S250486

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

JEROLD D. FRIEDMAN,

Petitioner-Plaintiff,

vs.

MICHAEL E. GATES, IN HIS CAPACITY AS CITY ATTORNEY OF HUNTINGTON BEACH; AND ROBIN ESTANISLAU, IN HER CAPACITY AS CITY CLERK OF HUNTINGTON BEACH

Respondents-Defendants.

PRELIMINARY OPPOSITION TO VERIFIED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

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INTRODUCTION

Petitioner-Plaintiff Jerold D. Friedman (hereinafter "Friedman") wants to be the next City Attorney for the City of Huntington Beach. Ironically, one of the main functions of the City Attorney is to uphold and enforce the very City Charter that Freidman now claims is unconstitutional. Even more ironically, the voters Freidman covets to elect him into office are the same group of voters that approved the City's Charter revisions that Friedman seeks to invalidate herein. Setting aside this irony, on a substantive level, the extraordinary relief sought by Mr. Freidman is just not warranted.

This case fundamentally is about the City of Huntington Beach's[1] (hereinafter "City") "power to prescribe the qualifications of its officers." (*Gregory v. Ashcroft* (1991) 501 U.S. 452, 462.) The State of California, by its Constitution, has vested in the City, a Charter City, autonomous control over its municipal affairs, including the minimum qualifications of *its* officers. (*Cawdrey v. City of Redondo Beach* (1993) 15 Cal.App.4th 1212, 1223, 1227; *see also Johnson v. Bradley* (1992) 4 Cal.4th 389, 403-04.). Particularly important to the issue at hand is the notion that in "recognition of a [Charter City's] constitutional responsibility for the establishment and operation of its own government, as well as the qualifications of an appropriately designated class of public office holders," constitutional scrutiny "will not be so demanding" when courts "deal with matters resting firmly within a [Charter City's] constitutional prerogatives." (*Gregory*, *supra*, 501 U.S. at 462.)

[1] The Petition is directed against the City Clerk of the City and the City Attorney of the City, i.e., officers acting in a public capacity on behalf of the City – the City is the real party in interest. (*See* Cal. Rules of Court, rule 8.486(a)(2).)

The minimal effect of the City's requirement that its City Attorney be a graduate of a law school accredited by the American Bar Association (hereinafter "ABA-law school"), balanced against the substantial legitimate interests advanced thereby, manifests the requirement's constitutionality. Respondents-Defendants submit that rational basis scrutiny is the appropriate standard for judicial review of a qualification directed at a candidate's fundamental ability to carry out the duties of the office. (See *Zeilenga v. Nelson* (1971) 4 Cal.3d 716, 721; *Legislature v. Eu*, 54 Cal.3d (1991) 54 Cal.3d 492, 518.) However, even if this Court applies the balancing test set forth in *Anderson v. Celebrezze* (1983) 460 U.S. 780, 788, discussed more fully below, Respondents-Defendants submit that there is no substantial question as to the constitutionality of the City Charter's educational qualification for the office of City Attorney. Also, the idea that this requirement, enacted in 2010, is a bill of attainder as applied to Friedman, who was admitted to the California Bar in 2013, is a non-sensical non-sequitor.

In addition, Friedman's petition for writ of mandate is not properly sought against Respondent-Defendant Michael E. Gates. Mr. Gates is the current elected City Attorney, but did not take any action related to Friedman's disqualification. And, Mr. Gates is not in any position to direct the City Clerk (an elected officer in her own right) to take any action, ministerial or otherwise. The underlying Petition sets forth zero basis for naming Freidman's would-be opponent as a defendant. Perhaps this was done for political show, but regardless was unjustified and unsubstantiated by the moving papers.

Finally, the appropriateness of this Petition is in question. The educational qualification at issue in the Petition was adopted by the City's voters in November 2010. Friedman filed his Initial Candidate Intention Statement on May 10, 2018, three months before the August 10, 2018

closure of the nomination period. (Resp't Req. for Jud. Not., Ex. 1 [Friedman's Initial Candidate Intention Statement] at p. 4[2].) Accordingly the Petition does not adequately address why, "[i]f the petition could have been filed first in a lower court," why this Court "should issue the writ as an original matter." (Cal. Rules of Court, rule 8.486(a)(1).). By waiting until the eleventh hour to seek relief, Freidman has essentially created his own exigency, for which he now seeks extraordinary relief.

