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Committee on Rules of the California State Senate

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
12 IN AND FOR THE COUNTY OF SACRAMENTO

13  
14 NORMAN R. BROWN, et al. ) CASE NO. 34-2009-80000266  
15 Petitioners, )  
16 v. ) MEMORANDUM OF POINTS AND  
17 LINDA ADAMS, et al., ) AUTHORITIES OF RESPONDENTS  
18 Respondents. ) KAREN BASS AND THE COMMITTEE ON  
19 ) RULES OF THE CALIFORNIA STATE  
20 ) SENATE IN SUPPORT OF DEMURRER TO  
21 ) PETITIONERS' VERIFIED PETITION FOR  
22 ) WRIT OF MANDATE  
23 )  
24 ) DATE: December 18, 2009  
25 ) TIME: 9:00 a.m.  
26 ) DEPT.: 31  
27 )  
28 ) **Exempt from Fees**  
) **(Gov. Code, § 6103)**

23 **I. Preliminary Statement**

24 Petitioners request this Court to issue a writ of mandate compelling the Speaker of the  
25 California Assembly and the Committee on Rules of the California State Senate to make  
26 appointments to the Scientific Review Panel on Toxic Air Contaminants on which appointees are  
27 currently serving.

28 The relief sought by Petitioners is simply unavailable. The separation of powers doctrine

1 prohibits a California court from compelling a member of the Legislature to exercise a legislative  
2 function. Moreover, because the appointments in question are not ministerial in nature, they may not  
3 be compelled by writ of mandate. Finally, with respect to the claim against the Committee on Rules  
4 of the California State Senate, the Petition seeks to challenge title to an office, which may not be  
5 accomplished by writ of mandate. Thus, Petitioners have failed to state facts sufficient to constitute a  
6 cause of action, and this Court should sustain Respondents' Demurrer without leave to amend  
7 pursuant to Code of Civil Procedure section 430.10, subdivision (e). If Petitioners disagree with  
8 actions taken by appointees to the Scientific Review Panel on Toxic Air Contaminants, their  
9 recourse is to seek to influence new appointments through the political process, not through the  
10 courts.

## 11 **II. Allegations of the Petition for Writ of Mandate**

12 This action is based on section 39670 of the Health and Safety Code ("section 39670"),  
13 which establishes the Scientific Review Panel on Toxic Air Contaminants ("the Scientific Review  
14 Panel"). Among other functions, the Scientific Review Panel reviews and approves determinations  
15 made by the State Air Resources Board ("the ARB") regarding the regulation of toxic air  
16 contaminants. (Petition, at pp. 5-6, ¶ 17-18; see Health & Saf. Code, § 39661.)<sup>1</sup>

17 Petitioners assert that the Speaker of the California State Assembly ("the Speaker") and the  
18 Committee on Rules of the California State Senate ("the Senate Rules Committee") "have a clear,  
19 present, ministerial, and nondiscretionary duty ... to replace those Scientific Review Panel members  
20 whose terms have expired." (Petition, at p. 9, ¶ 32.) Petitioners also allege that "Respondents have  
21 refused, and continue to refuse, to initiate and complete the Scientific Review Panel nomination and  
22 appointment process to replace those Scientific Review Panel members whose terms have expired."  
23 (Petition, at p. 9, ¶ 33.)

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26 <sup>1</sup> Section 39670 establishes the Scientific Review Panel and provides for the appointment of its members. Five  
27 members are appointed by the Secretary of the California Environmental Protection Agency (para. (1), subd. (b)), two  
28 members by the Senate Rules Committee (para. (2), subd. (b)), and two members by the Speaker (para. (3), subd. (b)).  
The statute requires that appointments be made from a list of nominees provided to the appointing powers by the  
President of the University of California. ( Para. (4), subd. (b).) Each member is to serve a three-year term. (Subd. (b).)  
The provision does not expressly address the reappointment of members when their terms have expired.

