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' REPLY BRIEF

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Third Appellate District

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

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v.
State of California, et al.

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Ralph W. Kasarda

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January 7, 2014.

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INTRODUCTION

In their Opening Brief, Appellants Ward Connerly and the American Civil Rights Foundation (Connerly) explained how Government Code Section 8252(g) violates the Equal Protection Clause of the Fourteenth Amendment. In their Opposition Briefs, Respondents the State of California, the Citizens Redistricting Commission, and the State Auditor, Elaine M. Howle (collectively, Respondents) do not dispute that Section 8252(g) classifies on the basis of race and sex those California voters applying to serve as public officers on the Citizens Redistricting Commission, *see* State's Opp. at 4 (setting forth without dispute the text of Section 8252(g)); State Auditor's Opp. at 7 (same). Instead, they ask this Court to ignore Connerly's federal Equal Protection Clause argument, claiming the State should be given an opportunity to demonstrate that it has a compelling interest in selecting public officers on the basis of race. State's Opp. at 8; State Auditor's Opp. at 17. But Respondents completely disregard the second requirement of strict scrutiny: Narrow tailoring. Nowhere in their Opposition Briefs do Respondents dispute—or even acknowledge—an entire section of Connerly's brief that Section 8252(g)'s use of race cannot be narrowly tailored according to the requirements of strict scrutiny. Connerly's Opening Brf. at 23-28. Respondents thus fail to offer valid arguments for why this Court should not now find that Section 8252(g) is unconstitutional. Even if Respondents could somehow show, contrary to Supreme Court precedent, that a compelling

interest justifies the State's use of racial qualifications to select public officers, Section 8252(g) would still be unconstitutional for indisputably failing the narrow tailoring requirements of strict scrutiny.

Respondents' secondary argument fares no better. Connerly argues that the trial court abused its discretion in dismissing Connerly's Complaint without leave to amend it to add a Federal Equal Protection Clause cause of action. Connerly's Opening Brf. at 35-36. Respondents attempt to invent a new legal standard by arguing that Connerly should not be allowed to amend his complaint, because a facial challenge is difficult to prove. *See* State's Opp. at 13 (discussing Plaintiff's burden of proof for making a facial challenge); State Auditor's Opp. at 22 (same). This argument conflicts with well-established case law holding that an appellant's only burden is to establish that there is a reasonable possibility that the complaint can be amended to cure its defects. *Careau & Co. v. Sec. Pac. Bus. Credit, Inc.*, 222 Cal. App. 3d 1371, 1386 (1990). Connerly met that burden in his Opening Brief. *See* Connerly's Opening Brf. at 35-36 (setting forth with particularity the facts in the Complaint giving rise to an Equal Protection Clause cause of action). Respondents ignore this section of Connerly's brief, just as they ignore Connerly's narrow tailoring arguments. Respondents' proposed legal standard has no basis in the law and should be rejected.

ARGUMENT

I

SECTION 8252(g) IS UNCONSTITUTIONAL

Connerly contends that the undisputed race- and sex-based classifications found in Section 8252(g) violate the federal Equal Protection Clause, and that this Court should decide that issue on appeal. Connerly's Opening Brf. at 14-29, 30-32. In their Opposition Briefs, Respondents acknowledge that appellate courts may consider a new legal theory raised for the first time on appeal when it presents a question of law based on undisputed facts, State's Opp. at 7-8; State Auditor's Opp. at 16, and nowhere dispute Connerly's contention that Section 8252(g) must satisfy strict scrutiny to be constitutional under the Equal Protection Clause. Connerly's Opening Brf. at 14-15. Respondents' primary argument is that this Court should not determine Section 8252(g)'s constitutionality until the State has had the opportunity to present new facts to show it has a compelling interest justifying its use of racial classifications. State's Opp. at 8; State Auditor's Opp. at 17. The Court should reject that argument, because neither Respondent disputes that Section 8252(g) fails the narrow tailoring requirement of strict scrutiny. Thus, even if the State could show that it does have a compelling interest in using race to select public officers, Section 8252(g) is still unconstitutional as a matter of law.

A. Respondents Do Not Dispute That Section 8252(g) Classifies Applicants by Race and Sex

Section 8252(g) "requires public officers to classify, 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." Connerly's Opening Brf. at 2-3; *see also* Joint Appendix (J.A.) 23, 27, 28, 30, 33, 34 (Connerly's Complaint alleging Section 8252(g)'s discriminatory selection scheme). Section 8252(g) itself states that the last six members of the Citizen's Redistricting Commission "shall be chosen to ensure the commission reflects this state's diversity, including, but not limited to, racial, ethnic, geographic, and gender diversity."[1] *Id.* at 5 (quoting Gov't Code § 8252(g)).

