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SUPERIOR COURT
OF CALIFORNIA
SACRAMENTO COUNTY

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11 WARD CONNERLY, a citizen and taxpayer, and)
AMERICAN CIVIL RIGHTS FOUNDATION,)
12 a nonprofit public benefit corporation,)
13 Plaintiffs and Petitioners,)
14 v.)
15 STATE OF CALIFORNIA, ELAINE M. HOWLE,)
in her official capacity as the STATE AUDITOR OF)
16 CALIFORNIA, and the CALIFORNIA CITIZENS)
REDISTRICTING COMMISSION,)
17 Defendants and Respondents.)

No. 34-2011-80000966-CU-WM-GDS
**PLAINTIFFS' AND
PETITIONERS' NOTICE OF
DEMURRER AND DEMURRER
TO DEFENDANT AND
RESPONDENT STATE AUDITOR'S
ANSWER TO SECOND AMENDED
VERIFIED PETITION FOR WRIT
OF MANDATE AND COMPLAINT,
AND SUPPORTING MEMORANDUM
OF POINTS AND AUTHORITIES**

Date: July 10, 2015
Time: 9:00 a.m.
Place: Department 31
Judge: The Hon. Michael Kenny

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NOTICE OF DEMURRER

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on July 10, 2015, at 9:00 a.m., in Department 31 of the above-entitled Court located at 720 Ninth Street, Sacramento, California 95814, Plaintiffs and Petitioners Ward Connerly and American Civil Rights Foundation (Plaintiffs or Petitioners), will demur to all of the Affirmative Defenses alleged in Defendant and Respondent State Auditor's (State Auditor) Answer (Answer) to Plaintiffs' and Petitioners' Second Amended Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief (SAC) on the following grounds:

Pursuant to California Code of Civil Procedure section 430.20(a), each and every one of the Affirmative Defenses of the Answer demurred fails to state facts sufficient to constitute a defense. Plaintiffs also demur to Defendant's purported Sixth Affirmative Defense on the ground that it is uncertain. Code of Civ. Proc. § 430.20(b).

These demurrers are based upon this Notice of Demurrer, on the accompanying Demurrer to the Answer, on the Memorandum of Points and Authorities attached hereto, on the pleadings and records on file herein, and on such further oral or documentary evidence or argument as may be presented at the hearing.

Pursuant to Local Rule 1.06(A), the court will make a tentative ruling on the merits of this matter by 2:00 p.m., the court day before the hearing. The complete text of the tentative rulings for the department may be downloaded off the court's website. If the party does not have online access, they may call the dedicated phone number for the department as referenced in the local telephone directory between the hours of 2:00 p.m. and 4:00 p.m. on the court day before the hearing and receive the tentative ruling. If you do not call the court and the opposing party by 4:00 p.m. the court day before the hearing, no hearing will be held.

DEMURRERS

Plaintiffs will and do demur to each and every one of the Affirmative Defenses in the State Auditor's Answer to Plaintiffs' SAC as follows:

///

1 **DEMURRER TO THE FIRST AFFIRMATIVE DEFENSE**

2 1. Plaintiffs demur to this purported affirmative defense on the ground that it fails to
3 state facts sufficient to constitute a defense. Code of Civ. Proc. § 430.20(a).

4 **DEMURRER TO THE SECOND AFFIRMATIVE DEFENSE**

5 2. Plaintiffs demur to this purported affirmative defense on the ground that it fails to
6 state facts sufficient to constitute a defense. Code of Civ. Proc. § 430.20(a).

7 **DEMURRER TO THE THIRD AFFIRMATIVE DEFENSE**

8 3. Plaintiffs demur to this purported affirmative defense on the ground that it fails to
9 state facts sufficient to constitute a defense. Code of Civ. Proc. § 430.20(a).

10 **DEMURRER TO THE FOURTH AFFIRMATIVE DEFENSE**

11 4. Plaintiffs demur to this purported affirmative defense on the ground that it fails to
12 state facts sufficient to constitute a defense. Code of Civ. Proc. § 430.20(a).

