

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

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HEIDI FULLER )  
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 )  
 *Plaintiff and Appellant* ) C065237  
 )  
 )  
 v. )  
 )  
 )  
 DEBRA BOWEN, )  
 Secretary of State, et al., )  
 )  
 )  
 TOM BERRYHILL, )  
 )  
 )  
 *Defendants and Respondents.* )  
 )  

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Sacramento County Superior Court No. 34-2010-800000452-CU-WM-GDS  
The Honorable Judge Timothy M. Frawley

**APPLICATION TO FILE BRIEF OF *AMICUS CURIAE*  
LEGISLATURE OF THE STATE OF CALIFORNIA  
AND BRIEF OF *AMICUS CURIAE* LEGISLATURE OF THE STATE  
OF CALIFORNIA**

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State of California  
Court of Appeal  
Third Appellate District

**CERTIFICATE OF INTERESTED ENTITIES OR PERSONS**  
California Rules of Court, rule 8.208

Court of Appeal Case Caption:

HEIDI FULLER, *Plaintiff and Appellant*

v.

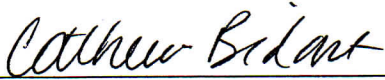
DEBRA BOWEN, Secretary of State, et al., TOM BERRYHILL, *Defendants and Respondents*

Court of Appeal Case Number: C0 65237

Please check here if applicable:

- There are no interested entities or persons to list in this Certificate as defined in the California Rules of Court.

Name of Interested Entity or Person (Alphabetical order, please.)	Nature of Interest
1.	
2.	
3.	
4.	



Signature of Attorney or Unrepresented Party

Date: May 20, 2011

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**TO THE HONORABLE PRESIDING JUSTICE OF THE  
COURT OF APPEAL, THIRD APPELLATE DISTRICT**

The Legislature of the State of California respectfully requests permission, under rule 8.200(c) of the California Rules of Court, to file the attached *amicus curiae* brief.

The resolution of this case depends on the jurisdictional issue of which branch of government, legislative or judicial, has authority to judge the qualifications of a Member of the Legislature. The qualifications clause, set forth in section 5 of article VI of the California Constitution, vests each house of the Legislature with exclusive authority to judge the qualifications of its members. The California Supreme Court has repeatedly recognized that exclusive authority and held that, under the separation of powers set forth in section 3 of article III of the Constitution, courts have no jurisdiction to judge qualifications of a legislative member. In submitting the attached brief, the Legislature seeks to safeguard the separation of powers set forth in the Constitution, and preserve the constitutional power of each house of the Legislature to judge the qualifications of its members.

The Legislature's brief provides an informative discussion of



the governing jurisdictional law that would assist the court in deciding  
the case.

Dated: May 20, 2011

Respectfully submitted,  
DIANE F. BOYER-VINE  
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**AMICUS CURIAE BRIEF OF THE LEGISLATURE OF THE  
STATE OF CALIFORNIA**

**I.  
INTRODUCTION**

The appeal before the court is from the denial of a writ petition filed by Heidi Fuller, challenging Tom Berryhill's qualification to run in the primary election for the 14th District of the California State Senate. (See *Fuller v. Bowen*, Minute Order for Case No. 34-2010-80000452, pp. 1, 5.) Fuller challenged Berryhill's qualification on the ground that he did not meet the requirement for a Member of the Legislature to reside in the member's district for one year preceding the election, set forth in section 5 of article IV of the California Constitution.<sup>1</sup> (See *id.* at 1.) Rather than submitting her grievance to the Senate,<sup>2</sup> which has exclusive jurisdiction over the matter under the qualifications clause in section 5 of article IV of the Constitution, Fuller brought her challenge in court.

Despite the jurisdictional defect, the trial court denied the

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<sup>1</sup> All references to the Constitution are to the California Constitution unless otherwise noted.

