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In the

Supreme Court

of the

State of California

JOHN ALBERT DUMMETT, JR., et al.,

Plaintiffs and Appellants,

v.

DEBRA BOWEN, as Secretary of State, etc.,

Defendant and Respondent.

CALIFORNIA COURT OF APPEAL · THIRD APPELLATE DISTRICT · NO. C073763
SUPERIOR COURT OF SACRAMENTO · HON. MICHAEL P. KENNY
NO. 342012800001091CUWMGDS

PETITION FOR REVIEW

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PETITION FOR REVIEW

ISSUES PRESENTED

On March 20, 2012, Plaintiff-Appellant John Albert Dummett, Jr., a write-in candidate for President of the United States, sought a writ of mandate to order California Secretary of State Debra Bowen to require all presidential candidates to provide proof of their eligibility for the office of President before placing their names on the official state ballot. Alternatively, Plaintiff-Appellant Dummett asserted that California Elections Code § 6901 is unconstitutional insofar as it could be read to mandate that the Secretary of State place presidential candidates of established political parties on the official state ballot without verifying the eligibility of those candidates.

The trial court granted Defendant-Respondent's demurrer on the ground that determining the eligibility of presidential candidates is "not within the mandatory duties of the Secretary of State." Dummett v. Bowen, slip op., p. 3.

On appeal, on July 21, 2014, the Court of Appeal for the Third Appellate District affirmed on the ground that Keyes v. Bowen, 189 Cal.App.4th 647 (2010), had previously ruled that the Secretary of State does not have a duty to investigate and determine if candidates are qualified to be on the official state ballot.

The questions for review by this Court are:

1. Whether the California Secretary of State, who approves names to be placed on official state election ballots, has a duty to determine eligibility to serve in office of presidential candidates before placing their names on the official state ballot?

2. Whether California Elections Code § 6901 unconstitutionally prevents the California Secretary of State from performing her duties to consider the constitutional eligibility of presidential candidates of established political parties to serve in office before placing their names on the official state ballot, thus potentially allowing ineligible candidates to appear on the official state ballot?

NECESSITY FOR REVIEW

Although the issues presented in this case arose because of questions about whether President Barack Obama qualified as a "natural born citizen," as required by Article II, Section 1, Clause 5 of the U.S. Constitution (slip op., p. 2 n.2), the issues are not limited to this President, his party, or even this time. Thus, this case does not raise a partisan issue. Questions of presidential eligibility have arisen at various times throughout the nation's history, including the 19th century President Chester A. Arthur, the 20th century candidacy of George Romney, and the 21st century candidacy of John McCain. Mr. Obama has not, then, been singled out for special scrutiny. Indeed, the "natural born citizen" credentials of Senators Rick Santorum, Marco Rubio, and Ted Cruz and Governor Bobby Jindal — all of whom are recognized as potential Republican Party presidential candidates in the 2016 election — are already being debated.

The constitutional requirement that the President be a "natural born citizen" demonstrates that America's founders did not leave the issue of a person's eligibility to serve to the electors or voters. Rather, as Justice Joseph Story proclaimed in his Commentaries on the Constitution, our founders established a precondition because they considered it "indispensable" that the person occupying the highest office in the land be a natural born citizen as "a barrier against ... corrupt interferences of foreign

governments in executive elections." Not only did the founders not trust the voters to protect the nation from the threat of international intrigue, but also they built a fence to keep Congress out of presidential elections, barring service of Representatives and Senators as electors, and limiting Congress's powers to specifying the day of the election, to counting the votes of the Electoral College, and to providing for an order of succession to the presidency upon the demise or disability of the President.

Those who suggest that it is up to Congress to enforce the citizenship eligibility requirement by the exercise of its powers of impeachment and removal would unnecessarily and often unconstitutionally disrupt the body politic — as such action would necessarily take place after a President took office. As the impeachment process requires a showing of "Treason, Bribery, or other high Crimes and Misdemeanors" (Art. II, Sect. 4), a lesser misrepresentation of citizenship status by a President would appear insufficient to remove a President who is not eligible to serve. And there is no other known constitutional warrant for Congress to remedy such a circumstance.

