APPENDIX

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Appendix A.1

JOHN ALBERT DUMMETT, JR., et al.,
Plaintiffs and Appellants,
v.
DEBRA BOWEN, as Secretary of State, etc.,
Defendant and Respondent.

C073763

COURT OF APPEAL OF CALIFORNIA,
THIRD APPELLATE DISTRICT

2014 Cal. App. Unpub. LEXIS 5089

July 21, 2014, Opinion Filed

NOTICE: NOT TO BE PUBLISHED IN OFFICIAL REPORTS. *CALIFORNIA RULES OF COURT, RULE 8.1115(a)*, PROHIBITS COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY *RULE 8.1115(b)*. THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF *RULE 8.1115*.

In *Keyes v. Bowen* (2010) 189 Cal.App.4th 647 (*Keyes*), this court held that the California Secretary of State "does not have a duty to investigate and determine whether a presidential candidate meets [the] eligibility requirements of the United States Constitution." (*Id.* at p. 651-652.) Within two years of the *Keyes* decision, plaintiff John Albert Dummett, Jr., a write-in presidential candidate in the 2012

California Republican primary, and others (hereafter Dummett) commenced this mandamus proceeding, seeking a writ of mandate to require defendant Debra Bowen, as Secretary of State, to "require all candidates for the office of President of the United States provide sufficient proof of eligibility prior to approving their names for the ballot" and to enjoin Bowen "from placing the names of candidates who have failed to so prove their eligibility on the 2012 California Presidential primary election ballot." Like the plaintiffs in *Keyes*, Dummett based his petition on the assertion that Bowen has a duty to "verify the eligibility of Presidential candidates." Dummett also asserted in his petition that Elections Code section 6901 is unconstitutional [*2] to the extent it requires the Secretary of State to place presidential candidates' names on the ballot without vetting their qualifications.[1]

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

FACTUAL AND PROCEDURAL BACKGROUND

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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.)

In March 2012, Dummett filed a petition for writ of mandate "challeng[ing] the failure of . . . Bowen . . . to verify that all candidates for the office of President of the United States seeking to be placed on the California Presidential primary ballot are eligible for that office under the U.S. Constitution, Article II, Section 1, Clause 5."[2] He further asserted that "the language of California Elections Code [section] 6901, compelling the Secretary of State to place any candidate nominated by [*3] a political party on the ballot, without verifying that the candidate is eligible for the office, is in direct conflict with the requirements for Presidential eligibility in Article II of the United States Constitution."

Bowen demurred. The trial court sustained the demurrer without leave to amend. The court concluded that the petition "fail[ed] to state facts sufficient to constitute a cause of action because [the petition] requires the Court to find that the Secretary of State has a mandatory duty to make a determination of the eligibility of candidates in the presidential primary election. Such a determination is a matter that is not within the mandatory duties of the Secretary of State." In reaching this conclusion, the court relied largely on this court's decision in *Keyes*. The trial court also

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

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

concluded that Elections Code section 6901 is not unconstitutional because that "contention is based on the [*4] theory that the Secretary of State has a legal duty, in this instance one that is alleged to be of constitutional origin, to determine the eligibility of candidates for President of the United States before their names may be placed on the ballot. As discussed above, no such legal duty exists."

From the resulting judgment of dismissal, Dummett appealed.

DISCUSSION

On appellate review of the sustaining of a demurrer without leave to amend, "[i]t is plaintiffs' burden to show either that the demurrer was sustained erroneously or that the trial court's denial of leave to amend was an abuse of discretion." (*Keyes, supra,* 189 Cal.App.4th at p. 655.) Because Dummett does not assert any error in the denial of leave to amend, the sole question before us is whether he has carried his burden of showing that the demurrer was sustained erroneously. To carry that burden, he must persuade us that the Secretary of State *does*, in fact, have a duty to investigate and determine whether a presidential candidate meets the eligibility requirements of the United States Constitution.[3] (See *Keyes*, at p. 657

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[3] Given the nature of [*5] the constitutional challenge to Elections Code section 6901, it is not separate from the question of whether the Secretary of State has the duty Dummett claims because, as the trial court recognized, the statute would be unconstitutional only if it interfered with a constitutionally-based duty on the part of the Secretary of State to determine the

[issuance of writ of mandamus requires "'a clear, present and usually ministerial duty on the part of the respondent'"].) He has not done so.