1 Petitioners are seeking a peremptory writ of mandate directing the Speaker and the Senate  
2 Rules Committee to “initiate and complete the nomination and appointment process to replace those  
3 Scientific Review Panel members whose terms have expired.” (Petition, at p. 9, ¶ 1.) Petitioners are  
4 also seeking costs and attorney’s fees. (Petition, at p. 9, ¶ 2.)

5 Correspondence attached as Exhibit B to the Petition indicates that the terms of Dr. Craig V.  
6 Byus and Dr. John R. Froines, who were appointed by the Speaker to the Scientific Review Panel,  
7 expired on January 1, 2008, and January 1, 2009, respectively. That correspondence also indicates  
8 that the terms of Dr. Stanley Glantz and Dr. Paul Blanc, who were appointed by the Senate Rules  
9 Committee, have not yet expired. The Petition acknowledges that Dr. Blanc was reappointed from a  
10 list of nominees supplied by the U.C. President. (Petition, at p. 8, ¶ 26.)

11 The claims against the Speaker and the Senate Rules Committee contained in the Petition are  
12 ambiguous, as is the relief requested. It appears that Petitioners allege that the Speaker should have  
13 appointed or reappointed members to the panel after the expiration of the terms of Dr. Byus and Dr.  
14 Froines. Further, Petitioners appear to allege that those appointments or reappointments should have  
15 been made after receiving a new list of nominees from the UC President, even if Dr. Byus and Dr.  
16 Froines continue to meet all requirements for service on the panel and the Speaker is satisfied with  
17 their service. However, with respect to the Senate Rules Committee, Petitioners appear to allege that  
18 the most recent appointment of Dr. Glantz to the panel was procedurally defective, and that he is not  
19 entitled to serve the remainder of the 3-year term to which he has been appointed. Petitioners do not  
20 appear to challenge the appointment of Dr. Blanc.

### 21 III. Argument

#### 22 A. The Separation of Powers Doctrine Bars Petitioners’ Requested Relief

23 In California, the legislative power is vested solely in the Legislature. (Cal. Const., art. IV, §  
24 1). California’s separation of powers doctrine, found in article III, section 3 of the California  
25 Constitution, declares, “Persons charged with the exercise of one power may not exercise either of  
26 the others except as permitted by this Constitution.” Thus, the legislative power may not be  
27 delegated to the courts, nor may the courts interfere with the legislative process. (*Schaezlein v.*  
28 *Cabaniss* (1902) 135 Cal. 466, 467; see, e.g., *Santa Clara v. Sup. Ct.* (1949) 33 Cal.2d 552, 559.)

1 The California Supreme Court has held that making appointments to state boards,  
2 commissions, and similar entities is a valid legislative function. (*Marine Forests Society v.*  
3 *California Coastal Com.* (2005) 36 Cal.4th 1, 40; (*Marine Forests*.) That function has been  
4 recognized and exercised since the adoption of the 1849 Constitution. (*Id.* at pp. 31-42; see, e.g.,  
5 *People ex rel. Aylett v. Langdon* (1857) 8 Cal. 1, 16.) The Legislature’s authority to make such  
6 appointments stems from the fact that, under the Constitution, “the Legislature enjoys plenary  
7 legislative powers unless there is an explicit prohibition of legislative action in the Constitution  
8 itself.” (*Marine Forests, supra*, 36 Cal.4th 1, 39.) The only constitutional limitation on this authority  
9 is found in the separation of powers doctrine, which operates to prohibit the Legislature from  
10 defeating or materially impairing the constitutional functions of the executive or the judicial  
11 branches. (*Id.* at p. 45.)

12 It is well established in California that the courts may not compel the Legislature to exercise  
13 a legislative function. Thus, in *French v. Senate of State of Cal.* (1905) 146 Cal. 604, the California  
14 Supreme Court declined to require the issuance of a writ of mandate to compel the California State  
15 Senate to admit the petitioners as members after their expulsion from that body. In doing so, the  
16 court stated the following:

17 The legislature is a coordinate department of the state government. By article III of the  
18 constitution it is provided that one department of the state shall not exercise the functions of  
19 either of the other departments except as in that instrument expressly directed and permitted.  
20 There is no provision authorizing courts to control, direct, supervise, or forbid, the exercise  
21 by either house of the power to expel a member. These powers are functions of the legislative  
22 department, and therefore in the exercise of the power thus committed to it the senate is  
23 supreme. An attempt by this court to direct or control the legislature, or either house thereof,  
24 in the exercise of the power, would be an attempt to exercise legislative functions, which it is  
25 expressly forbidden to do.

