IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

WARD CONNERLY, et al., Plaintiffs and Appellants, **v.** **STATE OF CALIFORNIA, et al.,** Defendants and Respondents.	Case No. C073753

Sacramento County Superior Court, Case No. 34-2011-80000966
The Honorable Michael P. Kenny, Judge

BRIEF OF RESPONDENTS STATE OF CALIFORNIA AND CALIFORNIA CITIZENS REDISTRICTING COMMISSION

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

Case Name: *WARD CONNERLY, et al. v. STATE OF CALIFORNIA, et al.*

Court of Appeal No.: C073753

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INTRODUCTION

Appellants Ward Connerly and American Civil Rights Foundation come before this Court to challenge the consideration of racial and gender diversity in the selection of some of the members of the California Citizens Redistricting Commission, as they did in the court below. But they now concede that the trial court was correct in sustaining defendants' demurrers on the grounds that Proposition 209 does not apply to the appointment of public officers like the members of the commission. Rather than press their claim under Proposition 209, appellants ask this Court to consider an entirely new theory – and an entirely new claim – for the first time on appeal: that on its face, the selection process for the commission violates the Equal Protection Clause.

Appellants' failure to meet their burden in demonstrating to the trial court how their complaint could be amended need not be cured now. Their request that the commission's selection process be considered under the Equal Protection Clause for the first time on appeal should be denied because the State has had no opportunity to make a factual presentation regarding its compelling interests in the diversity of the commission. Moreover, the argument presented in appellants' opening brief is a novel one, and one that should not be contemplated for the first time on appeal.

Furthermore, their decision to refrain from making an equal protection argument in their initial complaint and their first amended complaint appears to have been deliberate, rather than a mistake. Both appellants and their counsel are sophisticated litigants and have vast experience in challenging similar laws under both Proposition 209 and the Equal Protection Clause. Appellants therefore should not be allowed to litigate this issue piecemeal – and waste judicial resources – by belatedly raising an equal protection argument because their strategy to argue their case under Proposition 209 alone has failed.

Appellants' alternative request to remand to the superior court to allow them to amend the first amended complaint to add an equal protection claim should also be denied. The court did not abuse its discretion in sustaining respondents' demurrer without leave to amend where the burden was on these sophisticated parties to demonstrate how their pleading could be amended to withstand demurrer. Finally, there is no reasonable possibility that amending the complaint to include an equal protection claim will cure the flaws that led the complaint to be dismissed without leave to amend in the first place: a facial constitutional challenge to section 8252 is not viable.

BACKGROUND

Historically, the Legislature adjusted the boundaries of State legislative districts, Board of Equalization districts, and congressional districts every ten years after the federal census. In approving Proposition 11 in November 2008, the voters transferred the Legislature's power to draw State Senate, Assembly, and Board of Equalization districts to fourteen registered voters seated on the California Citizens Redistricting Commission. (Prop. 11, as approved by voters, Gen. Elec. (Nov. 4, 2008).) Proposition 11 was amended by Proposition 20 in November 2010 to authorize the commission to draw congressional districts as well. (Prop. 20, as approved by voters, Gen. Elec. (Nov. 2, 2010).)[1]

I. THE COMMISSION'S SELECTION PROCESS

The commission is comprised of fourteen registered voters – five Democrats, five Republicans, and four individuals who belong to neither

[1] The Legislature amended statutory provisions related to the commission, particularly to change certain deadlines, in 2012. (Stats. 2012, ch. 271.) The State Auditor promulgated regulations interpreting the laws governing the commission's selection process in 2009 and 2010. (Cal. Code Regs., tit. 2, §§ 60800-60863.)

party – who serve ten-year terms. (Cal. Const., art. XXI, § 2, subd. (c)(2), (4).) These members must have maintained the same party affiliation for at least five years preceding their appointments and have voted in two of the last three statewide general elections. (*Id.*, § 2, subd. (c)(3).)