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

In support of his assertion that the Secretary of State has the "power[] and dut[y]" to examine the qualifications of candidates for every office subject to election in the State of California, Dummett cites Government Code section 12172.5. As we noted in *Keyes*, however, that statute provides only that "[t]he Secretary of State is charged with ensuring 'that elections are efficiently conducted and that state election laws are enforced . . . .' " (*Keyes, supra*, 189 Cal.App.4th at p. 658, quoting Gov. Code, § 12172.5, subd. (a).) Nothing in that statute imposes, explicitly [*6] or implicitly, a clear and present duty on the Secretary of State to investigate and determine whether a presidential candidate meets the eligibility requirements of the United States Constitution. (See *Keyes*, at pp. 659-660.)

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eligibility of presidential candidates. Because Dummett has failed to demonstrate the existence of any such duty, he has necessarily failed to show that Elections Code section 6901 is unconstitutional.

As for Dummett's suggestion in his opening brief that the Secretary of State has a duty to investigate and determine whether a presidential candidate meets the eligibility requirements of the United States Constitution because some Secretaries of State have, in fact, done so, we find no merit in that argument. As we stated in *Keyes*, just because a Secretary of State has "excluded a candidate who indisputably did not meet the eligibility requirements does not demonstrate that the Secretary of State has a clear and present ministerial duty to investigate and determine if candidates are qualified before following the statutory mandate to place their names on the general election ballot." (*Keyes, supra,* 189 Cal.App.4th at p. 660.)

Finally apart from *Keyes*, we briefly address a recent case from the Ninth Circuit Court of Appeals, *Lindsay v. Bowen* (9th Cir. 2014) 750 F.3d 1061 that affirmed the dismissal of a case brought by a 27-year-old candidate for President of the United States whom the Secretary of the State of California (Bowen) omitted from the certified list of [*7] candidates generally recognized to be seeking their parties' nominations, because it was undisputed the candidate was not constitutionally eligible to be President because she too was young. *Lindsay* stands for the proposition that it does not violate the federal Constitution -- specifically, the First Amendment, the equal protection clause, and the Twentieth Amendment -- for the California Secretary of State to refuse to place on the ballot the name of a presidential candidate who admittedly was not qualified to serve as President.

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

DISPOSITION

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

ROBIE, J.

We concur:
BLEASE, Acting P. J.
DUARTE, J.

Appendix A.2

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

C071764

COURT OF APPEAL OF CALIFORNIA,
THIRD APPELLATE DISTRICT

2014 Cal. App. Unpub. LEXIS 6055

August 27, 2014, Filed

NOTICE: NOT TO BE PUBLISHED IN OFFICIAL REPORTS. *CALIFORNIA RULES OF COURT, RULE 8.1115(a)*, PROHIBITS COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY *RULE 8.1115(b)*. THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF *RULE 8.1115*.

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

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[1] "Whenever a political party, [*2] 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.)

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 [*3] "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 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

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[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.)

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

United States, or to find that the Secretary of State has a mandatory duty to make that determination. Such a determination is a matter [*4] 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 burden of showing that the demurrers were sustained erroneously. To carry that burden, they must persuade us [*5] 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 [*6] 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

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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.

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.

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 [*7] 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

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

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 the office of the President [*8] 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 [*9] 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 [*10] 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 [*11] 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 [*12] 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 [*13] 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 [*14] 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 [*15] 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.

Appendix B.1

Superior Court of the State of California
County of Sacramento

JOHN ALBERT DUMMETT, JR., et al.,
Petitioners,
v.
SECRETARY OF STATE DEBRA BOWEN,
Respondent.

Case No. 34-2012-80001091
Related Case No. 34-2012-80001048

ORDER SUSTAINING DEMURRER TO PETITION FOR WRIT OF MANDATE

Date: October 26, 2012

This matter came before the Court on October 26, 2012, at 9:00 a.m., for hearing on Respondent California Secretary of State Debra Bowen's demurrer to the petition for writ of mandate.

Gary G. Kreep and Nathaniel J. Oleson appeared on behalf of Petitioners. Anthony R. Hakl, Deputy Attorney General, appeared on behalf of Respondent California Secretary of State Debra Bowen.

Having considered the written material submitted by the parties, and after hearing oral argument, for the reasons set forth in the Court's Minute Order, a copy of which is attached as Exhibit A and

incorporated by reference, IT IS HEREBY ORDERED that:

The demurrer by Respondent California Secretary of State Debra Bowen is sustained without leave to amend.

IT IS SO ORDERED.

