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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

REPLY IN SUPPORT OF DEMURRER TO FIRST AMENDED VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND PETITION FOR WRIT OF MANDATE ON BEHALF OF STATE OF CALIFORNIA AND THE CALIFORNIA CITIZENS REDISTRICTING COMMISSION

Date: June 1, 2012
Time: 9:00 a.m.
Dept: 31
Judge: Hon. Michael P. Kenny

INTRODUCTION

Plaintiffs' opposition to the demurrer of the State of California and the California Citizens Redistricting Commission (Redistricting Commission) reveals that plaintiffs are not seeking to enforce Proposition 209 as it is written, but are rather urging an unprecedented extension of Proposition 209 from the operation of public employment to the appointment of public officers. This argument relies on an interpretation of Proposition 209 that categorically prohibits any consideration of race, ethnicity, or gender by any state official in any context. That is not, however, what Proposition 209 does. Rather, it precludes state discrimination against or preference in favor of a particular group or individuals that occurs specifically in the context of public employment, public education, or public contracting. (Cal. Const., art. I, § 31, subd. (a).) A fair reading of Proposition 209 does not support the plaintiffs' argument that it applies to the appointment of public officers such as members of the Redistricting Commission.

First, Proposition 209 does not and has never been applied to the appointment of public officers, much less those who, like members of the Redistricting Commission, are not public employees. As such, a statute that calls for considering the racial, ethnic, and gender diversity of the Commission as a whole, in addition to many other factors, when determining which members shall sit on the Commission cannot pose a facial violation of Proposition 209. While some officers may also be considered public employees, members of the Redistricting Commission are not public employees in any sense. Second, even if Proposition 209 applied to members of the Redistricting Commission, a statute that calls for considering the diversity of the Commission as a whole—as required by the California Constitution—does not grant a preference to, or discriminate against, any specific group or individual. Because plaintiffs cannot demonstrate that Government Code section 8252 presents a facial violation of Proposition 209, the court should sustain the demurrer and dismiss the First Amended Complaint, with prejudice.

ARGUMENT

I. PROPOSITION 209 DOES NOT APPLY TO THE MEMBERS OF THE REDISTRICTING COMMISSION

A. Members of the Redistricting Commission Are Public Officers.

Plaintiffs do not dispute the fact that members of the Redistricting Commission are public officers, and for good reason. Under established law, the Commissioners satisfy each criterion for a public office: they are appointed pursuant to the Constitution for a fixed term in office; they exercise the sovereign function of government; they can only be removed by the Governor with two-thirds of the Senate concurring for "substantial neglect of duty, gross misconduct in office, or the inability to discharge the duties of office;" and they act on behalf of the public rather than any employer. (See, e.g., *Dibb v. County of San Diego* (1994) 8 Cal.4th 1200; *Coulter v. Pool* (1921) 187 Cal. 181.) They are public officers by any measure.

B. Not All Public Officers Are Public Employees.

Plaintiffs' argument that the appointment of public officers is the "operation of public employment" relies on dicta in decades-old cases. While it is true that several courts have suggested in passing that "every office is an employment" (Plaintiff's Opp. to Demurrer at p. 3), a fair reading of those decisions instead supports the distinction the demurrer draws between officers and employees.

The dictum that "every office is an employment" is overbroad. Several of the cases cited by plaintiff explicitly qualify that statement. (See *Leymel v. Johnson* (1930) 105 Cal.App. 694, 701 ["It is true that, *in a sense*, every office is an employment . . . ."] [emphasis added].) And while many public officers may also be employees in some sense, many officers, like members the Redistricting Commission, are not employees in *any* sense. Even when the Commission is active, members of the Redistricting Commission do not receive a salary or benefits; they only receive a *per diem* of $300 for each day that they are engaged in Commission business. (Gov. Code, § 8253.5.) While members of the Redistricting Commission retain their office until their successors are appointed in 2020 (Cal. Const, Art. XXI, § 2, subd. (c)(4)), the Governor has not allocated any funding for the Commission in his proposed budget. (Ex. G to Supplemental

Request for Judicial Notice in Support of Demurrer.) The fact that the members of the Redistricting Commission will remain officers for eight years without receiving compensation illustrates that they are not engaged in "public employment" in any meaningful sense.

