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

Case No. C073753

WARD CONNERLY, et al.,

Plaintiffs and Appellants,

v.

STATE OF CALIFORNIA, et. al.,

Defendants and Respondents.

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

[PROPOSED] AMICUS CURIAE BRIEF OF CALIFORNIA COMMON CAUSE, LEAGUE OF WOMEN VOTERS OF CALIFORNIA, AND CALIFORNIA NAACP IN SUPPORT OF RESPONDENTS

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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, 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*): CA Common Cause, LWV of CA, CA NAACP

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

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

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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: January 21, 2014

Soraya C. Kelly
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF PARTY OR ATTORNEY)

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[PROPOSED] AMICUS CURIAE BRIEF OF CALIFORNIA COMMON CAUSE, LEAGUE OF WOMEN VOTERS OF CALIFORNIA, AND CALIFORNIA NAACP

I. INTRODUCTION

Appellants Ward Connerly and American Civil Rights Foundation ask this Court to do something extraordinary and improper—to consider on appeal federal constitutional causes of action that they never asserted in their complaint or otherwise argued or even mentioned in the trial court. This Court should refuse to do so and should affirm the judgment below.

In the trial court, Appellants asserted state law claims alleging that one component of the California Citizens Redistricting Commission's process for appointing commissioners is invalid under the California Constitution. On appeal, however, Appellants have completely abandoned their state law claims and ask the Court instead to decide the merits of entirely new causes of action under the United States Constitution. At no previous time in this litigation—not in their initial complaint, their amended complaint, or their papers and arguments opposing Respondents' demurrers—did Appellants suggest that they had or would seek to assert federal constitutional claims. Amici curiae submit that Appellants' request that this Court consider the merits of such federal constitutional claims for the first time on appeal should be denied for two reasons in addition to those set forth by Respondents in their briefs.

First, a party may not raise a new cause of action for the first time on appeal. State and federal courts of appeal consistently decline to consider claims that are newly asserted on appeal and deem such claims to be waived or abandoned. Appellants' contention that an appellate court may sometimes consider new *arguments* on appeal is inapposite. None of the

cases Appellants cite involves the assertion of a *new cause of action* on appeal, as they attempt to do here; rather, they concern the raising of a *new argument* in support of (or in opposition to) an *existing cause of action* that was timely asserted in the trial court.

Second, the consideration by a state appellate court of a federal cause of action asserted for the first time on appeal would improperly deprive a defendant of the right to remove that claim to federal court. Courts are careful to prevent a plaintiff from frustrating a defendant's right to remove through such tactical gamesmanship.

For these reasons, Amici respectfully request that the Court deny Appellants' request to have the merits of their new federal causes of action decided for the first time on appeal and affirm the judgment of the trial court.

II. LEGAL ARGUMENT

A. Appellants Cannot Assert A New Federal Cause Of Action For The First Time On Appeal

Having had their state constitutional law causes of action dismissed on demurrer in the court below, Appellants take the unusual step of abandoning those claims on appeal and now asserting—for the first time—new federal causes of action under the Equal Protection Clause. This Court should decline to consider Appellants' new federal causes of action and should affirm the judgment of the trial court because the courts of appeal should not review new causes of action that were not asserted in a complaint or otherwise raised in the trial court. The authorities relied on by Appellants—which provide only that appellate courts may consider new

arguments made in support of (or in opposition to) *previously asserted claims*—are not to the contrary.

1. Federal and State Courts of Appeal Decline To Review New Causes Of Action Raised For The First Time On Appeal

"It is well settled that a new cause of action cannot be introduced for the first time on appeal." (*Le Sawyer v. Squillace* (1961) 221 N.Y.S.2d 455, 457.) California appellate courts have repeatedly held that an appellant may not pursue on appeal new causes of action that were not presented to the trial court. (*Ginsberg v. Gamson* (2012) 205 Cal. App. 4th 873, 902 [holding that appellant could not raise a wrongful eviction cause of action for the first time on appeal]; *Beroiz v. Wahl* (2000) 84 Cal. App. 4th 485, 498 fn. 9 [rejecting appellant's argument that the defamation claim it asserted below should be considered on appeal as a new cause of action for malicious prosecution]; *U.S. Golf Ass'n v. Arroyo Software Corp.* (1999) 69 Cal. App. 4th 607, 623 [rejecting appellant's attempt to introduce new federal antitrust causes of action on appeal as "patently frivolous"].) Federal and other state appellate courts also have consistently declined to consider on appeal new causes of action that were not asserted in the trial courts. (See, e.g., *In re Reliant Energy Channelview LP* (3d Cir. 2010) 594 F.3d 200, 209, citing *Yee v. City of Escondido* (1992) 503 U.S. 519, 533-534; *McKinney v. Lockyer* (9th Cir. 2003) 65 Fed. Appx. 613, 615; *Prater v. City of Kent* (1985) 40 Wash. App. 639, 642.)