Dated: March 28, 2013

/s/
Michael P. Kenney
Judge of the Superior Court

Exhibit A

JOHN ALBERT DUMMETT, JR., et al.,
Petitioners,
v.
SECRETARY OF STATE DEBRA BOWEN,
Respondent.

Filed: October 26, 2012

MINUTE ORDER

TENTATIVE RULING

The following shall constitute the Court's tentative ruling on the demurrer to the petition for writ of mandate, which is scheduled to be heard by the Court on Friday, October 26, 2012 at 9:00 a.m. in Department 31. The tentative ruling shall become the

final ruling of the Court unless a party wishing to be heard so advises the clerk of this Department no later than 4:00 p.m. on the court day preceding the hearing, and further advises the clerk that such party has notified the other side of its intention to appear.

In the event that a hearing is requested, oral argument shall be limited to no more than 20 minutes per side.

The petition for writ of mandate in this matter asserts two claims:

1. United States in the primary election to provide her with sufficient proof of their eligibility for office as a condition of approving their names for the ballot.
2. Elections Code section 6901, which governs the duties of the Secretary of State in relation to the general election ballot, is unconstitutional and unenforceable.

Respondent Secretary of State has filed a demurrer to the petition, asserting that the petition fails to state facts sufficient to constitute a cause of action.[1]

The petition attempts to state a cause of action for issuance of a writ of mandate under Code of Civil Procedure section 1085. Two essential elements must

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[1] On May 25, 2012, the Court sustained demurrers without leave to amend in a related action, *Edward C. Noonan, et al., v. Bowen, et al.*, Case Number 2012-80001048, which raised the same issue regarding the Secretary of State's alleged mandatory duties. The Court subsequently entered judgment of dismissal in that case.

be met in order for the writ to issue: "(1) A clear, present and usually ministerial duty upon the part of the respondent; and (2) a clear, present and beneficial right in the petitioner to the performance of that duty." (See, *Loder v. Municipal Court* (1976) 17 Cal. 3rd 859, 863.)

For the purpose of the demurrer only, the court treats all of the petition's factual allegations as true (without making any actual findings as to their truth or falsity), but does not treat as true any contentions, deductions, or conclusions of fact or law. (See, *Blank v. Kirwan* (1985) 39 Cal. 3rd 311, 318.)

Having applied the standard of review described above to the petition, the Court sustains the demurrer. The petition fails to state facts sufficient to constitute a cause of action because it requires the Court to find that the Secretary of State has a mandatory duty to make a determination of the eligibility of candidates in the presidential primary election. Such a determination is a matter that is not within the mandatory duties of the Secretary of State, as held in controlling decisions of the Third District Court of Appeal.

In *Keyes v. Bowen* (2010) 189 Cal. App. 4th 647, 661, the Court of Appeal held that the California Secretary of State was under no "ministerial duty to investigate and determine whether a presidential candidate is constitutionally eligible to run for that office". The Court explained that federal law provided the appropriate remedy through an objection to electoral votes in Congress under Section 15 of Title 3 of the

United States Code. Because this remedy existed, the Court held that a writ of mandate could not be issued to compel the California Secretary of State to investigate the eligibility of a presidential candidate, stating:

"[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. [...] 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 electoral votes." (*Id.*, at 660.)

The appellate court also analyzed Elections Code section 6041, concluding that the statute did 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 a more recent opinion issued on March 1, 2012, *Fuller v. Bowen* (2012) 203 Cal. App. 4th 1476, the Third District Court of Appeal held that California courts lack jurisdiction to judge the qualifications of a candidates of the State Senate because the California Constitution vested the power to do so in the State Senate itself. The Court specifically held:

"The California Constitution vests in each house of the Legislature the sole authority to judge the qualifications and elections of a candidate for membership in that house, even when the challenge to the candidate's qualifications is brought prior to a primary election." (*Id.*, at page 1479.)

Even though *Fuller* involved a state office, rather than a federal office, the Court's holding indicates that the courts lack jurisdiction to make a determination of the eligibility of any candidate for office, state or federal, or to order a state elections official to do so, if the right to make that determination is vested by law in a legislative body. As found in the *Keyes* case, the right to make any determination regarding a presidential candidate's eligibility to hold office under the provisions of the United States Constitution belongs to Congress. This Court therefore concludes that it lacks jurisdiction to order that the Secretary of State make such a determination on the theory that she has a mandatory duty to do so.

Finally, petitioners contend that Elections Code section 6901 is unconstitutional and unenforceable, because it prevents respondent Secretary of State from fulfilling her duties as the Chief Election Officer of California. The statute provides:

"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 ensuring general election."

