Case No. C073753

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

WARD CONNERLY, etc. et al.,

Plaintiffs and Appellants,

v.

STATE OF CALIFORNIA, et al.,

Defendants and Respondents.

Appeal from a Judgment of the Superior Court
for the County of Sacramento
Case No. 34-2011-80000966-CU-WM-GDS
The Honorable Michael P. Kenny

BRIEF OF RESPONDENT CALIFORNIA STATE AUDITOR

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, THIRD **APPELLATE DISTRICT, DIVISION**	Court of Appeal Case Number: C073753
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APPELLANT/PETITIONER: Ward Connerly, etc. et al. RESPONDENT/REAL PARTY IN INTEREST: State of California, et al.	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS *(Check one):* ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

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1. This form is being submitted on behalf of the following party (*name*): Elaine M. Howle, California State Auditor

2. a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

	Full name of interested entity or person	**Nature of interest *(Explain):***
(1)		
(2)		
(3)		
(4)		
(5)		

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: November 14, 2013

Margaret Carew Toledo
(TYPE OR PRINT NAME)

▶ Margaret Carew Toledo
(SIGNATURE OF PARTY OR ATTORNEY)

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I.

INTRODUCTION

Respondent California State Auditor Elaine M. Howle ("State Auditor") files this respondent's brief addressing the procedural issues raised by appellants Ward Connerly and the American Civil Rights Foundation ("Appellants") in their opening brief. The State Auditor also joins in the arguments in the respondents' brief filed by the State of California and the California Citizens Redistricting Commission (collectively, the "Redistricting Commission").

This appeal bears no resemblance to the case Appellants litigated in the trial court. Indeed, the only issues litigated in the trial court are conceded on appeal. Where, as here, Appellants fail to assign any error to the trial court, the judgment must be affirmed.

In the trial court, this case involved two voter initiatives – both of which amended the California Constitution – Proposition 11 and Proposition 209. Proposition 11 is a 2008 initiative, which amended the California Constitution to change the redistricting process by creating a fourteen-member independent Redistricting Commission. (Cal. Const., art. XXI.) Proposition 11 also contains statutory provisions to implement the constitutional amendment. (See Gov. Code, §§ 8251 et seq.) The purpose of Proposition 11 was to reform the redistricting process and take it out of "the partisan battles of the Legislature." (State Auditor's Request for

Judicial Notice ("RJN"), Exh. A [Proposition 11, § 2, subd. (d)].) Under Proposition 11, the new independent Redistricting Commission is directed to "draw districts based on strict, nonpartisan rules designed to ensure fair representation." (*Ibid.*) The proposition's constitutional amendment requires the selection process for the members of the Redistricting Commission be "designed to produce a commission that is independent from legislative influence and reasonably representative of the State's diversity." (Cal. Const., art. XXI, § 2, subd. (c)(1).)

Appellants' complaint, filed in the trial court, alleged a facial challenge to Proposition 11's statutory provision that implements the constitutional mandate for a "diverse" Redistricting Commission. Specifically, Appellants challenged as unconstitutional the statute's direction that the eight initial members of the Redistricting Commission select the remaining six members "to ensure the commission reflects this state's diversity, including, but not limited to, racial, ethnic, geographic, and gender diversity." (Gov. Code, § 8252, subd. (g).) Appellants based their challenge on Proposition 209, the 1996 voter initiative that amended the California Constitution and provides in relevant part:

> The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity or national origin in the operation of public employment, public education, or public contracting.

(Cal. Const., art. I, § 31, subd. (a) [hereinafter, "Section 31"].)

In the trial court, the State Auditor and the Redistricting Commission filed demurrers to Appellants' First Amended Complaint, which contained four causes of action alleging that Government Code section 8252, subdivision (g) violated Section 31. The trial court sustained the demurrers without leave to amend on the grounds that the selection of members of the Redistricting Commission is not "the operation of public employment, public education or public contracting." Appellants do not dispute the trial court's ruling that their First Amended Complaint failed to state a claim. (See Appellants' Opening Brief ["AOB"] at pp. 11-12.)

