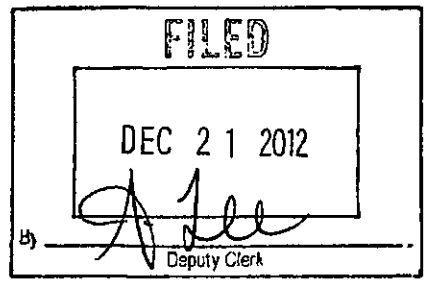

SUPERIOR COURT OF CALIFORNIA

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; CALIFORNIA CITIZENS REDISTRICTING COMMISSION,

Defendants and Respondents.

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

RULING ON SUBMITTED MATTER: DEMURRERS TO FIRST AMENDED VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND PETITION FOR WRIT OF MANDATE

Introduction

The Court heard oral argument in this matter on October 5, 2012. At the close of the hearing, the Court took the matter under submission for issuance of a written ruling. The following shall constitute the Court's final ruling on the demurrers.

On March 20, 2012, plaintiffs/petitioners filed their First Amended Verified Complaint for

Declaratory and Injunctive Relief and Petition for Writ of Mandate ("the complaint and petition").[1] The complaint and petition asserts a facial challenge to Government Code Section 8252 ("Section 8252"), which governs the selection process for the Citizens Redistricting Commission, on the ground that it is in conflict with Article I, Section 31(a) of the California Constitution as a matter of law.[2] Plaintiffs/petitioners seek a ruling by the Court that Section 8252 is invalid and unenforceable on the ground that it is unconstitutional.

The complaint and petition names three parties as the defendants/respondents: the State of California; the Citizens Redistricting Commission; and the State Auditor (Elaine M. Howle), whose office conducts the selection process for members of the Commission under Government Code section 8252.

In essence, plaintiffs/petitioners allege that Government Code section 8252 requires the first eight members of the Citizens Redistricting Commission, and members of the State Auditor's Applicant Review Panel, to consider race, ethnicity and gender in appointing the final six members to the Commission, in violation of the declaration contained in Article I, Section 31(a) that "[t]he 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."

The defendants/respondents have filed demurrers to the complaint and petition, asserting that it fails to state facts sufficient to constitute a cause of action. (Code of Civil Procedure section 430.10(e).)[3] In essence, they argue that the selection process for the Commission established in Section 8252 does not violate Article I, Section 31(a) because the appointment of members to the Commission does not involve the operation of public employment, public education, or public contracting.

Standard of Review on Demurrer

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[1] Plaintiffs/petitioners initially filed a Verified Complaint for Declaratory and Injunctive Relief and Petition for Writ of Mandate on October 4, 2011. After a demurrer was filed, but before any hearing on the demurrer, they filed the amended complaint and petition.

[2] See, Complaint and Petition, paragraph 1, page 1:10-11.

[3] The State of California and the Citizens Redistricting Commission, represented by the Attorney General, filed one demurrer. The State Auditor, represented by private counsel, filed the other. The State Auditor also filed a joinder in the State and Commission's demurrer.

As noted above, the complaint and petition explicitly states that it is making a facial challenge to Government Code section 8252(g). Because a facial challenge raises only issues of law, and not factual issues regarding the implementation of the challenged provision of law, a demurrer is an appropriate means to attempt to show that the challenge lacks merit. (See, *Tobe v. City of Santa Ana* (1995) 9 Cal. 4th 1069, 1084.)

In ruling on the demurrer, the court must accept as true all material facts pleaded in the complaint, disregarding only conclusions of law and allegations contrary to judicially noticed facts. (See, *Burt v. County of Orange* (2004) 120 Cal. App. 4th 373.)[4]

The function of a demurrer is to test the sufficiency of a pleading by raising questions of law, and the court should not sustain the demurrer unless the complaint, liberally construed, fails to state a cause of action on any theory. (See, *Kramer v. Intuit, Inc.* (2004) 121 Cal. App. 4th 574, 578.) Thus, if the complaint states a cause of action on any theory, regardless of the title under which the factual basis for relief is stated, that aspect of the complaint is good against demurrer. (See, *Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal. 4th 26, 38.) If it appears, on consideration of all the facts stated, that the plaintiff is entitled to any relief against the defendant, the complaint will be held good even though the plaintiff may demand relief to which he is not entitled under the facts stated. (See, *Augustine v. Trucco* (1954) 124 Cal. App. 2nd 229, 236.)

