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17 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

18 **COUNTY OF ORANGE**

19 PEOPLE OF THE STATE OF CALIFORNIA,  
20 *ex. rel.* MICHAEL SCHLESINGER, an  
21 individual,

22 Plaintiff,

23 v.

24 ED SACHS, WENDY BUCKNAM, AND  
25 GREG RATHS, individuals,

26 Defendants.

Case No.

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
APPLICATION FOR LEAVE TO SUE IN  
QUO WARRANTO TO TRY TITLE TO  
PUBLIC OFFICE**

**[Code Civ. Proc. § 803; Cal. Code Reg., Title  
11, §2(a)]**

Action filed:

Trial date:

27 Pursuant to Title 11, Section 2(b) of the California Code of Regulations, Applicant and  
28 Proposed Relator MICHAEL SCHLESINGER, submits the following Memorandum of Points &  
Authorities for the Attorney General to consider prior to issuance of a ruling on this application for  
leave to sue *in quo warranto*.

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1 **I. INTRODUCTION**

2 It is a simple maxim in democratic government that an elected official holds office only for  
3 the term for which he or she was elected. Once their term of office expires (or their mandate ends),  
4 the elected official must vacate the office and an election be held to determine his or her successor.  
5 But that is not the case in the City of Mission Viejo (“City”). Proposed Defendants Ed Sachs,  
6 Wendy Bucknam, and Greg Rath were each elected to a two-year term in November 2018 and  
7 sworn into office in December 2018. Their terms expired in December 2020. Yet they continue to  
8 hold office, having refused to put their seats up for re-election. Our democracy does not allow  
9 elected officials to simply decide not to hold an election in order to extend their terms of office.

10 The two-year terms held by the Proposed Defendants were the result of a Stipulated  
11 Judgment entered into by the City to settle a California Voting Rights Act (“CVRA”) lawsuit,  
12 *Southwest Voter Registration Education Project v. City of Mission Viejo et al.*, Orange County  
13 Superior Court Case No. 30-2018-00981588-CU-CR-CRC (“*SWVREP v. MV*”). Under the  
14 stipulated judgment, the City envisioned implementing a cumulative voting system, where all five  
15 members of the City Council were elected during Presidential election cycles. The City therefore  
16 stipulated and agreed that “the election in November 2018 shall be for two-year terms on the City  
17 Council.”

18 Public announcements were made that in 2018, the term of office for the council members  
19 elected that year would be for only two years. Public notices were given and official records were  
20 made certifying that the term of office would be for only two years. Public debate ensued in the  
21 City as to the wisdom of the decision, and the electorate went to the polls believing that their  
22 choices—whether good or bad—would have to stand for election again. When the votes were  
23 counted, the results certified the election of the Proposed Defendants to a two-year term.

24 Although the City envisioned a cumulative voting system, the Elections Code does not make  
25 such a system available for general law cities like Mission Viejo. Facing the deadline imposed in  
26 the Stipulated Judgment, the City and plaintiffs in that case submitted a joint *ex parte* application  
27 to amend the Stipulated Judgment, which the Court entered on July 16, 2020. The Amended  
28 Stipulated Judgment postponed the implementation of the cumulative voting system until

1 November 2022, and requiring that the election of City Council members in the 2020 elections be  
2 for only a two-year term.

3 The Amended Stipulated Judgment did not—and could not—change the fact that the  
4 Proposed Defendants had been elected to a two-year term in 2018. But rather than hold a new  
5 election for those seats, the City called an election for the two other seats on the City Council, and  
6 the Proposed Defendants continued to serve in office, without a mandate, following the expiration  
7 of their term.

8 More recently, City has faced the reality that it cannot use cumulative voting. City has  
9 indicated its intent to transition to a by-district election system to resolve *SWVREP v. MV*. Those  
10 plans indicate, however, that the City intends to extend the terms of the other two members of the  
11 City Council, allowing each to sit for an additional two years beyond the expiration of the two-year  
12 terms to which they were elected by (again) simply refusing to put their seats up for vote in the  
13 forthcoming 2022 by-district election.

