ROBIN B. JOHANSEN, State Bar No. 79084
THOMAS A. WILLIS, State Bar No. 160989
MARGARET R. PRINZING, State Bar No. 209482
REMCHO, JOHANSEN & PURCELL, LLP
201 Dolores Avenue
San Leandro, CA 94577
Phone: (510) 346-6200
Fax: (510) 346-6201
E-Mail: rjohansen@rjp.com

R. ZACHARY WASSERMAN, State Bar No. 54764
WENDEL, ROSEN, BLACK & DEAN, LLP
1111 Broadway, 24th Floor
Oakland, CA 94607
Phone: (510) 834-6600
Fax: (510) 834-1928

Attorneys for Defendant
EDMUND GERALD "JERRY" BROWN JR.

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

THOMAS G. DEL BECCARO, MARK A. PRUNER, DAVID B. PRINCE, CARL A. BURTON, and ADAM C. ABRAHMS,

Plaintiffs,

vs.

EDMUND GERALD "JERRY" BROWN JR., an individual; BRUCE McPHERSON, Secretary of State of the State of California; BILL LOCKYER, Attorney General of the State of California; STEVE WESTLY, Controller of the State of California; and DOES 1-100, inclusive,

Defendants.

No.: 06AS04494

DEFENDANT EDMUND G. BROWN JR.'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO ELECTION CONTEST AND PLAINTIFFS' FIRST AMENDED COMPLAINT

Hearing:

Date: February 9, 2007
Time: 1:30 p.m.
Dept: 11

(The Honorable Gail D. Ohanesian)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES:

TABLE OF AUTHORITIES: (continued) **Page(s)**

CALIFORNIA CONSTITUTION:

TABLE OF AUTHORITIES: (continued) **Page(s)**

STATUTES:

TABLE OF AUTHORITIES: (continued) **Page(s)**

MISCELLANEOUS:

INTRODUCTION

On November 7, 2006, the voters of California elected Edmund G. Brown Jr. ("Brown") to be their Attorney General by an overwhelming margin. Unhappy with that result, plaintiffs ask this Court to take the extraordinary step of overturning a statewide election. They do so for the flimsiest of reasons, arguing that the Attorney General's voluntary inactive bar status three years ago renders him ineligible to hold the office. Plaintiff's arguments are completely without merit.

Government Code section 12503 sets forth the eligibility requirements for Attorney General, stating simply that candidates "shall have been admitted to practice before the state Supreme Court" for at least five years preceding their election. The California Supreme Court admitted Brown to practice before it on June 14, 1965, and he has remained admitted ever since. During Brown's 40 plus years of admission to legal practice, there has never been any action by the Supreme Court, the State Bar, or any other entity that ever questioned, let alone affected, his admission to practice under Government Code section 12503.

Ignoring the plain meaning of section 12503, plaintiffs now insist that candidates for Attorney General must have been active bar members and "actively practicing" for five years before they can run for office. The statute says no such thing. As demonstrated below, the Legislature knows how to require that attorneys be active members or "actively practicing," and it has not required that status for eligibility to be Attorney General.

Plaintiffs' reading – or misreading – of section 12503 is manufactured entirely from dictum in a case decided long before section 12503 even existed and which has no bearing on the issues here. *Johnson v. State Bar of Cal.* (1937) 10 Cal.2d 212, was not an election contest, but rather a *disbarment* proceeding for a lawyer who falsely claimed to have been actively practicing before running for a judgeship, when in fact the Supreme Court had already suspended him for serious misconduct. Suspension by the Supreme Court bears no resemblance to voluntary inactive status. A lawyer who has chosen inactive status can reactivate at any time; a lawyer who has been suspended by the Supreme Court will not be reinstated until he has successfully completed his suspension. Thus,

Johnson had nothing to do with the facts or the statute at issue here, and it says not one word about the distinction between active and voluntarily inactive members of the State Bar.

Its lack of merit aside, plaintiffs' interpretation of section 12503 is also unconstitutional. Plaintiffs are asking this Court to trample on two core fundamental rights: the right of the voters to elect the candidate of their choice and the right of the candidate to run for and hold public office. Under controlling case law, such radical judicial intervention in the electoral process can only be justified if a candidate is undeniably ineligible as a matter of law. Any ambiguity either in the facts or the law must be resolved in favor of upholding the election. Plaintiffs cannot begin to meet these standards.

Finally, plaintiffs' partisan effort to pursue this case is barred by laches. Plaintiffs filed their complaint – with TV cameras in tow – only three weeks before the general election and after voting by mail had commenced. There is no excuse for this kind of delay when Brown's candidacy and his bar status had been matters of public record for nearly two and a half years. For plaintiffs to sit on their hands through two statewide elections when they had clear remedies to address their "eligibility" issue is inexcusable, not to mention highly prejudicial to the people of California.

For all of these reasons, plaintiffs' lawsuit is frivolous and should be dismissed.

ARGUMENT

I.

STANDARD OF REVIEW

Because they seek to overturn a statewide popular election, plaintiffs' burden of proof is far higher than that in the usual civil case.

First, "[i]t is a primary principle of law as applied to election contests that it is the duty of the court to validate the election if possible." (*Wilks v. Mouton* (1986) 42 Cal.3d 400, 404;[1] *accord Gooch v. Hendrix* (1993) 5 Cal.4th 266, 277.) This has been the law in California since at least 1899, when the Supreme Court quoted approvingly from a New Jersey case: "'Elections should never be

[1] *Wilks v. Mouton* was superseded by statute on other grounds as noted in *Gooch v. Hendrix* (1993) 5 Cal.4th 266, 280, fn. 8.

held void unless clearly illegal. It is the duty of the court to give effect to them, if possible.'" (*People v. Prewett* (1899) 124 Cal. 7, 10, quoting *State v. Board of Freeholders* (1871) 35 N.J. L. 269.)