A statute is presumed to be valid unless its unconstitutionality clearly, positively, and unmistakably appears. (See, *People v. Falsetta* (1999) 21 Cal. 4th 903, 913.) Moreover, a facial challenge to a statute, such as this case, considers only the text of the measure itself, and not its application to the particular circumstances of any individual. To support a finding of facial unconstitutionality, voiding the statute as a whole, the challengers may not prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular application of the statute. Rather, the

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[4] Defendants/respondents State of California and the Commission have filed a request for judicial notice (filed April 30, 2012) and a supplemental request for judicial notice (filed May 24, 2012) in support of their demurrer. Plaintiffs/petitioners filed a request for judicial notice in opposition to the demurrer on May 18, 2012. Amici Curiae filed a request for judicial notice in support of the demurrer on May 17, 2012. No objections have been made to any of the request, and the matters included in the requests appear to the satisfaction of the Court to be proper subjects for judicial notice. The requests for judicial notice are therefore granted.

challengers must demonstrate that the act's provisions "...inevitably pose a present total and fatal conflict with applicable constitutional provisions." (See, *Tobe v. City of Santa Ana, supra,* 9 Cal. 4th at 1084.)

Summary of Applicable Law: Section 8252

On November 4, 2008, the voters of the State of California approved Proposition 11. Proposition 11 amended Article XXI of the California Constitution to transfer the power to re-draw State Assembly, State Senate and State Board of Equalization districts from the Legislature to a newly-created fourteen-member Citizens Redistricting Commission. Proposition 11 also enacted several new statutes in the Government Code, including Section 8252, entitled "Citizens Redistricting Commission Selection Process". The process takes place in two phases: the first phase involves the selection of eight members of the Commission; the second phase involves the selection of the remaining six members. Only the second phase is at issue in this proceeding. Nevertheless, it is useful to place the second phase in context by summarizing the entire process as set forth in the statute.

Section 8252(a)(1) provides that the State Auditor shall initiate an application process every ten years, with the first such process beginning by January 1, 2010. The process is to be "...open to all registered California voters in a manner that promotes a diverse and qualified applicant pool." Section 8252(a)(2) directs the State Auditor to establish an applicant pool in accordance with specified standards, which are not challenged in this proceeding.

Section 8252(b) directs the State Auditor to establish an Applicant Review Panel, consisting of three qualified independent auditors, to screen applicants. Section 8252(c) requires the State Auditor to publicize the names in and applicant pool and to provide copies of their applications to the Applicant Review Panel.

Section 8252(d) governs the activities of the Applicant Review Panel. As relevant to this matter, it states:

"From the applicant pool, the Applicant Review Panel shall select 60 of the most qualified applicants, including 20 who are registered with the largest political party in California based on registration, 20 who are registered with the second largest political party in California based on

registration, and 20 who are not registered with either of the two largest political parties in California based on registration. These subpools shall be created on the basis of relevant analytical skills, ability to be impartial, and appreciation for California's diverse demographics and geography."

Section 8252(e) requires the Applicant Review Panel to present its pool of recommended applicants to the Secretary of the Senate and the Chief Clerk of the Assembly, and provides that certain members of the leadership of the two houses of the Legislature may strike a specified number of applicants from each subpool. After this process is completed, the Secretary of the Senate and the Chief Clerk of the Assembly jointly present the pool of remaining names to the State Auditor. This subsection of Section 8252 is not challenged in this proceeding.

Section 8252(f) provides that the State Auditor shall randomly draw eight names from the remaining pool of applicants in a specified manner, and that those eight individuals shall serve on the Citizens Redistricting Commission. This subsection of Section 8252, which concludes the first phase of the selection process, is not challenged in this proceeding.

Section 8252(g) governs the second phase of the selection process, involving the last six members of the Commission. It provides:

"Not later than December 31 in 2010, and in each year ending in the number zero thereafter, the eight commissioners shall review the remaining names in the pool of applicants and appoint six applicants to the commission as follows: two from the remaining subpool of applicants registered with the largest political party in California based on registration, two from the remaining subpool of applicants registered with the second largest political party in California based on registration, and two from the remaining subpool of applicants who are not registered with either of the two largest political parties in California based on registration. The six appointees must be approved by at least five affirmative votes which must include at least two votes of commissioners registered from each of the two largest parties and one vote from a commissioner who is not affiliated with either of the two largest political parties in California. **The six appointees shall be chosen to ensure the commission reflects this state's diversity, including, but not limited to, racial, ethnic, geographic, and gender diversity.** However, it is not intended that

formulas or specific rations be applied for this purpose. Applicants shall also be chosen based on relevant analytical skills and ability to be impartial." (Emphasis added.)

