supra, 176 Cal.App.3d 982, 986-89.) Specifically, the Second District Court of Appeal rejected a challenge to the qualifications of an Assembly Member, concluding that, under the separation of powers doctrine, the Assembly alone possesses the power to judge its members' qualifications. (*Id.* at 984, 986-89.) Interpreting the qualifications clause, and following the California Supreme Court's interpretation of parallel predecessor clauses, the court stated, "It is unequivocally clear that under article IV, section 5 of the Constitution, appellants cannot successfully seek relief in the courts." (*Id.* at 989.)

B. The California Supreme Court's Interpretation of Each House's Exclusive Power to Expel Its Members is Instructive in Interpreting Each House's Exclusive Power to Judge Qualifications of Its Members

The California Supreme Court's interpretation of each house's power to expel a member, most recently pronounced in *French v. Senate* (1905) 146 Cal. 604, is instructive. The power to expel a member is similar to the power to judge a member's qualifications. For example, the Second District Court of Appeal used *French v. Senate* to illustrate the California Supreme Court's continued adherence, after the adoption of the present California Constitution of 1879, to the principle that courts may not determine the membership of the Legislature. (See *California War Veterans for Justice v.*

Hayden, *supra*, 176 Cal.App.3d 982, 987.)

In *French*, four expelled Senators sought reinstatement to the Senate after their expulsion on the ground that they accepted bribes. (*French v. Senate* (1905) 146 Cal. 604, 605.) The Court concluded that it lacked jurisdiction over the Senators' claims. (*Id.* at 606.) In reaching its conclusion, the Court examined the power of a house to expel its members, which was set forth in section 9 of article IV (but is now in the same provision as the qualifications clause in section 5 of the same article). (See *ibid.*) The Court reasoned that each house's power to expel a member

> does not depend on implication. It is expressly given. Or, as the power would exist without the express grant, perhaps it is more accurate. [*sic*] to say that it is expressly recognized and limited. The constitution provides that the senate "shall determine the rule of its proceeding, and may, with the concurrence of two thirds of all the members elected, expel a member." (Const., art. IV, sec. 9.) *If this provision were omitted, and there were no other constitutional limitations on the power, the power would nevertheless exist and could be exercised by a majority. The only effect of the provision is to make the concurrence of two thirds of the members elected necessary to its exercise. In all other respects it is absolute.*

(*Ibid.*) (Emphasis added.)

Notably, the Court interpreted each house's power to expel its members as a power that would exist *without* the express grant in the Constitution. This is consistent with the Court's conclusion in other cases that the Constitution is a limitation, not a grant, of the Legislature's power. (See, e.g., *Pac. Legal Found. v. Brown* (1981) 29 Cal.3d 168, 180; *Methodist Hosp. of Sacramento v. Saylor* (1971) 5 Cal.3d 685, 691.)

It follows that each house's power to judge the qualifications of its members would exist even without its expression in the Constitution. Under the Court's reasoning, any limitation upon this power—for example, a timing limitation that would forbid a house from judging member qualifications before a primary election—must be in the Constitution. As there is no express limitation to that effect, the exclusive authority of each house of the Legislature to judge the qualifications of its members must be held to apply without regard to whether a primary election has occurred. The power of a house of the Legislature to judge its members' qualifications applies both before and after a primary election, as it does both before and after a general election.

C. *The Trial Court's Decision Has No Basis Under California or Federal Law*

Apart from the trial court's decision that led to this appeal, California courts have consistently held that each house of the Legislature has the exclusive power to determine its members' qualifications. In departing from that longstanding principle, the trial court provided little analysis.

In support of its decision, the trial court cited three out-of-state cases: *Comer v. Ashe* (Tenn. 1974) 514 S.W.2d 730, *State ex rel. Gralike v. Walsh* (Mo. 1972) 483 S.W.2d 70, and *State ex rel. McGrath v. Erickson* (Minn. 1938) 203 Minn. 390. There is no basis for California courts to adopt these out-of-state decisions. For example, there is only a brief statement in *State ex rel. McGrath* in favor of a court's jurisdiction to determine members' qualifications before a primary election. (See *State ex rel. McGrath v. Erickson*, *supra*, 203 Minn. 390, 391.) Moreover, the statement is dicta, and appears to be based on a state statute. (See *ibid.* [stating that "... it may be conceded that in respect to primary election ballots[,] courts, in virtue of § 316 of the statutes, may strike the name of a candidate ... who is not a resident of the legislative election district wherein he has filed"].)