Petitioners' contention that this provision of law is unconstitutional is without merit. As before, petitioner's 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.

The demurrers therefore are sustained.

The remaining issue is whether the demurrers should be sustained without leave to amend.

"A demurrer may be sustained without leave to amend where the facts are not in dispute and the nature of the plaintiff's claim is clear, but, under substantive law, no liability exists." (*Keyes v. Bowen, supra*, 189 Cal. App. 4th at 655.) Here, there is no dispute over the relevant facts (which are that the Secretary of State does not verify the eligibility of all candidates in presidential primary elections as a matter of mandatory duty), and the nature of petitioners' claim is clear. Any further amended petition still would require the Court either to find that the Secretary of State is legally required to make a determination as to the eligibility of candidates in the presidential primary election. Under the

controlling authority of the *Keyes* and *Fuller* cases, as discussed above, the Secretary of State has no legal duty to do so. No liability, and no right to relief, exists on the basis of the facts alleged by petitioners.

Moreover, the petition, as framed, is moot. The petition alleges that the Secretary of State's duties must be performed prior to the primary election. Although the petition was filed before the primary election, that election is now over.

The demurrer therefore is sustained without leave to amend. Judgment of dismissal shall be entered in favor of respondents.

In the event that this tentative ruling becomes the final ruling of the Court, in accordance with Local Rule 9.16, counsel for respondent Secretary of State is directed to prepare a formal order and judgment of dismissal in conformity with this ruling; submit them to counsel for petitioners and to any unrepresented petitioners for approval as to form in accordance with Rule of Court 3.1312(a); and thereafter submit them to the Court for signature and entry of judgment in accordance with Rule of Court 3.1312(b).

COURT RULING

The matter is argued and submitted. The Court takes the matter under submission.

COURT RULING ON SUBMITTED MATTER

The Court AFFIRMS the tentative ruling.

Appendix B.2

Superior Court of the State of California
County of Sacramento

EDWARD C. NOONAN, et al.,
Petitioners,
v.
DEBRA BOWEN, individually and officially as the CALIFORNIA SECRETARY OF STATE, et al.
Respondents.

Case No. 34-2012-80001048

ORDER SUSTAINING DEMURRERS TO FIRST AMENDED PETITION FOR WRIT OF MANDATE

Date: May 25, 2012

This matter came before the Court on May 25, 2012, at 9:00 a.m., for hearing on (1) Respondent California Secretary of State Debra Bowen's demurrer to the first amended petition for writ of mandate and (2) Respondents President Barack Obama and Obama for America's demurrer to the first amended petition for writ of mandate.

Gary G. Kreep appeared on behalf of Petitioner Edward C. Noonan. Pamela Barnett, proceeding pro se, appeared on her own behalf. Petitioners Sharon Chickering, George Miller, Tony Dolz, Neil Turner and Gary Wilmott, also proceeding pro se, did not appear.

Anthony R. Hakl, Deputy Attorney General, appeared on behalf of Respondent California Secretary of State Debra Bowen. Fredric D. Woocher of Strumwasser & Woocher LLP appeared on behalf of Respondents President Barack Obama and Obama for America.

Having considered the written material submitted by the parties, and after hearing oral argument, for the reasons set forth in the Court's Minute Order, a copy of which is attached as Exhibit A and incorporated by reference, IT IS HEREBY ORDERED that:

The demurrer by Respondent California Secretary of State Debra Bowen and the demurrer by Respondents President Barack Obama and Obama for America are sustained without leave to amend.

IT IS SO ORDERED.

Dated: July 5, 2012

/s/
Michael P. Kenney
Judge of the Superior Court

Exhibit A

EDWARD C. NOONAN, et al.,
Petitioners,
v.
DEBRA BOWEN, individually and officially as the CALIFORNIA SECRETARY OF STATE, et al.,

Respondents.

Filed: May 25, 2012

MINUTE ORDER

TENTATIVE RULING

The following shall constitute the Court's tentative ruling on the demurrers to the "First Amended [Petition for] Prerogative Writ of Mandate and Restraint of Fund Raising" (the "amended petition"), which are scheduled to be heard by the Court on Friday, May 25, 2012 at 9:00 a.m. in Department 31. The tentative ruling shall become the final ruling of the Court unless a party wishing to be heard so advises the clerk of this Department no later than 4:00 p.m. on the court day preceding the hearing, and further advises the clerk that such party has notified the other side of its intention to appear.

