No. 14-_____

IN THE
Supreme Court of the United States

JOHN ALBERT DUMMETT, JR. AND
EDWARD C. NOONAN,
Petitioners,

v.

ALEJANDRO PADILLA,
AS CALIFORNIA SECRETARY OF STATE, *ET AL.*,
*Respondent*s.

On Petition for Writ of Certiorari
to the California Court of Appeal,
Third Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The late Chief Justice William Rehnquist observed in Bush v. Gore, 531 U.S. 98 (2000), that "there are a few exceptional cases in which the [United States] Constitution imposes a duty or confers a power on a particular branch of a State's government." *Id.* at 112 (Rehnquist, C.J., concurring). This petition presents one of those cases: whether the California legislature and its agent, the State's Chief Elections Official, neglected their sworn duty to comply with the constitutional provisions governing the selection of the President of the United States.

Article II, Section 1, Clause 2 of the Constitution vests in the legislatures of the several States the exclusive power to direct the manner by which the electors for President of the United States shall be chosen. Pursuant to this expressly delegated power, the legislature of the State of California has determined to hold statewide elections to appoint the State's presidential electors, delegating to the California Secretary of State the duty to administer such elections. Purporting to construe the State's statutes conferring such authority, the California courts below concluded that the California legislature vested no duty upon the Secretary to take care that persons whose names appear on the general election ballot as candidates for the office of President of the United States meet the eligibility requirements of Article II, Section 1, Clause 5.

The questions presented by this petition are:

1. Whether the power vested in the California legislature by Article II, Section 1, Clause 2 to direct the manner of selection of presidential electors must be exercised in conformity with the presidential eligibility requirements of Article II, Section 1, Clause 5.

2. Whether the California Secretary of State has a duty to verify the eligibility of candidates for President of the United States before placing them on the official state ballot.

3. Whether California Election Code Section 6901 — which instructs the Secretary of State to cause the names of candidates for President designated by the several political parties be placed upon the ballot for the general election regardless of whether the candidate is constitutionally eligible to serve — violates the California Legislature's duties under Article II, Section 1, Clauses 2 and 5 of the United States Constitution.

PARTIES TO THE PROCEEDINGS

Petitioner John Albert Dummett, Jr., was a petitioner and appellant below. Other appellants in Petitioner Dummett's case below were Gil Houston, Larry Lakamp, Milo L. Johnson, and Joe Ott, none of which is a party to this Petition.

Petitioner Edward C. Noonan was a petitioner and appellant below. One other appellant in Petitioner Noonan's case below was Pamela Barnett, who is not a party to this Petition.

Respondent Alejandro Padilla is the California Secretary of State, replacing Debra Bowen who was respondent and appellee in both cases below. Respondents Barack Obama and Obama for America were respondents and appellees in Petitioner Noonan's case below.

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Article II, Section 1, Clause 5 of the U.S. Constitution sets forth the eligibility requirements for the office of President of the United States. Although that clause does not explicitly specify a mechanism to enforce those requirements, Article II, Section 1, Clause 2 vests in the individual State legislatures the power to direct the manner of selection of Presidential electors. Thus, the several State legislatures, including California's, are constitutionally obliged to ensure that each State's electoral votes are cast for a person who, if elected, is eligible to serve as the nation's chief executive officer.

In California, the legislature has designated the Secretary of State to be the Chief Elections Officer, delegating to him the duties of effecting the selection of the presidential Electors. The Secretary of State's statutory duties include ensuring that elections in the State, including the election of presidential electors, are "efficiently conducted."

However, the California Court of Appeal below determined that the California Secretary of State has no duty to verify the constitutional eligibility of presidential candidates who are to be placed on the official state general election ballot.

Yet neither the Electoral College nor Congress has been vested with the authority to entertain challenges to a presidential candidate's eligibility. Additionally, numerous federal courts have denied that the judiciary has any such authority. Nevertheless, this Court does have the responsibility and the duty to ensure that State legislatures such as California's do not abdicate

their constitutional role in ensuring that their State's electoral votes are cast for a candidate qualified to serve as President of the United States.

Petitioners respectfully ask this Court to grant this Petition and review the judgments of the California Court of Appeal to determine this important question of federal law, lest the presidential eligibility requirements set out in the U.S. Constitution be rendered a dead letter.

OPINIONS BELOW

The opinions of the Court of Appeal of the State of California, Third Appellate District, are reported at Dummett v. Bowen, 2014 Cal. App. Unpub. LEXIS 5089 (Cal. App. 3d Dist. July 21, 2014), and Noonan v. Bowen, 2014 Cal. App. Unpub. LEXIS 6055 (Cal. App. 3d Dist. Aug. 27, 2014), and are reproduced at App. 1a-7a and App. 8a-20a, respectively.

On October 15, 2014, the Supreme Court of California issued an order denying Petitioner Dummett's timely Petition for Review. That unreported order is reproduced at App. 43a. On October 29, 2014, the Supreme Court of California issued an order denying Petitioner Noonan's timely Petition for Review. That unreported order is reproduced at App. 44a.

JURISDICTION

On July 21, 2014, the Court of Appeal of the State of California, Third Appellate District, issued its opinion in Dummett v. Bowen, and on August 27, 2014, that Court issued its opinion in Noonan v. Bowen. The Supreme Court of California denied Petitioner Dummett's Petition for Review on October 15, 2014, and denied Petitioner Noonan's Petition for Review on October 29, 2014. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves U.S. Constitution Article II, Section 1, Clauses 2 and 5, reproduced at App. 45a; California Elections Code section 6901, reproduced at App. 46a; and California Government Code section 12172.5(a), reproduced at App. 46a.