On appeal, Appellants completely have abandoned their trial court challenge and now for the first time argue that Government Code section 8252, subdivision (g) is unconstitutional under the federal Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. (AOB at p. 2.) Although conceding that their "new claim" was not presented in their complaint or otherwise presented in the trial court, they now contend that this Court should decide their "new claim" on appeal because it purely is a question of law that can be decided on undisputed facts. (AOB at p. 12.) Alternatively, Appellants ask this Court to find that the trial court abused its discretion in sustaining the demurrer without leave to amend and therefore should remand the case to the trial court so they can amend their First Amended Complaint to incorporate their "new claim."

The Court should not entertain Appellants' "new claim" for two reasons. First, Appellants failed to preserve the claim before the trial court and therefore have waived it on appeal. Second, there is no applicable exception to permit this "new claim" to be considered for the first time on appeal, as an Equal Protection Clause claim raises issues of fact and therefore is not purely a question of law.

Similarly, the Court should decline to remand the case to the trial court because it was not an abuse of discretion to deny Appellants leave to amend their First Amended Complaint to state an entirely different cause of action from that originally pleaded. Further, Appellants do not have a viable claim under the federal Equal Protection Clause.

For all of the reasons discussed herein, the State Auditor respectfully requests that this Court affirm the judgment below.

II.

BACKGROUND

A. The Role of the California State Auditor

Respondent Elaine M. Howle is California's independent State Auditor who serves the State of California by providing accurate, unbiased, and timely assessments of the finances and performance of state and local government entities. (See Gov. Code, §§ 8543.1, 8543.2.) The State Auditor is "independent of the executive branch and legislative control." (Gov. Code, § 8543.)

B. California Voters Approve Proposition 11 in 2008.

In 2008, California voters adopted Proposition 11, which transferred from the Legislature to a fourteen-member Redistricting Commission, the authority to draw district lines for the State Assembly, State Senate, and State Board of Equalization. (Joint Appendix ["JA"] 152.) The purpose of Proposition 11 was to eliminate the "partisan battles" of the Legislature and substitute an independent process that would be open to public scrutiny and ensure the "fair representation" of all Californians. (RJN, Exh. A [Ballot Pamp., Gen. Elec. (Nov. 4, 2008) text of Prop. 11, p. 137, § 2, subd. (d)].) To achieve these goals, Proposition 11 specifically amended the California Constitution to require that the members of the Redistricting Commission be "independent from legislative influence and reasonably representative of the State's diversity." (Cal. Const., art. XXI, § 2, subd. (c)(1).) Proposition 11 also enacted several new statutes in the Government Code, including the one at issue in this case, section 8252, which is entitled "Citizens Redistricting Commission Selection Process." (See Gov. Code, § 8252.)[1]

C. Proposition 11 Creates Duties for the State Auditor with Respect to Redistricting.

Proposition 11, and specifically Government Code section 8252, created a unique role for the State Auditor with respect to redistricting. The

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[1] In 2010, Proposition 11 was amended by Proposition 20 to authorize the Redistricting Commission to draw congressional districts as well. (JA 101.)

State Auditor is responsible for overseeing the application and selection process for appointing members of the Redistricting Commission. (Gov. Code, § 8252.) Government Code section 8252 sets forth the application and selection process. Section 8252 mandates that by January 1, 2010, "and each year ending in the number zero thereafter, the State Auditor shall initiate an application process, open to all California voters in a manner that promotes a diverse and qualified applicant pool." (Gov. Code, § 8252, subd. (a)(1).) The State Auditor "shall remove from the applicant pool individuals with conflicts of interest . . . ." (Gov. Code, § 8252, subd. (a)(2).)

