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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, vs. EDMUND GERALD "JERRY" BROWN JR., an individual and Attorney General of the State of California; et al., Defendants.	Case No. 06AS04494 **PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN REPLY TO OPPOSITION BY EDMUND GERALD "JERRY" BROWN JR., IN HIS INDIVIDUAL CAPACITY, TO THE ELECTION CONTEST AND FIRST AMENDED COMPLAINT** Date: February 9, 2007 Time: 1:30 p.m. Dept.: 11 Judge: Honorable Gail D. Ohanesian

INTRODUCTION

The Plaintiffs filed this action in defense of the Rule of Law, a foundation of our Democracy. They did so because by the laws of the State of California, our recently sworn-in Attorney General simply was not eligible to be Attorney General at the time of his election. Through artful, though flawed argument, the Defendants would have this court all but gut the candidate qualification process. In doing so, the Rule of Law would be bent if not broken for the purposes of this one candidate.

In rather plain terms, therefore, the question before the Court is whether the laws of this state apply to all of our citizens. Plaintiffs believe, and the truth is, that the Laws of the State of California do apply without partiality to every person within its borders. It is for this reason that the Plaintiffs undertake this necessary action to stop an unprecedented attempt by a candidate for Attorney General to undermine the very laws he is sworn to protect.

It is worthy to note that under our current system it is left only to the citizens of this state to challenge a candidate's eligibility for office. Neither the California Secretary of State nor local registrars "pre-qualify" candidates in cases of this nature. To the contrary, long ago the California legislature enacted a law for post-election challenges regarding eligibility. In keeping with that, this action represents the fulfillment of our duties as citizens to protect the integrity of our election process.

ARGUMENT

I. THIS ACTION IS ABOUT STRAIGHTFORWARD STATUTORY INTERPRETATION OF ONLY ONE SECTION OF THE LAW

The Plaintiffs look to this Court to rule in the same manner that the Supreme Court of this State has previously ruled. That Court reviewed the exact language at issue here -- language which requires that candidates "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 . . . ." (Government Code section 12503.)

In determining the meaning of that language, the California Supreme Court gave us a simple two-part test to determine whether a candidate fulfils that qualification, namely:

"It is self-evident, we think, that said provision requires as a fundamental qualification . . . that the candidate for such position [1] be qualified as an attorney [2] **actually entitled to practice** in the state courts" for the five-year period of time immediately preceding the election. (Emboldened emphasis added.) (*Johnson v. State Bar of California* (1937) 10 Cal.2d 212, 216.)

The Defendants fail to cite any case or statute that in any way modifies or undermines our Supreme Court's interpretation of that statutory language. That is so because that two-part test has never been challenged let alone overturned. As such, this Court should continue to abide by that long standing statutory interpretation.

The Defendant Brown, rather obviously, did not fulfill that requirement because he was designated as an inactive member of the bar by his own admission. Defendant Brown, *by his own volition*, chose to be "not entitled to … practice law" (Bus. & Prof. Code sec. 6006) as was his right under Business and Professions Code section 6006. Defendant Brown chose the benefits of not being entitled to practice law and voluntarily forwent the responsibilities required to remain entitled to practice law.

After having chosen and accepted the benefits of not being entitled to practice law, defendant Brown now seeks to avoid the consequences of his choice, claiming instead that he has met the minimum qualifications for election to the Office of Attorney General.

Our Supreme Court has stated clearly that "An inactive member of the State Bar, of course, is **not entitled to practice** law." (Johnson, Id. at 216.) The Defendants have failed

to cite any law to the contrary. It is clear that for over two of the five years preceding his election defendant **Brown was not entitled to practice law** in the California.

Thus, the crux of this case is that defendant Brown meets part one of the Supreme Court test for eligibility but, because he was inactive and legally barred from the practice of law for approximately two out of the last five years, he cannot, under any test, meet part two. As a result, defendant Brown was not qualified to be elected Attorney General, nor is he currently qualified to be Attorney General.

No artful argument offered by the Defendant can change the foregoing. So the question remains, is defendant Brown above law. Plaintiff believe the answer to be self-evident.

II. DEFENDANTS HAVE CITED NO CASE IN OPPOSITION TO THE ELECTION CONTEST WHICH HAS INTERPRETED THE EXACT LANGUAGE AT ISSUE

Defendant Brown seeks to draw the attention of the Court away from the clear meaning of the language at issue *as applied* to the office of Attorney General.

Numerous cases are cited which relate to judges and membership in the State Bar of California. This case is not about mere membership.

As is well evident by now in the briefs, in 1966 the Legislature, in the form of Assembly Constitutional Amendment 13, specifically separated the concept of appointment for judicial office, requiring mere membership.