Similarly, other public officers, such as members of the Commission on Teacher Credentialing (which is also charged with being ethnically diverse) serve without compensation. (Educ. Code, §§44215; 44210.5.) In fact, the governing statute for the credentialing commission expressly contemplates that its members are not employees of the commission. It provides that for those members who are public employees, "the agency or body by which they are *regularly employed*" may not reduce their salary for their participation on the credentialing commission. (*Id.*, § 44217 [emphasis added].) This contemplates both that some of the commission members are not public employees at all, and for those that are, they are employees of the agency for which they work full-time, not the commission itself. Since the appointment of public officers such as the Commissioners does not implicate the "operation of public employment," there is no inevitable conflict with Proposition 209 and the demurrer should be sustained.

C. Construing Proposition 209 to Apply to the Appointment of Public Officers Would Dramatically Expand Its Reach and Conflict with Longstanding Practice and Several Constitutional Provisions.

Expanding the reach of Proposition 209 to apply to the appointment of public officers would have a significant impact on the makeup of commissions, boards, and other public entities throughout state government. As plaintiffs concede, applying Proposition 209 to the appointment of all public officers generally could dramatically circumscribe the power of the Governor and other elected officers to appoint public officers. (Plaintiff's Opposition to Demurrer by State Auditor at p. 4.) Public officers occupy a much different role in our government than public employees. This distinction is reflected in our state constitution, and in the numerous court decisions distinguishing the two. (State of California and Redistricting Commission's Memorandum of Points and Authorities at p. 6–7, 10.)[1] As argued above, the ordinary

[1] Recognizing the fact that elected officerss must have wide discretion to appoint a public officer, the federal government exempts state officers such as the members of the Redistricting Commission from Title VII (42 U.S.C. § 2000e, subd. (f)), and federal officers from the Civil Service Reform Act (5 U.S.C. § 2302, subd. (a)(2)(B).)

understanding of the phrase "operation of public employment" does not include the appointment of public officers such as the members of the Redistricting Commission. While plaintiffs point to broad statements that Proposition 209 prohibits the State from classifying individuals on the basis of race, ethnicity or gender, the actual text of Proposition 209 only concerns "the operation of public employment, public education, or public contracting." (Cal. Const., art. I, § 31, subd. (a).) Moreover, Proposition 209 has never been understood to regulate the appointment of public officers. This is reflected in the fact that no reported decision has ever addressed the question of whether the appointment of public officers falls within Proposition 209's regulation of "public employment." That is particularly significant in light of the numerous statutes and constitutional provisions providing for the appointment of public officers that reflect the State's racial, ethnic, and gender diversity. (See, e.g., Penal Code, § 13500, subd. (a) [Commission on Peace Officer Standards and Training]; Bus. & Prof. Code, 6079.1 [Hearing judges on the State Bar Court]; Educ. Code, § 44210.5 [Commission on Teacher Credentialing]; Gov. Code, § 8299.01 [California Commission on Disability Access]; Gov. Code, § 100500 [California Health Benefit Exchange].)[2]

The consideration of diversity is not limited to commissions established by statute. For instance, the Governor is authorized to make judicial appointments pursuant to article VI, section 16, subdivision (d) of the California Constitution. In making those appointments, several Governors have stated that they consider the diversity of the bench as a whole—including its

[2] It is irrelevant that cases involving Proposition 209 were brought against public officials. Plaintiffs argue that the fact that public officials were sued under Proposition 209, is evidence that the appointment of public officials is covered by Proposition 209. (Plaintiffs' Opposition to Demurrer by State of California (Opp.) at p. 6.) That argument gets it exactly backwards: defendants do not dispute that public officials can be responsible for public employment, education, or contracting, and thus proper defendants to a lawsuit. In *American Civil Rights Foundation v. Berkeley Unified School Dist.* (2009) 172 Cal.App.4th 207, cited by plaintiffs, Berkeley Unified School District, and its Superintendent, were alleged to have violated Proposition 209 in assigning students to schools: clearly this involves public education. Similarly, *Connerly v. State Pers. Board*, 92 Cal.App.4th 16 (2001), in which the Chancellor of the public community college system was sued for implementing an affirmative action program with regard to employees of a community college school district, involved public employment. It is not surprising that public officers are sued for programs that are alleged to violate Proposition 209, since public officers are often in charge of public employment, education, or contracting. Plaintiffs have located no case, however, in which a court applied Proposition 209 to the selection of public officers, such as the members of the Redistricting Commission.