U.S. Golf Association v. Arroyo Software Corporation is squarely on point. In that case, the defendant had filed a cross-complaint in the trial court asserting three California state law causes of action for unfair competition, violation of the Cartwright Act, and tortious interference with

economic advantage. (69 Cal. App. 4th at p. 623.) The trial court dismissed all three claims on summary judgment. (*Id.*) On appeal, the defendant abandoned its state law causes of action and instead challenged the trial court's summary judgment ruling by attempting to assert a new cause of action under the federal antitrust laws. (*Id.*) The Court of Appeal rejected that attempt, noting that the defendant's "amended cross-complaint did not include any claim under the Sherman Act or federal antitrust law," and explaining that "[o]bviously, the [defendant] cannot challenge a judgment on the basis of a new cause of action it did not advance below." (*Id.*)

Similarly, in *In re Reliant Energy Channelview LP*, the United States Court of Appeals for the Third Circuit refused to consider a new equitable cause of action raised by the plaintiff for the first time on appeal. (594 F.3d at p. 209.) In that case, the plaintiff had asserted, litigated, and lost a statutory claim in the district court. (See *id.* at pp. 202, 205, 209.) On appeal, the plaintiff sought to assert a new unjust enrichment claim seeking the same relief as under its statutory claim. (See *id.* at p. 209.) In declining to consider the new equitable claim, the Third Circuit rejected the plaintiff's argument "that it [was] simply asserting a different basis for the same claim"—which appellate courts are permitted to review—and concluded that the statutory and equitable causes of action were discrete and separate causes of action, "rather than being different arguments advancing the same claim." (*Id.*) The Third Circuit thus recognized the well-established distinction between an appellate court's discretion to consider new arguments made in support of a previously asserted claim and the court's inability to consider newly asserted causes of action. (*Id.*, citing to *Yee*, supra, 503 U.S. at pp. 533-534 [refusing to consider a due process

claim not raised in the state trial or appellate courts, but noting that the Court had the discretion to consider a new argument raised on appeal in support of a previously-asserted regulatory taking claim]; see also *Pugliese v. Pukka Development, Inc.* (11th Cir. 2008) 550 F.3d 1299, 1304 fn. 3 ["Although new claims or issues may not be raised, new arguments relating to preserved claims may be reviewed on appeal."].)

Other state appellate courts that have been asked to consider a new cause of action on appeal have similarly refused. In *Taylor v. First Jersey Securities, Inc.*, the Louisiana Court of Appeal—reviewing an appeal from an order granting a motion to dismiss—held that appellants were prohibited from asserting on appeal a statutory cause of action for fraud that had not been raised first in the trial court. ((La. App. 4th Cir. 1986) 533 So.2d 1383, 1388 [citing cases].) Similarly, in *Ahmed v. Wise, M.D.*, the Ohio Court of Appeals refused to address appellants' newly asserted cause of action for breach of fiduciary duty, "[b]ecause this constitutes not only a new argument being raised on appeal for the first time, but appears to be an attempt to raise a new claim for the first time on appeal." ((Ohio App. 10th Dist., May 30, 2013, No. 12AP-613) 2013 WL 2444109, at *6 [citing cases]; see also *Trotter v. State Farm Mut. Auto Ins. Co.* (S.C. App. 1988) 297 S.C. 465, 477 [per curiam] [confining review to cause of action alleged in appellant's complaint, and declining to consider "new and different causes of action [argued] for the first time on appeal"].)

The rule prohibiting appellants from asserting new causes of action on appeal applies equally to constitutional claims as to statutory and common law claims: "New causes of action based on constitutional claims may not . . . be raised for the first time on appeal." (*Prater*, supra, 40 Wash. App. at p. 642; see also *Smith v. Cummings* (10th Cir. 2006) 445

F.3d 1254, 1258 [declining to consider for the first time on appeal a new Eighth Amendment claim not asserted in the district court]; *McKinney*, supra, 65 Fed. Appx. at p. 615 [declining to consider Sixth and Eighth Amendment claims advanced for the first time on appeal]; *Crawford v. Lungren* (9th Cir. 1996) 96 F.3d 380, 389 fn. 6 [refusing to consider new equal protection and due process claims presented for the first time on appeal].)

