Neither the Legislative Analyst's Analysis nor the ballot arguments contain a single reference to the representation of the States's diversity on the Citizens Compensation Committee. The Legislative Analyst's Analysis simply states that the Governor will appoint the commissioners, and that he must do so within 30 days after the election. Ballot materials for Proposition 112 at 22, Exhibit 1 to Plaintiffs' Request for Judicial notice. The ballot pamphlet describes the purpose of Proposition 112 as follows:

> Proposition 112 is a well-thought-out reform package that creates a constitutionally required set of laws that will hold government officials in both the legislative and executive branches to tough new ethical standards. Proposition 112 is important because it will help return government to the people.

Id. The voters approving Proposition 112 cannot be presumed to have intended that state officials, such as the Governor and members of the California Citizens Compensation Commission, be allowed to consider race and gender when acting on behalf of the public.

The demonstrated intent of the voters must be followed, and there is only one way to do so. The purpose of Proposition 112, as described in the ballot materials, will be fully realized even if the Governor is prohibited from considering race, gender, or ethnicity when appointing commissioners or other public officials pursuant to Article III, Section 8(c). The Governor can

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consider all other types of diversity. The State's suggestion to exclude public officers from Proposition 209's command for race- and gender-neutral government operations would change the very nature of the amendment, and would fail to comply with the voters' clear intent.

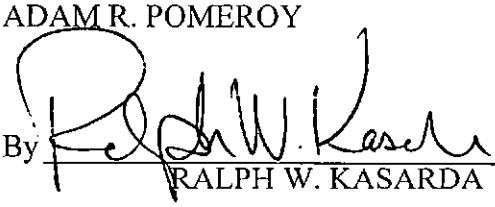
CONCLUSION

For the foregoing reasons, Plaintiffs Ward Connerly and American Civil Rights Foundation respectfully request that this Court overrule the Defendants' Demurrer.

DATED: May 18, 2012.

Respectfully submitted,

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

By 
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DECLARATION OF SERVICE BY MAIL

I, Barbara A. Siebert, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 930 G Street, Sacramento, California 95814.

On May 18, 2012, true copies of PLAINTIFFS' OPPOSITION TO DEMURRER BY STATE OF CALIFORNIA AND THE CALIFORNIA CITIZENS REDISTRICTING COMMISSION were placed in envelopes addressed to:

KAMALA D. HARRIS
TAMAR PACHTER
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455 Golden Gate Avenue, Suite 11000
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Counsel for Defendant Elaine M. Howle, State Auditor of California

which envelopes, with postage thereon fully prepaid, were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 18th day of May, 2012, at Sacramento, California.

Barbara A. Siebert
BARBARA A. SIEBERT

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