Likewise, efforts to enlist the federal judiciary in an effort to remove a sitting President come too late in the day and are too disruptive to be relied upon. Even the electoral college is not well positioned to enforce the

presidential eligibility requirements as it does not meet until after the popular vote occurs.

That does not mean, however, that the "natural born citizen" requirement was not intended to be legally enforced. Vesting the presidential selection process in the several state legislatures, the Constitution anticipates each state to enforce the citizenship requirement before an election — here, in finalizing the official state ballot for the selection of the presidential electors. And if California state officials neglect their duty under the U.S. Constitution, it is this Court's "province" and "duty," as the highest judicial body in the state of California, to mandate their compliance with the U.S. Constitution. *See* Marbury v. Madison, 5 U.S. 137, 177 (1803).

To justify her neglect of the "natural born citizen" eligibility requirement, the California Secretary of State refers to California Elections Code § 6901, which directs her to place the names of the presidential electors for candidates of established political parties on the election ballot without regard to citizenship. Yet even then, the Secretary of State apparently assumes that she is bound by this mandate only as it relates to a candidate's citizenship, but not as it relates to a candidate's age, even though standards for both are prescribed by Article II, Section 1, Clause 5 of the Constitution. If this statute is to be read in this fashion, it is

unconstitutional. *See* Lindsay v. Bowen, 750 F.3d 1061, 1065 (9th Cir. 2014).

Those who now would claim that the Chief Elections Officer of the State of California has no duty to enforce the "natural born citizen" clause of the U.S. Constitution would sanction a presidential election system which disregards the constitutional text. Some who deny that the states are bound to enforce the federal constitutional text may harbor animus toward its eligibility requirements.[1] However, this Court is duty bound to uphold the U.S. Constitution as written. Indeed, this Court is duty bound to grant this petition to settle these profoundly important questions that, if unaddressed by this Court, will render the "natural born citizen" clause in the U.S. Constitution a dead letter, undermining the confidence of people not just in the California Secretary of State, but also in the courts, and ultimately in the person elected to the highest office in the land, whose oath is to "preserve, protect and defend the Constitution of the United States."

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[1] *See e.g.*, Professor Jonathan Turley, "Arnold Schwarzenegger and the Constitutional Ban on Foreign Born Presidents" ("The eligibility provision was written for a different people and a different time. It now strikes a decidedly xenophobic note in an otherwise inclusive document.") http://jonathanturley.org/2007/08/20/arnold-schwarzenegger-and-the-constitutional-ban-on-foreign-born-presidents/

STATEMENT OF THE CASE

Plaintiff-Appellant Dummett is a citizen of California and was a write-in candidate for President of the United States in 2012.[2] As a candidate, Dummett has a personalized legal interest in having a lawful and fair election contest.

Defendant-Appellee Bowen is Secretary of State, and is the Chief Elections Officer for the State of California.[3] She is responsible for enforcing California elections law, verifying the eligibility of candidates for office, and approving names to be placed on the official state election ballots.

Article II of the U.S. Constitution sets forth eligibility criteria for the office of President of the United States.[4] There is no federal office or agency that verifies the constitutional eligibility of candidates for federal office. California Elections Code § 6901 requires the Secretary of State simply to "cause the names of the candidates for President and Vice

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2 *See* Federal Election Commission registration # P20002499.

3 *See* California Government Code § 12172.5(a).

4 "No Person except a **natural born Citizen** ... shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of **thirty five Years**, and been fourteen Years a Resident within the United States." Article II, Section 1, Clause 5 (emphasis added).

President of the several political parties to be placed upon the ballot for the ensuing general election."

On February 23, 2012, Dummett and his co-plaintiffs filed a petition for a writ of mandate compelling Bowen to determine eligibility prior to placing the names of presidential candidates on the official state ballot. Further, plaintiffs sought a declaratory judgment that California Elections Code § 6901 is unconstitutional. On March 29, 2013, the trial court entered an order sustaining Bowen's demurrer without leave to amend and dismissing the petition in its entirety.

