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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 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.	CASE NO. 34-2011-80000966-CU-WM-GDS **THE STATE AUDITOR'S REPLY BRIEF IN SUPPORT OF DEMURRER TO FIRST AMENDED COMPLAINT** Date: June 1, 2012 Time: 9:00 a.m. Dept: 31 Judge: The Honorable Michael P. Kenny Action Filed: October 4, 2011

I.

INTRODUCTION

California State Auditor Elaine M. Howle ("State Auditor") and co-defendants the State of California and the California Citizens Redistricting Commission (collectively, the "Redistricting Commission") demurred to the First Amended Complaint on the grounds that the complaint failed to state a claim.

As a matter of law, Proposition 209 does not apply to the selection of members of the Redistricting Commission because the members are public officers, not public employees. Thus,

the selection of the members of the Redistricting Commission is not "the operation of public employment, public education or public contracting." Contrary to Petitioners' contentions, the State Auditor does not seek a "judicial exception" to Proposition 209, rather the State Auditor asks this Court to interpret Proposition 209 consistent with its plain language and the case law interpreting it. In opposition to the demurrer, Petitioners read Proposition 209 as if the limiting phrase "operation of public employment, public education, and public contacting" does not exist. Proposition 209 is not susceptible to Petitioners' broad interpretation and it must be rejected because well-established cannons of statutory construction require that each and every word in Proposition 209 be given meaning.

In her moving papers, the State Auditor explained that Petitioners' interpretation of Proposition 209, as applying to the selection of the members of the Redistricting Commission, created a conflict between the constitutional provisions of Proposition 11 and Proposition 209. However, the two constitutional provisions can be harmonized by reading Proposition 209, in accordance with its plain language, as applying strictly to the "operation of public employment, public education, or public contracting" and not to the appointment of public officers. In response to this argument, Petitioners make a wholly unsupported and nonsensical argument that the phrase "this state's diversity" as used in Proposition 11's constitutional provision, means something that does not conflict with Proposition 209, while the same phrase, as used in Proposition 11's implementing statutory provision, section 8252, subdivision (g), means something completely different that conflicts with Proposition 209. It is irrational to try to harmonize the two constitutional provisions by adopting such a strained interpretation of the phrase "this state's diversity" in Proposition 11's constitutional provision. The State Auditor offers a rational and consistent interpretation of the phrase in Proposition 11 and its implementing statute, 8252, subdivision (g), and demonstrates that the constitutional conflict can be avoided by interpreting Proposition 209, consistent with its plain language, as not applying to the appointment of public officers.

As discussed herein, Petitioners' First Amended Complaint fails to state a cause of action and the demurrer should be sustained in its entirety, without leave to amend.

II.

ARGUMENT

A. The State Auditor Joins in the Reply Arguments of the Redistricting Commission.

The State Auditor joins in the arguments made by the Redistricting Commission in its reply brief in support of its demurrer to the First Amended Complaint. (See Redistricting Commission's Reply Brief.) As set forth at length in the Redistricting Commission's reply brief, the members of the Redistricting Commission are public officers and the selection of those members is not "the operation of public employment." Petitioners do not dispute that the members of the Redistricting Commission are public officers. Petitioners, however, rely on dicta in a series of old cases to contend that all public officers are engaged in public employment. Significantly, all of these authorities cited by Petitioners support that there are important distinctions between public officers and public employees. (See, e.g., *Kirk v. Flournoy* (1974) 36 Cal.App.3d 553, 557 ["There are numerous decisions dealing with the distinction between public employment and public office."].) Rather than focus on the substance of these cases, Petitioners rely on dicta contained in a single phrase taken out of context to make a superficial argument that public officers are "involved" in public employment. (See *Leymel v. Johnson* (1930) 105 Cal.App. 694, 701 ["It is true that, *in a sense*, every office is an employment . . . ."] [emphasis added].) Petitioners' argument on this point must be rejected because public officers are not necessarily public employees. (See Redistricting Commission's Reply Brief at pp. 2-3.)

B. Petitioners Interpret Proposition 209 as though it Does Not Contain the Limiting Phrase "the Operation of Public Employment, Public Education, or Public Contracting."

In response to the State Auditor's demurrer, Petitioners argue that because members of the Applicant Review Panel are public employees, Proposition 209 applies. This interpretation turns Proposition 209 on its head and fails to give any meaning to the phrase "the operation of public employment, public education, or public contracting." Petitioners' argument impermissibly interprets Proposition 209 in such a way that the phrase "operation of public employment, public education, or public contracting" is mere surplusage and is rendered meaningless. (See *Simpson*

Strong-Tie Company, Inc. v. Gore (2010) 49 Cal.4th 12, 28-29 [rejecting interpretation of statute that failed to give meaning to every word and phrase and rendered portions of the statute surplusage].) Under Petitioners' erroneous interpretation, the mere involvement of a state actor is sufficient to produce a violation of Proposition 209 – even if the state actor is not involved in the "operation of public employment, public education, or public contracting."