In conjunction with conducting the application process, the State Auditor "shall establish an Applicant Review Panel, consisting of three qualified independent auditors, that is responsible for the screening of the applicants." (Gov. Code, § 8252, subd. (b).) The members of the Applicant Review Panel must be employed by the State and licensed by the California Board of Accountancy. (*Ibid.*) The Applicant Review Panel shall select "60 of the most qualified applicants," consisting of 20 who are registered as Democrats, 20 who are registered as Republicans, and 20 who are not registered with either party. (Gov. Code, § 8252, subd. (d).) Each subpool of 20 applicants "shall be created on the basis of relevant analytical skills, ability to be impartial, and appreciation for California's diverse demographics and geography." (*Ibid.*) The names of the 60 applicants then

are presented to the Legislature where the legislative leaders may strike up to eight applicants from each of the subpools. (Gov. Code, § 8252, subd. (e).) The State Auditor then randomly draws eight names from the remaining pool of applicants: three Democrats, three Republicans, and two who are not registered with either party. (Gov. Code, § 8252, subd. (f).) These eight individuals are appointed as the first eight members of the Redistricting Commission. (*Ibid.*)

The statute provides that the first eight members of the Redistricting Commission shall review the remaining names in the applicant pool and appoint six applicants to the commission. (Gov. Code, § 8252, subd. (g).) Section 8252, subdivision (g), the provision at issue here, reads as follows:

> No later than December 31 in 2010, and in each year ending in the number zero thereafter, the eight commissioners shall review the remaining names in the pool of applicants and appoint six applicants to the commission as follows: two from the remaining subpool of applicants registered with the largest political party in California based on registration, two from the remaining subpool of applicants registered with the second largest political party in California based on registration, and two from the remaining subpool of applicants who are not registered with either of the two largest political parties in California based on registration. The six appointees must be approved by at least five affirmative votes which must include at least two votes of commissioners registered from each of the two largest parties and one vote from a commissioner who is not affiliated with either of the two largest political parties in California. The six appointees shall be chosen to ensure the commission reflects this state's diversity, including, but not limited to, racial, ethnic, geographic, and gender diversity. However, it is not intended that formulas or specific ratios be applied for

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

(Gov. Code, § 8252, subd. (g).)

III.

PROCEDURAL HISTORY

A. Appellants' Original Complaint

On October 4, 2011, Appellants filed their original complaint alleging a facial challenge to Government Code section 8252, subdivision (g), on the grounds that it violates Article I, section 31, subdivision (a) of the California Constitution. (JA 1 [¶ 1].) Appellants named as defendants the State Auditor, the Redistricting Commission, and the State of California. (JA 4 [¶¶ 4-6].) Appellants alleged that:

> in selecting the final six members to the Citizens Redistricting Commission, Government Code section 8252(g) requires the first eight members of the Commission to grant preferential treatment to applicants on the basis of race, ethnicity, and gender, and accordingly, to discriminate against other applicants on the same basis.

(JA 2 [¶ 1].) The original complaint did not contain any allegations that section 8252, subdivision (g), violated the federal Constitution.

The Redistricting Commission filed a demurrer to the complaint on the primary grounds that the members of the Redistricting Commission are public officers and not employees; thus, Section 31 does not apply. (See JA 264.) The State Auditor filed an answer to the original complaint. (JA 13.)

B. Appellants' First Amended Complaint

In response to the Redistricting Commission's demurrer, Appellants filed a First Amended Complaint which included their original allegations and alleged a second theory:

> Second, the public employees of the Applicant Review Panel, when reviewing applications to the Citizens Redistricting Commission, must consider the race, ethnicity, and sex of the applicants so that the first eight members of the Commission can meet their statutory duties in appointing the final six members so that the composition of the Commission reflects the state's race, sex, and ethnic diversity.

(JA 23 [First Amended Complaint, ¶ 2].) This second theory was set forth in the second and fourth causes of action. (See JA 31-32 [¶¶ 30-34]; JA 34-35 [¶¶ 46-51].)

The State Auditor and the Redistricting Commission demurred to the First Amended Complaint on the grounds that the selection process for the Redistricting Commission established in section 8252, subdivision (g) does not violate Section 31 because the appointment of members to the Redistricting Commission does not involve the operation of public employment, public education, or public contracting. (See JA 40; JA 65.) Like the original complaint, the First Amended Complaint did not allege a violation of the federal Constitution.

