IN THE
SUPREME COURT OF CALIFORNIA

HEIDI FULLER
Petitioner

v

DEBRA BOWEN, Secretary of State, et al.,
Respondents

TOM BERRYHILL
Real Party in Interest

PETITION FOR REVIEW

After a Decision by the Court of Appeal
Third Appellate District
Case Number C065237

On Appeal From The Superior Court
For The County Of Sacramento
The Honorable Timothy M. Frawley
Superior Court Case Number 34-2010-80000452

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
(Cal. Rules of Court, rule 8.208)

The following entities or persons have either (1) an ownership interest of 10 percent or more in the party or parties filing this certificate (Cal. Rules of Court, rule 8.208(e)(1)), or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves (Cal. Rules of Court, rule 8.208(e)(2)):

Tom Berryhill

Dated: March 29, 2012

_____
Heidi Fuller, Pro per

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ISSUES PRESENTED

ISSUE #1: Whether Article IV, Section 5(a) Of The California Constitution Extinguishes The Jurisdiction of the California State Courts Before A Primary Election To Consider Whether The Durational Residency Requirement Of Article IV, Section 2(c) Of The California Constitution Violates The Equal Protection Clause Of The Constitution Of The United States And To Mandate The Enforcement Of The Durational Residency Requirement Of Article IV, Section 2(c) Of The California Constitution.

ISSUE #2: Whether The Doctrine of Separation of Powers Extinguishes The Jurisdiction of the California State Courts Before A Primary Election To Consider Whether The Durational Residency Requirement Of Article IV, Section 2(c) Of The California Constitution Violates The Equal Protection Clause Of The Constitution Of The United States And To Mandate The Enforcement Of The Durational Residency Requirement Of Article IV, Section 2(c) Of The California Constitution.

ISSUE #3: Whether The One-Year Durational Residency Requirement Of Article IV, Section 2(C) Of The California Constitution Violates The Equal Protection Clause Of The Constitution Of The United States.

WHY REVIEW SHOULD BE GRANTED

The issues presented in this case are novel constitutional questions. The questions are of great importance to the people of the State of California directly impacting the voters' right to be represented by constitutionally qualified members of the State Legislature. The Petitioner asserts these important questions of law are appropriately for review by this Honorable Court pursuant to *California Rules of Court 8.500 (a)(1) and (b)(2).*

This honorable Court should grant review to clarify the constitutionality and enforceability of Article IV, Section (2)(c) of the

California State Constitution and define the jurisdictional limits of Article IV, Section (5)(a) of the California State Constitution.[1]

The Respondents, the Real Party in Interest and the Legislature argue that California courts lack jurisdiction due to the applicability *before* the primary election of Article IV, section (5)(a) which states that "Each house shall judge the qualifications and election of its Members." The Appellate Court impermissibly extended the California Supreme Court holding in *In re McGee* (1951) 36 Cal.2d 592, to the indefinite period of time before the primary election thereby cutting off *any* judicial interpretation or enforcement over matters concerning the "qualifications and election" of members of the legislature. Complicating matters, the Appellate court left unclear at what point a person becomes a candidate and thereby a "member" of the legislature for the purposes of jurisdiction.

In the first case interpreting Article IV, section (5)(a) brought *after* the institution of the primary election system in California, *Allen v. Lelande, (1912) 164 Cal. 56,* the California Supreme Court expanded the jurisdiction of the Legislature under Article IV, section (5)(a) up to the certification of the primary election. In *In re McGee* (1951) 36 Cal.2d 592, the court slightly extended the reach of the Legislature's jurisdiction to the point of the commencement of the primary election voting process. No other

[1] Hereinafter undesignated "Article" references are to the California Constitution.

federal or state jurisdiction in the nation, when construing like provisions, has extended legislative jurisdiction to a point before the primary elections.

The Appellate Court, in the instant case, quoting *French v. Senate (1905) 146 Cal. 604*, said that it "has no power to revise even the most arbitrary and unfair action of the legislative department;" thus, even though, the Attorney General has wrongly declared that our constitutional residency requirement is unenforceable as a violation the Equal Protection Clause of the 14th Amendment, and, even though, the legislature has impermissibly usurped the prerogative of the People by setting its own residency standard in the form of Election Code section 201 which requires a candidate to be "registered voter…at the time that the nomination papers are issued"[2], the people have absolutely no judicial recourse within the state court system. It takes a large dollop of credulity to construe the above as the intent of the People when they ratified Article IV, section (5)(a). Under the Appellate Court's reasoning the prerogative of the People to set the qualifications for the legislature has passed into hands of the legislature itself. Article IV, section (5)(a) has effectively swallowed section (2)(c) because the issue of the constitutionality of the residency clause is unlikely to arise out of any

[2] The Ninth Circuit Court of Appeals has held that Election Code §201 is unconstitutional as it applies to candidates for the United States House of Representatives "because the states do not have the power to add to or alter the requirements enumerated in the Qualifications Clause." *Schaefer v. Townsend*, (2000) 215 F.3d 1031, 1037-1039, certiorari denied 121 S.Ct. 1225, 532 U.S. 904, 149 L.Ed.2d 136.

context except that of the election for a legislator because that is the only context to which either provision applies. Indeed, because the residency requirement has languished unenforced under the presumption of unconstitutionality for almost 40 years, any challenge within the legislature would be decided by members who, in the words of the Real Party in Interest, "would be quite surprised to find that *their eligibility* might even be an issue at this point (emphasis added)." Oral Argument, Superior Court p.33. By giving the Legislature the power to judge its own "members", the People did NOT give up or subordinate their own power to set the basic qualifications for those members, nor did they remove from the court the power to define and interpret our Constitution.

Article IV, Section (2)(c) mandates that "a person is ineligible to be a member of the Legislature unless the person is an elector and has been a resident of the legislative district for one year,…immediately preceding the election." The one-year durational residency requirement has never been challenged or held to be unconstitutional or unenforceable by any court of Federal or California State jurisdiction. In the instant case, the Appellate Court did not address whether the one year residency requirement is unconstitutional. This was the only question appealed by the petitioner to the Appellate Court.