Little more than a month later, on May 6, 2014, in an unrelated case, the U.S. Court of Appeals for the Ninth Circuit took a different approach and held that Secretary of State Bowen's exclusion of a clearly unqualified (27-year-old) person from the ballot was proper: "The Secretary does not violate the Equal Protection Clause by excluding from the ballot candidates who are indisputably ineligible to serve, while listing those with a colorable claim of eligibility." Lindsay v. Bowen, 750 F.3d 1061, 1065 (9th Cir. 2014).

Plaintiffs in this case appealed from dismissal of their petition and, on July 21, 2014, the Court of Appeal for the Third Appellate District

affirmed the judgment of the trial court.[5] The Court of Appeal[6] followed Keyes v. Bowen, a 2010 decision of the same court that held that "the California Secretary of State 'does not have a duty to investigate and determine whether a presidential candidate meets [the] eligibility requirements of the United States Constitution.'" Dummett, slip op. at 1. The Court of Appeal addressed the Lindsay decision, but disregarded it as having no bearing on this case.

REASONS FOR GRANTING REVIEW

I. ENSURING THAT CANDIDATES FOR THE OFFICE OF PRESIDENT OF THE UNITED STATES ARE ELIGIBLE TO SERVE IF ELECTED PRESENTS AN IMPORTANT QUESTION OF LAW.

The "executive Power" of the United States government is "vested" in the President of the United States,[7] and he is the "Commander in Chief of the Army and Navy of the United States."[8] The presidency is considered to

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[5] No petition for rehearing was filed.

[6] On August 27, 2014, the Court of Appeal decided a case similar to Dummett. Relying primarily on Keyes' unsupported assumption that "eligibility is best left to each party...," the court held that the Secretary of State has no duty to provide a check on a private organization's determination whether a presidential candidate meets the constitutional eligibility requirements. Noonan v. Bowen, No. C071764 (3rd App. Dist., Aug. 27, 2014).

[7] Article II, Section 1, Clause 1.

[8] Article II, Section 2, Clause 1.

be the most powerful elected position in the United States and, as such, is considered by many to be the most powerful political office in the world.

Indeed, not only is the office and power of the executive branch vested in one person, but also the presidency is the only office vested by the Constitution with the sworn duty to "**preserve, protect and defend** the Constitution of the United States." Article II, Section 1, Clause 8 (emphasis added). All other civil government officers — legislative, executive, and judicial, federal and state — are only "bound by Oath or Affirmation, to **support** this Constitution." Article VI, Section 3 (emphasis added).

It is in this light that the Constitution requires that the President, and only the President, to be a "natural born Citizen." As Joseph Story observed in his Commentaries on the Constitution:

> It is indispensable ... that the president should be a natural born citizen of the United States.... It cuts off all chances for ambitious foreigners, who might otherwise be intriguing for the office; and interposes a barrier against those corrupt interferences of foreign governments in executive elections, which have inflicted the most serious evils upon the elective monarchies of Europe.... [J. Story, Commentaries on the Constitution, § 1473 (1833), reprinted in 3 The Founders' Constitution, Item 2, p. 564 (P. Kurland & R. Lerner, eds., Univ. of Chi. Press: 1987).]

Likewise, Federalist No. 68 explained that the presidential selection process was designed to protect, in part, against foreign influences:

> Nothing was more to be desired, than that every practicable obstacle should be opposed to cabal, intrigue and corruption. These most deadly adversaries of republican government might naturally have been expected to make their approaches from more than one quarter, but chiefly from the **desire in foreign powers to gain an improper ascendant in our councils**. How could they better gratify this, than by raising a creature of their own to the chief magistracy of the union? [Federalist No. 68, *The Federalist* at 353 (G. Carey & J. McClellan, eds., Liberty Fund: 2001) (emphasis added).]