For these reasons, and as set forth more fully in the Memorandum of Points and Authorities below, Respondents-Defendants respectfully submit that this Petition should be summarily denied.

STATEMENT OF MATERIAL FACTS

In 2009, in commemoration of the City's first centennial, the City Council authorized a commission of 15 select community members, including former elected officials, community activists and first-time volunteers to review the City Charter and propose a substantial overhaul of the City's foundational governing document. (Resp't Req. for Jud. Not., Ex. 2 [Huntington Beach Sample Ballot and Voter Information Pamp. (Nov. 2, 2010)] at p. 31.)

After 9 months of meetings, the commission delivered its recommendations to the City Council. (*Ibid.*) What is clear from the documents submitted by Freidman with the Petition is that the commission determined a need existed to strengthen the qualifications of candidates for the City's elected positions. (Ex. D at p. 2.) With regard to the City Charter provision relating to the elected office of City Attorney, the commission recommended that the qualifications be modified to require management experience, graduation from an ABA-law school, and five

[2] References to page numbers for documents submitted by Respondents are to consecutively paginated documents attached to the Respondents' Request for Judicial Notice.

years of experience practicing law instead of just three years. (Ex. B at p.2; Ex. C, proposed section 309.)

The office of the City Attorney was not the sole elected position that the commission sought to strengthen in terms of increased qualifications. The commission similarly recommended enhanced credentials for the other elected offices of City Clerk (at least a bachelor's degree in business, public administration, or a related field, management experience, and certification within three years of taking office) and City Treasurer (at least five years' financial/treasury experience, at least three years' management experience, and a bachelor's or master's degree in accounting, finance, business or public administration [with a certification from the California Municipal Treasurer's Association within three years of taking office, if only holding a bachelor's]). (Ex. B. at p. 2; Ex. C, proposed sections 310 and 311.) It is abundantly obvious that by strengthening the required qualifications of all three of these elected offices, the commission found the prior qualifications insufficient and acted to strengthen them for the betterment of the City.

In fact, after presentation of the commission's initial recommendations, the elected City Council inquired about the recommendations for enhanced qualifications for the offices of City Attorney, City Clerk, and City Treasurer, specifically regarding the requirement of managerial experience. (Ex. B at p. 2.) In writing, dated April 30, 2010, the commission explained that the prior provisions of the charter "contained ***relatively weak requirements*** for these positions, even in comparison to other cities with elected positions.... Those who fill assistant positions just below the department head now must meet significant professional requirements." (Ex. B. at p. 2, emphasis added.)

The City Council also initially inquired about whether, if no qualified candidate were elected to these offices, whether the City Council could appoint someone from outside Huntington Beach in the interim. (Ex.

B. at p. 3.) The commission responded: "An appointee would have to meet the same qualifications as those required of a person elected to the office." (Ex. B at p. 3.) This, of course, belies Friedman's assertion that even a non-attorney could be appointed as City Attorney. (Petition at ¶ 20.)

On May 3, 2018, the City Council took up the proposed City Charter recommendations in consultation with the commission's chair, vice chair, and facilitator Prof. Raphael Sonenshein. (Resp't Req. for Jud. Not., Ex. 3 [City Council Meeting Minutes (May 3, 2010)] at p. 49.) Councilmember Hansen addressed the enhanced qualifications for the elected offices – he raised concerns about the "management experience" qualification, but otherwise referred to the remainder as "baseline qualifications." (Video Recording of May 3, 2010 City Council Meeting, available online at http://huntingtonbeach.granicus.com/MediaPlayer.php?view_id=13&clip_id=564, at approx. 05:11:30-05:13:00.)

On May 17, 2018, the City Council took straw votes on the recommended revisions to the City's Charter. (Resp't Req. for Jud. Not., Ex. 4 [City Council Meeting Minutes (May 17, 2010)] at p. 64-66.) With regard to the provisions as to the City Attorney, City Clerk, and City Treasurer, the City Council voted to delete the management experience qualification from all three positions, and made no further changes to those provisions. (*Id.* at p. 65.) In other words, the City Council agreed with the heightened educational qualifications for the three elected offices addressed by the commission.

At the next City Council meeting, the City Council adopted a resolution submitting the revised City Charter for voter approval at the November 2, 2010 General Municipal Election. (Resp't Req. for Jud. Not., Ex. 5 [City Council Res. No. 2010-41].) The voter information pamphlet contained a summary of the City Charter revisions, including the addition of "new qualifications... for the elected offices of City Clerk, City

Treasurer, and City Attorney." (Ex. 2 at p. 31.) The pamphlet informed the voters that a copy of the measure could be obtained from the City's website, the City Clerk's office, or the elections official's office. (Ex. 2 at p. 31.)