Some forty years ago, the California Supreme Court decided a line of local election cases which precipitated the California's legal principal that a

durational residency requirement for candidates for local office in excess of thirty (30) days was subject to the constitutional strict scrutiny test and found to violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Johnson v. Hamilton (1975) 15 Cal.3d 461, 472* and *Thompson v. Mellon (1973) 9 Cal.3d 96, 106*. The Court in *Johnson* distinguished a United States Supreme Court Case, *Sununu v. Stark*, (1974) 383 F.Supp. 1287, 1292, *aff'd*, 420 U.S. 958, 95 S.Ct. 1346, 43 L.Ed.2d 435 (1975), that upheld constitutional durational residency requirements of seven years for state senator, by recognizing that it was not construing a constitutional provision. Thus, the holding in *Johnson* was limited to local, statutory durational residency requirements.

The standard of strict scrutiny may have applied at the time the California Supreme Court decided *Johnson v. Hamilton*, (1975) 15 Cal.3d 461, 472 and *Thompson v. Mellon*, (1973) 9 Cal.3d 96, 106; however, the United States Supreme Court reduced the Constitutional test from strict scrutiny to intermediate scrutiny in *Clements v. Flashing*, (1982) 457 U.S. 957. In light of this lesser level of scrutiny, the application of *Thompson* and *Johnson* is inaccurate and should be abandoned in light of *Clements.*

In *Clements*, The United States Supreme Court upheld a provision of Texas Constitution had the effect of imposing a waiting period to run for the state legislature. Id. at 961-962.

The 9th Circuit recognized the doctrinal shift in *Clements* away from strict scrutiny in cases considering constitutional durational residency requirements and has applied a "Rational Basis" level of review to uphold a one-year residency requirement for city council. [3]

The Superior Court declined to rely on *Clements,* (1981) 457 U.S. 957, stating it was "merely a plurality opinion and not a majority opinion of the Court." While the lower court is correct that the *Clements* opinion is a plurality regarding the **methodology** of the applicable standard, it is a majority opinion regarding the standard of review applied by five justices. The California Supreme Court should adopt the lower standard of review applied in *Clements*.

Alternatively, court should apply the analysis in *Anderson v. Celebrezze,* (1983) 460 U.S. 780, 103 S.Ct. 1564, 74 L.Ed.2d 547 applied to uphold a constitutional provision imposing a lifetime ban on legislators once they have completed a maximum number of terms. *Legislature v. Eu,* (1991) 54 Cal.3d 492, 286 Cal.Rptr 283, 816 P.2d 1309 (upholding the constitutionality of the institution of term limits in California.)

I. BACKGROUND

A. The Dispute

[3] See *MacDonald v. City of Henderson,* (1993) 818 F.Supp. 303.

The factual basis of the lawsuit is not in dispute. Appellant Heidi Fuller and Real Party in Interest Tom Berryhill were both republican primary candidates for the 14th District Senate Seat. Tom Berryhill was not a resident within the 14th Senate District until sometime in late December 2009 and, thus, unable to fulfill the durational residency requirement under Article IV, Section (2)(c) of the California Constitution. Appellant filed a petition for writ of mandate / prohibition asking the court to order the California Secretary of State and Attorney General to enforce Article IV, Section (2)(c) of the California Constitution by rejecting the Statement of Intention for candidacy, Statement of Organization and the Declaration of Candidacy for the 14th Senate District of Real Party in Interest Tom Berryhill and costs and **other relief as may be just and proper.** Respondents filed an opposition arguing 1) Appellant failed to meet the requirements for a writ of mandate by failing to identify a clear, present, and ministerial duty of either the Secretary of State or the Attorney General and 2) the court has no jurisdiction to decide the matter because exclusive jurisdiction was vested in the Legislature under Article IV, section 5(a) of the California Constitution.

The Real Party in Interest filed an opposition arguing that 1) the court has no jurisdiction to decide the matter because exclusive jurisdiction was vested in the Legislature under Article IV, section 5(a) of the California Constitution and 2) the durational residency requirement under Article IV,

section 2(c) of the California Constitution violates the equal protection clause of the United States Constitution.

B. Superior Court Decision

The Superior Court denied the petition on March 10, 2010 and entered judgment thereon holding that the court has jurisdiction to hear the petition; but Article IV, section 2(c) of the California Constitution failed the test of strict scrutiny and thus, violates the Equal Protection Clause of the 14th Amendment of the United States Constitution. The court did not reach the question of requirements for the writ of mandate.

C. Appellate Court Decision

The Appellate Court affirmed the lower court's decision holding that the court lacked jurisdiction to consider the matter because "it is not the judiciary's role to judge the qualifications and elections of candidates for membership in the Legislature." (App. A p.) The court did "not address whether the one year residency requirement is unconstitutional, because a threshold jurisdictional issue resolves this case." (App. A)

D. Petition for Rehearing

On March 15, 2012, Petitioner filed a petition for rehearing on the following grounds:

VI. The Court misapplied the law in determining that Article IV, Section 5(a) of the California Constitution extinguished the Court's jurisdiction.

A. The Appellate Court blurs the distinction between enforceability and enforcement of the residency qualification in applying Article IV, Section 5(a).

B. The Appellate Court's application of Article IV, Section 5(a) to the preprimary election period has the impermissible effect of denying any citizen the right to have a court construe Article IV, Section 2(c) of the California Constitution.

C. The Appellate Court impermissibly attempts to contain the definition of "member" within the boundary of sections 8040 and 8041 of the Election Code.

VII. The Court impermissibly denied the Appellant's right to an appeal under section 904.1(a)1 of the Code of Civil Procedure by failing To address the issue of residency.

VIII. The Court should have reversed the opinion of the lower court and remanded the case for either further consideration or dismissal As *Void Ab Initio* thereby avoiding a miscarriage of justice.

On March 20, 2012, the Court of Appeal denied the petition.