14 This matter presents a matter of serious public concern warranting judicial intervention *quo*  
15 *warranto*. The Proposed Defendants have usurped, intruded into, and unlawfully continue to hold  
16 office, warranting immediate redress. The need for redress is underscored by the likelihood that  
17 the City’s intrusion on the fundamental rights of its citizens to elect their representatives will be  
18 repeated in short order.

19 **II. SUMMARY OF FACTS**

20 **A. Defendants Were Elected to Two-Year Terms for City Council in 2018**  
21 **Pursuant to a Stipulated Judgment Entered Into by City.**

22 The City of Mission Viejo is a general law city, with a city council consisting of five  
23 members elected via at-large election for staggered four-year terms. (Statement of Facts in Support  
24 of Application for Leave to Sue in Quo Warranto to Try Title to Public Office [“SOF”] ¶ 1.) On or  
25 about June 26, 2018, the City Council adopted Resolution 18-22 calling the November 2018 general  
26 election for three City Council members. (SOF ¶ 6.)

27 Shortly thereafter, on July 20, 2018, the City of Mission Viejo entered into a Stipulation for  
28 Entry of Judgment and Judgment in *SWVREP v. MV* (the “Stipulated Judgment”), which settled a

1 lawsuit alleging that the City’s at-large elections violated the CVRA. (SOF 7, Ex. A.)<sup>1</sup> Under the  
2 terms of the Stipulated Judgment, City was, amongst other provisions, permanently enjoined from  
3 conducting any further at-large elections subsequent to the November 2018 general election. While  
4 then-existing council members were to serve the remainder of their elected terms, the Stipulated  
5 Judgment required that council members elected in the November 2018 election hold two-year  
6 terms, with subsequent elections (conducted under a cumulative voting system) being for four-year  
7 terms. (*Ibid.*)

8 On or about July 26, 2018, the Court entered Judgment pursuant to the terms of the  
9 Stipulation. Entry of the Stipulated Judgment effectively amended Resolution 18-21. (SOF ¶ 9,  
10 Ex. A.) All actions taken by the City following its request for entry of the Stipulated Judgment  
11 were in accordance with the fact that the individuals elected to the City Council in the November  
12 2018 general elections would serve only two-year terms. For example:

- 13 • The City’s July 27, 2018 announcement that it had settled the *SWVREP v. MV* litigation  
14 clearly stated that the 2018 elections would be for two-year terms and not four-year  
15 terms: “Mission Viejo City Council Members voted into office this November will serve  
16 for two years rather than the traditional four-year terms. The City will work with the  
17 community on voter education in the coming years.” (SOF ¶ 11, Ex. B.)
- 18 • The City Clerk issued a Public Notice of Election on July 30, 2018 stating that a General  
19 Municipal Election was to be held in the City on November 6, 2018 for “Three Members  
20 of the City Council” for a “Full term of two years.” (SOF ¶ 12, Ex. C.)
- 21 • After the candidate filing deadline for the 2018 election passed, the City issued a public  
22 announcement that: “Mayor Ed Sachs, Mayor Pro Tem Greg Raths and Council Member  
23 Wendy Bucknum are up for re-election” and that “[t]he five candidates are running for  
24 two-year terms rather than the typical four-year term because of the recent Voting Right  
25 Litigation Settlement. . . .” (SOF ¶ 13, Ex. D [emphasis added].)<sup>2</sup>

26  
27  
28 <sup>1</sup> The *SWVREP v. MV* litigation was filed on or about March 22, 2018. (SOF ¶ 5.)

<sup>2</sup> The City’s announcement highlighting the incumbents’ status is of dubious propriety.

- 1           • The ballots for ballots for the City Council elections indicated two-year terms for the  
2           successful candidate. (SOF ¶ 14.)