On November 2, 2010, the voters of the City of Huntington Beach voted to adopt the exhaustive revision of the City's Charter. (Resp't Req. for Jud. Not., Ex. 6 [City Council Res. No. 2010-92].) In so voting, the residents of the City stamped their approval on the heightened educational qualifications for its City Attorney, City Clerk and City Treasurer. The Charter was further amended in 2014, but without any substantive change to the City Attorney qualifications. (Resp't Req. for Jud. Not., Ex. 7 [Current City Charter], section 309.)

Friedman was admitted to the California Bar on June 7, 2013[3]. On May 10, 2018, Friedman filed his initial California Fair Political Practices Commission Form 501 – Candidate Intention Statement, expressing his intent to seek the office of City Attorney. (Ex. 1.) The nomination period ran from July 16 to August 10, 2018. (Req. for Jud. Not., Ex. 8 [Timeline of Dates re: Nov. 6, 2018 Election].) Among the papers required to be filed during this period for the office of City Attorney is a Qualification Affidavit signed by the putative candidate, attesting to his or her satisfying each of the qualifications for the office set forth in the City's Charter, Section 309. (Ex. E.)

On July 30, 2018, Friedman submitted his Qualification Affidavit, which did not confirm his graduation from an ABA-law school. (Ex. E.) The clerk, bound to apply the plain language of the charter, immediately

[3] According to the California State Bar's public website, at http://members.calbar.ca.gov/fal/Licensee/Detail/290434.

issued a letter to Friedman disqualifying him from running for City Attorney[4]. (Ex. E.)

Vote-by-mail ballots commence being mailed on October 8, 2018. The election will be held on November 6, 2018. (Ex. 8.)

Friedman filed his Petition on August 9, 2018.

MEMORANDUM OF POINTS AND AUTHORITIES

I.

FRIEDMAN HAS NOT ADEQUATELY EXPLAINED WHY THIS COURT SHOULD INVOKE ITS ORIGINAL JURISDICTION

Under California Rules of Court, rule 8.486(a)(1), a petition for writ of mandate "must explain why the reviewing court should issue the writ as an original matter" in the event that the petition "could have been filed first in a lower court." As noted above, the ABA-law school qualification dates back to 2010, three years before Friedman was admitted to the bar, and over seven years before he officially declared his intent to run for City Attorney.

There is no explanation by Friedman in his Petition why he never sought relief in the California Superior Court, by way of an action for declaratory relief, or a petition for writ of mandate under California Code of Civil Procedure § 1085. Instead, Friedman waited until July 30, 2018, nearly three months after he officially declared his candidacy, to petition this Supreme Court to invoke its original jurisdiction. Freidman waited despite knowing he did not satisfy the educational qualification, and despite

[4] Freidman has clearly been aware that he did not meet the educational requirements of the City Attorney for some time. His Qualifications Affidavit notes his contention that the ABA-law school education qualification is "unconstitutional," and he even retained legal counsel to evaluate this issue before he submitted the affidavit itself. Indeed, accompanying the Qualifications Affidavit was a letter from Freidman's counsel threatening legal action.

having had time to hire a lawyer to threaten legal action if the education qualification was enforced.

Respondents-Defendants do not dispute that this Court has fundamental jurisdiction over this matter, *see Thompson v. Mellon* (1973) 9 Cal. 3d 96, 98, but Respondents-Defendants submit that it is inappropriate to permit Friedman to manufacture the exigency that would justify this Court's exercise of its jurisdiction. And, as shown below, his delay in bringing forth the instant Petition does impact the Court's and Respondents-Defendants' ability to fully address his claims.

It should be noted, and will be further addressed below, that this Court applied a strict scrutiny test in *Thompson*, to decide that a durational residency requirement for a city council was unconstitutional. (*Thompson*, *supra*, 9 Cal. 3d at 101-02.) However, subsequent decisions of the United States Supreme Court and this Court have recognized:

> [T]he rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.' *Norman v. Reed* (1992), 502 U.S. 279, 289 [116 L. Ed. 2d 711, 112 S. Ct. 698]. But when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions.