LEGAL ARGUMENT

A. Article IV, Section 5(a) of the California Constitution does not extinguish the court's jurisdiction before the primary election.

Article IV, Section 5(a) states, "Each house shall judge the qualifications and election of its Members." The Appellate Court held that the Legislature has plenary jurisdiction even before the primary election.

When considering the federal constitution's parallel provision to article IV, section 5(a), the U.S. Supreme Court held that "a determination

of petitioner ['s]… right to sit would require no more than an interpretation of the Constitution. Such a determination falls within the traditional role accorded courts to interpret the law." *Powell v. McCormack* (1969) 395 U.S. 486, 548, 89 S.Ct. 1944, 1978, 23 L.Ed.2d 491. Thus, under *Powell v. McCormack*, the power of each house of Congress to be the judge of the qualifications of its members is not plenary but limited, and the role of construing the constitutional provision rests with the court.

From the clear reading of Article IV, section 5 of the California Constitution, the Legislature has jurisdiction over qualifications and election of any person duly elected in the general election. In the cases of *Allen v. Lelande* (1912) 164 Cal. 56, and *In re McGee* (1951) 36 Cal.2d 592 the California Supreme Court determined the jurisdiction of the legislature extends to the post primary election period. A survey of cases demonstrates that our Supreme Court's interpretation is not universal.[4]

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[4] See *In re Primary Election Ballot Disputes 2004* (2004) 857 A.2d. 494, 2004 Me. 99 ("provision "does not vest exclusive authority in the Legislature over legislative primary… and does not prevent us from assuming jurisdiction."), *State ex rel. Gralike v. Walsh*, (1972) 483 S.W.2d 70 (declining to extend jurisdiction of the legislature to the primary election stating "This interpretation of the constitutional provision would mean that a 15-year-old resident of Illinois could file a declaration of candidacy for State Senator in Missouri, and even though the facts were undisputed, the courts could do nothing to prevent his name from appearing on the ballot."), *Comer v. Ashe* (1974) 514 S.W.2d 730 (constitution provision "applies when a General Election has been held"), ***Leu v. Montgomery* (1914)** 31 N.D. 1, 148 N.W. 662 (courts to determine contests involving the nomination at a primary election), *Buskey v. Amos*, 294 Ala. 1, 310 So.2d 468 (1975) (jurisdiction of courts

California represents one end of the spectrum with *In re McGee* and Kentucky represents the opposite end of the spectrum with its decision in *Stephenson v. Woodward* (2006) 182 S.W.3d 162, holding that the court maintains jurisdiction up to 4:00 p.m. the day before the general election even if the case will be adjudicated after the election. There are many cases expressly holding that jurisdiction passes to the legislature only after the primary election.[5] Petitioner can cite no case holding that the legislature has exclusive jurisdiction over matters regarding the qualifications and election of its members during the indefinite period before the primary elections.

Article IV, section (5)(a) is modeled on a similar provision of our federal constitution: "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members…" United States Constitution, Article I, Section 5. The constitutions of most, if not all, of the states have similar provisions. 107 ALR 205.

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extinguished at general election), ***State ex rel. O'Connell v. Dubuque* (1966)** 68 Wash.2d 553, 413 P.2d 972 (provision does not divest the courts of jurisdiction at the primary election), ***State ex rel. Cloud v. Election Bd. of State of Oklahoma* (1934)** 169 Okla. 363, 36 P.2d 20 (court has jurisdiction to determine whether nominee for office of representative was eligible).

[5] See ***State ex rel. McGrath v. Erickson* (1938)** 203 Minn. 390, 281 N.W. 366 **(**courts must yield to the senate upon receiving the votes cast).

The founders and writers of our constitutions were certainly familiar with elections and the concept of candidacy. They certainly could have expressly included "candidates" as well as "members" if that were the intent behind the provision; they chose not to include "candidates."

All of the cases cited by the lower courts address challenges to candidate qualifications after the primary or, the general election. In *People v. Metzker* (1874) 47 Cal. 524, the court declined to take jurisdiction over a challenge to a seated council member after the general election. Id. at 525-526. In *French v. Senate* (1905) 146 Cal. 604 [80 P. 1031], the court declined jurisdiction over four seated members of the State Senate seeking reinstatement after their expulsion for malfeasance in office. *Id.*, at p. 605. In *California War Veterans for Justice v. Hayden* (1986) 176 Cal.App.3d. 982, the court declined jurisdiction over a challenge to a members qualifications filed almost two full years after the member had won the general election.

The cases of *Allen v. Lelande* (1912) 164 Cal. 56, and *In re McGee* (1951) 36 Cal.2d 592, considered the issue of court's jurisdiction during the period between the primary election and the general election.

In *Allen*, a post primary election challenge to the party's nominee, the court held that "the assembly should be the sole and exclusive judge of

the eligibility of those **whose election is properly certified** (emphasis added)." 164 Cal. at 57.

In re McGee considered a post primary election challenge on the grounds that the defendant failed to meet the constitutional durational residency requirement. *In re McGee* at 593. The court extended the Legislature's jurisdiction to include the beginning of the actual voting because it is an integral part of the election process, and since the Assembly has exclusive jurisdiction to judge qualifications and elections of Assemblymen it cannot delegate that duty nor achieve that result indirectly by authorizing the courts to decide contests after primary elections. *Id.* at 597.

The historical context of Article IV, section 5(a) jurisprudence demonstrates it is not an expansion legislative power but rather an expansion of the will of the people in the electoral process. Prior to 1912, the Legislature assumed jurisdiction over questions of qualifications after the general election. See *People v. Metzker* (1874) 47 Cal.524 and *French v. Senate* (1905) 146 Cal. 604. This was not a difficult question since the general election was the only direct election: direct primary elections are a 20th century phenomenon the spread of which replaced the party convention system.

The first case in California to consider legislative jurisdiction during the period between the primary and general elections, *Allen v. Lelande* (1912) 164 Cal. 56, arose out of the first primary election.

