IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

No. C073753

WARD CONNERLY, a citizen and taxpayer,
and AMERICAN CIVIL RIGHTS FOUNDATION,
a nonprofit public benefit corporation,

Plaintiffs and Appellants,

v.

STATE OF CALIFORNIA, ELAINE HOWLE,
in her official capacity as the STATE AUDITOR OF CALIFORNIA,
and the CALIFORNIA CITIZENS REDISTRICTING COMMISSION,

Defendants and Respondents.

On Appeal from the Superior Court of Sacramento County
(Case No. 34-2011-80000966, Honorable Michael P. Kenny, Judge)

APPELLANTS' OPENING BRIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

California Rules of Court, rules 8.208, 8.490(i), 8.494(c), 8.496(c), or 8.498(d)

Court of Appeal Case Caption:

Ward Connerly, et al.
v.
State of California, et al.

Court of Appeal Case Number: C073753

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_____ August 19, 2013.
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INTRODUCTION

A state obstructs representative democracy when it uses race to deny its citizens an equal opportunity to seek public office. Both the United States and California Supreme Courts recognize that individuals have a constitutional right to be considered for public service without being burdened by discriminatory qualifications. But the California State Auditor infringes upon this "fundamental right" by requiring public officers to classify, screen, and select applicants for the Citizens Redistricting Commission on the basis of their race, ethnicity, and sex.

Appellants Ward Connerly and the American Civil Rights Foundation (Connerly) brought a facial challenge to Gov't Code Section 8252(g) under Article I, Section 31(a), of the California Constitution. Connerly alleged that Section 8252(g)'s use of race, ethnicity, and sex requires public officers and public employees to discriminate against, and grant preferential treatment to, individuals applying to serve on the Citizens Redistricting Commission. Section 31(a) prohibits state public institutions from considering race, sex, color, ethnicity, or national origin in employment, education, and contracting. The trial court held that Section 31(a) only applies to the selection of public employees, not public officers. The court dismissed Connerly's Complaint without leave to amend, explaining that Connerly "cannot amend the complaint and petition to state a viable cause of action." The trial court was wrong.

The undisputed facts in Connerly's Complaint support a cause of action that Section 8252(g) is unconstitutional under the federal Equal Protection Clause. U.S. Const. amend. XIV, § 1. The selection process mandated by Section 8252(g) requires that the State, through appointed commissioners, discriminate on the basis of race and sex against individuals who apply to serve on the Citizens Redistricting Commission, in violation of their Fourteenth Amendment rights. This Court should rule on this new claim, because it concerns an issue of law applied to undisputed facts. In the alternative, Connerly requests that this Court grant leave to amend the Complaint to specifically allege a violation of the federal Equal Protection Clause.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Citizens Redistricting Commission

This case concerns a facial challenge by Appellants Ward Connerly and the American Civil Rights Foundation (collectively, Connerly) to Government Code Section 8252(g).[1] That section requires public officers to classify,

[1] Connerly also alleged a facial challenge to Section 8252(g) to the extent it requires public employees on the Applicant Review Panel to grant preferences to, and discriminate against individuals on the basis of their race, ethnicity, and sex when forming a pool of the 60 most qualified applicants. *See* J.A. 31, 34 (Second and Fourth Causes of Action to FAC). Connerly does not appeal the trial court's ruling as to those causes of action, because should this Court invalidate Section 8252(g)'s use of race, ethnicity, and sex, the definition of diversity used by the Applicant Review Panel would no longer include those classifications.

screen, and select California citizens applying to serve as members of the Citizens Redistricting Commission using criteria that include an applicant's race, ethnicity, and sex.

The following facts, which the trial court described as merely a summary of applicable law, Joint Appendix (J.A.) 188 (Ruling on Demurrers), are not in dispute, J.A. 196 (*id.*). On November 4, 2008, the voters of the State of California approved Proposition 11. J.A. 188 (*id.*); J.A. 27 (First Amended Complaint (FAC) ¶ 13). Proposition 11 amended Article XXI of the State constitution to transfer the power to redraw State Assembly, Senate, and Board of Equalization districts from the Legislature to a newly created Citizens Redistricting Commission (Commission). J.A. 188 (Ruling on Demurrers); J.A. 27 (FAC ¶ 14).[2] Article XXI, Section 2, requires that the Commission be "reasonably representative of this State's diversity," but it does not specify the meaning of the word "diversity," nor does it use the words race, ethnicity, or sex. Cal. Const. art. XXI, § 2(c)(1).

With the passage of Proposition 11, California voters also approved several Government Code sections, including Section 8252, entitled the "Citizens Redistricting Commission Selection Process." That section sets forth the process for selecting the 14 members of the Commission. The process takes place in two phases: the first phase involves the selection of the

[2] Proposition 20, adopted in November, 2010, gave the Commission authority to re-draw congressional districts as well. J.A. 27 (FAC ¶ 14).

first eight members of the Commission by the State Auditor; the second phase involves the selection of the remaining six members who are chosen by the first eight commissioners. Connerly challenges Section 8252(g), which injects race, ethnicity, and sex into the commissioner selection process.

The manner in which members of the Commission are chosen is set forth in Section 8252(a)-(g). Section 8252(a)(1) directs the State Auditor to initiate an application process every ten years, beginning in January, 2010. The application process is open to all registered California voters, but the statute requires that commissioners be selected "in a manner that promotes a diverse and qualified applicant pool." Section 8252(a)(2) directs the State Auditor to establish an impartial applicant pool comprised of individuals without conflicts of interest. Section 8252(b) directs the State Auditor to establish an Applicant Review Panel, consisting of three qualified independent auditors employed by the state to screen applicants.

Section 8252(d) governs the activities of the Applicant Review Panel. The Applicant Review Panel selects the 60 most qualified applicants from the first applicant pool. Gov't Code § 8252(d). The 60 most qualified applicants must consist of 20 applicants who are registered with the largest political party in California, 20 who are registered with the second largest political party in California, and 20 who are not registered with either of the two largest political parties. *Id.* These subpools of individuals are to be assembled on the basis of

their relevant analytical skills, ability to be impartial, and appreciation for California's diverse demographics and geography. *Id.*

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. The Secretary of the Senate and the Chief Clerk of the Assembly then present the pool of remaining names to the State Auditor. Section 8252(f) directs the State Auditor to randomly draw eight names from the remaining pool of applicants, who then become the first eight members of the Commission.