(*Edelstein v. City and County of San Francisco* (2002) 29 Cal.4th 164, 174, quoting *Anderson v. Celebrezze* (1983) 460 U.S. 780, 788.)

Thus, although Respondents-Defendants submit that the facts undisputedly establish that the City's ABA-law school graduation qualification is not a "severe" restriction, to the extent that further factual development may be necessary to resolve that issue, Friedman's unreasonable delay in seeking judicial relief frustrates the parties and this

Court from examining a complete record. Freidman alone is to blame for this unreasonable delay.

For this reason, Respondents-Defendants respectfully request that this Court summarily deny the Petition.

II.

THE CITY'S EDUCATIONAL QUALIFICATION IS CONSTITUTIONALLY VALID

The City Attorney is not merely an elected representative of the people of Huntington Beach. The City's Charter sets forth several express duties of the City Attorney:

> (a) Represent and advise the City Council and all City officers in all matters of law pertaining to their offices.
> (b) Prosecute on behalf of the people any or all criminal cases arising from violation of the provisions of this Charter or of City ordinances and such state misdemeanors as the City has the power to prosecute, unless otherwise provided by the City Council.
> (c) Represent and appear for the City in any or all actions or proceedings in which the City is concerned or is a party, and represent and appear for any City officer or employee, or former City officer or employee, in any or all civil actions or proceedings in which such officer or employee is concerned or is a party for any act arising out of their employment or by reason of their official capacity.
> (d) Attend all regular meetings of the City Council, unless excused, and give their advice or opinion orally or in writing whenever requested to do so by the City Council or by any of the boards or officers of the City.
> (e) Approve in writing the form of all contracts made by and all bonds and insurance given to the City.
> (f) Prepare any and all proposed ordinances and City Council resolutions and amendments thereto.
> (g) Devote such time to the duties of their office and at such place as may be specified by the City Council.
> (h) Perform such legal functions and duties incident to the execution of the foregoing powers as may be necessary.
> (i) Surrender to their successor all books, papers, files, and documents pertaining to the City's affairs.

(j) Assist and cooperate with the City Manager consistent with Section 403 of the City Charter.

(k) Provide advice related to compliance with the City Charter to all elected and appointed officials of the City.

(City Charter[5], section 309.)

In other words, the City Attorney is literally the City's attorney – for a city that has over 200,000 residents, making it the fourth largest city the County of Orange. The holder of this position is clearly required to provide legal advice and legal services fundamental to the effective functioning of the City. Given the importance of the position, Section 309 of the City's Charter also sets forth the following qualifications for the office of City Attorney: (1) graduation from an ABA-law school; (2) be a duly licensed attorney under the laws of the State of California; and (3) have been engaged in the practice of law for at least 5 years immediately prior to election or appointment. (City Charter, section 309.)

The educational qualification was added in 2010 as the result of an exhaustive City Charter revision process whereby a select citizen commission convened for 9 months to recommend changes throughout the City Charter.[6] Thereafter, the City Council did not merely rubber-stamp the recommendations; it meaningfully considered the recommendations, including the recommendations for enhanced qualifications for the elected offices of the City Attorney, City Clerk and City Treasurer. The City Council, in fact, rejected the recommendation for a management experience qualification for these positions.

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[5] Further references to the City Charter are to the current version of the City Charter, provided as Ex. 7 to the Respondents' Request for Judicial Notice.

[6] These changes were obviously not directed at Freidman's potential candidacy, given that Freidman was not even a lawyer in the State of California at the time the changes were made. Similarly, Respondent-Defendant Michael Gates had no role in the changes given that he was not elected into office until four years after the changes were made by the commission.

The City Charter revision was put up to a vote, and the voter pamphlet summary mentioned the enhanced qualifications for the City Attorney, and informed the public how to obtain a copy of the proposed revisions. Ultimately, ***the people of the City voted to adopt the revised City Charter***, including the enhanced qualifications for City Attorney.

In other words, by an act of its voters, the City exercised its "power to prescribe the qualifications of its officers" and met its "constitutional responsibility for the establishment and operation of its own government, as well as the qualifications of an appropriately designated class of public office holders." (*Gregory*, *supra*, 501 U.S. at 462.)

> Such power inheres in the [charter city] by virtue of its obligation... to preserve the basic conception of a political community.... And this power and responsibility of the [charter city] applies... to persons holding... elective and important nonelective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government.