The other two cases, *Comer* and *State ex rel. Gralike*, conclude that courts have jurisdiction over qualifications-based challenges before the general election and, thus, before the primary election, as well. (See *Comer v. Ashe*, *supra*, 514 S.W.2d 730, 739, 741; *State ex rel. Gralike v. Walsh*, *supra*, 483 S.W.2d 70, 73.) These conclusions, that courts have jurisdiction over qualifications-based challenges before a primary election, are based upon each court's interpretation of its own state constitution that the courts in its state have jurisdiction over qualifications-based challenges before a general election. This latter interpretation is directly at odds, however, with longstanding California Supreme Court precedent interpreting the California Constitution to the effect that the courts of this state lack that jurisdiction before a general election. (See, e.g., *In re McGee*, *supra*, 36 Cal.2d 592, 597; *Allen v. Lelande*, *supra*, 164 Cal. 56, 57.) While the case law in Tennessee and Missouri, pursuant to *Comer* and *State ex rel. Gralike*, may reflect the view that those two out-of-state courts have jurisdiction over the issue of legislator qualifications before a general election and also before a primary election, it is settled in California that the Legislature has exclusive jurisdiction over the issue

of legislator qualifications before a general election. (See *ibid.*)[9] Because these out-of-state decisions reach a conclusion with respect to jurisdiction before a general election that is opposite to the conclusion of the California Supreme Court on that issue, these decisions are an untenable ground upon which to conclude that the Legislature lacks jurisdiction before the primary election. To accept the reasoning in these inconsistent, out-of-state decisions would turn the established California jurisprudence on the issue of jurisdiction on its head.

After citing the out-of-state cases, the trial court stated that it rejected the "argument that the Legislature was intended to be the sole and exclusive judge of any issues related to the qualifications of its

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[9] The language of the qualifications clause, while stated in a similar manner in constitutions of various states, has received different interpretations by different state courts. Although courts in Tennessee and Missouri interpret the wording differently from the California Supreme Court, other states share the Court's interpretation of the clause. For example, interpreting the qualifications clause in its state constitution, the Florida Supreme Court stated, "we fail to see the jurisdictional or constitutional significance in distinguishing between eligibility for candidacy and qualifications for office," and noted that courts in Arkansas and Georgia agree with that position. (*McPherson v. Flynn* (Fla. 1981) 397 So.2d 665, 668 [citing *Reaves v. Jones* (Ark. 1974) 515 S.W.2d 201); *Rainey v. Taylor* (Ga. 1928) 143 S.E. 383].) The Florida court expressly endorsed the California Supreme Court's view in the *McGee* case, stating, "In brief, candidacy is an integral part of the election process. See In re McGee. The litigation in this case unavoidably involves a nonjusticiable political question and is properly left to the prerogative of the legislature." (*Ibid.*)

members, including, as presented here, an issue whether a state constitutional requirement is valid under the equal protection clause of the U.S. Constitution." (*Fuller v. Bowen*, *supra*, pp. 2-3.) Although the court provided no support for that assertion, in our view there are two limited circumstances, neither of which is presented here, in which a court may adjudicate an issue related to the qualifications of members.

The first circumstance arises if a legislative body uses extra-constitutional criteria to judge member qualifications; in other words, the body uses criteria that are *not* set forth in the governing constitutional provisions. The second circumstance arises if a plaintiff alleges that a qualification set forth in a state constitution is nonetheless invalid under the federal constitution. In neither circumstance is a court asked to address the question of whether a particular person actually meets the qualification. These two circumstances are illustrated by United States Supreme Court cases.