"The selection process is designed to produce a commission that is independent from legislative influence and reasonably representative of this State's diversity." (Cal. Const., art. XXI, § 2, subd. (c)(1).)

In order to meet the Constitutional mandate that the commission be independent from legislative influence, applicants and their immediate family members must not have participated in a number of political activities in the 10 years preceding their application that would create a conflict of interest. These activities include being a candidate for, being elected to, or being appointed to state or federal office; working for a political party or a candidate campaign committee; serving as a member of a political party central committee; registering as a federal, state or local lobbyist; serving as state legislative, congressional, Board of Equalization, or gubernatorial staff, consultant, or contractor; being an immediate family member of a state legislator, Congress member, Board of Equalization member, or Governor; or contributing $2,000 or more to any congressional, state, or local candidate in any year. (Gov. Code, § 8252, subd. (a)(2).)[2]

In order to ensure the commission is reasonably representative of California's diversity, the State Auditor must, every ten years, "initiate an application process, open to all registered California voters in a manner that promotes a diverse and qualified applicant pool." (§ 8252, subd. (a)(1).)

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[2] All statutory references are made to the Government Code unless otherwise specified.

After the State Auditor reviews the applications to ensure that the applicants do not have any of the conflicts listed above and otherwise meet the basic qualifications for the office (§ 8252, subd. (a)(2)), three randomly-selected qualified independent auditors (one Democrat, one Republican, and one individual not affiliated with either party) on the Applicant Review Panel screen the applications and select 60 of the most qualified applicants in pools of 20 registered Democrats, 20 registered Republicans, and 20 voters unaffiliated with either party. (§ 8252, subds. (b), (d).) "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." (§ 8252, subd. (d).)

Legislative leaders have the opportunity to strike a total of eight of the 20 applicants in each subpool (the President pro Tem of the State Senate, the Speaker of the Assembly, and the minority leaders of both houses each have two strikes in each subpool). (§ 8252, subd. (e).) The final pool may thus contain as few as 36 applicants.

The first eight commissioners are randomly drawn by the State Auditor, three each from the Democrat and Republican voter subpools, and two from the unaffiliated voter subpool. (§ 8252, subd. (f).)

These eight commissioners then select an additional six commissioners from the remaining applicants, two each from the Democrat, Republican, and unaffiliated voter subpools. (§ 8252, subd. (g).) The final six commissioners

> 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 ratios be applied for this purpose. Applicants shall also be chosen based on relevant analytical skills and ability to be impartial.

(§ 8252, subd. (g).) It is this part of the process that appellants challenge.

The regulation governing the selection of the final six commissioners allows any of the first eight members to propose slates of six applicants, designed to consist of the required number of members of the specified political party subpools, and "reflect[ ] California's diversity while being composed of persons having the relevant analytical skills and ability to be impartial." (Cal. Code Regs., tit. 2, § 60860, subds. (c), (d).) The first eight members then vote to approve a slate of six members "based on whether they believe it will ensure that the commission reflects California's diversity while being composed of persons having the relevant analytical skills and ability to be impartial needed by the commission." (*Id.*, § 60860, subd. (f).)

In sum, the members of this citizens commission must meet several qualifications. They must (1) be registered voters with certain political party affiliations (2) who have maintained the same party affiliation for at least five years preceding their appointments and (3) have voted in two of the last three statewide general elections, with (4) no political conflicts of interest, (5) possess relevant analytical skills and (6) the ability to be impartial, and (7) appreciate California's diverse demographics and geography. In addition, the final six commissioners may be selected to reflect California's racial, ethnic, geographic, and gender diversity.

II. THIS LAWSUIT

The fourteen members of the first commission were selected and approved in December 2010. (See former § 8252, subd. (g), amended by Stats. 2012, ch. 271.) The commission then worked to analyze demographic data, redraw district lines and consider public input for several months, certifying the new district maps on August 15, 2011. (Joint Appendix ("JA") 88, 90, 92, 94.) The California Supreme Court dismissed challenges to the validity of the maps on October 26, 2011. (*Vandermost v. Bowen* (Oct. 26, 2011, S196493), denying pet. for writ of mandate;

Radanovich v. Bowen (Oct. 26, 2011, S196852), denying pet. for writ of mandate.)

