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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

CENTRAL DISTRICT

JOHN RANDO and MARIANO A. RODAS,

Plaintiffs and Petitioners,

vs.

KAMALA HARRIS, individually and in her official capacity as Attorney General;

Defendant and Respondent,

FRANK QUINTERO, individually and in his official capacity as Glendale City Councilmember; CITY OF GLENDALE,

Real Parties in Interest.

CASE NO. BS145904

REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF MANDATE AND ORDER TO SHOW CAUSE WHY PEREMPTORY WRIT SHOULD NOT ISSUE

Date: January 7, 2014
Time: 8:30 a.m.
Dept. 85

INTRODUCTION

This Court ordered Respondent Attorney General, Kamala Harris ("AG") to show cause why a peremptory writ should not issue requiring her to grant Petitioners' *quo warranto* application to remove Frank Quintero from office as a member of the Glendale City Council. The AG's primary response to that order is that her discretion in such matters is absolute and this Court has no power to issue a writ.[1] Her alternate position is that, even *if* the Court had such power, Petitioners have not shown that her denial of their application constituted a sufficient abuse of discretion to warrant this Court's compelling her to grant their application.

The AG's primary proposition is simply untenable. Courts have made clear that denials of quo warranto applications are reviewable for abuse of discretion and the specific remedy is a mandamus action against the Attorney General. *Nicolopulos v. City of Lawndale*, 91 Cal.App.4th 1221, 1228-29 (2001). The AG's backup position is also unpersuasive. She overstates her discretion in quo warranto proceedings, ignoring the plain language of Cal.C.C.P. § 803 and, in doing so, fails to rebut any of Petitioners' substantive arguments.

I. MANDAMUS MAY ISSUE TO CORRECT THE ATTORNEY GENERAL'S ABUSE OF DISCRETION IN DENYING QUO WARRANTO APPLICATIONS

The AG begins her brief in opposition by properly acknowledging that the standard for reviewing quo warranto denials is whether there was an "extreme and clearly indefensible" abuse of discretion. See, Res. Opp. at 1. However, she proceeds to assert that this Court does not have authority to review her decision. Indeed, she claims this Court would be abusing its discretion and violating the separation of powers doctrine if it found she abused her discretion. (Res. Opp, at 5-8). But, to support this proposition, the AG cites cases where courts are in fact reviewing the discretion of Attorneys General through a writ of mandate. (Res. Opp, at 7, citing *Int'l Assn. of Fire Fighters, Local 55 v. Oakland* (1985) 174 C.A.3d 687; *City of Campbell v. Mosk*, 197 Cal. App. 2d 640, 648 (1961); and *Lamb v. Webb*, 151 Cal. 451, 455 (1907).).

Contrary to the AG's assertion, the separation of powers doctrine does not prohibit or limit

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[1] *See, e.g.,* Res. Opp. at 8 (" a petition for writ of mandate is not a proper procedure, and petitioners' request for mandamus should be denied.").

this Court in this context. In fact, case law makes clear that the sole reason the writ of quo warranto survives a facial due process challenge is *because* the AG's decision is reviewable by the courts. *Nicolopulos*, 91 Cal. App. 4th at 1228-29.

The writ of quo warranto is unique because of its requirement that a private citizen first receive permission from the government (the Attorney General) to sue the government (an official who unlawfully holds office). Because this is a rare procedure, it has been argued on several occasions that the quo warranto application process violates Due Process and is unconstitutional. Courts have repeatedly rejected this argument, each time reassuring the petitioner that the writ of quo warranto does not violate due process because the Attorney General's decision to deny it is reviewable for abuse of discretion:

> Appellant suggests the quo warranto procedure does not satisfy due process because it requires the consent of the Attorney General to proceed. . . if the circumstances were such that the Attorney General abused his discretion by denying leave, appellant would have a remedy by mandamus against the Attorney General.

Nicolopulos, 91 Cal. App. 4th at 1228-29.

This view is reiterated in *Int'l Assn. of Fire Fighters, Local 55 v. Oakland* . In that case, the appellants argued that quo warranto proceedings were improper because it would commit their case to the AG's "unbridled discretion, leaving them without an adequate remedy at law." (*Int'l Assn. of Fire Fighters,*174 C.A.3d at 695.) The Court rejected this argument, holding:

> And, with regard to the conundrum posed by appellant as to whether the ancient proceeding affords an individual sufficient protection against abuse by a government officer in the prosecution of grievances in large part distinctively private in nature such as those in the case at bench, the resolution hinges upon whether the Attorney General's control of the action is judicially reviewable by and responsive to a writ of mandamus—to the extent that it is, a proceeding in the nature of quo warranto affords an adequate remedy, since the authority to determine whether an individual might proceed to redress his grievance would reside ultimately in the courts. (*Id.* at 696.).