The first circumstance is illustrated by *Powell v. McCormack*, in which the Court asserted jurisdiction over a claim that the United States House of Representatives unconstitutionally refused to seat an elected candidate by applying qualifications criteria not set forth in the

federal Constitution. (*Powell v. McCormack* (1969) 395 U.S. 486, 489, 492.) Also, in *Bond v. Floyd*, the Court asserted jurisdiction over a claim that the Georgia House of Representatives unconstitutionally refused to seat an elected candidate, where the house found he met the qualifications stated in the Georgia Constitution, but excluded him on criteria that violated his right to free speech. (*Bond v. Floyd* (1966) 385 U.S. 116, 129.)

Those cases provide no support for court jurisdiction here. In those cases, the Court did not judge whether a candidate in fact met qualifications set forth in a constitution, as that would have usurped the legislative body's jurisdiction. (In *Powell*, it would have usurped the House of Representative's jurisdiction under the qualifications clause in the federal Constitution, providing that "[e]ach House shall be the Judge of ... its own Members" (see U.S. Const., art. I, § 5), and in *Bond* it would have usurped the Georgia House of Representative's jurisdiction under the qualifications clause in the Georgia Constitution, providing that "[e]ach House shall be the judge of the ... qualifications of its members" (see *Bond*, *supra*, 385 U.S. 116, 129 [quoting the clause]).) Instead, the Court asserted jurisdiction to decide the lawfulness of a house's application of qualifications not set

forth in the constitution.[10]

The second circumstance—in which a plaintiff alleges that a qualification set forth in a state constitution is nonetheless invalid under the federal constitution—is illustrated by *Sununu v. Stark*. In *Sununu*, the United States Supreme Court affirmed summarily a court's rejection on the merits (not on jurisdictional grounds) of plaintiffs' claim that the residency requirement for state senators in New Hampshire's Constitution contravened the federal Constitution. (*Sununu v. Stark* (1975) 420 U.S. 958; see also *Sununu v. Stark* (D. N.H. 1974) 383 F.Supp. 1287.) Although not discussed in the opinion, which was affirmed summarily, the New Hampshire Constitution contained (and still contains) a qualifications clause that says "[t]he senate shall be final judges of the elections, returns, and qualifications, of their own members, as pointed out in this

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[10] The Appellant cites *Powell* as support for her argument that the Legislature does not have plenary jurisdiction to judge the qualifications of its members. (See Appellant's Reply Brief, p. 5.) According to the Appellant, the Court, in considering the federal qualifications clause, stated that "a determination of petitioner['s] ... right to sit would require no more than an interpretation of the Constitution[, and this] determination falls within the traditional role accorded to courts to interpret the law." (*Ibid.* [quoting *Powell v. McCormack*, *supra*, 395 U.S. 486, 548]) The Court's statement, however, is not directed to the issue of jurisdiction to decide qualifications of members. Instead, the statement is made in the context of rejecting an argument that the case presents a non-justiciable political question.

constitution." (See N.H. Const., art. 35, part 2; see also *Brown v. Lamprey* (1965) 106 N.H. 121, 124-25 [holding New Hampshire qualifications clause bars court from interfering with senate's determination regarding whether senators were qualified].)

Presumably, the *Sununu* opinion did not discuss the clause because it posed no jurisdictional bar. There, the plaintiffs' entire case consisted of their claim that the residency requirement was invalid under the federal Constitution. (See *Sununu v. Stark*, *supra*, 383 F.Supp. 1287 at 1289-90 [recounting undisputed facts, including that named plaintiff, Sununu, did not meet residency requirement].) The plaintiffs did not petition the court to judge the qualifications of a particular candidate—the named plaintiff, Sununu—and to disqualify him for not meeting the residency requirement (as both sides agreed that he not meet the requirement).[11] (*Id.* at 1289.) If instead the plaintiffs' petitioned the court to determine whether the candidate for

