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State of California

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OPINION	:	No. 13-1103
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of	:	March 21, 2014
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KAMALA D. HARRIS	:	
Attorney General	:	
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LAWRENCE M. DANIELS	:	
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Proposed relators BASIL KIMBREW, RADENE RAMOS HIERS, and DEANNA REEDER have requested leave to sue proposed defendant DR. YXSTIAN GUTIERREZ in quo warranto on the following questions:

1. Was Dr. Yxstian Gutierrez unlawfully appointed to serve out the term of the incumbent city council member for Moreno Valley’s “District Four,” who resigned from office before his term expired, because Dr. Gutierrez did not reside in District Four as that district was constituted when the incumbent was elected?

2. Was Dr. Yxstian Gutierrez unlawfully appointed to the Moreno Valley City Council because the council failed to comply with the open-meeting and notice provisions of the Brown Act?

## CONCLUSION

Leave to sue in quo warranto is GRANTED to determine whether Dr. Yxstian Gutierrez satisfies the residency requirements for holding the office of Moreno Valley City Council member from District Four. We make no determination regarding Relators' Brown Act claims as it is not necessary for us to do so in order to reach a decision on the present application.

## ANALYSIS

Moreno Valley is a general law city that contains five council districts, each represented by a council member. Council members hold office for four-year terms, with staggered elections alternating every two years between the odd- and even-numbered districts.<sup>1</sup> To be eligible to serve as a council member for a district, a person must be a resident of that district.<sup>2</sup> When a vacancy occurs in the middle of a council member's term, the council may fill that vacancy for the remainder of the term either by appointment or by calling for a special election.<sup>3</sup>

Proposed relators Basil Kimbrew, Radene Ramos Hiers, and Deanna Reeder (Relators) are residents of Moreno Valley. Proposed defendant Dr. Yxstian Gutierrez (Dr. Gutierrez) is currently serving on the Moreno Valley City Council by appointment of his fellow council members to fill out the remaining part of a former council member's term. Relators contend that Dr. Gutierrez is unlawfully holding the office of District Four council member because (1) he was not a resident of District Four when his predecessor was elected from that district as required by law, and (2) the city council's appointment of Dr. Gutierrez violated the Ralph M. Brown Open Meetings Act<sup>4</sup> in several ways.

We first recount the uncontested facts that gave rise to the question whether Dr. Gutierrez satisfies the residency requirement for holding the public office he now occupies.

- On October 23, 2001, following the 2000 decennial census, the Moreno Valley City Council adopted boundaries for its five council districts by Resolution No. 2001-60.

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<sup>1</sup> See Gov. Code, § 34884, subds. (b), (c).

<sup>2</sup> Gov. Code, § 34882.

<sup>3</sup> Gov. Code, § 36512, subd. (b).

<sup>4</sup> Gov. Code, §§ 54950-54963.

- On November 2, 2010, Marcelo Co was elected to District Four of the Moreno Valley City Council for a four-year term. At that time, Dr. Gutierrez resided within the boundaries of what was then council District Three. Mr. Co's term of office commenced in December 2010.
- On October 25, 2011, following the 2010 decennial census, the city council adopted new district boundaries, repealing Resolution No. 2001-60 and enacting Resolution 2011-107. According to the new resolution, a neighborhood encompassing Dr. Gutierrez's residence was moved to District Four.
- On November 6, 2012, District Three, as well as Districts One and Five, held an election according to the boundaries adjusted in 2011.
- On August 13, 2013, Mr. Co resigned from his council seat in District Four.
- On September 24, 2013, the council appointed Dr. Gutierrez to fill the vacancy in District Four for the remainder of Mr. Co's term. Dr. Gutierrez's residence was in District Four as it was redistricted in 2011, but was in District Three as it had been districted at the time of Mr. Co's election in 2010.
- In November 2014, the first regular election in District Four since the 2011 readjustment of district boundaries is scheduled to occur.
- In December 2014, Mr. Co's uncompleted term of office (now being served by Dr. Gutierrez) will expire.