The enforcement of the constitutional eligibility requirements by the Secretary of State of California constitutes an important statutory and constitutional issue,[9] not a narrow partisan issue as some have sought to characterize it.[10] Disputes over the application of this clause date back 133 years to President Chester A. Arthur. In the upcoming 2016 Presidential election, there are already no fewer than four candidates or potential candidates for the Republican nomination whose ability to meet the "natural

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[9] *See* McInnish v. Bennett, 2014 Ala. LEXIS 41, at *1 (Ala. 2014) (wherein the full Supreme Court of Alabama addressed the issue whether that state's Secretary of State had "an affirmative duty to investigate the qualifications of a candidate for President of the United States of America before printing that candidate's name on the general-election ballot in this state.").

[10] *See, e.g.*, "Republican = Birther," Partisan Dawn blog, http://partisandawn.wordpress.com/2012/05/30/republican-birther/.

born citizen" requirement has been put into question.[11] Thus, candidate eligibility has arisen in the past and remains an issue that will continue to arise in the future — in both major political parties as well as so-called "third parties."[12] This Court has been presented with a case which requires it to decide whether the California Secretary of State is duty-bound to determine the critical question of the eligibility of a presidential candidate to hold such a powerful office.

Moreover, because California currently has the largest number of presidential electors in the electoral college, the issue of the integrity of California's state presidential ballot significantly effects the outcome of the

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[11] For example, U.S. Senator Ted Cruz (R-TX) was born in Calgary, Alberta, Canada to an American mother, but a Cuban citizen father. http://bioguide.congress.gov/scripts/biodisplay.pl?index=C001098. Former U.S. Senator Rick Santorum (R-PA), who ran for president in 2012 and may be considering running again in 2016, was born in the U.S. to an American mother, but an Italian citizen father. http://www.politico.com/news/stories/0812/80348.html U.S. Senator Marco Rubio (R-FL) was born in Florida in 1971 to Cuban citizen parents who became naturalized U.S. citizens after his birth. http://www.washingtonpost.com/politics/marco-rubios-compelling-family-story-embellishes-facts-documents-show/2011/10/20/gIQAaVHD1L_singlePage.html. Louisiana Governor Bobby Jindal was born in Louisiana in 1971 to parents who were citizens of India, who became naturalized U.S. citizens after his birth. http://www.wnd.com/2011/05/297485/.

[12] As such, the issues in this case are not mooted by the fact that the 2012 elections are over because they are "capable of repetition, yet evading review" — indeed capable of repetition every four years. *See, e.g.*, Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 125 (1974).

national election. Thus, this case presents an issue of not only statewide, but also national importance.

II. THE STATES HAVE THE PRIMARY RESPONSIBILITY FOR DETERMINING PRESIDENTIAL CANDIDATE ELIGIBILITY.

Article II, Section 1, Clause 2 of the U.S. Constitution provides:

> Each **State** shall appoint, in such **Manner as the Legislature** thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but **no Senator or Representative**, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector. [Emphasis added.]

It is the States, rather than Congress, that are given the primary authority for administering the presidential elections. Congress's role in presidential elections under Article II is quite limited. Article II, Section 1, Clause 4 grants Congress the authority merely to "determine the Time of chusing the Electors, and the Day on which they shall give their Votes...." Indeed, Article II, Section I, Clause 2 specifically excludes U.S. Senators and Representatives (as well as all other federal employees) from being presidential electors, thus providing additional protective distance from federal influence over the presidential electoral process.[13]

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[13] *See* Federalist No. 68, *The Federalist* at 353 ("No senator, representative, or other person holding a place of trust or profit under the United States, can be of the number of the electors. Thus, without corrupting the body of the people, the immediate agents in the election will

Fulfilling its role to determine the manner of the elections, the California legislature vests in the California Secretary of State the responsibility to serve as the Chief Elections Officer, a role which includes placing the names of presidential candidates on the official state general election ballots. *See* California Elections Code § 6901.

Despite the Secretary of State's statutory duty, the Appellate Court below relied on Keyes v. Bowen, 189 Cal.App.4th 647 (2010), which incorrectly assumed the ability of federal mechanisms to resolve questions of presidential eligibility. Specifically, the court in Keyes grounded its decision on the Twelfth and Twentieth Amendments[14] to the U.S. Constitution along with 3 U.S.C. § 15. The federal mechanisms set out in those amendments do not address consideration of the Article II presidential eligibility.[15]

The Twelfth Amendment directs the Electors to cast their votes and send the votes in a sealed envelope to the United States Congress for

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at least enter upon the task, free from any sinister bias.").