The court clearly considers the occurrence of the primary election as the logical threshold moment for the passing of jurisdiction from the courts to the legislature. It is the point at which the ability to be a candidate is no longer an option for the general population and the first instance during an election cycle that the people "speak". The case at bar was filed and decided by the Superior Court well before the primary election and is firmly within the jurisdiction of this court.

This threshold is reflected in our statutory framework. Before the primary elections, an elector may seek recourse under section 13314 of the Election Code while post-election challenges must be brought under section 16100. An elector, however, may seek relief in the courts if the post-election misconduct rises to constitutional levels. *Horwath v. City of East Palo Alto* (1989) 212 Cal.App.3d 766, 775, 261 Cal.Rptr. 108. Both the legislature and courts recognize a fundamental change in the nature of the candidacies once a primary election has taken place.

The court by extending the holding in *In re McGee* to the pre primary election period as it relates to "qualifications and election" expands the definition of "Members" to include an absurd number of individuals.

Furthermore, the definition of "Members" becomes so broad as to be impossible to harmonize with the definition of the word "member" as used in the same or other sections of the constitution.[6]

The legislature may not delegate its constitutional duty; therefore, if the legislature's jurisdiction is extended, Election Code section 13314 would be an impermissible encroachment on the legislature's jurisdiction over the "election of it Members." This leads to untenable circumstance that Californians would be denied judicial recourse in all things related to the election of an Assemblyman or Senator.

Finally the Appellate Court misconstrued the nature of the petitioners request in her writ of mandate. The first sentence in the introduction of the original petition makes clear that the petition would affect "the voters and the candidates running for the California State Senate or Assembly." The prayer of the Appellant was that the Court "Issue a writ of mandate ordering Respondents Attorney General and the Secretary of State to enforce Article IV, section 2, subdivision (c) of the Constitution…" Senator Berryhill's specific residency status per se was not at issue.

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[6] For example, Art IV, sec 5(b) "No **Member** of the Legislature may accept any honorarium"; Article IV, Section 2(a) "The Senate has a membership of 40 Senators…" See also, *Stephenson v. Woodward* (2006) 182 S.W.3d 162, 167-168, holding that since each seat could be represented by only one member the election does not instantly transform this Senator-elect into a sitting member of the Senate.

B. Separation of Powers Doctrine Does Not Extinguish the Jurisdiction of the Courts.

The concept of a separation of powers is foundational to our constitutional system. Our founding fathers were very concerned about the separation of power and avoiding the concentration of power in a single branch of government; however, they were not equally concerned about the different branches. After making a detailed survey of the working results of the original thirteen Constitutions under the Articles of Confederation, they were particularly alarmed at the almost universal impermissible usurpation of power by the legislatures. Federalist #48. James Madison, as "Publius", concluded that existing "parchment barriers" to legislative usurpation of power were inadequate because "***The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex… it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions*** (emphasis added).

Federalist #48.

He quotes Thomas Jefferson's dismay at the usurpation of power by the Legislature in Virginia:

> All the powers of government, legislative, executive, and judiciary, result to the legislative body. The concentrating these in the same hands, is precisely the definition of despotic government…An *elective despotism* was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should

> be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others (emphasis in the original).

Id.

The most oft cited examples were of the legislative encroachment upon the judiciary: "They have accordingly, *in many* instances, *decided rights* which should have been left to *judiciary controversy*... and cases belonging to the judiciary department frequently drawn within legislative cognizance and determination (emphasis in the original)." *Id*.

The founders were acutely aware of the failings of human nature afflicting both the governed and the governing:

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

Federalist #51.

The Separation of Power Doctrine is clearly a two-pronged concept. It "not only guards against the concentration of power in a single branch of government; it also protects one branch against the overreaching of the other." *Kasler v. Lockyer* (2000) 23 Cal.4th 472, rehearing denied, certiorari denied 121 S.Ct. 1090, 148 L.Ed.2d 964.

The doctrine also recognizes that the three branches of government are interdependent and it permits actions of one branch that may significantly affect those of another branch. In *Carmel Valley Fire Protection Dist. v. State of California* , the California Supreme Court stated, "The purpose of the doctrine is to prevent one branch of government from exercising the *complete* power constitutionally vested in another [citation]; it is not intended to prohibit one branch from taking action properly within its sphere that has the *incidental* effect of duplicating a function or procedure delegated to another branch.' [Citation.]." 25 Cal.4th 287, 298.

The Constitution is not a grant, but a restriction upon the power of the Legislature, and hence an express enumeration of legislative powers and privileges in the Constitution cannot be considered as the exclusion of others not named unless accompanied by negative terms. *Zumbrun Law Firm v. California Legislature* (2008) 165 Cal.App.4th 1603.

It does not command a hermetic sealing off of the three branches of government from one another. *California Assn. of Retail Tobacconists v. State of California* (2003) 109 Cal.App.4th 792, 829, review denied[7]. The branches of government share common boundaries, and "no sharp line

[7] citing *Obrien v. Jones* (2000) 23 Cal.4th 40, 48, 96 Cal.Rptr.2d 205, 999 P.2d 95, quoting *In re Attorney Discipline System* (1998) 19 Cal.4th 582, 602.

between their operations exists." *People v. Bunn* (2000) 115 Cal.Rptr.2d 192, 27 Cal.4th 1, 14, 37 P.3d 380.

The Constitution vests each branch of government with certain "core" or "essential" functions that may not be usurped by another branch. *Id.* It is well established that it is the court's duty is to "say what the law is." *Marbury v. Madison* (1803) 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60. Resolving specific controversies between parties, declaring the law, and ensuring the orderly and effective administration of justice are core judicial functions protected by the separation of powers doctrine. *Case v. Lazben Financial Co.* (2002) 99 Cal.App.4th 172, 184.

The Legislature does not have absolute power to limit courts in determination of constitutional question. *People v. Romero* (1936) 13 Cal.App.2d 667, 671-672. "It is the constitutional right of every citizen and litigant to be governed by the law as expounded by judges and not by officials or employees provided by the legislature…" *Washburn v. Washburn* (1942) 49 Cal.App.2d 581, 589.