Respondents present no argument opposing this contention, or challenge Connerly's description of the text of Section 8252(g). In their Opposition Briefs, both Respondents set out the same text of Section 8252(g) as Connerly did in his Opening Brief. State's Opp. at 4; State Auditor's Opp. at 7. Moreover, as the trial court noted, there is no dispute among the parties that Section 8252 employs classifications based on race and sex. *See* J.A. 188 (Ruling on Demurrers) (facts are not in dispute).

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[1] The text of Government Code Section 8252(g) uses the mandatory term "shall," rather than the permissive term "may," as the State erroneously claims. *See* State's Opp. Brf. at 5.

Having acknowledged the racial and gender classifications in Section 8252(g), Respondents may not simply ask this Court to ignore them. The express racial classifications contained in Section 8252(g) are immediately suspect, are presumptively invalid, and, without more, trigger strict scrutiny review. *Connerly v. State Pers. Bd.*, 92 Cal. App. 4th 16, 43 (2001) (citing *Shaw v. Reno*, 509 U.S. 630, 642-44 (1993); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 289 (1978) (Powell, J. (lead opn.)). There are two prongs to this examination. First, any racial classification "must be justified by a compelling governmental interest." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986). Second, but just as essential to determining whether a racial classification is constitutional, the means chosen by the State to effectuate its purpose must be "narrowly tailored to the achievement of that goal." *Id.* (citation omitted).

In their opposition briefs, Respondents utterly fail to dispute Connerly's argument that Section 8252(g) is unconstitutional because it fails the narrow tailoring prong of strict scrutiny.

B. Neither the State Nor the State Auditor Dispute That Section 8252(g)'s Racial Classification and Selection Scheme Fails Narrow Tailoring

Connerly strongly disagrees that the State has a compelling interest to justify the selection of public officers on the basis of race. Connerly's

Opening Brf. at 15-23. Nevertheless, even where the State does have a compelling interest supported by a strong basis in evidence, a race-conscious program must be narrowly tailored to further that interest. Connerly's Opening Brf. at 23 (citing *Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2419 (2013); *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003)). Connerly argued at length in his opening brief that Section 8252(g) fails the narrow tailoring prong of strict scrutiny. Connerly's Opening Brf. at 23-28. But nowhere in their Opposition Briefs do Respondents dispute, or even mention, Connerly's narrow tailoring arguments.

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 considerations of workable race-neutral alternatives." Connerly's Opening Brf. at 23-24 (citing *Fisher*, 133 S. Ct. 2411; *Grutter*, 539 U.S. at 339). Section 8252(g) satisfies none of these factors, and neither Respondent argues to the contrary.

Fisher reiterated that narrow tailoring requires reviewing courts to verify that it is "necessary" for a university to use race to achieve the educational benefits of diversity. *Fisher*, 133 S. Ct. at 2420; *see Bakke*, 438 U.S. at 305 (state must show that its racial classification is necessary to the accomplishment of its purpose); Connerly's Opening Brf. at 24. The State cannot show that it is "necessary" to screen and select applicants on the basis

of race or sex. The State has never attempted to form a Citizens Redistricting Commission by using a race-neutral commissioner selection scheme. Connerly's Opening Brf. at 24-25. Therefore, it cannot 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). The first ever Citizens Redistricting Commission was formed in 2010. *See* Gov't Code § 8252(g) (requiring the first commission to be formed "[n]o later than December 31, in 2010"). Commissioners had to be chosen on the basis of race and sex during this process. *Id.* Since this is the first time the Commission was formed, the State has never even attempted to create the Citizen's Redistricting Commission using race- and sex-neutral alternatives. Connerly's Opening Brf. at 24-25. Neither the State nor the State Auditor dispute this point.

Section 8252(g) has no sunset provision; its mandate is permanent. Gov't Code § 8252(g) (new selection process to begin "in each year ending in the number zero"); Connerly's Opening Brf. at 26. The United States Supreme Court holds that "[e]nshrining a permanent justification for racial preferences" offends equal protection principles. *Grutter*, 539 U.S. at 342; *see Connerly*, 92 Cal. App. 4th at 37 ("the use of a racial classification must be limited in scope and duration"); *Petit v. City of Chicago*, 352 F.3d 1111, 1116 (7th Cir. 2003) (To be narrowly tailored, "[a] program must be limited in time; that is, not enshrined as a permanent justification for racial preferences."). Thus, "all

governmental use of race must have a logical end point." *Grutter*, 539 U.S. at 342. Neither Respondents dispute that Section 8252(g) fails this narrow tailoring requirement.

Section 8252(g) is not flexible enough to allow the consideration of all possible elements of diversity, because race, ethnicity, and sex are the determining factors in the commissioner selection process. The United States Supreme Court invalidated the University of Michigan's race-conscious admissions policy in *Gratz v. Bollinger*, because the race of an applicant was always the determining factor the university relied upon to grant a preference to an applicant. 539 U.S. 244, 272 (2003). In contrast, the race-conscious admissions policy in *Grutter* was upheld, in part, because the law school's plan ensured that all factors that may contribute to student body diversity were meaningfully considered alongside race in admissions decisions. *Grutter*, 539 U.S. at 337. The law school in *Grutter* considered many possible bases for diversity, such as an applicant's travels, fluency in different languages, overcoming adversity, family hardship, community service, unusual intellectual achievement, employment experience, and unique personal background. *Id.* at 338. Race was never a determining factor. *See id.* ("the Law School actually gives substantial weight to diversity factors besides race"). That is not the case here.