C. The Trial Court's Decision

The trial court sustained the State Auditor's and the Redistricting Commission's demurrers and dismissed Appellants' First Amended

Complaint without leave to amend. (JA 196.) The trial court held that Appellants' facial challenge to Government Code section 8252, subdivision (g), failed to state a cause of action "because the appointment of members of the Citizen Redistricting Commission does not, as a matter of law, fall within the scope of 'the operation of public employment, public education, or public contracting', which are the objects of Article I, Section 31(a)." (JA 190.) The trial court further held that Appellants failed to carry their burden to show how the First Amended Complaint could be amended "to state a viable cause of action." (JA 195-196.)

D. Appellants Appeal the Trial Court's Judgment.

On March 8, 2013, judgment was entered in favor of the defendants. (JA 218.) Appellants filed a notice of appeal and an amended notice of appeal from the judgment. (JA 226, 241.) The only issue raised on appeal is Appellants' "new claim" that Government Code section 8252, subdivision (g) violates the Equal Protection Clause of the federal Constitution. (See AOB at p. 2.)

IV.

ARGUMENT

A. Appellants Waived Their "New Claim" Because They Failed to Raise it in the Trial Court.

The well-established general rule in California is that a party may not, for the first time on appeal, change his claim or raise a new theory.

(*Ernst v. Searle* (1933) 218 Cal. 233, 241; see *Cable Connection, Inc. v. DirectTV, Inc.* (2008) 44 Cal.4th 1334, 1350 fn. 12 [party could not argue on appeal that issue was governed by Federal Arbitration Act after litigating in the trial court that California Arbitration Act controlled].) The California Supreme Court has recognized that to permit a party to do so "would not only be unfair to the trial court, but manifestly unjust to the opposing litigant." (*Ernst v. Searle, supra,* at p. 241.) "Whether the rule is to be applied is largely a question of the appellate court's discretion." (*Richmond v. Dart Industries, Inc.* (1987) 196 Cal.App.3d 869, 874, 879 [declining to exercise its discretion to determine new issue on appeal "on the policy ground that plaintiffs ought not have two trials where they could have had but one"].)

Here, Appellants ask this Court to apply the exception to the general rule and allow them to raise their federal constitutional issue for the first time on appeal. (AOB at pp. 30-32.) As discussed below, the Court should not permit this belated assertion of the "new claim" because justice requires that respondents have an opportunity to present evidence in the trial court and demonstrate that the statute complies with the federal Equal Protection Clause.

1. To Allow Appellants to Litigate Their "New Claim" in the This Court is "Manifestly Unjust."

Without an operative pleading or an evidentiary record, Appellants ask this Court to decide a significant issue of first impression in California and perhaps the nation. This Court should reject the invitation because to do so is manifestly unjust to the State Auditor and the other respondents and places this Court in the untenable position of deciding a significant issue of first impression without a sufficient record on which to base that decision.

As discussed above, California courts have long-recognized that "[i]t would be manifestly unjust to the opposing parties, unfair to the trial court, and contrary to judicial economy to permit a change of theory on appeal." (*North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 29 ["*North Coast*"].) The general principles of "waiver" and "theory of the trial" dictate the general rule that a party forfeits claims and theories on appeal, which he failed to raise in the trial court. (*North Coast*, 17 Cal.App.4th at pp. 28-29; *Kaufman & Broad Communities, Inc. v. Performance Plastering Inc.* (2006) 136 Cal.App.4th 212, 226 [holding that party's failure to raise argument in trial court forfeits that argument on appeal]; *Blue Shield of California Life & Health Insurance Co. v. Superior Court* (2011) 192 Cal.App.4th 727, 736 fn. 11 [holding "[b]ecause Blue Shield did not raise the issue in the trial court, it was

waived" on appeal]; *Winchester Mystery House, LLC v. Global Asylum, Inc.* (2012) 210 Cal.App.4th 579, 595 [finding issue forfeited because it would require appellate court to consider new factual questions and plaintiff failed to raise issue in trial court].)

