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11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
12 **COUNTY OF ORANGE, CENTRAL JUSTICE CENTER**

13 JULIE FOLCIK,

14 Petitioner,

15 vs.

16 ORANGE COUNTY REGISTRAR OF  
17 VOTERS, and NEAL KELLEY, Registrar of  
18 Voters,

19 Respondent.

20 JOHN B. STEPHENS,

21 Intervener,  
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CASE NO. 30-2012-00553905

Assigned to: Hon. Franz Miller  
Department C14

**AMICUS BRIEF IN OPPOSITION TO EX  
PARTE APPLICATION FOR WRIT OF  
MANDATE; DECLARATIONS OF  
JOHN B. STEPHENS AND KATRINA  
FOLEY; EXHIBITS**

DATE: March 20, 2012  
TIME: 8:30 A.M.  
DEPT: C-14

1 **I. STEPHENS AND FOLEY SHOULD BE ALLOWED TO PARTICIPATE IN THE**  
2 **EX PARTE HEARING PENDING HIS EFFORTS TO OBTAIN LEAVE TO**  
3 **INTERVENE.**

4 Any “person, who has an interest in the mater in litigation, or in the success of either of the  
5 parties, or against both, may intervene in the action or proceeding.” Cal.Civ.Proc. Code § 387.

6 Prospective Intervener, John B. Stephens (“Stephens”) has been a citizen of the City of  
7 Costa Mesa for 23 years. Stephens has spoken on matters related to the proposed City Charter at  
8 two City Council meetings/hearings. Stephens was one of five citizens who signed the ballot  
9 argument against the Charter. Declaration of John B. Stephens (“Stephens Decl.”) at Exh. A.  
10 Stephens specifically requested, in writing, that he be given *ex parte* notice of any hearing on this  
11 matter. The Costa Mesa’s communications director promised, in writing, to “keep [Stephens]  
12 apprised.” Costa Mesa’s City Attorney was advised of Stephens’s request and Mr. Lobdell’s  
13 promise, in writing. *Id.* at ¶ 6, Exhibit B. Thereafter, Mr. Lobdell provided some information to  
14 Stephens, but he did not provide *ex parte* notice as requested. Stephens at ¶ 6, Exhibit B. On  
15 March 16, Mr. Lobdell wrote that no judge had been assigned to the case. He did not provide a  
16 copy of the Petition despite Stephens’s specific request.

17 Prospective Intervener, Katrina Foley (“Foley”) has been a citizen of the City of Costa  
18 Mesa for 17 years. Foley was a City of Costa Mesa Planning Commissioner from 1999-2004. In  
19 2004, Foley was elected to the City Council for the City of Costa Mesa, and then was re-elected in  
20 2008. In 2010, Foley was elected to the Newport Mesa Unified School Board and continues to  
21 hold public office. Foley also participated in a public education forum organized by residents  
22 about the proposed Charter and on March 19, 2012, Foley was also one of the signatories on the  
23 Rebuttal to the Argument in Favor of the proposed Charter.

24 On March 19, 2012 Foley requested, in writing, that the City provide her with the same  
25 information that was requested by Stephens and to also provide me with *ex parte* notice. Foley  
26 never received any communication, written or oral from the City Attorney, Tom Duarte, since the  
27 City blew the filing regarding the Charter. Foley sent an email to outside counsel listed on the  
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1 pleadings of the Petition, Mr. Richard J. Grabowski of Jones Day, requesting a copy of the  
2 Petition, the proof of service, judicial assignment, and *ex parte* paperwork once filed.

3           Foley and Stephens were finally able to obtain a copy of the Petition on March 19, 2012 by  
4 downloading it from the Orange County Superior Court web site and had to call the court clerk to  
5 discover the judicial assignment of the matter. Despite their requests, neither the City Attorney  
6 nor the outside counsel attorney in the law firm of Jones Day provided Stephens or Foley with a  
7 copy of the Petition or any of the *ex parte* hearing filings despite their numerous written requests.

8           Normally, intervention is requested by motion and the complaint-in-intervention is filed  
9 after leave is granted. However, because of the nature of this matter – emergency request for writ  
10 of mandate – and because no *ex parte* notice was provided despite the City of Costa Mesa’s  
11 promise in writing to provide such notice, Stephens and Foley fear that if a noticed motion is  
12 required by this Court, then the issue upon which Stephens and Foley request to be heard will be  
13 moot before intervention is granted. Concurrently with this opposition, Stephens and Foley will  
14 provide *ex parte* notice for an application for leave to file a complaint in intervention to be heard  
15 as soon as possible.