Section 8252(g) governs the second phase of the selection process, involving the last six members of the Commission. The first eight commissioners review the remaining names in the pool of applicants and appoint six applicants to the Commission. These last six members are not randomly chosen like the first eight, but "shall be chosen to ensure the commission reflects this state's diversity, including, but not limited to, racial, ethnic, geographic, and gender diversity." Gov't Code § 8252(g). In addition to racial, ethnic, geographic, and gender diversity, applicants shall also be chosen based on their relevant analytical skills and ability to be impartial. It is not intended that formulas or specific ratios be applied during the last phase of the selection process. This selection process was to take place for the first

time no later than December 31 in 2010, and "in each year ending in the number zero" thereafter. *Id.* All Commission members are compensated by the State and are eligible for reimbursement of personal expenses connected with their duties as members of the Commission. Gov't Code § 8253.5.

In essence, Section 8252 requires the State to create a Commission every ten years that must reflect "this state's diversity." Gov't Code § 8252(g). Since diversity is defined by Section 8252(g) to include race, ethnicity, and sex, Section 8252's selection scheme requires the State to select public officers on the basis of those factors. Even Section 8252's implementing regulations call for the Applicant Review Panel to consider the diversity of applicant pools.[3] J.A. 60 (State's Demurrer at 13 n.4 (citing Cal. Code Regs. tit. 2, §§ 60848(f), 60850(e))).[4] The regulations define "diversity"

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[3] *See* Connerly's Motion Requesting Judicial Notice, filed herewith (requests this Court take judicial notice of specific regulations implementing Section 8252(g)'s requirement that race, ethnicity, and sex be considered in the selection of the final six commissioners).

[4] Title 2, Section 60848(f) of the California Code of Regulations provides, in pertinent part:

> As the application process is designed to produce a commission that is reasonably representative of the State's diversity, . . . the [Applicant Review Panel] shall also consider whether the composition of the pool of applicants to participate in Phase III [selection of final 120 applicants] of the application process is reflective of the State's diversity.

Cal. Code Regs. tit. 2, § 60848(f). Section 60850(e) provides, in pertinent part:

(continued...)

as "the variety in the racial, ethnic, geographic, economic, and gender characteristics of the population of California." Cal. Code Regs. tit. 2, § 60815.

B. The Lawsuit and the Relief Sought

On March 20, 2012, Connerly filed his First Amended Verified Complaint for Declaratory and Injunctive Relief and Petition for Writ of Mandate.[5] The Complaint asserts a facial challenge to Section 8252(g)'s requirement that race, ethnicity, and sex be considered during the selection process for Commission members. Connerly alleged that, as a matter of law, Section 8252(g) violates Article I, Section 31(a), of the California Constitution, and sought a ruling that the statute is invalid and unenforceable. Section 31(a) of the California Constitution prohibits the state from discriminating against, or granting preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the

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[4] (...continued)

> As the application process is designed to produce a commission that is reasonably representative of the State's diversity, . . . the [Applicant Review Panel] shall also consider whether the composition of the pool of applicants to participate in Phase IV [selection of final 60 applicants] of the application process is reflective of the State's diversity.

Cal. Code Regs. tit. 2, § 60850.

[5] Plaintiffs 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, Plaintiffs filed the amended Complaint.

operation of public employment, public education, or public contracting. Cal. Const. art I, § 31(a).

Connerly alleged that Section 8252(g) is unconstitutional in two ways. First, Section 8252(g) is unconstitutional because it requires the first eight members of the Commission to consider the race, ethnicity, and sex of the applicants when they select the final six commissioners. J.A. 23 (FAC ¶ 2). Second, the statute is unconstitutional because it requires public employees on the Applicant Review to consider the race, ethnicity, and sex of the applicants. That is necessary to ensure that the first eight members of the Commission can meet their statutory duty to appoint the final six members so that Commission reflects the State's race, ethnic, and sex diversity. *Id.*

The Complaint named three parties as Defendants/Respondents: the State of California; the Citizens Redistricting Commission; and the State Auditor, Elaine M. Howle (collectively, "State"), whose office conducts the selection process under Section 8252.

The State of California and the Citizens Redistricting Commission filed one demurrer. J.A. 40. The State Auditor filed a separate demurrer, J.A. 65, and also filed a joinder in the other demurrer, J.A. 81. Essentially, the State defendants argued that a statutory requirement requiring government employees and officials to consider race, ethnicity, and sex when selecting commissioners does not violate Article I, Section 31(a), because the race-based

appointment of commissioners does not involve any of the policy areas covered by Section 31(a).

C. The Lower Court's Decision

On December 21, 2012, the Sacramento County Superior Court issued a Ruling sustaining the State's demurrers. J.A. 185. The court noted that the facts of the challenged selection process are not in dispute. J.A. 196. But the court ruled that members of the Citizens Redistricting Commission are "public officers" and not "public employees." J.A. 191. Therefore, the State does not violate Article I, Section 31(a), of the California Constitution by requiring the first eight members of the Commission or public employees of the Applicant Review Panel to consider race and sex as governed by Section 8252(g), because the selection of public officers is not an activity related to the operation of public employment. J.A. 195. The court concluded that Connerly cannot amend his Complaint to state a viable cause of action, because he "cannot demonstrate that the statute is facially unconstitutional." J.A. 196. The court dismissed the First Amended Verified Complaint without leave to amend. *Id.*

Final judgment was entered on March 8, 2013. J.A. 218. Notice of Entry of Judgment was entered by Defendants State of California and the Commission on March 19, 2013, J.A. 216, and by the State Auditor, on March 21, 2013, J.A. 221.