racial, ethnic, and gender diversity—to be an important factor, and that they consider the race, ethnicity, and gender of a candidate as one of many relevant factors when making an appointment. Former Governor Schwarzenegger, for instance, stated that his administration "focused on expanding the pool of minority judicial candidates, which is the key to making our bench more diverse" and that while he was "committed to appointing the most-qualified people to the bench . . . it's still important that the appointees represent the rich diversity of the state." (Miller, *Meaning of Stats Stubbornly Remains in the Eye of the Beholder*, The Recorder (March 6, 2007); Wildermuth, *Schwarzenegger Appointing More Women, Minorities As Judges*, San Francisco Chronicle (Aug. 21, 2007) p. B-1.) Indeed, it was Governor Schwarzenegger's commitment to increasing the racial and ethnic diversity of the bench that resulted in the Legislature's approval of 50 new judgeships during his administration. (Senate Bill 56, Stats. 2006, ch. 390; De Atley, *Minorities Sought for Judiciary*, The Press Enterprise (May 29, 2007) A-1.) As a result of this legislation, the Governor is required to release each year demographic data related to the ethnicity, race, gender, gender identity, and sexual orientation of all judicial applicants and nominees to help ensure that the bench reflects this State's diversity. (Gov. Code, § 12011.5, subd. (n).) Governor Brown's spokesman recently stated that "diversity is one of the many factors we consider" in making an appointment. (Hernandez, *Diversity in Courtrooms*, Ventura County Star (April 5, 2012) p. A-1.) If plaintiffs are correct that Proposition 209 applies to the selection and appointment of public officers, all of these efforts to increase the racial, ethnic, and gender diversity of the bench could be called into question.

Interpreting Proposition 209 in the manner suggested by plaintiffs would conflict with other constitutional provisions that require appointing officers to consider the racial, ethnic, and gender diversity of public officers. For instance, Proposition 112, which established the Citizens Compensation Commission, directs that the Governor "strive insofar as practicable to provide a balanced representation of the geographic, gender, racial, and ethnic diversity of the State in appointing commission members." (Cal. Const., art. III, § 8, subd. (c).) Plaintiffs seek to minimize this constitutional command, arguing that since the composition of the commission was not mentioned in the ballot materials, "the voters approving Proposition 112 cannot be presumed

to have intended that state officials . . . be allowed to consider race and gender when acting on behalf of the public." (Opp. at p. 14.) First, that is simply not true: the text of article III, section 8 is quite clear. Second, it misses the point. Defendants' argument is that if Proposition 209 is read in the manner suggested by plaintiffs to apply to all officers, that provision of Proposition 112 would be impliedly repealed by Proposition 209. Plaintiffs suggest that the Governor can still consider other types of diversity, but article III, section 8 makes clear that the Governor should consider gender, racial, and ethnic diversity. By reading those words out of Constitution, plaintiffs would have Proposition 209 impliedly repeal that constitutional provision. The same is true of the constitutional provision that the Regents of the University of California "be able persons broadly reflective of the economic, cultural, and social diversity of the state, *including ethnic minorities and women*." (Cal. Const., art. IX, § 9, subd. (d) [emphasis added].) An initiative constitutional amendment, however, cannot impliedly repeal another constitutional provision; otherwise it is considered to be an impermissible revision, rather than a constitutional amendment. (*Board of Supervisors v. Lonergan* (1980) 27 Cal.3d 855, 868.) If Proposition 209 were construed to be a revision it would be invalid. Revisions must be proposed by the Legislature and then approved by the electorate. (Cal. Const,. art. XVIII, §1; *Strauss v. Horton* (2009) 46 Cal.4th 364, 386 ["although the initiative process may be used to propose and adopt *amendments* to the California Constitution, under its governing provisions that process may not be used to *revise* the state Constitution"].) The only way to harmonize Proposition 209 with articles III and IX is to limit Proposition 209's operation to public employment, and not extend its reach to the appointment of public officers.