16 **II.     THERE IS NO BASIS TO ISSUE A WRIT OF MANDAMUS AND DOING SO**  
17 **WOULD BE REVERSIBLE ERROR.**

18           From the Petition, it appears that Petitioner will argue that the Writ of Mandamus should  
19 be granted because she made an “inadvertent mistake” (as opposed to an intentional mistake,  
20 apparently), that she was confused, and that even though the City blew the deadline for filing the  
21 Charter with the Registrar of Voters, Costa Mesa “substantially complied” with the filing  
22 requirements. *See* Petition at 1:13-17. Petitioner also argues that there will be “no prejudice to the  
23 [Registrar of Voters]” but Petitioner does not make any argument regarding lack of prejudice to  
24 the citizens of Costa Mesa. *Id.* at 1:19. Petitioner does not argue that there will be any harm,  
25 much less irreparable harm, to Petitioner, the ROV, Costa Mesa or its citizens if the Charter is  
26 placed on the November 2012 ballot as opposed to the June 2012 ballot.

27           Under *Barnes v. Wong*, 33 Cal.App.4th 390 (1995) (attached as Exhibit “D”), it would be  
28 reversible error to grant a Writ of Mandamus in this circumstance. In *Barnes*, the trial court

1 granted a Writ of Mandamus to allow the filing of a ballot argument even though it was submitted  
2 five hours late. The Court of Appeal held that granting a Writ of Mandamus in that circumstance  
3 was judicial error. As the *Barnes* court stated:

4 The two requirements for mandamus thus are (1) a clear, present and usually  
5 ministerial duty on the part of the respondent and (2) a clear, present and beneficial  
6 right in the petitioner to performance of that duty. (*Hutchinson v. City of  
Sacramento* (1993) 17 Cal.App.4th 791, 796, 21 Cal.Rptr.2d 779.)

7 *Barnes v. Wong*, 33 Cal.App.4th at 394-95. Neither of these requirements is present in the instant  
8 case. The ROV had no ministerial duty to accept the untimely-filed Charter resolution. Likewise,  
9 there is no beneficial right for Petitioner to be able to file a late document and have it accepted by  
10 the ROV as if it were timely.

11 The *Barnes* court also noted that mandamus is intended to correct an abuse of discretion,  
12 not to substitute the discretion of the Court for the discretion of the ROV:

13 And, while mandamus is not available to control the discretion exercised by a  
14 public official or board, it is available to correct an abuse of discretion by such  
15 party. (*Glendale City Employees' Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d  
328, 344, 124 Cal.Rptr. 513, 540 P.2d 609.)

16 *Barnes v. Wong*, 33 Cal.App.4th at 395. Here, there is no credible argument that the ROV abused  
17 its discretion when he rejected the admittedly-late filing of Petitioner. Therefore, there is no basis  
18 to grant a Writ of Mandamus – especially not on an *ex parte* basis.

19 *Barnes* also rejected the argument that “substantial compliance” is permitted in connection  
20 with election deadlines:

21 Nevertheless *Barnes* argued below that the writ should issue because he had  
22 substantially complied with the deadline rules. ***The doctrine of substantial  
23 compliance does not apply. Cases specifically dealing with statutory deadlines for  
24 election filings*** that are couched in language requiring documents to be filed “not  
less” than or “not later” than a given number of days before a designated time ***have  
insisted on strict compliance with the deadlines.***

25 *Barnes v. Wong*, 33 Cal.App.4th at 396 (emphasis added). The code section at issue Elections  
26 Code Section 10403 (Exhibit I) contains such language of mandatory deadlines, providing that the  
27 city “***shall*** at least 88 days prior to the election, file with the board of supervisors, and a copy with  
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1 the elections official, a resolution of its governing board requesting the consolidation, and setting  
2 forth the exact form of any question, proposition, or office to be voted upon at the election, as it is  
3 to appear on the ballot. . . .” (Emphasis added) The *Barnes* court concluded:

4           Substantial compliance . . . is not an appropriate consideration in mandamus where  
5           the predicate inquiry is whether there is (1) a present ministerial duty on the part of  
6           the officer in question that must be exercised or (2) an official abuse of discretion  
7           ripe for correction. Neither predicate existed and thus the extraordinary remedy  
8           should not have been granted.

8 *Barnes v. Wong*, 33 Cal.App.4th at 397.

9           Substantial compliance is not sufficient where there is a blown statutory election deadline;  
10          instead, strict compliance with statutory election deadlines is required. For instance, if a citizen  
11          registers to vote one day after the voter registration deadline, then he or she is not able to vote in  
12          the upcoming election. Likewise, in this case, there is no question that Petitioner blew the  
13          statutory election deadline. It does not matter whether Petitioner did so due to an “inadvertent  
14          mistake” or confusion. The Costa Mesa City Council operated on the thinnest of margins when  
15          starting the charter process on December 6, 2011. The City Council, City Attorney, and Petitioner  
16          well knew the election deadlines and they engineered the process to provide the least possible  
17          public participation in the debate regarding the proposed Charter. They should not be relieved of a  
18          mistake that was brought about by their poor planning and procrastination. To do so, would be  
19          contrary to *Barnes* and would therefore be reversible error.