STATEMENT OF APPEALABILITY

This appeal is taken from the final March 8, 2013, judgment resolving all issues between the parties in accordance with Code of Civil Procedure section 904.1(a)(2). Connerly's Notice of Appeal was timely filed on May 3, 2013. J.A. 226. An amended Notice of Appeal was filed on June 3, 2013.[6] J.A. 241.

STANDARD OF REVIEW AND ISSUES ON APPEAL

An appeal from a judgment of dismissal after an order sustaining a demurrer without leave to amend is reviewed de novo. The court examines the complaint to determine whether it alleges facts sufficient to state a cause of action under any legal theory. *Keyes v. Bowen*, 189 Cal. App. 4th 647, 655 (2010). The court is "not bound by the trial court's construction of the complaint . . . ." *Wilner v. Sunset Life Ins. Co.*, 78 Cal. App. 4th 952, 958 (2000). Rather, the court independently evaluates the complaint, construing it liberally, giving it a reasonable interpretation, reading it as a whole, and viewing its parts in context. *Blank v. Kirwan*, 39 Cal. 3d 311, 318 (1985).

On appeal, a party may raise, and the court can decide, a new legal theory based on undisputed facts in the record. *C9 Ventures v. SVC-W., L.P.*, 202 Cal. App. 4th 1483, 1492 (2012) (citations omitted) (court exercising its

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[6] The Amended Notice of Appeal added the different filing dates of the Defendants' notices of entry of judgment.

discretion to decide new legal arguments based on the stipulated facts and evidence). Connerly requests that the Court decide its claim that Section 8252(g) violates the Equal Protection Clause. Racial classifications must be subjected to strict judicial scrutiny, and are constitutional only if they are narrowly tailored to further compelling governmental interests. *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411, 2419 (2013) (citing *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003)). Classifications based on sex are subject to intermediate scrutiny, and are constitutional only if they are substantially related to important governmental objectives. *United States v. Virginia*, 518 U.S. 515, 533 (1996).

The trial court's decision to sustain the demurrers without leave to amend is subject to review for an abuse of discretion. *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 68 Cal. App. 4th 445, 459 (1998). A trial court abuses its discretion to sustain demurrers without leave to amend if there is a reasonable possibility that the plaintiff can amend the complaint to cure its defects. *Careau & Co. v. Sec. Pac. Bus. Credit, Inc.*, 222 Cal. App. 3d 1371, 1386 (1990) (citing *Goodman v. Kennedy*, 18 Cal. 3d 335, 349 (1976)).

SUMMARY OF ARGUMENT

Government Code 8252(g) includes a discriminatory scheme requiring state officers and employees to classify and screen, on the basis of race, ethnicity, and sex, the applications of California voters who want to serve as

commissioners on the Citizens Redistricting Commission. Gov't Code § 8252(g). The facts relating to that selection process are undisputed. J.A. 196 (Ruling on Demurrers). Therefore, Connerly may raise for the first time on appeal his contention that the facts of the Complaint give rise to a claim that Section 8252(g) violates the Equal Protection Clause. And this Court can decide whether Section 8252(g) is constitutional in the first instance, because the claim is based on undisputed facts. *C9 Ventures*, 202 Cal. App. 4th at 1492.

All governmental action based on race is presumptively unconstitutional and must be subjected to strict judicial scrutiny to ensure that the personal right to equal protection of the laws has not been infringed. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995). Such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests. *Adarand*, 515 U.S. at 227. Section 8252(g)'s selection process fails strict scrutiny, because the State cannot meet either the compelling interest or narrow tailoring prongs of the test.

The United States Supreme Court has never recognized any compelling state interest that justifies the use of racial qualifications for public office. Not only has the Court never recognized a compelling interest that could justify Section 8252(g)'s use of race, the Court has invalidated laws where the use of

race burdens an individual's right to be considered for elected or appointed public office. *Anderson v. Martin*, 375 U.S. 399, 400 (1964).

Section 8252(g)'s use of race also fails the narrow tailoring prong of strict scrutiny: the State has not made "serious, good faith consideration of workable race-neutral alternatives," *Fisher*, 133 S. Ct. at 2420; Section 8252(g) is not limited in time, *see Grutter*, 539 U.S. at 341-42; and it fails to provide a flexible consideration of the particular qualifications of each applicant, *see Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 307 (1978) (Powell, J., op.).

Section 8252(g)'s use of sex as a qualification for public office also violates the Equal Protection Clause. Government classifications based on sex are constitutional only if they are substantially related to important government objectives. *Virginia*, 518 U.S. at 533. Section 8252(g) was enacted without any evidence that classifications based on sex were related to any state interest.

If this Court declines to resolve the equal protection issue, Connerly seeks leave to amend his Complaint to allege a cause of action under the Fourteenth Amendment. A trial court abuses its discretion by sustaining demurrers without leave to amend if the facts of the complaint state a cause of action under any possible legal theory. *Cundiff v. GTE California Inc.*, 101 Cal. App. 4th 1395, 1405 (2002). Here, the Complaint alleges facts sufficient to state a cause of action under the Equal Protection Clause.

ARGUMENT

I

GOVERNMENT CODE SECTION 8252(g) VIOLATES THE FEDERAL EQUAL PROTECTION CLAUSE BECAUSE IT IS NOT NARROWLY TAILORED TO FURTHER A COMPELLING STATE INTEREST

The Equal Protection Clause mandates that, "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Because the "Fourteenth Amendment . . . protect[s] persons, not groups . . . all governmental action based on race—a group classification long recognized as 'in most circumstances irrelevant and therefore prohibited,'—should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed." *Adarand*, 515 U.S. at 227 (emphasis and citation omitted). Under strict scrutiny, racial classifications are constitutional only if they are narrowly tailored to further compelling governmental interests. *Adarand*, 515 U.S. at 227; *see Connerly v. State Pers. Bd.*, 92 Cal. App. 4th 16, 36-39 (2001) (this Court's discussion of strict scrutiny).