26 (*Id.* at pp. 606-607)

27 Applying the separation of powers doctrine, courts have declined to order the Legislature to  
28 exercise other legislative functions, such as enacting a law (see *Mandel v. Myers* (1981) 29 Cal.3d  
531, 551; *Serrano v. Priest* (1976) 18 Cal.3d 728, 751) and appropriating funds (see *Myers v.*  
*English* (1858) 9 Cal. 341; *County of San Diego v. State of California* (2008) 164 Cal.App.4th 580).  
In the oft-cited case of *Myers v. English, supra*, 9 Cal. 341 (*Myers*), the California Supreme Court  
expanded upon the rationale behind the separation of powers doctrine as follows:

1 It is within the legitimate power of the judiciary, to declare the action of the Legislature  
2 unconstitutional, where that action exceeds the limits of the supreme law; *but the Courts*  
3 *have no means, and no power, to avoid the effects of non-action.* The Legislature being the  
creative element in the system, its action cannot be quickened by the other departments.

4 (*Id.* at p. 349 (emphasis added) (disapproved on other grounds by *Mandel v. Myers, supra*, 29 Cal.3d  
5 531, 551, fn. 9).)

6 The principle that mandamus may not be used to overcome legislative inaction has been  
7 reaffirmed many times since *Myers* was decided. (See, e.g., *Sklar v. Franchise Tax Board* (1986)  
8 185 Cal.App.3d 616; *County of San Diego v. State of California, supra*, 164 Cal.App.4th 580, 612-  
9 613.) Moreover, the *Myers* court refused to require the Legislature to make an appropriation,  
10 notwithstanding that the Legislature's inaction violated a provision of the Constitution mandating the  
11 payment of judges' salaries. (*Myers, supra*, 9 Cal. 341, 346; see also *County of San Diego v. State of*  
12 *California, supra*, 164 Cal.App.4th 580, 612-613.) As the court noted in *Myers*, there may be many  
13 valid reasons for the Legislature's inaction on a matter within the legislative arena (*Myers, supra*, 9  
14 Cal. 341, 349), and it is therefore outside the power of a court to compel legislative action with  
15 respect to the exercise of a legislative function.

16 It is important to note that, even if courts possess the power to compel some legislative  
17 appointment in urgent circumstances, no such circumstances exist with respect to the Scientific  
18 Review Panel. The appointees whose terms have expired continue to serve validly on the panel  
19 under section 1302 of the Government Code (referenced in Exhibit E to the Petition), which requires  
20 a public officer whose term has expired to serve until a successor has qualified. Thus, this is not a  
21 case in which a public body is unable to perform its duties because seats are vacant. Moreover,  
22 Petitioners do not allege that any current members of the Scientific Review Panel are unqualified to  
23 serve in their positions. Under these circumstances, there is no significant reason for this Court to  
24 intervene in the appointment process. As noted in the cases discussed above, courts have declined to  
25 compel the Legislature to take action even where action was expressly required by the Constitution.  
26 (See, e.g., *County of San Diego v. State of California, supra*, 164 Cal.App.4th 580.)

27 The authority of the Speaker and the Senate Rules Committee to appoint a total of four  
28 members of the nine-member Scientific Review Panel is clear, and Petitioners do not challenge that

1 authority. It is equally clear that, in light of both recent and longstanding precedent, the appointment  
2 and reappointment of members to that panel is a valid legislative function.

3 Thus, regardless of whether Petitioners' questionable construction of section 39670 is  
4 correct, an order directing the Speaker to appoint new members to the Scientific Review Panel  
5 would violate the separation of powers doctrine. With respect to the Senate Rules Committee, the  
6 requested relief would constitute an especially egregious violation of that doctrine because  
7 Petitioners seek not just to compel an appointment, but to invalidate an appointment already made  
8 that has not yet expired. Accordingly, as to the Speaker and the Senate Rules Committee, the relief  
9 requested by Petitioners falls outside the scope of the court's authority.