[14] As shown *infra*, the Twelfth and Twentieth Amendments were not significant changes to the presidential election process, but more in the nature of "housekeeping," to remedy specific problems that had arisen with federal elections.

[15] But even if they did, those federal protections over who may serve in the **office** would fail to protect the integrity of the **California ballot** because any such federal protections would only be applied after an election has taken place.

counting. Once the votes are sent to Congress, the process for objections under the amendment's implementing statute, 3 U.S.C. § 15, is very limited. The objections must be in writing, signed by at least one Senator and one Member of the House, and clearly state without argument the ground for the objection. Each House of Congress then receives the objections and votes only on whether the procedures for selecting the Electors were followed, and if they were followed, the Electoral votes may not be rejected: "no electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to according to section 6 of this title from which but one return has been received shall be rejected." 3 U.S.C. § 15.

The statutory scheme established in 3 U.S.C. § 15 does not allow for general objections to candidates to be raised, and even if such objections were allowed, Electoral votes may not be rejected if the Electors were properly selected. The question of whether a candidate for President is eligible cannot be seen to have been comprehended by the Twelfth Amendment as a matter to be addressed, much less resolved, by Congress.

Section 3 of the Twentieth Amendment details a procedure to govern the transition of power from the President Elect to the Vice President Elect in the extraordinary event that the President Elect died or otherwise "failed to qualify." In the event that the Vice President Elect shall also have failed

to "qualify," Congress was empowered by law to provide for an Acting President, but only until either the President or Vice President "shall have qualified." In the further event that neither the President nor Vice President qualified, Congress was authorized to enact a governing law of presidential succession, which it has done.

Clearly, the section does not confer any powers on Congress to determine a presidential candidate's eligibility. Rather, the Twentieth Amendment left intact the authority of the state legislatures to establish the manner by which the President and Vice President are to be elected, and the role of the Electoral College in the process. Importantly, no new powers were assigned to Congress under the Twentieth Amendment to change the "qualifications" for election to either office, including the Article II eligibility requirements for the office of President.

The Twelfth and Twentieth Amendments notwithstanding, the selection of a President remains a matter entrusted to the various state legislatures.

III. THE STATE HAS AN INDEPENDENT INTEREST AND DUTY TO PROTECT BALLOT INTEGRITY.

In discussing the scheme for elections, the U.S. Supreme Court explained that "a State has **an interest, if not a duty**, to protect the integrity of its political processes from frivolous or fraudulent candidacies." Bullock

v. Carter, 405 U.S. 134, 145 (1972) (emphasis added). As Chief Elections Officer in California, Secretary of State Bowen had the duty to ensure the integrity of the official state ballot, but did not fulfill that duty.

Fully consistent with Bullock, just three months ago, on May 6, 2014, the U.S. Court of Appeals for the Ninth Circuit decided Lindsay v. Bowen, 750 F.3d 1061 (9th Cir. 2014), observing that California Secretary of State Bowen was justified in taking the initiative to exclude a presidential candidate of the Peace and Freedom Party from the ballot because that candidate was ineligible to serve in that office. The person was excluded due to the fact that she was 27 years old, not meeting the constitutional requirement that a person be at least 35 years old to be eligible for the presidency.

In support of its opinion, the Ninth Circuit repeated the proposition that "'a State has **an interest, if not a duty**, to protect its **integrity** of the political processes from frivolous or **fraudulent** candidacies.'" 750 F.3d at 1064 (citing Bullock v. Carter, 405 U.S. 134, 145 (1972) (emphasis added)). Moreover, the federal court of appeals opined that if the Secretary did not exclude an obviously ineligible candidate from the ballot, it "would mean that anyone, regardless of age, citizenship or any other constitutional ineligibility would be entitled to **clutter and confuse** our electoral ballot." *Id.* (emphasis added). Thus, the court concluded that "[b]ecause including

ineligible candidates on the ballot could easily cause voter confusion, treating ineligible candidates differently from eligible ones is rationally related to the state's interest in maintaining the **integrity of the election process**." *Id.* (emphasis added)