The court continued that it "would not hesitate to hold that mandamus would issue to correct any arbitrary, capricious, or unreasonable action by the Attorney General." (*Id.* at 697.).

Therefore, contrary to the AG's assertions, not only does the case law permit this Court to review the AG's decision to deny Petitioners' quo warranto application, Due Process *requires* that

the Court be able to.

II. THE AG'S ROLE IN QUO WARRANTO PROCEEDINGS IS TO SERVE AS GATEKEEPER AND HER DISCRETION IS LIMITED ACCORDINGLY

The AG begins her analysis of the modern use and application of the writ of quo warranto by quoting the controlling statute, California Code of Civil Procedure section 803. But, she omits the second sentence of this single-paragraph statute. That sentence speaks directly to the limits on her discretion – that is, to the heart of the matter before this Court. The full statute reads as follows, with the portion omitted by the AG in italics, and key terms underlined:

> An action may be brought by the attorney-general, in the name of the people of this state, upon his own information, or upon a complaint of a private party, against any person who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise, or against any corporation, either de jure or de facto, which usurps, intrudes into, or unlawfully holds or exercises any franchise, within this state. *And the attorney-general must bring the action, whenever he has reason to believe that any such office or franchise has been usurped, intruded into, or unlawfully held or exercised by any person, or when he is directed to do so by the governor.*

Cal.C.C.P. § 803 (emphasis added). In short, the AG quoted the "may" portion of the statute and curiously left out the "must" portion.[2]

There is little debate that the primary purpose of requiring a private party to obtain permission ("leave to sue") from the AG prior to litigation is to avoid frivolous or vexatious claims against public officials. (See, *Lamb,* 151 Cal. at. 456; *Nicolopulos,* 91 Cal.App.4th at 1225.). Identifying the AG's role as gatekeeper to prevent frivolous suits is essential to understanding the limited scope of her discretion to deny a quo warranto application. This principle is further illuminated by a review of the relevant case law.

The first documented case in California discussing a court's role in reviewing the Attorney

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[2] Unfortunately, the AG's omission of important but damaging language in the quo warranto statute at issue in this case is but one example of the AG's failure to address authorities directly adverse to her position, let alone Petitioners' arguments. Another is the AG's failure to address *Nicolopulos*, the most recent and comprehensive case out of the Court of Appeal, Second District concerning the quo warranto procedure – one that specifically confirms (1) that an action in quo warranto is the *exclusive* means for removing someone from an unlawfully held office and (2) that a mandamus action is the proper way to challenge an Attorney General who refuses to grant leave to sue, i.e., a case that directly contracts the AG's position on those key points.

General's discretion in deciding quo warranto applications is *Lamb v. Webb*. In *Lamb*, the Court held that a writ of mandamus correcting the AG's denial of a quo warranto application should only issue "where the abuse of discretion by the Attorney General in refusing the leave is extreme and clearly indefensible." *Id* at 454. At first blush, this might seem an unusually high standard. But, the Court's application of this standard makes clear that it merely solidifies the AG's role in the quo warranto procedure, which is essentially to weed out frivolous litigation.("[the] chief object in requiring leave is to prevent vexatious prosecutions." *Id.* at 456.)

This is seen in how the California Supreme Court in *Lamb* applied its abuse of discretion standard. The Court analyzed Lamb's evidence supporting his quo warranto application (which was only a verified complaint). It determined that such evidence was insufficient to give the Attorney General *reason to believe* an office had been illegally usurped and thus the Attorney General did not abuse his discretion in denying the application. ("Clearly, to our minds this was not a sufficient showing to warrant a court in holding that the Attorney General ought to have been convinced that he had 'reason to believe' that [the opponent] had unlawfully intruded into and usurped said office of supervisor." *Id.*).

This application and subsequent explanation by the Court demonstrates that if there is sufficient information to give the Attorney General "*reason to believe*" that an office has been illegally usurped, then the application is not frivolous and the Attorney General must grant the quo warranto application. Therefore, logic dictates that if there is sufficient information to give the Attorney General *reason to believe* that an office has been illegally usurped and the Attorney General still denies the quo warranto application this would be sufficient to establish an "extreme and clearly indefensible abuse of discretion."