The language quoted in bold type above provides the focus for plaintiffs/petitioners' contentions in this proceeding.

Summary of the Allegations of the Complaint and Petition

The complaint and petition purports to state four causes of action, which divide into two pairs. Each pair includes a claim for declaratory relief and a petition for writ of mandate.

One pair, consisting of the first and third causes of action, focuses on the actions of the first eight members of the Commission in their selection of the last six. Plaintiffs/petitioners allege that members of the Commission are public employees, or alternatively, public contractors, and that the first eight members of the Commission violate Article I, Section 31(a) by applying Section 8252(g)'s provisions calling for them to consider racial, ethnic and gender diversity in the selection process for the final six members.

The other pair, consisting of the second and fourth causes of action, focuses on the actions of the Applicant Review Panel. Plaintiffs/petitioners allege that members of the panel are state employees who violate Article I, Section 31(a) by participating in a selection process that ultimately requires consideration of racial, ethnic, and gender diversity.

Discussion

The Court finds that the demurrer has merit, because the appointment of members of the Citizens Redistricting Commission does not, as a matter of law, fall within the scope of "the operation of public employment, public education, or public contracting", which are the objects of Article I, Section 31(a). Thus, plaintiffs/petitioners facial challenge to Government Code section 8252(g) fails to state a cause of action.

It is clear from the face of Government Code section 8252(g) that it does not relate to public education or public contracting. The only potential issue is whether the appointment of members of the Commission relates to "the operation of public employment" within the meaning of Article I, Section 31(a), as plaintiffs/petitioners argue here.

The Court finds that it does not, because members of the Citizens Redistricting Commission are "public officers" as that term is defined in long-established case law, and not "public employees". Thus, the activity governed by the challenged statute involves the selection of public officers, and is not an activity related to the operation of public employment.

The California Supreme Court addressed the distinction between public officers and public employees many years ago in *Coulter v. Pool* (1921) 187 Cal. 181. The Court stated, at pages 186-187 of its opinion:

"A public office is ordinarily and generally defined to be the right, authority, and duty, created and conferred by law, the tenure of which is not transient, occasional, or incidental, by which for a given period the individual is invested with power to perform a public function for the benefit of the public. [...] The most general characteristic of a public officer, which distinguishes him from a mere employee, is that a public duty is delegated and entrusted to him, as agent, the performance of which is an exercise of the governmental functions of the particular political unit for which he, as agent, is acting."

This statement of the law is still viable, as evidenced by the fact that the California Supreme Court quoted from it and applied it in a much more recent case, *Dibb v. County of San Diego* (1994) 8 Cal. 4th 1200, 1212.

It is apparent from the face of the Constitutional and statutory provisions regarding the duties of the Citizens Redistricting Commission that the positions held by its members are public offices because the members are invested with the authority to perform a public function for the benefit of the public, namely, the periodic adjustment of Congressional, Legislative, and Board of Equalization Districts. That this duty is a public function, and an exercise of the governmental functions of the State, for which the members of the Commission act as agents, is apparent from the fact that redistricting previously was done by the State Legislature. The challenged statute thus addresses an activity, the appointment of public officers, that is distinct from the activity addressed in Article I, section 31(a), which is the operation of public employment.

Other provisions of the State Constitution consistently distinguish between public "offices" and

"employment", or between "officers" and "employees". The following provisions may be cited as examples.

Article VII, Section 1(a), which governs the state civil service, states: "The civil service includes every officer and employee of the state except as otherwise provided in this Constitution." The Court further notes that the title of Article VII is "Public Officers and Employees".

Article IV, Section 17 states that the Legislature "...has no power to grant, or to authorize a city, county, or other public body to grant, extra compensation or extra allowance to a public officer, public employee, or contractor after service has been rendered or a contract has been entered into and performed in whole or in part...".

Article IV, Section 13 provides that "[a] member of the Legislature may not, during the term for which the member is elected, hold any office or employment under the State other than an elective office."

Article VI, Section 17, which applies to the judiciary, states that a judge of a court of record "...is ineligible for public employment or public office other than judicial employment or judicial office...".

These provisions, all of which pre-date the enactment of Article I, Section 31(a), demonstrate that public office and public employment are distinct concepts under the State Constitution.