Second, "[e]ven mandatory provisions must be liberally construed to avoid thwarting the fair expression of popular will." (*Wilks v. Mouton*, 42 Cal.3d at 404.) Both the policy and the rule in favor of upholding elections make courts "reluctant to defeat the fair expression of popular will in elections . . . ." (*Simpson v. City of Los Angeles* (1953) 40 Cal.2d 271, 277; *accord Canales v. City of Alviso* (1970) 3 Cal.3d 118, 127.) This rule is particularly important here, where the Attorney General received 1.5 million votes more than his Republican opponent, winning with the greatest margin of victory of any of the statewide constitutional officers.[2]

Third, the case law uniformly holds that any restriction on the right to run for office must be strictly construed. In construing a local term limits provision, the Second District Court of Appeal set out the controlling law:

> We also are guided by the principle that the right to hold public office is a fundamental right of citizenship (*Zeilenga v. Nelson* (1971) 4 Cal.3d 716, 720 [94 Cal.Rptr. 602, 484 P.2d 578] that can be curtailed only if the law clearly so provides (*Carter v. Com. on Qualifications, etc.* (1939) 14 Cal.2d 179, 182 [93 P.2d 140]; *Helena Rubinstein Internat. v. Younger* (1977) 71 Cal.App.3d 406, 418 [139 Cal.Rptr. 473]).
>
> (*Woo v. Superior Court* (2000) 83 Cal.App.4th 967, 977.)

In words directly applicable here, the Court of Appeal concluded in *Woo*: "Any ambiguity in a law affecting that right must be resolved in favor of eligibility to hold office." (*Id.*)

The reason for these heightened requirements is obvious: A challenge to the validity of an election implicates the fundamental rights of the people to elect the candidates of their choice, as set forth in *Wilks, supra,* and of the individual to run for and to hold public office. As discussed in more detail below, plaintiffs' interpretation of section 12503 is not only wholly implausible; it is unconstitutional under any standard of review.

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[2] Defendants' Request for Judicial Notice ("Def.'s RJN"), Exhibit A at p. xix, Excerpts from the *Statement of the Vote, 2006 General Election, November 7, 2006.*

II.

ATTORNEY GENERAL BROWN WAS ELIGIBLE TO BE ELECTED TO HIS OFFICE

Plaintiffs do not dispute that the Attorney General was admitted to the State Bar in 1965, nor do they claim that he has ever been suspended or disbarred since that time. (Plaintiffs' Memorandum of Points & Authorities in Support of Election Contest ["Pls.' Mem."] at 5; First Amended Verified Complaint ["Am. Compl."] at ¶ 5.) The sole basis for their lawsuit is the fact that, while he was Mayor of Oakland, Brown chose to go on inactive status for a portion of the years immediately preceding the election. (*Id.*)[3] Plaintiffs' claim is frivolous. The statutes and the case law make quite clear that an attorney who is voluntarily inactive is "admitted to practice" in California and is therefore eligible to run for the office of Attorney General.

A. The Plain Meaning of Section 12503 Includes Voluntarily Inactive Attorneys Among Those Who Are Eligible to Run for Attorney General

Government Code section 12503 reads in its entirety as follows:

> No person shall be eligible to the office of Attorney General unless he shall have been admitted to practice before the Supreme Court of the state for a period of at least five years immediately preceding his election or appointment to such office.

Thus, eligibility to run for Attorney General depends on whether a candidate has been "admitted to practice before the Supreme Court of the state for a period of at least five years . . . ." The power to admit an individual to practice law rests solely with the California Supreme Court as part of its inherent judicial authority under article VI of the California Constitution. (*Hustedt v. Workers' Comp. Appeals Bd.* (1981) 30 Cal.3d 329, 336-337 and cases cited therein.) Although the Supreme Court has recognized that the Legislature may exercise "a reasonable degree of regulation and control over the profession and practice of law," the Court retains the ultimate authority to decide who is admitted to practice before it. (*Brydonjack v. State Bar of Cal.* (1929) 208 Cal. 439, 446 [Supreme Court retains the authority to "admit those who have in our opinion met the prescribed test, whether the investigators do or do not agree with this conclusion."].)

[3] The parties have agreed on a stipulated statement of facts, which plaintiffs will file with the Court.

Once the Court has admitted an attorney to practice, the attorney cannot be suspended or disbarred except by order of the Court.[4] Thus, although the State Bar acts as the administrative arm of the Supreme Court, it cannot revoke a member's admission status on its own. Once an attorney has been admitted to practice he retains that status unless the Supreme Court revokes it by ordering his suspension or disbarment.

The question of "admission to practice" is entirely separate from whether the attorney has requested to be on inactive status with the State Bar. The State Bar has two classes of members: active and inactive. (Bus. & Prof. Code, § 6003.) Members who do not wish to engage in the practice of law and who are not under suspension may be enrolled as inactive members upon written request. (*Id.* at § 6005; Rules and Regulations of the State Bar of California ["Rules"], art. I, § 2(a).) An inactive member may transfer to active status upon written request and payment of the full annual membership fee for the current calendar year. (Bus. & Prof. Code, § 6006; Rules, art. I, § 3.) The change in status is purely ministerial. There is no waiting period nor is the transfer subject to any discretion on the part of the Bar. Instead, the Bar describes "inactive status" this way on its website: "Inactive members have chosen this status voluntarily and may transfer to active *at any time upon request.*" (Def.'s RJN, Exh. B, California State Bar "Member Status Definitions," emphasis added.) The Bar's form for requesting transfer to active status states: "Status change will be effective upon receipt of this form and payment in full." (Def.'s RJN, Exh. C, California State Bar "Request to Transfer to Active Status" Form.)