STATEMENT OF THE CASE

In 2012, Petitioner Dummett was a write-in candidate for President of the United States on the California election ballot.[1] In the same year,

[1] Petitioner Dummett is an announced candidate for the 2016 presidential election, and has filed a statement of candidacy with the Federal Election Commission. *See* Statement of Candidacy, http://www.fec.gov/fecviewer/CandidateCommitteeDetail.do?candidateCommitteeId=P20002499&tabIndex=3 and http://www.dummett2016.com/. Regardless of this current candidacy, the case is not mooted because it meets the test for being "capable of repetition, yet evading review." *See* Storer v.

Petitioner Noonan was the American Independent Party's declared presidential candidate. Each filed a petition for a writ of mandate in the California Superior Court, Sacramento County, seeking an order that California Secretary of State require all presidential candidates to provide proof of their eligibility for the office of President before placing their names on the official state ballot.

Petitioners alleged in their petitions for mandate that the Secretary of State had a duty under California law and Article II, Section 1, Clause 5 of the U.S. Constitution to enforce the presidential eligibility requirements. Petitioners further alleged that California Elections Code § 6901, which requires the Secretary of State to place the candidates who are nominated by the several political parties on the general election ballot, is unconstitutional if that section's mandate is read to apply regardless of a candidate's constitutional eligibility to serve in the office of President. The Superior Court rejected all claims and dismissed the petitions. *See* App. 24a and 35a.

On appeal, petitioners again argued that the Secretary of State has both a statutory duty and a constitutional duty to enforce the eligibility requirements for presidential candidates. The Court of Appeal affirmed the Superior Court's dismissals, using nearly identical language, holding "that the California Secretary of State 'does not have a duty to

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Brown, 415 U.S. 724, 737 n.8 (1974).

investigate and determine whether a presidential candidate meets [the] eligibility requirements of the United States Constitution.'" App. 1a and 8a-9a. In both cases, the Court of Appeal stated that the question of duty had already been addressed and decided previously by the Court of Appeal in Keyes v. Bowen, 189 Cal. App. 4th 647 (2010). Furthermore, each opinion held that Elections Code § 6901 was constitutional because there was no constitutional duty to determine eligibility. *See* Section III, *infra*.

The Court in Keyes rested its decision that the Secretary of State had no duty to verify the eligibility of presidential candidates on the ground that such verification is better left to Congress and the political parties. In support of this view, the Keyes Court explained:

> The presidential nominating process is not subject to each of the 50 states' election officials independently deciding whether a presidential nominee is qualified, as this could lead to chaotic results. Were the courts of 50 states at liberty to issue injunctions restricting certification of dulyelected presidential electors, the result could be conflicting rulings and delayed transition of power in derogation of statutory and constitutional deadlines. Any investigation of eligibility is best left to each [political] party, which presumably will conduct the appropriate background check or risk that its nominee's election will be derailed by an objection in Congress, which is authorized to entertain and resolve the validity of objections

following the submission of the electoral votes. [Keyes at 660.]

The Keyes opinion, like the Dummett and Noonan opinions below, were issued by the same court, the California Court of Appeal, Third Appellate District. The present two cases involve identical issues and were decided on the same grounds. Therefore, pursuant to Rule 12.4, the petitioners file this joint Petition for Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

I. THE QUESTION OF WHETHER STATES HAVE A DUTY TO VERIFY PRESIDENTIAL CANDIDATE ELIGIBILITY IS AN IMPORTANT ISSUE OF FEDERAL LAW THAT CAN ONLY BE SETTLED BY THIS COURT.

Although this case arose out of the controversy whether Barack Obama qualified as a "natural born citizen," as required by Article II, Section 1, Clause 5 of the U.S. Constitution, the issues presented in this petition are not limited to the citizenship of this President.

Indeed, questions of presidential eligibility have arisen at various times throughout the nation's history, including 19th century President Chester A. Arthur, the 20th century candidacies of Republicans George Romney, Barry Goldwater, and Christian D. Herter, as well as Democrat Franklin D. Roosevelt,

Jr.,[2] and the 21st century candidacy of John McCain.[3] No specific president or candidate has been singled out for special scrutiny. Indeed, the "natural born citizen" eligibility of former Senator Rick Santorum (R-PA), current Senators Marco Rubio (R-FL) and Ted Cruz (R-TX), and Louisiana Governor Bobby Jindal — all of whom are recognized as potential Republican Party presidential candidates in the 2016 election — are already being debated. Thus, this case does not raise a partisan issue.

Rather, America's founders of all political persuasions believed that the "natural born citizen" requirement was a necessary precondition to hold the high office of President of the United States.[4] In the Federalist Papers, the Founders explained that they established this precondition as a "practicable

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[2] George Romney (born in Mexico), Barry Goldwater (born in the Arizona territory), Christian D. Herter (born in France), and Franklin D. Roosevelt, Jr. (born in Canada) all faced questions regarding their eligibility for the office of President. *See* Charles Gordon, *Who Can Be President of the United States: the Unresolved Enigma*, 28 MD. L. REV. 1 (1968).

[3] Senator John McCain (R-AZ) was born either in Panama or in the Panama Canal Zone. *See*, *e.g.*, Hollander v. McCain, 566 F. Supp. 2d 63 (N.H. Dist. 2008); and Robinson v. Bowen, 567 F. Supp. 2d 1144 (N.D. Cal. 2008).