10 **B. Appointments to the Scientific Review Panel are Not Ministerial in Nature**

11 It is well established that a writ of mandate will not issue to compel the exercise of discretion  
12 unless that exercise is ministerial in nature. (*Sklar v. Franchise Tax Board, supra*, 185 Cal.App.3d  
13 616, 625-626.) However, the claim by Petitioners that the Speaker and the Senate Rules Committee  
14 have a ministerial duty to appoint members to the Scientific Review Panel is belied by the nature of  
15 the panel. The Scientific Review Panel must, of necessity, exercise a considerable level of discretion  
16 in determining how to apply scientific principles to the policies enacted by the Legislature relating to  
17 the regulation of toxic air contaminants. The process of appointing members to a body that exercises  
18 discretion in implementing legislative policy decisions cannot be deemed ministerial in nature.

19 The Legislature, as the policymaking branch of government, has the power to directly  
20 regulate air contaminants in California. Instead, the Legislature chose to create the Scientific Review  
21 Panel and the ARB and to delegate some of its discretionary, policymaking authority to those bodies.  
22 In so doing, it also chose to retain a voice in the policy decisions of those bodies by appointing a  
23 limited number of their members. As a result, appointments to the Scientific Review Panel are  
24 infused with sensitive political and policy implications.

25 In *Sklar v. Franchise Tax Board, supra*, 185 Cal.App.3d 616, the court declined to issue a  
26 writ of mandate because of the sensitive political nature of the issue in question. The plaintiffs in  
27 *Sklar* claimed that the Franchise Tax Board had failed to adopt regulations limiting deductions for  
28 alcoholic beverages as business expenses, and that this failure violated the board's ministerial duty

1 to enforce the income tax laws. (*Id.* at p. 619.) The court, while acknowledging that mandamus may  
2 lie to command the exercise of discretion in certain cases, nonetheless held that “the Board’s  
3 inaction implicates a sensitive area of legislative discretion....” (*Id.* at p. 626.) Thus, the court lacked  
4 authority to order the adoption of regulations.

5 Appointments to the Scientific Review Panel likewise implicate a sensitive area of legislative  
6 discretion. The panel must approve new regulatory standards proposed by the ARB before those  
7 standards may take effect. (See Health & Saf. Code § 39661.) In evaluating those proposed  
8 standards, members of the panel apply their own perspectives regarding what constitutes harmful  
9 exposure to air contaminants. Those perspectives, while grounded in science, involve matters about  
10 which scientists frequently disagree. Thus, through their appointments to the Scientific Review  
11 Panel, the Speaker and the Senate Rules Committee seek to promote scientific approaches that are  
12 consistent with their policy goals. In addition, their consideration of those appointments must take  
13 account of the sensitive politics of environmental regulation, including the views of other members  
14 of the Legislature, interest groups, and public opinion. Because of this inherent political sensitivity,  
15 there is nothing ministerial in the process of appointing members to the Scientific Review Panel.

16 Accordingly, a writ of mandate is not available to compel the Speaker or the Senate Rules  
17 Committee to exercise their discretion to make appointments to the Scientific Review Panel.

18 **C. A Petition for Writ of Mandate May Not be Used to Challenge Title to an Office**

19 As noted above, Petitioners’ allegations indicate that Dr. Blanc was properly appointed by  
20 the Senate Rules Committee, even under Petitioners’ interpretation of section 39670. (Petition, at p.  
21 8, ¶ 26.) The term of Dr. Glantz, also appointed by the Senate Rules Committee, does not expire  
22 until 2011. Thus, the Petition applies to the Senate Rules Committee only if it is construed to allege  
23 that the appointment of Dr. Glantz was procedurally defective. So construed, the Petition seeks, by  
24 writ of mandate, a ruling invalidating the appointment of Dr. Glantz to his current 3-year term and  
25 compelling the Senate Rules Committee to replace him.