Thus, both active and voluntarily inactive members of the Bar are by definition "admitted to practice before the Supreme Court." They were all granted admission upon passing the bar exam and satisfying the other standards set by the Bar, and they remain admitted to practice unless the Supreme Court declares otherwise.

[4] *In re Rose* (2000) 22 Cal.4th 430, 436 ("The State Bar Court exercises no judicial power, but rather makes recommendations to this court, which then undertakes an independent determination of the law and the facts, exercises its inherent jurisdiction over attorney discipline, and enters the first and only disciplinary order.").

When it passed section 12503 in 1966, the Legislature was well aware that the State Bar included two classes of members, and it made no reference to that fact. Instead, it chose language that was simple and clear: eligibility depends upon admission to practice, not active status with the State Bar. Moreover, there is ample evidence that the Legislature knows how to differentiate between lawyers who are admitted to practice and those who are on active status with the State Bar. For example, Probate Code section 6388 provides that "[i]ndividuals who have been admitted to practice law before the courts of this state *and* who are in good standing as active law practitioners of this state are authorized persons in relation to international wills." (Emphasis added.) Business and Professions Code section 6062 sets out the requirements for out-of-state attorneys to practice law in this state. Section 6062(a) requires that the person have "been admitted to practice law in a sister state," but then says that a person who "has been an active member in good standing of the bar of the admitting sister state . . . for at least four years immediately preceding the first day" of the State Bar exam may take the Attorneys' Examination, while those "who have not been active members in good standing . . . for at least four years" must take the general bar exam.

The Legislature has also differentiated between active and inactive members of the bar. For example, Insurance Code section 1831, added in 1959, exempts "active members of the State Bar of California" from licensing requirements for life insurance analysts. Business and Professions Code section 6041, added in 1939, requires that local administrative committees of the State Bar "shall be composed of active members of the State Bar." Labor Code section 5270.5 provides that attorneys are eligible to become workers' compensation arbitrators "if they are active members of the California State Bar Association" and possess other qualifications set out in the statute.

Finally, the Legislature has long known how to require that attorneys have actually engaged in the practice of law as a qualification for office. For example, between 1951 and 1965, the Legislature added a series of sections to the Public Utilities Code specifying the qualifications for attorneys for various types of local utility and transit districts. Public Utilities Code section 90266 lists the qualifications for counsel for the San Diego County Transit District and is nearly identical to all the others:

> The attorney shall be admitted to practice law in the Supreme Court of the state, and shall have been actively engaged in the practice of his profession for not less than five years next preceding his appointment.[5]

Public Utilities Code section 90266 and the similar provision contained in section 95526 were added in 1965, just one year before the Legislature enacted Government Code section 12503.

Thus, when the Legislature wanted to make sure that someone was both admitted to practice before the Supreme Court *and* an active member of the State Bar, it said so clearly. What plaintiffs are really asking this Court to do is to rewrite the statute to add a requirement that is not and never has been there. It is an elementary principle of law, codified in section 1858 of the Code of Civil Procedure, that "[i]n the construction of a statute . . . the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted . . . ." The Court should reject plaintiffs' invitation "to insert what has been omitted" in section 12503.

B. Case Law Confirms That "Admitted to Practice" Does Not Require Active Membership Status

Plaintiffs' claims are also contradicted by well-established case law. In *Chambers v. Terry* (1940) 40 Cal.App.2d 153, the Court of Appeal construed the same "admitted to practice" language as appears in section 12503 and concluded that it did *not* require that an individual actually practice law, as plaintiffs insist. (Pls. Mem. at 1.) The case involved the scope of then-section 23 of article VI of the state Constitution, which read:

> No person shall be eligible to the office of a justice of the supreme court, or of a district court of appeal, or of a judge of a superior court, or of a municipal court, unless he shall have been admitted to practice before the supreme court of the State for a period of at least five years immediately preceding his election or appointment to such office.
>
> (40 Cal.App.2d at 155.)

[5] Other provisions are: Public Utilities Code section 11932 (attorney for municipal utility district), section 24932 (attorney for Alameda and Contra Costa County Transit Districts), section 28810 (general counsel for San Francisco BART District), section 30303 (general counsel for Southern California Rapid Transit District), section 50101 (counsel for San Joaquin Regional Transit District), and section 95526 (counsel for Santa Barbara Metropolitan Transit District).

Like this case, *Chambers* was an election contest in which the contestant argued that the winner was not eligible to be elected to the municipal court because of a statute providing that judges of that court "'must have had at least five years *active* practice at law in this State prior to their election or appointment.'" (*Id.* at 154, emphasis added.) The contestant argued that "aside from some five years of judicial service, [the contestee] has been engaged in the general practice of law only for four years and seven months." (*Id.* at 155.)

The Court of Appeal upheld the election on the ground that the statute requiring five years of active practice impermissibly enlarged the qualifications set out in the Constitution for municipal court judge – namely that a judge need only have been "admitted to practice" for five years prior to his election, not that he have been an active practitioner. A requirement that the candidate have also been engaged in "active practice" was, therefore, "unconstitutional and void as an attempted exercise of a power which had been expressly withheld from the legislature." (*Id.* at 156.)