Finally, the courts cannot interfere with the exercise of jurisdiction of legislature "so long as it keeps within its constitutional restraints." *People v. Craven* (1933) 219 Cal. 522, 528. It is those "constitutional restraints" that are at issue in the case at bar and clearly within the jurisdiction of this court.

C. The one-year durational residency requirement of Article IV, Section 2(c) of the California Constitution does not violates the Equal Protection Clause of the Constitution of the United States

The standard of strict scrutiny may have applied at the time the California Supreme Court decided *Johnson v. Hamilton*, (1975) 15 Cal.3d 461, 472 and *Thompson v. Mellon*, (1973) 9 Cal.3d 96, 106, however, the United States Supreme Court has reduced the Constitutional test from strict scrutiny to intermediate scrutiny in *Clements v. Flashing*, (1982) 457 U.S. 957. In light of this lesser level of scrutiny, the application of *Thompson* and *Johnson* is inaccurate and should be abandoned in light of *Clements*.

A pattern has emerged from a survey of cases across the nation. Cases construing statutory provisions containing residency requirements of *more than* one year for local office generally have been struck down under both strict scrutiny and rational basis standards of review.[8] Cases construing

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[8] *Alexander v. Kammer*, (1973) 363 F.Supp. 324; *Wellford v. Battaglia*, (1972) 343 F.Supp. 143, aff'd, 485 F.2d 1151 (3rd Cir.1973); *McKinney v. Kaminsky*, (1972) 340 F.Supp. 289; *Bolanowski v. Raich*, (1971) 330 F.Supp.; *Zeilenga v. Nelson*, (1971) 4 Cal.3d 716, 94 Cal.Rptr. 602, 484 P.2d; *Camara v. Mellon*, (1971) 4 Cal.3d 714, 94 Cal.Rptr. 601, 484 P.2d 577; *Bay Area Women's Coalition v. City & County of San Francisco*, (1978) 78 Cal.App.3d 961, 144 Cal.Rptr. 591; *Cowan v. City of Aspen*, (1973) 181 Colo. 343, 509 P.2d 1269; *Bird v. City of Colorado Springs*, (1973) 181 Colo. 141, 507 P.2d 1099; *Board of Comm'ns of Sarasota County v. Gustafson*, (1993) 616 So.2d 1165; *Peloza v. Freas*, (1994) 871 P.2d 687; *Green v. McKeon*, (1972) 468 F.2d 883, 885; *Lentini v. City of Kenner*, (1979) 479 F.Supp. 966; *Brill v. Carter*, (1978) 455 F.Supp. 172; *Alexander v. Kammer*, (1973) 363 F.Supp. 324; *Cowan v. City of Aspen*, (1973) 181 Colo. 343, 350, 509 P.2d 1269; *Castner v. Clerk of Grosse Pointe Park*, (1978) 86 Mich.App. 482, 496, 272 N.W.2d 693; *Phelan v. City of Buffalo*, (1976) 54 A.D.2d 262, 269, 388 N.Y.S.2d 469; *Henderson*

both constitutional and statutory provisions containing residency requirements of one year are generally upheld under both strict scrutiny and rational basis standards of review.[9] Cases construing *constitutional* provisions containing residency requirements of *one year or more* for constitutional offices are generally upheld under the strict scrutiny standard of review.[10] Those few cases where a one-year residency requirement was found invalid are easily distinguishable from the instant case.[11]

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v. Fort Worth Ind. School Dist., (1976) 526 F.2d 286; *Mogk v. City of Detroit*, (1971) 335 F.Supp. 698; *Hall v. Miller*, (1979) 584 S.W.2d 51; **but see** *Langmeyer v. State*, (1982) 104 Idaho 53, 656 P.2d 114; *State ex rel. Brown v. Summit County Bd. of Elections*, (1989) 46 Ohio St.3d 166, 545 N.E.2d 1256; *DeHond v. Nyquist*, (1971) 65 Misc.2d 526, 530, 318 N.Y.S.2d 650; *Stothers v. Martini*, (1951) 6 N.J. 560.

[9] *MacDonald v. City of Henderson*, (9th D.Nev.1993) 818 F.Supp.; *Howlett v. Salish and Kootenai Tribes*, (9th Cir.1976) 529 F.2d 233; *City of Akron v. Beil*, (6th Cir.1981) 660 F.2d 166; *Joseph v. City of Birmingham*, (6th E.D.Mich.1981) 510 F.Supp. 1319; *Brandenberg v. McCellan*, (8th E.D.Mo.1977) 427 F.Supp. 943; *Russell v. Hathaway*, (5th N.D.Tex.1976) 423 F.Supp. 833; *Daves v. City of Longwood*, (11th M.D.Fla.1976) 423 F.Supp. 503; *Cox v. Barber*,(2002) 275 Ga. 415; *Civil Serv. Merit Bd. of Knoxville v. Burson*, (1991) 816 S.W.2d 725; *Castner v. City of Homer*, (1979) 598 P.2d 953; *Triano v. Massion*, (1973) 109 Ariz. 506; *Wise v. Lentini*, 374 So.2d 1286, 1287, *cert. denied*, 375 So.2d 1182 ; *Cahnmann v. Eckerty*, (1976) 40 Ill.App.3d 180, 181, *appeal dismissed*, 431 U.S. 934, 97 S.Ct. 2644, 53 L.Ed.2d 252 ; *Lawrence v. City of Issaquah*, (1974) 524 P.2d 1347, 1350, **but see**, *Bruno v. Civil Serv. Comm'n of Bridgeport*, (1984) 472 A.2d 328; *Headlee v. Franklin County Board of Elections*, (1973) 368 F.Supp. 999; *Marra v. Zink*, (1979) 256 S.E.2d 581, *Smith v. Evans*, (1974) 42 Cal.App.3d 154.