The State makes no attempt to dispute Connerly's argument that race is, and must be, the deciding factor in Section 8252(g)'s commissioner

selection process. The State Auditor claims Section 8252(g) merely requires that the first eight Commissioners "should" consider the race and sex of applicants and that the preferential treatment of, or discrimination against, any particular group is not required. State Auditor's Opp. at 24. The State Auditor is wrong, and her claim is based on an inaccurate phrasing of the actual text of Section 8252(g).

Contrary to the State Auditor's argument, Section 8252(g) states that the last six members of the Commission "*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) (emphasis added). In other words, the first eight members of the Commission "shall" always select the last six members to "ensure" the commission reflects California's racial, ethnic, and gender diversity. It is not the case, as the State Auditor claims, that the first eight Commission members "should" consider race as only one factor when selecting the last six Commission members. Every time the Citizen's Redistricting Commission is formed, the State must "ensure" that the Commission reflects the state's racial, ethnic, and gender diversity. Gov't Code § 8252(g). Thus, race, ethnicity, and sex must be the deciding factors in the selection of commissioners for the State to "ensure" that diversity—as defined by Section 8252(g)—is attained. Connerly's Opening Brf. at 27. Even if the State Auditor were correct on this one point—and she is not—the State Auditor has made no attempt to dispute Connerly's other

contentions that Section 8252(g) fails narrow tailoring because it is not limited as to time, and the State has made absolutely no attempt to create a diverse Commission using race- and sex-neutral alternatives. Connerly's Opening Brf. at 24-27.

"*Grutter* made clear that racial 'classifications are constitutional only if they are narrowly tailored to further compelling governmental interests.'" *Fisher*, 133 S. Ct. at 2419 (citing *Grutter*, 539 U.S. at 326). Both prongs of strict scrutiny must be satisfied for racial classifications to be constitutional. *See Connerly*, 92 Cal. App. 4th at 37 (describing narrow tailoring requirements even after a compelling interest is shown). Thus, even if Respondents could somehow show that a compelling interest allows the State to screen, select, or reject California voters applying to serve as public officers on the basis of race and sex, Section 8252(g) is still unconstitutional because it fails the narrow tailoring prong of strict scrutiny. Respondents have made no effort to dispute this point.

II

THIS COURT SHOULD DECIDE THE CONSTITUTIONALITY OF SECTION 8252(g)

This Court should determine whether Section 8252(g) violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Connerly's Opening Brf. at 30-32. Respondents' arguments that resolution of this issue requires a "factual presentation," or that some made-up

principle of estoppel prevents the Court from determining the constitutionality of Section 8252(g), are simply wrong. State's Opp. at 8-9; State Auditor's Opp. at 16-17.

A. No Additional Facts Can Change the Text of Section 8252(g)

The State argues that this Court should not resolve Connerly's Equal Protection Clause argument because resolution "*may* require a factual presentation by the State." State's Opp. at 8. Connerly makes a facial challenge to Section 8252(g). J.A. 187:1-5 (Ruling on Demurrer). "Where a statutory scheme, on its face, employs a suspect classification, the scheme is, on its face, in conflict with the core prohibition of the Equal Protection Clause." *Connerly*, 92 Cal. App. 4th at 44 (citing *Shaw*, 509 U.S. at 642). No amount of factual presentation can change the text of the statute, which, on its face, requires the State to create a new commission by screening and selecting citizens on the basis of race and sex, without first using *any* race- and sex-neutral alternatives, and without a termination date.

No amount of discovery or expert witness testimony will change the text of Section 8252(g). It still remains undisputed that Section 8252(g) sets forth a discriminatory scheme whereby California voters-applicants are screened and selected for public office on the basis of race. No amount of "factual presentation" can amend the California Constitution or Government Code to add a sunset provision to Section 8252(g) in order demonstrate the

required narrow tailoring. No new evidence will change the fact that the first Commission was formed in 2010 with Section 8252(g)'s discriminatory selection scheme in place, State's Opp. at 5 (citing former Section 8252(g) amended by Stats. 2012, ch. 271); that prior to the Citizens Redistricting Commission, the Legislature adjusted the boundaries of State legislative districts, Board of Equalization districts, and congressional districts, *id.*; and prior to 2010 the State never even attempted to staff the Citizen's Redistricting Commission using race- and sex-neutral alternatives to Section 8252(g)'s discriminatory selection process; Connerly's Opening Brf. at 24-26; State's Opp. at 2.

