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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

THOMAS G. DEL BECCARO, MARK A. PRUNER, DAVID B. PRINCE, CARL A. BURTON, and ADAM C. ABRAHMS, Plaintiffs and Contestants, v. EDMUND GERALD "JERRY" BROWN, JR., an individual; BRUCE McPHERSON, Secretary of State of the State of California; BILL LOCKYER, Attorney General of the State of California; STEVE WESTLY, Controller of the State of California; and DOES 1-100, inclusive, Defendants.	Case No. 06AS04494 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF STATEMENT OF ELECTION CONTEST AND IN SUPPORT OF FIRST AMENDED COMPLAINT** [Elections Code §§ 16000, *et seq.*] Date: February 9, 2007 Time: 1:30 p.m. Dept: 11 Judge: Honorable Gail D. Ohanesian

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

CALIFORNIA CONSTITUTION

OTHER SOURCES

INTRODUCTION

"Ours is a government of laws, not men." (John Adams, "Novanglus Papers," no. 7 —*The Works of John Adams*, ed. Charles Francis Adams, vol. 4, p. 106 (1851).)

This case is about the rule of law in the context of California's elections law. California Government Code section 12503 provides that an individual may not be a candidate for Attorney General unless he has been actually practicing law, that is an *active* member of the State Bar of California, for five consecutive years immediately prior to election to that office. (See *Johnson v. State Bar of California* (1937) 10 Cal.2d 212.)

On December 16, 2006, after canvassing the votes cast in the statewide general election, then California Secretary of State, Bruce McPherson, declared Defendant Edmund Gerald "Jerry" Brown, Jr., elected as California Attorney General. Unfortunately, Defendant Brown was not eligible to be elected Attorney General of California because he had not been on active status with the California State Bar of California for the previous five consecutive years prior to his election.

Elections Code section 16100, subdivision (b), empowers any elector within the applicable jurisdiction to contest the election of a candidate on the grounds that said person was not eligible for the elected office at the time of the vote. This includes any person who has in fact been elected to state and local office, including a constitutional office. A determination that the candidate is ineligible at the time of his or her election to office voids the election of that candidate. This does not, however, presuppose the defeat of the popular will. Under the doctrine of the rule of law, voiding an election result where the Candidate is ineligible is warranted when an ineligible candidate failed to meet the established legal standards and thus forfeited the public's mandate. The resulting defeat of popular will is not the fault of the

plebiscite, but the ignorance or perhaps shrewdness of the ineligible candidate.

Contestants ask this court to uphold the rule of law, and the public's mandate, and set aside the election to the Office of Attorney General in the November 7, 2006 California statewide general election, pursuant to Elections Code section 16100, subdivision (b).

ARGUMENT

I. DEFENDANT BROWN WAS INELIGIBLE TO HOLD THE OFFICE OF ATTORNEY GENERAL AT THE TIME OF THE ELECTION

State law requires a candidate for the Office of California Attorney General to have been an uninterrupted, practicing, "active" member of the State Bar of California for at least the five consecutive years immediately prior to election for that office. (See Government Code section 12503.) Defendant Brown, however, had been an uninterrupted, practicing, active member of the state bar for less than four years at the time of the November 7, 2006 California statewide general election. (See Plaintiffs' Request for Judicial Notice, Exhibit "A".) Therefore, Defendant Brown was an ineligible candidate at the time of the statewide general election.

A. Government Code Section 12503 Requires an Individual Holding the Office of the Attorney General to Have Maintained Practicing Active Status with the State Bar of California for the Immediately Preceding Five Consecutive Years

Government Code section 12503 provides:

> No person shall be eligible to the office of Attorney General unless he shall have been admitted to practice before the Supreme Court of the state for a period of at least five years immediately preceding his election or appointment to such office.