The Court of Appeal below attempted to distinguish the concerns in the instant case from Lindsay, "where the lack of qualification is patent and undisputed," concluding that it is one thing to remove an obviously ineligible candidate, it is quite another to require the Secretary of State to "investigate and determine qualifications, particularly when the matter of the qualification is in dispute." *See* Dummett, slip op. at 5. Such an artificial distinction creates a significant threat to electoral integrity, in that the candidate who is successful in concealing his or her ineligibility is rewarded, by being insulated from any serious vetting by the Secretary, which only would encourage fraudulent candidacies.

As the primary guardian of the integrity of California's ballot, the Secretary of State has the duty to ensure that only those who are eligible to hold the office that they seek are on the ballot. To fulfill Secretary Bowen's sworn duty to uphold and enforce California election laws, she must apply even-handedly the age, residency, and citizenship requirements prescribed by the United States Constitution for the office of President, and avoid even the appearance of partisan or political motivation, such as she failed to do

here, having excluded an underage presidential candidate of the Peace and Freedom Party, while ignoring challenges to the eligibility of a candidate of one of the two major political parties. Here, Bowen exercised the duties of her office in an arbitrary and capricious manner.

IV. CALIFORNIA ELECTIONS CODE SECTION 6901 UNCONSTITUTIONALLY CONFLICTS WITH ARTICLE II, SECTION 1, CLAUSE 5 OF THE U.S. CONSTITUTION.

Relying on California Elections Code § 6901, the trial court excused the Secretary of State from any obligation to determine the eligibility of candidates before placing their names on the ballot. Section 6901 states: "The Secretary of State shall cause the names of the candidates for President and Vice President of the several political parties to be placed upon the ballot for the ensuing general election." Read as an unqualified mandate, section 6901 flatly conflicts with the U.S. Constitution's Article II presidential eligibility criteria. Although state legislatures are vested with power to determine the "manner" of selecting the president, they do not have the authority to change federal constitutional eligibility requirements, which they must, without reservation, accept and faithfully enforce.

Among the statutory duties of California's Chief Elections Officer, Secretary of State Bowen is to ensure that all election laws are enforced. *See* California Government Code § 12172.5(a). However, the trial court's interpretation of Elections Code § 6901 puts the Secretary of State in the

inconsistent position of being **required to determine eligibility** for almost every office that would appear on the ballot — Governor, Lieutenant Governor, Secretary of State, Controller, Treasurer, Attorney General, Insurance Commissioner, Member of the State Board of Equalization, all state Senators and Members of the Assembly, United States Senators and Members of the House of Representatives — but being **required to ignore eligibility** for President and Vice President of the United States candidates nominated by established political parties.

If section 6901 is read to require the Secretary of State to list candidates on the ballot regardless of any conflict with the Article II, Section 1, Clause 5 eligibility provisions of the U.S. Constitution, she has not consistently done so, having enforced that statute selectively, in an arbitrary and capricious manner, abusing her authority by selecting certain eligibility criteria to apply while ignoring other criteria. As noted above, the Peace and Freedom Party candidate was disqualified in 2012 from the ballot because of her age, while the Secretary of State ignored verification for candidates based on the citizenship requirement in the very same presidential election. Such unfettered discretion is illegal and unconstitutional in that it gives the Secretary of State the arbitrary power to determine or ignore any particular candidate's eligibility at her whim.

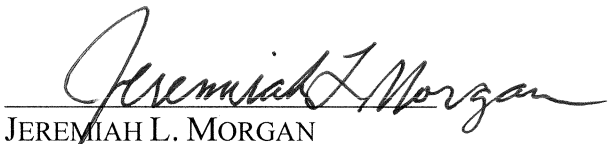
Thus, to the extent California Elections Code § 6901 requires the Secretary of State to ignore the plain requirements of the U.S. Constitution's Article II, it is unconstitutional and unenforceable.

CONCLUSION

For the foregoing reasons, petitioner submits that this Court should grant this petition for review.