Thus, even if the State could somehow convince a court that the State had a compelling interest in having a racially diverse Citizens Redistricting Commission, "there must still be a further judicial determination that the [selection] process meets strict scrutiny in its implementation." *Fisher*, 133 S. Ct. at 2419-20. On this point, the State "receives no deference." *Id.* As Connerly has already shown, the undisputed text of the Government Code demonstrates that Section 8252(g) fails narrow tailoring, and ultimately strict scrutiny.

B. The Supreme Court Prohibits Race from Being Used in the Selection of Public Officers, and Has Never Recognized Diversity as a Compelling Interest Outside the Context of Higher Education

The State Auditor claims Connerly did not cite any case holding that race and sex may not be used in the selection of public officers. State Auditor's Opp. at 22. That is false. As Connerly pointed out in his Opening Brief, the United States Supreme Court has already foreclosed Respondents' compelling interest arguments by repeatedly rejecting the notion that public officers may be chosen based on race. Connerly's Opening Brf. at 19-23. In holding that race has "no relevance" to a person's "qualification[s] for office," the Court invalidated a state statute requiring the designation of public officers by race. *Anderson v. Martin*, 375 U.S. 399, 403 (1964); Connerly's Opening Brf. at 19-20. A state can have no compelling interest for requiring racial qualifications for public office, because race "is not germane to one's ability to participate intelligently in the electoral process." *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 668 (1966); Connerly's Opening Brf. at 21. The Court holds that "[t]he 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." *Turner v. Fouce*, 396 U.S. 346, 362-63 (1970).[2] No amount of discovery, expert opinion, or factual

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[2] The State claims that a stance against racial qualifications for public officers is "novel." State's Opp. at 8. However cases such as *Anderson*, *Harper*, and (continued...)

presentation can reverse these Supreme Court decisions holding that states may not select public officers on the basis of race.

The enactment of a racial classifications to select public officers based on the racial demographics of the state is simply not permitted. *See Wygant*, 476 U.S. at 275 ("tying the required percentage of minority teachers to the percentage of minority students" would lead to discriminatory hiring practices and layoffs). Indeed, the manner in which Section 8252(g) requires the attainment of diversity is exactly what the Supreme Court forbids. "A university is not permitted to define diversity as 'some specified percentage of a particular group merely because of its race or ethnic origin.'" *Fisher*, 133 S. Ct. at 2419 (citing *Bakke*, 438 U.S. at 307, (opinion of Powell, J.)). But Section 8252(g) requires that the last six Commissioners "shall be chosen to ensure the commission reflects this state's . . . racial, ethnic, geographic, and gender diversity." Gov't Code § 8252(g). In the final selection process, applicants are classified, preferred, or rejected, because of the color of their skin, not because of their particular viewpoints, or experience.

The State argues that two cases from the Seventh Circuit are controlling and prevent this Court from considering Connerly's equal protection arguments. State Opp. at 8-9. The State is wrong, as neither of the cited cases

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[2] (...continued)
Turner, which forbid states from using race as a qualification for public office, show that Connerly's position is established law.

involve a challenge to racial classifications set forth in a state statute. In *Petit*, the court held that "rather modest affirmative action promotions were necessary for the effective operation of the police department." *Petit*, 352 F.3d at 1114. However, the court was clear that the police department's use of race was narrowly tailored to that interest in part because the procedures were "limited in time, as *Grutter* [] requires." *Id.* at 1118. In fact, the police department had completely stopped using race-conscious admissions twelve years before the case was heard on appeal. *Id.* In contrast, the race- and sex-based selection scheme set forth in Section 8252(g) is set to last indefinitely.

In *Reynolds v. City of Chicago*, a case decided before *Gratz* and *Grutter*, plaintiffs claimed that the specific promotions of 20 minorities and women within the Chicago Police Department in 1990 and 1991 violated the Equal Protection Clause. 296 F.3d 524, 525 (7th Cir. 2002). Because the case concerned as-applied challenges to particular race-conscious hiring decisions, the court did not subject the police department's affirmative action plan to strict scrutiny. Strict scrutiny would only apply if, as in this case, the plan had been challenged as facially unlawful. Thus *Reynolds* has no relevance to a facial challenge to race- and sex-based classifications permanently enshrined in a state statute.

In the context of diversity, the Court has held that the interest in having a diverse student body may justify the use of race in university admissions, but only in the context of higher education. *Grutter*, 539 U.S. at 325.

Respondents have not cited any Supreme Court cases which held that diversity could be a state compelling interest outside the context of higher education.