[4] The "natural born citizen" requirement finds support in scriptural guidance for the Nation of Israel: "Thou shalt in any wise set him king over thee, whom the LORD thy God shall choose: one from among thy brethren shalt thou set king over thee: thou mayest not set a stranger over thee, which is not thy brother." Deuteronomy 17:15 (KJV).

obstacle" against "cabal, intrigue and corruption."[5] Designed to protect against "foreign powers ... raising a creature of their own to the chief magistracy of the union," the Constitution's drafters did not entrust the matter to the electoral process. *Id*.

Additionally, the founders built a constitutional fence to keep Congress out of presidential elections, barring Representatives and Senators from serving 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. Yet, this protective provision (separation of the election of the President from the control of the legislative branch) is exactly

[5] Federalist No. 68, *The Federalist* (G. Carey & J. McClellan, eds., Liberty Fund: 2001).

the reverse of what the court below prescribed.[6] *See* Noonan at 13a-14a. *See also* Keyes at 660.

There are good and sufficient reasons for the constitutional proscription precluding a significant Congressional role. As a practical matter, any such enforcement would unnecessarily and often unconstitutionally disrupt the body politic — as Congressional action would necessarily take place

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[6] There has been serious scholarship on the meaning of the presidential eligibility clause. *See*, *e.g.*, Charles Gordon, *Who Can Be President of the United States: the Unresolved Enigma*, 28 MD. L. REV. 1 (1968) (by the former General Counsel of the U.S. Immigration and Naturalization Service); J. Michael Medina, *The Presidential Qualification Clause in This Bicentennial Year: the Need to Eliminate the Natural Born Citizen Requirement*, 12 OKLA. CITY UNIV. L. REV. 243 (1987); Jill A. Pryor, *The Natural-Born Citizen Clause and Presidential Eligibility: an Approach for Resolving Two Hundred Years of Uncertainty*, 97 YALE L.J. 881 (1988); Malinda L. Seymore, *The Presidency and the Meaning of Citizenship*, 205 BYU L.REV. 927 (2005); Lawrence Friedman, *An Idea Whose Time Has Come: the Curious History, Uncertain Effect, and Need for Amendment of the "Natural Born Citizen" Requirement for the Presidency*, 52 ST. LOUIS L.J. 137 (2007); Lawrence B. Solum, *Originalism and the Natural Born Citizen Clause*, 107 MICH. L. REV. FIRST IMPRESSIONS 22 (2008). Also, a naturalized citizen's ineligibility for the presidency is referenced in at least four Supreme Court cases: Luria v. United States, 231 U.S. 9, 22 (1913) ("Under our Constitution, a naturalized citizen stands on an equal footing with the native citizen in all respects, save that of eligibility to the Presidency."); Baumgartner v. United States, 322 U.S. 665, 673 (1944); Knauer v. United States, 328 U.S. 654, 658 (1946); and Schneider v. Rusk, 377 U.S. 163, 165, 177 (1964) (where Justice Douglas stated, "The only difference drawn by the Constitution [between naturalized citizens and natural born citizens] is that only the 'natural born' citizen is eligible to be President.").

after the general election occurred, effectively, undoing the results of a presidential election. Further, Congressional enforcement by impeachment and removal from office would require an evidentiary showing meeting the constitutional standard of "Treason, Bribery, or other high Crimes and Misdemeanors" (Art. II, Sect. 4). An innocent or lesser form of misrepresentation of citizenship status by a President would appear insufficient to remove a President who is not eligible to serve.[7]

That Congress was not empowered to enforce Article II, Section 1, Clause 5 does not mean, however, that the "natural born citizen" requirement is legally unenforceable. Having committed the presidential selection process to the several state legislatures under Article II, Section 1, Clause 2, the Constitution anticipates that each State will enforce the federal eligibility requirement. In the modern era, selection of electors supporting a presidential candidate is conducted by popular vote.[8] Thus, in California — as

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[7] To the extent that the "natural born citizen" standard requires evidence of a place of birth, no person, no matter how precocious, can give personal testimony to where he was born, despite his personal presence on the day in question. A person primarily relies on family narratives which may be false for one reason or another. Senator Marco Rubio recently admitted the inaccuracy of his claim that his family fled Cuba to escape the rule of Fidel Castro, now asserting he just learned that his family left Cuba years before Castro seized power. *See* http://www.politifact.com/florida/statements/2011/oct/21/marco-rubio/sen-marco-rubio-said-his-parents-came-america-foll/.

[8] The electoral college is not well positioned to enforce the presidential eligibility requirements, as it does not meet until

it would be true in the other 49 states — enforcement of the citizenship requirement would best be performed before an election by the State's chief election official's control over the official state ballot, ensuring it contained only the names of eligible presidential candidates.

Instead, the court below seized upon California Elections Code § 6901 to avoid finding the Secretary of State had a duty. App. 4a n.3 and 12a n.3. That section directs the Secretary of State to place the names of the presidential electors for candidates of established political parties on the election ballot without any express requirement that the Secretary consider natural born citizenship or any other qualification.

In essence, the court below has ruled that the Chief Elections Officer of the State of California has no duty to enforce the "natural born citizen" requirement of the U.S. Constitution. If California state officials neglect their duty under the U.S. Constitution, as has happened here, it is this Court's "province" and "duty" to mandate their compliance with the U.S.

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after the popular vote occurs, and state law often dictates how the elector must cast his vote. *See* Ray v. Blair, 343 U.S. 214, 224-25 (1952). *See also* California Elections Code § 6906; and Keyes v. Bowen, 189 Cal.App.4th 647 (2010) at 658 ("the electors have a ministerial duty to convene on a specific date, in a specific place, to cast their ballots for their parties' nominees, and then transmit their sealed list of votes to the President of the Senate. There is nothing in any state or federal legislation ... imposing a ministerial duty on the electors to investigate the eligibility of their parties' candidate.").