This conclusion is strengthened after reviewing the *Lamb* Court's source for this test, *Lamoreaux v. Ellis*. ("The true rule on the subject is, in our opinion, expressed by the court in *Lamoreaux v. Ellis*, 89 Mich. 146, [1891]." *Lamb*, 151 Cal. at 456). In *Lamoreaux,* the Court reviewed the Petitioner's evidence for the position that an office had been unlawfully usurped concluding there was insufficient, "reasonable grounds for the belief that the incumbent of the office is an intruder therein." *Id.* at 817.

This case makes clear that the focus of courts when determining whether there is an abuse of discretion by the Attorney General, turns on the facts of the case. If there are sufficient facts from which the Attorney General should have had a reasonable belief that the office was unlawfully usurped and nevertheless denies the quo warranto application, then she has abused her discretion in an extreme and clearly indefensible manner.

III. THE ATTORNEY GENERAL'S DISCRETION IN REVIEWING QUO WARRANTO APPLICATIONS MUST BE OBJECTIVE

The AG asserts in general terms that when she decided to deny Petitioners' quo warranto application she did so in a reasoned manner and therefore did not exercise "extreme and clearly indefensible discretion." In fact, she argues that "the case before this Court does not even come close to meeting this very high burden." (Res. Opp. at 1). But, she never defines the limits this standard places on her. Instead, the AG ignores the limits on her discretion and argues that since she cannot find any case where she abused her discretion, this Court should not find an abuse of discretion here. (Res. Opp. at 8).

This Court should reject the AG's generalist approach, as it lacks any legal foundation. It fails to recognize the role of this Court and the constitutional check imposed on her in quo warranto proceedings. See, *Int'l Assn. of Fire Fighters,* 174 C.A.3d at 263 ["it is, however, contrary to the policy of our law that the power to determine whether an individual shall have the privilege to be heard in the courts in the assertion of private rights should be lodged in any official or tribunal except a court or judicial office."]. If the limit cannot be defined by the AG (the one charged with making decisions under this standard) or by the courts, (the entity charged with enforcing the limit) then there is no limit, which is precisely what *Int'l Firefighter* rejected.

Fortunately, there is a standard, it just has not been fully developed, as this issue rarely makes it before the courts. As discussed above, the focus of the controlling cases is whether there is sufficient information to give the Attorney General "*reason to believe*" that an office was illegally usurped.

It appears that the AG's confusion on this issue is rooted in her belief that the "reason to believe" language provides her with a subjective standard. However, this is incorrect. As detailed

above, this standard must be an objective one, where, if a reasonable AG acting on a quo warranto application finds reasonable grounds to believe that a government official unlawfully holds office, she must grant leave to sue. The AG Harris seems to argue that her personal belief trumps all. But the standard is not whether *she* believes that Councilmember Quintero is ineligible to hold office, it is whether there are sufficient facts that give "reason to believe" that he unlawfully holds office. If there are - as is the case here - then she must grant Petitioners' application and allow for judicial resolution of the matter. If the test were as the AG suggests, then she would have "unbridled discretion" and, as case law makes clear, Due Process would be violated.

IV. THE AG HAD "REASON TO BELIEVE" QUINTERO IS UNLAWFULLY HOLDING OFFICE AND ABUSED HER DISCRETION BY DENYING PETITIONERS' QUO WARRANTO APPLICATION

Petitioners' initial brief to this court (as well as the briefs submitted to the AG attached thereto as exhibits) provides to the AG overwhelming "reason to believe" that Quintero is holding office in violation of Section 12. Both the AG and RPI admit Petitioners' view of Section 12 is plausible, and, thus, by definition, not frivolous. *See*, Res Opp. at 9, "there is more than one way to read Section 12;" RPI. Opp. at 3 "there [are] at least two interpretations of Section 12." They just propose a different - and in Petitioners' view, less plausible - interpretation, one based on a strained and complicated exercise in statutory construction. But, the question of whose interpretation of Section 12 is correct is one for the courts.