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[11] The case arose because Sununu sought to run for the New Hampshire state senate, but was unable to sign an affidavit stating he met the residency requirement. (*Sununu v. Stark*, *supra*, 383 F.Supp. 1287 at 1289.) Absent the signed affidavit, the elections clerk refused to file Sununu's declaration of candidacy, and the plaintiffs filed for declaratory and injunctive relief challenging the constitutionality of the requirement. (*Ibid.*) (Sununu's co-plaintiffs alleged that they were registered voters who would have voted for Sununu, but were unable to because of the allegedly unconstitutional residency requirement. (*Ibid.*))

state senate met the requirement, the court would have lacked jurisdiction, as that determination lies exclusively with the New Hampshire senate under New Hampshire's qualifications clause. (See *Brown v. Lamprey*, *supra*, 106 N.H. 121, 124-25 [holding New Hampshire qualifications clause bars court from interfering with senate's determination regarding whether senators were qualified].)

Unlike the plaintiffs in *Sununu*, the plaintiff here petitioned the court to determine whether a candidate met a residency requirement. Specifically, the plaintiff petitioned the trial court to determine that Berryhill did not meet the requirement and to issue a writ of mandate to remove his name from the ballot. (*Fuller v. Bowen*, *supra*, p. 1.) In defending the plaintiff's petition, Berryhill asserted that it should be dismissed because courts do not have jurisdiction to judge the qualifications of members; alternatively, he asserted that if the court has jurisdiction, the residency requirement is invalid under the federal constitution. (See *id.* at 1-2.) The trial court determined it has jurisdiction over the petition, and then held the requirement to be invalid under the federal constitution. (See *id.* at 2, 5 [stating that the court "is not persuaded that article IV, section 5(a) of the California Constitution deprives this Court of jurisdiction to inquire into

Berryhill's qualifications," and then concluding that the residency requirement violates the federal equal protection clause].)

In determining it has jurisdiction over the petition, however, the trial court misconstrued the qualifications clause of the Constitution, which gives the Legislature exclusive jurisdiction to judge its members' qualifications. (See Cal. Const., art. IV, § 5(a); *In re McGee*, *supra*, 36 Cal.2d 592; *Allen v. Lelande*, *supra*, 164 Cal. 56.) Because the court has no jurisdiction over the petition, it should have dismissed the petition. Without jurisdiction over the petition, the court cannot reach any other issues. Thus, because the court lacks jurisdiction over the petition, the court has no jurisdiction to reach the alternative ground for dismissal raised by the defendant—i.e., that the requirement is invalid under the federal constitution.

In her reply brief, the Appellant states that she only asks the reviewing court to reverse the trial court's determination that the residency requirement is invalid under the federal constitution, and that she is *not* asking for a determination of whether the requirement was met. (Appellant's Reply Brief, p. 4.) But she cannot cure the lack of jurisdiction over her case by framing her appeal in these other terms.

because Resp. admits he does not meet the requirement.

Unlike the plaintiffs in *Sununu*, the plaintiff here asked the trial court to step outside the bounds of its authority, usurp the exclusive constitutional authority of the legislative body, and judge whether the residency qualification is met by a particular candidate. However, exclusive jurisdiction over whether a particular candidate meets a constitutional requirement belongs to the legislative body—here, the California State Senate. The trial court should have therefore dismissed the case for lack of jurisdiction.

III.
CONCLUSION

Both inherently and by express provision, the California Constitution assigns sole authority to each house of the Legislature to judge the qualifications of its members. Thus, the plaintiff should have presented to the California State Senate, not to the courts, her contention that the defendant did not satisfy the qualification for office as a State Senator. When the trial court undertook to decide the case, it exceeded its jurisdiction, in contravention of all California case law construing the qualifications clause, and in violation of the separation of powers doctrine. 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 respectfully asks this court to vacate the trial court's decision for lack of jurisdiction.

Dated: May 20, 2011

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.360(b)(1), I certify that the attached *amicus curiae* brief contains 5,844 words, which is less than the total number of words permitted under Rule 8.204(c)(1).

Dated: May 20, 2011

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PROOF OF SERVICE

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I also filed the above document with the California Court of Appeal for the Third Appellate District.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 20th day of May, 2011, at Sacramento, California.

Michael J. Kerins