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In the

Supreme Court

of the

State of California

EDWARD NOONAN et al.,

Plaintiffs and Appellants,

v.

DEBRA BOWEN, as Secretary of State, etc., et al.,

Defendants and Respondents.

CALIFORNIA COURT OF APPEAL · THIRD APPELLATE DISTRICT · NO. C071764
SUPERIOR COURT OF SACRAMENTO · HON. MICHAEL P. KENNY
NO. 34201280001048CUWMGDS

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CONSTITUTION

FEDERAL STATUTES

FEDERAL CASES

STATE STATUTES

STATE CASES

MISCELLANEOUS

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SUPREME COURT OF CALIFORNIA

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ISSUES PRESENTED

On January 6, 2012, Plaintiff-Appellant Edward Noonan, a declared candidate for President of the United States for the American Independent Party, sought in Superior Court: (i) 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, and (ii) an injunction to prevent Bowen from placing on the ballot the names of those candidates who failed to demonstrate eligibility. Additionally, Plaintiff-Appellant Noonan 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 Defendants-Respondents' demurrers on the ground that determining the eligibility of presidential candidates is "not within the duties of the Secretary of State." Noonan v. Bowen, slip op. at 3.

On appeal, on August 27, 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 ballots, has a duty to determine whether presidential candidates are constitutionally eligible to serve in the office they are seeking 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 duty to determine 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 Respondent Barack Obama qualified as a "natural born citizen," as required by Article II, Section 1, Clause 5 of the U.S. Constitution (slip op. at 2 n.2), the issues on appeal are not limited to this President, his party, or even the 2012 presidential election.[1] Thus, this case on appeal does not raise a partisan issue. 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 George Romney, Barry Goldwater, Christian D. Herter, and Franklin D. Roosevelt, Jr.[2] and the 21st century candidacy of John McCain.[3]

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[1] Although Respondent Obama was made a party in the petition and filed a brief in the Court of Appeal below, the issues before this Court only involve the Secretary of State, as Respondent Obama is term-limited by the Twenty-Second Amendment. However, that could change in the unlikely event that the Democratic Party nominated Respondent Obama for the 2016 general election. Would the California Secretary of State be required to defer to the Democratic Party, or would she be required to determine his eligibility under the Twenty-Second Amendment?

[2] Republicans George Romney (born in Mexico), Barry Goldwater (born in the Arizona territory), and Massachusetts Governor Christian D. Herter (born in France), and Democrat 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. http://bioguide.congress.gov/scripts/biodisplay.pl ?index=m000303.

Mr. Obama has not, then, 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.

The constitutional requirement that the President be a "natural born citizen" demonstrates that America's founders believed that issue too important to entrust to the political process. Rather, as explained in Federalist No. 68, our founders explained that they established this precondition as a "practicable obstacle" against "cabal, intrigue and corruption." It was designed to protect against "foreign powers ... raising a creature of their own to the chief magistracy of the union." Federalist No. 68, *The Federalist* (G. Carey & J. McClellan, eds., Liberty Fund: 2001).

Additionally, the founders 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. Yet, this protective provision (separation of the election of the

President from the control of the legislative branch) is exactly the reverse of what Keyes presumes.[4]

Those who suggest that it is Congress's responsibility to enforce the citizenship eligibility requirement by the exercise of its powers of impeachment and removal would create both a practical and a legal problem. As a practical matter, it would unnecessarily and often unconstitutionally disrupt the body politic — as Congressional action would necessarily take place after a President was inaugurated and took office,

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[4] 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.").

undoing the results of a presidential election. The legal problem is that impeachment and removal 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,[5] and there is no other constitutional mechanism for Congress to remedy such a constitutional violation.

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, and state law often dictates how the elector must cast his vote.[6]

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[5] 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 falsity 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/.

[6] *See, e.g.*, California Elections Code § 6906. *See also* Keyes at 658 ("the electors have a ministerial duty to convene on a specific date, in a

That there are problems associated with enforcement of the clause by Congress, the electoral college, and the judiciary does not mean, however, that the "natural born citizen" requirement was intended to be legally unenforceable. Vesting the presidential selection process in the several state legislatures, the Constitution anticipates that each state will enforce the federal citizenship requirement. In the modern era, selection of electors supporting a presidential candidate is done by popular vote.[7] Thus, in California, enforcement of the citizenship requirement should be performed by the Secretary's issuance of the official state ballot for the selection of the presidential electors. If California state officials neglect that duty under the U.S. Constitution, as has happened here, 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).