13 **DEMURRER TO THE FIFTH AFFIRMATIVE DEFENSE**

14 5. Plaintiffs demur to this purported affirmative defense on the ground that it fails to
15 state facts sufficient to constitute a defense. Code of Civ. Proc. § 430.20(a).

16 **DEMURRER TO THE SIXTH AFFIRMATIVE DEFENSE**

17 6. Plaintiffs demur to this purported affirmative defense on the ground that it fails to
18 state facts sufficient to constitute a defense. Code of Civ. Proc. § 430.20(a).

19 7. Plaintiffs demur to this purported affirmative defense on the ground that it is
20 uncertain. Code of Civ. Proc. § 430.20(b); Ans. at 9:21-23.

21 **DEMURRER TO THE SEVENTH AFFIRMATIVE DEFENSE**

22 8. Plaintiffs demur to this purported affirmative defense on the ground that it fails to
23 state facts sufficient to constitute a defense. Code of Civ. Proc. § 430.20(a).

24 **DEMURRER TO THE EIGHTH AFFIRMATIVE DEFENSE**

25 9. Plaintiffs demur to this purported affirmative defense on the ground that it fails to
26 state facts sufficient to constitute a defense. Code of Civ. Proc. § 430.20(a).

27 ///

28 ///

1 **DEMURRER TO THE NINTH AFFIRMATIVE DEFENSE**

2 10. Plaintiffs demur to this purported affirmative defense on the ground that it fails to
3 state facts sufficient to constitute a defense. Code of Civ. Proc. § 430.20(a).

4 **DEMURRER TO THE TENTH AFFIRMATIVE DEFENSE**

5 11. Plaintiffs demur to this purported affirmative defense on the ground that it fails to
6 state facts sufficient to constitute a defense. Code of Civ. Proc. § 430.20(a).

7 WHEREFORE. Plaintiffs pray for an Order:

8 1. That the general and special demurrers to each of the State Auditor's Affirmative
9 Defenses of the Answer be sustained without leave to amend on the grounds that each said
10 Affirmative Defense, respectively fails to state facts sufficient to constitute a defense, and that the
11 Sixth Affirmative Defense is uncertain; and

12 2. For such other relief as is just and proper.

13 **MEMORANDUM OF POINTS AND AUTHORITIES**

14 **I**

15 **DEMURRER IS PROPER BECAUSE THE STATE**
16 **AUDITOR'S AFFIRMATIVE DEFENSES ARE NOT**
17 **ALLEGED WITH SPECIFICITY AND/OR ARE UNCERTAIN**

18 A party against whom an answer has been filed may demur on one or more of three grounds
19 specified in California Code of Civil Procedure section 430.20. Two of those grounds apply to the
20 State Auditor's answer in this case: Subsection (a) provides for objection to an answer that fails
21 to state facts sufficient to constitute a defense, and subsection (b) allows objection to an answer
22 that is ambiguous and unintelligible.

23 The answer filed by the State Auditor alleges ten affirmative defenses, each of which is
24 summarily stated without factual support of any kind. Each affirmative defense is thus subject to
25 attack under Code of Civil Procedure section 430.20(a). An affirmative defense must be pleaded
26 with ultimate facts and particularity in pleading in the same manner as if the facts were set forth
27 in a complaint. 5 S.E. Witkin, *California Procedure* (5th ed. 2008), Pleading, § 1082, at 515.
28 Facts which are sufficient to support a cause of action must be affirmatively plead. *Bradbury v.*
Higginson, 167 Cal. 553, 557 (1914). As the court explained in *S. Shore Land Co. v. Petersen*, 226

1 Cal. App. 2d 725, 732 (1964), “the determination whether an answer states a defense is governed
2 by the same principles which are applicable in determining if a complaint states a cause of action.”