(*Ibid; Rawls v. Zamora* (2003) 107 Cal.App.4th 1110, 1117 ("[T]he authority of the [city] to determine the qualifications of [its] most important governmental officials is an authority that lies at the heart of representative government....").)

Thus, in considering the constitutionality of the qualifications for elective office, courts ***are not*** bound to subject all election laws to strict scrutiny. (*Gregory*, *supra*, 501 U.S. at 462.) Indeed, the United States Supreme Court has further held:

> Election laws will invariably impose some burden upon individual voters. Each provision of a code, "whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects -- at least to some degree -- the individual's right to vote and his right to associate with others for political ends." *Anderson* v. *Celebrezze*, 460 U.S. 780,

> 788, 75 L. Ed. 2d 547, 103 S. Ct. 1564 (1983). Consequently, ***to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as petitioner suggests, would tie the hands of States*** seeking to assure that elections are operated equitably and efficiently. [Citation.] Accordingly, the mere fact that a State's system "creates barriers . . . tending to limit the field of candidates from which voters might choose . . . does not of itself compel close scrutiny." *Bullock* v. *Carter*, 405 U.S. 134, 143, 31 L. Ed. 2d 92, 92 S. Ct. 849 (1972); *Anderson, supra*, at 788; *McDonald v. Board of Election Comm'rs of Chicago*, 394 U.S. 802, 22 L. Ed. 2d 739, 89 S. Ct. 1404 (1969).

(*Burdick v. Takushi* (1992) 504 U.S. 428, 433-434, emphasis added; *Anderson v. Celebrezze* (1983) 460 U.S. 780, 788.)

Although the foregoing citations refer to the power of states to control their elections, in the context of this case, the State of California has delegated to the City control over its own municipal affairs, including the qualifications of its officers. (Cal. Const., art. XI, sec. 5; *Cawdrey v. City of Redondo Beach* (1993) 15 Cal.App.4th 1212, 1223, 1227; *see also Johnson v. Bradley* (1992) 4 Cal.4th 389, 403-04.)

Therefore, in reviewing the constitutionality of the City's educational qualification for the elected office of the City Attorney, "strict scrutiny" does not automatically apply. The closeness of the scrutiny to which an election law is subjected depends upon how severe a restriction it is on voters' and candidates' constitutional rights. When a law imposes "only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, 'the [government's] important regulatory interests are generally sufficient to justify' the restrictions." (*Edelstein, supra*, 29 Cal.4th at 174, quoting *Anderson, supra*, 460 U.S. at 788.) This very Court has similarly stated that "the high court will give wide latitude to state election laws, even those that may restrict the electorate's choice of representatives, so long as those laws are applied in

an even-handed manner without discriminating against particular citizens or classes of citizens." (*Legislature v. Eu* (1991) 54 Cal.3d 492, 516.)

Moreover, it should be noted that the use of the balancing test set forth in *Anderson* has been limited in application to restrictions on candidates otherwise qualified and capable of performing their duties, such as residency requirements, write-in candidacies, etc. Where the issue is whether a candidate is fundamentally qualified to perform the duties of office (such as the case here), this Court has suggested a rational basis is sufficient. In *Zeilenga v. Nelson* (1971) 4 Cal.3d 716, having held that the right to hold public office is a fundamental right, this Court noted:

> "Qualifications for office must have a rational basis, such as age, integrity, training or, perhaps, residence. . . . If a classification is employed in prescribing qualifications, it must be nondiscriminatory and '*based on a real and substantial difference* having reasonable relation' to the object sought to be accomplished by the legislation. . . ." (Italics ours.)

(*Zeilenga*, 4 Cal.3d at 721.) "[C]andidacy requirements, akin to age, integrity, training or residency... have generally been upheld." (*Eu*, *supra*, 54 Cal.3d at 518.)

Thus, qualifications regarding the amount and nature of training necessary to hold a particular office should be subject to a less exacting, rational basis-level of review.

A.

The City's Educational Requirement Is Not A Severe Restriction

In *Legislature v. Eu*, *supra*, this Court considered the constitutionality of Proposition 140, which imposed lifetime term limits on the legislature. (*Eu*, *supra*, 54 Cal.3d at 499-501.) This Court did not summarily state whether the term limits were severe, but this Court did distinguish prior cases that had applied strict scrutiny. (*Id.* at 515.) This Court recognized certain factors that mitigated the impact of the term limits

provision in that case, including "the voters' continued right to vote for any qualified candidates, as well as the candidates' ability to run for other public offices...." (*Id.* at 519.)