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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.").

[7] Contrary to the understanding of most Americans today, popular elections for the President (or even the electors) are not mandated by the U.S. Constitution. Indeed, early in our nation's history, many states had their legislatures choose their electors. *See, e.g.*, McPherson v. Blacker, 146 U.S. 1, 32 (1892) ("In 1824 the electors were chosen by popular vote, by districts, and by general ticket, in all the States excepting Delaware, Georgia, Louisiana, New York, South Carolina, and Vermont, where they were still chosen by the legislature.").

In justifying the Secretary of State's neglect of the "natural born citizen" eligibility requirement, the court below also rejected a challenge to California Elections Code § 6901, which directs Bowen to place the names of the presidential electors for candidates of established political parties on the election ballot without any express requirement that Bowen consider natural born citizenship or any other qualification. Slip Op. at 4 n.3. Yet even then, the Secretary of State apparently assumes that she is bound by the mandate of § 6901 to put candidates of established political parties on the ballot regardless of a candidate's citizenship, but not as it relates to a candidate's age, for which reason she disqualified a presidential candidate in 2012,[8] 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.

Those who now assert 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 thereby sanction state presidential elections in violation of the federal constitutional text. Indeed, many of those who reject the notion that the states are bound to enforce the federal constitutional text harbor

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

animus toward the citizenship eligibility requirement.[9] However, this Court is duty bound to uphold the U.S. Constitution as written, irrespective of its own views of the policy embedded in its provisions. Indeed, Petitioner submits that 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. The effect of denial of this petition would seriously undermine the confidence of people in a system which allows the California Secretary of State to enforce or disregard the U.S. Constitution as suits her personal agenda, but also undermine the people's confidence that judges are under the law, taking an oath to enforce the constitutional text even when it varies from their personal preferences. Lastly, refusal to address this issue ultimately would undermine confidence in the legitimacy of the person

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[9] *See, e.g.*, L. Solum, *Originalism and the Natural Born Citizen Clause*, 107 Mich. L. Rev. First Impressions 22, 23 (2008) (citing constitutional scholar Michael Dorf: "The '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!"); Professor Jonathan Turley, "Arnold Schwarzenegger and the Constitutional Ban on Foreign Born Presidents," Res Ipsa Loquitur blog, Aug. 20, 2007 ("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/.

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).

STATEMENT OF THE CASE

Plaintiff-Appellant Noonan is a citizen of California and was a declared candidate for President of the United States for the American Independent Party for the 2012 presidential election. As a candidate, Noonan had a discrete and personalized legal interest in having a lawful and fair election.

Defendant-Appellee Bowen is Secretary of State and Chief Elections Officer for the State of California.[10] 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.[11] There is no federal office or agency that verifies the constitutional eligibility of candidates for federal office, that duty being vested in the states. Yet California Elections Code § 6901 requires the Secretary of State to "cause the names of the candidates

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[10] *See* California Government Code § 12172.5(a).

[11] "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).

for President and Vice President of the several political parties to be placed upon the ballot for the ensuing general election" without any express reference to constitutional eligibility.

On January 6, 2012, Noonan and his co-plaintiffs filed a petition for a writ of mandate to compel 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. Defendants demurred, plaintiffs filed an amended petition on March 22, 2012, and defendants demurred again. On July 5, 2012, the trial court entered an order sustaining defendants' demurrers without leave to amend and dismissing the petition in its entirety.

While the instant case was still before the Court of Appeal, 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 an 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). In rejecting the candidate's First Amendment arguments, the Ninth Circuit stated that "[h]olding that Secretary Bowen couldn't exclude [ineligible candidates] from the ballot ...

would mean that anyone, regardless of age, citizenship or any other constitutional ineligibility would be entitled to clutter and confuse our electoral ballot." *Id.* at 1064.

Plaintiffs in this case appealed from dismissal of their petition and, on August 27, 2014, the Court of Appeal for the Third Appellate District affirmed the judgment of the trial court.[12] The Court of Appeal[13] "consider[ed] Noonan's ... challenge to *Keyes* and reject[ed] it on its merits." It 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.'" Noonan, slip op. at 1. The Court of Appeal briefly addressed the Ninth Circuit's Lindsay decision, but disregarded it as having no bearing on this case. *Id.* at 9-10.

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[12] Petitioner Noonan did not file a petition for rehearing. A petition for rehearing was filed by Petitioner Barnett, which was denied by the Court of Appeal on September 18, 2014.