The Washington court of appeals' discussion of the issue in *Prater v. City of Kent* is instructive. In *Prater*, the plaintiff sought to argue on appeal that she was fired in retaliation for complaining about sex discrimination. (See *Prater*, supra, 40 Wash. App. at p. 642.) But the only retaliatory discharge claim the plaintiff had asserted in the trial court was that she had been fired for complaining about unsafe working conditions in violation of Washington's industrial health and safety statute. (See *id.*) The court of appeals declined to consider the plaintiff's new cause of action on appeal, reasoning that the new discrimination-based retaliatory discharge claim—which had constitutional dimensions—was a separate cause of action from the statutory retaliatory discharge cause of action that had been pleaded below. (See *id.* ["Having failed to raise this claim below, [appellant] may not now argue it on review"].)

These authorities demonstrate that Appellants may not assert their federal constitutional causes of action for the first time on appeal and after having deliberately decided to forego such claims in the trial court. Appellants are experienced constitutional law litigants who could have asserted their federal equal protection claims at various points in the trial court—in their initial complaint, their amended complaint filed nearly six months later, or their papers and arguments in opposition to Respondents'

demurrers. They chose not to do so. "The district court is not merely a way station through which parties pass by arguing one issue while holding a host of others for appeal." (*Crawford*, supra, 96 F.3d at 386 fn. 6.) Accordingly, this Court should decline to consider Appellants' belatedly asserted federal causes of action.

2. The Authorities Cited By Appellants Do Not Authorize Appellate Courts To Decide New Causes of Action Raised For The First Time On Appeal

Appellants contend that, because appellate courts sometimes have the discretion to consider new issues or arguments made for the first time on appeal, the Court should consider Appellants' new federal causes of action in this appeal. Not so. As discussed in Section II.A.1, *supra*, appellate courts have the discretion to consider only new legal arguments made in support of (or in opposition to) *previously asserted* claims, but not to consider new causes of action that were not asserted in the trial courts. None of the authorities Appellants cite in its opening or reply papers is to the contrary.

In most of the cases that Appellants cite, the appellate courts merely considered new defensive arguments raised by the defendant for the first time on appeal. (See *C9 Ventures v. SVC-W, L.P.* (2012) 202 Cal. App. 4th 1483, 1491-1492 [considering on appeal new defensive argument raised by cross-defendant, where facts were not in dispute]; *Fort Bragg Unified Sch. Dist. v. Solano Cnty. Roofing, Inc.* (2011) 194 Cal. App. 4th 891, 907 [holding that "new theories of defense" may be raised on appeal if they involve a pure question of law based on undisputed facts]; *Collins v. State Dep't of Transp.* (2003) 114 Cal. App. 4th 859, 864-865 [considering on appeal defendant's new argument that trial court misinterpreted sanctions

statute by making an award of attorneys' fees in granting plaintiff's request for sanctions]; *Bayside Timber Co., Inc. v. Bd. of Supervisors* (1971) 20 Cal. App. 3d 1, 5-6 [considering defendant municipality's new challenge to constitutionality of state forestry statute, which the trial court ruled preempted the defendant's power to regulate forestry permits].) None of these cases involved the consideration of a new cause of action asserted for the first time on appeal.

For example, Appellants erroneously rely on *Preserve Shorecliff Homeowners v. City of San Clemente* (2008) 158 Cal. App. 4th 1427, 1432-1433, to suggest that the appellate courts may consider new constitutional causes of action raised for the first time on appeal. See Appellants' Reply Br. at p. 16. But that is not what that case held. In *Preserve Shorecliff*, the defendants sought to subject a city ordinance to a referendum, and the plaintiffs sought a writ directing the city clerk to certify the referendum as insufficient. The trial court denied the writ, concluding that although the referendum process at issue violated a provision of the Elections Code, the referendum petition could not be disqualified if the signatures were genuine. (*Id.* at p. 1432.) The plaintiffs appealed, arguing that the trial court's ruling in effect voided the relevant provision of the Elections Code. (*Id.* at p. 1433.) On appeal, defendants argued for the first time that the provision at issue was unconstitutional, and the appellate court exercised its discretion to consider that new defensive argument, because it involved a pure question of law. (*Id.*) *Preserve Shorecliff* thus stands only for the proposition that an appellate court may review a new argument that the statute under which the plaintiff has sued is unconstitutional. The case does not authorize appellate courts to consider new *affirmative* constitutional causes of action that could have been but were not asserted in the trial

courts. (See *Santisas v. Goodwin* (1998) 17 Cal. 4th 599, 620 [a court decision is not authority for issues not presented therein but only "'for the points actually involved and actually decided'"] [citations omitted].)