"Courts will uphold as 'not severe' restrictions that are generally applicable, even-handed, [and] politically neutral…." (*Rubin v. City of Santa Monica* (9th Cir. 2002) 308 F.3d 1008, 1014.) The Ninth Circuit in *Rubin* considered for itself California's Proposition 140. The Ninth Circuit did summarily state that the lifetime term limit was not a severe restriction, reasoning that it was "a neutral candidacy qualification, such as age or residence, which the State certainly has the right to impose." (*Id.* at 847.) The Ninth Circuit further cited the fact that legislators prohibited from running for more terms "are not precluded from running for some other state office." (*Ibid.*)

> Most important, the lifetime term limits do not constitute a discriminatory restriction. Proposition 140 makes no distinction on the basis of the content of protected expression, party affiliation, or inherently arbitrary factors such as race, religion, or gender. Nor does the Proposition "limit[] political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status."

(*Ibid.*, quoting *Anderson*, *supra*, 460 U.S. at 793.)

The ABA-law school educational qualification in this case is similarly not a severe restriction because: (1) it is a neutral candidacy qualification, (2) persons who do not meet the qualification may still run for other elected City offices, and (3) the qualification is not discriminatory. Indeed, in terms of the practical effect of the City's educational qualification on the pool of qualified candidates, only 10% of the attorneys practicing in Los Angeles, Orange, and San Diego Counties graduated from non ABA-law schools. (Req. for Jud. Not., Ex. 9 [Cal. State Bar, Final

Report on the 2017 California Bar Exam Standard Setting Study] at p. 163.)[7] The effect is therefore minimal.

In the underlying Petition, Freidman obviously recognizes this hurdle and its potentially fatal impact on the outcome of his request. Halfheartedly and without any support, the Petition claims the City's Charter effectively discriminates based on wealth. Simply put, Friedman's conclusory assertion that the educational requirement discriminates on the basis of socio-economic status is patently ridiculous. The ABA has accredited 204 institutions across the country. (ABA-Approved Law Schools, https://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools.html.) There are 21 ABA-law schools in California alone. (Law Schools, http://www.calbar.ca.gov/Admissions/Law-School-Regulation/Law-Schools#cals.) Tuitions and expenses of course vary considerably among the variety of ABA-law schools. Moreover, as part of the accreditation requirements of the ABA, ABA-law schools are required to provide student loan and financial aid counseling. (ABA Accreditation Standards Chapter 5[8], standards 507 and 508.) They are also required to publicly disclose their tuition and fees, living costs, financial aid, and conditional scholarships. (ABA Accreditation Standards Chapter 5, standard 509(b)(2)-(3).)

The underlying Petition conveniently omits these readily obtainable facts, and instead bases Freidman's income discrimination claim on unverified "information and belief." The City's ABA-law school educational qualification is not a stealth vehicle for socio-economic discrimination.

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[7] A copy is also available at, http://www.calbar.ca.gov/Portals/0/2018BarExamReport.pdf.

[8] Available at https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2017-2018ABAStandardsforApprovalofLawSchools/2017_2018_standards_chapter5.authcheckdam.pdf

B.

The City's Educational Qualification Reasonably Relates To A Candidate's Ability To Ably Perform The Functions Of City Attorney

Particularly as it relates to the general public serving as voters, graduation from an ABA-law school is a reasonable proxy for determining the capability of a candidate. More directly, it reflects the quality of the legal education received[9]. "Since 1952, the Council of the Section of Legal Education and Admissions to the Bar (the Council) of the American Bar Association (the ABA) has been approved by the United States Department of Education as the recognized national agency for the accreditation of programs leading to the J.D. degree." (ABA Accreditation Standards, Preface[10] at page v.) "Almost all [jurisdictions] rely exclusively on ABA approval of a law school to determine whether the jurisdiction's legal education requirement for admission to the bar is satisfied." (*Ibid.*)

The California State Bar itself recognizes the ABA's expertise and authority in accrediting law schools. ABA-law schools are deemed accredited and exempt from the State Bar's accreditation rules, even if they have only been provisionally accredited by the ABA. (Cal. State Bar Law Sch. Accreditation, Rule 4.102.)