It was not until October 4, 2011 – nearly three years after Proposition 11 was passed, over a year after the commission was selected, and well after the commission's work had been completed – that plaintiffs/ petitioners and appellants Ward Connerly and American Civil Rights Foundation filed their Verified Complaint for Declaratory and Injunctive Relief and Petition for Writ of Mandate in Sacramento Superior Court challenging section 8252's requirement that the commission ensure its members reflect the state's racial and gender diversity. (JA 1-12.)

The sole basis for the complaint was that, on its face, section 8252 violated article I, section 31 of the California Constitution, which was enacted by the voters in 1996 via Proposition 209 to prohibit state discrimination or preferential treatment of any individual or group on the basis of race, sex, color, ethnicity, or national origin in public employment, public education, and public contracting. (JA 1-12.) The complaint makes no mention of the Equal Protection Clause. (*Ibid.*) Plaintiffs amended their complaint over five months later on March 20, 2012, primarily to add allegations and causes of action regarding the Applicant Review Panel's consideration of diversity in selecting the subpools of applicants for the random drawing. (Compare JA 1-12 with JA 22-39.) The amended complaint likewise contains no mention of the Equal Protection Clause. (JA 22-39.)

Defendants and respondents State of California and the commission filed a demurrer to the first amended complaint on April 30, 2012, arguing that Proposition 209 does not apply to the selection of the commission's members because the commission seats are public offices, not public employment. (JA 40-64.) Defendant and respondent State Auditor filed a separate demurrer on the same grounds. (JA 65-80.)

Following briefing and oral argument, the superior court issued an order sustaining the demurrers and dismissing the first amended complaint without leave to amend on March 8, 2013. (JA 198-215.) The court agreed with defendants that the commissioners are public officers, not public employees, so Proposition 209 does not apply to the commission's selection process. (JA 208.) The court then held that plaintiffs could not amend the complaint because 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." (JA 212.) The court further found that "the nature of plaintiffs/petitioners' claim [under Proposition 209] is clear" and plaintiffs "cannot demonstrate that the statute is facially unconstitutional." (JA 213.)

Appellants filed their notice of appeal on May 3, 2013. (JA 226-240.)

ARGUMENT

I. THIS COURT SHOULD NOT CONSIDER APPELLANTS' NEW LEGAL THEORY

Appellants have abandoned their challenge to the commission's selection process under Proposition 209, and thus concede that the trial court correctly sustained the demurrers on the ground that Proposition 209 does not apply to the selection or appointment of public officers like the commission members.[3] They instead pivot and request that this Court consider an entirely new claim on appeal: that the commission's selection process violates the federal Equal Protection Clause.

While it is true that an appellate court has discretion to consider a new legal theory brought up for the first time on appeal when it presents a

[3] Appellants also concede that the trial court was correct in dismissing two of their causes of action that alleged the statute required "public employees" to ensure diversity in the pool of the 60 most qualified applicants. (AOB at p. 2, fn. 1.)

question of law based on undisputed facts, this Court should not exercise that discretion here.[4] First, consideration of appellants' equal protection theory for the first time on appeal is not fair to the State and commission. "The general rule confining the parties upon appeal to the theory advanced below is based on the rationale that the opposing party should not be required to defend for the first time on appeal against a new theory that 'contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at the trial.' [Citation.]" (*C9 Ventures v. SVC-West, L.P.* (2012) 202 Cal.App.4th 1483, 1491-1492, quoting *Ward v. Taggart* (1959) 51 Cal.2d 736, 742.) This is especially true here because appellants' argument regarding the consideration of diversity in the appointment of members of a public commission is novel, and to the State's knowledge, has not been made before in California or elsewhere.