Constitution. *See* Marbury v. Madison, 5 U.S. 137, 177 (1803).

This Court should grant this petition to settle these profoundly important questions that, if unaddressed, will render the "natural born citizen" clause in the U.S. Constitution a dead letter. Otherwise, refusal to address this issue ultimately would undermine confidence in the legitimacy of the person elected to the highest office in the land, whose oath is to "preserve, protect and defend the Constitution of the United States" (Art. II, Sect. 1, Cl. 8).

II. THE CALIFORNIA STATE LEGISLATURE HAS A CONSTITUTIONAL DUTY TO DETERMINE THAT ONLY PRESIDENTIAL CANDIDATES WHO WOULD BE ELIGIBLE TO SERVE, IF ELECTED, ARE PLACED ON THE STATE'S ELECTION BALLOT.

A. Regardless of How Presidential Electors Are Chosen, Each State Legislature Has a Duty to Ensure That the Means Chosen Result in Only Eligible Persons Receiving That State's Electoral Votes.

How state legislatures exercise their constitutional duty to direct the manner by which our nation selects the only two officials who represent all the people — the President and Vice President of the United States — is a matter that has rarely come before this Court. However, the method by which California exercised its constitutional duty in the Presidential election of 2012 was deeply flawed, requiring this Court's intervention.

If California's neglect of this constitutional duty is not corrected by this Court, neither California nor any of the other states can be expected to give effect to the constitutional provisions defining eligibility for the Presidency.

In McPherson v. Blacker, 146 U.S. 1 (1892), this Court observed that, in specifying the manner of selection of President of the United States, "[t]he Constitution does not provide that the appointment of electors shall be by popular vote...." *Id.* at 27. Indeed, in the first election for President of the United States under the U.S. Constitution in 1791, "the appointment of electors was made by the legislatures of Connecticut, Delaware, Georgia, New Jersey and South Carolina." *Id.* at 29. This Court viewed this constitutional provision as leaving it "to the legislature exclusively to define the method of effecting the object." *Id.* at 27; *see* Bush v. Gore, 311 U.S. 98, 113 (2000). The "object" that state legislators must effect in using their power under Article II, Section 1 is not just defining a method to select the correct number of electors from that State, but to ensure that the electors chosen will vote for a person eligible to serve under Article II, Section 1, Clause 5.

During earlier times when certain state legislatures directly appointed electors, the connection between clauses 2 and 5 of Article II, Section 1 was obvious. In appointing electors, state legislators knew that they were constrained by Constitution's eligibility requirements for President of the United States. In those early days, the central concern was whether the candidate met the age and residency requirements,

and whether he was "a citizen of the United States, at the time of the adoption of this Constitution" rather than whether he was a "natural born citizen of the United States...." Art. II, Sect. 1, Cl. 5. The problem presented by this case did not arise because the state legislatures were well aware of eligibility requirements and were sworn to uphold the U.S. Constitution that contained those requirements. If review of the qualification of a candidate for President had been required, it can be expected that it would have been performed by each state legislature before it selected electors. It would be inconceivable that state legislatures would have exercised their authority under Article II, Section 1, Clause 2 in disregard of that Section's Clause 5.

Circumstances have changed since state legislatures have exercised their constitutional power to provide that selection of electors would be made by popular vote. Whereas, previously, State legislatures exercised their supervisory duty to ensure the selection of a qualified candidate directly, now they need to do so indirectly by ensuring that electors selected by the people support qualified candidates. Unlike members of the state legislature, voters generally do not take an oath to the U.S. Constitution, and the duty of the legislature cannot be delegated to the voters. Once California determined to entrust the selection of electors to the people by use of an official state ballot, it became a duty of the State to ensure that the people of California would select only from among candidates who were eligible to serve. In this case, whether the California legislature established a process which

respected Article II, Section 1, Clause 5 depends on how one reads the California Elections Code.

If the Court below is correct, and the California code vests no duty to examine qualifications of candidates for President, the state legislature violated its constitutional duty in directing the manner of selection of electors. If, on the other hand, the fault lies with the Secretary of State in failing to perform the duty to "see that elections are efficiently conducted," then the fault is that of the respondent Secretary of State. It certainly would be no answer to blame the people of California for how they voted from among the choices they were given. Whether state legislatures or a chief election official agrees or disagrees with the requirements of Article II Section 1, Clause 5, these officials may not stand idly by allowing those requirements to be circumvented by a popular vote for ineligible candidates, for it is the state legislatures — not the people — which have the constitutional duty to establish a manner of selection which does not yield to electors pledged to ineligible candidates. And State legislatures certainly cannot entrust the determination of eligibility to political parties, as discussed in Section III, *infra*. This Petition provides this Court the opportunity to clarify the constitutional duty of the California state legislature, and all other state legislatures, at the same time.

The duty of Alabama election law officials to ensure that presidential eligibility standards are met by all candidates listed on a state ballot was addressed last year by the Alabama Supreme Court in a *per curiam*

decision, which was accompanied by four thoughtful opinions, with two justices concurring and two justices dissenting. The two concurring justices believed that there was no "statutory framework" for the Secretary of State to perform this duty, except that candidates be "otherwise qualified," and therefore no duty to rule on eligibility.