The California Supreme Court has already interpreted this exact language to require that the individual seeking office be an active member of the State Bar of California during the entire five-year period immediately prior to the election for that office. (See *Johnson v. State Bar of California* (1937) 10 Cal.2d 212, 216; *Browning v. Dominguez* (1935) 3 Cal.2d 167, 171.)

In *Johnson*, the state high court was required to interpret the following language that at the time was found in Article VI, section 23 of the California Constitution:

> No person shall be eligible to the office of a Justice of the Supreme Court, or of a district court of appeal, or of a judge of a superior court, or of a municipal court, unless he shall have been admitted to practice before the Supreme Court of the state for a period of at least five years immediately preceding his election or appointment to such office.

Other than the name of the office - "Attorney General" versus "Justice of the Supreme Court, or of a district court of appeal, or of a judge of a superior court, or of a municipal court" - this text is exactly the same as the current version of Government Code section 12503. In *Johnson*, the Supreme Court interpreted this language to prohibit an individual from holding office as a superior court judge *regardless* of when the individual was first admitted to the state bar if that individual was on "inactive" status with the State Bar of California, at any time, during the immediately preceding five years.

> It follows that no one is eligible to hold the office of superior judge who has not been an admitted practitioner before the Supreme Court of this state for a period of five consecutive years immediately preceding his election or appointment to such office. Certainly an attorney who has been suspended from the practice of law during this period cannot successfully claim to be eligible. [Citation.] *It is self-evident, we think, that said provision requires as a fundamental qualification for the office of superior judge, that the candidate for such position be qualified as an attorney* ***actually entitled to practice in the state courts***.

(*Id.* at p. 216. [italicized and emboldened emphasis added].)

Therefore, pursuant to *Johnson*, the requirement found both in Government Code section 12503 and Article VI, section 23 of the California Constitution circa 1937 that a person be "admitted" to the state bar for the five consecutive years immediately prior to the election of the stated public office requires more than the mere initial admission to the State Bar of California at a time at least five years prior to the election. Rather, the provisions require that the individual *both* have been initially admitted to the state bar, *and* maintained the right to be "actually entitled

to practice in the state courts" during the five years immediately preceding election.[1]

Additionally, in *Browning*, the California Supreme Court held that the language "immediately preceding his election," in Article VI, Section 23 required that a candidate have satisfied the five-year qualification period by the time of the election, not at the time the sought-after term commenced.

> The practical effect of granting the petition would be to declare that the petitioner was nominated at the recent primary election as a candidate for the office of municipal judge of said city, being office No. 10, instead of the respondent, Delamere Frances McCloskey. ... The primary election at which said parties were candidates for nomination to said office No. 10 was held on the second day of April, 1935. The municipal election to elect an incumbent for said office No. 10 will be held on May 7, 1935.
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> ...
>
> We are, therefore, unable to agree with respondent McCloskey that under the provisions of section 23 of article VI of the Constitution a person is eligible to the office of municipal judge if admitted to practice five years before the commencement of the term of office to which he was elected, although he has not been admitted to practice for a period of five years before his election. This section of the Constitution says nothing about the beginning of the term of office, but explicitly makes the time of his election the time when he must possess the qualifications necessary to make him eligible to the office.
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> ...
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> From the foregoing, we conclude that respondent McCloskey is ineligible to the office of municipal judge No. 10 of the city of Los Angeles, and was so disqualified at the date of said primary election.

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[1] As Defendant Brown has previously cited, the California Supreme Court has determined that "[t]he elective franchise and the right to hold public offices constitute the principal political rights of citizens of the several States," (see *People v. Washington* (1869) 36 Cal. 658, 662) and "the right to hold public office, either by election or appointment, is one of the valuable rights of citizenship ... The exercise of this right should not be declared prohibited or curtailed except by plain provisions of law. Ambiguities are to be resolved in favor of eligibility to office. ...," (see *Carter* v. *Com. on Qualifications etc.*, 14 Cal.2d 179, 182.) In turn, however, this same state high court also determined in *Johnson* that the requirement set forth by the "admitted" language of then-Article VI, Section 23 unambiguously required an individual *both* to have been initially admitted to the state bar for the requisite period prior to the election *and* to have maintained the right to be "actually entitled to practice in the state courts" during that period. (See *Johnson v. State Bar of California*, *supra*, 10 Cal.2d 212, 216. Accordingly, the California Supreme Court has already determined the ambiguity question previously raised by Defendant Brown, and found the applicable "admitted" language unambiguous.