[10] *Sununu v. Stark*, (1974) 383 F.Supp. 1287, 1292, *aff'd*, 420 U.S. 958, 95 S.Ct. 1346, 43 L.Ed.2d 435 (1975) (seven-year residency for state senator); *Chimento v. Stark*, 353 F.Supp. 1211, 1218, *aff'd*, 414 U.S. 802, 94 S.Ct.

The Superior Court declined to rely on *Clements*, (1981) 457 U.S. 957, stating it was "merely a plurality opinion and not a majority opinion of the Court." While the lower court is correct that the *Clements* opinion is a plurality regarding the **methodology** of the applicable standard, it is a majority opinion regarding the standard of review applied by five justices. The Superior Court should have applied the lower standard of review applied in *Clements*.

The court in *Clements* considered a challenge to the constitutionality of provision of Texas Constitution rendering an officeholder ineligible for

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125, 38 L.Ed.2d 39 (1973) (seven-year residency for governor); *Walker v. Yucht*, (1972) 352 F.Supp. 85, 99 (three years for state representative); *Hadnott v. Amos*, (1970) 320 F.Supp. 107 (Judge); *Gilbert v. State*, (1974) 526 P.2d 1131, 1136; *Griggers v. Moye*,(1980) 246 Ga. 578, 581, 272 S.E.2d 262, 266; *Hayes v. Gill*, (1970) 52 Hawaii 251, 261, 473 P.2d 872, 877 (1970), *appeal dismissed*, 401 U.S. 968, 91 S.Ct. 1200, 28 L.Ed.2d 319 (1971) (state constitution); *White v. Manchin*, (1984) 173 W.Va. 526, 318 S.E.2d 470 (one year requirement for state senators serves a compelling state interest); *Gilbert v. State*, (1974) 526 P.2d 1131 (one year requirement state senator serves compelling interest), *State ex rel. Gralike v. Walsh*, (1972) 483 S.W.2d 70, 76 (state senator), *Ammond v. Keating*, (1977) 150 N.J.Super. 5 (one year for state senator); *Fischnaller v. Thurston County*, (1978) 21 Wash.App. 280, 288-89, 584 P.2d 483.

[11] *Headlee v. Franklin County Bd. Of Elections*, 368 F.Supp. 999 (S.D. Ohio 1973) involved a situation where a significant recent annexation had the effect that a nearly one-half of the village would be disqualified to hold public office. In the following cases the court was construing a requirement in a local ordinance: *Bruno v. Civil Serv. Comm'n of Bridgeport*, (1984) 192 Conn. 335, 472 A.2d 328; *Marra v. Zink*, (1979) 163 W.Va. 400, 256 S.E.2d 581; *Smith v. Evans*, (1974) 42 Cal.App.3d 154, 116 Cal.Rptr. 684.

the state legislature if his current term of office will not expire until after the legislative term to which he aspires begins as well as an "automatic resignation" provision, under which some officeholders automatically resign if they become a candidate for another office at a time when an unexpired term of office then held exceeds one year. Id. at 961-962.

In *Clements*, Justice Stevens, in his concurrence, did not dispute the level of scrutiny applied by the plurality but rather argued that the plurality missed a step in its analysis. Indeed, Justice Stevens notes with approval "Justice Rehnquist has demonstrated that there is a 'rational basis' for imposing the burdens at issue." *Id.* at 975.

In his dissent, Justice Brennan recognized the lower level of scrutiny applied by the five justices in the majority's opinion and concurrence. He notes, "a majority of the Court today rejects the plurality's *mode* of equal protection analysis (emphasis added)." *Id.* at 977, fn1. He then puts "to one side the question of the proper level of equal protection scrutiny." *Id.*

The 9th Circuit recognizes this doctrinal shift away from strict scrutiny in cases considering durational residency requirement. Citing *Clements*, the 9th Circuit consciously moved from applying "Strict Scrutiny" to a "Rational Basis" level of review. The court in *MacDonald* declaring constitutional a one-year residency requirement for city council candidates states "[w]ith regard to the standard of review applicable to this case, this Court finds that the *rational basis test* is the required standard of

review…more recent decisions, including a plurality decision of the United States Supreme Court, have evaluated durational residency requirements under a rational basis test…[i]n light of this more recent case law, particularly the Supreme Court decision in *Clements*, this Court finds that it is bound to evaluate MacDonald's equal protection claim under a rational basis test (emphasis added)."[12] *MacDonald v. City of Henderson*, (1993) 818 F.Supp. 303.

The court in *Clements* starts its analysis with the proposition that "Legislatures are ordinarily assumed to have acted constitutionally." *Clements* 457 U.S. at 963, 102 S.Ct. 2843. In the case at bar, it is the voice of the people of California speaking through the ratified Constitution rather than a legislature.

The *Clements* court states it "has departed from traditional equal protection analysis" in two lines of ballot access cases: those based on wealth and those involving burdens imposed on new or small political parties or independent candidates. *Id.* at 2844. The court states that while falling outside of the two lines of cases "does not automatically follow, of course that we must apply traditional equal protection principles…this fact

[12] In an earlier case, the court applying strict scrutiny held a one-year durational residency requirement on candidates for tribal council member was justified by "compelling interests." *Howlett v. Salish and Kootenai Tribes*, (1976) 529 F.2d 233, 242-44.

does counsel against discarding traditional principles." *Id.* at 2845. The case at bar clearly falls outside both referenced lines of cases.