<sup>2</sup> A matter of this nature may appropriately be directed to the Senate Committee on Rules, which has "the general responsibility for the administrative functioning of the Senate." (See Senate Rule 13(a), available at <[http://www.leginfo.ca.gov/rules/senate\\_rules.html](http://www.leginfo.ca.gov/rules/senate_rules.html)>.)

petition on its merits, holding that the one-year residency requirement violates the equal protection clause of the United States Constitution. (*Fuller v. Bowen, supra*, p. 5.) To reach its holding, the trial court first determined that it has the constitutional jurisdiction to decide the qualifications of a Member of the Legislature. (*Id.* at 2-3.) As amicus curiae, the Legislature of the State of California respectfully requests this court to vacate the trial court's decision for lack of jurisdiction.<sup>3</sup>

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<sup>3</sup> The Appellant asserts that this court may not review the trial court's determination that it has jurisdiction to judge qualifications of legislative members because there is no cross-appeal on the issue. (Appellant's Reply Brief, p. 3.) That is incorrect. A reviewing court may consider a respondent's claim not raised by cross-appeal. (See, e.g., *Citizens for Unif. Laws v. County of Contra Costa* (1991) 233 Cal.App.3d 1468, 1472; *Westinghouse Elec. Corp. v. County of Los Angeles* (1982) 129 Cal.App.3d 771, 781 [noting that respondent "may complain of the trial court's ruling on the issue of standing, even though [respondent] has not appealed from the judgment"].) And as this court stated:

[Although] it is the general rule that a respondent who has not appealed from the judgment may not urge error on appeal ... [a] limited exception ... is provided by Code of Civil Procedure section 906, which provides in pertinent part: "The respondent ... may, without appealing from the judgment, request the reviewing court to and it may review ... [described orders or rulings] for the purpose of determining whether or not the appellant was prejudiced by the error ... upon which he relies for reversal or modification of the judgment from which the appeal is taken." ... *The purpose of the statutory exception is to allow a respondent to assert a legal theory which may result in affirmance of the judgment.*

(*California State Employees' Assn. v. State Pers. Bd.* (1986) 178 Cal.App.3d 372, 382 n.7 (emphasis added).) Furthermore, because reviewing courts have "inherent power to decide any issue deemed necessary for a proper disposition of the case whether or not it was originally presented or briefed by the parties," this court must be able to

Code of  
Civ. Pro 906



Under the qualifications clause of the Constitution and longstanding California Supreme Court precedent interpreting that clause, the California State Senate and the California State Assembly possess the exclusive power to judge the qualifications of their respective members. The trial court nevertheless determined it has jurisdiction over a qualifications-based challenge raised before a primary election. (See *Fuller v. Bowen*, *supra*, pp. 2-3.) Instead of recognizing the Legislature's longstanding constitutional power to determine its members' qualifications, the trial court usurped this power.

To uphold the trial court's determination regarding jurisdiction over this question would not only be unsupported by California case law, but would unconstitutionally alter the separation of powers among the three branches of California state government. The separation of powers doctrine is a cornerstone of American democracy. As stated by James Madison in Federalist Paper No. 48, no branch of government

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determine whether the threshold jurisdictional question was properly decided. (See *Canal-Randolph Anaheim, Inc. v. Wilkoski* (1978) 78 Cal.App.3d 477, 476; see also *Goldsworthy v. Dobbins* (1952) 110 Cal.App.2d 802, 806 [stating that court's rulings and decisions on all issues are reviewable].)



ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers.... [P]ower is of an incroaching nature, and ... it ought to be effectually restrained from passing the limits ... assigned to it.

(2 Federalist 101, pp. 1788-89.)

To safeguard the separation of powers set forth in the Constitution, and preserve the constitutional power of each house of the Legislature to judge the qualifications of its members, the Legislature urges this court to vacate the trial court's decision.