3           The City’s election certification clearly stated that Defendants were elected to two-year  
4 terms, as reflected in Resolution No. 18-52 (adopted on December 11, 2018):

5                     SECTION 4. The City Council does declare and determine that: Ed Sachs  
6                     was elected as Member of the City Council for the term of two years;  
7                     Wendy Bucknam was elected as Member of the City Council for the term  
8                     of two years; and Greg Rath was elected as Member of the City Council  
9                     for the term of two years.

8 (SOF ¶ 15, Ex. E.) Each Proposed Defendant was sworn into office immediately thereafter, thus  
9 beginning each of their respective two-year terms.

10           **B. The City Sought an Amendment to Its Stipulated Judgment Because It Was**  
11           **Unable to Implement Its Cumulative Voting Plan.**

12           That the City would not be able to implement cumulative voting by 2020 became  
13 immediately apparent, including through repeated communications and admonishments from the  
14 Secretary of State.<sup>3</sup> For example, on May 3, 2019, the Secretary of State stated: “In short, we do  
15 not find any authority for the adoption of cumulative voting for the City of Mission Viejo, a general  
16 law city.” On February 25, 2020, the Secretary of State sent a letter of rebuke to the City, taking  
17 issue with the City Attorney’s inaccurate characterization of the City’s interactions with the  
18 Secretary of State’s Office. A second letter of rebuke followed on May 1, 2020, in which Secretary  
19 of State Alex Padilla personally expressed his “profound disappointment” with the City’s  
20 inaccurate characterization of its interactions with his office, stating pointedly:

21                     As we have expressed repeatedly to the City Attorney by phone, in writing,  
22                     and during the April 24th call, the Secretary of State's office DISAGREES  
23                     with the City Attorney’s claim that cumulative voting is currently  
24                     authorized under state law. Our position remains unchanged - we do not

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24           <sup>3</sup> In reality, the City and Defendants were aware that cumulative voting was not a viable option for the City. The  
25           Secretary of State had issued official guidance that cumulative voting was not legally permissible for general law  
26           cities such as the City of Mission Viejo. Moreover, the City and Defendants were made aware that another court in  
27           *Soliz v. City of Santa Clarita* refused to approve an agreement settling CVRA claims via cumulative voting for this  
28           reason. Nonetheless, City did not make the Court in *SWVREP v. MV* aware of these highly pertinent facts when it  
          requested entry of the Stipulated Judgment, nor did it inform the public. Rather, the City and the Defendants  
          appeared to have agreed to the Stipulated Judgment as a scheme to avoid having to adopt by-district elections—and  
          thereby avoiding member against member elections.

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believe your legal analysis regarding the California Voting Rights Act has merit.

The City failed to implement cumulative voting in accordance with the provisions of the Stipulated Judgment in the two years leading into the 2020 city council election. And although Defendants’ terms were to expire in December 2020, City did not adopt a resolution calling the election for Defendants’ three expiring seats. Instead, on June 23, 2020, the City Council passed Resolution 20-25 which prescribed that a General Municipal Election was to be held on November 3, 2020, for the purpose of the election of two (2) members for a term of two years. (SOF ¶ 21, Ex. E.) The resolution calling the election pertained to the two remaining city council seats not held by Defendants. No provision of the Resolution addressed the fact that the two-year terms of Defendants Rath, Sachs and Buckman were set to expire in December 2020. (SOF ¶ 22.)

On July 14, 2020, City submitted a joint ex parte application to amend the Stipulated Judgment. The Court issued an Order Granting the Joint Ex Parte Application for Order Amending Stipulated Judgment (“the July 2020 Stipulation”). (SOF ¶ 23, Ex. G.) The July 2020 Stipulation amended the Stipulated Judgment to: (1) delay the implementation of cumulative voting in the City until the November 2022 election; (2) require that election for all five seats of the City Council be held in November 2022, and every four years thereafter; (3) require that the City implement limited voting or district-based voting if cumulative voting can not be implemented by November 2022; and (4) prohibit further postponements of remedial measures in the City’s electoral system. (SOF ¶ 24, Ex. G.) In all other respects, the Stipulated Judgment remained the same.