Government Code Section 8252(g) mandates that the state classify on the basis of race. That section requires the first eight commissioners to review the remaining names in the pool of applicants and appoint six applicants to the Commission. These last six members "shall be chosen to ensure the

commission reflects this state's diversity, including, but not limited to, racial, ethnic, geographic, and gender diversity." Gov't Code § 8252(g). To justify the use of race in Section 8252(g), the State bears the burden of showing that Section 8252(g)'s race-based public officer qualifications serve a compelling governmental interest. *Adarand*, 515 U.S. at 227. Additionally, the State must show that its use of race in Section 8252(g) is narrowly tailored to further that compelling interest. *Fisher*, 133 S. Ct. at 2419 (citing *Grutter*, 539 U.S. at 326). As discussed below, the State cannot meet its burden.

A. The State Cannot Identify a Compelling Interest That Justifies the Selection of Public Officers on the Basis of Race

California voters who apply to serve on the Commission have a "federal constitutional right" to have their applications considered without regard to their race or sex. *Turner v. Fouche*, 396 U.S. 346, 362 (1970). The State may not infringe upon this right.

1. The Supreme Court Has Never Recognized a State Compelling Interest to Ensure a Racially Diverse Public Commission

The Supreme Court has recognized only three instances in which a pressing public necessity may justify the existence of racial classifications, none of which apply here. In *Korematsu v. United States*, 323 U.S. 214, 216 (1944), the Court recognized that the vital protection of national security may

be compelling.[7] Second, the Court has recognized that government has a compelling interest in remedying past discrimination, but only after the government has shown a strong basis in evidence that remedial action is necessary. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500, 504 (1989) (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion)). Finally, the Court recognizes that a diverse student body is a compelling state interest that can justify the use of race in university admissions, but only in the context of higher education.[8] *Grutter*, 539 U.S. at 325. Only one of these interests—the interest in remedying past discrimination—could conceivably apply, but Section 8252(g) was not enacted in response to identified discrimination.

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[7] But *Adarand* subsequently called this interest into doubt, explaining "[a]ny retreat from the most searching judicial inquiry can only increase the risk of another such error occurring in the future." 515 U.S. at 236. "The fact that such an important and vital interest, national security, was retroactively determined to be insufficient to justify the use of racial classifications in the *Korematsu* situation demonstrates just how stringent judicial review under strict scrutiny was meant to be." Brandon M. Carey, Note, *Diversity in Higher Education: Diversity's Lack of a "Compelling" Nature, and How the Supreme Court Has Avoided Applying True Strict Scrutiny to Racial Classifications in College Admissions*, 30 Okla. City U. L. Rev. 329, 345 (2005).

[8] The State's interest in diversity does not even justify the use of race to select a racially diverse jury panel to ensure an unbiased and impartial tribunal. "It is clearly established that juries are not to be made up on any theory of proportional representation." *Ganz v. Justice Ct. for Arvin-Lamont Jud. Dist.*, 273 Cal. App. 2d 612, 621-22 (1969); *see People v. White*, 43 Cal. 2d 740, 749 (1954) (an impartial jury from a cross-section of the community does not mean that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community).

2. The State's Racial Classification Was Not Enacted to Remedy Past Discrimination

Before resorting to a race-conscious measure, the government must identify the discrimination to be remedied, public or private, with some specificity, and must have a strong basis in evidence upon which to conclude that remedial action is necessary. *Croson*, 488 U.S. at 504, 500 (citation omitted). Proper findings of past discrimination are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects. *Id.* at 510. The State's use of racial classifications to redress specific discrimination "must *actually* be remedial." *Connerly*, 92 Cal. App. 4th at 38 (citing *Shaw v. Hunt*, 517 U.S. 899, 915 (1996)). Here, there are no facts in the ballot materials to support a suggestion that the State has ever discriminated on the basis of race when assembling commissions in the past.

Nor is there any evidence that the State legislature or voters approved the racial classifications in Section 8252(g) to remedy past discrimination. The statute itself, adopted by the Legislature and included in the Official Voter Information Guide, makes no mention of past discrimination or a remedial purpose. The Legislative Analyst's Analysis (LA's Analysis) of Proposition 11 was contained in the Official Voter Information Guide. *See* J.A. 151-155 (excerpts of Official Voter Information Guide).[9] The LA's

[9] The trial court took judicial notice of the Legislative Analyst's Analysis of Proposition 11 with no objection from the State. J.A. 187 n.4 (Ruling on (continued...)

Analysis explained that Proposition 11 amended the constitution to "change the redistricting process for the state Legislature, [Board of Equalization], and California members of the U.S. House of Representatives, beginning with the 2010 census." J.A. 152. The LA's Analysis contains a background section that mentions the federal census and the need for redistricting. J.A. 152. But the background section contains no mention of past discrimination on the basis of race, ethnicity, or sex.

The section of the LA's Analysis entitled "Proposal," describes how Proposition 11 shifts the responsibility for developing redistricting plans to a new Commission. *Id.* Another section, titled "Selection of Commissioners" describes the commissioner selection process. *Id.* It says that registered voters in the State can apply to be commissioners, and the State Auditor would remove applicants with various conflicts of interest. *Id.* The LA's Analysis informed voters that an Applicant Review Panel would narrow the applicants down to 60 based on the applicants' analytic skill, impartiality, and appreciation of California's diversity. J.A. 153. However the LA's Analysis does not provide a definition of diversity. Nowhere in this section is there any indication that the commissioner selection process has been designed for a remedial purpose. Other sections in the LA's Analysis provide the requirements of district boundaries, the approval process, and funding

[9] (...continued)
Demurrers).

requirements. *Id.* These sections provide no discussion of diversity, past discrimination, or applicants' race, ethnicity or sex.

In short, nothing in the Proposition 11 ballot materials, the language of the constitutional amendment, or the enacted statutes explains why race and ethnicity must be considered. Article XXI of the California Constitution and the Legislative Analyst's Analysis of Proposition 11 do not even mention race, ethnicity, or sex.

It is not possible for the State to have evidence of discrimination in the selection of past members of the Citizens Redistricting Commission. The Citizens Redistricting Commission, formed by Proposition 11, is the first such commission of its kind. *See* J.A. 152 (the measure shifts the responsibility for developing redistricting plans "from the Legislature to the *new* Commission") (emphasis added). There was no Citizens Redistricting Commission prior to the passage of Proposition 11.