Relying on these undisputed facts, Relators request our permission to sue Dr. Gutierrez in quo warranto in order to remove him from the public office he now occupies because he did not reside in District Four as that district was constituted when his predecessor, former council member Co, was elected to that office in 2010. Dr. Gutierrez responds that he is qualified to serve out Mr. Co's term in District Four because his residence is within that district's redrawn boundaries pursuant to the 2011 reapportionment, which he contends had taken effect by the time he was appointed in 2013.

We grant Relators' application to sue in quo warranto based on our evaluation of the statutes governing city-council elections and on analogous California Supreme Court authority for state and federal elections. Because we find that the residency question

clearly presents substantial issues of law, we need not delve into the additional, factually disputed claims about alleged Brown Act violations in order to determine whether to grant this application.

### **Nature of and Criteria for Quo Warranto**

Code of Civil Procedure section 803 provides the authority for initiating a quo warranto proceeding: “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 . . . within this state.” The state possesses the remedy of quo warranto to protect the people’s interests.<sup>5</sup> In a proper case, quo warranto may be authorized to test title to public office by evaluating whether the person lacks essential qualifications, such as residing within the boundaries of the area that the person serves.<sup>6</sup> In order for a private party to file an action in quo warranto, that party must first obtain the Attorney General’s consent.<sup>7</sup> In determining whether to grant that consent, we need not resolve the merits of the controversy. Instead, we decide whether the application presents a substantial issue of fact or law that warrants judicial resolution, and whether granting the application would serve the overall public interest.<sup>8</sup>

### **There Is a Substantial Issue of Law as to Dr. Gutierrez’s Eligibility to Serve the Remainder of his Predecessor’s Term of Office**

Government Code section 36512, subdivision (b), requires a city council to fill a vacancy in an elective office either by appointment or special election. Under Government Code section 34882, a person is eligible to be a city council member only if the person resides within the geographical area of the council district that he or she seeks to represent. Elections Code section 21601 provides that after each decennial census, a city council must adjust the boundaries of its districts to be as equal as possible in population.

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<sup>5</sup> *Citizens Utilities Co. of Cal. v. Super. Ct.* (1976) 56 Cal.App.3d 399, 406; see *City of Campbell v. Mosk* (1961) 197 Cal.App.2d 640, 648.

<sup>6</sup> 96 Ops.Cal.Atty.Gen. 36, 39 (2013); 95 Ops.Cal.Atty.Gen. 43, 45 (2012).

<sup>7</sup> See *Internat. Assn. of Fire Fighters v. City of Oakland* (1985) 174 Cal.App.3d 687, 693-698.

<sup>8</sup> 93 Ops.Cal.Atty.Gen. 144, 145 (2010).

Elections Code section 21606 speaks directly to council terms and elections after boundary changes. Subdivision (a) of this statute provides: “The term of office of any council member who has been elected and whose term of office has not expired shall not be affected by any change in the boundaries of the district from which he or she was elected.”<sup>9</sup> Subdivision (b) continues: “At the first election for council members in each city following adjustment of the boundaries of councilmanic districts, a council member shall be elected for each district under the readjusted district plan that has the same district number as a district whose incumbent’s term is due to expire.”<sup>10</sup>

Relators contend that the phrase “the first election”—i.e., the event that triggers the use of the “readjusted district plan” in Elections Code section 21606, subdivision (b)—means the first *regular* election for a given council office after the boundary adjustments. Under this interpretation, Dr. Gutierrez’s appointment would be invalid because the “readjusted district plan” that would allow him to serve District Four will not take effect until the regular November 2014 election. Dr. Gutierrez counters that the phrase “the first election” must instead be construed to mean the first election *of any sort* after the boundary adjustments, including a special election or even, as in the present case, an appointment to serve out the remainder of the term of a former council member.

In addressing this question, we employ the familiar rules of statutory construction:

[O]ur task is to determine the intent of the enacting body so that the law may receive the interpretation that best effectuates that intent. We begin by examining the words of the statute because the language is generally the most reliable indicator of legislative intent. The statutory language is not read in isolation, however. Rather, we consider its terms in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment. If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend.<sup>11</sup>

Guided by these standards, we preliminarily observe that “election” is defined in the Elections Code as “any election including a primary that is provided for under this

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<sup>9</sup> Elec. Code, § 21606, subd. (a).

<sup>10</sup> Elec. Code, § 21606, subd. (b).