In *North Coast*, the appellant alleged in the trial court that his fraud claim was not time-barred because the alleged construction defect was a drainage problem, which he failed to discover for a period of time. Failing to prove at summary judgment that the claim was not time-barred, the appellant changed his theory on appeal and argued that the relevant construction defect was defective footing. (*North Coast, supra,* 17 Cal.App.4th at p. 28.) The Fourth Appellate District, Division One, rejected this new theory on the grounds that it was never raised in the trial court and thus was waived. (*Id.* at pp. 28-29.) The appellate court explained:

> Ordinarily, the failure to preserve a point below constitutes waiver of the point. This rule is rooted in the fundamental nature of our adversarial system: The parties must call the court's attention to issues they deem relevant. In the hurry of the trial many things may be, and are, overlooked which could readily have been rectified had attention been called to them. The law casts upon the party the duty of looking after his legal rights and of calling the judge's attention to any infringement of them. . . .
>
> The same policy underlies the principles of "theory of the trial." A party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing

> party. The principles of "theory of the trial" apply to motions, including summary judgment motions.

(*Id.* at pp. 28-29 [internal citations omitted].)

In addition, constitutional issues are to be raised at the earliest opportunity or they will be considered waived. The California Supreme Court has recognized that "[t]he right to question the constitutionality of a statute may be waived." (*Hershey v. Reclamation Dist. No. 108* (1927) 200 Cal. 550, 564.) "It is a general rule applicable in civil cases that a constitutional question must be raised at the earliest opportunity or it will be considered waived." (*Ibid.* [citations omitted]; *Fourth La Costa Condominium Owners Association v. Seith* (2008) 159 Cal.App.4th 563, 585 [holding that appellant waived equal protection argument because the constitutional issue was not raised in the trial court].)

Based on the foregoing principle of waiver, Appellants waived their federal constitutional claim by failing to raise it in the trial court. Appellants concede that it is a "new claim." (AOB at p. 2.) Appellants had a full and fair opportunity to present their Equal Protection Clause claim to the trial court, but chose not to do so. Indeed, nowhere in their opening brief do Appellants indicate any reasonable justification for their failure to raise their "new claim" in the trial court.

Significantly, Appellants had multiple chances to raise their Equal Protection claim in the trial court, yet failed to do so. Appellants amended

their original complaint in response to the Redistricting Commission's first demurrer, but chose not to include their federal claim in their First Amended Complaint. The State Auditor and the Redistricting Commission filed two separate demurrers in April 2012 to the First Amended Complaint. In their opposition to the demurrers, Appellants did not request leave to amend their First Amended Complaint to state a cause of action under the federal Constitution. The trial court granted the demurrers without leave to amend. Appellants never filed a motion for reconsideration based on a proposed amended complaint. In the absence of any proposed amended pleading, the State Auditor does not know the exact scope of Appellants' "new claim." For example, what specific relief do Appellants seek based on their new Equal Protection Clause cause of action? Do they only seek prospective relief, or do they seek to overturn the work of the Redistricting Commission two years ago?

On appeal, Appellants have abandoned all four causes of action in their First Amended Complaint. All respondents know about Appellants' "new claim" are the arguments Appellants presented in their opening brief. There is no operative complaint or governing pleading setting forth the specific federal constitutional challenge for the parties to litigate or for this Court to resolve.

At no time before the trial court did Appellants ever suggest how their First Amended Complaint could be amended to state a cause of action

under the federal Constitution. Under these circumstances, it is manifestly unjust to allow Appellants to litigate their "new claim" in the first instance on appeal and Appellants should be found to have waived their "new claim."[2]

2. Appellants' "New Claim" Cannot Be Resolved On Appeal Because Facts That May Be Necessary to Resolve the Claim Were Not Presented to the Trial Court.

Appellants assert that their "new claim" fits within the exception to the general rule against making a new claim on appeal because their claim involves a pure question of law based on undisputed facts. (AOB at p. 30.) As discussed below, the very cases that Appellants rely on demonstrate that their federal Equal Protection claim is not purely a question of law, and thus cannot be considered for the first time on appeal.