Chambers v. Terry appeared only three years after *Johnson v. State Bar of Cal.* (1937) 10 Cal.2d 212, the case that contains the dictum upon which plaintiffs so heavily rely. The two cases discussed the same provision of the Constitution having to do with qualifications for judicial election. If the Court of Appeal felt that *Johnson* applied to the case before it, it would have said so. Certainly if the Court of Appeal read *Johnson* as requiring active membership in the State Bar, it would have either found a way to distinguish the situation in *Chambers* or acknowledged that it was bound by the Supreme Court's ruling and overturned the election. It did neither, nor did it make any reference to *Johnson.*

The reason is simple – the *Johnson* Court was not talking about voluntary inactive status; it was talking about *suspension.* The issue before the Court was not whether the petitioner was entitled to run for judicial office, but whether he should be disbarred for submitting a false declaration of candidacy, saying that he was a practicing lawyer when in fact he was under a three-year suspension on two separate charges. (10 Cal.2d at 214.)

The charges at issue in *Johnson* were serious indeed. One involved deceptive advertising, and the other stemmed from a complicated scheme whereby Johnson not only betrayed the trust of his clients, but filed an appeal on their behalf without having authorization to do so. Based on this record, the California Supreme Court suspended Johnson from the practice of law for three years.[6] While under three-year suspension, Johnson sought to run for judicial office and filed a declaration of candidacy describing his occupation for the past three years as "'Lawyer, practicing, and admitted to practice since 1927 in California . . . .'" (*Johnson*, 10 Cal.2d at 214.)

It was in this context that the Court wrote that the constitutional provision required that a judicial candidate "be qualified as an attorney actually entitled to practice in the state courts . . . ." (*Id.* at 216.) The Court's statement is clearly limited to the question before it: whether Johnson's claims that he was a practicing lawyer for the past three years "were false and were undoubtedly made with the intent to deceive," because he was in fact suspended for misconduct when he made them. (*Id.* at 216.) As the Court put it, "[c]ertainly an attorney who has been suspended from the practice of law . . . cannot successfully claim to be eligible" to run for judicial office, because he was not entitled to practice law during the relevant period. (*Id.*) Because of his suspension, he was not "admitted to practice" before the Supreme Court, and he could not be reinstated until he had successfully completed his period of suspension.

Thus, *Johnson* is of no help to plaintiffs. It had nothing to do with voluntary inactive status, nor did it purport to decide anything about eligibility to run for judicial office, much less the office of Attorney General. It decided nothing more than that George Johnson should be disbarred because he had willfully stated under penalty of perjury that he was a practicing lawyer admitted to the State Bar when in fact he had been suspended from the practice of law for egregious misconduct.[7]

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[6] These facts are set forth in a previous case, *Johnson v. State Bar of Cal.* (1935) 4 Cal.2d 744. All other references to *Johnson* or *Johnson v. State Bar of Cal.* in this brief refer to the 1937 case cited in Plaintiffs' Memorandum, *Johnson v. State Bar of Cal.* (1937) 10 Cal.2d 212.

[7] Plaintiffs' reliance on *Bowring v. Dominguez* (1935) 3 Cal.2d 167 is puzzling. The case had nothing to do with active or inactive status. Instead, it held that the petitioner was ineligible to run for judicial office because he was not admitted a full five years prior to the election. (*Id.* at 169.) That question is obviously not at issue here, given that the Attorney General was admitted to practice in 1965.

C. Long-Standing Practice Confirms That Voluntarily Inactive Members Are Eligible

In *Carter v. Commission on Qualifications of Judicial Appointments* (1939) 14 Cal.2d 179, 185, the California Supreme Court wrote that the Attorney General's practical interpretation of a rule regarding legislators' eligibility for judicial office is "entitled to great weight." Such an interpretation exists, and it also runs squarely against plaintiffs' theory of their case.

In a 1973 opinion letter, Attorney General Evelle Younger reviewed language similar to section 12503 and concluded that "inactive membership may be included in computing the requisite time qualifications for judicial office." (Def.'s RJN, Exh. D, Cal. Atty. Gen., Indexed Letter, No. IL 73-41, p. 1 (Feb. 27, 1973).)[8] The letter did so relying on the language of the provision itself: "Construing article VI section 15 according to its plain meaning, we conclude that inactive membership in the State Bar may be included in computing the requisite time for judicial office." (*Id.* at p. 6.)

The letter closed with a cogent analysis of the public policy issues at stake:

> Requiring that persons only be members of the State Bar, and not actual practitioners of the law, insures eligibility to judicial office for that vast reservoir of potential judicial talent who otherwise would be ineligible under a stricter interpretation of the California Constitution. This category could include law professors as well as individuals serving in quasi-judicial capacities, who, because of the inherent nature of their functions or personal preference, may become inactive members of the State Bar.
>
> (*Id.*)

Indeed, under plaintiffs' strained interpretation of the law, Justice Marvin Baxter, now sitting on the California Supreme Court, would not have been eligible at the time he was appointed to the bench, because he had been on inactive status within five years of his appointment. (Def.'s RJN, Exh. E, California State Bar Certificate summarizing the Bar records for Marvin Ray Baxter.) Justice Baxter was appointed and confirmed in 1988, just one year before the Legislature clarified that inactive

[8] The constitutional revision of 1966 renumbered article VI, section 23 as article VI, section 15 and changed the language from requiring that persons have been "admitted to practice before the Supreme Court" to that they have been "member[s] of the State Bar." The Attorney General's opinion letter concluded that these changes did not change the meaning of the provision. (Def.'s RJN, Exh. D. at pp. 1-2, citing Judicial Council analysis.)

status does not disqualify an attorney for appointment or election to judicial office. (*See* Part D, below.) We have found no evidence that anyone questioned Justice Baxter's eligibility for judicial office, including the Chief Justice, Attorney General, and presiding justice of the Fifth District who confirmed him. (*See* Cal. Const., art. VI, § 7.) These state officers, as well as Justice Baxter himself,[9] were thoroughly familiar with the requirements for judicial office, yet they all concluded he was qualified, and certainly no one would question his qualifications now.[10]