Because the Commission has been newly created, and there are no prior findings of discrimination in the selection of members to the new Commission, the State's use of race cannot be justified as a remedial measure.

3. The United States Supreme Court Has Repeatedly Rejected the Argument That Public Officers May Be Chosen Based on Race

The Supreme Court has repeatedly invalidated state schemes using racial qualifications as a requirement for public officers. In *Anderson*, the

Court considered a challenge to an amended Louisiana statute requiring that in all primary, general, or special elections, the nomination papers and ballots shall designate the race of candidates for elective office. 375 U.S. at 400. The Court held this race-conscious requirement was unconstitutional. Adding the racial element "could only result in [a] 'repressive effect' " through "the exercise of governmental power." *Id.* at 403 (citing *Bates v. Little Rock*, 361 U.S. 516, 524 (1960)). Nor was the racial requirement related to any legitimate government interest. *Id.* at 403. The Court affirmed that race has "no relevance" to a person's "qualifications for office." *Id.* A state may not "require or encourage its voters to discriminate upon the grounds of race." *Id.* at 402. There are no exceptions. Here, the State may not "require or encourage" public employees of Applicant Review Panel, or the first eight members of the Commission to discriminate against voters applying to serve as a public officer on the Commission.

In *Anderson*, the race of a candidate could not be revealed on ballots because "by directing the citizen's attention to the single consideration of race or color, the State indicates that a candidate's race or color is an important—perhaps paramount—consideration in the citizen's choice." *Id.* at 402. This could "decisively influence" citizen[s] to cast [their] ballot[s] along racial lines." *Id.* Though a resulting injury may be the discrimination against candidates on the basis of race, the Supreme Court identified an even greater harm: "[T]he placing of the power of the State behind a racial classification

that induces racial prejudice." *Id.* That harm occurs in California each time the State enforces the selection process set forth in Section 8252(g).

In *Turner*, the Court considered a constitutional challenge to the system that had been used in many Georgia counties to select school boards. 396 U.S. at 348. In one challenged scheme, school board members and members of the jury had to be property owners. *Id.* This requirement resulted in the disqualification of African Americans for jury service and school board membership. *Id.* at 361. The Court held the selection process unconstitutional, because while there is no right to be appointed to public office, individuals "have a federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualifications." *Id.* at 362. "The State may not deny to some the privilege of holding public office that it extends to others on the basis of distinctions that violate federal constitutional guarantees." *Id.* at 362-63; *see Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 668 (1966) ("Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process.").

In California, "the right to hold public office, either by election *or appointment*," has long been recognized as a valuable right of citizenship. *Carter v. Comm'n on Qualifications of Jud. Appointments*, 14 Cal. 2d 179, 182 (1939) (emphasis added); *Helena Rubenstein Internat v. Younger*, 71 Cal. App. 3d 406, 418 (1977). The California Supreme Court has held this right to be a

"fundamental right." *Zeilenga v. Nelson*, 4 Cal. 3d 716, 720-21 (1971). Any impairment to this right is subject to strict scrutiny. *Id.*; *see Harper*, 383 U.S. at 670 ("[W]here fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.").

Each California voter who meets the legitimate qualifications to serve as a commissioner on the Citizens Redistricting Commission, has a federal constitutional right to be considered for public service without regard to race or ethnicity. *Turner*, 396 U.S. at 362. The United States Supreme Court has held that the race of a candidate has "no bearing upon his qualifications for office." *Anderson*, 375 U.S. at 403. The State has no justification—no compelling interest—to mandate that an applicant be preferred by race. Under *Anderson*, which prohibits states from requiring that a candidate's race be indicated on ballots, it is doubtful the State may even require that applicants for the Redistricting Commission reveal their race on application materials.[10] *See also Avery v. Georgia*, 345 U.S. 559, 560 (1953) (jury selection process where the names of prospective jurors had been printed on differently colored

[10] Title 2, Section 60843(c) of the California Code of Regulations sets forth the application requirements for individuals applying to the Commission. To be eligible to become a member of the initial applicant pool, applicants must provide their "race, ethnicity, gender, age, date of birth, and household income." Cal. Code Regs. tit. 2, § 60843(c)(2); *see* Connerly's Motion Requesting Judicial Notice (requesting Court take judicial notice of regulation implementing section 8252(g)).

tickets according to their race was "repugnant to the Equal Protection Clause").

B. The State's Discriminatory Selection Scheme Fails the Narrow Tailoring Prong of Strict Scrutiny

Even where the state has a compelling interest supported by a strong basis in evidence, a race-conscious program must be narrowly tailored to further that interest. *Fisher*, 133 S. Ct. at 2419 (citing *Grutter*, 539 U.S. at 326). Only the most exact connection between justification and classification will suffice. *Adarand*, 515 U.S. at 236. Here the State has no justification, because the Supreme Court holds that a state has no compelling interest in selecting public officers to "ensure the commissions reflects the state's [racial, ethnic, and gender] diversity." Gov't Code § 8252(g); *see Turner*, 396 U.S. at 362-63 (state may not deny to citizens the privilege of holding public office on the basis of distinctions that violate federal constitutional guarantees). Moreover, as *Grutter* recognized, the pursuit of diversity as an end in and of itself is nothing more than impermissible "racial balancing." 539 U.S. at 329-30; *see Fisher*, 133 S. Ct. at 2424 (Thomas, J., concurring) ("Attaining diversity for its own sake is a nonstarter."). Thus, the State cannot show that its use of race is narrowly tailored to any compelling government interest.

But even if the State could somehow argue that it is not attempting to attain "diversity for its own sake," Section 8252(g) fails narrow tailoring. The

Supreme Court set out the test for narrow tailoring in *Grutter*, where it approved a race-conscious plan only after concluding that it was sufficiently flexible, limited in time, and followed "serious, good faith consideration of workable race-neutral alternatives." *Fisher*, 133 S. Ct. 2411 (citing *Grutter*, 539 U.S. at 339). Section 8252(g) satisfies none of these factors.