"As a general rule, a new theory may not be presented for the first time on appeal unless it raises only a question of law and can be decided based on undisputed facts." (*Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 983; see also *Zimmerman, Rosenfeld, Gersh & Leeds LLP v. Larson* (2005) 131 Cal.App.4th 1466, 1488 [deeming appellants new argument regarding the interpretation of a reorganization plan waived

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[2] To the extent that Appellants only seek prospective relief for their "new claim," there is no need to adjudicate this federal issue in the first instance on appeal. Under Government Code section 8252, the next selection process for the commissioners for the Redistricting Commission will not begin until 2019 – more than 5 years from now. (Gov. Code, § 8252, subd. (g).)

on appeal, where it was not raised in the trial court, and it required "consideration of new factual questions"].) Furthermore, a new claim or issue raised for the first time on appeal is deemed forfeited if the factual record below is insufficient to resolve it. (*Saville v. Sierra College* (2005) 133 Cal.App.4th 857, 873.) In *Saville*, this Court explained:

> Plaintiff's duty was to direct the court's attention to any different factual basis of liability on which he could rely. Plaintiff failed to do this, and forfeiture is appropriate. Indeed, if this were permitted procedure, parties opposing and losing summary judgment motions could attempt to embed grounds for reversal on appeal into every case by their silence.

(*Saville v. Sierra College*, *supra,* at p. 873.)

Appellants' "new claim" does not present a pure question of law based on undisputed evidence. Rather, Appellants contend that section 8252, subdivision (g) does not survive the traditional strict scrutiny test applied to race-based classifications and does not survive intermediate scrutiny applied to gender-based classifications under federal constitutional jurisprudence. (AOB at pp. 12, 13.) Respondents should have been afforded an opportunity to develop the factual record to show that section 8252, subdivision (g) does not violate the Equal Protection Clause.

The strict scrutiny test, which Appellants allege should be applied to section 8252, subdivision (g), cannot be applied for the first time on this appeal because "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause." (*Grutter v. Bollinger* (2003)

539 U.S. 306, 327 [holding that under the strict scrutiny test applicable to equal protection challenges under Fourteenth Amendment, court reviews state's evidence of its purported compelling interest in the race-based policy and whether policy is narrowly tailored to further such interest]; see *Adarand Constructors, Inc. v. Pena* (1995) 515 U.S. 200, 228 [holding that "[t]he point of carefully examining the interest asserted by the government in support of a racial classification, and the evidence offered to show that the classification is needed, is precisely to distinguish legitimate from illegitimate uses of race in governmental decisionmaking"]; *City of Richmond v. J.A. Croson Co.* (1989) 488 U.S. 469, 493 [holding that "[a]bsent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial'. . . "and thus, the courts use "strict scrutiny . . . to 'smoke out' illegitimate uses of race . . . ."].)

A review of the cases cited by Appellants confirms that the United States Supreme Court repeatedly has recognized that the strict scrutiny analysis has factual components. For example, in their opening brief (AOB at p. 16), Appellants rely on *Wygant v. Jackson Bd. of Education* (1986) 476 U.S. 267, which expressly acknowledges the factual nature of the strict scrutiny inquiry:

> Evidentiary support for the conclusion that remedial action is warranted becomes crucial when the remedial program is challenged in court by nonminority employees. In this case,

> for example, petitioners contended at trial that the remedial program – Article XII – had the purpose and effect of instituting a racial classification that was not justified by a remedial purpose. In such a case, the trial court must make a factual determination that the employer had a strong basis in evidence for its conclusion that remedial action was necessary. The ultimate burden remains with the employees to demonstrate the unconstitutionality of an affirmative-action program. But unless such a determination is made, an appellate court reviewing a challenge by nonminority employees to remedial action cannot determine whether the race-based action is justified as a remedy for prior discrimination.

(*Wygant v. Jackson Bd. of Education, supra,* at pp. 277-278; see also *Fisher v. Univ. of Texas* (2013) 133 S.Ct. 2411, 2420 [stating that the strict scrutiny analysis "involves a careful judicial inquiry into whether a university could achieve sufficient diversity without using racial classifications"].)

In this case, Appellants did not raise their federal claim in the trial court. As a result, the parties have not had a reasonable opportunity to present factual evidence of the state's important or compelling governmental interests in the alleged race or sex classifications and whether such alleged classifications were substantially or narrowly tailored to accomplish such governmental interests. It is "manifestly unjust" to decide a new claim when respondents have not been given the opportunity to develop an evidentiary record in the trial court to rebut Appellants' claim that section 8252, subdivision (g), violates the federal Equal Protection

Clause. (See *Richmond v. Dart Industries, Inc., supra,* 196 Cal.App.3d at p. 874.)