26 However, a petition for writ of mandate may not be used to contest title to public office  
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1 occupied by a de facto officer. Instead, that claim must be asserted in an action in quo warranto.<sup>2</sup> In  
2 *Hallinan v. Mellon* (1963) 218 Cal.App.2d 342, 348 (*Hallinan*), the court held that an action in  
3 mandamus could not be maintained where the relief requested by the plaintiff was a court order  
4 requiring the repayment of salary and restraining the payment of future salary to a police  
5 commissioner who, the plaintiff claimed, was illegally appointed. The plaintiff asserted that he was  
6 not primarily challenging title to office but merely seeking to prevent illegal payments. The court  
7 rejected that argument, holding that “an action to determine the de facto officer’s right to salary ... is  
8 an action to try title to office” (*id.* at p. 348), and that such an action may be maintained only in quo  
9 warranto.

10 Similarly, in *Klose v. Superior Court* (1950) 96 Cal.App.2d 913, the plaintiff demanded that  
11 an election be called to fill a vacancy on a city council because, allegedly, the member in question  
12 was no longer a resident of the district. The court rejected the plaintiff’s contention that the question  
13 of title to the office was merely incidental to filling the office, stating, “This is putting the cart before  
14 the horse, for until some authority decides the dispute as to whether a vacancy exists, there is  
15 nothing to fill....” (*Id.* at p. 917.) Thus, an action in quo warranto was the plaintiff’s only remedy.

16 One reason for the rule that quo warranto proceedings are the exclusive remedy in actions to  
17 try title to an office is that, “when title to a public office is involved, sovereign power by quo  
18 warranto should be invoked in preference to private interests in order to avoid undue interference  
19 with government....” (*Stout v. Democratic County Central Committee* (1952) 40 Cal.2d 91, 93.) That  
20 rationale is applicable to the Scientific Review Panel, whose members must make decisions based  
21 upon their scientific viewpoints free from private efforts to coerce their actions. In addition, the  
22 panel’s approval of regulatory standards proposed by the ARB is critical to the public legitimacy that  
23 those standards possess. Consequently, when private interests disagree with its actions, it is  
24 important that those private interests not be allowed to interfere with its functions by casting doubt

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<sup>2</sup> Section 803 of the Code of Civil Procedure governs actions in quo warranto. Such an action may be brought only by the Attorney General on his or her own information or by complaint of a private party, unless the Attorney General consents to allow a private party to proceed. (C.C.P. Sec. 803; see 8 Witkin, Cal. Procedure (5th Ed. 2008), pp. 909-914.) The Attorney General’s decisions in this regard are reviewable by mandamus. (*International Assoc. of Firefighters, Local 55 v. City of Oakland* (174 Cal.App.3d 687, 698).)

1 on the legitimacy of the panel itself without appropriate review by the Attorney General.

2 In short, Petitioners seek to invalidate, by writ of mandate, the appointment of Dr. Glantz to  
3 the Scientific Review Panel by the Senate Rules Committee. Because a petition for writ of mandate  
4 may not be used to try title to an office, the relief requested by Petitioners is not available.

5 **IV. Conclusion**

6 The separation of powers doctrine is a cornerstone of American democracy and serves as  
7 guidepost for the structure of government on both the state and national level. In addition, the limits  
8 placed upon issuance of writs of mandate by centuries of precedent ensure that courts act to compel  
9 executive or legislative action only when that action lacks any discretionary component and is  
10 without sensitive political dimensions. Finally, the rule that an action in quo warranto constitutes the  
11 exclusive means of challenging title to a public office ensures that claims of illegitimacy may be  
12 asserted without unduly interfering with the functions of government.

13 Petitioners' request for relief would require this Court to violate all of these principles. Thus,  
14 the Speaker and the Senate Rules Committee respectfully request this Court to sustain their  
15 Demurrer without leave to amend, as Petitioners have failed to state facts sufficient to constitute a  
16 claim against them.

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18 Dated: August 26, 2009

Respectfully submitted,

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