Justice Stevens, in his concurrence, believes that the starting point for the analysis should instead begin with "a careful identification of the character of the federal interest in equality [and] whether the State's classification offends any interest in equality that is protected by the Equal Protection Clause." *Id.* at 2849. He reasons that "appellees do not claim that the classes are treated differently because of any characteristic of the persons…there is no suggestion that the attributes of the offices have been defined to conceal an intent to discriminate on the basis of personal characteristics or to provide governmental services of differing quality to different segments of the community." *Id.* He stated, "in this case, the disparate treatment of different officeholders is entirely a function of the different offices that they occupy" *Id.*

Finally, Justice Stevens concludes that "This reasoning brings me to the same conclusion that Justice REHNQUIST has reached…Justice REHNQUIST has demonstrated that there is a "*rational basis* for imposing the burdens at issue (emphasis added)" even if he "has not adequately explained the reasons, if any, for imposing those burdens on some offices but not others." *Id.*

Next, the court examines the nature of the interests that are affected and the burdens they place on the candidate. *Id.* at 2845. The court notes

that the constitutional provision "applies only to candidacy for the Texas Legislature." *Id.* The court concluded, "establishing a maximum 'waiting period' of two years for candidacy…places a de minimis burden…[and] discriminates neither on the basis of political affiliation nor on any factor not related to a candidate's qualifications to hold political office." *Id.* The court declared a "'waiting period' is hardly a significant barrier to candidacy." *Id.* The court cites its holding in *Storer* upholding "a statute that imposed a flat disqualification upon any candidate seeking to run in a party primary if he had been registered or affiliated with another political party within the 12 months preceding his declaration of candidacy" and its holding in *Chimento* stating "we *upheld* a 7-year durational residency requirement for candidacy (emphasis added)."[13] *Id.* (citing *Storer v. Brown*, 415 U.S. 724, 733-737, 94 S.Ct. 1274, 1280-1281 and *Chimento v. Stark*, (1973) 414 U.S. 802, 94 S.Ct. 125, 38 L.Ed.2d 39, summarily aff'g 353 F.Supp. 1211 (NH)).[14]

In *Chimento*, when considering a seven-year residency requirement for the office of governor, the court in concluded

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[13] See *Hicks v. Miranda*, (1975) 422 U.S. 332, 95 S.Ct. 2281, 45 L.Ed.2d 223 "'votes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case [and] lower courts are bound by summary decisions by this Court 'until such time as the Court informs (them) that (they) are not'" (citations omitted).

[14] See also *Sununu v. Stark*, (1974) 383 F.Supp. 1287, *aff'd mem.* 420 U.S. 958, 95 S.Ct. 1346, 43 L.Ed.2d 435 (1975).

> "that the seven year residency requirement acts only as a minimal infringement upon the ability of the plaintiff to participate in the election process and that its limiting effect upon the voters' choice of candidates is more hypothetical than real…[m]oreover, the seven year period does not act as an outright ban on anyone's candidacy for Governor; rather, it delays the eligibility."

Chimento v. Stark, (1973) 353 F.Supp. 1211, 1216, aff'd, 414 U.S. 802, 94 S.Ct. 125, 38 L.Ed.2d 39 (1973).

The court in *Chimento* also gave weight to the facts that the residency requirement was for the highest executive office in the state and that it was a constitutional requirement rather than statutory. \

Similarly, the residency requirement under consideration in the instant case is for the highest legislative office in the State of California and is contained in the California Constitution, which distinguishes it from the previous cases cited by the lower court that imposed residency requirements for candidates running for city council.

In *Chimento*, the court discusses these two distinguishing aspects:

> "First, the seven year durational residency requirement applies only to the office of Governor and State Senator the highest elective offices in the State of New Hampshire. The rationale asserted by the State for such a residency requirement carries far greater weight than if it applied to candidacies for lesser public offices…A second and important difference between this case and other recent cases is that the residency requirement in question is contained in the Constitution of the State…all the other cases dealt with state statutes or local ordinances."

Id.

Finally, the court in *Clements* concludes "this sort of insignificant interference with access to the ballot *need only rest on a rational predicate* in order to survive a challenge under the Equal Protection Clause (emphasis added)." *Clements* 457 U.S. at 965, 102 S.Ct. 2845.

California's constitutional durational residency requirement imposes a one-year waiting period on all those that seek office in the legislature. The impact on the right to vote in the instant case is no different than the impact on the appellees' in *Clements*.

In addition to implicating the right to vote, the case at bar also implicates the right to travel. Traditionally, the right to travel generally refers to the right to *interstate* travel, while the case at bar concerns exclusively *intrastate* travel. The court should not consider the interference with the right to travel to be any less "insignificant" than the interference with the right to vote; because doing so would elevate the importance of right to travel over the right to vote and there is nothing to suggest such elevation is warranted.

The case of *Legislature v. Eu*, (1991) 54 Cal.3d 492, 286 Cal.Rptr 283, 816 P.2d 1309 upheld the constitutionality of term limits in California relying on the analysis in *Anderson v. Celebrezze*, (1983) 460 U.S. 780, 103 S.Ct. 1564, 74 L.Ed.2d 547. The decision in *Anderson*, written by Justice Stevens, reflects the majority agreement in *Clements* that strict scrutiny is no longer the applicable standard. It also reflects the disagreement between

Justices Stevens and Rehnquist that first surfaced in *Clements* as to the proper methodology when applying the lower standard.

The court considered three separate elements to ascertain the constitutionality of California's constitutional term limits provision: "(1) the nature of the injury to the rights affected, (2) the interests asserted by the state as justifications for that injury, and (3) the necessity for imposing the particular burden affecting the plaintiff's rights, rather than some less drastic alternatives." *Legislature v. Eu*, 54 Cal.3d at 517.

In the first prong, the court considered the incumbent's right to run for public office and the voters' right to reelect the incumbent to that office. *Id.* at 518. The case at bar is analogous to *Legislature v. Eu*. The residency requirement affects the candidates' right to run for office and the voters' right to elect a candidate.

In their argument, the Respondents in *Legislature v. Eu* likened term limits to "to age, integrity, training or *residency*, which have generally been *upheld* (emphasis added)." *Id.* at 518. A one-year residency requirement is certainly less onerous than a lifetime ban. Similar mitigating factors also apply to the instant case.

Finally there is the additional implication on the candidates' right to travel. Again, the right to travel generally refers to the right to *interstate* travel, while the case at bar concerns exclusively *intrastate* travel.