August 29, 2014

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

CRC 8.204(c)(1)

I hereby certify that this Petition for Review consists of 4,523 words per California Rules of Court Rule 8.204(c)(1). The number of words was confirmed by reference to counting by the WordPerfect computer program used to typeset this brief.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed this 29th day of August, 2014.

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OPINION

Filed 7/21/14 Dummett v. Bowen CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

JOHN ALBERT DUMMETT, JR., et al., Plaintiffs and Appellants, v. DEBRA BOWEN, as Secretary of State, etc., Defendant and Respondent.	C073763 (Super. Ct. No. 342012800001091CUWMGDS)

In *Keyes v. Bowen* (2010) 189 Cal.App.4th 647 (*Keyes*), this court held that the California Secretary of State "does not have a duty to investigate and determine whether a presidential candidate meets [the] eligibility requirements of the United States Constitution." (*Id.* at p. 651-652.) Within two years of the *Keyes* decision, plaintiff John Albert Dummett, Jr., a write-in presidential candidate in the 2012 California Republican primary, and others (hereafter Dummett) commenced this mandamus proceeding, seeking a writ of mandate to require defendant Debra Bowen, as Secretary of State, to "require all candidates for the office of President of the United States provide sufficient proof of

eligibility prior to approving their names for the ballot" and to enjoin Bowen "from placing the names of candidates who have failed to so prove their eligibility on the 2012 California Presidential primary election ballot." Like the plaintiffs in *Keyes*, Dummett based his petition on the assertion that Bowen has a duty to "verify the eligibility of Presidential candidates." Dummett also asserted in his petition that Elections Code section 6901 is unconstitutional to the extent it requires the Secretary of State to place presidential candidates' names on the ballot without vetting their qualifications.[1]

The trial court sustained Bowen's demurrer without leave to amend. Because Dummett has shown no error in that ruling, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In March 2012, Dummett filed a petition for writ of mandate "challeng[ing] the failure of . . . Bowen . . . to verify that all candidates for the office of President of the United States seeking to be placed on the California Presidential primary ballot are eligible for that office under the U.S. Constitution, Article II, Section 1, Clause 5."[2] He further asserted that "the language of California Elections Code [section] 6901, compelling the Secretary of State to place any candidate nominated by a political party on

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1 "Whenever a political party, in accordance with Section 7100, 7300, 7578, or 7843, submits to the Secretary of State its certified list of nominees for electors of President and Vice President of the United States, the Secretary of State shall notify each candidate for elector of his or her nomination by the party. *The Secretary of State shall cause the names of the candidates for President and Vice President of the several political parties to be placed upon the ballot for the ensuing general election.*" (Elec. Code, § 6901, italics added.)

2 The United States Constitution provides that "[n]o person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of President." (U.S. Const., art. II, § 1, cl. 5.)

Dummett and Barnett's position is that President Obama is not a " 'natural born citizen' " because his father was not a United States citizen.

the ballot, without verifying that the candidate is eligible for the office, is in direct conflict with the requirements for Presidential eligibility in Article II of the United States Constitution."

Bowen demurred. The trial court sustained the demurrer without leave to amend. The court concluded that the petition "fail[ed] to state facts sufficient to constitute a cause of action because [the petition] requires the Court to find that the Secretary of State has a mandatory duty to make a determination of the eligibility of candidates in the presidential primary election. Such a determination is a matter that is not within the mandatory duties of the Secretary of State." In reaching this conclusion, the court relied largely on this court's decision in *Keyes*. The trial court also concluded that Elections Code section 6901 is not unconstitutional because that "contention is based on the theory that the Secretary of State has a legal duty, in this instance one that is alleged to be of constitutional origin, to determine the eligibility of candidates for President of the United States before their names may be placed on the ballot. As discussed above, no such legal duty exists."

From the resulting judgment of dismissal, Dummett appealed.