Nobody alerted the Court that City did not intend to hold elections for the Defendants’ two-year terms that were expiring in December 2020. No provision of the July 2020 Stipulation permits for the extension of Defendants’ terms beyond the two years for which they were elected. (Ibid.)

The Defendants were never re-elected to office following the expiration of their terms in December 2020. (SOF ¶ 5.)



1 **III. ARGUMENT**

2 **A. The Right of the People to Exercise the Franchise Must be Honored.**

3 The right of suffrage is a fundamental right protected by Article II of the California  
4 Constitution. It is a right necessary for the preservation of basic civil and political rights. (See,  
5 e.g., *Reynolds v. Sims* (1964) 377 U.S. 533, 562; *Castro v. State of California* (1970) 2 Cal.3d 223,  
6 234.) To the extent that any ambiguity arises concerning the effect of any legislation, judicial  
7 decision, or government action, the ambiguity must be resolved in favor of the preservation of the  
8 right of the people to exercise the elective process. “Every reasonable presumption and  
9 interpretation is to be indulged in favor of the right of the people to exercise the elective process.”  
10 (*Hedlund v. Davis* (1956) 47 Cal.2d 75; see also *Robson v. Upper San Gabriel Valley Municipal*  
11 *Water Dist.* (2006) 142 Cal.App.4th 877, 885 [“Any ambiguity in a statute relating to elections  
12 must be weighed in favor of the public’s right to vote.”]; *Stanton v. Panish* (1980) 28 Cal.3d 107,  
13 115.)

14 Part-and-parcel to the peoples’ right to elect their representatives is that their representatives  
15 will honor the expiration of their term of office. “A term of office applies to the office, and is a  
16 fixed and definite term.” (*Harrold v. Barnum* (1908) 8 Cal.App. 21, 22.) An elected official cannot  
17 be permitted to act (or fail to act) in a manner that forecloses an election to select a successor to a  
18 term of office. (*Stanton v. Panish* (1980) 28 Cal.3d 107, 115 [statute could not be interpreted to  
19 allow incumbents’ retirement to cause cancellation of an election].)

20 **B. Proposed Defendants Were Elected to Two-Year Terms of Office That Expired**  
21 **in December 2020.**

22 There is no legal basis on which the Proposed Defendants were authorized to remain in  
23 office beyond the December 11, 2020, expiration of the two-year terms to which they were elected.  
24 Their terms of office were fixed, two-year terms, as set forth in the Stipulated Judgment, entered  
25 by a court of competent jurisdiction. (*Harrold v. Barnum*, supra, 8 Cal.App. at p. 22.) That two-  
26 year term was confirmed by every action undertaken by the City—and every notice to potential  
27 candidates and the electorate—leading up to the Proposed Defendants assuming their office. In  
28 particular, a two-year term was set forth in the Public Notice of Election issued pursuant to calling

1 for candidates for “Three Members of the City Council” for a “Full term of two years.” (Elec.  
2 Code, § 12101 [. . .before any municipal election to fill offices, the city elections official shall  
3 publish a notice of the election in the city . . . . The notice shall be headed “Notice of Election,”  
4 and shall contain a statement of: . . . The offices to be filled, specifying full term or short term, as  
5 the case may be.”].) The City’s certification of election specified that Defendants were elected to  
6 two-year terms, and those were the terms of office into which they were sworn immediately  
7 thereafter. (SOF ¶¶ 15-16, Ex. E.)<sup>4</sup>

8         There is no legal basis on which the Proposed Defendants were authorized to remain in  
9 office beyond the December 11, 2020, expiration of the two-year terms to which they were elected.  
10 Their terms of office were fixed, two-year terms, as set forth in the Stipulated Judgment, entered  
11 by a court of competent jurisdiction. (*Harrold v. Barnum*, supra, 8 Cal.App. at p. 22.) That two-  
12 year term was confirmed by every action undertaken by the City—and every notice to potential  
13 candidates and the electorate—leading up to the Proposed Defendants assuming their office. In  
14 particular, a two-year term was set forth in the Public Notice of Election issued pursuant to calling  
15 for candidates for “Three Members of the City Council” for a “Full term of two years.” (Elec.  
16 Code, § 12101 [. . .before any municipal election to fill offices, the city elections official shall  
17 publish a notice of the election in the city . . . . The notice shall be headed “Notice of Election,”  
18 and shall contain a statement of: . . . The offices to be filled, specifying full term or short term, as  
19 the case may be.”].) The City’s certification of election specified that Defendants were elected to  
20 two-year terms, and those were the terms of office into which they were sworn immediately  
21 thereafter. (SOF ¶¶ 15-16, Ex. E.)