The issue of restricting the pool of available candidates is even more critical to the office of Attorney General. Unlike many judges, the Attorney General is chosen by vote of the people, who have a strong interest in their right to elect the candidate of their choice. As demonstrated in part III below, that right and the fundamental right to run for office are constitutionally protected, and any doubts must be resolved in favor of those rights. The "vast reservoir" of candidates for the office of Attorney General includes lawyers who, like the current Attorney General, may have held other elected office that precluded them from actually practicing law. [11]

In fact, the Bar's website states that there are 43,168 inactive lawyers, constituting over 20 percent of the Bar's membership. (Def.'s RJN, Exh. G, California State Bar "Member Demographics.")[12] Under the plaintiffs' theory, this huge segment of the bar would be ineligible to run

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[9] According to his official biography on the Court's website, Justice Baxter served as appointments secretary to Governor Deukmejian in the six years before his own appointment to the bench. During that time, he "assisted in the appointment of more than 700 judges." (Supreme Court of California's website, Justices at <http://www.courtinfo.ca.gov/courts/supreme/justices/baxter.htm> [as of Jan. 25, 2007].)

[10] Similarly, had plaintiffs' theory been the law in 1958, Justice Stanley Mosk would not have been eligible to run for Attorney General, because he had been serving as a Superior Court judge for the last 15 years and was therefore prohibited from practicing law. (Judicial Council of California, Release No. 39 (June 19, 2001) at http://www.courtinfo.ca.gov/presscenter/newsreleases/NR39-01.HTM [as of Jan. 29, 2007].)

[11] Immediately prior to assuming his current office, the Attorney General served two terms as Mayor of the City of Oakland. Because the duties of his office precluded him from practicing law, the Attorney General had no reason to pay the much higher dues for active membership in the State Bar. (*See generally* Charter of the City of Oakland, art. III, § 305 [Mayor must "devote his full time and attention to the duties of the Office of the Mayor and shall not engage in outside employment while in office."]. (Def.'s RJN, Exh. F.)

[12] This number does not include those who are judges (1,914) or those whom the website lists as "Not Eligible to Practice Law" (8,055). (*Id.*)

for one of the most important statewide offices. There is not a shred of evidence that the Legislature ever contemplated such a result.

D. The Legislature Clarified the Law in 1989 to Remove Any Doubt About the Effect of Inactive Status on Eligibility

As plaintiffs point out, in 1989 the Legislature amended Business and Professions Code section 6006 by adding the following sentence:

> Those who are or have been enrolled as inactive members at their request are members of the State Bar for purposes of Section 15 of Article VI of the California Constitution.

Article VI, section 15 is the current version of the constitutional provision regarding judicial eligibility that the Court discussed in the *Johnson* case. Plaintiffs argue that the change in section 6006 has no effect on the meaning of section 12503. (Pls.' Mem. at 11-14.) Plaintiffs are correct, but not for the reason they state. The legislative history of section 6006 demonstrates that the provision clarified existing law that inactive status will count toward eligibility not only for judicial office but for the office of Attorney General as well. Because a clarification explains what the law meant all along, the Legislature had no need to change section 12503.

As noted above, the rule regarding judicial eligibility appears in Article VI, section 15 of the California Constitution, which now provides that "[a] person is ineligible to be a judge of a court of record unless for 10 years immediately preceding selection, the person has been a member of the State Bar or served as a judge of a court of record in this State." Prior to 1966, this provision was found in article VI, section 23, and it contained the same "admitted to practice" language that is in section 12503 regarding the office of Attorney General.[13]

In 1989, the Legislature clarified section 6006 of the Business and Professions Code to state that inactive membership counts for purposes of eligibility for appointment to the bench. Plaintiffs' evidence itself demonstrates that the change was a clarification: "'SB 905 would clarify that

[13] As the Attorney General's opinion letter discussed above makes clear, the change from requiring that an appointee have been "admitted to practice" to having been a "member of the State Bar" for a certain number of years was not substantive. (Def.'s RJN, Exh. D at pp. 1-2.)

members of the State Bar who have been enrolled as inactive members, at their request, would be eligible to be appointed as a judge.'" (Pls.' Mem. at 13, quoting Enrolled Bill Report.)[14]

It is well-established that "[a] legislative clarification establishes the true legislative intent without changing the past legal consequences of the statute as properly understood." (*Bell v. Farmers Ins. Exchange* (2006) 135 Cal.App.4th 1138, 1146 and cases cited therein.) Thus, the change to section 6006 establishes that voluntary inactive status was *never* meant to disqualify an attorney from appointment to the bench, and that someone like Justice Baxter was always eligible, not just after the 1989 legislation. It follows, therefore, that when the Legislature used the same language in section 12503, it did so with the understanding that voluntary inactive status can be counted toward the eligibility requirement for the office.[15]

This reading of the 1989 legislation is the only one that is consistent with the well-established rule that statutes setting forth qualifications for office must be narrowly construed and any ambiguity in those provisions "must be resolved in favor of eligibility to hold office." (*Woo v. Superior Court, supra*, 83 Cal.App.4th 977.) Because hurdles to holding office are disfavored, courts may only enforce them if they are plain on their face. (*Helena Rubinstein Internat. v. Younger* (1977) 71 Cal.App.3d 406, 418; *see also People ex rel. Foundation for Taxpayer and Consumer Rights v. Duque* (2003) 105 Cal.App.4th 259, 265-266.) If there is any ambiguity in the statute which favors eligibility, the case is over, and rightly so, for civic participation is a fundamental right and one to be encouraged rather than frustrated. Here, of course, the plain meaning of section 12503 neither says "active" membership nor otherwise supports plaintiffs' position.