An easy-to-compare substantive difference between ABA-law schools and law schools accredited by the California State Bar is the minimum bar exam passage rate. "California is one of the least restrictive

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[9] Indeed, it has been long-established that the public believes the quality of ABA-law schools is greater than non-ABA-law schools. (See Cal. Appellate Legacy Project Interview of Justice William Rylaarsdam, https://www.youtube.com/watch?v=QJPFauhvreg at approx. timestamp 9:32-11:24, transcript p. 4 available at http://www.courts.ca.gov/documents/Rylaarsdam_transcript.pdf.)

[10] Available at https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2017-2018ABAStandardsforApprovalofLawSchools/2017_2018_standards_preface.authcheckdam.pdf.

states in setting the legal education requirements for who may take the bar exam. In California students who attend ABA accredited, state accredited, or unaccredited law schools may sit for the [bar exam]." (Cal. State Bar, Final Report on the 2017 California Bar Exam Standard Setting Study.) "California is also one of only seven states that allows applicants to take the bar exam after reading the law."[11] (*Ibid.*) Indeed, the California State Bar itself recognized that bar exam passage rate is a measure of "the qualitative soundness of a law school's program of legal education." (Cal. St. Bar Law Sch. Accreditation, Rule 4.160(N).)

For ABA accreditation:

> A law school's bar passage rate shall be sufficient, for purposes of Standard 301(a), if the school demonstrates that it meets any one of the following tests:
> (1) That for students who graduated from the law school within the five most recently completed calendar years:
> (i) 75 percent or more of these graduates who sat for the bar passed a bar examination; or
> (ii) in at least three of these calendar years, 75 percent of the students graduating in those years and sitting for the bar have passed a bar examination.
> ...
> (2) That in three or more of the five most recently completed calendar years, the school's annual first-time bar passage rate in the jurisdictions reported by the school is no more than 15 points below the average first-time bar passage rates for graduates of ABA approved law schools taking the bar examination in these same jurisdictions.

(ABA Accreditation Standards, standard 316(a).)

The Rules of the California State Bar require an accredited law school to maintain a minimum bar exam passage rate. (Cal. St. Bar Law Sch. Accreditation, Rule 4.160(N).) Under the current guidelines, "a law school must maintain a minimum, cumulative bar examination pass rate

[11] Thus, according to Friedman's reasoning, it would be unconstitutional for a city to require its City Attorney to have ***any*** formal legal education, as long as he or she was otherwise permitted to take and pass the bar.

(MPR) of at least 40 percent for the most recent five-year reporting period." (Cal. Bar Guidelines for Accredited Law School Rules, Section 12.1.) In other words, the ABA's standard is substantially higher than the California Bar's.

Moreover, in 2016, the bar passage rates on the California Bar for California ABA-law schools and non-California ABA-law schools are 54% and 49%, respectively. Whereas, the rates for California-accredited and non-accredited law schools are 13% and 14%, respectively. (Ex. 9 at p. 249.) From 2008 to 2016, California-accredited and non-accredited law schools experienced 50% and 33% negative changes in their respective pass rates. (*Ibid.*)

The people of the City clearly have a compelling interest in ensuring that their City Attorney has the ability to capably discharge his/her duties. Freidman most assuredly does not and would not say otherwise. In fact, the City Charter revision at issue not only addressed the ABA-law school requirement, but also increased the years-of-experience qualification from three years to five. Tellingly, because he meets it, Freidman does not challenge this heightened experience qualification in the Petition.

Fundamentally, the educational qualification at issue here is no more restrictive or unconstitutional than a years-of-experience qualification. Indeed, various cities in California have a variety of different years-of-experience qualifications for their elected city attorneys – Compton requires only 3 years (Compton Charter, section 702), Chula Vista requires 7 years (Chula Vista Charter, section 503(d)), and Oakland (Oakland Charter, section 401(2)), San Francisco (S.F. Charter, section 6.100), and San Diego (San Diego Charter, section 40) require 10 years – Huntington Beach itself used to require only 3 years until the 2010 City Charter revision changed it to 5 years. These non-discriminatory, neutral candidate qualifications lie within the core of the City's power and responsibility to provide for its own

government. The people's choice to require the City Attorney to be a graduate of an ABA-law school and have five years of experience as a lawyer should not be discarded.

III.