Proposition 209's prohibition against discrimination and preferential treatment on the basis of race, sex, color, ethnicity, or national origin is limited to the arenas of public employment, public education, and public contracting. The phrase "the operation of public employment, public education, or public contracting" must have some meaning. (Cal. Const., art. I, § 31, subd. (a).) All of the cases relied upon by Petitioners involve public employment, public education, or public contracting. (See, e.g., *Hi-Voltage Wire Works, Inc. v. City of San Jose* (2000) 24 Cal.4th 537, 542 [public contracting]; *Coral Construction, Inc. v. City & County of San Francisco* (2010) 50 Cal.4th 315, 320 [public contracting]; *Connerly v. State Personnel Board* (2001) 92 Cal.App.4th 16, 28 [public contracting and public employment]; *Kidd v. State of California* (1998) 62 Cal.App.4th 386, 410 [public employment]; *C&C Construction, Inc. v. Sacramento Municipal Utility District* (2004) 122 Cal.App.4th 284, 291 [public contracting]; *Crawford v. Huntington Beach Union High School District* (2002) 98 Cal.App.4th 1275, 1277 [public education].)

The California Supreme Court has confirmed that Proposition 209 only applies to public employment, public contracting, and public education. In *Hi-Voltage Wire Works, Inc., supra*, the Court stated:

> The ballot arguments – from which we draw our historical perspective – make clear that in approving Proposition 209, the voters intended section 31, like the Civil Rights Act as originally construed, *to achieve equality of public employment, education, and contracting opportunities* and to remove barriers that operate invidiously to discriminate on the basis of racial or other impermissible classification.

(Id. at pp. 561-562 [internal citation and quotation marks omitted and emphasis added].) No court has expanded Proposition 209 beyond its plain language. (See *Wood v. Horton* (2008) 167 Cal.App.4th 658, 676-677 [declining to reach Proposition 209 issue because it had not been adequately briefed and it was not clear that the domestic violence programs at issue fit within "public employment, public education, and public contracting"].)

Thus, the plain language of Proposition 209 and the case law confirm that its application is limited to public employment, public education, and public contracting. The selection of the members of the Redistricting Commission is not public employment – even though the Applicant Review Panel is made up of state employees. Accordingly, Proposition 209 does not apply.

C. Petitioners Refuse to Acknowledge the Limited Scope of a Facial Challenge.

Petitioners contend that the State Auditor fails to understand the meaning of a facial challenge, but it is Petitioner who misunderstands the standard. In this facial challenge, the Court's task is to determine whether section 8252, subdivision (g), "can constitutionally be applied in any set of circumstances." (*American Civil Rights Foundation v. Berkeley Unified School District* (2009) 172 Cal.App.4th 207, 217 [holding that school board's use of neighborhood demographic data, which included information about racial composition of neighborhoods, in assigning students to schools was constitutional under Proposition 209].)

First, Petitioners argue that the First Amended Complaint alleges violations of Proposition 209 "based on Defendant's *implementation* of a process for selecting members of the Redistricting Commission." (Petitioners' MPA at 1:10-11 [emphasis added].) The State Auditor's implementation of section 8252, subdivision (g), is irrelevant to a facial challenge. (*American Civil Rights Foundation v. Berkeley Unified School District, supra*, 172 Cal.App.4th at p. 219 ["On a facial challenge, we do not consider the policy's application to the particular circumstances of an individual."].)

Second, Petitioners contend that the First Amended Complaint alleges "facts sufficient to support" their second and fourth causes of action. (Petitioners' MPA at 5:5; 6:16-18.) A facial challenge, however, considers only the text of the statute itself, not the factual allegations of the plaintiff. As stated in *Sturgeon v. Bratton* (2009) 174 Cal.App.4th 1407:

> 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. To support a determination of facial unconstitutionality, voiding the statute as a whole, those challenging the statute or ordinance cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular *application* of the statute . . . Rather, the challengers must demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions.

(*Id.* at p. 1418 [internal citations and quotation marks omitted, but emphasis in the original].)