[14] Defendant does not oppose plaintiffs' request for judicial notice.

[15] *In re Do Kyung K.* (2001) 88 Cal.App.4th 583, 589, quoting *In re Bittaker* (1997) 55 Cal.App.4th 1004, 1009 ("'To understand the intended meaning of a statutory phrase, we may consider use of the same or similar language in other statutes, because similar words or phrases in statutes in pari material [that is, dealing with the same subject matter] ordinarily will be given the same interpretation.'").

III.

PLAINTIFFS' INTERPRETATION OF SECTION 12503 IS UNCONSTITUTIONAL

The California Supreme Court has made clear that "the right to run for public office is as fundamental a right as is the right to vote" and that the two rights are "inextricably intertwined." (*Zeilenga v. Nelson* (1971) 4 Cal.3d 716, 723; *Thompson v. Mellon* (1973) 9 Cal.3d 96, 99.) *Zeilenga* and *Thompson* both held that the residency requirements at issue there violated the rights of both the candidates who wished to run and the voters who wished to vote for them. (4 Cal.3d at 723; 9 Cal.3d at 105-106.) Under the reasoning of these and subsequent California Supreme Court cases, plaintiffs' novel interpretation of section 12503 is unconstitutional.

In *Edelstein v. City & County of S.F.* (2002) 29 Cal.4th 164, the California Supreme Court held that the constitutionality of a ballot restriction "'depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights.'" (29 Cal.4th at 174, quoting *Burdick v. Takushi* (1992) 504 U.S. 428, 434.) Thus, when ballot access is subjected to "severe" restrictions, "the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" (*Id.*, quoting *Norman v. Reed* (1992) 502 U.S. 279, 289.) "[W]hen a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters," however, "'the State's important regulatory interests are generally sufficient to justify' the restrictions." (*Id.*, quoting *Anderson v. Celebrezze* (1983) 460 U.S. 780, 788.)

Under this test, at a *minimum* a state restriction on ballot access must further "the State's important regulatory interests . . . ." That is the test to be used when the restriction is both "reasonable" and "nondiscriminatory." If, however, the restriction is "severe," then it must be "narrowly drawn to advance a state interest of compelling importance." (*Id.*) Plaintiffs' interpretation of section 12503 fails to satisfy even the lower standard of the *Edelstein/Burdick* test, because it is neither reasonable nor nondiscriminatory, and it does not further an important regulatory interest of the State.

Although it is entirely reasonable for a state to require that its Attorney General have been admitted to practice in the state, there is no rational reason for the state to discriminate between those who are active members of the State Bar and those who have been voluntarily inactive for a period of time before their election. So long as the members re-activate their bar status prior to assuming office, they are not engaging in the unauthorized practice of law. Nor is there any reason to require an Attorney General-elect to activate his bar status before assuming office, because he cannot appear on behalf of the State as its chief law officer until he has taken the oath of office.

If the argument is that such a rule is necessary to insure a requisite amount of legal experience before assuming office, the rule fails to accomplish that objective because there is no requirement that active members actually practice law. As noted above, when the Legislature wanted to require actual experience, it said that candidates for certain positions must have been "actively engaged" in the practice of law.

Similarly plaintiffs cannot argue that such a rule insures that candidates for Attorney General have been required to complete a certain amount of mandatory continuing legal education. First, the Legislature did not require continuing legal education until 1989, long after it enacted section 12503 in 1966. (1 Witkin, California Procedure (4th ed. 1996) Attorneys, § 417, p. 506.) By definition, then, this could not have served as an important state interest for requiring active membership in the Bar when the statute was enacted.

More importantly, many individuals who are likely candidates for Attorney General are exempt from the MCLE requirements. Business and Professions Code section 6070(c) exempts state "officers and elected officials . . . full-time professors at law schools" and "[f]ull-time employees of the State of California" from MCLE requirements. If MCLE were in fact the "important state interest" behind a requirement for holding the office of Attorney General, the Legislature would have said so, and it would not have exempted a very large pool of those most likely to run for the office.

Another possible argument that plaintiffs could make is that the State somehow has an interest in requiring those who run for Attorney General to pay the higher bar dues charged for active members. The Legislature has never asserted such an interest nor is it ever likely to do so, given the

relatively small amount of money it would add to the Bar's budget and the fact that the Bar has been content to allow more than 20% of its members to pay the lower fees for inactive status. Even if this were the Legislature's intent, however, requiring payment of the higher fee for someone like Attorney General Brown, who held an office that barred him from practicing law, would amount to an unconstitutional filing fee because it serves no other purpose and the state has provided no alternative to its payment. (*See Lubin v. Panish* (1974) 415 U.S. 709, 718; *Belitskus v. Pizzingrilli* (3d Cir. 2003) 343 F.3d 632, 637, 645-647 [$200 filing fee invalid because state failed to provide any alternative mechanism to qualify for ballot.].)

IV.

PLAINTIFFS' SUIT IS BARRED BY LACHES

There is yet another reason this case must be dismissed: It is barred by laches. Plaintiffs waited until after voting in the general election had commenced to file their lawsuit, even though Brown's State Bar status was a matter of public record at all times, his campaign committee was formed and publicly filed two and one-half years before the election, and pre-election remedies were available to plaintiffs both before the primary and general elections. Given that two of the plaintiffs are lawyers sufficiently versed in election law and State Bar issues to represent the plaintiffs here, their delay is inexcusable and if permitted would cause grave prejudice to the voters of California.