3 A pleading is “uncertain” when it is ambiguous and intelligible. Code of Civ. Proc.
4 § 430.20(b). “The objection of uncertainty does not go to the failure to allege sufficient facts. It
5 goes to the doubt as to what the pleader means by the facts alleged.” *Brea v. McGlashan*, 3 Cal.
6 App. 2d 454, 459 (1934). An objection to such a pleading must specifically state how and why the
7 pleading is uncertain and where such uncertainty appears in the pleading. *Fenton v. Goveland*
8 *Cnty. Servs. Dist.*, 135 Cal. App. 3d 797, 809 (1982).

9 FIRST AFFIRMATIVE DEFENSE

10 The State Auditor Failed to Allege Facts Sufficient to State an Affirmative Defense

11 The First Affirmative Defense claims that Plaintiffs have not stated facts sufficient to state
12 a cause of action against the State Auditor. Ans. at 9. This defense is untenable because it is only
13 a conclusory allegation. The SAC articulates actionable facts with sufficient precision to inform
14 the State Auditor as to what Plaintiffs are complaining and what remedies are being sought. But
15 the State Auditor alleges no facts in her affirmative defense.

16 The modern approach to pleading is illustrated by the “*Semole test*.” 4 B.E. Witkin,
17 *California Procedure* (5th ed. 2008), Pleading, § 378, at 513. The test is whether a pleading as a
18 whole apprises the adversary of the factual basis of a claim. *Semole v. Sansoucie*, 28 Cal. App. 3d
19 714, 719 (1972). “[A] plaintiff is required only to set forth the essential facts of his case with
20 reasonable precision and with particularity sufficient to acquaint a defendant with the nature,
21 source and extent of his cause of action.” *Id.* (citations omitted). The more knowledge of the facts
22 which the State Auditor may be assured to have, the less particularity is required in the complaint.
23 *Id.*

24 SECOND AFFIRMATIVE DEFENSE

25 State Auditor’s Affirmative Defense as to Standing is an Insufficient Legal Conclusion

26 The Second Affirmative Defense alleges in conclusory terms that “plaintiffs’ causes of
27 action, and each plaintiff, are barred on the ground that plaintiffs lack standing . . . to assert[] the
28 claims alleged in the Petition and Complaint.” Ans. at 9. Not so. Both Plaintiffs Ward Connerly

1 (Connerly) and the American Civil Rights Foundation (ACRF) have standing to challenge the
2 Defendants' unconstitutional selection process.

3 Connerly has standing as a taxpayer and as a citizen. "A taxpayer [may] bring an action
4 to restrain or prevent an illegal expenditure of public money." *Connerly v. State Pers. Bd.*, 92 Cal.
5 App. 4th 16, 29 (2001). Similarly, a citizen may bring suit "where the issue is one of public right
6 and the object is to procure the enforcement of a public duty. *Id.* (citing *Green v. Obledo*, 29 Cal.
7 3d 126, 144 (1981)). "A claim that [a race-based] program violates the principles of equal
8 protection . . . is precisely the type of claim to which citizen and taxpayer standing rules apply."
9 *Id.* at 29-30. The State Auditor does not allege facts to contradict Connerly's pleading that he is
10 a taxpayer and citizen of the State of California. *See Ans.* at 1.

11 ACRF has standing for the same reasons as Connerly. ACRF includes members who are
12 citizens and taxpayers in California. The State Auditor has not alleged any facts to the contrary.
13 *See id.* ACRF also has at least one member who has applied to serve as a member of the
14 commission in the past, and intends to apply again through the discriminatory selection procedure
15 mandated by the statute at issue. SAC ¶ 2 (1:23-25). Since this fact would satisfy the strict
16 standing requirements in federal court, *see Ne. Fla. Chapter of the Associated Gen. Contractors*
17 *of Am. v. City of Jacksonville, Miss.*, 508 U.S. 656, 666 (1993), it should also confer standing upon
18 ACRF in California state courts where there is no case or controversy requirement. *See Connerly*,
19 92 Cal. App. 4th at 29 ("California's Constitution, unlike its federal counterpart, does not contain
20 a 'case or controversy' limitation on the judicial power.").