In sum, Appellants have waived their right to assert their federal claim for the first time on appeal because their failure to raise the issue in the trial court has caused the appellate record to be lacking. Contrary to Appellants' assertions, this is not an issue of law based on undisputed facts. The requisite analysis under the Equal Protection Clause requires that respondents have the opportunity to defend the claim and present evidence in the trial court to support the constitutionality of section 8252, subdivision (g).

B. The Trial Court Did Not Abuse its Discretion in Sustaining Respondents' Demurrers Without Leave to Amend.

On appeal, Appellants are not entitled to leave to amend for two reasons. First, an appellate court need not grant leave to amend when the party seeks to amend the complaint to state an entirely different cause of action. Second, Appellants' Equal Protection claim is not a viable claim.

An appellate court is required to uphold a trial court's ruling sustaining a demurrer without leave to amend unless the ruling constitutes an abuse of discretion. (*Hendy v. Losse* (1991) 54 Cal.3d 723, 742; see Code Civ. Proc., § 472c, subd. (a).) When a demurrer is sustained with leave to amend, the reviewing court must decide "if there is a reasonable possibility that the defect in a complaint can be cured by amendment."

(*Hendy v. Losse, supra,* at p. 742.) "[A] reviewing court should reverse only where there is manifest an abuse of discretion in refusing leave to amend." (*Schultz v. Steinberg* (1960) 182 Cal.App.2d 134, 140.) The plaintiff-appellant bears the burden of proving that the trial court abused its discretion. (*Ibid.*)

1. Appellants Concede That They Seek to Amend Their Complaint to Add a "New Claim."

Appellants do not dispute that they failed to request leave to amend their complaint and failed to demonstrate that the First Amended Complaint could be amended in the trial court. (See JA 119, 139.) In this case, Appellants' First Amended Complaint failed to state a claim because Government Code section 8252, subdivision (g) does not violate Section 31 of the California Constitution. The trial court properly held that the defects of the First Amended Complaint could not be cured by an amendment.

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

(JA 195.) On appeal, Appellants do not challenge this ruling by the trial court. Instead, Appellants seek to add a completely new cause of action. In such circumstances, leave to amend is inappropriate. (See *Taliaferro v. Industrial Indemnity Co.* (1955) 131 Cal.App.2d 120, 123 [recognizing that it is not an "abuse of discretion for a trial court to refuse leave to a plaintiff

to amend his complaint to state an entirely different cause of action from that originally pleaded"].)

2. Appellants Do Not Have a Viable Claim Under the Federal Equal Protection Clause.

Appellants ask this Court to consider on appeal a federal constitutional challenge that they never raised in the trial court. The issue of whether Government Code section 8252, subdivision (g) violates the federal Equal Protection Clause presents an issue of first impression. Appellants do not cite a single case holding that race and gender diversity are impermissible factors to consider in the appointment of public officers for a redistricting commission.

Appellants claim that their challenge is a facial challenge to section 8252, subdivision (g). As this Court has recognized in *Taxpayers for Improving Public Safety v. Schwarzenegger* (2009) 172 Cal.App.4th 749, Appellants carry a very heavy burden to establish that a statute is unconstitutional when making a facial challenge:

> "In considering the constitutionality of a legislative act we presume its validity, resolving all doubts in favor of the Act. Unless conflict with a provision of the state or federal Constitution is clear and unquestionable, we must uphold the Act."

(See *Taxpayers for Improving Public Safety v. Schwarzenegger, supra,* at pp. 769-770 [quoting *California Housing Finance Agency v. Elliott* (1976) 17 Cal.3d 575, 594].)

Appellants challenge section 8252, subdivision (g)'s requirement that the first eight commissioners appointed to the Redistricting Commission select the remaining six appointees "to ensure the commission reflects this state's diversity, including but not limited to racial, ethnic, geographic, and gender diversity" as a violation of the Equal Protection Clause. (Gov. Code, § 8252, subd. (g).) This facial challenge is not a viable claim under the principles announced in *Grutter v. Bollinger* (2003) 539 U.S. 306.