Appellants also rely on several cases in which appellate courts considered newly asserted constitutional arguments brought by criminal defendants challenging their convictions or the application of penal statutes. (See *People v. Hines* (1997) 15 Cal. 4th 997, 1059-1061 [considering death row inmate's new constitutional challenge to application of an obstruction-of-justice statute that was used to introduce evidence of aggravating circumstances]; *People v. Blanco* (1992) 10 Cal. App. 4th 1167, 1173 [considering inmate's new constitutional challenge to a recently amended Evidence Code provision under which evidence of defendant's propensity for violence had been admitted]; *Hale v. Morgan* (1978) 22 Cal. 3d 388, 394-395 [considering defendant's constitutional challenge to statute applied by trial court to impose penalties on defendant]; see also *In re Sheena K* (2007) 40 Cal. 4th 875, 887 fn. 7 [considering juvenile defendant's new vagueness and overbreadth challenges to a probation condition].) These authorities are limited to the criminal or penal context and have no bearing on the consideration of new civil causes of action asserted on appeal. Indeed, in *Blanco*, the Court of Appeal specifically explained that consideration of constitutional questions for the first time on appeal was appropriate "when the enforcement of a penal statute is involved" and that it was agreeing to review the defendant's newly asserted constitutional challenge "in order to avoid a subsequent habeas corpus proceeding raising the same point." (*Blanco*, supra, 10 Cal. App. 4th at p. 1173; see also *Hale*, supra, 22 Cal. 3d at pp. 394-395 [explaining that appellate courts have examined newly asserted constitutional arguments "when the enforcement

of a penal statute is involved"].) Here, Appellants are not challenging a criminal or penal statute, and their reliance on these authorities is therefore misplaced.

Appellants cite only two cases in which the new arguments considered on appeal were raised by plaintiffs. In those cases, however, the new arguments did not constitute new causes of action but only new theories to support the plaintiffs' claims for damages on causes of action that had been asserted in the trial courts. (See *Francies v. Kapla* (2005) 127 Cal. App. 4th 1381 [involving new arguments by plaintiff regarding the calculation of damages awarded in his favor on a claim litigated at trial]; *Ward v. Taggart* (1959) 51 Cal. 2d 736 [involving the assertion by plaintiff of a new theory of recovery to support damages awarded to him at trial on his fraud claim].)

None of the authorities Appellants cite contradict the well settled rule, in California and elsewhere, that appellate courts should not consider causes of action asserted for the first time on appeal. Appellants' cases stand only for the much narrower proposition that, in certain limited circumstances, an appellate court may consider a *new argument* made on appeal in support of (or in opposition to) an *existing claim* that was timely asserted in the trial court, a proposition which is inapposite here.

B. Consideration Of A Federal Cause of Action Asserted For The First Time On Appeal Would Improperly Deprive A Defendant Of The Right To Remove The Case To Federal Court

The Court should decline to consider Appellants' equal protection causes of action for the additional reason that to do so would deprive Respondents of their right to remove an action involving federal claims to

federal court. Federal courts have original jurisdiction over federal question claims—such as the federal constitutional claims Appellants have asserted on appeal—and, although a plaintiff may bring some such claims in state court, the defendant has the right to remove an action raising such claims to federal court. (28 U.S.C. § 1331; see Cal. Civ. Proc. Before Trial, Ch. 3-E ¶ 3:622 (The Rutter Group) ["As a practical matter, federal claims usually end up in federal court. If filed in state court, defendants have the right to remove to federal court [ ] and usually do."].) Courts are vigilant in preventing plaintiffs from depriving defendants of their removal rights through artful pleading or tactical gamesmanship. Indeed, the United States Supreme Court long ago counseled that courts "may and should take such action as will defeat attempts to wrongfully deprive parties entitled to sue in the Federal courts of the protection of their rights in those tribunals." (*Alabama Great S. Ry. Co. v. Thompson* (1906) 200 U.S. 206, 218; see *Home Ins. Co. of New York v. Morse* (1874) 87 U.S. 445, 451 [overruling state law that limited removal of actions to federal court and declaring that "[e]very citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him"].)