21 **THIRD AFFIRMATIVE DEFENSE**

22 **A Clear Duty is Plead in the Petition**

23 The State Auditor incorrectly claims in her Third Affirmative Defense that neither
24 Government Code section 8252(g), nor related statutes, impose a duty that entitles Petitioners to
25 a writ of mandate. *Ans.* at 9. This Affirmative Defense merely states a legal conclusion and is
26 insufficient under Code of Civil Procedure section 430.20(a). *See In re Quantification Settlement*
27 *Agreement Cases*, 201 Cal. App. 4th 758, 813 (2011) (conclusory affirmative defenses are
28 insufficient).

1 Notwithstanding the constitutional questions concerning the appointment of commissioners,
2 the State Auditor has a duty to enforce Government Code section 8252. Section 8252(a) provides
3 as follows: “By August 15 in each year ending in the number nine, the State Auditor shall initiate
4 an application process, open to all registered California voters in a manner that promotes a diverse
5 and qualified applicant pool.” Although the word “diverse” is not defined in subsection (a), it is
6 defined in subsection (g): diversity “includes racial, ethnic, and gender diversity.” It is a general
7 rule of statutory construction that “identical words used in different parts of the same act are
8 intended to have the same meaning.” *See, e.g., People v. Roberge*, 29 Cal. 4th 979, 987 (2003)
9 (citations omitted).

10 The State Auditor is required by statute to treat individuals differently based on race,
11 ethnicity, or gender, and, at the same time, is obligated to comply with the Equal Protection Clause
12 of the Fourteenth Amendment to the United States Constitution, which prohibits the different
13 treatment of individuals based on race, ethnicity, or gender. The existence of these conflicting
14 duties is clearly set out in the Second Amended Complaint at paragraphs 47-49, 56-57, 59-62.
15 Prompt resolution is necessary to prevent the continued discriminatory effects on the citizens and
16 residents of the State and the continued unconstitutional use of taxpayer funds to enforce them.

17 **FOURTH AFFIRMATIVE DEFENSE**

18 **Petitioners Have a Beneficial Interest In**

19 **Preventing Discriminatory Governmental Actions**

20 The State Auditor’s Fourth Affirmative Defense states that “plaintiffs are not entitled to a
21 writ of mandate on the ground that they have no beneficial interest in the administration,
22 implementation, or enforcement of Government Code section 8252, subdivision (g) or related
23 statutes.” Ans. at 9. Petitioners allege a beneficial interest in preventing the discriminatory effects
24 of treating individuals differently on the basis of race, ethnicity, and gender, as required by
25 Government Code section 8252(g) and related statutes. The continued enforcement of laws that
26 require unequal treatment of individuals violates the Federal Equal Protection Clause, infringes
27 on the constitutional rights of citizens and residents of the State, and uses taxpayer funds to enforce
28 discriminatory conduct. SAC ¶¶ 29-30. Petitioner Ward Connerly is a citizen, and taxpayer, and

1 constitutional violation will often alone constitute irreparable harm.” *Associated Gen. Contractors*
2 *of Cal., Inc. v. Coal. for Econ. Equity*, 950 F.2d 1401, 1412 (9th Cir. 1991). The same is true with
3 equal protection violations. When a State subjects its citizens to racial discrimination, the legal
4 remedy is inadequate to repair the harm. *See Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715
5 (9th Cir. 1997) (money damages may remedy the loss of a contract, but not “unconstitutional
6 discrimination in the bidding process based on race and sex”).