In *Grutter*, the United States Supreme Court was presented with the issue of diversity in higher education. In deciding the case, the Supreme Court recognized the importance of diversity in civic life and held that the University of Michigan Law School "has a compelling interest in attaining a diverse student body." (*Grutter v. Bollinger, supra,* at p. 328.) Consistent with *Grutter*, California has a compelling interest in diversity in the members of the Redistricting Commission because "'ensuring 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*, *supra,* at pp. 331-332 [quoting Brief for United States as Amicus Curiae at p. 13].) Moreover, the Supreme Court recognized that "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is

essential if the dream of one Nation, indivisible, is to be realized." (*Id.* at p. 332.)

Based on an extensive factual record that was developed after a 15-day trial, the Supreme Court in *Grutter* held that a constitutionally permissible race-conscious admissions program may consider race or ethnicity as a "plus" factor in the context of individualized consideration of each applicant. (*Grutter v. Bollinger*, *supra,* 539 U.S. at p. 334.) The program cannot contain quotas or a separate admissions track, and must be narrowly tailored to advance the state's compelling interest in obtaining the educational benefits of a diverse student body.

Section 8252, subdivision (g) is constitutional under *Grutter* because, like higher education, a citizens redistricting commission should be open to participation by all segments of California society. (See *id.* at p. 332.) Moreover, much like in *Grutter*, section 8252, subdivision (g) only calls for race and gender to be considered as a single factor in the selection of the final six members of the Commission.

Section 8252, subdivision (g) does not require the preferential treatment of, or discrimination against any particular group. It simply instructs that in selecting the final six members of the Redistricting Commission, the first eight members of the Commission should consider, as one factor, whether the applicants it chooses will produce a 14-member body that "reflects this State's diversity," which includes geographic

diversity as well as racial, ethnic, and gender diversity. (Gov. Code, § 8252, subd. (g).) It does not require that members of specific groups be included among the final six appointees. It does not require the first eight members of the Commission eliminate or seat any individual applicant on the basis of his or her race, ethnicity, or gender. Rather, the first eight commissioners must consider, as one factor, whether appointing a particular slate of six applicants will help ensure that the Redistricting Commission reflects the diversity of California as required by article XXI, section 2 of the California Constitution.

As made clear by section 8252, subdivision (g), each individual applicant shall "be chosen based on relevant analytical skills and ability to be impartial." (Gov. Code, § 8252, subd. (g).) The racial, ethnic, geographic, and gender diversity of the appointees is considered as an additional factor with an eye toward creating a body whose composition affirms that it is open to participation by all segments of California society. Accordingly, section 8252, subdivision (g) does not grant preferential treatment to any particular race, ethnicity, or gender, and does not discriminate against any individual on the basis of his or her race, ethnicity, or gender. The statute therefore does not violate the Equal Protection Clause and is consistent with the principles of diversity upheld by the United States Supreme Court in *Grutter*.

In sum, leave to amend is not appropriate here and the judgment should be affirmed because Appellants cannot state a viable claim under the federal Equal Protection Clause. (See e.g., *Hendy v. Losse*, *supra*, 54 Cal.3d at pp. 742-743 [holding that trial court's ruling sustaining demurrer without leave to amend was not an abuse of discretion where plaintiff failed to meet his burden of showing the trial court how the proposed amendment would cure the defect in the complaint].)

V.

CONCLUSION

For all the foregoing reasons, the trial court's judgment should be affirmed. This Court should reject Appellants' invitation to transform their losing case into a brand new federal case. If Appellants want to litigate their new federal claim, they cannot do so in this case.

Date: November 15, 2013 TOLEDO DON LLP

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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, Rule 8.204 subd.(c)(1))

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Date: November 15, 2013 TOLEDO DON LLP

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I am more than eighteen years old and not a party to this action. My business address is Toledo Don LLP, 3001 Douglas Blvd., Suite 340, Roseville, California 95661. On November 15, 2013, I served the following document(s):

- **BRIEF OF RESPONDENT CALIFORNIA STATE AUDITOR**

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Susan L. Langley

Susan L. Langley