While the AG is correct that no reviewing court has upheld a writ of mandate to correct the AG's denial of a quo warranto application,[3] it is equally noteworthy that no court has upheld the AG's denial of an application based purely on interpreting a question of law. As noted above, in every case upholding the AG's denial the courts held there was insufficient evidence (facts) to give the AG reason to believe that a quo warranto application should be granted. Thus, nothing supports the notion that the AG has discretion to decide questions of law. In fact, the AG's own long established position has been that "in passing on applications for leave to sue in quo

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[3] The lower court in *Lamb* issued such a writ, but it was overturned because there was insufficient evidence to give the Attorney General "reason to believe" the office had been unlawfully usurped, not because a writ is the improper vehicle to challenge the Attorney General's discretion.

warranto, the Attorney General ordinarily does not decide the issues presented, but determines only whether or not there is a substantial question of law or fact which calls for judicial decision." (19 Ops. Cal. Atty. Gen.46.).

This case involves a pure question of law, i.e., the interpretation of Section 12. But, the AG deviated dramatically from the usual practice of allowing courts to decide such issues. After finding Petitioners had presented a substantial and serious (i.e., non-frivolous) question of law, instead of considering her gatekeeper role fulfilled, the AG chose to adjudicate their claim, denying to Petitioners the judicial review that they were entitled to under the quo warranto procedure. The AG's extensive venture into legislative history, ballot arguments, etc., to reach a particular statutory construction - regardless of whether it is correct - was an indefensible abuse of her discretion, violating the plain language of section 803, the uncontroverted role of the AG, and the separation of powers doctrine. Statutory construction based on inferences drawn from extrinsic evidence like ballot pamphlets warrant *judicial* resolution.

Even if the AG were entitled to resolve such complex legal questions on a quo warranto application, as Petitioners' pointed out in their opening brief (and unrebutted by the AG in her opposition thereto), she nonetheless abused her discretion by failing to follow basic tenets of statutory construction. For example she insists that the ballot pamphlet must be considered in construing Section 12's two-year restriction because it is an ambiguous provision but never identifies the ambiguity she sees in "any city office" that would call for such.[4] But, it is improper to look past clear language to determine the meaning of legal provisions. See, Pet. Br. A7 citing *People v. Jones,* 5 Ca1.4th 1142, 1146 (1993) ["[i]f the language is clear and unambiguous. there ordinarily is no need for construction."].

Moreover, the AG failed to rebut or even address, for the second time, Petitioners' very specific arguments that, even if it were proper to consider, the ballot pamphlet supports

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[4] *Leymel v. Johnson*, 105 Cal.App. 694 (1930), cited by RPI merely explains that determining the universe of positions contemplated by "office" can be problematic, but makes clear that courts consider positions of governmental authority like that of councilmember to be an "office." *Id.* at 696; 698-99. It does not stand for the proposition that one can never determine whether a position is an "office" definitively.

Petitioners' interpretation of Section 12. See, Pet. Br. at 9-11. RPI wholly ignored those points too.

Without addressing these points, the AG cannot be certain her interpretation of Section 12 is correct. And, regardless of what the scope of the AG's discretion ultimately is determined to be, in no case can it include committing errors of law. (*Bruns v. E-Commerce Exchange, Inc.* (Cal. App. 2d Dist. 2009) 2009 WL 737663; *In re Lugo* (2008) 164 Cal.App.4th 1522, 1536, fn. 8.)

In short, Petitioners provided the AG with more than ample reason to believe that Mr. Quintero is unlawfully serving in a position for which he is ineligible, reasons solidly founded in fact. Under Section 803, the AG was bound to grant Petitioners' application and allow for judicial review of their claim.

V. THE CONSTITUTIONAL CONCERNS RAISED BY THE AG AND RPI ARE BASELESS

Petitioners do not argue, as the AG contends, that "ambiguities in language of Section 12 should be resolved in restricting the plaintiff [sic][5] from taking office" in citing *Lungren v. Deukmejian*, 45 Cal. 3d 727 (1988) Res. Opp. at 11. Rather, Petitioners are simply making the point that ambiguities could be resolved in favor of restricting an officeholder where the interpretation supporting the officeholder is contrived, as is the one set forth by the AG. The very language the AG cites from *Lungren* shows why it is a fitting example to that point. See, Res. Opp. at 11, citing *Lungren*, 45 Cal.3d at 733 . In any event, it is irrelevant since Section 12 clearly contemplates councilmembers as being subject to its two-year restriction. Glendale Charter Art. VI, sec 12.

RPI ironically argue that Quintero has a First Amendment right to be immunized from political consequences for his official decisions (an argument rejected by the U.S. Supreme Court, *Nevada Commission on Ethics v Carrigan*, 131 S. Ct. 2343, (2011)), while at the same time arguing Petitioners are precluded from pursuing a quo warranto action against Quintero simply because of their alleged political views on an unrelated matter. Setting aside that RPI's assertion about Petitioners' motives for bringing this action is completely speculative, it is irrelevant.