A case is barred by laches when plaintiffs unreasonably delay in bringing an action, causing prejudice to the adverse party. (*Getty v. Getty* (1986) 187 Cal.App.3d 1159, 1170-1171.) Laches can bar untimely election challenges. In *Finnie v. Town of Tiburon* (1988) 199 Cal.App.3d 1, 13-14, the Court of Appeal held that the trial court properly imposed sanctions on plaintiffs who waited until two weeks before an election to sue to stop it. Like this case, the plaintiffs' lawsuit was not only meritless, but filed far too late. The court in that case held that the plaintiffs were guilty of laches, because they had learned about the election three months earlier but only sued two weeks before the scheduled election. (*Id.* at 14.) The court found that the delay caused substantial prejudice because the Town had already incurred expenses associated with the special election, including

printing and distributing the ballots, and absentee voting had commenced. Based on that delay and resulting prejudice, the court concluded that the case was properly barred. (*Id.*)

The facts requiring dismissal here are even more compelling than those in *Finnie*. In *Finnie,* plaintiffs delayed for three months, and the prejudice involved only the cost of holding a local initiative election. Here, plaintiffs delayed for two and one-half years, and the prejudice is to the entire state.

Attorney General Brown formed his campaign committee in May of 2004. As of December 31, 2004, he reported having more than $1.4 million cash on hand.[16] He was clearly a serious candidate two years ago. He was considered the front runner when he entered the race and remained so throughout the campaign. He easily won the primary election in June 2006, gaining 63.3% of the vote.[17] At the general election, he had the largest margin of victory of all statewide candidates, gaining 56.3% of the vote.[18]

Yet through all of this, plaintiffs sat on their hands, and failed to take action until the general election was well under way. Plaintiffs cannot seriously claim their delay was reasonable.[19] As lawyers representing themselves and the other plaintiffs, plaintiffs Thomas Del Beccaro and Mark Pruner certainly knew that the Attorney General's Bar status was available online at all relevant times. Whether plaintiffs failed to investigate, or did so and knowingly waited until the eleventh hour to sue, is irrelevant. The delay is unreasonable by any standard.

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[16] *California Secretary of State's Website* at <http://cal-access.ss.ca.gov/Campaign/Candidates/Detail.aspx?id=1265530&session=2003> (as of Jan. 28, 2007).

[17] Def.'s RJN, Exh. H at pp. xxx, Excerpts from the *Statement of the Vote, 2006 Primary Election, June 6, 2006.*

[18] Def.'s RJN, Exh. A at p. xix.

[19] Plaintiffs attempt to excuse their delay in bringing this case by arguing that the Elections Code "contemplates" that a challenge like theirs should wait until after the election and moreover, that they could not have brought an election contest challenging the Attorney General's win in the primary election because only a candidate in that race, and not an elector, can bring such an action. (Memo. at 15, fn. 9.) The first point is wrong, and the second is irrelevant. As discussed below, section 13314 permits any elector to bring a pre-election challenge concerning the placing of a candidate's name on the ballot. Plaintiffs offer no excuse for why they did not pursue a pre-election challenge either before the primary or general elections.

There is also no question that plaintiffs' delay, if countenanced here, would cause prejudice. The California electorate has already voted on the Attorney General's candidacy twice, in the primary and general elections, and both times Attorney General Brown was their candidate of choice. Considerable state resources were spent on both elections. Most important, plaintiffs' argument would strip the voters of their right to elect the Attorney General, the state's top law officer. If plaintiffs were to prevail, the office would be filled by a gubernatorial appointment for the unexpired term, which in this case would be virtually a full term.[20] Taking the fundamental right to decide who sits as Attorney General away from the people when that could have been avoided is prejudicial in the extreme.

Laches is particularly applicable here given the fact that plaintiffs had a clear pre-election remedy available. Under Elections Code section 13314, any elector can bring a writ of mandate concerning the placing of a candidate on the ballot. The only requirement is that the case must be brought well enough in advance of the election to ensure that it will not substantially interfere with the conduct of election. (Elec. Code, § 13314(a)(2).) Plaintiffs' filing, of course, violated this key provision, coming after election materials had not only been printed, but after voting had actually begun.

The pre-election remedy is particularly appropriate to settle questions concerning a candidate's eligibility for office. (*See, e.g., McKinney v. Superior Court* (2004) 124 Cal.App.4th 951, 957-959 [question of candidate eligibility should have been brought under section 13314 prior to the election rather than after election]; *Pope v. Superior Court* (2006) 136 Cal.App.4th 871, 874 [in pre-election challenge under section 13314, court determined candidate's right to run for office in light of new term limits law].) For example, in *McKinney v. Superior Court, supra,* the court recently held that an elector seeking to challenge the eligibility of a candidate to be a write-in candidate in an election could not wait until after the election to bring such a case. (124 Cal.App.4th at 959.) Instead, the court stated, the elector should have brought a pre-election action under section 13314 to determine whether

[20] Elec. Code, § 16702 (if election is annulled through an election contest, office becomes vacant) and Cal. Const., art. V, § 5(b) (Governor fills vacancy in statewide office through appointment, subject to confirmation).

the candidate was eligible. "[H]aving passed up the chance to challenge Frye's qualification . . ., McKinney cannot bring that challenge now, after the election. He had a remedy prior to the election if he had been willing to exercise it." (*Id.*)[21]

V.

PLAINTIFFS' TAXPAYER CLAIMS SHOULD BE DISMISSED

Plaintiffs' First Amended Complaint not only alleges an election contest but also contains six taxpayer causes of action for injunctive and declaratory relief against the Controller regarding the use of public funds to allow the Attorney General to occupy his office. (Am. Compl., ¶¶ 23-44.) Taxpayer actions cannot be used to overturn an election. The only way to do that is through an election contest, a remedy which in this case is barred by the doctrine of laches.

