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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 AMICUS BRIEF OF CALIFORNIA COMMON CAUSE, LEAGUE OF WOMEN VOTERS OF CALIFORNIA, AND CALIFORNIA NAACP** Date: June 1, 2012 Time: 9:00 a.m. Place: Department 31 Judge: The Hon. Michael Kenny

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Plaintiffs Ward Connerly and American Civil Rights Foundation respectfully submit the following arguments in opposition to the amicus brief of California Common Cause, League of Women Voters of California, and California NAACP in Support of Demurrer.

I

ARTICLE I, SECTION 31, PROMOTES THE INCLUSION OF ALL RACES

Amici question Article I, Section 31's (Section 31), legitimacy, musing about the ability of all racial groups to participate in government. Amicus Brief at 4-5. Their concerns are misplaced because Section 31 promotes the inclusion of all racial groups by memorializing the understanding that "a preference to any group constitutes inherent inequality" and that preferences "for any purpose" are "anathema to the very process of democracy." *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537, 561 (2000) (citation omitted). The voters understood that "discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society." *Id.* at 548 (citation omitted). Amici, however, are not seeking access for all groups to the Redistricting Commission. Instead they seek a Commission that is properly balanced, a "portrait, in miniature" of the people. Amicus Br. at 5 (citation omitted). But, "[r]acial balance is not to be achieved for its own sake." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 729-30 (2007) (citation omitted); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (opinion of Powell, J.) ("If petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected . . . as facially invalid.").

Plaintiffs, in their Opposition to the State's Demurrer at 10-11, explain why reliance on *Grutter v. Bollinger*, 539 U.S. 306 (2003), is misplaced in this case.

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II

SECTION 8252(G) REQUIRES CONSIDERATION OF THE RACE OF AN INDIVIDUAL OR A GROUP, WHICH HAS NEVER BEEN UPHELD UNDER SECTION 31

Article I, Section 31, is violated any time the State classifies individuals or groups by race[1] when making decisions in the operation of public employment; violation does not hinge on whether the challenged program involves numerical goals or requirements. "Rather than classifying individuals by race or gender, Proposition 209 prohibits the State from classifying individuals by race or gender." *Hi-Voltage*, 24 Cal. 4th at 561 (quoting *Coal. for Econ. Equality v. Wilson*, 122 F.3d 692, 702 (9th Cir. 1997); Cal. Const. art I, § 31(a).

Amici's reliance on *Am. Civil Rights Found. v. Berkeley Unified Sch. Dist.*, 172 Cal. App. 4th 207 (2009), is misplaced. In *Berkeley*, the school assignment program never considered the race of an individual student or group of students. *Id.* at 217-18, 222. Instead, the program assigned diversity scores based on the generalized makeup of the *neighborhood* where students lived. *Id.* at 213-14. A "diversity category" did "not consider an individual student's race at all," *id.* at 211, it only gave generalized information concerning the socio-economic and racial makeup of different Berkeley neighborhoods. *Id.* No individual student's race was ever relevant to determining school assignments. *Id.* at 213 ("[T]he actual personal attributes of students is not relied upon in determining student assignments." (internal quotations omitted).

Section 8252(g) is anything but race neutral. It requires that the last six commissioners be classified and analyzed upon the basis of their actual race: "The six appointees shall be chosen to ensure the commission reflects this state's diversity," including race. Gov't Code § 8252(g). Unlike the plan in *Berkeley*, this requirement guarantees that the six commissioners will be analyzed on the basis of race, whether individually or as a slate of six. *See* Cal. Code of Regs. tit. 2, §§ 60848, 60850, 60860; Plaintiff's Opp. to State's Demurrer at 8-11; First Amended Complaint (FAC) ¶ 2. The entire process is structured to guarantee a racially diverse Commission,

[1] 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).

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based upon each of the last six appointees' individual analytical skills, ability to be impartial, and contribution to the overall racial makeup of the Commission. Gov't Code § 8252(g); Cal. Code of Regs. tit. 2, § 60860; Demurrer of State of California and the California Citizens Redistricting Commission (State's Demurrer) at 12 (admitting the requirement to consider race); Plaintiffs' Opp. to State's Demurrer at 8-11; FAC ¶¶ 15-20.