<sup>11</sup> *Los Angeles Unified School Dist. v. Garcia* (2013) 58 Cal.4th 175, 186 (internal quotation marks and citations omitted).

code.”<sup>12</sup> One type of election provided for under the Elections Code is a special election.<sup>13</sup> So, if read in isolation, the term “first election” in Election Code section 21606, subdivision (b), might appear to include a special election to fill a vacancy on the city council.<sup>14</sup>

But we must read the phrase “first election” in the context of the entire statute. Doing so, we believe that the Legislature did not intend the law to apply to special elections or appointments to fill vacancies. First, section 21606, subdivision (b), directs that, in that first election post-reapportionment, the districts filling seats under the readjusted district plan will be those with the same district numbers as those “whose incumbent’s term is due to expire.”<sup>15</sup> This suggests that the referenced election will not occur until the elected term for that office (i.e., the incumbent’s term) is completed, which is when the next regularly-scheduled election would take place. Also, by its use of the plural form, the statute’s introductory phrase “[a]t the first election for council members” indicates that the election would be for multiple council positions, which, again, would indicate a regularly-scheduled election, rather than a specially-held election to fill a vacancy.<sup>16</sup> Moreover, section 21606, subdivision (a), specifies that “the term of office” of any council member shall not be affected by a change in district boundaries.<sup>17</sup> Thus, the “term of office” would continue for its full duration, further indicating that the redrawn boundaries should not be used for a given office until the first regular election for that office.

Our interpretation is further bolstered by the statute requiring city councils to hold special elections or make appointments for the remaining terms of departed council members. Government Code section 36512, subdivision (b), states in pertinent part: “If

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<sup>12</sup> Elec. Code, § 318.

<sup>13</sup> Elec. Code, § 348 (defining a regular election as “an election, the specific time for the holding of which is prescribed by law”), Elec. Code, § 356 (defining a special election as “an election, the specific time for the holding of which is not prescribed by law”).

<sup>14</sup> Notably, too, the statute refers to “election,” not “appointment,” which at least raises a question whether the statute would apply to appointments at all. But given our conclusion (discussed in further detail *infra*) that the referenced election is the next regularly-scheduled election, we need not dwell on the distinction between special election and appointment.

<sup>15</sup> Elec. Code, § 21606, subd. (b).

<sup>16</sup> *Ibid.*

<sup>17</sup> Elec. Code, § 21606, subd. (a).

a vacancy occurs in an elective office . . . , the council shall . . . fill the vacancy by appointment or call a special election to fill the vacancy. . . . A person appointed or elected to fill a vacancy holds office for the unexpired term of the former incumbent.”<sup>18</sup> A sensible inference from this wording is that since the appointed council member “holds office for the unexpired term of the *former* incumbent,” the boundaries of the former incumbent should also be used for that same unexpired term.

Thus, it would be most congruous with our reading of the relevant statutes for an appointed council member who takes the place of a former, elected member to both represent and reside in the same district that elected the former member. On the other hand, it would be inharmonious if the boundaries that the appointed member represented were to change during the elective term of office, based on the fortuity that the elected incumbent happened to resign or was otherwise unable to serve out his or her full term. The voters within the old boundaries were the ones who elected the council member for that term, not the voters of the part of the new district that lies outside those boundaries.<sup>19</sup> In sum, it appears to us that the district boundaries used when the former council member was elected are to be used for the remainder of his or her unexpired term when filling his or her vacancy.

And, while we have found no case law specifically addressing the question before us, as it pertains to city council districts, the California Supreme Court has addressed which geographical area to use for special elections to fill vacancies for United States representatives and California state senators after redistricting.<sup>20</sup> In the first of these two cases, *Sloan v. Donoghue*, the Supreme Court held that when the Legislature changed the boundaries of a congressman’s district after his election, and then the congressman died during his term, “the special election to fill out the remaining years of the vacant seat was properly held in the district as it existed at the time of the dead legislator’s election.”<sup>21</sup> The Court found this to be “the only practical and sound conclusion” and explained that it

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<sup>18</sup> Gov. Code, § 36512, subd. (b).