DISCUSSION

On appellate review of the sustaining of a demurrer without leave to amend, "[i]t is plaintiffs' burden to show either that the demurrer was sustained erroneously or that the trial court's denial of leave to amend was an abuse of discretion." (*Keyes*, *supra*, 189 Cal.App.4th at p. 655.) Because Dummett does not assert any error in the denial of leave to amend, the sole question before us is whether he has carried his burden of showing that the demurrer was sustained erroneously. To carry that burden, he must persuade us that the Secretary of State *does*, in fact, have a duty to investigate and determine whether a presidential candidate meets the eligibility requirements of the United States

Constitution.[3] (See *Keyes*, at p. 657 [issuance of writ of mandamus requires " 'a clear, present and usually ministerial duty on the part of the respondent' "].) He has not done so.

As we noted at the outset of this opinion, this court resolved the question of whether the Secretary of State has such a duty in *Keyes*, concluding that no such duty exists. (*Keyes*, *supra*, 189 Cal.App.4th at pp. 651-652.) Dummett does not persuade us that *Keyes* was wrongly decided.

In support of his assertion that the Secretary of State has the "power[] and dut[y]" to examine the qualifications of candidates for every office subject to election in the State of California, Dummett cites Government Code section 12172.5. As we noted in *Keyes*, however, that statute provides only that "[t]he Secretary of State is charged with ensuring 'that elections are efficiently conducted and that state election laws are enforced . . . .' " (*Keyes*, *supra*, 189 Cal.App.4th at p. 658, quoting Gov. Code, § 12172.5, subd. (a).) Nothing in that statute imposes, explicitly or implicitly, a clear and present duty on the Secretary of State to investigate and determine whether a presidential candidate meets the eligibility requirements of the United States Constitution. (See *Keyes*, at pp. 659-660.)

As for Dummett's suggestion in his opening brief that the Secretary of State has a duty to investigate and determine whether a presidential candidate meets the eligibility requirements of the United States Constitution because some Secretaries of State have, in fact, done so, we find no merit in that argument. As we stated in *Keyes*, just because a Secretary of State has "excluded a candidate who indisputably did not meet the eligibility

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[3] Given the nature of the constitutional challenge to Elections Code section 6901, it is not separate from the question of whether the Secretary of State has the duty Dummett claims because, as the trial court recognized, the statute would be unconstitutional only if it interfered with a constitutionally-based duty on the part of the Secretary of State to determine the eligibility of presidential candidates. Because Dummett has failed to demonstrate the existence of any such duty, he has necessarily failed to show that Elections Code section 6901 is unconstitutional.

requirements does not demonstrate that the Secretary of State has a clear and present ministerial duty to investigate and determine if candidates are qualified before following the statutory mandate to place their names on the general election ballot." (*Keyes*, *supra*, 189 Cal.App.4th at p. 660.)

Finally apart from *Keyes*, we briefly address a recent case from the Ninth Circuit Court of Appeals, *Lindsay v. Bowen* (9th Cir. 2014) 750 F.3d 1061 that affirmed the dismissal of a case brought by a 27-year-old candidate for President of the United States whom the Secretary of the State of California (Bowen) omitted from the certified list of candidates generally recognized to be seeking their parties' nominations, because it was undisputed the candidate was not constitutionally eligible to be President because she too was young. *Lindsay* stands for the proposition that it does not violate the federal Constitution -- specifically, the First Amendment, the equal protection clause, and the Twentieth Amendment -- for the California Secretary of State to refuse to place on the ballot the name of a presidential candidate who admittedly was not qualified to serve as President.

The question in our case, however, is whether the California Secretary of State has a ministerial duty to investigate the qualifications of presidential candidates and to exclude those who do not qualify. The answer to that question is "no." The Secretary of State may have the power to exclude unqualified candidates from the ballot -- at least where the lack of qualification is patent and undisputed -- but that does not translate into a duty to investigate and determine qualifications, particularly when the matter of the qualification is in dispute.

DISPOSITION

The judgment is affirmed. Bowen shall recover her costs on appeal. (Cal. Rules of Court, rule 8.278(a).)

ROBIE, J.

We concur:

BLEASE, Acting P. J.

DUARTE, J.

State of California)
County of Los Angeles)
)

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I, Kirstin Largent , declare that I am not a party to the action, am over 18 years of age and my business address is: 631 S Olive Street, Suite 600, Los Angeles, California 90014.

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