20 **III.    THERE IS NO PREJUDICE IF THE CHARTER IS PLACED ON THE**  
21 **NOVEMBER 2012 BALLOT.**

22          Under *Barnes*, the issue of prejudice is not a valid consideration. Strict compliance with  
23          deadlines is required. If the Court considers the issue, however, it will be apparent that Petitioner  
24          will suffer no prejudice if Writ of Mandamus is denied.

25          Costa Mesa has been a general law city for 59 years since it was incorporated in 1953.  
26          Now, the City Council wants the citizens of Costa Mesa to vote to convert Costa Mesa to a charter  
27          city. The proposed charter would empower the Costa Mesa City Council to circumvent the general  
28          laws of the State of California on many issues relating to municipal affairs by adopting ordinances

1 and resolutions that conflict with the laws of the State of California. Whether the proposed  
2 Charter should be adopted has been hotly debated within Costa Mesa. There is no reason why that  
3 vote cannot take place in November 2012. In fact, the Court can take judicial notice that a vote in  
4 November 2012 as opposed to June 2012 would likely result in a greater percentage of registered  
5 voters participating in the Charter decision inasmuch as November 2012 is a general election for  
6 the President of the United States. During hearings on the proposed Charter, several citizens  
7 requested that the vote take place in November so that more citizens will participate in this  
8 election that so profoundly impacts the governmental structure of Costa Mesa. Stephens Decl. at  
9 ¶ 10.

10 **IV. THE CITIZENS OF COSTA MESA WILL SUFFER EXTREME PREJUDICE IF**  
11 **THE WRIT OF MANDAMUS IS GRANTED.**

12 The City Council engineered the process so that there would be the minimum amount of  
13 time necessary to conduct an election on the Charter. The pending petition creates more confusion  
14 as to whether the proposed Charter will even be on the ballot. This confusion has distracted the  
15 citizenry from debating the relative pros and cons of the Charter. The time lost by this late-filing  
16 debacle cannot be recovered. Stephens Decl. at ¶ 11.

17 Dated: March \_\_\_\_, 2012

STEPHENS FRIEDLAND LLP  
THE FOLEY GROUP, PLC

18 By: \_\_\_\_\_  
19 John B. Stephens  
20 Katrina Foley  
21 Attorneys for [Proposed] Interveners JOHN B.  
22 STEPHENS and KATRINA FOLEY  
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1 considering my input. The attached brief is filed as an *amicus* brief in anticipation of being  
2 allowed to intervene.

3           6.       As soon as I found out that the Charter had not been filed timely with the Registrar  
4 of Voters, I wrote to the City Attorney (Tom Duarte) and the City Communications Director (Bill  
5 Lobdell) asking for information. On March 13, 2012 I requested, in writing, that they provide me  
6 with *ex parte* notice. The City Communications Director wrote back that he would “keep [me]  
7 apprised.” I forwarded his e-mail to the City Attorney to make sure the City Attorney was aware  
8 of this written commitment by the Communications Director upon which I intended to rely. I have  
9 never received any communication, written or oral, from the City Attorney, Tom Duarte, since the  
10 City blew the filing regarding the Charter. I did, however, receive updates from the  
11 Communications Director, Bill Lobdell. On March 16, 2012, Mr. Lobdell wrote me that, “the City  
12 of Costa Mesa doesn’t have a hearing date yet to ask a judge to allow the measure on the ballot.”  
13 Nevertheless, I did not receive notice of the *ex parte* hearing despite the written promise that he  
14 would keep me “apprised.” True and correct copies of all of the communication between the City  
15 Attorney and the City Communications Director, on the one hand, and me, on the other hand, is  
16 attached hereto as Exhibit B and placed in chronological order. I underlined the dates on the  
17 correspondence for the Court’s convenience.

18           7.       I did not obtain a copy of the Petition until March 19, 2012 when it was  
19 downloaded from the Orange County Superior Court web site. Neither the City Attorney nor the  
20 City Communications Director provided me with a copy of the Petition despite my written request  
21 and Mr. Lobdell’s written promise to keep me “apprised.”

22           8.       As soon as I received the Petition, I wrote an e-mail to outside counsel for  
23 Petitioner, Richard Grabowski of Jones Day asking him to provide me with notice and to provide  
24 me with the papers he filed. Attached as Exhibit C is a true and correct copy of that e-mail. I have  
25 received no response from Mr. Grabowski.