[13] A petition for review in a case raising issues similar to Noonan is currently pending before this Court in Dummett v. Bowen, No. S220934.

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,[14] and he is the "Commander in Chief of the Army and Navy of the United States."[15] The presidency is considered to 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. Unlike the parliamentary systems which exist in many countries, in which the Executive is a creature of the legislature, the American Presidency can be viewed as an experiment in creating a chief executive independent of the national legislature. *See generally* Federalist No. 68.

Indeed, not only is the office and power of the executive branch vested in one person, independent of Congress, 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

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

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

— 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 be a "natural born Citizen." The early American jurist St. George Tucker explained "[t]hat [the] provision in the constitution which requires that the president shall be a native-born citizen ... is a happy means of security against foreign influence, which ... is to be dreaded more than the plague." St. George Tucker, View of the Constitution of the United States at 260 (Liberty Fund: 1999). 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,[16] not a narrow partisan issue as some have sought to characterize it.[17] Disputes over the application of this clause date back 133 years to President Chester A. Arthur.[18] In the upcoming 2016 Presidential election, there are already no fewer than four potential candidates for the Republican nomination whose ability to meet the "natural born citizen" requirement is in question.[19] Candidate eligibility has arisen in the past and remains an issue that will continue to arise in the future — in both major

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[16] *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."). *See also* Rudy v. Lee, 2014 U.S. App. LEXIS 7025 (Fed. Cir. 2014).

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

[18] *See also* p. 3 n.2, *infra*.

[19] 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/.

political parties as well as so-called "third parties."[20] With this petition for review, 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 the highest office in the land.

Moreover, because California currently has the largest number of presidential electors in the electoral college,[21] the issue of the integrity of California's official state presidential ballot significantly affects the outcome of the national election. Thus, this case presents an issue of not only statewide, but also national, importance.

II. KEYES WAS BASED ON AN ERRONEOUS AND UNCONSTITUTIONAL PREMISE THAT ELIGIBILITY IS BEST LEFT TO THE POLITICAL PARTIES AND TO CONGRESS.

As part of the Constitutional plan to have a President who is neither subordinate to nor indebted to Congress, Article II, Section 1, Clause 2 of the U.S. Constitution provides:

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[20] 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).

[21] California has 55 votes in the electoral college, of a total of 538 electors, constituting fully 20 percent of the 270 electoral votes required to win an election.

> 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 process by which the president is elected. 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 duties, 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. [Noonan at 6, quoting Keyes, 189 Cal. App. 4th at 660 (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.[22]

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, which incorrectly grounded its decision on the Twelfth and 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 the Article II presidential eligibility provisions.[23] Instead, the Twelfth and Twentieth Amendments were not significant

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[22] *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.").

[23] 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.

changes to the presidential election process, but more in the nature of "housekeeping," to remedy specific problems that had arisen with federal elections. Those amendments did not expand Congress's role in presidential elections, but instead confirm 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, at 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 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, nor even allude to general objections of the type referred to by Keyes. Moreover, even if such objections were properly made, 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 expressed great concern 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. *See* The Records of the Federal Convention[24]:

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[24] Federalist No. 68 also confirmed that the division of the authority over presidential elections to the states was done intentionally, and 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

> 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, to be a matter entrusted to the various state legislatures. Indeed, the California legislature established a system for administering presidential elections in this state,[25] and has entrusted that responsibility to the Secretary of State. However, the Secretary of State has refused to fulfill her constitutional and statutory obligations.

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. In the professed interest of avoiding "chaotic results," the California courts have turned over

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eminent degree endowed with the requisite qualifications." *The Federalist*, pp. 353-54.

[25] *See* California Elections Code, Division 6.

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 chance for winning a general election. The Court of Appeal appears to have either forgotten or ignored the entire history of human nature, as well as what has more recently 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 is also absurd in its delegation of the state's responsibility over the official state ballot to political parties, based on an unwarranted belief that they will do the job the Secretary of State refused to do.

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, earlier this year, 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 official state 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 U.S. Constitution's 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 the **integrity** of its political processes from frivolous or **fraudulent** candidacies.'" 750 F.3d at 1064 (citing Bullock v. Carter at 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 although 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* Noonan, slip op. at 9-10 (emphasis added). A judicial rationale based on such an artificial distinction between degrees of ineligibility 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 encourages 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 her own Democrat party.[26]

For all the reasons stated above, 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.