However, the dissenting Chief Justice and one Associate Justice concluded that the Secretary of State had a duty both as a constitutional officer, under oath to the U.S. Constitution, and as obliged by the "otherwise qualified" provision in the state law. The dissenters explained that "'Constitutional provisions are presumed to be self-executing' [and] 'usually no legislation is required to effectuate a constitutional provision that is prohibitory in its language." McInnish v. Bennett, 2014 Ala. LEXIS 41, *78-79 (2014) (citations omitted) (Chief Justice Moore and Justice Parker, dissenting). They pointed out that courts have upheld decisions by state officials to exclude candidates who were not qualified even without such a "statutory framework." *See* Socialist Workers Party of Illinois v. Oglivie, 357 F. Supp. 109 (N.D. Ill. 1972); Peace & Freedom Party v. Bowen, 912 F.Supp.2d 905 (E.D. Cal. 2012). Chief Justice Moore concluded that "[a]s the gatekeeper for presidential-ballot access in Alabama, the Secretary of State is the official upon whom rests the duty to enforce the qualifications clause." *Id.* at *79. His opinion accurately concluded, "[t]his matter is of great

constitutional significance in regard to the highest office in our land."[9]

B. The California Courts Below Definitively and Unconstitutionally Determined that the California State Legislature Has No Duty to Determine Eligibility of Candidates for President of the United States.

As discussed *supra*, it is the States, rather than Congress, that are given the primary authority for administering the process by which presidential electors are chosen. Instead, the court below erroneously concluded the opposite: that Congress, rather than the States, has the basic responsibility, with the aid of political parties. The court quoted at length from Keyes v. Bowen in shirking the State's constitutional duty, passing it off to private political parties and Congress:

> Any investigation of eligibility is **best left to each party**, which presumably will conduct the appropriate background check or risk that its nominee's election will be derailed by an **objection in Congress**, which is authorized to entertain and resolve the validity of objections following the submission of the electoral votes.

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[9] Dissenting Justice Parker disagreed with Chief Justice Moore only in that he did "not believe that the Secretary of State has an affirmative duty to investigate [but here] received notice sufficient to raise a duty to investigate...." *Id.* at *87-88.

> [Noonan at Pet. 14a-15a, quoting Keyes, 189 Cal. App. 4th at 660 (2010) (emphasis added).]

It is beyond reasonable debate that under the U.S. Constitution Congress's role in presidential elections under Article II is narrow and discrete. 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 1, Clause 2 specifically excludes U.S. Senators and Representatives (as well as all other federal employees) from being presidential electors, thus providing additional protection against Congressional influence over the presidential electoral process.[10]

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 Court of Appeal below relied on Keyes, which incorrectly grounded its decision on the Twelfth and

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[10] *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 at least enter upon the task, free from any sinister bias.").

Twentieth Amendments 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 Article II presidential eligibility.[11] The Twelfth and Twentieth Amendments did not make significant changes in the presidential election process, but instead were more in the nature of "housekeeping" provisions, added to remedy specific problems that had arisen with respect to federal elections. Those amendments did not expand Congress's role in presidential elections, but instead confirmed Congress's limited role.

To be sure, there were efforts at the time of the adoption of the Twelfth Amendment that would have specified a uniform mode of choice of the electors across all the states, but those efforts failed. *See* McPherson v. Blacker, 146 U.S. 1, 33-34 (1892). The rejection of such proposals confirms that the Twelfth Amendment reflected only "housekeeping," not evidencing a larger shift in roles relating to the presidential election process.

The Twelfth Amendment directs the electors to cast their votes and send the votes in a sealed envelope to the United States Congress for counting. Once the votes are sent to Congress, the process for objections, set out under the amendment's implementing statute, 3 U.S.C. § 15, provides that objections must be in

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[11] 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.

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.

Thus, the statutory scheme established in 3 U.S.C. § 15 certainly does not allow for, provide for, or even allude to objections of the type assumed by Keyes. Moreover, even if such objections were properly made, by statute, Congress may not reject those votes if the Electors were properly selected. The question of whether a candidate for President is eligible simply is not addressed by the Twelfth Amendment as an issue to be resolved by Congress.

The Twentieth Amendment is equally inapposite. Section 3 of that 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." *See* Amendment 20, Section 3. 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. *See* 3 U.S.C. § 19.

Clearly, the Twentieth Amendment does not confer any powers on Congress to determine a presidential candidate's eligibility. Rather, that 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 Keyes court, upon which the Court of Appeal below relied, entrusted the issue of eligibility to Congress based on its fear that requiring state election officers to determine presidential candidate eligibility would "lead to chaotic results ... conflicting rulings and delayed transition of power...." Keyes at 660. However, the clarion call of our founders was that the selection of our President would not be subject to the pressures that would come if the President were selected by Congress. They specifically addressed that as a possible method of selection, but rejected it, reflecting a lengthy and careful consideration of the role of the national legislature over the presidential election process. During the constitutional convention, the founders addressed this specific issue many times

between June 1 and September 7, 1787. *See* The Records of the Federal Convention[12]:

> Mr. Gerry, opposed the election by the national legislature. There would be a constant intrigue kept up for the appointment. The Legislature & the candidates wd. bargain & play into one another's hands. votes would be given by the former under promises or expectations from the latter, of recompensing them by services to members of the Legislature or to their friends. [Reprinted in 3 The Founders' Constitution, Item 2, pp. 536-550 (P. Kurland & R. Lerner, eds., Univ. of Chi. Press: 1987).]

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

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[12] Federalist No. 68 also confirmed that the division of the authority over presidential elections to the states was done intentionally, and that one of the purposes was to avoid the corruptibility of pre-existing bodies of persons: "All these advantages will happily combine in the plan devised by the convention; which is, that the people of each state shall choose a number of persons as electors.... The process of election affords a moral certainty, that the office of president, will never fall to the lot of any man, who is not in an eminent degree endowed with the requisite qualifications." *The Federalist*, pp. 353-54.

C. State Legislators and State Officials Must Enforce the Constitution as Written, Unaffected by Personal Views of the Natural Born Citizen Requirement.