26           9.       Costa Mesa has been a general law city for 59 years since it was incorporated in  
27 1953. Now, the City Council wants the citizens of Costa Mesa to vote to convert Costa Mesa to a  
28 charter city. The Proposed Charter would empower the Costa Mesa City Council to circumvent

1 the general laws of the State of California on many issues relating to municipal affairs by enacting  
2 ordinances and resolutions that are in conflict with the laws of the State of California. It is an  
3 important change governmental structure of Costa Mesa. Whether the proposed Charter should be  
4 adopted has been hotly debated within Costa Mesa since it was raised for the first time by *Mayor*  
5 *Pro Tem* James Righeimer late in the evening on December 6, 2011.

6 10. There is no reason why that vote on the Proposed Charter cannot take place in  
7 November 2012. In fact, I request that the Court take judicial notice that a vote in November as  
8 opposed to June would likely result in a greater percentage of Costa Mesa registered voters  
9 participating in the Charter decision inasmuch as November 2012 is a general election for  
10 President of the United States. During hearings on the proposed Charter, I personally observed  
11 several citizens requesting that the vote take place in November 2012 so that more citizens will  
12 participate in this election that so profoundly impacts the governmental structure of Costa Mesa.

13 11. The City Council engineered the process so that there would be the minimum  
14 amount of time necessary to conduct an election on the Charter. The pending Petition has created  
15 confusion as to whether the proposed Charter will even be on the ballot. I know this because I am  
16 personally confused about the timing of the Writ of Mandamus and the uncertainty associated with  
17 whether it will be granted and, if it is granted, whether it will be appealed and, if so, the timing of  
18 any appeal or appellate writ. If I am confused despite having practiced law in California since  
19 1989, it is reasonable to infer that others within Costa Mesa are similarly confused, or more so.

20 12. Attached as Exhibit D is the *Barnes* case that is cited in the attached *amicus* brief.

21 13. Attached as Exhibit E is a copy of a news article from the Daily Journal about this  
22 issue. I offer this so that the Court can consider whether this matter should be transferred to Judge  
23 Tam Namoto-Schumann who is handling a case that appears to be related based upon the quote by  
24 *Mayor Pro Tem* James Righeimer in the attached Daily Journal Article.

25 14. Attached as Exhibit I is a true and correct copy of California Elections Code  
26 Section 10403.

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Executed this 19th day of March 2012 in Newport Beach, California. I declare under penalty of perjury that the foregoing is true and correct.

\_\_\_\_\_  
John B. Stephens



1 to intervene in this matter under Code of Civil Procedure Section 387. I will move the Court as  
2 soon as possible for leave to intervene. I will provide *ex parte* notice to all parties' counsel as  
3 required by California Rules of Court. I ask the Court to please not make any decision on the  
4 Petition without considering my input.

5         6.       As soon as I found out that the Charter had not been filed timely with the Registrar  
6 of Voters, I began researching the issue. On March 19, 2012 I requested, in writing, that the City  
7 provide me with the same information that was requested by John Stephens and with *ex parte*  
8 notice. I have never received any communication, written or oral from the City Attorney, Tom  
9 Duarte, since the City blew the filing regarding the Charter. Attached hereto as Exhibit G is a true  
10 and correct copy of my March 19, 2012 email.

11         7.       I also sent an email to outside counsel listed on the pleadings of the Petition, Mr.  
12 Richard J. Grabowski of Jones Day, requesting a copy of the Petition, the proof of service, judicial  
13 assignment, and *ex parte* paperwork once filed. Attached as Exhibit H to my declaration is a copy  
14 of the email.

15         8.       I received a copy of the Petition when it was downloaded from the Orange County  
16 Superior Court web site and discovered the judicial assignment as well as the reservation of *ex*  
17 *parte* application by calling the court clerk. Neither the City Attorney nor the outside counsel  
18 attorney in the law firm of Jones Day provided me with a copy of the Petition or any of the *ex*  
19 *parte* hearing filings despite my written request. In fact, as of 6:15 p.m. Monday, March 19, 2012,  
20 I still have received no response.

21         9.       Costa Mesa has been a general law city for 59 years since it was incorporated in  
22 1953. Now, the City Council wants the citizens of Costa Mesa to vote to convert Costa Mesa to a  
23 charter city. The charter would empower the Costa Mesa City Council to circumvent the general  
24 laws of the State of California on many issues relating to municipal affairs by enacting ordinances  
25 and resolutions that are in conflict with general law. It is an important change to the governmental  
26 structure of Costa Mesa. Whether the proposed Charter should be adopted has been hotly debated  
27 within Costa Mesa since it was raised by *Mayor Pro Tem* James Righeimer for the first time late in  
28 the evening on December 6, 2011.