The only other case raised by Amici is not only unambiguously contra to their contention that other California cases have allowed consideration of race under Section 31, but it actually supports Plaintiffs' arguments. First, *Los Angeles Cnty. Prof'l Peace Officers Ass'n v. Cnty. of Los Angeles*, No. B151737, 2002 Cal. App. Unpub. LEXIS 5596, 2002 WL 1354411 (Cal. Ct. App. June 20, 2002), is an unpublished opinion and, therefore, Amici are prohibited from relying on or even citing to the case. Cal. R. Ct. 8.1115(a). Second, even if the case was good law, it does not support Amici's argument. The court did not uphold the program despite the program's use of racial considerations, it upheld the County's Policy on Diversity because it *did not consider race* at all. *Los Angeles Cnty. Prof'l Peace Officers Ass'n*, 2002 Cal. App. Unpub. LEXIS 5596 at *15-17. "The Policy on Diversity reasonably can be read to discourage discrimination against any particular race or gender." *Id.* at *17.

There are no cases allowing the categorization of individuals or groups by race under Section 31. Amici have cited no case to support their contention that a program may consider an individual's race and survive scrutiny under Section 31. Instead, they merely repeat Defendants State of California's and Citizen Redistricting Commission's argument that racial considerations may be used here because they are not "the sole or determinative criterion" or "factor" and are instead "limited." *Cf.* Amicus Br. at 9-10 *with* State's Demurrer at 12, 14-15; *see also* Demurrer of the State Auditor (Auditor's Demurrer) at 5 (joining in the State's Demurrer). Plaintiffs addressed this incorrect argument in their Opposition to the State's Demurrer at 8-11. Quite simply, no court has ever approved a program that categorizes individuals or groups by race.

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III

PROPOSITION 11 DID NOT CREATE AN EXCEPTION TO SECTION 1, ARTICLE 31

Amici's statutory interpretation arguments are the same as those made by the State Auditor. Plaintiffs' responded to those arguments in their Opposition to Auditor's Demurrer at 6:23-8:16, and limit their response here to a few points.

Like the Auditor, Amici argue that the word "diversity" in Article XXI, Section 2(c)(1), "must mean the same thing in Proposition 11's constitutional mandate" as it does in Government Code Section 8252(g). Amicus Br. at 10 n.3; Auditor's Demurrer at 9:26-10:24. The argument is wrong for at least three reasons. First, it does not consider the rule of construction providing that "[w]here different language is used in different parts of the same statute, it must be presumed that the Legislature intended a different effect." *Demchuk v. State Dep't of Health Servs.*, 4 Cal. App. 4th Supp. 1, 4 (1991) (citing *Charles S. v. Bd. of Educ.*, 20 Cal. App. 3d 83, 95 (1971)). Second, Amici ignore the fact that implementing provisions "remain subject to judicial challenge in subsequent cases on the basis that they may incorrectly manifest the intent of" the constitutional provision that they support. *Amador Valley Joint Union High Sch. Dist. v. State Bd. of Equalization*, 22 Cal. 3d 208, 247 (1978). Plaintiffs have properly challenged the constitutionality of Section 8252(g).

Third, Amici have not presented, and cannot, present any evidence that the voters who adopted Proposition 11 intended to create an exception to Article 1, Section 31. As Plaintiffs explain in their Opposition to the Auditor's Demurrer at 8:4-12, it cannot be presumed that the voters considered, or were even aware of, the "diversity" aspect of Proposition 11, because the voter materials did not contain a single reference to that portion of the initiative.

Proposition 209, adopting Article I, Section 31, set out a clear constitutional mandate prohibiting the use of race in government operations. Exceptions to that mandate were specifically and clearly set out in the ballot materials. *See* Plaintiffs' Opp. to State's Demurrer at 13:11-14:2. Additional "exceptions" to Section 31 cannot result from a statute implementing a constitutional

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provision adopted by the voters to accomplish a goal wholly unrelated to the goal of Proposition 209.