At the exact time, in the coordinated measure which actually created Government Code section 12503, Assembly Bill 147 specifically used the language which had been interpreted in Johnson (supra, 10 Cal.2d 212). Specifically, after noting the change to membership as a minimum requirement for appointment to judicial office, the Special Counsel to the Legislature's Constitution Revision Commission noted in his April 22, 1966

report that the Legislature, at page five, made "[t]wo changes from the Commission's suggestions". . .:

"A section was added requiring five years admission to the practice of law before a person can be eligible to the office of Attorney General. Pg. 5, AB 147."[1]

It is critical that at the same time the Legislature made "membership" the criteria for judicial office, it was affirmatively required, with the *Johnson* case as the law of the State, admission to practice law (meaning actually entitled to practice law) as a minimum requirement for election to the office of Attorney General.

Defendant, in his quest to keep an office for which he is not qualified, has completely failed to take account of this critical and decisive fact.

III. THE EXISTING ATTORNEY GENERAL QUALIFICATION AS INTERPRETED BY THE CALIFORNIA SUPREME COURT IS NOT UNCONSTITUTIONAL

Without supporting authority, the Defendants assert that the Plaintiffs' interpretation of the Attorney General qualification statute, Government Code Section 12503, is unconstitutional. Their position, however, in addition to being unsupported, is untenable. The interpretation on which the Plaintiffs rely is not their own but that of the California Supreme Court. Further, qualifications for office have been upheld as constitutional in the past and so should this particular qualification.

First, as pointed out above, the Plaintiffs rely on the Supreme Courts interpretation of the exact language at issue, i.e. which requires that candidates be "admitted to practice before Supreme Court of the state." In *Johnson v. State Bar of California* (1937) 10 Cal.2d 212, 216, the California Supreme Court interpreted that provision as follows: "It is self-

[1] See Plaintiffs' Supplement to Request for Judicial Notice filed and served herewith.

evident, we think, that said provision requires as a fundamental qualification . . . that the candidate for such position be qualified as an attorney actually entitled to practice in the state courts . . ." It is that interpretation that binds this Court – the constitutionality of which has never been challenged.

Second, according to the United States Supreme Court, "states have 'compelling' reasons for requiring candidates for public office to establish their . . . eligibility for office within a reasonable and fixed period of time before the election." (*Dunn v. Blumstein* (1972) 405 U.S. 330, 343, 92 S.Ct. 995, 1003, 31 L.Ed.2d 274, cited in *Tergeson v. Superior Court* (1989) 211 Cal.App.3d 1204 [rejecting claims of unconstitutionality of residency requirements and nullifying the election of a candidate that did not meet eligibility qualifications].

Government Code section 12503

In this case, the legislature of this state set forth the eligibility requirements for Attorney General pursuant to a law signed by the Defendant's father, Edmund G. Brown, Sr. Subsequent to that, the legislature modified the law with respect to judicial appointments – the qualifications for which were once the same. In deciding to change those qualifications, but not the qualifications for attorneys general, it can safely be assumed that the legislature reaffirmed the importance it played on this eligibility requirement.

The argument offered by the Defendant Brown seeks to undermine the role of the legislature and would have this Court legislate from the bench and thereby create a watered down qualification standard. Indeed, the standard would amount to nothing more than a substantial compliance standard. Like Elections Code section 25041, Government Code Section 12503 is mandatory. As stated in *Tergeson v. Superior Court* (1989) 211 Cal.App.3d 1204, 1208 a provision is mandatory if "it goes to the substance or necessarily

affects the merits or results of an election…" In such circumstances the constitutional challenge must fail. (*Tergeson*, Id. at 1210-1212.)

IV. JUSTICE BAXTER'S CASE IS NOT COGNISABLE

Defendants attempt to bring Justice Baxter into the case must fail. What is at issue here is the qualification for election of a person to the office of Attorney General, not the qualification of a person to sit as a judicial officer.

We know from the 1989 enactment of SB905, when the Legislature again visited the subject matter, that it extended to ten years the time of membership as a qualification. It did not change the different and other language related to basic qualification for election to the office of Attorney General.

No matter what decision is made in this case, Justice Baxter, in retrospect, would not have been affected.

V. LACHES CANNOT APPLY

Defendants have put forth laches as a legal position. Suffice it to say that if laches was a bar in cases such as this filed under the Elections Code, there would never be an election contest to challenge the qualifications of a person elected to office. Such was in no way the intention of the Legislature.

CONCLUSION

This case is about upholding the Rule of Law, the basis for our society. The people of California look to the court to fairly interpret the law, with impartiality. This case gives the Court, under unique circumstances, that opportunity in a new and different context to be sure.

Yes, Plaintiffs are asking for an unusual remedy. With due respect, Plaintiffs are forced to ask for an unusual remedy because defendant Brown himself, and for the office of Attorney General, for the Rule of Law not to apply in his case.

Dated: February 2, 2007.

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