Nevertheless, plaintiffs/petitioners argue that there is no legal distinction between public office and public employment for the purpose of applying the provisions of Article I, Section 31(a). This argument is based primarily on language from case law stating generally that "in a sense, every office is an employment." (See, e.g., *Patton v. Board of Health* (1899) 127 Cal. 388, 393; *Mono County v. Industrial Accident Commission* (1917) 175 Cal. 752, 755; *Curtin v. State of California* (1923) 61 Cal. App. 377, 386; *Leymel v. Johnson* (1930) 105 Cal. App. 694, 701; *Kirk v. Flournoy* (1974) 36 Cal. App. 3rd 553, 557.)

The argument is unpersuasive because none of the cited cases address the specific meaning of the term "public employment" as used in Article I, section 31(a), which was enacted long after any of those cases were decided, or hold that exercising a public office is legally identical to engaging in public employment. Instead, the cases typically have been concerned with determining whether a particular

individual or group of individuals should be classified as public officers or public employees in order to determine whether those persons were entitled to the rights or benefits, or subject to the prohibitions, applicable to one status or the other. In doing so, the cases invariably treat the two statuses as distinct for legal purposes.[5]

Thus, far from finding that public officers are engaged in the "operation of public employment", the cited cases thus emphasize the legal distinction between holding public office and being engaged in public employment. The language from these cases upon which plaintiffs/petitioners rely appears, in this context, to use the term "employment" in the more generic sense of "work" or "occupation", and to reject the implication that because an "office" is an "employment" in this generic sense, it is also an "employment" in the specific legal sense that determines eligibility for benefits or the application of legal prohibitions.

It is also significant for the analysis of the present claim that, in addition to the provisions demonstrating the distinction between public office and public employment, the State Constitution also contains at least two provisions directing public officers to consider race or gender in making appointments to public office. Both of these provisions were in effect when the voters approved Proposition 209, the measure which added Article I, Section 31(a) to the State Constitution.

Article III, Section 8(c), which concerns the California Citizens Compensation Commission, states that the Governor, who appoints the Commission's seven members, "...shall strive insofar as practicable to provide a balanced representation of the geographic, gender, racial and ethnic diversity of the State in appointing commission members."

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[5] In *Patton,* the court found that a city health inspector was an "officer" rather than an "employee" and thus served at the pleasure of the city board of health, rejecting the inspector's contention that, as an employee, he could only be discharged for cause. In *Curtin,* the court found that a member of the Legislature who was appointed as an expert to sit with a Joint Legislative Committee to examine and report on revenue and taxation measures was engaged in an "employment" rather than an "office", and thus his appointment did not violate a constitutional prohibition against a member holding another public office. In *Mono County,* the Supreme Court found that an elected county sheriff was a public officer, and not an "employee" within the meaning of the Workmen's Compensation Act, and that his widow therefore was not entitled to benefits under the Act when he was killed on the job. In *Leymel,* the court separately considered the issues of whether a member of the Legislature who simultaneously worked as a public school teacher was holding an "office" or "employment" under the state, ultimately finding that the State Constitution did not bar him from doing so on either basis. In *Kirk,* the court found that the plaintiff, a retiring superior court judge and thus a public officer, was not entitled to service retirement credit for time during which he was employed as assistant general counsel for an irrigation district, because he was a public employee in this position, and not a public officer.

Article IX, Section 9(d), which concerns the membership of the Board of Regents of the University of California, most of whom are appointed by the Governor, states that "Regents shall be able persons broadly reflective of the economic, cultural, and social, diversity of the state, including ethnic minorities and women. However, it is not intended that formulas or specific ratios be applied in the selection of regents."

The voters are deemed to have been aware of existing laws and judicial constructions of laws when they enact an initiative measure such as Proposition 209, and the use of a term in the enactment which has been judicially construed and used in prior constitutional provisions raises an "almost irresistible" presumption that that term has been used in the precise and technical sense in which it has been used and construed in pre-existing law. (See, *Wilson v. John Crane* (2000) 81 Cal. App. 4th 847, 855.)

In this case, the use of the term "employment" in Article I, Section 31(a), where that term has been used in pre-existing constitutional provisions and construed by the California Supreme Court as something separate and distinct from "office", raises an almost irresistible presumption that the voters used it in that sense, and did not intend to extend its meaning to public offices. Similarly, the voters who enacted Proposition 209 are deemed to have been aware of the pre-existing constitutional provisions involving the consideration of matter such as race and gender in the appointment of public officers. This also raises an "almost irresistible" presumption that they intended Article I, Section 31(a) to be consistent with existing law, and did not intend the language "operation of public employment" to extend to the selection of public officers.