22         The Proposed Defendants were each sworn into a two-year term of office in December  
23 2018. (SOF ¶ 16.) Their terms ended in December 2020. Those office were never put up for re-  
24 election, nor were Defendants re-elected. In short, no legal authority exists—nor can any be  
25 interpreted to allow—incumbents, after they are elected, to effectively extend their own terms by  
26 simply refusing to issue a call for election. (See, e.g., *Stanton v. Panish*, supra, 28 Cal.3d at p.

27 \_\_\_\_\_  
28 <sup>4</sup> The City’s 2020 resolution calling the election also prescribed two-year terms, in accordance with the Stipulated Judgment (including as later amended).

1 115.) The terms of the Stipulated Judgment are clear and unambiguous: “[T]he election in  
2 November 2018 shall be for two-year terms on the City Council ...” In no way did it make those  
3 terms contingent or alternative. At no point did any court authorize (or even consider) an extension  
4 of the terms of office. More specifically, the July 2020 stipulation contained no express or implied  
5 language that modified the term of office in the 2018 election, or allowed the City to bypass  
6 elections to fill the three council seats held by Proposed Defendants.

7 There exist important issues of law and fact affecting the fundamental rights of the people  
8 of the City of Mission Viejo warranting judicial intervention. Elected officials cannot be permitted  
9 to structure their actions in a manner that allows them to unilaterally extend (or simply overstay)  
10 their terms of office.<sup>5</sup> Indeed, doing so would run counter to Article II, Section I of the California  
11 Constitution, which states: “All political power is inherent in the people.”

12 **C. The Need for Intervention Is Pressing Because Defendants Are Likely to Cause**  
13 **The City To Unilaterally Extend Terms Of Additional Council Members.**

14 Although not directly the subject of this quo warranto request, City’s ongoing conduct  
15 underscores the need for judicial intervention to resolve any factual or legal disputes relating the  
16 terms of office of the Proposed Defendants before history has the opportunity to repeat itself. City  
17 now intends to implement by-district voting, but has indicated that it intends to only place three  
18 seats on the 2020 ballot (those of the long-expired terms of the Proposed Defendants), effectively  
19 extending the terms of the other two incumbents beyond the two-year terms to which they were  
20 elected. While not actionable at this point, it bears on the importance of addressing this matter,  
21 including to dissuade such conduct in the future, and to promote judicial efficiency.

22 **D. Quo Warranto is the Proper Method to Challenge Title to Public Office.**

23 The right to a public office must be determined by *quo warranto*. (See, e.g., *Rando v. Harris*  
24 (2014) 228 CA4th 868; 87 Ops.Cal.Atty.Gen. 30 (2004)). A member of a city council holds a  
25 public office for purposes of a *quo warranto* action. (See, e.g., 85 Ops.Cal.Atty.Gen. 90 (2002).)  
26 The statutory basis for a *quo warranto* action is set forth in Section 803 of the Code of Civil

27 <sup>5</sup> Allowing such behavior is also problematic because it chills participation by potential challenger candidates, since  
28 potential challengers are less likely to incur cost of mounting a campaign for a two-year term rather than a four-year  
term.

1 Procedure, which provides, in pertinent part: “An action may be brought by the attorney-general,  
2 in the name of the people of this state...upon a complaint of a private party, against any person  
3 who... unlawfully holds or exercises any public office...within this state.” Quo warranto actions  
4 are used to determine whether a holder of public office has unlawfully remained in office beyond  
5 the expiration of his or her elected term. (See *People ex rel. Bledsoe v. Campbell* (1902) 138 Cal.  
6 11, 14.)

