

# MONTHLY OPINION REPORT

CALIFORNIA ATTORNEY GENERAL'S OFFICE



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**December 1, 2023**

The Attorney General's Opinion Unit is responsible for researching and drafting the formal opinions of the Attorney General. This Monthly Opinion Report lists all of the questions that are currently under consideration for formal opinions.

The Attorney General welcomes and solicits the views of all interested persons concerning the issues raised in any question submitted for an opinion. Views should be in writing and directed to the deputy assigned to prepare the opinion. Contact information for deputies is included at the end of this report. All views submitted before publication will be considered, but early submissions are greatly preferred. All submissions will be treated as public records subject to disclosure under the Public Records Act.

For more information about the Opinion Unit, or to retrieve a copy of a published opinion, please see our website at <http://oag.ca.gov/opinions>.

## NEW QUESTIONS ASSIGNED DURING NOVEMBER 2023

### **23-1002 requested by Lieutenant Governor Eleni Kounalakis**

Are public entities required to offer remote participation as a reasonable accommodation under the Americans with Disabilities Act (ADA) to members of boards and commissions regulated by the Brown Act open meetings law?

(Assigned to Deputy Attorney General Catherine Bidart.)

**23-1101 requested by San Benito County Counsel David Prentice**

Does the doctrine of incompatible public offices preclude the same individual from simultaneously serving on both the San Benito County Planning Commission and San Benito County Board of Education?

(Assigned to Deputy Attorney General Heather Thomas.)

**OPINIONS ISSUED OR CONCLUDED DURING NOVEMBER 2023**

**Opinion No. 22-1201 (issued November 9, 2023)**

*Question Presented and Conclusion:*

California wineries applying for a direct shipper license in another state are often required—pursuant to the other state's alcohol control statutory or regulatory scheme—to provide a criminal record check in connection with that application. If a California winery owner or manager obtains their own criminal record check from the California Department of Justice, would furnishing that criminal record check—or a notification reflecting that no such record exists—to another state's alcohol control agency violate California Penal Code sections 11125, 11142, or 11143?

If a California winery owner or manager furnishes their criminal record—or notification no such record exists—to another state's alcohol control agency, that would constitute a violation of California Penal Code sections 11125, 11142, or 11143. However, if the other state's alcohol control agency obtains authorization from the California Department of Justice to receive California state summary criminal information, then the other state's agency may request and receive the criminal background information directly from the California Department of Justice as specified in Penal Code section 11105.

**Opinion No. 23-302 (issued November 30, 2023)**

*Questions Presented and Conclusions:*

1. Under state law, may an appointed public member of the City of San Diego Audit Committee concurrently serve as: (a) an appointed public member of the San Diego Association of Governments (SANDAG) TransNet Independent Taxpayer Oversight Committee; (b) an appointed public member of the SANDAG Audit Policy Advisory Committee; or (c) the Internal Auditor of the San Diego Metropolitan Transit System?

As to (a) and (b), an appointed public member of the City Audit Committee may not serve concurrently as an appointed public member of either the SANDAG TransNet

Independent Taxpayer Oversight Committee or the SANDAG Audit Policy Advisory Committee. Such concurrent service would violate Government Code section 1099, which prohibits serving in legally incompatible public offices.

As to (c), an appointed public member of the City Audit Committee may serve concurrently as the Internal Auditor of the San Diego Metropolitan Transit System without violating section 1099, because the Internal Auditor position is not a public office. Such concurrent service also would not violate Government Code section 1126's prohibition against engaging in incompatible outside activities, unless the City Council determines that serving as the System's Internal Auditor is inconsistent with the duties of a City Audit Committee member. Other state laws prohibiting financial and personal conflicts of interest would not prohibit the concurrent holding of these positions either. Those laws generally apply to particular government transactions or decisions, not the simultaneous holding of government positions, and, in any event, the request does not reference any type of financial or personal conflict.

2. Would the City Council of San Diego violate state law by appointing a member of the public to the City Audit Committee if doing so would result in the appointee holding incompatible public offices in violation of Government Code section 1099?

No. The City Council would not violate state law by appointing a member of the public to the City Audit Committee if doing so would result in the appointee holding incompatible public offices in violation of Government Code section 1099. Although section 1099(b) provides that a *public official* who accepts a second, legally incompatible public office thereby forfeits the first office held, neither section 1099, nor any other authority we are aware of, provides that an *appointing authority* violates or is subject to any sanction under state law by making such an appointment.

### **Opinion No. 23-402 (issued November 30, 2023)**

#### *Question Presented and Conclusion:*

SHAKIR KHAN has applied to this office for leave to sue RAMON YEPEZ in quo warranto to remove Yepez from his seat on the Lodi City Council. Khan, the former holder of that seat, alleges that the City Council unlawfully declared Khan's seat to be vacant and therefore unlawfully appointed Yepez to fill it.

We conclude that there are substantial issues of fact and law as to whether the City Council lawfully declared Khan's former seat to be vacant and (as a result) whether the Council lawfully appointed Yepez to fill it. Consequently, and because the public interest

will be served by allowing the proposed quo warranto action to proceed, we GRANT the application for leave to sue.

**Opinion No. 23-602 (issued November 30, 2023)**

*Question Presented and Conclusion:*

The San Joaquin Delta Community College District has applied to this office for leave to sue KATHLEEN GARCIA in quo warranto to remove her from serving as a member of the San Joaquin Delta Community College District Board of Trustees. The application asserts that Garcia, while serving on that board, assumed a second and incompatible office as a member of the Eastside Rural Fire Protection District Board of Trustees in violation of Government Code section 1099, and by doing so forfeited her seat on the College District board.