1. The State Has Not Considered "Race-Neutral Alternatives"

For the State to meet its burden, it must show that "no workable race-neutral alternatives would produce [whatever] . . . benefits of diversity" it might claim are necessary. *Fisher*, 133 S. Ct. at 2420 (citations and quotations omitted). If a nonracial approach could promote the substantial interest about as well—and at tolerable administrative expense—then the State may not consider race. *Id.*; *see Connerly*, 92 Cal. App. 4th at 37 (the availability of nonracial alternatives, or the failure of the legislative body to consider such alternatives, is "fatal to the classification"). On this point, the State receives no deference. *Fisher*, 133 S. Ct. at 2420.

It is impossible for the State to meet this heavy burden, because the State has never attempted to form a Citizen's Redistricting Commission without considering race. No Citizen's Redistricting Commission existed prior to 2010. Section 8252 was enacted in 2008 when voters approved Proposition 11. J.A. 188 (Ruling on Demurrers); J.A. 27 (FAC ¶ ¶ 13, 14). When the first Citizen's Redistricting Commission was created in 2010, the

commissioners were chosen in consideration of their race, ethnicity, and sex. Gov't Code § 8252(g). Since this is the first time the Commission was ever formed, the State has had no opportunity to create a Citizen's Redistricting Commission using only race- and sex-neutral alternatives. Thus, the State lacks a "strong basis in evidence" that it could not achieve the same level of diversity using only a "nonracial approach." In other words, the State cannot meet its "ultimate burden" under strict scrutiny "of demonstrating, before turning to racial classifications, that available, workable race-neutral alternatives do not suffice." *Fisher*, 133 S. Ct. at 2420.

The Supreme Court has recognized that race-neutral alternatives exist to ensure that public officers represent particular interests. In *Dusch v. Davis*, the Court upheld city residency requirements for candidates running for city council. 387 U.S. 112, 115 (1967). Four members could be elected at large without regard to residence. But seven other members had to reside in each of the city's seven boroughs. *Id.* at 114. The purpose of the requirement was "to assure that there will be members of the City Council with some general knowledge of rural problems to the end that this heterogeneous city will be able to give due consideration to questions presented throughout the entire area." *Id.* at 116. The plan provided for the "intelligent expression of views" *id.* at 116, "that [were] important in resolving the complex problems of [a] modern megalopolis," *id.* at 117. Since the plan "[made] no distinction" on the basis of "race" or "creed," *id.* at 115, the Court found no "invidious

discrimination," *id.* at 117. Even if diversity were a compelling interest in this situation—and it is not—until the State has shown that workable race-neutral alternatives do not result in a Commission that reflects the State's diversity, it is forbidden from implementing race-conscious measures.

2. Section 8252(g) Is Not Limited in Time

"A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race." *Grutter*, 539 U.S. at 341-42 (citing *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)). The State's use of race to select Redistricting Commissioners "must be limited in time" and "have a logical end point." *Id.* at 342; *see Connerly*, 92 Cal. App. 4th at 37 ("[T]he use of a racial classification must be limited in scope and duration to that which is necessary to accomplish the legislative purpose."). This requirement reflects that racial classifications, however compelling their goals, are so potentially dangerous that they may be employed no more broadly than the interest demands. *Id.* "Enshrining a permanent justification for racial preferences would offend this fundamental equal protection principle." *Id.*

Section 8252(g) is not narrowly tailored to any compelling interest, because it is unlimited in time. Section 8252(g) calls for the new commissioner selection process to begin "in each year ending in the number zero." Gov't Code § 8252(g). The Government Code provisions for the selection of new Citizen Redistricting Commissioners fail to provide a year

when the use of race should expire, or even when the use of race is to be reevaluated. J.A. 256-261 (Gov't Code §§ 8251-8253.6). Instead, the race- and sex-conscious selection criteria is permanently entrenched in our law.

3. Section 8252(g) Is Not Narrowly Tailored Because Race Must Be a Deciding Factor in the Selection Process

Section 8252(g) is not flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant. In *Bakke*, Justice Powell reiterated that "[p]referring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake." 438 U.S. at 307.

Section 8252(g) provides that the State must "ensure" that the Commission reflects the state's racial, ethnic, and gender diversity. Because of this mandatory language, race, ethnicity, and sex *must* be the deciding factors in the selection of commissioners in order for the State to ensure that diversity is attained. It is not enough that "formulas or specific ratios" are not "intended." As this Court recognizes, strict scrutiny does not depend on semantic distinctions, such as "goal" rather than "quota." *Connerly*, 92 Cal. App. 4th at 35. "What is constitutionally significant is that the government has drawn a line on the basis of race or has engaged in a purposeful use of racial criteria." *Id.* (citing *Bakke*, 438 U.S. at 289). Section 8252(g)'s racial classification is a purposeful use of racial criteria.

"Equal protection of the laws is something more than an abstract right. It is a command which the state must respect." *Hill v. State of Texas*, 316 U.S. 400, 406 (1942). The use of race in the commissioner selection process, as required by Section 8252(g), cannot meet the command of the Equal Protection Clause, because it is not narrowly tailored to further a compelling state interest.

II

THE SEX CLASSIFICATION IN SECTION 8252 FAILS INTERMEDIATE SCRUTINY

Classifications based on sex are immediately suspect and require the government to demonstrate with "exceedingly persuasive" evidence that it is acting to achieve "important governmental objectives" when imposing them. *Virginia*, 518 U.S. at 533. As with strict scrutiny of racial classifications, the "burden of justification is demanding and it rests entirely on the State." *Id.* Moreover, the discriminatory means chosen by the State must be substantially related to the achievement of those objectives. *Nguyen v. I.N.S.*, 533 U.S. 53, 60 (2001). The justification must be genuine, not hypothesized or invented *post hoc* in response to litigation; and it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females. *Virginia*, 518 U.S. at 533 (citations omitted). The fact that a statutory scheme "discriminates against males rather than against females does

not exempt it from scrutiny or reduce the standard of review." *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723 (1982).