II. SECTION 8252 DOES NOT GRANT A PREFERENCE TO, OR DISCRIMINATE AGAINST, ANY PARTICULAR GROUP OR INDIVIDUAL

Even if Proposition 209 applies to public officers, Government Code section 8252 does not on its face discriminate against or grant a preference to any group or individual. Plaintiffs appear to argue that section 8252 establishes a "goal [or] timetable to overcome underutilization of minorities" that is prohibited by Proposition 209. (Opp. at p. 8 [citing *Connerly, supra,* 92 Cal.App.4th at p. 55].) Section 8252 does no such thing. It does not set a goal for the

participation of any particular race, ethnicity, or gender; it simply encourages the Commissioners to make sure that *all* races, ethnicity, and genders are represented on the Commission. No group or individual is granted or denied a seat on the Commission solely because of their race, ethnicity or gender. And contrary to plaintiffs' assertion, there is no "proportionality" requirement in section 8252. (See Opp. at p. 9.) Section 8252 does not direct the first eight Commissioners to select a set of final six Commissioners that reflects a particular percentage of California's population, but rather a slate that broadly reflects the diversity of the State. No particular formula, quota, percentage, or number of any race, ethnicity, or gender is required, and indeed, the use of formulas and ratios is expressly prohibited. (Cal. Gov. Code, §8252, subd. (d).)

Section 8252 does not grant preferential treatment to any group. Unlike the affirmative action programs in contracting and employment targeted by Proposition 209, which encouraged the hiring of specific groups, section 8252 is facially neutral. *All* groups, whether majority and minority, benefit from the direction that the first eight Commissioners strive to select a slate of six members that, when combined with the first eight Commissioners, reflects the diversity of California. Moreover, as established in defendants' memorandum of points and authorities, section 8252 does not operate to discriminate against any specific individual. Rather, the first eight Commissioners select a slate of six Commissioners as a whole; no individual is seated based on his or her race alone.[3] Accordingly, section 8252 does not discriminate or grant a preference to any individual.

CONCLUSION

Unlike public employees, who are chosen based on their ability to perform a specific task, public officers are elected and appointed based on a wide variety of factors, including their ability to lead and inspire the citizens of California. While officers are appointed on the basis of their ability, the appointing officer may consider other factors as well that are unique to the

[3] Plaintiffs seek to recharacterize this argument as relying on *Grutter v. Bolinger* (2003) 539 U.S. 306, a case that is not cited in defendants' brief. (Opp. at p. 10.) While it is true that section 8252 requires the consideration of the diversity of the Commission as only one factor among many, the point is that because the final six Commissioners are chosen as a slate rather than one at a time, no individual is ever discriminated against because of his or her race, gender, or ethnicity.

responsibility of a public officer, who exercises the sovereign authority of the state. It is thus critical that the appointing officer or entity be permitted wide discretion in determining who to appoint as an officer, including how the appointment will contribute to a sense that government fairly represents the population of California. The concern that government reflect the diversity of the State ensures the legitimacy of our representative democracy. "Racial diversity and pluralism . . . ensure the legitimacy of representative bodies by giving them, and the electoral process as a whole, the appearance of fairness." (McDonald, Holder v. Hall: *Blinking At Minority Voting Rights* (1995) 3 D.C. L. Rev. 61, 96-97.) As retired Chief Justice Ronald George stated, "Having individuals who reflect [California's] diversity serve on the bench helps reinforce the important message that ours is a system open to all and that individuals drawn from any segment of society can preside fairly and objectively over all claims involving Californians from every background." (*Study: Minorities, Women Reach Nearly 30 Percent of State Judiciary* (March 5, 2007) Metropolitan News-Enterprise, p. 1.) This principle is particularly important in the context of the Redistricting Commission, which is charged with the monumental task of determining how Californians select their elected representatives. As the drafters of Proposition 11 understood, ensuring the Redistricting Commission reflects the diversity of California will help to ensure that its citizens respect the work of the Commission in helping to elect California's representatives.

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

Dated: May 24, 2012

Respectfully Submitted,

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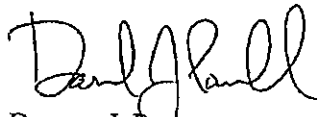

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***Connerly v. State of California, et al.***

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

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On May 24, 2012, I served the attached **REPLY IN SUPPORT OF DEMURRER TO FIRST AMENDED VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND PETITION FOR WRIT OF MANDATE ON BEHALF OF STATE OF CALIFORNIA AND THE CALIFORNIA CITIZENS REDISTRICTING COMMISSION** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 24, 2012, at San Francisco, California.

Susan Chiang
Declarant

Signature

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