

# INFORMATIONAL BRIEF

## Race as a Consideration in the Commissioner Selection Process

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### Core Question

The purpose of this brief is to shed light on the degree to which race can be used in the LA city independent redistricting commissioner selection process to achieve a racially/ethnically representative commission.

### Summary of Topline Findings

Below is 1 court case against the 2010 CA Citizens Redistricting Commission that was dismissed with prejudice, and discussion of local commissions incorporating race/ethnicity in their diversity criteria. Together, these suggest that having race/ethnicity as a consideration in the selection process should not lead to legal issues, particularly if the framing is closer to “reasonably representing” the jurisdiction’s diversity rather than implementing ratios to achieve a representative commission.

### Background & Information

#### Context – 1996 Proposition 209

Voter approved Prop. 209 in 1996 and re-approved in 2020 states that the state cannot discriminate against or grant preferential treatment on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, and public contracting.

#### Connerly v. State of CA (2012)

Typically, Prop. 209 is discussed in the context of hiring or university enrollment. However, Prop. 209 has also been the basis for a lawsuit against the 2010 CA Citizens Redistricting Commission.<sup>1</sup> In 2012, a lawsuit was filed claiming the 2010 commissioner selection process violated Prop. 209’s mandate that the state shall not discriminate, or grant preference based on race/ethnicity. In December of 2012, the Sacramento Superior Court dismissed with prejudice the lawsuit on the grounds that the commission’s selection process did not fall within “the operation of public employment, public education, or public contracting” as required for Prop. 209 to apply.<sup>2</sup> The 2010 Redistricting Commission’s selection process did not establish preference for particular groups, rather had a requirement for the commission to be “reasonably representative of CA’s diversity.”

It seems that the legal system has established that a redistricting commissioner selection process aiming to be representative the diversity of a given jurisdiction does not equate to engaging in the prohibited behaviors under Prop. 209. The US Supreme Court has supported this rationale in other court cases where it has ruled line-drawers can and must consider race in order to comply

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<sup>1</sup> <https://equaljusticesociety.org/law/prop11amicus/>

<sup>2</sup> <https://app.box.com/s/kbxqe4o9l8ckp7a27l8k>

with the VRA so long as race is not the predominant factor guiding the map drawing process to the subordination of other criteria.<sup>3</sup> We can expect that a similar rationale would be applied to the selection process where race can be a factor so long as it is not the predominant factor guiding the commissioner selection process.

### **Frequency of Race/Ethnicity in Selection Process**

Many jurisdictions in California name race and ethnicity as considerations in their diversity requirement for the selection of commissioners.<sup>4</sup> Common Cause’s 2017 report includes an appendix detailing which of 18 CA jurisdictions consider race/ethnicity within their diversity criteria. These include Berkeley, Chula Vista, Escondido, LA County, Modesto, Oakland, Sacramento, city of San Diego, San Jose, and the state of California. In most of these jurisdictions, race is added as a consideration alongside others such as gender, class, and sexual orientation, but all retain geography as the priority. For example:

#### **Berkeley City Charter Section 9.5b:**

“...the Citizens Redistricting Commission shall attempt to achieve community representation by taking into consideration geographic diversity, race, age and gender.”

#### **San Diego City Charter Article 2:**

“The Appointing Authority shall appoint members who will give the Redistricting Commission geographic, social and ethnic diversity, ....”

#### **Sacramento City Charter Article 12, Section 174:**

“The commissioner selection process is designed to produce a commission that is independent and that reasonably reflects the diversity of the city.”

#### **Oakland City Charter Section 220:**

“The Commissioner selection process is designed to produce a Commission that is independent and is reasonably representative of the geographic, racial, ethnic and economic diversity of the City of Oakland.”

#### **Modesto City Charter Article 5, Section 501:**

“The Commission shall reflect the demographic and geographic diversity of the City.”

#### **Long Beach City Charter Article 25, Section 2505:**

“The commissioner selection process is designed to produce a Commission that is independent and that reasonably reflects the diversity of the City. The City Clerk shall ...publicize an application process... that is large and reflective of the diversity of the City.”

#### **Chula Vista City Charter Section 903:**

“the extent possible and as permitted by law, the Commission includes: (a) persons who reflect the racial, ethnic, gender and geographic diversity of the City...”

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<sup>3</sup> *Bush v. Vera*, 517 U.S. 952, 958 (1996); <https://supreme.justia.com/cases/federal/us/517/952/>

<sup>4</sup> Nicolas Heidorn, California Local Redistricting Commissions: Landscape, Considerations, and Best Practices. (California Local Redistricting Project, updated 2017), <https://www.localredistricting.org/research>