(*Browning v. Dominguez, supra,* 3 Cal.2d at pp. 167-168, 171.)[2]

Therefore, pursuant to *Johnson* and *Browning*, Defendant Brown must have been "actually entitled to practice in the state courts," that is an active member of the State Bar, without interruption during the five consecutive years immediately prior to election to the office of California Attorney General. He was not.

B. Defendant Brown Had Not Been an Active Member of the State Bar of California for the Requisite Five-Year Period at the Time of the June 6, 2006 Primary Election

On June 14, 1965, Defendant Brown was admitted to the State Bar of California. (See Plaintiffs' Request for Judicial Notice, Exhibit "A".) However, except the short time from January 23, 1996 to January 1, 1997, from January 1, 1992 through April 30, 2003, Defendant Brown voluntarily changed his status with the State Bar of California to "inactive." (See Plaintiffs' Request for Judicial Notice, Exhibit "A.") In total, Defendant Brown has been an active member of the State Bar of California for less than five of the past fourteen years combined.

On May 1, 2003, Defendant Brown changed his status with the State Bar of California back to "active" by filing a Transfer to Active Status Form and paying an associated fee.[3] (See

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[2] In *Browning*, the court held that the petitioner be named as the nominee having received the next highest number of votes due to specific provisions found in the then-charter of the City of Los Angeles. (*Browning v. Dominguez, supra,* 3 Cal.2d at p. 171.) In contrast, the California Supreme Court has held that for elections held pursuant to state general law - as is the case with all state officers including the California Attorney General - that when a political party nominates an ineligible candidate, the candidate receiving the next highest number of votes is not considered the nominee. Rather, the party is found to not have nominated any candidate. (See *Heney v. Jordan* (1918) 179 Cal. 24, 29-30.)

[3] The change in status from "inactive" to "active" is not simply just about payment of a fee. Among the serious fiduciary and statutory duties incumbent upon an "active" attorney, the "active" attorney also takes upon himself or herself significant and important obligation to take mandatory continuing legal education. (See discussion on SB 905 below.)

Plaintiffs' Request for Judicial Notice, Exhibit "A;" State Bar of California Membership Rules, rule 2.31.) As such, at the time of the June 6, 2006 California statewide primary election, Defendant Brown had only been an active member of the state bar for barely more than three consecutive years. Likewise, at the time of the November 7, 2006 general election, Defendant Brown had been an active member of the state bar for less than four consecutive years. Finally, at the time of his January 8, 2007 inauguration, Defendant Brown had still not met the five-year requirement of active bar membership.

C. The Distinction Between "Voluntary" and "Involuntary" Inactive Status Is One Without a Difference for the Purposes of this Election Contest

In *Johnson*, the candidate had been "involuntarily" placed on inactive status for having committed improper acts. (See *Johnson v. State Bar of California*, *supra*, 10 Cal.2d at p. 212.) Defendant Brown, in contrast, "voluntarily" placed himself on inactive status. Nevertheless, the distinction between "voluntary" and "involuntary" inactive status is one without a difference for the purposes of the underlying election contest. Business and Professions Code section 6006 and The State Bar of California Membership Rules, rule 2.30 provide that *neither* "voluntary" or "involuntary" inactive members of the state bar are "actually entitled to practice in the state courts."