<sup>19</sup> Cf. *Opinion of Justices to Governor* (Mass. 1972) 282 N.E.2d 629, 631 (“a legislator represents the constituency which elected him,” so that “if the incumbent does not serve his full term but ceases to serve during his term, the resulting vacancy in the Ninety-second Congress will then occur in the district from which he was elected to office”).

<sup>20</sup> *Legislature v. Reinecke* (1973) 10 Cal.3d 396, 404-406; *Sloan v. Donoghue* (1942) 20 Cal.2d 607, 609; see *Gaona v. Anderson* (9th Cir. 1993) 989 F.2d 299, 303.

<sup>21</sup> *Gaona v. Anderson, supra*, 989 F.2d at p. 301, citing *Sloan v. Donoghue, supra*, 20 Cal.2d at pp. 608-612.

would result in “retaining the same proportionate Congressional representation under the old apportionment act and giving to the new apportionment act application to the selection of representatives for the Seventy-eighth and succeeding Congresses, as intended.”<sup>22</sup>

More than 30 years after *Sloan*, our high court in *Legislature v. Reinecke* resolved a similar issue in the context of California’s staggered election system for state senators, deciding “whether elections for state senate had to be held in all senate districts after a decennial census and reapportionment, or only in the 20 new even-numbered districts normally scheduled for that year.” Applying *Sloan*, the Court directed that “the senators in odd districts elected in 1972 were entitled to serve until 1976, and if vacancies occurred in those districts before 1976, they would be filled using the districts in effect in 1972.” The Court went on to reject a claimed “violation of equal protection in the continuance of staggered terms in state senate elections following redistricting.”<sup>23</sup>

Both *Sloan* and *Reinecke* determined that the boundaries of former districts were to be used in special elections conducted to fill out unexpired terms after redistricting. Our construction of the statutes governing local reapportionment and council vacancies comports with the rule established in *Sloan* and *Reinecke*.<sup>24</sup> As a result, we believe that the district boundaries used at the time of the departed council member’s election should be used for determining residential eligibility—whether the seat is filled by appointment or special election—to serve the remaining term of a councilmember.

We are not persuaded by the argument that, if the new boundaries do not apply to Dr. Gutierrez’s appointment, he would be deprived of his constitutional rights because he would be ineligible to vote, and unqualified to serve, until the next regular election. To be sure, he was unable to vote in the November 6, 2012, first regular election for District Three because that election used the readjusted boundaries, which put his residence outside of District Three. And, in our view, he could not hold the office of District Four council member until the first regular election is held for that office in November 2014. But while that may be so, we have previously observed that “somewhat anomalous results in representation may be the necessary by-product of reapportionment.”<sup>25</sup> On this

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<sup>22</sup> *Sloan, supra*, 20 Cal.2d at p. 612.

<sup>23</sup> *Gaona, supra*, 989 F.2d at p. 301, citing *Reinecke, supra*, 10 Cal.3d at pp. 404, 406.

<sup>24</sup> *Lexin v. Superior Court* (2012) 47 Cal.4th 1050, 1091 (statutes on the same subject will be read consistently “to the extent their language permits”).

<sup>25</sup> 66 Ops.Cal.Atty.Gen. 412, 414 (1983), citing *Reinecke, supra*, 10 Cal.3d at pp. 404-405.



point, the California Supreme Court in *Reinecke* recognized that persons moved by reapportionment “from an even-numbered district to an odd-numbered district could not vote for two years after reapportionment and in essence were unrepresented for those two years.”<sup>26</sup> This practice did not violate equal protection principles, however, because the state’s rational interest in “stability and continuity in the Senate” by means of “four-year staggered terms” outweighed the “resulting inequality” from “temporary disenfranchisement” among certain residents for two years after reapportionment, which was less than the “up to four-year disenfranchisement that may be imposed on residents who move into a senate district or who become of voting age shortly after an election has taken place.”<sup>27</sup>

We also reject the contention that Moreno Valley City Council Resolution No. 2011-107 became immediately effective, on October 25, 2011, when it was approved and adopted the new boundaries based on the 2010 census results, meaning that the new boundaries should control as soon as any change in officeholder occurs, even if before a regular election. This view is refuted by *Sloan*, in which the California Supreme Court made the opposite inference. As the Court explained, “Nothing in the Apportionment Act of 1941 indicates that it was intended to apply to special elections held to fill vacancies arising in terms occupied at the time of its passage. It was intended to apply to the next general election and succeeding elections.”<sup>28</sup> The judicial reapportionment in *Reinecke* was also immediately “final,” and yet, likewise, the Court delayed the implementation of its own plan until the next general election for each staggered district.<sup>29</sup>

For these reasons, we conclude that the question of Dr. Gutierrez’s residential qualifications to serve as council member from District Four presents substantial issues of law.