Here, Petitioners allege that the Applicant Review Panel is required to consider race and gender in order to provide the first eight Commissioners with a sufficiently diverse pool of applicants to meet the statutory requirements of ensuring that "the commission reflects the state's diversity, including, but not limited to, racial, ethnic, geographic, and gender diversity." (Gov. Code, § 8252, subd. (g); First Amended Complaint, ¶¶ 19, 22, 32, 48.) In their opposition brief, Petitioners claim Proposition 209 is violated because "the Applicant Review Panel enables, facilitates, and encourages a process where the final six Commissions (sic) are selected on the basis of race." (Petitioners' MPA at 6:15-16.) These allegations are not supported by the language of Government Code section 8252 and thus, Petitioners' facial challenge must fail.

As discussed in the State Auditor's moving papers, under section 8252, subdivision (d), the Applicant Review Panel selects 60 of the "most qualified applicants," consisting of 20 who are registered as Democrats, 20 who are registered as Republicans, and 20 who are not registered with either party. (Gov. Code, § 8252, subd. (d).) The statute requires that the Applicant Review Panel create the three subpools "on the basis of relevant analytical skills, ability to be impartial, and appreciation for California's diverse demographics and geography." (*Ibid.*). Thus, according to the text of the statute, the Applicant Review Panel is required to consider whether applicants have an "appreciation for California's diverse demographics and geography." Contrary to Petitioners' allegations, the statute does not *require* the Applicant Review Panel to consider race or gender of the individual applicants in selecting 60 of the most qualified applicants. (*Ibid.*)

In sum, Petitioners' allegations are not supported by the statute's directive to the Applicant Review Panel on how it must conduct the selection process. (See Gov. Code, § 8252, subd. (d).) Because a facial challenge considers only the text of the statute itself, and not its application, Petitioners' claims must fail. (See *Sturgeon v. Bratton, supra,* 174 Cal.App.4th at p. 1418.) Accordingly, Petitioners' second and fourth causes of action are meritless and must be dismissed without leave to amend.

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D. Proposition 209 Must Be Harmonized With Proposition 11.

Petitioners' interpretation of Proposition 209 that it applies to the selection of members of the Redistricting Commission places Proposition 209 in conflict with Proposition 11's constitutional diversity mandate, as set forth in Article XXI, section 2 of the California Constitution, which provides that the "selection process is designed to produce a commission that is . . . reasonably representative of this State's diversity." The purpose of section 8252 is to "implement[] Article XXI of the California Constitution by establishing the process for the selection and governance of the Citizens Redistricting Commission." (Gov. Code, § 8251, subd. (a).) To that end – and in light of Article XXI, section 2's requirement that the Redistricting Commission be reasonably representative of California's diversity – section 8252 requires that the final six appointees to the 14-member Redistricting Commission be selected "to ensure the commission reflects this state's diversity, including, but not limited to, racial, ethnic, geographic, and gender diversity." (Gov. Code, § 8252, subd. (g).) Thus, Petitioners' challenge to section 8252, subdivision (g), is inconsistent with Article XXI, section 2 of the California Constitution, and cannot be sustained.

Petitioners argue that this constitutional conflict can be avoided by limiting the word "diversity," as it appears in Article XXI, section 2, to include "all of the types of diversity, except those prohibited by [Proposition 209]." (Petitioners' MPA at 7:10-11.) In doing so, Petitioners invite this Court to disregard one of the most basic rules of statutory interpretation: where the terms used in a statute are not ambiguous, apply their plain meaning. California courts routinely hold that where the meaning of statutory language within an act is clear, the sole function of the courts is to apply the plain meaning of the terms therein. (See, e.g., *Building Industry Assn. v. City of Camarillo* (1986) 41 Cal.3d 810, 818 ["If the language is clear, there can be no room for interpretation; effect must be given to the plain meaning of the words."]; *County of Sacramento v. Pacific Gas & Electric Co.* (1987) 193 Cal.App.3d 300, 308 [it is "elementary" that the "meaning of a statute must, in the first instance, be sought in the language in which the act is framed," and "if that is plain, . . . the sole function of the courts is to enforce it according to its terms"].) This "plain meaning" rule presupposes that statutory words and phrases are used in their common and

ordinary sense. (*County of Sacramento, supra,* 193 Cal.App.3d at p. 308.) Thus, "courts should give effect to statutes according to the usual, ordinary import of the language employed in framing them." (*Merrill v. Department of Motor Vehicles* (1969) 71 Cal.2d 907, 918 [internal quotations omitted].) Petitioners' contention that this Court should disregard the plain meaning of "diversity" in favor of a tortured interpretation that adheres to a particular political agenda finds no basis in the law.