**II.**  
**COURTS LACK JURISDICTION TO DETERMINE THE  
QUALIFICATIONS OF MEMBERS OF THE LEGISLATURE  
PURSUANT TO THE SEPARATION OF POWERS DOCTRINE**

California's separation of powers doctrine, set forth in section 3 of article III of the Constitution, declares that "[t]he powers of state government are legislative, executive, and judicial," and that "[p]ersons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." Under the separation of powers doctrine, a power belonging to the legislative branch may not be exercised by any other branch, except as permitted by the Constitution.

The Constitution directly addresses the manner in which the qualifications of Members of the Legislature are to be judged, expressly providing that each house of the Legislature is to judge the qualifications of its members.

Each house shall judge the qualifications and elections of its Members and, by rollcall vote entered in the journal, two thirds of the membership concurring, may expel a Member.

(Cal. Const., art. IV, § 5(a).)

Nowhere does the Constitution grant to the courts any power to judge the qualifications of Members of the Legislature. Rather, the California Supreme Court held that a predecessor qualifications clause, which is substantively identical to the current clause, vested “exclusive jurisdiction [in] the Legislature to judge the qualifications and elections of its members.” (*In re McGee* (1951) 36 Cal.2d 592, 594 [construing former section 7 of article IV, which provided that “[e]ach house (of the Legislature) shall ... judge of the qualifications, elections and returns of its members”].) “When a power has been expressly vested in the legislature ... [e.g., the power] to determine the qualifications of one of its members[,] the courts are without authority to assume jurisdiction over the controversy.” (*People v. Odle* (1951)

37 Cal.2d 52, 59 (conc. opn. of Shenk, J.)) Because the Constitution places the power to judge legislative members' qualifications exclusively with each house of the Legislature, under the separation of powers doctrine, that power may not be exercised by any other branch of government.<sup>4</sup> As illustrated below, the California Supreme Court has repeatedly upheld that principle.

A. *Longstanding California Supreme Court Precedent Holds That Each House Has the Exclusive Power to Judge the Qualifications of Its Members*

“For over 100 years the California Supreme Court has consistently held that under the Constitution the courts have no jurisdiction to inquire into the qualifications of the members of the Legislature.” (*California War Veterans for Justice v. Hayden* (1986) 176 Cal. App.3d 982, 986.)

The Court's first pronouncement on the constitutional power of a house to judge its members came 137 years ago in *People v. Metzker* (1874) 47 Cal. 524. The *Metzker* case involved a dispute over the analogous power of a city council to judge its members, under a

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<sup>4</sup> This power is not limited to the point in time at which a member is initially seated, as it is a continuing power, and the question of election and qualification of a member is never finally decided, in the sense that a decision is conclusive on the house, until final adjournment. (See National Conference of State Legislatures, *Mason's Manual of Legislative Procedure* (2010), p. 394.)



statutory provision stating that the council “shall judge of the qualifications, elections, and returns of their own members.” (*People v. Metzker, supra*, 47 Cal. 524, 525.) In reasoning that the council alone holds the power to determine its members’ qualifications, the Court relied on the qualifications clause in the Constitution of 1849, which stated, “Each house [of the Legislature] shall choose its own officers and judge of the qualifications, elections, and returns of its own members.” (*Ibid.* [interpreting former Cal. Const., art. IV, § 8].) The Court concluded:

*It is settled beyond controversy, that those words of the Constitution confer upon each house the exclusive power to judge of and determine the qualifications, elections and returns of its own members; and it follows that the Common Council of a city to which that section of the Act is applicable, possesses the like exclusive authority to judge of and determine the qualifications, elections, and returns of its own members.<sup>[5]</sup> The Court, therefore, had no jurisdiction of the action.*

(*People v. Metzker, supra*, 47 Cal. 524, 525-26.) (Emphasis added.)

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<sup>5</sup> The Court later distinguished a case, *People v. Bingham* (1889) 82 Cal. 238, that could appear contrary to this statement regarding the authority of a local council. Specifically, the Court distinguished it as involving “a conflict of a statutory grant of jurisdiction to a local legislative body and a constitutional provision investing power in the courts.” (*In re McGee, supra*, 36 Cal.2d. 592, 594.) (Emphasis added.)