C. This Court's Determination That Section 8252(g)—a Presumptively Unconstitutional Statute—Violates Equal Protection Would Not Be "Unjust" or "Unfair"

Despite the State Auditor's argument to the contrary, it is settled by this Court, and the California Supreme Court, that the constitutionality of a statute may be resolved for the first time on appeal when the question involves a pure question of law which is presented by undisputed facts. *See* State Auditor's Opp. at 10-11 (arguing a party may not raise a new theory on appeal); *id.* at 12 (claiming resolution of equal protection claim would be "unjust"). As this Court noted in *Pres. Shorecliff Homeowners v. City of San Clemente*, 158 Cal. App. 4th 1427, 1433 (2008), appellate courts typically have discretion to review legal arguments on appeal when the "claim involves an important issue of constitutional law or a substantial right." *See People v. Hines*, 15 Cal. 4th 997, 1061 (1997) (determining constitutionality of Penal Code § 69); *People v. Blanco*, 10 Cal. App. 4th 1167, 1173 (1992) (determining constitutionality of Evid. Code § 1103(b)); *In re Sheena K.*, 40 Cal. 4th 875, 887 n.7 (2007) (whether condition of probation was unconstitutional on its face); *Hale v. Morgan*, 22 Cal. 3d 388, 394 (1978) (considering for first time on appeal constitutional validity of statute assessing penalty against landlord for depriving tenant of utility services for purpose of eviction); *Bayside Timber*

Co., Inc. v. Bd. of Supes. of San Mateo Cnty., 20 Cal. App. 3d 1, 5-6 (1971) (considering for first time on appeal whether forestry statute was constitutional in light of impact of timber and logging operations on state as a whole); *Alfaro v. Terhune*, 98 Cal. App. 4th 492, 512 (2002) ("claim that including inmates under a sentence of death within the [DNA and Forensic Identification Database and Data Bank Act]" was unconstitutional on its face and could be resolved as a question of law); *Thain v. City of Palo Alto*, 207 Cal. App. 2d 173, 185 (1962) ("However the question of the validity and constitutionality of the ordinance, on its face, including its notice provisions, is one of law.").

The State Auditor erroneously relies on *North Coast Bus. Park v. Nielsen Constr. Co.*, 17 Cal. App. 4th 22 (1993), to argue the Court may not consider Connerly's equal protection argument. State's Opp. at 12. In *North Coast*, the appellant asked the court to rule on a new legal theory based upon facts that were not raised during summary judgment proceedings, including appellant's points and authorities, separate statement of undisputed material facts, and oral argument. *North Coast*, 17 Cal. App. 4th at 28. The court declined to exercise its discretion to consider appellant's new legal theory, because they were inconsistent, *id.* at 30, and the facts upon which the new theory was based were not known to the court and were not undisputed. *See id.* at 30-31 (Golden Rule of Summary Adjudication is that a fact not set forth in the separate statement "does not exist").

In contrast, the race- and sex-based classifications of Section 8252(g) have always been front and center, and never hidden during the proceedings below. *See, e.g.*, J.A. 23 (allegations in First Amended Complaint stating "section 8252(g) requires that race, sex, color, ethnicity, or national origin be a factor in the selection process"); J.A. 28 (First Amended Complaint setting forth the text of Section 8252(g)); J.A. 50 (State's Demurrer summarizing text of Section 8252(g)); J.A. 51 (State's Demurrer summarizing Plaintiff's race- and sex discrimination allegations); J.A. 69 (State Auditor's Demurrer stating: "Petitioners challenge as unconstitutional [Section 8252(g)'s] requirement 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."); J.A. 189 (trial court quoting full text of Section 8252(g) in Rulings on Demurrers). The facts underlying Connerly's facial challenge to Section 8252(g), and his allegations that Section 8252(g) set forth a discriminatory scheme based on race and sex, have always been known to the Respondents and to the Court.

The State Auditor's reliance on *North Coast* is further misplaced because that case did not involve an important issue of constitutional law, but rather breach of contract and negligence claims between two private parties. *North Coast*, 17 Cal. App. 4th at 26. Here, however, the issue is whether a state statute violates the Federal Equal Protection Clause on its face, which is

an important matter of constitutional law, and a matter of "intense public concern." *See Connerly*, 92 Cal. App. 4th at 29 ("Statutorily enacted affirmative action programs are matters of intense public concern.").

The State Auditor claims that Connerly's Federal Equal Protection Clause theory should be waived because it was not raised earlier. State Auditor's Opp. at 14. It is not black letter law that appellate courts refrain from deciding constitutional issues for the first time on appeal. As *Connerly* has shown, *supra*, claims involving an important issue of constitutional law or a substantial right are "typically" engaged by appellate courts for the first time on appeal when they involve questions of law on undisputed facts. *Pres. Shorecliff Homeowners*, 158 Cal. App. 4th at 1433.