The Constitution's requirement that the President be a "natural born citizen" is viewed by some modern commentators with contempt. A recent law review article cited constitutional scholar Michael Dorf, writing that "[t]he 'natural born citizen' requirement manifests a distrust of the foreign-born that, in a nation of immigrants, can only be derided as repugnant. I both 'reject' it and I 'denounce' it!" *See* L. Solum, *Originalism and the Natural Born Citizen Clause*, 107 MICH. L. REV. FIRST IMPRESSIONS 22, 23 (2008).[13] George Washington University law professor Jonathan Turley has written that "[t]he eligibility provision was written for a different people and a different time. It now strikes a decidedly xenophobic note in an otherwise inclusive document." "Arnold Schwarzenegger and the Constitutional Ban on Foreign Born Presidents," Res Ipsa Loquitur blog, Aug. 20, 2007.[14] Indeed, many of those who reject the notion that the States are bound to enforce the federal constitutional text harbor animus toward the citizenship eligibility requirement itself, or at least the partisan political implications of giving life to this

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[13] http://www.michiganlawreview.org/articles/originalism-and-the-natural-born-citizen-clause

[14] http://jonathanturley.org/2007/08/20/arnold-schwarzenegger-and-the-constitutional-ban-on-foreign- born-presidents/

constitutional text with respect to a particular president or candidate.

However, this Petition does not ask this Court to determine the eligibility of any particular individual to serve as President of the United States. Neither does it ask this Court to define the phrase "natural born citizen." Article VI of the U.S. Constitution already requires that both "the Members of the several State Legislatures," and "all executive ... Officers [of the] several States, shall be bound by Oath or Affirmation, to support this Constitution." All this Petition asks this Court to do is to ensure that, in fulfilling that oath by exercising their constitutional duty to determine the matter of selection of electors, these state legislators and state officers give meaning to the eligibility requirements for the office of President. For in taking the same oath as members of this Court, these state legislators owe fidelity to the U.S. Constitution as written, irrespective of views of the policy embedded in its provisions, with no liberty to disregard its mandates.

"Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." D.C. v. Heller, 554 U.S. 570, 634-35 (2008). This observation by Justice Scalia applies equally to the issue in this case. In 2003, Senator Orrin Hatch (R-UT) introduced a constitutional amendment to repeal the natural born citizen clause, and hearings were held in the Senate

Committee on the Judiciary.[15] However the amendment was unsuccessful, and neither state officials nor the state legislatures nor the federal courts may participate in a *de facto* repeal of this constitutional provision.

D. If the Eligibility of a Candidate for President of the United States Is Not a Precondition to Appearing on an Official State Ballot, as a Practical Matter, the "Natural Born Citizen" Requirement Will Be Rendered a Nullity.

In the modern era in which electors are chosen by popular election of electors, the practical result of the decision of the California courts below — allowing state officials to neglect the Constitutional preconditions to serving in office in determining ballot eligibility — would have the effect of rendering the Constitution's national born citizen requirement a dead letter. The state legislature's role now should be to determine that the people will choose from among candidates eligible to serve, and the California legislature, having vested responsibility for conducting that election in a chief election official, it believes that it has done its duty. The record of the past six years demonstrates that there is no other time and no other forum to raise this issue of eligibility after a general election has occurred if it is evaded by state legislatures and chief election officials.

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[15] Senate Joint Resolution 15, 108th Congress (July 10, 2003).

The political parties cannot be trusted to properly vet the eligibility of a candidate who may bring the vast benefits of incumbency to their party. Electors cannot be expected to make such determinations, as they are generally bound by state law to cast their votes in accordance with the outcome of the popular vote of the State in the general election. After a general election has occurred, it is unrealistic to expect that objections will be lodged by Members of Congress based on the constitutional eligibility of a candidate, and as discussed *supra*, it was never the plan of the Founders to give the Congress any meaningful degree of control over the selection of the President. Once a President has been declared and sworn in, there must be constitutional grounds for impeachment by the U.S. House and removal by the U.S. Senate under Article II, Section 4 ("Treason, Bribery, or other high Crimes and Misdemeanors"), which may well not exist in the case of an ineligible candidate.

Lastly, there is no clear authority for the federal judiciary to step in after the fact, and directly or indirectly declare that the President is ineligible to serve, effectively vacating the office. The problems faced by the judiciary in attempting to rule upon presidential eligibility after a general election has occurred demonstrate the futility of leaving the issue to the judiciary after the fact.

- A challenge to the validity of a law signed by a President whose eligibility is being questioned which increased certain patent fees was

dismissed for the reason that it raised a non-justiciable political question.[16]

- A challenge to the validity of military deployment orders issued under the authority of the President whose eligibility is being challenged was dismissed for the reason that it constituted interference with internal military affairs.[17]

- A challenge to the 2012 presidential election was dismissed for the reason, *inter alia*, that "the issue of [a] President's qualifications and his removal from office are textually committed to the legislative branch and not the judicial branch."[18]

- Various challenges to presidential eligibility by current and former military personnel, state representatives, opposing political candidates

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[16] Suit was dismissed by the district court, Rudy v. U.S. Patent and Trademark Office (E.D. Vir., No. 1:13cv00278, Aug. 29, 2013), an appeal was denied by the U.S. Court of Appeals for the Federal Circuit *per curium*, without opinion, No. 2014-1056 (April 11, 2014), and a petition for certiorari was denied by this Court (Docket No. 14-36) (Dec. 1, 2014).

[17] *See* Rhodes v. MacDonald, 2009 U.S. Dist. LEXIS 84743 at*2 (M.D. GA, Sept. 2009).