The trial court ruled that California Elections Code § 6901 was not unconstitutional because the Secretary of State has no obligation to determine the eligibility of candidates before placing their names on the official state ballot. Likewise, the Court of Appeal brushed away the challenge to § 6901 with a simple footnote:

> 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 Noonan [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 Noonan [has] **failed to demonstrate** the existence of any such **duty**, [he has] necessarily failed to show that Elections Code section 6901 is unconstitutional. [Noonan at 4, n.3 (emphasis added).]

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[26] California Secretary of State is an elected office, and Debra Bowen was elected to that office as a Democrat.

Once again, beginning with a false premise, the Court of Appeal reaches the wrong conclusion.

Section 6901 cited by the Court of Appeal governs only candidates for President and Vice President, and 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,[27] 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 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, if the lower courts are wrong, and Bowen does a have a duty to prevent candidates ineligible to serve from being placed on the official state ballot and to verify

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[27] 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 Secretary Bowen's actions as she has tried to use it. *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.").

presidential eligibility, then 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 candidates for the highest offices in the land — President and Vice President of the United States, when 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 done so inconsistently, having enforced that statute selectively, in an arbitrary and capricious manner, abusing her authority by applying certain eligibility criteria 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 to disregard the statute on some occasions and retreat behind it on other occasions 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.

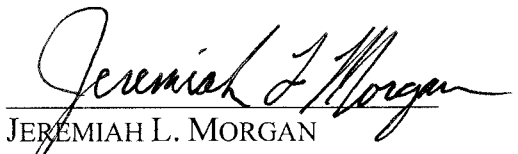
Thus, to the extent California Elections Code § 6901 requires the Secretary of State to ignore the plain requirements of the U.S. Constitution's Article II, it is unconstitutional and unenforceable.

CONCLUSION

For the foregoing reasons, petitioner submits that this Court should grant this Petition for Review.

October 3, 2014

Respectfully submitted,



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CERTIFICATE OF WORD COUNT

CRC 8.204(c)(1)

I hereby certify that this Petition for Review consists of 6,816 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 3rd day of October, 2014.

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OPINION

Filed 8/27/14 Noonan v. Bowen CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

EDWARD NOONAN et al., Plaintiffs and Appellants, v. DEBRA BOWEN, as Secretary of State, etc., et al., Defendants and Respondents.	C071764 (Super. Ct. No. 34201280001048CUWMGDS)

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.) Hardly a year after the *Keyes* decision, plaintiffs Edward C. Noonan and Pamela Barnett (among others) commenced this mandamus proceeding, seeking a writ of mandate to require defendant Debra Bowen, as Secretary of State, to "bar ballot access of ineligible declared candidates for office of President of the United States . . . at the 2012 election cycle with restraint of fund raising . . . ." Like the

plaintiffs in *Keyes*, Noonan and Barnett based their petition on the assertion that Bowen "has a ministerial duty to verify the eligibility of those who are running for the office of President of the United States." Noonan and Barnett also asserted in their petition that Election 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 the demurrers of Bowen and of defendants President Barak Obama and Obama for America without leave to amend. Because neither Noonan nor Barnett has shown any error in that ruling, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In January 2012, Noonan and Barnett (and others who have not sought relief on appeal) filed a petition for writ of mandate seeking to compel Bowen to "bar ballot access of ineligible declared candidates for office of President of the United States . . . at the 2012 election cycle with restraint of fund raising . . . ." Bowen and Obama demurred. In response, Noonan and Barnett filed an amended petition.

In their amended petition, Noonan and Barnett asserted that Bowen had a "duty . . . to determine whether President Obama or any other presidential candidate meets the eligibility requirements of the U.S. Constitution."[2] They further asserted that

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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.)

insofar as Election Code section 6901 "directs that the [Secretary of State] **must** place on the ballot the names of the several political parties' candidates," that statute is unconstitutional.

Bowen and Obama demurred again. The trial court sustained the demurrers 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 either to make a factual determination as to whether President Obama is eligible to hold or run for the office of President of the United States, or to find that the Secretary of State has a mandatory duty to make that determination. Such a determination is a matter that is beyond the jurisdiction of this Court, and is a matter that is not within the 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 Election 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, Noonan and Barnett each timely 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 neither Noonan nor Barnett asserts any error in the denial of leave to amend, the sole question before us is whether they have carried their

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

burden of showing that the demurrers were sustained erroneously. To carry that burden, they 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' "].) They have 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 p. 651.) Neither Noonan nor Barnett persuades us that *Keyes* was wrongly decided.