Members of the State Bar of California are only divided into two classes - active members and inactive members. (See Business and Professions Code section 6003.) Based upon this two-option classification system, Business and Professions Code section 6006 states in pertinent part:

> *Inactive members are not entitled to* hold office or vote or *practice law.* Those who are enrolled as inactive members at their request may, on application and payment of all fees required, become active members. Those who are or have been enrolled as inactive members at their request are members of the State Bar for purposes of Section 15 of Article VI of the California Constitution. Those who

are enrolled as inactive members pursuant to Section 6007 may become active members as provided in that section. [Emphasis added.]

The State Bar of California Membership Rules, rule 2.30 provides in pertinent part:

> (A) Any member not under suspension, who does not engage in any of the activities listed in (B) in California, may, upon written request, be enrolled as an inactive member. ...
>
> (B) *No member practicing law*, or occupying a position in the employ of or rendering any legal service for an active member, or occupying a position wherein he or she is called upon in any capacity to give legal advice or counsel or examine the law or pass upon the legal effect of any act, document or law, shall be enrolled as an inactive member. [Emphasis added.][4]

Therefore, inactive members - whether attaining that status voluntarily or involuntarily - are all denied the right of "*practicing law*" in state courts - the ultimate question pursuant to *Johnson*. (See *Johnson v. State Bar of California*, *supra*, 10 Cal.2d at p. 216 ["It is self-evident, we think, that said provision requires as a fundamental qualification for the office of superior judge, that the candidate for such position be qualified as an attorney *actually entitled to practice in the state courts*. [Emphasis added.]"].) Thus, a candidate must have been an active member of the state bar during the entire five consecutive years prior to his or her ethical nomination for the office of California Attorney General. Defendant Brown failed to satisfy this eligibility requirement at the time of the June 6, 2006 California statewide general election.

Rule 2.30, cited above, unequivocally states that "inactive" members shall not practice law. As an "inactive" member for part of the five years preceeding election, Defendant Brown by his own choice could not practice before the state courts.

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[4] The State Bar of California Membership Rules, rule 2.30, subdivision (C) provides one narrow exception to this rule by permitting inactive members of the state bar to act as a "referee, hearing officer, court commissioner, temporary judge, arbitrator, mediator or in another similar capacity" for a court or any other governmental agency.

II. THE *JOHNSON* INTERPRETATION IS FIXED INTO GOVERNMENT CODE SECTION 12503 AND CANNOT BE CHANGED BY SUBSEQUENT JUDICIAL FIAT

The *Johnson* decision interpreting the text of then-Article VI, section 23 was rendered in 1937. On November 8, 1966, the State Legislature enacted Government Code section 12503, who again, copied the exact language from Article VI, section 23 of the California Constitution for the text of the provision.[5] (See Stats.1966, 1st Ex.Sess., c. 161, p. 715, § 9.6.) The Legislature is presumed to be aware of prior case law when drafting legislation. (See *Barragan v. Workers' Comp. Appeals Bd.* (1987) 195 Cal.App.3d 637, 650.) Thus, when the State Legislature copied into Government Code section 12503 word-for-word the language of then-Article VI, Section 23 which had been previously interpreted by the California Supreme Court in *Johnson*, they are presumed to have been aware of that interpretation and intended such interpretation to hold for Section 12503. Therefore, even if at some point in the future the California Supreme Court determined that the *Johnson* interpretation was incorrect, such a subsequent judicial determination is of no consequence for the purposes of interpreting Government Code section 12503 as the *Johnson* interpretation was the state of the law at the time the provision was enacted, and is considered the intent of the State Legislature which drafted it. A court must adopt the interpretation which carries out the intent and objective of the drafters of the provision. (See *Mosk v. Superior Court* (1979) 25 Cal.3d 474, 495 [superceded on