[18] *See* Grinols v. Electoral College, 2013 U.S. Dist. LEXIS 73446 at *18 (E.D. CA 2013).

and others, were dismissed, *inter alia*, for reasons of standing.[19]

However, the judicial branch cannot escape responsibility when a case properly brought to it requests that it act to ensure compliance by state legislatures with their basic duty to determine the manner of election of the President of the United States consistent with Article II, Section 1, Clause 5. That is the matter now being presented to this Court by this Petition.

III. THE CALIFORNIA COURTS BELOW UNCONSTITUTIONALLY DETERMINED THAT, UNDER STATE LAW, THE SECRETARY OF STATE HAS NO DUTY TO DETERMINE WHETHER A CANDIDATE FOR PRESIDENT IS ELIGIBLE TO SERVE BEFORE PLACING THAT CANDIDATE'S NAME ON THE GENERAL ELECTION BALLOT.

A. The Court Mistakenly and Unlawfully Presumed that the Secretary Had No Statutory Duty to Verify Eligibility.

Relying solely on Keyes v. Bowen, 189 Cal. App 4th 647 (2010), both the Dummett and the Noonan courts concluded that, as a matter of state law, the Secretary of State has no duty "to investigate and determine

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[19] *See* Drake v. Obama, 664 F.3d 774 (9th Cir. 2011); Berg v. Obama, 586 F.3d 234 (3rd Cir. 2009); Kerchner v. Obama, 612 F.3d 204 (3rd Cir. 2010).

whether a presidential candidate meets the eligibility requirements of the United States Constitution." *See* Dummett at Pet. 4a; Noonan at Pet. 16a-17a. The Keyes decision, in turn, was based upon its interpretation of three state statutes. Initially, Keyes noted that, although California Government Code Section 12172.5(a) designated the Secretary of State as "the chief elections officer of the state," the Secretary was simply charged with the duty "that elections are efficiently conducted and that state election laws are enforced." Keyes at 658. Further, it noted that there were two additional statutes, one concerning the placing of presidential candidates on the ballot in the state primary (*id.* at 659), and the other concerning the placing of the name of a recognized political party's nominee on the ballot in the state general election (*id.*), but concluded that neither statute required the Secretary to conduct any inquiry about any candidate's constitutional eligibility to hold the office of the presidency. *See id.*

Without making any further inquiry, the Keyes court concluded that "[t]he aforementioned statutes do not impose a clear, present, or ministerial duty on the Secretary of State to determine whether the presidential candidate meets the eligibility criteria of the United States Constitution." *Id.* at 659. In essence, the Keyes court, relying solely on an argument from silence, based its conclusion upon the absence of any specific language charging the Secretary to conduct any such inquiry. Strikingly, it made no inquiry into the general responsibilities of the Secretary as the State's chief election officer, and neglected to make any effort to determine the nature

and scope of the California legislature's charge that the Secretary "**shall** see that elections are **efficiently conducted.**"[20] *See* Cal. Government Code Section 12172.5(a) (emphasis added). Yet, silence does not trump text, and according to the fundamental principles of statutory construction, "[t]he words of a governing text are of paramount concern, and what they convey, in their context, is what the text means." *See* A. Scalia & B. Garner, Reading Law 56 (Thomson/West: 2012). Instead of following this fundamental principle of statutory construction to ascertain the nature and scope of the Secretary's duties, the Keyes court engaged in wild speculation, forecasting that, if each of 50 state election officials was empowered to determine if a presidential candidate was eligible to occupy the Oval Office, all "chaos" would break out. Keyes at 660. To foreclose this hypothetical risk, the Keyes court concluded that "[a]ny investigation of eligibility is best left to each party," ultimately leaving it in the hands of Congress to resolve any conflicting claims. *Id.*

The Keyes inventive solution of placing the final say under the ultimate control of Congress would have been — in the opinion of the Constitution's drafters — tantamount to putting the fox in charge of the hen house. Indeed, the Keyes proposal to enlist Congress

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[20] "[W]here a general ... duty [is] enjoined, every particular power necessary for [its] performance ... is also conferred." A. Scalia & B. Garner, Reading Law 192 (Thomson/West: 2012), quoting T. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 62 (1868).

to exercise oversight of the selection of presidential electors clashes directly with Article II, Section 1, Clause 2, which vests in the legislatures of the 50 states the sole power to "direct [the] manner [of selection of the] President." It has long been established that this constitutional vestment "convey[s] the broadest power of determination" and "leaves it to the legislature exclusively to define the method" of appointment." *See* McPherson v. Blacker, 146 U.S. 1, 27 (1892). Although the Keyes court feared that vesting power in the States, whether the original 13 or current 50, would threaten the stability of the American constitutional republic, the Founders considered it essential to protect the presidency from a greater risk of "intrigues and cabals which would be promoted in the [national] legislative body by artful and designing men ... with a view of accomplishing their own selfish purposes." 2 J. Story, Commentaries on the Constitution, Section 1456, p. 306 (Little, Brown, 5th ed. 1891).

To accomplish this and other important national interests, the Founders set the election of the President apart as one of a "few exceptional cases in which the Constitution imposes a duty [and] confers a power on a particular branch of a State's government." *See* Bush v. Gore, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring).

B. No Deference Is Owed to the California Court's Ruling that the Secretary Had No Duty to Verify Eligibility.

As a direct result of the choice to vest authority over presidential elections in the **legislative** branch of the state governments, not just in the States generally, "the **text** of the election law itself, and not just its interpretation by the courts of the States, takes on independent significance." *Id.* at 113. Ordinarily, "comity and respect for federalism compel[s] [this Court] to defer to the decisions of state courts on issues of state law." *Id.* at 112. In order to protect "the legislative scheme for appointing Presidential electors," however, "the Constitution requires this Court to undertake an **independent**, if still deferential, **analysis of state law**." *Id.* at 114 (emphasis added).