The effect on the voters is, for one-year, virtually identical to the effect on the voters in *Legislature v. Eu* except that, in the instant case, the voters still have the future opportunity to vote for a new district resident while the voters are forever denied the opportunity to vote for an incumbent candidate who has served the maximum number of terms.

The interest of the state is a clear interest in setting parameters for public office. California's constitutional durational residency requirement was originally six months. Cal. Const. of 1849, art. VI, § 4. In 1862, the legislature voted to submit to the voters an increase in the residency requirement by overwhelming majorities.[15] The voters then ratified the changes on September 3, 1862. Cal. Const. of 1849, art. VI, § 4, as amended Sept. 3, 1862. Finally, the one-year residency requirement was retained in 1879 when our current constitution was ratified. Cal. Const. of 1879. The rationale for the institution of term limits was written into the constitutional provision. Cal. Const. Art. IV, section 1.5. It would be illogical to think that the residency requirement was lengthened without some reason, debate, public input and support. The one-year residency requirement has remained unchanged and unchallenged until today.

The interests for the institution of term limits are instructive:

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[15] 26 to 8 in the Senate, The Journal of the Senate During the Thirteenth Session of the Legislature of the State of California 1862, Pp. 259-260, and 60 to 2 in the Assembly, The Journal of the Assembly During the Thirteenth Session of the Legislature of the State of California 1862, Pp. 500-501.

> The increased concentration of political power in the hands of incumbent representatives has made our electoral system less free, less competitive, and less representative. The ability of legislators to serve unlimited number of terms, to establish their own retirement system, and to pay for staff and support services at state expense contribute heavily to the extremely high number of incumbents who are reelected. These unfair incumbent advantages discourage qualified candidates from seeking public office and create a class of career politicians, instead of the citizen representatives envisioned by the Founding Fathers. These career politicians become representatives of the bureaucracy, rather than of the people whom they are elected to represent. To restore a free and democratic system of fair elections, and to encourage qualified candidates to seek public office, the people find and declare that the powers of incumbency must be limited. Retirement benefits must be restricted, state-financed incumbent staff and support services limited, and limitations placed upon the number of terms which may be served.

Cal. Const. Art. IV, sec 1.5

The interests of the state are clear: first, promotion of candidate familiarity with the needs and problems of the people he proposes to represent; second, the promotion of familiarity with the character, intelligence and reputation of the candidate and allowing the public to have direct knowledge of the above rather than through reliance on advertising; and third, the preclusion of frivolous or fraudulent candidacies by those more interested in public office than in public service.[16]

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[16] See *Sununu v. Stark*, (1974) 383 F.Supp. 1287, *aff'd mem*. 420 U.S. 958, 95 S.Ct. 1346, 43 L.Ed.2d 435 (1975) ("The three principal state interests served by the durational residency requirement are: first, to ensure that the candidate is familiar with his constituency; second, to ensure that the voters have been thoroughly exposed to the candidate; and third, to prevent political carpetbagging").

All of these interests are particularly relevant in a geographically large state like California.

These interests were upheld and affirmed by the Supreme Court in *Chimento,* and *Sununu*, which considered the questions of seven year residency requirements for Governor and State Senators respectively. *Chimento* 353 F.Supp. at 1215, and *Sununu*, 383 F.Supp. at 1290. The court in *Sununu* stated "It would be presumptuous for this court to engage in judicial hypothesizing in order to hold unconstitutional a provision of the New Hampshire constitution which has been unchallenged since 1784…If the durational residency requirement for State Senator "is to be eliminated, it should be accomplished by the voters through the constitutional amending process.'" *Sununu* 383 F.Supp. at 1291 citing *Chimento* v. Stark, 353 F.Supp. at 1217.

In *Legislature v. Eu*, the court concluded that the "less drastic alternatives suggested by the petitioners would have been inadequate to accomplish the declared purpose of [term limits] to eliminate the 'class of career politicians' that assertedly had been created by virtue of the 'unfair incumbent advantages' referred to in that measure. 54 Cal.3d at 523. The same holds true in the instant case.

If the court strikes down the constitutional durational residency requirement, presumably there will be no residency requirement.

Even if the court deems strict scrutiny is the proper standard, California's constitutional durational residency requirement was wrongly struck down.

Assuming, *arguendo*, that the highest level of scrutiny applies, "the state has the power reserved to it by the Tenth Amendment to the United States Constitution and the compelling interest, to impose eligibility requirements upon those who seek state-elective office." *Sununu,* 383 F.Supp. at 1290 *aff'd,* 420 U.S. 958, 95 S.Ct. 1346, 43 L.Ed.2d 435 (1975).

There is a compelling interest in a one-year durational residency requirement. All of the interests listed above are particularly relevant in a state the size of California. The Superior Court stated "this Court can conceive of no legitimate reason to treat candidates for statewide office differently than candidates for local office in regard to durational residency requirements." The answer was made clear in Justice Stevens' concurrence in *Clements*, and the courts in *Chimento* and *Sununu (supra):* the office itself is different: it is forms one of the three branches of our state government. The court in *Chimento* concluded

> "the residency requirement of the New Hampshire Constitution does promote legitimate state interests. It ensures that the chief executive officer of New Hampshire is exposed to the problems, needs, and desires of the people whom he is to govern, and it also gives the people of New Hampshire a chance to observe him and gain firsthand knowledge about his habits and character. While the length of the residency requirement may approach the constitutional limit, it is not unreasonable in relation to its objective...If the residency

> requirement for Governor is to be eliminated, it should be accomplished by the *voters* through the constitutional amending process."

353 F.Supp. at 1217.

CONCLUSION

For the foregoing reasons, petitioner and appellant respectfully requests that this petition for rehearing be granted.

Dated: March 29, 2012 by _____

Heidi Fuller
Appellant, Pro per.

CERTIFICATE OF WORD COUNT
(CAL RULES OF COURT, RULES 8.204, 8.490)

The text of this petition consists of 8,384 words as counted by the Microsoft Word version 2000 word-processing program used to generate the petition.

Dated: March 29, 2012

_____

Heidi Fuller
Appellant, Pro per.