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[5] Presumably, the AG means Quintero in stating "plaintiff."

Taking such into account is so antithetical and offensive to our First Amendment traditions that it is not even worthy of further consideration here.[6]

VI. PETITIONERS DO NOT ASSERT SECTION 12 EFFECTUATES A TERM LIMIT

Both the AG and RPI claim Petitioners read Section 12 as a term limit. While Petitioners are not entirely clear on the relevance of their point, Petitioners maintain that Section 12 is not a term limit. To the contrary, denying *appointments* like Quintero's is a perfectly logical way for Glendale to achieve its goal in enacting the two-year ban of avoiding cronyism or self-dealing by former councilmembers, while *not* limiting the time councilmembers can remain in service.

Quintero had every right and opportunity to run for the elected office of City Council member and extend his term. He chose not to; he let his term expire. Now, as a former council-member, he is of a class temporarily ineligible to serve in a paid city office for two years. Such a temporary ban on moving to another city position to prevent corruption is perfectly reasonable, and, contrary to RPI's assertion, is not the sort of "bizarre result" courts seek to avoid.

CONCLUSION

The operative Glendale Charter provision (Section 12) contains two sentences that address two different time periods. The first clearly says that sitting councilmembers cannot hold "any other" city office unless expressly authorized by law or necessary to performing their "duties as a councilmember." The second just as clearly states that after a member leaves the council, he or she is barred for two years from holding "any city office or city employment." These provisions obviously are aimed at avoiding self-dealing and cronyism– like having someone's former colleagues *appoint* him to a vacant seat on a city council eight days after he left the council. And that is exactly what happened, here, precipitating Petitioners' quo warranto challenge pursuant to Section 803.

Section 803 plainly states that "the attorney-general *must* bring the action, whenever he has *reason to believe* that any such office [is] . . . unlawfully held." The plain language of Glendale's Section 12 provides more than ample evidence to support a "reason to believe" that

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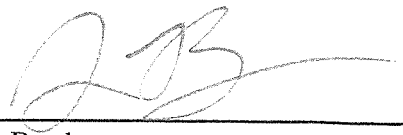
[6] This argument has been rebutted throughout this process. See Exhibit E pp 5-7, attached to Petitioners' Memorandum of Points and Authorities in Support of Ex Parte Application.

Councilmember Quintero unlawfully holds his current seat on the council. It is of little import that the AG *personally* believes otherwise. The "reason to believe" standard must be an objective one; otherwise it is meaningless. The question of Section 12's meaning should be resolved by the courts.

Because, by all objective measures, there is reason to believe Mr. Quintero unlawfully sits on the city council, it was incumbent upon the AG to grant Petitioners Quo Warranto application for permission to sue. Accordingly, this Court should issue the peremptory writ.

Dated: December 31, 2013

MICHEL & ASSOCIATES, P.C.



Sean A. Brady
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PROOF OF SERVICE

STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

I Claudia Ayala, am employed in the City of Long Beach, Los Angeles County, California. I am over the age eighteen (18) years and am not a party to the within action. My business address is 180 East Ocean Blvd., Suite 200, Long Beach, CA 90802.

On December 31, 2013, I served the following:

REPLY TO RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF MANDATE AND ORDER TO SHOW CAUSE WHY PEREMPTORY WRIT SHOULD NOT ISSUE

on the interested parties by placing
[ ] the original
[X] a true and correct copy
thereof enclosed in sealed envelope(s) addressed as follows:

Mark R. Beclomgton, Supervising
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Attorneys for Defendants

X (BY MAIL) As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under the practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Long Beach, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date is more than one day after date of deposit for mailing an affidavit.
Executed on December 31, 2013, at Long Beach, California.

__ (PERSONAL SERVICE) I caused such envelope to delivered by hand to the offices of the addressee.
Executed on December 31, 2013, at Long Beach, California.

X (VIA ELECTRONIC MAIL) As follows: I served a true and correct copy by electronic transmission. Said transmission was reported and completed without error.
Executed on December 31, 2013, California.

__ (VIA FACSIMILE TRANSMISSION) As follows: The facsimile machine I used complies with California Rules of Court, Rule 2003, and no error was reported by the machine. Pursuant to Rules of Court, Rule 2006(d), I caused the machine to print a transmission record of the transmission, copies of which is attached to this declaration.
Executed on December 31, 2013, California.

X (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

CLAUDIA AYALA