We conclude that there is a substantial legal issue as to whether Garcia is simultaneously holding incompatible offices. Consequently, and because the public interest will be served by allowing the proposed quo warranto action to proceed, the application for leave to sue is GRANTED.

**OPINIONS PENDING**

Opinion Requests

- 23-1101** Does the doctrine of incompatible public offices preclude the same individual from simultaneously serving on both the San Benito County Planning Commission and San Benito County Board of Education? (Thomas)
- 23-1002** Are public entities required to offer remote participation as a reasonable accommodation under the Americans with Disabilities Act (ADA) to members of boards and commissions regulated by the Brown Act open meetings law? (Bidart)
- 23-1001** Does California law prohibit the offering and operation of daily fantasy sports betting platforms with players physically located within the State of California, regardless of whether the operators and associated technology are located within or outside of the State? (Kentfield)
- 23-902** May the Legislature amend the definition of “unduplicated pupil” in California Education Code sections 42238.02 and 2574 (relating to the Local Control Funding Formula, or “LCFF”) to also include all members of the pupil subgroup

that had the lowest performance on the most recently available statewide assessment exams? For these purposes, the relevant pupil subgroups are those defined in Education Code section 52052(a)(2), except for those subgroups already receiving LCFF funding or supplemental funding through other state or federal resources. (Kentfield)

- 23-701** Does the California Office of Tax Appeals have the legal authority and jurisdiction to issue a written opinion declaring a provision in the California Code of Regulations, which was promulgated by a different state agency and approved by the Office of Administrative Law, to be invalid and refuse to enforce the regulation on that basis? (Kentfield)
- 23-601** 1. May the California State Teacher's Retirement System (CalSTRS) assess a penalty against a county office of education (COE) for errors in the CalSTRS reporting and contributions of a charter school that operates within the county and submits its CalSTRS payments through the COE? 2. If so, how may the COE defend against an assessment it believes to be incorrect? 3. Could CalSTRS issue a warrant that would allow the COE to withdraw funds directly from an agency that provides its CalSTRS reporting and contributions through the COE if that agency refuses to submit its penalty assessments to the COE voluntarily? (Medeiros)
- 23-501** Do federally recognized Indian tribes located within California, who have adopted laws that impose requirements similar to the standards imposed on state licensees by California's regulatory framework, qualify as a "contracting state" as that term is defined in Business and Professions Code section 26300(b), relating to interstate cannabis agreements? (Thomas)
- 23-401** Is it permissible for prosecutors to issue criminal grand jury subpoenas for a future date when the Penal Code section 904.6 criminal grand jury has not yet been empaneled, but which will be empaneled by the witness appearance date? (Duncan Lee)
- 23-201** 1. Does the probable cause standard for a grand jury criminal indictment state a lower standard of proof than preponderance of the evidence? 2. Must the word "shall" as used in Penal Code section 939.8, pertaining to the grand jury's issuance of a criminal indictment, be construed as "should" in order to avoid possible constitutional infirmity? (McCarroll)
- 23-103** Could state law authorization, under an agreement pursuant to Chapter 25 of Division 10 of the Business and Professions Code, for medicinal or adult-use commercial cannabis activity, or both, between out-of-state licensees and

California licensees, result in significant legal risk to the State of California under the federal Controlled Substances Act? (Kentfield)

- 23-102** 1. Is it a violation of the Brown Act for a mayor to deliver a “State of the City” address to attendees at a fee-only private event specifically held to facilitate the address, where all or a quorum of fellow council members are in attendance? 2. Does the “conference exception” of the Brown Act apply? 3. Does the “community meetings exception” of the Brown Act apply? (McCarroll)
- 22-402** Is the governing body of the San Bernardino County District Advocates for Better Schools (SANDABS), a lobbying association within the meaning of Government Code section 53060.5, a “legislative body” within the meaning of the Brown Act, Government Code section 54952? (Medeiros)
- 21-1001** 1. May a county adopt policies to address the environmental impacts of pesticides in a Local Coastal Program without violating Food and Agricultural Code section 11501.1? 2. May a county adopt ordinances to regulate pesticides in the coastal zone to implement Local Coastal Program requirements? (Duncan Lee)

#### Quo Warranto Matters

- 23-901** Were Pablo Bryan and Jeffrey McClenahan validly appointed to the Temecula-Elsinore Anza Murrieta Resource Conservation District Board of Directors? (Duncan Lee)
- 22-802** May Paul Keefer serve simultaneously as a member of the Sacramento County Board of Education and as the President, Chief Executive Officer, and Executive Director of the Pacific Charter Institute, a charter management organization that operates charter schools in Sacramento and other California counties? (Medeiros)

### CONTACT US

The Opinion Unit invites comments on the questions posed in pending opinion requests. To share your views, please contact the deputy assigned to prepare the opinion. Deputies can be reached at the following email addresses and telephone numbers:

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To submit an opinion request, please contact Marc J. Nolan, Senior Assistant Attorney General, at [Marc.Nolan@doj.ca.gov](mailto:Marc.Nolan@doj.ca.gov) or (213) 269-6392.

To submit a quo warranto application, please contact Marc J. Nolan, Senior Assistant Attorney General, at [Marc.Nolan@doj.ca.gov](mailto:Marc.Nolan@doj.ca.gov) or (213) 269-6392.

For all other inquiries, please contact Stephanie Grimes, Associate Governmental Program Analyst, at [Stephanie.Grimes@doj.ca.gov](mailto:Stephanie.Grimes@doj.ca.gov) or (916) 210-6005.

You may also contact the Opinion Unit at the following address:

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