"That the court's authority to invalidate an election is limited to the bases for contest specified in Elections Code section 16100 and that section is exclusive is strongly suggested by the nature of the grounds for contest therein enumerated." (*Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165, 192.) As a result, courts will dismiss any post-election cases or causes of action that are not brought under the election contest statute, such as plaintiffs' taxpayer claims. (*McKinney v. Superior Court*, 124 Cal.App.4th at 957-959 [dismissing post-election challenge to candidate's eligibility that was not brought under section 16100]; *Kilbourne v. City of Carpinteria* (1976) 56 Cal.App.3d 11, 16-17 [court lacked jurisdiction to entertain a writ seeking to overturn an election where candidate's name was misspelled since such an error was not actionable under the election contest provision].) "Election results may only be challenged on one of the grounds specified

[21] *McKinney* holds that post-election relief is available only if the alleged violation comes within one of the enumerated grounds for an election contest, set forth in section 16100. (124 Cal.App.4th at 957-959.) In *McKinney*, an election contest was not available because the candidate being challenged was not the winner. (*Id.* at 954.) Here of course, Attorney General Brown did win, and therefore plaintiffs can allege a cause of action under section 16100(b), which permits an election contest if the winner was not eligible for office at the time of the election. But just because a potential cause of action is available does not mean that plaintiffs are entitled to it. Laches bars their claim in light of plaintiffs' extreme delay and their clear right to a pre-election remedy that, had it been timely exercised, would have avoided the prejudice to the voters of California that plaintiffs now ask this court to inflict, after the fact.

in section 16100." (*Bradley v. Perrodin* (2003) 106 Cal.App.4th 1153, 1173.) Accordingly, this Court should also dismiss plaintiffs' first six causes of action.

CONCLUSION

Plaintiffs come to this Court seeking an unprecedented remedy – to annul a statewide popular election.

Given the fundamental rights involved, plaintiffs are obligated to ground their case in solid legal authority. Yet, they rely entirely on an obvious misreading of a single sentence of dictum in a 1937 disbarment proceeding. (*Johnson v. State Bar of Cal.*, 10 Cal.2d at 213-214.) The precise and only *holding* in that case was that George Johnson was "guilty of conduct involving moral turpitude and should be disbarred." That case has nothing to do with Attorney General Brown.

The key word in this case is "admitted." According to Webster's Dictionary, that means "to allow to enter."[22] In 1965, the California Supreme Court admitted Brown to enter upon the practice of law. It is undisputed that he has been admitted as a lawyer in good standing ever since.

The plain wording of the relevant statutes, legislative history, case law, Attorney General's opinions, and longstanding practice offer no support to plaintiffs' cause. Indeed, they all support Brown's clear eligibility to be Attorney General.

The Court should dismiss this lawsuit.

Dated: January 29, 2007

Respectfully submitted,

Robin B. Johansen
Thomas A. Willis
Margaret R. Prinzing
REMCHO, JOHANSEN & PURCELL, LLP

By: Robin B. Johansen
Robin B. Johansen

Attorneys for Defendant
EDMUND GERALD "JERRY" BROWN JR.

(00031654-2)

[22] Webster's New Universal Unabridged Dict. (1996) p. 26.

PROOF OF SERVICE

I, the undersigned, declare under penalty of perjury that:

I am a citizen of the United States, over the age of 18, and not a party to the within cause or action. My business address is 201 Dolores Avenue, San Leandro, CA 94577.

On January 29, 2007, I served a true copy of the following document(s):

Defendant Edmund G. Brown Jr.'s Memorandum of Points and Authorities in Opposition to Election Contest and Plaintiffs' First Amended Complaint

on the following party(ies) in said action:

Please see attached Service List.

☐ **BY UNITED STATES MAIL:** By enclosing the document(s) in a sealed envelope or package addressed to the person(s) at the address above and

- ☐ depositing the sealed envelope with the United States Postal Service, with the postage fully prepaid.
- ☐ placing the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the businesses' practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, located in San Leandro, California, in a sealed envelope with postage fully prepaid.

☐ **BY OVERNIGHT DELIVERY:** By enclosing the document(s) in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses listed. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

☐ **BY PERSONAL SERVICE:** By giving the document(s) directly to the persons listed above.

☒ **BY FACSIMILE TRANSMISSION:** By faxing the document(s) to the persons at the fax numbers listed based on an agreement of the parties to accept service by fax transmission. No error was reported by the fax machine used. A copy of the fax transmission is maintained in our files.

☒ **BY E-MAIL TRANSMISSION**: By e-mailing the document(s) to the persons at the e-mail addresses listed based on a court order or an agreement of the parties to accept service by e-mail. No electronic message or other indication that the transmission was unsuccessful was received within a reasonable time after the transmission.

I declare, under penalty of perjury, that the foregoing is true and correct. Executed on January 29, 2007, in San Leandro, California.

Sabrina Miller

SERVICE LIST

Thomas G. Del Beccaro 800 South Broadway, Suite 301 Walnut Creek, CA 94596 Phone: (925) 280-4487 Fax: (925) 284-2015 E-Mail: TGFDB@aol.com	*Attorneys for Plaintiff*
Mark A. Pruner 1206 "Q" Street, Suite 1 Sacramento, CA 95814-5810 Phone: (916) 447-1121 Fax: (916) 447-9661 E-Mail: mapruner@aol.com	*Attorneys for Plaintiff*
Leslie R. Lopez Deputy Attorney General Department of Justice 1300 "I" Street, Suite 124 P.O. Box 944255 Sacramento, CA 94244 Phone: (916) 327-0973 Fax: (916) 324-8835 E-Mail: Leslie.Lopez@doj.ca.gov	*Attorneys for Defendants Attorney General Bill Lockyer*