For his part, Noonan does not mention, let alone discuss, *Keyes* in his opening brief. This is an unconscionable omission, given that: (1) the trial court expressly rested its decision on *Keyes*; and (2) Noonan is represented on appeal by an attorney from the same organization (United States Justice Foundation) that represented the unsuccessful plaintiffs in *Keyes*. (See *Keyes*, *supra*, 189 Cal.App.4th at p. 651.)

In his reply brief, Noonan, for the first time, "contests the correctness of" *Keyes*. We could treat this contention as "forfeited because it was raised for the first time in [the] reply brief without a showing of good cause." (*Keyes*, *supra*, 189 Cal.App.4th at p. 660.) We choose not to do so, however. Instead, we consider Noonan's belated challenge to *Keyes* and reject it on its merits.

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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 Noonan and Barnett 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 Noonan and Barnett have failed to demonstrate the existence of any such duty, they have necessarily failed to show that Elections Code section 6901 is unconstitutional.

In support of his assertion that "[t]he Secretary of State has the duty and authority to examine the qualifications of candidates for every office subject to election in the State of California," Noonan cites Government Code section 12172.5.[4] 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*, *supra*, 189 Cal.App.4th at p. 659.)

Specifically addressing our decision in *Keyes*, Noonan argues that "this Court did not determine who had the duty to verify eligibility, finessing the issue by stating 'presumably [the political parties] will conduct the appropriate background check . . . .' " (*Keyes*, *supra*, 189 Cal.App.4th at p. 652.) He then argues that "the matter of eligibility in office of the President of the United States is too serious a matter to be left to a vague 'presumption' " and that "[t]he California state [L]egislature is duty bound by Article II, Section 1, Clause 5 of the U.S. Constitution to ensure that presidential electors are chosen, and that those electors are committed to voting only for a person who meets the qualifications for the office of the President as spelled out in Article II, Section 1, Clause [5]." Finally, he asserts that "[t]his responsibility has been vested in the California Secretary of State," and he once again cites Government Code section 12172.5

Noonan's assertions that "[t]he California state [L]egislature is duty bound by Article II, Section 1, Clause [5] of the U.S. Constitution to ensure that presidential electors . . . are committed to voting only for a person who meets the qualifications for

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4 Noonan repeatedly misidentifies the statute as *Elections* Code section 12172.5.

the office of the President as spelled out in [that] [c]lause" and that "[t]his responsibility has been vested in the California Secretary of State" are mere ipse dixit, unsupported by any principled argument or authority. As we stated in *Keyes*, "[t]he 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 duly-elected 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 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*, *supra*, 189 Cal.App.4th at p. 660.) Noonan has offered no argument or authority that dissuades us from that conclusion.

As for Noonan'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 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.) Noonan asserts that "[s]uch unfettered discretion is unconstitutional," but he offers no authority or argument in support of that assertion. It has been said that "[c]ounsel cannot, with nonchalant air, declare without argument that error was committed and by so doing transfer the labor of research from his own shoulders to the appellate tribunal." (*People v. Titus* (1927) 85 Cal.App. 413, 418.) That

observation applies here to Noonan's assertion that giving the Secretary of State discretion to investigate and determine if presidential candidates are qualified would be unconstitutional. Because Noonan does not support his assertion with argument or authority, we decline to consider it further.

For her part, Barnett offers arguments that are no more persuasive than Noonan's (to the extent we can even figure out what her arguments are). First, she contends the trial court added a requirement to the Elections Code in holding that she and Noonan could prevail only "if the State failed to perform a ministerial duty." She contends that Elections Code section 13314 gave the court the power to grant them relief "even without the State having a ministerial duty unfilled." We disagree.

Elections Code section 13314 provides in relevant part as follows:

"(a)(1) An elector may seek a writ of mandate alleging that an error or omission has occurred, or is about to occur, in the placing of a name on, or in the printing of, a ballot, sample ballot, voter pamphlet, or other official matter, or that any neglect of duty has occurred, or is about to occur.

"(2) A peremptory writ of mandate shall issue only upon proof of both of the following:

"(A) That the error, omission, or neglect is in violation of this code or the Constitution.

"(B) That issuance of the writ will not substantially interfere with the conduct of the election."

As we have explained, Noonan and Barnett sought a writ of mandate here on the theory 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 before allowing the candidate's name to be placed on the ballot. In essence, then, their claim was based on the assertion that a neglect of duty was about to occur insofar as Bowen was going to allow President Obama's name to be placed on the ballot in the 2012

election cycle without investigating or determining his eligibility for the office. Of course, to prevail on that claim they had to show that such a duty existed, which is consonant with the general requirement that a writ of mandamus will not issue unless the respondent has a clear, present and usually ministerial duty to act. (See *Keyes*, *supra*, 189 Cal.App.4th at p. 657.) Thus, Barnett's assertion that the trial court added a requirement to the Elections Code is without merit.