THE CITY'S EDUCATIONAL QUALIFICATION FOR CITY ATTORNEY IS NOT A BILL OF ATTAINDER

"A bill of attainder has been defined as a 'legislative *punishment,* of any form or severity, of specifically designated persons or groups.'" (*Eu*, *supra*, 54 Cal.3d at 525, quoting *United States* v. *Brown* (1965) 381 U.S. 437, 447.) This Court set forth three different tests that have been used to determine whether legislation amounts to a bill of attainder:

> First, an "historical" test has been used to determine whether the subject legislation imposes a kind of punishment traditionally deemed prohibited by the federal Constitution.... Second, the courts have used a "functional test of the existence of punishment, analyzing whether the law under challenge, viewed in terms of the type and severity of burdens imposed, *reasonably can be said to further nonpunitive legislative purposes*. [Citations.]" (*Id*., at pp. 475-476 [53 L.Ed.2d at p. 911], italics added and fn. omitted.) Finally, the courts have used a "motivational" test, "inquiring whether the legislative record evinces a congressional intent to punish."

(*Id.* at 526, quoting *Nixon v. Administrator of General Services* (1977) 433 U.S. 425, 475-76, 478.)

The educational qualification at issue in this case meets none of these tests. There is no tradition of prohibiting educational qualifications for public office as a kind of punishment prohibited by the Constitution. For the reasons set forth above, the educational qualification also clearly advances a legitimate nonpunitive purpose.

Furthermore, there is no evidence that the people of the City of Huntington Beach were motivated by a desire to punish Friedman, or any person similarly situated, when it adopted the educational qualification in

2010, three years before Friedman was admitted to the California Bar. Rather, the record shows that the City Charter review commission and City Council recommended the enhanced qualifications for City Attorney, as well as for City Clerk and City Treasurer, in light of developments such as the professional requirements and qualifications of the persons working under the City Attorney.

The educational qualification at issue in this case was not adopted to punish anyone or any class of persons. "'[I]t is clear that general legislation such as this . . . *aimed at the office* . . . rather than the incumbent office holders, has none of the objectionable attributes of a bill of attainder. [Citation.]' (emphasis added.)" (*Eu, supra*, 54 Cal.3d at 527, quoting *Connecticut Judicial Selection Com'n v. Larson* (D. Conn. 1989) 745 F. Supp. 88, 96.)

Finally, support for Petitioner's bill of attainder argument is based largely on the U.S. Supreme Court's decision in *Cummings v. Missouri* (1867) 71 U.S. 277. That decision is easily and obviously distinguishable. In *Cummings*, the Supreme Court addressed a post-civil war "Oath of Loyalty" enacted by the State of Missouri that punished and prohibited prior activities and thoughts that were previously not punishable. The legislation at issue in *Cummings* even fundamentally altered "universally recognized principles" by presuming guilt until innocence was proven. *Id.* at 328. Clearly, the City's requirement that candidates for City Attorney be a graduate from an ABA- law school is nothing like the legislation at issue in the *Cummings* decision.

Stated simply, Freidman's contention that the City's Charter revisions amount to a bill of attainder is both without merit and without evidentiary support.

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/ / /

IV.

CONCLUSION

In Conclusion, Friedman's Petition is procedurally improper and substantively lacks merit. For the reasons set forth above, Respondents-Defendants respectfully request that this Court summarily deny the Petition.

DATED: August 13, 2018 Respectfully submitted,

By: /s/ Daniel S. Cha
BRIAN L. WILLIAMS, Sr. Trial Counsel
DANIEL S. CHA, Sr. Deputy City Atty
Attorneys for Respondents,
Michael E. Gates, Huntington Beach City Attorney and Robin Estanislau, Huntington Beach City Clerk, and Real Party In Interest City of Huntington Beach

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.504(d), I certify that this PRELIMINARY OPPOSITION TO VERIFIED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF is proportionately spaced and has a typeface of 13 points or more. Excluding the caption page, tables of contents and authorities, signature block, and this certificate, it contains 6013 words.

DATED: August 13, 2018 By: /s/ Daniel S. Cha
DANIEL S. CHA, Sr. Deputy City Atty
Attorneys for Respondents,
Michael E. Gates, Huntington Beach City Attorney and Robin Estanislau, Huntington Beach City Clerk, and Real Party In Interest City of Huntington Beach

PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 2000 Main Street, Huntington Beach, CA 92648.

On August 13, 2018, I electronically filed the foregoing

PRELIMINARY OPPOSITION TO VERIFIED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

with the Clerk of the Supreme Court by using the TrueFiling system and electronically served the following parties via TrueFiling:

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The Animal Law Office
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 13, 2018, in Huntington Beach, California.

/s/
CHRISTINA LEONHARD