The cases cited by the State Auditor concern scenarios where Appellants' constitutional challenges were raised for the first time on appeal and were entirely unrelated to the causes of action in their complaints. But Connerly has always challenged the constitutionality of Section 8252(g), whether through a facial challenge under the California Constitution in the court below, or through a facial challenge under the federal Constitution here on appeal. J.A. 23, 27, 28, 30, 33, 34 (Connerly's Complaint alleging Section 8252(g)'s discriminatory selection scheme). The State Auditor primarily relies upon *Hershey v. Reclamation Dist. No. 108*, 200 Cal. 550, 564 (1927). But in *Hershey*, the court rejected appellants' constitutional challenge because appellants failed to avail themselves of the remedies provided by the

challenged statute. *See id.* ("And where parties have failed to invoke a remedy provided by statute they are in no position thereafter to assert rights which could have been secured by that remedy, by endeavoring to invoke the aid of the Constitution.") *Hershey* does not apply to cases where the constitutionality of a statute has been the central issue all along, and the appellant has merely changed his legal theory. *See Hoffman-Haag v. Transamerica Ins. Co.*, 1 Cal. App. 4th 10, 15-16 (1991) (on appeal a party may change the legal theory, so long as the new theory presents a question of law to be applied to undisputed facts); *see also Alviso v. Sonoma Cnty. Sheriff's Dep't*, 186 Cal. App. 4th 198, 204 (2010) (Whether a statute is challenged facially or as applied, when the facts are not disputed, the determination of its constitutionality is a question of law); *Samples v. Brown*, 146 Cal. App. 4th 787, 799 (2007) (interpretation of a statute and the determination of its constitutionality are questions of law); *Valov v. Dep't of Motor Vehicles*, 132 Cal. App. 4th 1113, 1120 (2005) (same).

The State Auditor's reliance on *Fourth La Costa Condo. Owners Ass'n v. Seith*, 159 Cal. App. 4th 563 (2008), is similarly unavailing. State Auditor's Opp. at 14. In that case, the appellant argued for the first time on appeal that a statute violated his procedural due process and equal protection rights. 159 Cal. App. 4th at 585. *Fourth La Costa* merely stands for the general proposition that constitutional issues not raised in earlier civil proceedings are waived. *Id.* Here, as noted above, Connerly has always asserted that Section 8252(g) is unconstitutional on its face. J.A. 23, 27, 28, 30, 33, 34

(Connerly's Complaint alleging Section 8252(g)'s discriminatory selection scheme). Moreover, appellate courts do consider issues raised for the first time on appeal when those issues involve a pure question of law presented by undisputed facts. *Hines*, 15 Cal. 4th at 1061 (citing *Hale*, 22 Cal. 3d at 394); *see also Oakland Mun. Improvement League v. City of Oakland*, 23 Cal. App. 3d 165, 171 (1972) (deciding equal protection violation raised for the first time on appeal).

Without citing any cases, the State Auditor claims it would be unfair for this Court to rule on Connerly's equal protection theory because it does not know the "exact scope" of this claim or the "specific relief" Connerly seeks. State Auditor's Opp. at 15. The State Auditor attempts to portray Connerly's equal protection arguments as being completely foreign and unrelated to Connerly's allegations that Section 8252(g) sets out a discriminatory Commissioner selection process in violation of Article I, Section 31, of the California Constitution. That is false. First, Connerly has always asserted that Section 8252(g) is unconstitutional, because "[d]uring the selection of the final six Commission members Government Code Section 8252(g) requires the first eight Commission members to discriminate against some applicants and grant preferential treatment to other applicants on the basis of race, ethnicity, and sex." J.A. 28:7-9 (First Amended Complaint). Thus, the principles of equal protection have at all times been prominent in this case. *See Connerly*, 92 Cal. App. 4th at 42 (Article I, Section 31, of the California Constitution "overlaps"

with "the principles of equal protection."). Second, the relief Connerly seeks in his First Amended Complaint and Petition for Writ of Mandate is the remedy for a finding that Section 8252(g) is unconstitutional: declaratory and injunctive relief, and issuance of a writ of mandate. J.A. 35-37 (Prayer for Relief).

The State claims that this Court's consideration of the equal protection theory would be unfair. State's Opp. at 8. But the cases cited by the State mention the rule that an opposing party should not be required to defend against a new theory for the first time on appeal, but then apply the rule that new legal arguments applied to undisputed facts can be raised for the first time on appeal. *See C9 Ventures v. SVC-W., L.P.*, 202 Cal. App. 4th 1483, 1492 (2012) (explaining how new legal theory could be raised on appeal); *Ward v. Taggart*, 51 Cal. 2d 736, 742 (1959) (same). On appeal, Connerly may raise a new issue of law based on undisputed facts, *Phillips v. TLC Plumbing, Inc.*, 172 Cal. App. 4th 1133, 1141 (2009), and may even "change the legal theory he relied upon at trial, so long as the new theory presents a question of law to be applied to undisputed facts in the record." *C9 Ventures*, 202 Cal. App. 4th at 1492; *Hoffman-Haag*, 1 Cal. App. 4th at 15.

Here, the trial court noted that the facts were not in dispute. J.A. 196. Additionally, Respondents do not dispute that Section 8252(g) creates classifications based on race and sex. State's Opp. at 5 ("final six commissioners may be selected to reflect California's racial, ethnic,

geographic, and gender diversity"); State Auditor's Opp. at 24 (Section 8252(g) "calls for race and gender to be considered as a single factor in the selection of the final sex members of the Commission"). Nor have they disputed the fact that the requirements of Section 8252(g) are unlimited in time; and that the State has never attempted to create a Citizen's Redistricting Commission using only race- and sex-neutral means. The Court can determine, as a matter of a law, that Section 8252(g) fails the narrow tailoring prong of strict scrutiny and is therefore unconstitutional based on undisputed facts.