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[5] In 1950, the people of California passed an amendment to Article VI, Section 23 of the California Constitution. The amendment did not alter any of the text that had been interpreted in *Johnson*. Rather, the amendment added the following language to the end of the provision: "provided, however, that any elected judge or justice of an existing court who has served in that capacity by election or appointment for five consecutive years immediately preceding the effective date of this amendment shall be eligible to become the judge of a municipal court by which the existing court is superseded upon the establishment of said municipal court or at the first election of judges thereto and for any consecutive terms thereafter for which he may be reelected. The requirement of consecutive years of judicial service shall be deemed to have been met even though interrupted by service in the armed forces of the United States during the period of war."

other grounds].) "In construing constitutional and statutory provisions, whether enacted by the Legislature or by initiative, the intent of the enacting body is the paramount consideration. [Citations.] '[W]e are mindful that the goal of statutory construction is ascertainment of legislative intent so that the purpose of the law may be effectuated.' [Citation.]" (*In re Lance W.* (1985) 37 Cal.3d 873, 889 [quoting *People v. Shirokow* (1980) 26 Cal.3d 301, 306-307].)

Therefore, unless and until a subsequent statute or initiative amends Government Code section 12503, the interpretation found in *Johnson* remains in effect and fully applicable to that provision.

III. ACA 13x (1966) AND AB 147x (1966) REFLECT THE LEGISLATIVE INTENT TO ADOPT THE *JOHNSON* INTERPRETATION OF GOVERNMENT CODE SECTION 12503

The legislative history of ACA 13x (1966) and AB 147x (1966) confirm Plaintiffs' position on the interpretation of Government Code section 12503. On February 10, 1966 then-Governor Edmund Gerald Brown,[6] declared an extraordinary session of the State Legislature. (See Plaintiffs' Request for Judicial Notice, Exhibit "B.") During this extraordinary session, the State Legislature passed ACA 13x, proposing a constitutional revision to the people of California. (See Plaintiffs' Request for Judicial Notice, Exhibit "C.") The 1966 constitutional revision, later known as Proposition 1A, repealed the Article VI, Section 23 interpreted in *Johnson*, and replaced it with current-Article VI, Section 15.[7] After the 1966 constitutional revision was enacted, Article VI, Section 15 read:

> A person is ineligible to be a judge of a court of record unless for 5 years immediately preceding selection to a municipal court or 10 years immediately preceding selection to other courts, the person has been a member of the State Bar

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[6]The father of Defendant Edmund Gerald "Jerry" Brown.

[7] For much of the revision process, Article VI, Section 15 was denominated as Section 16. Later during the constitutional revision process, the provision was re-denominated Section 15.

> or served as a judge of a court of record in this State. A judge eligible for municipal court service may be assigned by the chairman of the Judicial Council to serve on any court.

At the same time the State Legislature was revising Article VI, Section 15 and other portions of the state constitution, it also introduced AB 147x. AB 147x was a "clean up" bill for the constitutional revision "relating to codification of various provisions to be omitted from the California Constitution in its revision." (See Plaintiffs' Request for Judicial Notice, Exhibit "D.") The bill also included some new, non-constitutional provisions, including Government Code section 12503. (See Plaintiffs' Request for Judicial Notice, Exhibit "E.")

On March 29, 1966, the State Legislature introduced its first version of ACA 13x. (See Plaintiffs/ Request for Judicial Notice, Exhibit "F.") This version of the bill included the original "admitted" language for the new Article VI, section 15. (See Plaintiffs' Request for Judicial Notice, Exhibit "F.") On March 31, 1966, the State Legislature introduced its first version of AB 147x. Subsequently, on April 13, 2006, the State Legislature introduced revised versions of both ACA 13x and AB 147x. In these revisions, ACA 13x included for the first time the new "member" language for Article VI, Section 15. (See Plaintiffs' Request for Judicial Notice, Exhibit "G.") At the same time, AB 147x for the first time included the enactment of Government Code section 12503, which used the original "admitted" language. (See Plaintiffs' Request for Judicial Notice, Exhibits "D.") Therefore, on the same day the State Legislature decided to amend ACA 13x to include the new "member" language in Article VI, Section 15, it also decided to *revert back* to the original "admitted" language for Government Code section 12503. AB 147x was later enacted into law on July 19, 1966 without the State Legislature deciding to employ the new "member" language in Government Code section 12503.