Sex classifications may be used to compensate women for the "particular economic disabilities [they have] suffered," *Califano v. Webster*, 430 U.S. 313 (1977) *(per curiam*), to "promot[e] equal employment opportunity," *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 289 (1987), and to advance full development of the talent and capacities of our Nation's people. *Virginia*, 518 U.S. at 533. A State can evoke a compensatory purpose to justify an otherwise discriminatory classification only if members of the sex benefitted by the classification actually suffer a disadvantage related to the classification. *Mississippi Univ.*, 458 U.S. at 728.

There is no evidence that sex-based classifications were required before Section 8252(g) was enacted and enforced. The screening process for the first ever Citizens Redistricting Commission began in 2010 and included the race- and sex-based classifications. The State has presented no evidence of discrimination against female applicants in the selection of past Citizens Redistricting Commissioners. Nor does the Ballot Pamphlet for Proposition 11 contain any suggestion that remedial action is required because females have been prevented from obtaining the legitimate qualifications necessary for selection as commissioners. Neither Article XXI of the California Constitution, nor the Legislative Analyst's Analysis of Proposition 11, ever mention commissioner qualifications based on sex. Thus, the sex-based

classification in Section 8252(g) is not substantially related to any important government objective.

III

THIS COURT SHOULD RULE ON THE EQUAL PROTECTION CLAUSE VIOLATION OR GRANT CONNERLY LEAVE TO AMEND HIS COMPLAINT

A. This Court May Resolve the Constitutionality of the Commissioner Selection Scheme's Use of Race, Ethnicity, and Sex in Section 8252(g)

Connerly may argue for the first time on appeal, that as a matter of law, Section 8252(g)'s undisputed selection process violates the Equal Protection Clause. It is settled that a new legal theory, involving a pure question of law based on undisputed facts, can be raised for the first time on appeal. *See, e.g.*, *Ward v. Taggart*, 51 Cal. 2d 736, 742 (1959) (it is settled that a change in theory is permitted on appeal when a question of law only is presented on the facts in the record); *C9 Ventures*, 202 Cal. App. 4th at 1492 (new argument on appeal allowed if it raises a pure issue of law on undisputed facts); *Fort Bragg Unified Sch. Dist. v. Solano Cnty. Roofing, Inc.*, 194 Cal. App. 4th 891, 907 (2011) (same); *Francies v. Kapla*, 127 Cal. App. 4th 1381, 1386 (2005) (same); *Collins v. State Dep't of Transp.*, 114 Cal. App. 4th 859, 864-65 (2003) (new issue on appeal requiring interpretation and applicability of a statute on the undisputed facts is a question of law); *Arroyo v. Regents of Univ. of Cal.*, 48 Cal. App. 3d 793, 795 (1975) (general demurrer is an appropriate

proceeding to declare the rights of the parties if they can be determined as a matter of law).

Connerly contends the race- and sex-based classifications of Section 8252(g) violate the constitutional rights of California voters to apply for the Citizens Redistricting Commission without being burdened by unconstitutional qualifications. This Court may resolve this issue even though it has been raised for the first time on appeal. Appellate courts typically accept new arguments on appeal when the claim involves an important issue of constitutional law or a substantial right. *See, e.g., Preserve Shorecliff Homeowners v. City of San Clemente*, 158 Cal. App. 4th 1427, 1433 (2008) (determining constitutionality of section in the Elections Code); *In re Sheena K.*, 40 Cal. 4th 875, 887 n.7 (2007) (whether condition of probation was unconstitutional on its face).[11]

A facial claim concerning the constitutionality of legislation is a question of law. *See Alfaro v. Terhune*, 98 Cal. App. 4th 492, 512 (2002) (facial claim concerning the constitutionality of legislation was "question of law"); *Thain v. City of Palo Alto*, 207 Cal. App. 2d 173, 185 (1962) ("[T]he question of the validity and constitutionality of the ordinance, on its face,

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[11] *See also Hale v. Morgan*, 22 Cal. 3d 388, 394 (1978) (considering for first time on appeal constitutionality of statute assessing penalty against landlord for wrongful eviction); *Bayside Timber Co. v. Bd. of Supervisors*, 20 Cal. App. 3d 1, 5–6 (1971) (considering for first time on appeal whether forestry statute was constitutional).

including its notice provisions, is one of law."). Connerly's facial challenge concerns the actual text of Section 8252(g). That text is undisputed. The trial court noted that "the facts of the challenged [commissioner] selection process are not in dispute." J.A. 196 (Ruling on Demurrers). Section 8252(g) sets forth the manner in which the last six commissioners are chosen, and by its own language requires that the six commissioners be chosen in consideration of their race, ethnicity and sex. *See* Gov't Code § 8252(g) ("The six appointees shall be chosen to ensure the commission reflects this state's diversity, including, . . . racial, ethnic, . . . and gender diversity."). Whether the racial classification appearing in the text of Section 8252(g) is unconstitutional, is a question of law on undisputed facts. *See Thain*, 207 Cal. App. 2d 185 (facial challenge to ordinance is a question of law).

Since Section 8252(g) was not enacted to remedy discrimination based on race or sex, it would be fruitless to remand this matter in an attempt to gather facts that do not exist. The first and only Commission was created *using* the racial and gender criteria, so there can be no evidence of past discrimination.

B. Connerly Should Be Given Leave to Amend His Complaint If this Court Declines to Rule on the Constitutionality of the Commissioner Selection Process

1. Leave to Amend Must Be Granted If There Is a Reasonable Possibility That a Defect in the Complaint Can Be Cured by Amendment

Should this Court decline to resolve the constitutionality of the commissioner selection process, Connerly requests leave to amend his Complaint to allege a Federal Equal Protection Clause cause of action. The trial court ruled that Connerly could not amend his Complaint to state a viable cause of action under Article I, Section 31(a), of the California Constitution, concluding that the nature of Connerly's claim is clear, and that under the substantive law, no liability exists. J.A. 196 (Ruling on Demurrers). Connerly should be allowed to amend his Complaint because the facts of the Complaint are sufficient to allege a violation of the Equal Protection Clause.