D. A Statute Violates Equal Protection Even If It Does Not Confer a Preference

The State Auditor claims that Section 8252(g)'s racial classifications should evade review because that section "does not require the preferential treatment of, or discrimination against any particular group." State Auditor's Opp. at 24. The State Auditor is wrong. First, the State Auditor argues that Section 8252(g) suggests only that the first eight Commissioners "should" consider as one factor, whether the final six applicants will reflect this state's racial, ethnic, and gender diversity. *Id.* at 24-25. But the language of the statute is mandatory, not permissive. Section 8252(g) provides that the final six Commissioners "*shall* be chosen to ensure the commission reflects this states's diversity, . . . including racial, ethnic, . . . and gender diversity." Connerly's Opening Brf. at 5 (emphasis added); State's Opp. at 4 (same); State

Auditor's Opp. at 7 (same). The first eight Commissioners *must* consider the race and sex of the final six applicants.

Second, it is well settled that even the "establishment of goals and timetables to overcome identified underutilization of minorities" violates principles of equal protection. *Connerly*, 92 Cal. App. 4th at 55; *see Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 710 (9th Cir. 1997) (non-rigid system of goals and good faith efforts is treated as a racial classification under the Equal Protection Clause). As the California Supreme Court noted, a participation goal differs from a quota or set-aside only in degree; by whatever label, it remains "a line drawn on the basis of race and ethnic status" as well as sex. *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537, 563 (2000) (citing *Bakke*, 438 U.S. at 289).

Third, even if Section 8252(g) does not grant racial preferences to assure diversity, it is still presumptively invalid. *See Connerly*, 92 Cal. App. 4th at 44 ("We do not agree that a law must confer a preference before strict scrutiny applies."). The United States Supreme Court has made that point numerous times. The ultimate goal of the Equal Protection Clause is the complete elimination of irrelevant factors such as race from governmental decision-making. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 495 (1989) (plurality opinion). "Regardless of the burdens or benefits imposed by or granted under a particular law, the use of a racial classification presents significant dangers to individuals, racial groups, and society at large."

Connerly, 92 Cal. App. 4th at 45 (citing *Croson*, 488 U.S. at 493-94); *see Shaw*, 509 U.S. at 657 ("Racial classifications of any sort pose the risk of lasting harm to our society."). The risk that the racial classifications in Section 8252(g) will pose lasting harm to California society is real, given that its use of race has no termination date. Connerly's Opening Brf. at 26-27.

III

IF THE COURT DECLINES TO DECIDE THE MERITS OF CONNERLY'S EQUAL PROTECTION CLAIM, CONNERLY SHOULD BE ALLOWED TO AMEND

Connerly set forth with particularity facts in the Complaint giving rise to an Equal Protection Clause cause of action. Connerly's Opening Brf. at 35-36. Respondents fail to address Connerly's arguments that the facts in the Complaint support such a cause of action in their Opposition Briefs. Instead, they argue that Connerly should not be granted leave to amend his Complaint because facial challenges may be more difficult to prove than as-applied challenges. *See* State's Opp. at 13 (discussing plaintiff's burden for proving a facial challenge); State Auditor's Opp. at 22 (same). The fact that a facial challenge may be difficult to prove on the merits has nothing to do with the burden for establishing that the trial court abused its discretion when it denied leave to amend the Complaint.

The California Supreme Court holds that when a demurrer is sustained without leave to amend, appellate courts only determine whether there is a

"reasonable possibility" that the defect can be cured by amendment. If amendment is "possible," the trial court has abused its discretion and its ruling is reversed. *Blank v. Kirwan*, 39 Cal. 3d 311, 318 (1985). Appellate courts are not limited to plaintiffs' theory of recovery in testing the sufficiency of their complaint against a demurrer, but instead must determine if the factual allegations of the complaint are adequate to state a cause of action under *any* legal theory. *Id.*; *Quelimane Co., Inc. v. Stewart Title Guar. Co.*, 19 Cal. 4th 26, 38 (1998). Connerly's burden is to establish that there is a reasonable possibility that the Complaint can be amended to cure its defects. *Careau & Co.*, 222 Cal. App. 3d at 1386.

In general, great liberality should be exercised in permitting the plaintiff to amend the complaint. *See* Code of Civ. Proc. § 452 ("In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties."). Thus, it is an abuse of discretion to sustain a demurrer without leave to amend if there is a reasonable possibility that the defect can be cured by amendment. *California War Veterans for Justice v. Hayden*, 176 Cal. App. 3d 982, 985 (1986).