The resolution of any question as to whether the State has a compelling interest in the challenged provision may require a factual presentation by the State. If the Court considers this issue for the first time on appeal, the State would be denied the opportunity to develop or submit evidence and/or expert testimony regarding the state's interest in diversity on the commission. This type of evidence is often considered in equal protection cases, including those contemplating the state's interest in diversity, and it would presumably be of value here if plaintiffs' new claim is entertained. (See *Grutter v. Bollinger* (2003) 539 U.S. 306, 318-320 [trial court considered extensive factual record, including on the educational benefits of diversity, in equal protection challenge to the consideration of diversity in school admissions process]; *Gratz v. Bollinger*

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[4] The State and commission join in all arguments made by the State Auditor's brief.

(2003) 539 U.S. 244, 258 [trial court found respondents had presented "solid evidence" of the educational benefits of diversity in equal protection challenge to the consideration of diversity in school admissions process]; *Petit v. City of Chicago* (7th Cir. 2003) 352 F.3d 1111, 1114-1115 [relying upon expert testimony establishing city's compelling interest in the diversity of its police force because it has "compelling operational need for a diverse police department" in "a racially and ethnically divided major American city"]; *Reynolds v. City of Chicago* (7th Cir. 2002) 296 F.3d 524, 529-530 [relying upon expert testimony establishing city's compelling interest in the diversity of its police force].)

Second, because appellants should have been aware that there was a prospective claim under the Equal Protection Clause when they filed their complaint – and when they amended it, they should not be allowed to raise it as an entirely new claim now.

Appellants Ward Connerly and American Civil Rights Foundation, along with their counsel at the Pacific Legal Foundation, are very experienced in challenging laws under both Proposition 209 and the Equal Protection Clause. Connerly was the official proponent of Proposition 209. (See JA 98.) Since the passage of Proposition 209 in 1996, Connerly and/or the American Civil Rights Foundation have served as plaintiffs in numerous cases challenging California's laws under Proposition 209 and the Equal Protection Clause.[5] In at least one case, Connerly brought claims

[5] Recent cases include: *American Civil Rights Foundation v. Berkeley Unified School Dist.* (2009) 172 Cal.App.4th 207, rev. denied (unsuccessful Proposition 209 challenge litigated by Pacific Legal Foundation); *American Civil Rights Foundation v. Los Angeles Unified School Dist.* (2008) 169 Cal.App.4th 436, rev. denied (same); *Connerly v. Schwarzenegger*, No. 34-2010-80000412 (Sacramento County Super. Ct., filed Jan. 6, 2010) (Proposition 209 challenge litigated by Pacific Legal Foundation).

alleging violations of *both* Proposition 209 and the Equal Protection Clause. (*Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16 [Proposition 209 and equal protection challenges to several statutes involving the State Lottery Commission, state civil service, state community colleges, sale of state bonds, and state contracting, litigated by Pacific Legal Foundation].) Appellants' counsel at the Pacific Legal Foundation also has vast experience in similar cases outside of California involving the Equal Protection Clause.[6]

Whatever the reason, appellants and their counsel challenged section 8252 only under Proposition 209 in their complaint, presumably relying upon their extensive experience in bringing challenges to state laws and actions under Proposition 209, the Equal Protection Clause and/or both to determine that an Equal Protection Clause claim was not to their advantage. They also never mentioned to the trial court at any time that Equal Protection Clause cases *they themselves had participated in* might also apply to the statute. Accordingly, this Court should not indulge appellants' effort to avoid the consequences of their strategic choices now.