In general, the "[p]laintiff is the master of the claim, and if he or she chooses not to assert a federal claim, though one is available, defendant cannot remove on the basis of a federal question." (See Wright & Miller (2013) 20 Fed. Prac. & Proc. Deskbook, Ch. 6 § 40.) However, "a plaintiff cannot disguise a federal cause of action, and thereby frustrate a defendant's right of removal, by 'artfully pleading' her case to avoid any reference to federal law." (*Alshrafi v. American Airlines, Inc.* (D. Mass. 2004) 321 F. Supp. 2d 150, 155; see *Franchise Tax Bd. v. State of Cal.*

Constr. Laborers Vacation Trust for S. Cal. (1983) 463 U.S. 1, 22 [holding that a plaintiff cannot avoid removal to federal court "by omitting to plead necessary federal questions in a complaint"]; *Federated Dep't Stores v. Moitie* (1981) 452 U.S. 394, 397 fn. 2 [noting that courts "will not permit plaintiff to use artful pleading to close off defendant's right to a federal forum"].) That is what Appellants seek to do here. In the trial court, they advanced only state law causes of action and deliberately chose not to assert any federal causes of action, thereby depriving Respondents of the opportunity to remove this action to federal court. Only on appeal—now that their state law claims have been dismissed—have Appellants asserted their federal causes of action, suggesting that their delay in raising these claims is excused because the facts alleged below "support" these new causes of action. See Appellants' Opening Br. at pp. 33, 35; Appellants' Reply Br. at p. 25. Such tactical gamesmanship should not be countenanced. (See *In re Yasmin and Yaz (Drospirenone) Marketing, Sales Practices and Products Liability Litig.* (S.D. Ill. 2011) 779 F. Supp. 2d 846, 856 [noting that "tactical gamesmanship" to defeat removal rights "is troubling" and concluding that the plaintiff's "structural maneuvering wrongfully blocks defendants' access to federal courts"].)

Consideration by this Court of Appellants' newly asserted federal causes of action on appeal would have far greater implications than merely for Respondents' right to remove this particular case. If the Court considered the merits of Appellants' new federal constitutional causes of action, it would set a precedent for plaintiffs in the future to hold back their federal claims in the trial courts, only to assert those claims on appeal, thereby frustrating the defendants' removal rights. This Court should decline to consider the merits of Appellants' new federal causes of action.

III. CONCLUSION

For the foregoing reasons, Amici respectfully request that the Court deny Appellants' request to have the merits of their new federal causes of action decided for the first time on appeal and affirm the judgment of the trial court.

DATED: January 21, 2014

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, I hereby certify that the foregoing ***[Proposed] Amicus Curiae Brief of California Common Cause, League of Women Voters of California, and California NAACP*** is proportionately spaced, uses a 13-point Times New Roman font, and contains 3,641 words.

DATED: January 21, 2014

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CERTIFICATE OF SERVICE

I, Anna Velasquez, declare that I am employed with Munger, Tolles & Olson, LLP, whose address is 355 S. Grand Avenue, 35th Floor, Los Angeles, CA 90071. I am over the age of eighteen years and am not a party to this action. I hereby certify that on January 21, 2014, I filed via Federal Express, the attached:

APPLICATION OF CALIFORNIA COMMON CAUSE, LEAGUE OF WOMEN VOTERS OF CALIFORNIA, AND CALIFORNIA NAACP FOR PERMISSION TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENCTS

[PROPOSED] AMICUS CURIAE BRIEF OF CALIFORNIA COMMON CAUSE, LEAGUE OF WOMEN VOTERS OF CALIFORNIA, AND CALIFORNIA NAACP IN SUPORT OF RESPONDENTS

in this action with the Clerk of the Court of Appeal of the State of California Third Appellate District.

I also sent true and correct copies of the aforementioned documents in sealed envelopes with the postage fully prepaid, for collection and mailing through the United States Postal Service, following ordinary business practices, to:

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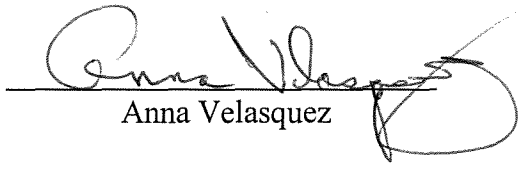
I declare under penalty of perjury that the above is true and correct.



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