IV

A FACIAL CHALLENGE CONSIDERS THE GENERAL SCOPE AND DOMINANT FEATURES OF A STATUTE TO DETERMINE ITS EFFECT

Amici repeat the Auditor's argument regarding the nature of a facial challenge. Amicus Br. at 6:16-7:10; Auditor's Demurrer at 8:17-9:11:17; *see* Plaintiffs' Opp. to Auditor's Demurrer at 5:7-6:19. However, Amici state specifically what is only hinted at in the Auditor's argument—that, in a facial challenge, the court cannot consider facts other than the words of the statute itself. *See* Amicus Br. at n.4 ("[B]ecause the First Amended Complaint brings only a facial challenge to Government Code section 8252(g), the implementing regulations are not at issue here."). While the implementing regulations are not challenged in this lawsuit, they may shed light on whether Section 8252(g) can be implemented without violating Section 31. And the ability to consider evidence is present in both facial and as-applied challenges to the validity of a statute.

A statute is facially invalid if it cannot be applied, under any set of facts, without violating the constitution.[2] *Tobe v. City of Santa Ana*, 9 Cal. 4th 1069, 1084 (1995) (Plaintiffs bringing a facial challenge must demonstrate that the provisions conflict with applicable constitutional prohibitions.). Plaintiffs allege that Section 8252(g) poses a fatal conflict with Section 31. *See, e.g.*, FAC ¶¶ 20 & 23; Plaintiffs' Opp. to Auditor's Demurrer at 5:18-6:18.

When reviewing a facial challenge to a statute, courts look to the words of the statute and must interpret the effect to understand the general scope and dominate features. *See Yee v. City of Escondido*, 503 U.S. 519, 526-31 (1992) (a facial challenge where the court analyzed how a rent control ordinance operated in conjunction with other laws to determine its economic effect on mobile home park owners and their tenants). The effect of a statute is determined by considering the manner by which it is implemented and interpreted. *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 131 (1992) ("In evaluating respondent's facial challenge, we must

[2] An as-applied challenge seeks relief from a specific application of a facially valid statute or ordinance. *Tobe*, 9 Cal. 4th at 1084.

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consider the county's authoritative constructions of the ordinance, including its own implementation and interpretation of it."); *Garneau v. City of Seattle*, 147 F.3d 802, 807-08 (9th Cir. 1998) (stating that plaintiffs bringing a facial challenge must produce evidence showing that the value of their property diminished as a consequence of the regulation); *Richardson v. City & County of Honolulu*, 124 F.3d 1150, 1154 n.2 (9th Cir. 1997) (providing an example using exact dollar amounts as "illustrative" of the economic impact of the regulation in a facial challenge).

Amici cite to *Cal. Farm Bureau Fed'n v. State Water Res. Control Bd.*, 51 Cal. 4th 421, 436-46 (2011), and include the following misleading description of the holding: "rejecting facial challenge to statute and analyzing implementing regulations under an as-applied analysis." Amicus Br. at 12 n.4. The facial challenge in that case questioned the constitutionality of a statute creating a regulatory fee. Plaintiff argued that the statute was unconstitutional on its face because it actually imposed a tax, not a valid regulatory fee. *Id.* at 437. An excessive fee used to generate general revenue becomes a tax. *Id.* at 438. The court determined that plaintiff could not bring a facial challenge because the language of the statute revealed a specific intention to avoid imposing a tax, *id.*, and did not require the collection of more than administrative costs, *id.* at 439-40. The facts in the instant case are far different. The language of Section 8252(g) contains no language to save it from a facial attack.

Plaintiffs must be allowed an opportunity to demonstrate that Section 8252(g) cannot be applied in any circumstance without violating Section 31.

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CONCLUSION

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

DATED: May 24, 2012.

Respectfully submitted,

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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 24, 2012, true copies of PLAINTIFFS' OPPOSITION TO AMICUS BRIEF OF CALIFORNIA COMMON CAUSE, LEAGUE OF WOMEN VOTERS OF CALIFORNIA, AND CALIFORNIA NAACP were placed in envelopes addressed to:

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which envelopes, were sent via Federal Express in Sacramento, California.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 24th day of May, 2012, at Sacramento, California.

Barbara A. Siebert
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