Recognizing that the power to determine members' qualifications lies exclusively with the legislative body, the Court held that the judiciary lacks jurisdiction over qualifications-based challenges.

Following the adoption of a new Constitution in 1879, the Court reaffirmed that the judiciary lacks jurisdiction to determine qualifications of Members of the Legislature. In *Allen v. Lelande*, the Court held that the qualifications clause precludes a court from exercising jurisdiction over a claim that a candidate was ineligible on residency grounds. (*Allen v. Lelande* (1912) 164 Cal. 56, 57.) The qualifications clause, then in section 7 of article IV, provided that “[e]ach house shall choose its officers, and judge of the qualifications, elections, and returns of its members.” (*Ibid.*)

The issue in *Allen* arose from a county clerk's refusal to strike from the ballot the name of a nominated candidate for Assembly, despite an allegation that he was “ineligible for that office by reason of nonresidence.” (*Allen v. Lelande, supra*, 164 Cal. 56, 57.) The Court refused to issue a writ of mandate to the clerk, holding that the Assembly is the exclusive judge of its members' qualifications under the qualifications clause. In this regard, the Court held:

For this court to undertake to try the question of eligibility and

to deprive the candidate of any chance to be elected, would simply be to usurp the jurisdiction of the assembly.

(*Ibid.*) A court's determination of the eligibility of a candidate for the Senate or Assembly would just as surely usurp the constitutional authority of that house to judge the qualifications of that candidate whether the question is raised before or after a primary election.

In another case, *In re McGee*, the plaintiff challenged the defendant's success at a primary election for a State Assembly seat, on the ground that he failed to meet a three-year state residency requirement in section 4 of article VI of the Constitution. Like the appeal here, the case involved a challenge on residency grounds in the context of a primary election.

As in prior cases, the California Supreme Court held that the qualifications clause precludes the judiciary from exercising jurisdiction over a claim that a candidate is not eligible for office as a Member of the Legislature. (See *In re McGee, supra*, 36 Cal.2d 592, 593, 599.) The qualifications clause at the time stated that "[e]ach house (of the Legislature) shall ... judge of the qualifications, elections, and returns of its members." (*Id.* at 593; former Cal. Const., art. IV, § 7.) The Court interpreted the clause to confer "exclusive

jurisdiction on the Legislature to judge the qualifications and elections of its members.” (*Id.* at 594.) Under the separation of powers doctrine, the Court concluded that courts lack jurisdiction to judge legislative members’ qualifications.

The powers of the government of the state are divided into the legislative, executive and judicial, and neither shall exercise the powers of the other “*except* as in this constitution expressly directed or permitted.” (Cal. Const., art. III, § 1.) And there is expressly vested in the Legislature, the power to judge the matters here involved (Cal. Const., art. IV, § 7, *supra*), a power which is judicial in character. [Citation omitted.] Hence we conclude that it was intended to be exclusive in the Legislature

....

(*In re McGee, supra*, 36 Cal.2d 592, 594-95.) (Emphasis in original.)

Importantly, the *McGee* court rejected a claim that each house’s power to judge the qualifications of its members “does not extend to or include primary elections.” (*In re McGee, supra*, 36 Cal.2d 592, 595-98.) Nothing in the Court’s reasoning supports a conclusion that the result would be different if the challenge had been raised before the primary election (as in the appeal before this court), instead of after (as in *McGee*).

In rejecting the challenge to the Assembly candidate’s



eligibility at the primary election, the Court relied in part on *State v. Zimmerman* (1946) 249 Wis. 237. (*In re McGee, supra*, 36 Cal.2d 592, 595-97.) The *Zimmerman* court held that the parallel qualifications clause in the federal Constitution<sup>6</sup> gave the United States Senate exclusive jurisdiction to decide the qualifications and elections of its members, including at the point of primary elections. (*Id.* at 595.) The *Zimmerman* court emphasized the importance of primary elections to the election process in Wisconsin. (*Id.* at 597.)