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<sup>26</sup> 66 Ops.Cal.Atty.Gen., *supra*, at p. 414, fn. 2, citing *Reinecke, supra*, 10 Cal.3d at p. 406.

<sup>27</sup> *Reinecke, supra*, 10 Cal.3d at pp. 405-406; see *Gaona, supra*, 989 F.2d at p. 302.

<sup>28</sup> *Sloan, supra*, 20 Cal.2d at p. 611; see also *Opinion of the Justices to Governor, supra*, 282 N.E.2d at pp. 630-631 (even though the federal reapportionment statute provided that it “should ‘take effect upon its passage,’” it should not be used “for the purpose of filling vacancies in . . . Congress”); see generally Elec. Code, § 324, subd. (a)(2) (a “general election” is defined generally as “[a]ny statewide election held on a regular election date”).

<sup>29</sup> *Reinecke, supra*, 10 Cal.3d at pp. 404-407.

## Allowing the Action to Proceed Would Serve the Public Interest

We further conclude that the proposed action in quo warranto would serve the overall public interest in ensuring “the integrity of public office and in the qualifications of their officials.”<sup>30</sup> Ordinarily, we have viewed the necessity for judicial resolution of a substantial issue of fact or law to be sufficient to grant leave to sue in quo warranto, absent any overriding factors,<sup>31</sup> and it has been suggested here that an overriding factor is that there is an insufficient amount of time to litigate the matter before Dr. Gutierrez’s appointed term of office ends in December 2014. We reject this suggestion. While the fact that an office holder has a relatively short amount of time left in his or her term might “reinforce” our decision to deny a quo warranto application that we find lacking in legal merit,<sup>32</sup> we decline to invoke the timing element as the sole basis for denying what we believe to be a meritorious application with a substantial likelihood of prevailing. Moreover, in this instance, there is no disputed issue of fact, only of law, with regard to the residency/redistricting issue, which should expedite any litigation. So while we cannot predict with certainty how long this quo warranto litigation might take, we nonetheless find it appropriate and in the public interest, to grant this application. Moreover, the judicial resolution of this particular dispute would, in our view, have the additional desirable effect of clarifying the law as it applies to other city councils throughout the state.<sup>33</sup>

We conclude that the question whether Dr. Yxstian Gutierrez is lawfully holding the office of Moreno Valley City Council member for District Four presents substantial issues of law requiring judicial resolution, and that it would serve the overall public interest to allow this action to proceed. Although we decline to reach Relators’ additional claims involving alleged Brown Act violations, we observe that there appear to be substantial factual disagreements about what occurred both in and out of public view, and we are confident that such issues may be resolved within the context of the contemplated

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<sup>30</sup> 95 Ops.Cal.Atty.Gen., *supra*, at p. 49.

<sup>31</sup> *Ibid.*

<sup>32</sup> See 96 Ops.Cal.Atty.Gen. 48, 53 (2013).

<sup>33</sup> See 73 Ops.Cal.Atty.Gen. 197, 212 (1990) (allowing quo warranto action to proceed despite approximately four months remaining in term, in part because “the resolution of the legal issue of whether Education Code section 45244 requires a member of a school district Personnel Commission to continue to reside within the district throughout a term of office, is important not only to Mr. Pallan but to all school districts throughout the state with personnel commissions”); see also 79 Ops.Cal.Atty.Gen. 21, 28 (1996); 35 Ops.Cal.Atty.Gen. 198, 203 (1960).

quo warranto action, should the court find it necessary or helpful to its consideration on the question of Dr. Gutierrez's eligibility to hold office.

Accordingly, for the reasons discussed above, Relators' application for leave to sue in quo warranto is GRANTED.

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