7 SIXTH AFFIRMATIVE DEFENSE

8 **The State Auditor Cites No Facts or Law Giving Rise to a Privilege or Justification**

9 The State Auditor’s Sixth Affirmative Defense merely states: “The State Auditor alleges
10 that her conduct at all times material to the present Petition and Complaint was privileged and/or
11 justified under applicable state and federal law.” Ans. at 9. This pleading is insufficient because
12 it fails to state any facts, or specific law. Affirmative defenses cannot be pled as mere legal
13 conclusions, but must instead be alleged with as much factual detail as the allegations of a
14 complaint. *In re Quantification Settlement Agreement Cases*, 201 Cal. App. 4th at 813; *FPI Dev.,*
15 *Inc. v. Al Nakashima*, 231 Cal. App. 3d 367, 384 (1991). Because conclusory allegations are not
16 admitted by demurrer, and because conclusory allegations have no pleading value, conclusory and
17 “boilerplate” affirmative defenses are insufficient. *FPI Dev.*, 213 Cal. App. 3d at 384. The State
18 Auditor’s Sixth Affirmative Defense is thus defective under Code of Civil Procedure section
19 430.20(a).

20 The State Auditor claims that her actions were privileged and/or justified under applicable
21 state and federal law, but cites to no law at all. Ans. at 9:21-23. A pleading that fails to specify
22 both the applicable statute and subdivision raises no issue and presents no defense. *Davenport v.*
23 *Stratton*, 24 Cal. 2d 232, 246-47 (1944). This is particularly true here, where the defense of
24 privilege and justification can be applied to many specific claims that are inapplicable. *See, e.g.,*
25 *Civ. Code § 47* (privileged publication or broadcast); *Evid. Code § 954* (confidential
26 communication between client and lawyer); *Citizens for Open Gov’t v. City of Lodi*, 205 Cal. App.
27 4th 296, 305 (2012) (deliberative process privilege); *San Francisco Design Ctr. Associates v.*
28 *Portman Companies*, 41 Cal. App. 4th 29, 40 (1995), *dismissed, remanded, and ordered published,*

1 911 P.2d 1373 (Cal. 1996) (privilege of competition); *Bledsoe v. Watson*, 30 Cal. App. 3d 105, 108
2 (1973) (justified interference with contractual relations). Despite the many different types of
3 privilege and justification, the State Auditor's Answer fails to identify any privilege or justification
4 to which she is entitled, and fails to identify any "applicable state and federal law" providing the
5 basis for her defense. The State Auditor's affirmative defense is thus ambiguous and/or
6 unintelligible for failing to allege any basis in law for privilege or justification.

7 SEVENTH AFFIRMATIVE DEFENSE

8 Section 8252(g) is Unconstitutional on Its Face

9 The State Auditor's Seventh Affirmative Defense states that "Plaintiffs are not entitled to
10 relief under a facial challenge to Government Code section 8252, subdivision (g) and related
11 statutes because the statutes may be applied in a constitutional manner." Ans. at 9. This statement
12 is a legal conclusion without any factual detail. *See In re Quantification Settlement Agreement*
13 *Cases*, 201 Cal. App. 4th at 813 (affirmative defenses cannot be pled as mere legal conclusions but
14 must be alleged with as much factual detail as the allegations of a complaint).

15 To prevail under their facial challenge, Plaintiffs must demonstrate that Government Code
16 section 8252(g) inevitably poses a present total and fatal conflict with applicable constitutional
17 prohibitions. *Am. Acad. of Pediatrics v. Lungren*, 16 Cal. 4th 307, 421 (1997). Plaintiffs allege
18 in their Second Amended Complaint that "Section 8252(g) provides that the last six members of
19 the Commission 'shall be chosen to ensure the commission reflects this state's diversity, including,
20 but not limited to, racial, ethnic, geographic, and gender diversity.'" SAC ¶ 18 (quoting Gov't
21 Code § 8252(g)). The mandatory terms "shall" and "ensure" require the State Auditor and other
22 named Defendants in this action to screen and select commissioner-applicants by race, ethnicity,
23 and gender every time a new commission is formed.