These aforementioned acts by the State Legislature of (1) originally drafting Article VI,

Section 15 with the original "admitted" language as interpreted in *Johnson*; and (2) subsequently changing the "admitted" language of the constitutional provision Article VI, Section 15 to the new "member" language, but then *reverting back* to the "admitted" language for the statutory provision of Government Code section 12503, provides a clear legislative intent to enforce the same "admitted" requirement for Government Code section 12503 as had been interpreted in *Johnson* for the original Article VI, Section 23.

IV. SB 905 (1989) DID NOT AMEND THE *JOHNSON* INTERPRETATION OF THE "ADMITTED" LANGUAGE IN GOVERNMENT CODE SECTION 12503

In 1989, then-Governor George Deukmejian signed into law SB 905. SB 905 enacted two distinct provisions. First, SB 905 set requirements for members of the State Bar of California to participate in a certain number of hours of mandatory continuing learning education ("MCLE's") within a prescribed period. Second, SB 905 amended Business and Professions Code section 6006 to include the following text: "Those who are or have been enrolled as inactive members at their request are members of the State Bar for purposes of Section 15 of Article VI of the California Constitution." The State Legislature chose not to include a similar provision for Government Code section 12503 within SB 905, nor for any other law requiring admission to practice law in state courts.

The language of the amendment to Business and Professions Code section 6006 speaks for itself as explicitly and exclusively focused in providing an exception from the definition of "member" or "admitted" in regards to determining whether a person is an eligible candidate for the bench. Aside from Article VI, Section 15 and Government Code section 12503, several other provisions include requirements that a person be a "member" of the state bar, or "admitted" to practice before state courts in order to hold an official position. (See e.g., Government Code section 8262 [requiring a member of the Commission on Uniform State Laws to be a "member"

of the state bar or "admitted" to practice before other state courts]; Government Code section 11502, subdivision (b) [requiring an administrative law judge to have been admitted to practice in California for at least five years]; Government Code section 24002 [requiring a district attorney to have been admitted to practice in California]; Government Code section 24004 [prohibiting a sheriff or deputy sheriff to be admitted to practice law in the state]; Government Code section 27724 [requiring a hearing officer to be admitted to practice law in the state]; Government Code Title 3, Division 2, Part 3, Chapter 6, California Land Title Law, section 18 [requiring an examiner of titles to be admitted to practice law in the state].)

SB 905's amendment to Business and Professions Code section 6006 did not provide that a county district attorney can be a voluntarily inactive member of the state bar. (See Government Code section 24002 [requiring a district attorney to have been admitted to practice in California]). Nor did SB 905 prohibit voluntarily inactive members of the state bar from becoming a sheriff or sheriff's deputy. (See Government Code section 24004 [prohibiting a sheriff or deputy sheriff to be admitted to practice law in the state].) Equally, SB 905 did not provide that a candidate for California Attorney General could be a voluntarily inactive member of the state bar.

In addition, the legislative history of SB 905 clearly demonstrates that the State Legislature's sole intent with the legislation was to set qualifications for members of the bench. The legislative history is void of any attempt to set qualifications for the California Attorney General, district attorneys, sheriffs, or any other public office including a "member" or "admitted" requirement. For instance, the Senate Third Reading of SB 905 on September 12, 1989, speaks only of providing an exemption for determining if a candidate is eligible for the bench:

> 2) As found in Section 15 of Article VI of the Constitution, [sic] states that a person is ineligible to be a judge of a court of record unless he or she has been a "member" of the State Bar for a specified period of time "immediately preceding" his or her judicial appointment.
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> ...
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> 3) Provides that a member of the Bar who is voluntarily enrolled as an inactive member, nevertheless, remains a "member" of the Bar for purposes of judicial appointment under Section 15 of Article VI.