The *Zimmerman* holding was persuasive to the California Supreme Court because “[a]s in Wisconsin, primary elections in this state are an integral part of the election process.” (*In re McGee, supra*, 36 Cal.2d 592, 597.) The Court thus concluded that

the jurisdiction to judge qualifications and elections of [Assembly Members] lies exclusively with the Assembly and it cannot delegate that duty and it cannot achieve that result indirectly by authorizing the courts to decide contests after primary elections.

(*Ibid.*) The Court elaborated on its conclusion, explaining that “while the Legislature may prescribe tests and conditions for candidates

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<sup>6</sup> Section 5 of article I provides: “Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members ....”



under section 2 1/2 of article II of the Constitution<sup>[7]</sup>... that does not mean that the courts may be given jurisdiction to override the power vested in the Legislature to judge qualifications, elections and returns of members.” (*Id.* at 598.) (Citations omitted.)

Observing that the duty of a legislative house to judge its members’ qualifications is exclusive, the Court concluded that the separation of powers doctrine prohibits a house from delegating that duty to the courts, and that the courts thus could not be authorized to

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<sup>7</sup> Former section 2 1/2 of article II stated:

The Legislature shall have the power to enact laws relative to the election of delegates to conventions of political parties; and the Legislature shall enact laws providing for the direct nomination of candidates for public office, by electors, political parties, or organizations of electors without conventions, at elections to be known and designated as primary elections; also to determine the tests and conditions upon which electors, political parties, or organizations of electors may participate in any such primary election. It shall also be lawful for the Legislature to prescribe that any such primary election shall be mandatory and obligatory. The Legislature shall also have the power to establish the rates of compensation for primary election officers serving at such primary elections in any city, or city and county, or county, or other subdivision of a designated population, without making such compensation uniform, and for such purpose such law may declare the population of any city, city and county, county or political subdivision. *Provided, however*, that until the Legislature shall enact a direct primary election law under the provisions of this section, the present primary election law shall remain in force and effect.

(Cal. Const., art. II, § 2 1/2, as amended Nov. 3, 1908.) (Emphasis in original.)

decide a qualifications-based challenge before a general election.<sup>8</sup> The Court's reasoning—that a house may not delegate its power to determine its members' qualifications, nor may a court assert that power—is no less applicable before a primary election. A court's determination that a candidate fails to meet the qualifications for legislative office, and shall be removed from the ballot, would preclude the Senate or Assembly from exercising its judgment as to that candidate's qualifications, regardless of whether the court's determination occurs before or after a primary election.

The most recent published California appellate decision on jurisdiction to judge qualifications of a Member of the Legislature followed the longstanding California Supreme Court precedent described above. (See *California War Veterans for Justice v. Hayden*,

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<sup>8</sup> Because the Legislature may not delegate its constitutional duty, the Appellant argues that the grant, under Elections Code section 13314, of writ jurisdiction to courts over ballot errors concerning candidates before a primary election “would be an impermissible encroachment on the legislature's jurisdiction.” (Appellant's Reply Brief, p. 10.) However, the Constitution prevails over statutes, which should be construed whenever possible to be consistent with the Constitution. (See *Walnut Creek Manor v. Fair Employment and Hous. Comm'n* (1991) 54 Cal.3d 245, 268; *Harris v. Alcoholic Beverage Control Appeals Bd.* (1964) 228 Cal.App.2d 1, 7.) Accordingly, the writ jurisdiction conferred by section 13314 must be read to exclude a qualifications-based challenge to a candidate for the Senate or Assembly, as the Constitution gives each house exclusive power to judge the qualifications of its respective members. (See Cal. Const., art. IV, § 5(a).)