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[6] See, e.g., *Schuette v. Coalition to Defend Affirmative Action*, No. 12-682 (U.S. Supreme Ct., cert. granted Mar. 25, 2013) (Pacific Legal Foundation submitted amicus brief on behalf of Pacific Legal Foundation and American Civil Rights Foundation regarding equal protection challenge to Michigan law similar to Proposition 209); *Parents Involved in Community Schools v. Seattle Sch. Dist. No. 1* (2007) 551 U.S. 701 (Pacific Legal Foundation submitted amicus curiae brief in equal protection challenge); *Grutter v. Bolinger*, *supra*, 539 U.S. 306 (same); *Gratz v. Bollinger*, *supra*, 539 U.S. 244 (same); *Adarand Constructors, Inc. v. Pena* (1995) 515 U.S. 200 (same); *City of Richmond v. J.A. Croson Co.* (1989) 488 U.S. 469 (same); *Regents of Univ. of Cal. v. Bakke* (1978) 438 U.S. 265 (same); *H.B. Rowe Co., Inc. v. Tippett* (4th Cir. 2010) 615 F.3d 233 (Pacific Legal Foundation represented plaintiff in equal protection challenge).

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN SUSTAINING THE DEMURRERS WITHOUT LEAVE TO AMEND

In the alternative, appellants request that the case be remanded to the trial court so that they may amend their complaint to add the equal protection claim absent in the first two versions of their complaint. For the same reasons stated above, appellants should likewise not be allowed to reverse course now.

Although on appeal a court reviews an order sustaining a demurrer without leave to amend de novo, "[i]t is plaintiffs' burden to show either that the demurrer was sustained erroneously or that the trial court's denial of leave to amend was an abuse of discretion." (*Keyes v. Bowen* (2010) 189 Cal.App.4th 647, 655.) The trial court's discretion in denying leave to amend is what is at issue; the reviewing court may only determine whether the trial court's discretion was abused. (*Dey v. Continental Cent. Credit* (2008) 170 Cal.App.4th 721, 731.) Abuse of discretion can be found only if a potentially effective amendment was both apparent and consistent with plaintiffs' theory of the case. (*Ibid.*)

A trial court does not abuse its discretion by declining to grant leave to amend to plead new theories in the absence of any indication that plaintiffs might have wished to change theories. The court is not obliged to invite plaintiffs to offer up new theories, particularly where there was a rational basis for assuming that, prior to an adverse ruling, they would have been disinclined to shift theories. (*CAMSI IV v. Hunter Technology Corp.* (1991) 230 Cal.App.3d 1525, 1542, rehearing denied and modified, review denied ["Absent any indication whatsoever that CAMSI IV might wish to change theories, the trial court was by no means obliged to invite CAMSI IV to do so. There is a rational basis for hypothesis that . . . CAMSI IV would have been disinclined to shift to nuisance and trespass theories."].) There is also no abuse of discretion where "[t]he trial court could rationally

have regarded [plaintiffs'] choice among theories as essentially tactical and not subject to interference by the court." (*Id.* at p. 1543.)

While the record below is silent on this point, given appellants' and appellants' counsel's deep knowledge of this area of law, and the breadth of their experience challenging laws under both Proposition 209 and the Equal Protection Clause, it would have been rational for the trial court to assume that plaintiffs made a deliberate decision to challenge section 8252 solely under Proposition 209. The trial court may have understandably assumed that these experienced parties believed that an equal protection claim would not be viable. (See JA 196 ["[T]he nature of plaintiffs/petitioners' claim is clear. That claim is simply that Government Code section 8252(g) facially violates Article I, Section 31(a) [Prop 209]."]

Finally, "'even if a good amendment is proposed in proper form, unwarranted delay in presenting it may of itself be a valid reason for denial.'" (*Record v. Reason* (1999) 73 Cal.App.4th 472, 486, quoting *Roemer v. Retail Credit Co.* (1975) 44 Cal.App.3d 926, 939-940; *Melican v. Regents of University of California* (2007) 151 Cal.App.4th 168, 175-177 ["trial court did not abuse its discretion in denying plaintiffs' eleventh-hour request for leave to amend"].) Appellants presumably considered and rejected an equal protection claim when they filed their complaint, and when they amended it five months later to add additional causes of action. Their "unwarranted delay" in presenting it for the first time in their opening brief on appeal is more than sufficient to deny them the opportunity amend their complaint for a second time on remand. For this additional reason, this Court should affirm the trial court's dismissal of the complaint.