(Senate Third Reading, September 12, 1989, Senate Floor Analysis, SB 905 (1989), Request for Judicial Notice, Exhibit "H.")

Aside from the State Legislature, then-Governor George Deukmejian was also aware that the purpose of SB 905 was to set the qualifications for members of the bench only, as indicated in the legislation's Enrolled Bill Report.

> The California Constitution provides that a person is ineligible to be appointed as a judge of a municipal court unless he or she has been a member of the State Bar for five years immediately proceeding the appointment. For other courts, an individual must have been a member for ten years immediately proceeding the judicial appointment.
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> SB 905 would clarify that members of the State Bar who have been enrolled as inactive members, at their request, would be eligible to be appointed as a judge.

(Enrolled Bill Report, Governor's Chaptered Bill File, SB 905 (1989), Request for Judicial Notice, Exhibit "I.")

Thus, SB 905 was an effort by the State Legislature solely to provide eligibility qualifications in respect to Article VI, Section 15, and in no way implicated the "admitted" language applicable to the California Attorney General, district attorneys, sheriffs, and other public office qualifications. The provision enacted by SB 905 explicitly pertains to Article VI, Section 15 only. The legislative history of the bill shows that lawmakers were only concerned about setting qualifications for members of the bench with SB 905. (See Senate Third Reading, September 12, 1989, Senate Floor Analysis, SB 905 (1989); Enrolled Bill Report, Governor's

Chaptered Bill File, SB 905 (1989).) Neither the text of SB 905, nor its legislative record, make any reference to Government Code section 12503 or other provisions including "member" or "admitted" requirements. Additionally, the legislative record of SB 905 includes no evidence that the State Legislature was setting forth a universal policy regarding how an individual may satisfy any and all state bar membership requirements when such a requirement is a qualification for a public office. (See Senate Third Reading, September 12, 1989, Senate Floor Analysis, SB 905 (1989); Enrolled Bill Report, Governor's Chaptered Bill File, SB 905 (1989).)

Finally, a legislative act is not interpreted "to overthrow long established principles of law unless that intention is made clear by express declaration or necessary implication." (*Barragan v. Workers' Comp. Appeals Bd.* (1987) 195 Cal.App.3d 637, 650.) As no express declaration nor necessary implication is found within SB 905 towards Government Code section 12503, its provision cannot be implied to apply to Section 12503, nor any other "member" or "admitted" requirement.

V. THE COURT SHOULD PRONOUNCE JUDGMENT IN THE ELECTION CONTEST SETTING ASIDE DEFENDANT BROWN'S ELECTION

"The contestant has the burden of proving the defect in the election by clear and convincing evidence." (*Wilks v. Mouton* (1986) 42 Cal.3d 400, 404 [superceded by statute on other grounds].) This clear and convincing evidence standard is one suited for election contests based upon factually-contested allegations. (See e.g., *id.*) This case, on the other hand, is a pure question of law. The only pertinent facts in this case - Defendant Brown's changing active status with the State Bar of California - are not in dispute. The only question before this court is whether, based upon the undisputed facts, Defendant Brown was an eligible candidate for California Attorney General at the time of the November 7, 2006 California statewide general election. As set forth above, the answer is an unequivocal, "No."