Leave to amend must be granted if there is a reasonable possibility that a defect in the Complaint can be cured by amendment. *Quelimane Co. v. Stewart Title Guaranty Co.*, 19 Cal. 4th 26, 38-39 (1998). And leave to amend can be granted even though Connerly made no request to amend the operative complaint at the trial court. The Code of Civil Procedure provides that, when the trial court makes an order sustaining a demurrer without leave to amend, the question as to whether the court abused its discretion "is open on appeal even though no request to amend such pleading was made." Cal. Code of Civ.

Proc. § 472c(a). Connerly may demonstrate how his Complaint can be amended for the first time on appeal. *Cundiff*, 101 Cal. App. 4th at 1405 (citing *Careau & Co.*, 222 Cal. App. 3d at 1386).

It is irrelevant that Connerly has already amended the Complaint once. *See* J.A. 195 (Ruling on Demurrers at 11:21). If the plaintiff has not had an opportunity to amend the complaint in response to the demurrer, leave to amend is liberally allowed as a matter of fairness. *Stockton v. Superior Court*, 42 Cal. 4th 730, 747 (2007). But, even where previous demurrers have been sustained on the same ground, leave to amend is liberally granted. *See, e.g.*, *West v. JPMorgan Chase Bank, N.A.*, 214 Cal. App. 4th 780, 806 (2013) (court liberally construing plaintiff's third amended complaint); *Lockton v. O'Rourke*, 184 Cal. App. 4th 1051, 1060 (2010) (plaintiff allowed to amend complaint five times); *Stevenson v. San Francisco Hous. Auth.*, 24 Cal. App. 4th 269, 284 (1994) (noting plaintiff had seven previous chances to amend her complaint); *Stansfield v. Starkey*, 220 Cal. App. 3d 59, 76 (1990) (plaintiffs had been granted leave to amend their complaint five times); *Winn v. McCulloch Corp.*, 60 Cal. App. 3d 663, 672 (1976) (reversing judgment of dismissal and allowing plaintiffs to file a sixth amended complaint).

Here, Connerly amended his Complaint once, but before any hearing was held. *See* J.A. 186 (Ruling on Demurrers at 2 n.1). Connerly has not had the opportunity to amend his Complaint in response to the ruling on demurrer.

2. The Complaint Alleges Facts Sufficient to Make Out an Equal Protection Clause Violation

To state a facial claim that Section 8252(g) violates the Equal Protection Clause, Connerly need only allege that the selection criteria in Section 8252(g) classifies individuals on the basis of race and sex: "To the extent the statutory schemes challenged by plaintiff employ express racial and gender classifications, he has met his initial burden by pointing that out." *Connerly*, 92 Cal. App. 4th at 43. Express racial classifications are immediately suspect, are presumptively invalid, and, without more, trigger strict scrutiny review. *Id.* at 43 (citing *Shaw*, at 642-644; *Adarand*, 515 U.S. at 227); *Bakke*, 438 U.S. at 289).

In his Complaint, Connerly alleged Section 8252(g)'s race- and sex-based classifications, J.A. 28 (FAC ¶ 16); and that State actors treat applicants differently on the basis of race and sex, J.A. 27, 28, 30, 33, 34 (FAC ¶¶ 12, 18, 26, 41, 43, 48). These allegations are sufficient to plead a facial challenge that Section 8252(g) violates the Federal Equal Protection Clause. *See Connerly*, 92 Cal. App. 4th at 43 (plaintiff satisfies initial burden by pointing out the "express racial and gender classifications").

Because there are no factual issues in dispute, this Court should rule on Connerly's facial challenge and determine as a matter of law that Section 8252(g) violates the Equal Protection Clause. *See C.J.L. Constr., Inc. v. Universal Plumbing*, 18 Cal. App. 4th 376, 383 (1993) ("[I]f the facts are

not in dispute, an appellate court can determine as a matter of law whether declaratory relief is a proper remedy."). However, should the Court decline to make such a ruling at this time, Connerly requests that he be given leave to amend his Complaint to specifically plead an Equal Protection Clause cause of action.

CONCLUSION

California voters have a federal constitutional right to be considered for public service on the Citizens Redistricting Commission without the State imposing invidiously discriminatory qualifications. Appellants Ward Connerly and the American Civil Rights Foundation set forth facts in their First Amended Complaint and Petition for Writ of Mandate sufficient to state a claim under the Fourteenth Amendment to the United States Constitution that Government Code Section 8252(g) violates the rights of California voters who apply to become commissioners.

Based on the foregoing, Appellants request that this Court find, as a matter of law, that Government Code Section 8252(g) is not narrowly tailored to further any compelling state interest, and that the State's requirement that commissioners be chosen in consideration of their race, ethnicity, and sex violates the Equal Protection Clause of the Fourteenth Amendment. Alternatively, Appellants respectfully request this Court find that the trial court abused its discretion in sustaining the States' demurrers without leave to

amend, and allow Appellants to amend the Complaint to allege a cause of action under the Federal Equal Protection Clause.

DATED: August 19, 2013.

Respectfully submitted,

MERIEM L. HUBBARD
RALPH W. KASARDA
JOSHUA P. THOMPSON

By _____
RALPH W. KASARDA

Attorneys for Plaintiffs and Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing APPELLANTS' OPENING BRIEF is proportionately spaced, has a typeface of 13 points or more, and contains 8,700 words.

DATED: August 19, 2013.

_____

RALPH W. KASARDA

DECLARATION OF SERVICE

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 August 19, 2013, true copies of APPELLANTS' OPENING BRIEF were placed in envelopes addressed to:

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COURT CLERK
Sacramento County Superior Court
Gordon D. Schaber Courthouse
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which envelopes, with postage thereon fully prepaid, were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

On August 19, 2013, a true copy of APPELLANTS' OPENING BRIEF was sent electronically to:

COURT CLERK
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 19th day of August, 2013, at Sacramento, California.

_____
BARBARA A. SIEBERT