III. APPELLANTS' FACIAL CHALLENGE TO SECTION 8252 COULD NOT SUCCEED IF THE CASE WERE REMANDED

Finally, "if it does not appear that under applicable substantive law there is any reasonable probability that the defects can be cured, there is no abuse of discretion in sustaining the demurrer without leave to amend for no amendment would change the result." (*California War Veterans for Justice v. Hayden* (1986) 176 Cal.App.3d 982, 985, citations omitted.) "[T]he burden of proving such reasonable possibility is squarely on the plaintiff[s]." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) Appellants cannot meet their burden here, particularly because a facial constitutional challenge to a statute "is the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the [law] would be valid." (*American Civil Rights Foundation v. Berkeley Unified School Dist., supra*, 172 Cal.App.4th at p. 216, citation and internal quotations omitted [affirming the sustaining of demurrer without leave to amend complaint alleging facial challenge under Proposition 209].)

Appellants would remain unsuccessful in this action even if they were allowed to amend their first amended complaint because where state actions encouraging diversity have been challenged, the United States Supreme Court has held that states have a compelling interest in "[e]ffective participation by members of all racial and ethnic groups in [ ] civic life" and "leaders with legitimacy in the eyes of the citizenry" because "'[e]nsuring that public institutions are open and available to all segments of American society, including people of all races and ethnicities, represents a paramount government objective.'" (*Grutter v. Bollinger* (2003) 539 U.S. 306, 331-332, quoting Brief for United States as Amicus Curiae at p. 13.)

Because appellants have raised this claim for the first time on appeal, the State has not had the opportunity to submit evidence to demonstrate its compelling interest in ensuring diversity of the commission's membership, or the State's interest in diverse public bodies in order to ensure the legitimacy of those bodies in the eyes of all its citizens. But these interests are surely compelling under the Supreme Court's reasoning in *Grutter*. (See *Bredesen v. Tennessee Judicial Selection Com.* (Tenn. 2007) 214 S.W.3d 419, 437-439.) This is particularly true with respect to the Redistricting Commission, because there is no area where the public's faith that all citizens are being fairly represented in state governance is more important than in the electoral process.

CONCLUSION

For the foregoing reasons, respondents respectfully request that the judgment below be affirmed. The Court should decline to consider appellants' new Equal Protection Clause arguments for the first time on appeal. The Court should also decline to remand the case to allow appellants to amend their complaint to include such a claim.

Dated: November 12, 2013

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached ***Brief of Respondents State of California and California Citizens Redistricting Commission*** uses a 13 point Times New Roman font and contains 4,036 words.

Dated: November 12, 2013

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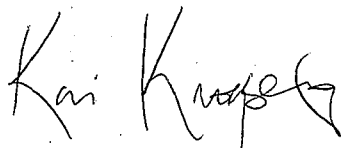

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***Ward Connerly, et al. v. State of California, et al.***
Case No.: **C073753**

I declare:

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

On November 12, 2013, I served the attached ***Brief of Respondents State of California and California Citizens Redistricting Commission*** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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Margaret Carew Toledo, Esq. Toledo Don LLP 3001 Douglas Boulevard, Suite 340 Roseville, CA 95661	*Attorneys for Defendant Elaine M. Howle, State Auditor of California*
Court Clerk Sacramento County Superior Court 720 Ninth Street Sacramento, CA 95814	*Courtesy Copy* *Case No. 34-2011-80000966*
Court Clerk Supreme Court of California 350 McAllister Street San Francisco, CA 94102	***Via Electronic Submission*** *(Pursuant to Rule 8.212(c)(2))*

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 12, 2013, at Sacramento, CA.

L. Carnahan	L Carnahan
Declarant	Signature

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