Plaintiffs/petitioners have not rebutted that presumption here. Significantly, Article I, Section 31(a) does not state that it applies to the selection of public officers, and it does not purport to repeal any of the pre-existing constitutional provisions regarding selection of public officers. On its face, Article I, Section 31(a) unambiguously applies only to "the operation of public employment, public education, or public contracting", and not to public officers. Where the language of an initiative is unambiguous, the court need not look to other indicia of the voters' intent. Nevertheless, it is appropriate to note that the

ballot pamphlet arguments submitted by the proponents of Proposition 209, as well as the nonpartisan Legislative Analyst's explanation of the measure, disclose no intent to apply Proposition 209 to the selection of public officers.[6] (See, *Knight v. Superior Court* (2005) 128 Cal. App. 4th 14, 25.)

A statute is presumed to be valid unless its unconstitutionality clearly, positively, and unmistakably appears. (See, *People v. Falsetta* (1999) 21 Cal. 4th 903, 913.) In this case, the unconstitutionality of Government Code section 8252(g) does not clearly, positively, and unmistakably appear, because the challenged portion of the statute does not address a matter within the scope of Article I, Section 31(a) of the California Constitution. The first eight members of the Commission, who are public officers, and the members of the Applicant Review Panel, who are state employees, are all engaged in the process of selecting public officers. This activity is not part of the "operation of state employment" within the meaning of Article I, Section 31(a).[7]

The Court accordingly concludes that the complaint and petition fails to state facts sufficient to constitute a cause of action asserting a facial challenge to the statute. The demurrer is sustained.

The remaining issue is whether the demurrer should be sustained without leave to amend. A general demurrer for failure to state a cause of action may be sustained without leave to amend where the petitioner does not demonstrate how the petition might be amended to state a cause of action, and where the court concludes that the petition is incapable of being amended to state a cause of action. The burden is on the petitioner to demonstrate how the pleading could be amended. (See, *Association of Community Organizations for Reform Now v. Department of Industrial Relations* (1995) 41 Cal. App. 4th 298, 302.)

Here, plaintiffs/petitioners already have amended the complaint and petition once. In opposing the demurrer to the amended complaint and petition, they have not demonstrated how the complaint and petition in this case might be further amended to state a cause of action, and therefore have not carried their burden.

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[6] These materials are found in Exhibit E to the April 30, 2012 Request for Judicial Notice filed by defendants/respondents State and Commission.

[7] In light of its conclusion that Article I, Section 31(a) does not apply to the selection of state officers such as members of the Commission, the Court finds it unnecessary to address the issue, raised by defendants/respondents State and Commission, of whether its provisions conflict with those of Article III, section 8, discussed above.

Moreover, the Court concludes that plaintiffs/petitioners cannot amend the complaint and petition to state a viable cause of action. "A demurrer may be sustained without leave to amend where the facts are not in dispute and the nature of the plaintiff's claim is clear, but, under substantive law, no liability exists." (See, *Keyes v. Bowen, supra,* 189 Cal. App. 4th at 655.) In this case, the facts of the challenged selection process are not in dispute. Moreover, the nature of plaintiffs/petitioners' claim is clear. That claim is simply that Government Code section 8252(g) facially violates Article I, Section 31(a). Under substantive law, as set forth above, no liability exists, in that plaintiffs/petitioners cannot demonstrate that the statute is facially unconstitutional.

The Court therefore sustains the demurrer without leave to amend, and orders this action to be dismissed with prejudice.

Counsel for defendants/respondents State of California and Commission is directed to prepare a formal order sustaining the demurrer without leave to amend and dismissing the action with prejudice, incorporating this Court's ruling as an exhibit, and a separate judgment of dismissal; submit them to opposing counsel for approval as to form in accordance with Rule of Court 3.1312(a); and thereafter submit them to the Court for signature and entry of judgment in accordance with Rule of Court 3.1312(b).

Pursuant to Government Code § 6103.5, all defendants/respondents shall recover from petitioner and pay to the clerk the amount of any fees that would have been paid but for Government Code § 6103.

DATED: December 21, 2012

Judge MICHAEL P. KENNY
Superior Court of California,
County of Sacramento

CERTIFICATE OF SERVICE BY MAILING
(C.C.P. Sec. 1013a(4))

I, the undersigned deputy clerk of the Superior Court of California, County of Sacramento, do declare under penalty of perjury that I did this date place a copy of the above-entitled **RULING ON SUBMITTED MATTER** in envelopes addressed to each of the parties, or their counsel of record as stated below, with sufficient postage affixed thereto and deposited the same in the United States Post Office at 720 9th Street, Sacramento, California.

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Superior Court of California,
County of Sacramento

Dated: December 21, 2012

By: S. LEE
Deputy Clerk