Moreover, the drafters of Proposition 11 left no doubt that when they said "diversity," they intended that term to include racial, ethnic, and gender diversity. Section 8252 expressly provides as such. Yet, Petitioners argue that the Court should read the phrase "this state's diversity" as it appears in Article XXI, section 2 to mean something different (and much more narrow) than that very same phrase as it appears in section 8252, subdivision (g). This, too, is inconsistent with the law. Statutes "should be construed with reference to the entire statutory system of which it forms a part in such a way that harmony may be achieved among the parts." (*Merrill v. Department of Motor Vehicles, supra,* 71 Cal.2d at p. 918; see also *Anthony J. v. Superior Court* (2005) 132 Cal.App.4th 419, 425 [In ascertaining the meaning of a term, courts "must consider the statutory language in the context of the entire statute and the statutory scheme of which it is a part."].) Thus, "[i]t is presumed, in the absence of anything in the statute to the contrary, that a repeated phrase or word in a statutory scheme is used in the same sense throughout." (*People v. Burns* (1997) 53 Cal.App.4th 1171, 1175 [internal citations and quotes omitted]; see also *Plaza Freeway v. First Mountain Bank* (2000) 81 Cal.App.4th 616, 623 ["It is a well-established rule of statutory construction that when a word or phrase is repeated in a statute, it is normally presumed to have the same meaning throughout."] [internal quotations omitted]; *People v. McCart* (1982) 32 Cal.3d 338, 344 ["[w]hen a word or phrase is repeated in a statute, it is normally presumed to have the same meaning throughout."].)

Petitioners cite no statutory language, or any other authority, suggesting that the word "diversity," as it appears in Article XXI, section 2, should be interpreted differently than the very same word as it appears in section 8252, within the same statutory scheme, as enacted by the

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voters in the same ballot initiative. Thus, the presumption that the term "diversity" means the same thing throughout Proposition 11 prevails.

Moreover, the presumption that terms and phrases are to be interpreted consistently within statutes and statutory schemes is particularly strong here. Section 8252 was drafted contemporaneously with Article XXI, section 2, for the sole purpose of implementing that Constitutional provision. (Gov. Code, § 8251, subd. (a).) Under such circumstances, it is absurd to suggest that section 8252's implementation of the mandate of "diversity" was somehow not intended to reflect the mandate of "diversity" set forth in Article XXI, section 2. In fact, the express purpose of section 8252 is to reflect, and implement, the concept set forth in Article XXI, section 2.

The term "diversity," as used in Article XXI, section 2, is consistent with its plain meaning (which includes diversity of race, ethnic background, and gender), and is internally consistent within Proposition 11. Thus, Article XXI, section 2 can only be read consistently with Proposition 209 if the selection of public officers for the Redistricting Commission is not within Proposition 209's purview. If Proposition 209 were somehow found to apply to the appointment of public officers, it would be irreconcilable with the more recently enacted Article XXI, section 2. This Court must avoid that result, if possible, by harmonizing Proposition 11 and Proposition 209. (See *City & County of San Francisco v. County of San Mateo* (1955) 10 Cal.4th 554, 563 [courts must harmonize constitutional provisions in order to avoid the implied repeal of one provision for another]; see also *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 371 [limiting the scope of the state constitutional privilege against self-incrimination under Article I, section 15 of the California Constitution as it relates to reciprocal discovery to maintain consistency with newly enacted Article I, section 30].) Here, there is only one way such harmonization can be rationally achieved: by reading Proposition 209 in accordance with its plain language, to apply strictly to the "operation of public employment, public education, or public contracting" and not to the appointment of public officers.

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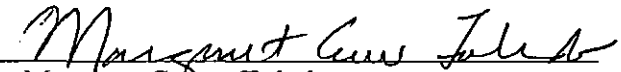
III.

CONCLUSION

For all the foregoing reasons and the reasons set forth in the defendants' moving papers, the State Auditor respectfully requests that the demurrer be sustained in its entirety.

Dated: May 24, 2012

MENNEMEIER, GLASSMAN & STROUD LLP

By: 

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I declare that I am employed with the law firm of Mennemeier, Glassman & Stroud LLP, whose address is 980 9th Street, Suite 1700, Sacramento, California 95814; I am not a party to the within cause; I am over the age of eighteen years and I am readily familiar with Mennemeier, Glassman & Stroud LLP's practice for collection and processing of correspondence for mailing with the United States Postal Service and know that in the ordinary course of Mennemeier, Glassman & Stroud LLP's business practice the document described below will be deposited with the United States Postal Service on the same date that it is placed at Mennemeier, Glassman & Stroud LLP with postage thereon fully prepaid for collection and mailing.

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THE STATE AUDITOR'S REPLY BRIEF IN SUPPORT OF DEMURRER TO FIRST AMENDED COMPLAINT

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Executed at Sacramento, California, this 24th day of May, 2012.

Cindie Wilding