As noted previously, the California courts below totally failed to apply the "supremacy-of-text principle" to its effort to ascertain any of the duties imposed by the California legislature upon the Secretary of State as the State's chief election official. Yet, according to California Government Code Section 12172.5(a), the Secretary "**shall** see that the elections are **efficiently conducted**." (Emphasis added.) Surely, this command applies to the decision of the Secretary whether to put the name of a presidential candidate on a general election ballot. *See, e.g.,* Anderson v. Celebrezze, 460 U.S. 780 (1983). And that duty, in turn, would logically extend to the question whether the named candidate is eligible to hold the office the candidate is seeking.

Indeed, both the Dummett and Noonan opinions below acknowledged that the Secretary previously had "omitted [a candidate] from the certified list of candidates generally recognized to be seeking their parties' nomination, because it was undisputed the candidate was not constitutionally eligible to be President because she too was young." Dummett at App. 6a. But, apparently to avoid chaos, the courts below would limit the Secretary's duty to only those cases where a candidate's ineligibility is patent. Noonan at App. 19a-20a. Neither court below found — or even sought — any principled basis for distinguishing between patent and less visible ineligibilities in the language of the statute defining the Secretary's duties as the State's chief election officer. The Dummett court did not even reach or support its conclusion after an examination of the Secretary's normal practice of excluding persons from the ballot on account of other factors, such as residency. *See* Bates v. Jones, 131 F.3d 843, 847 (9th Cir. 1997) (*en banc*). Instead, the court simply ruled from fear and by fiat. Thus, neither of the two opinions below deserves any degree of deference by this Court. Rather, the question of the Secretary of State's duties, and whether they require the chief election official to conduct an appropriate inquiry to ascertain a presidential candidate's eligibility, are questions to be decided by this Court.

The Secretary's duty of "efficiency" encompasses a duty to employ reasonable means to accomplish the desired result — which certainly must be the election of a candidate eligible to serve in the office to which he seeks election. As the Ninth Circuit observed in

Lindsey v. Bowen, "there's no doubt that 'a State has an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies.'" *Id.*, 750 F.3d 1061, 1064 (9th Cir. 2014) (quoting Bullock v. Carter, 405 U.S. 134, 145 (1972). *See also* Bullock at 145 ("The Court has recognized that a State has a legitimate interest in regulating the number of candidates on the ballot ... to prevent the clogging of its election machinery, avoid voter confusion, and assure that the winner is the choice of a majority...."); and Peace and Freedom Party v. Bowen, 912 F.Supp.2d 905 (E.D. Cal. 2012). Surely, the State's interest in ballot integrity extends not only to those cases where the candidate's ineligibility is uncontested and obvious, as the Ninth Circuit has implied, but also to those cases where a candidate has refused to provide, or has even suppressed, information of such ineligibility.

C. California Election Code Section 6901 Unlawfully Delegates the Secretary's Duty to Political Parties in Violation of Article II, Section 1, Clause 5.

Section 6901 cited by the Court of Appeal below applies only to candidates for President and Vice President, and states in relevant part: "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 on a state official sworn to uphold the U.S. Constitution

to comply with the directive of political parties,[21] section 6901 flatly conflicts with the U.S. Constitution's Article II presidential eligibility criteria, as outlined above. Although State legislatures are vested with power to determine the "manner" of selecting the President, they do not have the authority to delegate compliance with federal constitutional eligibility requirements to private parties not so sworn.

Finally, the Keyes court believed that it would be "truly absurd" for the individual states to determine candidate eligibility, and that it would be "best left to each [political] party, which **presumably** will conduct the appropriate background check...." Keyes at 660 (emphasis added). In the professed interest of avoiding "chaotic results," the California courts have turned over enforcement of constitutional criteria to the political parties — which are, essentially, private organizations of persons seeking one common goal: the election of their candidate to office.

What would be "truly absurd" is to presume, with Pollyanna-like naivete, that the political parties will conduct a good-faith "background check" of their most popular candidate who may represent the party's best

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[21] Of course, section 6901 could be read to incorporate, *sub silentio*, the eligibility requirements of the U.S. Constitution. But then it would not be available for use as a shield to cover the Secretary of State's actions as was tried in the past. *See* Keyes at 659 ("With respect to general elections, section 6901 directs that the Secretary of State *must* place on the ballot the names of the several political parties' candidates.").

chance for winning a general election. The Court of Appeal appears to have either forgotten or ignored the manifest thirst for power throughout the ages, including what has been demonstrated during the short history of our Republic. Not only is the Keyes decision legally wrong in its analysis of the Congressional role in the presidential election, it has also mistakenly allowed the delegation of the state's responsibility over the official state ballot to political parties, based on an unwarranted belief that they faithfully will do the job the Secretary of State refused to do.

The Court of Appeal brushed off the challenge to section 6901 with a substantially identical footnote in both the Noonan and Dummett opinions:

> 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 [Petitioners] claim[] 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 [Petitioners] ha[ve] **failed to demonstrate** the existence of any such **duty**, [they have] necessarily failed to show that Elections Code section 6901 is unconstitutional. [Noonan at App. 12a, n.3 (emphasis added); *see also* Dummett at App. 4a, n.3.]

Thus, to the extent California Elections Code section 6901 requires the Secretary of State to accept direction from private political parties and to ignore the plain requirements of the U.S. Constitution's Article II, it is unconstitutional and unenforceable.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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