Barnett next asserts that the trial court "failed to treat OBAMA's admission that his legal father is a British Subject as an *admission against interest*." The issue in this case, however, is *not* whether President Obama is, in fact, a "natural born citizen" within the meaning of clause 5 of article II of the United States Constitution. The issue is whether the Secretary of State had a duty to investigate and determine whether President Obama is a natural born citizen before allowing his name to be placed on the ballot in the 2012 election cycle. Having failed to show that any such duty exists, Noonan and Barnett were not entitled to relief in this proceeding, and Barnett's argument about President Obama's qualifications -- which take up much of her brief -- are entirely beside the point.

Barnett next appears to make some sort of equal protection argument based on the fact that Bowen excluded a presidential candidate from the Peace and Freedom Party from the ballot in 2012 because she was eight years shy of the minimum age (35) to serve as President, and that action was upheld by a federal district court (in an unpublished decision). This argument is not sufficiently developed for us to address, as Barnett fails to cite to even a single authority on the principles of equal protection and fails to coherently articulate why the different treatment of President Obama and this other candidate violated those principles.

We will note, however, that "[t]o prevail on an equal protection of law challenge, a person must show the state has adopted a classification that affects in an unequal manner two or more groups that are similarly situated for purposes of the law that is

challenged." (*Ziehlke v. Valverde* (2011) 191 Cal.App.4th 1525, 1534.) Thus, to prevail here, Barnett would have to show that President Obama, who has admitted that his father was not a United States citizen, is similarly situated -- for purposes of determining eligibility for the office of President -- with a person who has admitted she is 27 years old. Barnett has not made, or even attempted to make, this showing. Moreover, Barnett has not shown how establishing an equal protection violation would entitle her to the relief she sought in this proceeding, which was primarily a writ of mandate to require the Secretary of State to investigate and determine the eligibility of candidates for the office of President before allowing their names to be placed on the ballot. Thus, Barnett's equal protection argument is without merit.

In a decision that came out after the completion of briefing in this matter -- *Lindsay v. Bowen* (9th Cir. 2014) 750 F.3d 1061 -- the Ninth Circuit Court of Appeals affirmed the dismissal of the federal case brought by the 27-year-old Peace and Freedom Party candidate 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 is not qualified to serve as President.

The *Lindsay* decision does not support the arguments of Noonan and Barnett here because the question in this case is not whether the California Secretary of State has the power to exclude from the ballot the name of a presidential candidate who admittedly is not qualified to serve, but rather whether the Secretary of State has a *ministerial duty* to investigate the qualifications of presidential candidates and to exclude those whom the Secretary determines do not qualify. As we have explained, the answer to the latter 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.

To the extent Barnett's brief contains additional arguments, they are not sufficiently distinct from the foregoing arguments to require separate discussion, or they are simply not sufficiently comprehensible to allow for cogent discussion in this opinion. The bottom line is that neither Noonan nor Barnett has carried the burden of showing that the trial court's decision was in error.

DISPOSITION

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

ROBIE, J.

We concur:

RAYE, P. J.

MAURO, J.

ORDER- DENYING REHEARING

IN THE

Court of Appeal of the State of California

IN AND FOR THE

THIRD APPELLATE DISTRICT

EDWARD NOONAN et al.,
Plaintiffs and Appellants,
v.
DEBRA BOWEN, as Secretary of State, etc., et al.,
Defendants and Respondents.

C071764
Sacramento County
No. 34201280001048CUWMGDS

BY THE COURT:

Appellant Pamela Barnett's petition for rehearing is denied.

Dated: September 18, 2014

RAYE, P.J.

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cc: See Mailing List

State of California)
County of Los Angeles)
)

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I declare under penalty of perjury that the foregoing is true and correct:

Signature: _____

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Fredric D. Woocher, Esq. STRUMWASSER & WOOCHER LLP 10940 Wilshire Boulevard Suite 2000 Los Angeles, California 90024 *Attorney for Respondents,* *Barack Hussein Obama II, as President et al.*	Clerk for the Hon. Michael P. Kenny SUPERIOR COURT OF CALIFORNIA County of Sacramento Gordon D. Schaber Sacramento County Courthouse 720 9th Street Sacramento, California 95814 *Trial Court Judge*