The trial court abused its discretion in denying Connerly leave to amend the Complaint. J.A. 195 (court concluding Complaint cannot be amended to state a cause of action). The State misleads the Court by claiming that a trial court does not abuse its discretion when it denies leave to amend simply

because it believed that plaintiffs did not wish to change theories. State's Opp. at 11. This argument conflicts with Code of Civ. Proc. § 472c(a), which states that, the question of an abuse of discretion is open on appeal when a court sustains a demurrer without leave to amend. This is true even if plaintiffs did not request to amend the complaint. *Id.* The appellate court "decide[s] whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion." *Camsi IV v. Hunter Tech. Corp.*, 230 Cal. App. 3d 1525, 1538-39 (1991).

The State's reliance on *Camsi IV* is misplaced. State's Opp. at 11. In *Camsi IV*, the plaintiff alleged causes of action based on negligence and strict liability, but not nuisance or continuing trespass. 230 Cal. App. 3d at 1541. The trial court sustained defendant's demurrer to the second amended complaint without leave to amend. *Id.* at 1529. On appeal during oral argument, the court of appeal specifically asked plaintiff's counsel if he wanted to amend his complaint, but he declined. *See id.* at 1539 ("In the course of oral argument we also asked counsel whether CAMSI IV had intended to plead a theory of *nuisance* . . . ; counsel indicated that CAMSI IV had not pursued and would not pursue a nuisance theory."). It was only in a petition for rehearing to the court of appeal that plaintiff's counsel sought leave to amend the complaint to add new theories. *Id.* at 1541 ("By petition for rehearing CAMSI IV asserts for the first time that the trial court abused its discretion by failing to grant it leave to amend to plead theories of continuing

nuisance and continuing trespass . . . ."). Naturally, the court of appeal rejected this request. In contrast, Connerly has been clear that he does seek leave to amend his complaint should this Court decide not to rule on his equal protection argument. Connerly's Opening Brf. at 33-34.

The State Auditor goes further by asking this Court to ignore 53 years of case law and return to an arcane rule of pleadings that was overruled in *Austin v. Mass. Bonding & Ins. Co.*, 56 Cal. 2d 596, 600-01 (1961). Relying on *Taliaferro v. Indus. Indem. Co.*, 131 Cal. App. 2d 120, 123 (1955), the State Auditor urges this Court to adopt an abandoned practice which forbade plaintiffs from amending complaints to add new causes of action. State Auditor's Opp. at 21. As the California Supreme Court explained in *Austin*, "[s]ome early cases held that an amendment stating any new cause of action could not relate back and that a plaintiff could not amend so as to change the legal theory of his action." *Austin*, 56 Cal. 2d at 600. But under the modern rule of pleading, an added cause of action is not regarded as "different" where the amendment does "not essentially change the factual situation upon which recovery was predicated." *Id.* at 601; *see* 5 Witkin, *Cal. Proc.* (5th ed. 2008) Plead, § 1235, at 672-75 (discussing evolution of the modern approach to fact pleading). Under the modern rule, "it is the sameness of the facts rather than the rights or obligations arising from those facts that is determinative." *Lamont v. Wolfe*, 142 Cal. App. 3d 375, 378 (1983). Connerly demonstrated in his Opening Brief that the same facts and allegations giving rise to a

violation of Article I, Section 31, of the California Constitution also support a Federal Equal Protection Clause cause of action. Connerly's Opening Brf. at 35-36.

If Respondents' view became law, and plaintiffs must prove there is a substantial likelihood of success on the merits of the case in order to survive a demurrer, then few complaints could ever be amended. That is why courts construe a challenged complaint liberally, giving it a reasonable interpretation, reading it as a whole, and viewing its parts in context. *Blank*, 39 Cal. 3d at 318. Respondents' proposed harsh standard sharply conflicts with the "flexible approach" taken by courts in examining the facts alleged in a complaint to determine if a demurrer should be sustained, *Quelimane Co.*, 19 Cal. 4th at 39.

Accordingly, in the event this Court declines to resolve the constitutionality of Section 8252(g), Connerly's request for leave to amend his Complaint to allege a Federal Equal Protection Clause cause of action should be granted.

CONCLUSION

Based on the foregoing, and the arguments made in Appellants' Opening Brief, Appellants respectfully ask this Court to 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. In the alternative, 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: January 7, 2014.

Respectfully submitted,

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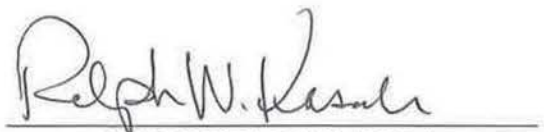
CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing APPELLANTS' REPLY BRIEF is proportionately spaced, has a typeface of 13 points or more, and contains 7,206 words.

DATED: January 7, 2014.



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 January 7, 2014, true copies of APPELLANTS' REPLY BRIEF were placed in envelopes addressed to:

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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 January 7, 2014, a true copy of APPELLANTS' REPLY BRIEF was sent electronically to:

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 7th day of January, 2013, at Sacramento, California.

Barbara A. Siebert
BARBARA A. SIEBERT