Pursuant to Elections Code section 16603, if a court determines that an individual elected to a public office was not eligible for that office at the time of the vote but received the greatest number of legal votes cast in the election, the Court must annul and set aside the election and deem the office vacant. (See *Bradley v. Perrodin* (2003) 106 Cal.App.4th 1153, 1170-1174.)[8] The underlying election contest does not allege that Defendant Brown received any illegal votes, nor that "but for" the casting of illegal votes Defendant Brown would not have received the most votes in the election. Rather, Contestants merely allege that Defendant Brown was ineligible to be elected as California Attorney General at the time of the November 7, 2006 California statewide election. As such, once determining that Defendant Brown was in fact an ineligible candidate at the time of the statewide general election, this Court must set aside and annul the Attorney General's Office election and deem the office vacant. In turn, the office shall be filled by appointment of the Governor of the State of California. (See California Constitution, Article V, Section 5, subdivision (b).) [9]

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[8] Elections Code section 16100, subdivision (d), allows an elector to contest an election upon the allegation that illegal votes were cast. In such a contest, if a court finds that illegal votes were cast, and the illegal votes altered the outcome of the election, the court would pronounce the candidate who would have otherwise prevailed in the election as elected to the public office. (See *Stebbins v. Gonzales* (1992) 3 Cal.App.4th 1138, 1142-1144.)

[9] Defendant Brown has previously argued that the underlying election contest is barred by laches. However, contesting the eligibility of a candidate at the time of an election in a *post-general election* election contest is specifically provided by Elections Code section 16100, subdivision (b). The likelihood of a candidate being eligible for office during the time leading up to a general election, but not at the time of the general election is remote at best. Therefore, the Elections Code contemplates would-be contestants waiting until after a general election to contest the eligibility of a candidate even if the candidate's eligibility was suspect prior to the election. Additionally, Contestants were prohibited from brining a like election contest after the primary election because not one of the Contestants was a candidate for the Democratic Party nomination for the Attorney General's Office. Elections Code section 16100, subdivision (b) only provides electors the right to contest elections "[t]hat the person *who has been declared elected to an office* was not, at the time of the election, eligible to that office. (Emphasis added.) Thus an elector can employ Elections Code section 16100, subdivision (b) only after general elections or non-partisan elections. On the other hand, Elections Code section 16101, subdivision (a) which provides the power to "contest the right

CONCLUSION

In short, (1) the *Johnson* interpretation of Government Code section 12503 is directly applicable to the underlying election contest because the statute uses the exact textual language analyzed in *Johnson*; (2) *Johnson* was good law at the time the statutory provision was enacted and remains good law under applicable canons of interpretation; (3) the legislative history of ACA 13x and AB 147x demonstrate the State Legislature's intent to maintain the "admitted" requirement for Government Code section 12503 as interpreted in *Johnson*; and (4) the enactment of SB 905 did not affect the interpretation of Government Code section 12503.

Therefore, the text of Government Code section 12503, as interpreted by *Johnson* and *Browning*, required Defendant Brown to have maintained active status in the State Bar of California for the five consecutive years immediately preceding the June 6, 2006 California statewide primary election to be an eligible candidate for the Attorney General's Office in the November 7, 2006 election. Defendant Brown, however, had only maintained active status with the state bar for barely more than three years at the time of the primary election. Therefore, pursuant to Government Code section 12503, this Court must enforce the laws of this state, declare Defendant Brown was ineligible to be a candidate for the Attorney General's Office in

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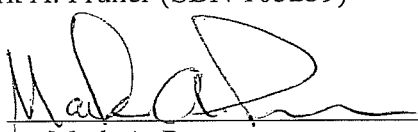
of [a] candidate *to nomination to [an] office* by filing an affidavit alleging ... the defendant is not eligible to the office in dispute," is only afforded to "[a]ny candidate at a primary election." (Emphasis added.) These two election contest provisions are distinct and exclusive to their respective election types. (See *Doran v. Biscailuz* (1954) 128 Cal.App.2d 55, 59-60.)

he November 7, 2006 election, set aside the Attorney General's Office election, and deem the office vacant.

Dated: January 1, 2007.

Respectfully submitted,

Thomas G. Del Beccaro (SBN 132351)
Mark A. Pruner (SBN 105259)

By: 
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