7 Because the Proposed Defendants’ terms have expired, they must be removed from the  
8 Mission Viejo City Council. Procedurally, the only way to properly effectuate this removal is  
9 through an action in quo warranto. In accordance with said procedural requirements, the instant  
10 application seeks leave to sue.

11 **E. An Election Must Be Held to Fill Vacancies Resulting from the Removal of**  
12 **Proposed Defendants from Office.**

13 Removal of the Proposed Defendants from office will create three vacancies on the City  
14 Council. Section 36512 of the Government Code provides the process through which such  
15 vacancies are filled, typically allowing a council to fill vacancies by appointment or by special  
16 election. Because the three vacancies constitute a majority of the council, however, subdivision  
17 (d)(1), provides the process through which the seats must be filled, requiring that such seats be filled  
18 via an election:

19 (d)(1) Notwithstanding subdivision (b) and Section 34902, an appointment  
20 shall not be made to fill a vacancy on a city council if the appointment would  
21 result in a majority of the members serving on the council having been  
22 appointed. The vacancy shall be filled in the manner provided by this  
23 subdivision.

24 (2) The city council may call an election to fill the vacancy, to be held on  
25 the next regularly established election date not less than 114 days after the  
26 call.

27 (3) If the city council does not call an election pursuant to paragraph (2),  
28 the vacancy shall be filled at the next regularly established election date.

(Gov Code, § 36512, subd. (d) [emphasis added].) The Proposed Complaint therefore requests as  
a remedy that an election be held to fill the vacancies.

1           **F. Leave to Sue Should Be Granted In This Case.**

2           Quo warranto actions are granted where there is a substantial question of fact or law that  
3 warrants judicial resolution, and where the public interest would be served. (See 96  
4 Ops.Cal.Atty.Gen. 36, 39 (2013).) For purposes of a quo warranto analysis, there is a strong public  
5 interest in ensuring “the integrity of public office and in the qualifications of their offices.” (95  
6 Ops.Cal.Atty.Gen. 43, 45, 49 (2012).) A decision by elected officials to simply extend their own  
7 terms by refusing to call an election undermines not only the integrity of the public office, but of  
8 the fundamental principles of democracy under which our nation was founded.

9           The need to protect the public interest is underscored by the fact that the Proposed  
10 Defendants’ two-year terms were the product of a Stipulated Judgment intended to settle another  
11 voting rights lawsuit. Allowing public officials to tell a court one thing to settle a suit, and telling  
12 the public a different story—including by implication that their term extensions were authorized by  
13 the court—makes a mockery of the institutions charged with protecting the right of citizens to elect  
14 their public officials.

15           Additionally, there is a substantial threat that the Proposed Defendants (who comprise a  
16 majority of the City Council) will repeat this harm by unilaterally extending the two-year term of  
17 the City Council members elected in November 2020. The Orange County Register reported just  
18 yesterday a statement by the City Attorney that there are only three seats up for election in 2022,  
19 not the five seats as required by the Amended Stipulated Judgment. (SOF ¶ 27, Ex. H.)

20           Relator is a citizen who resides in Mission Viejo. As such, Relator has standing to challenge  
21 Proposed Defendants’ right to serve on the Mission Viejo City Council. Moreover, Proposed  
22 Defendants’ decision to remain in office beyond the two-years terms to which they were elected  
23 poses a substantial question of law and fact which must be judicially resolved, and that the public  
24 interest would be served by determining whether Proposed Defendants are legally qualified to hold  
25 their offices. Consequently, leave to sue should be granted in this case.

1 **IV. CONCLUSION**

2 For all of the foregoing reasons, Relator respectfully requests that the Attorney General  
3 allow a Complaint to be filed in Superior Court in quo warranto to try Proposed Defendants' title  
4 to public office.

5  
6  
7  
8 Dated: January 11, 2022

**BUNSOW DE MORY LLP**

9  
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