24 The State Auditor provides no facts, let alone new facts, in her affirmative defense. "An
25 affirmative defense is one which sets forth facts from which it results that, notwithstanding the
26 truth of the allegations of the complaint, no cause of action existed in the plaintiff at the time the
27 action was brought." *Walsh v. W. Valley Mission Cmty. Coll. Dist.*, 66 Cal. App. 4th 1532, 1542
28 n.3 (1998) (internal quotations omitted) (citing *Salazar v. Maradeaga*, 10 Cal. App. 4th Supp. 1,

1 5 (1992)); *Goddard v. Fulton*, 21 Cal. 430, 436 (1863). Thus, an affirmative defense “admits that
2 all the material allegations of the complaint or petition are true, and consists of facts not alleged
3 therein which destroy the right of action, and defeat a recovery.” *Walsh*, 66 Cal. App. 4th at 1546.
4 The State Auditor’s affirmative defense concerning the failure of Plaintiffs’ facial challenge,
5 contains no new facts—new matter—showing how, “notwithstanding the truth of the allegations”
6 in Plaintiffs’ Complaint, Section 8252(g) may be applied in a constitutional manner. At the most,
7 this Affirmative Defense is simply a conclusory denial, and improper under Code of Civil
8 Procedure section 430.20(a).

9
10 **EIGHTH AFFIRMATIVE DEFENSE**

11 **There is No Compelling Interest to Select Public Officers Using Race**

12 The State Auditor’s Eighth Affirmative Defense states that “Plaintiffs are not entitled to
13 relief because the State has a compelling interest in ensuring the Commission reflects the state’s
14 diversity.” Ans. at 10. This statement is a legal conclusion without any factual detail. *See In re*
15 *Quantification Settlement Agreement Cases*, 201 Cal. App. 4th at 813 (affirmative defenses cannot
16 be pled as mere legal conclusions but must be alleged with as much factual detail as the allegations
17 of a complaint).

18 The statement is also contrary to law. The United States Supreme Court has held that the
19 only interest in diversity that justifies the narrowly tailored violation of the Federal Equal
20 Protection Clause is the interest in achieving a diverse student body in higher education. *Grutter*
21 *v. Bollinger*, 539 U.S. 306, 325 (2003). Moreover, the Court has never recognized any compelling
22 state interest that justifies the use of racial qualifications for public office. Not only has the Court
23 never recognized a compelling interest that could justify Section 8252(g)’s use of race, the Court
24 has invalidated laws where the use of race burdens an individual’s right to be considered for
25 elected or appointed public office. *Anderson v. Martin*, 375 U.S. 399, 400 (1964).

26 The State Auditor provides no facts, law, or new matter concerning this purported
27 compelling interest, such as how and when it was derived, and how it relates to public officers, and
28 which public officers must be selected based on their race, ethnicity, and gender. It is not a proper
affirmative defense under Code of Civil Procedure section 430.20(a).

1 **NINTH AFFIRMATIVE DEFENSE**

2 **The State Auditor Provides No Facts That Section 8252(g) is Narrowly Tailored**

3 The State Auditor's Ninth Affirmative Defense states that "Plaintiffs are not entitled to
4 relief because Government Code section 8252, subdivision (g) is narrowly tailored to achieve a
5 compelling State interest." Ans. at 9. This conclusory statement puts no facts in issue and fails
6 to constitute an affirmative defense under Code of Civil Procedure section 430.20(a).

7 Even where the state has a compelling interest supported by a strong basis in evidence, a
8 race-conscious program must be narrowly tailored to further that interest. *Grutter*, 539 U.S. at 326.
9 The United States Supreme Court set out the test for narrow tailoring in *Grutter*, where it approved
10 a race-conscious plan only after concluding that it was sufficiently flexible, limited in time, and
11 followed "serious, good faith consideration of workable race-neutral alternatives." *Id.* at 339.
12 Accordingly, Plaintiffs alleged in their Second Amended Complaint that Section 8252(g):
13 (1) "does not provide for an alternative commissioner selection process that is race- and
14 gender-neutral," SAC ¶ 44; (2) has "no expiration date for the use of race, sex, and ethnicity in
15 choosing the last six members of the Commission," SAC ¶ 45; and (3) has "no provision for
16 reevaluating the use of race, gender, and ethnicity in choosing the last six members of the
17 Commission." SAC ¶ 46.

18 In response, the State Auditor simply alleges that Section 8252(g) is narrowly tailored.
19 This statement cannot be interpreted as an affirmative defense. Affirmative defenses must not be
20 pled as terse legal conclusions, but rather as facts averred as carefully and with as much detail as
21 the facts which constitute the cause of action and are alleged in the complaint. *FPI Dev.*, 231 Cal.
22 App. 3d at 384. Plaintiffs alleged specific facts pertaining to narrow tailoring which constitute
23 their Equal Protection Clause violation cause of action. If the State Auditor alleges as an
24 affirmative defense that Section 8252(g) is not narrowly tailored, it must do so not by pleading
25 terse legal conclusions, but rather facts averred as carefully and with as much detail as the facts
26 in the Second Amended Complaint.

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TENTH AFFIRMATIVE DEFENSE

Defendant Alleges No Facts Concerning Any Benefit Plaintiffs Purportedly Gained

The State Auditor's Tenth Affirmative Defense states that "Plaintiffs' causes of action are barred under the doctrine of constitutional estoppel because plaintiffs did not challenge the validity of Government Code section 8252, subdivision (g) at the time they benefitted from its implementation." Ans. at 10. This statement fails as an affirmative defense under Code of Civil Procedure section 430.20(a), because it is a legal conclusion without any factual detail. *See In re Quantification Settlement Agreement Cases*, 201 Cal. App. 4th at 813 (affirmative defenses cannot be pled as mere legal conclusions but must be alleged with as much factual detail as the allegations of a complaint).

Under the doctrine of constitutional estoppel, a party generally "cannot claim the benefit of statutes and afterwards assail their validity." *Wall v. Parrot Silver & Copper Co.*, 244 U.S. 407, 412 (1917). Constitutional estoppel has been applied where a party has enjoyed *specific* benefits of a government act, but later attacks the constitutionality of one of the act's conditions. *See, e.g., United States v. City & County of San Francisco*, 310 U.S. 16, 29 (1940) (city that accepted grant of land subject to conditions was estopped from challenging the constitutionality of the conditions decades later); *Booth Fisheries Co. v. Indus. Comm'n of Wis.*, 271 U.S. 208, 211 (1926) (business that agreed to be bound by state compensation act in return for certain benefits and immunities was estopped from later asserting the act's terms were unconstitutional).

The United States Supreme Court has not applied constitutional estoppel to persons challenging the discriminatory selection process for positions or benefits for which they unsuccessfully applied. *See Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2413 (2013) (plaintiff could allege that her application for undergraduate admissions was rejected because the university used race as a predominant factor in its admissions process); *Grutter*, 539 U.S. at 317 (plaintiff could allege that her application for law school was rejected because the school used race as a predominant factor); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 482 (1989) (contractor could challenge city's discriminatory contracting policy even though contractor submitted bids for public contracts).

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1 The State Auditor fails to state facts identifying a tangible benefit Plaintiffs purportedly
2 derived or claimed from the implementation of Section 8252(g), or when they received the alleged
3 benefit. The affirmative defense is simply stated as a legal conclusion and is insufficient under
4 Code of Civil Procedure section 430.20(a), *FPI Dev.*, 213 Cal. App. 3d at 384 (affirmative
5 defenses consisting of conclusory allegations are insufficient).

6 **CONCLUSION**

7 For the above reasons, Defendant's First to Tenth Affirmative Defenses should be stricken
8 from Defendant's Answer.

9 DATED: January 23, 2015.

10 Respectfully submitted,

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14 
15 By _____
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