In the event that a hearing is requested, oral argument shall be limited to no more than 20 minutes per side.

This matter is related to the impending June 5 Democratic Party presidential primary election. The underlying basis for the amended petition is the factual contention that President Obama is ineligible to be a candidate for President of the United States, or to hold office, because he is not a natural born citizen as required by Artide 2, Section 1 of the United States Constitution.

Based on this contention, petitioners seek various forms of relief, including issuance of a writ of mandate and an injunction. Principally, petitioners seek an order that would require respondent Bowen, as California Secretary of State, to bar respondent President Barack Obama from the ballot on the basis that he has not submitted sufficient proof of his eligibility for office.

Petitioners further seek an order requiring respondent Bowen to require all candidates for the office of President of the United States to provide her with sufficient proof of their eligibility for office as a condition of approving their names for the ballot, and enjoining her from placing the names of any candidates on the ballot who have not done so.

The petition also appears to seek a direct order of the Court barring President Obama from the California Primary Ballot until he provides evidence that he is a "natural bom citizen" of the United States, and releases certain documentation allegedly related to this issue.

Petitioners also seek an order restraining respondents President Obama and Obama for America (California) from engaging in fund-raising activities in California during this election cycle, on the theory that President Obama is not eligible for office and has been concealing evidence of his alleged ineligibility.

Finally, petitioners seek an order finding Elections Code section 6901, which govems the duties of the

Secretary of State in relation to the general election ballot, to be unconstitutional and unenforceable.

Respondent Bowen has filed a demurrer to the amended petition. Respondents President Obama and Obama for America (California) have filed a separate demurrer. Both demurrers assert that the amended petition fails to state facts sufficient to constitute a cause of action that could support the relief requested in the petition.

Only one of the seven petitioners, Edward C. Noonan, filed a timely opposition to the demurrers.[1]

The amended petition attempts to state a cause of action for issuance of a writ of mandate under Code of

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[1] All petitioners in this case appeared *in propria persona* when they filed the original petition on January 6, 2012. On May 14, 2012, petitioner Noonan filed a Substitution of Attorney-Civil form stating that he would thenceforth be represented by an attorney, Gary G. Kreep, who filed the opposition to the demurrers on behalf of petitioner Noonan on the same date. On May 21, 2012, petitioner Pamela Barnett filed an untimely opposition, in which she asks the Court to continue the hearing on the demurrer until June 15, 2012. Petitioner Barnett states that she did not file a timely opposition because she believed that Mr. Kreep had agreed to represent her as well as petitioner Noonan, and she did not find out that was not the case until it was too late to file her own timely opposition. Petitioner Barnett's request for a continuance is denied on the ground that she has not demonstrated good cause for her untimely filing, in that she has not demonstrated that she had reasonable grounds for believing that Mr. Kreep would represent her. As an alternative, petitioner Barnett asks the Court to consider the legal arguments in the amended petition as her opposition to the demurrer. The Court has considered the arguments set forth in the amended petition.

Civil Procedure section 1085, along with other ancillary relief. Two essential elements must be met in order for the writ to issue: "(1) A clear, present and usually ministerial duty upon the part of the respondent; and (2) a clear, present and beneficial right in the petitioner to the performance of that duty." (See, *Loder v. Municipal Court* (1976) 17 Cal. 3rd 859, 863.)

For the purpose of the demurrer only, the court treats all of the petition's factual allegations as true (without making any actual findings as to their truth or falsity), but does not treat as true any contentions, deductions, or conclusions of fact or law. (See, *Blank v. Kirwan* (1985) 39 Cal. 3rd 311, 318.)

The Court also considers matters which may be judicially noticed. (See, *California Alliance for Utility Safety and Education v. City of San Diego* (1997) 56 Cal. App. 4th 1024, 1028.) In this case, respondents President Obama and Obama for America have filed two requests for judicial notice. The requests are not opposed and are granted.

Having applied the standard of review described above to the amended petition, the Court sustains the demurrers. The amended petition fails to state facts sufficient to constitute a cause of action because it 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, as held in controlling decisions of the Third District Court of Appeal.

In *Keyes v. Bowen* (2010) 189 Cal. App. 4th 647, 661, the Court of Appeals held that the California Secretary of State was under no "ministerial duty to investigate and determine whether a presidential candidate is constitutionally eligible to run for that office". The Court explained that federal law provided the appropriate remedy through an objection to electoral votes in Congress under Section 15 of Title 3 of the United States Code. Because this remedy existed, the Court held that a writ of mandate could not be issued to compel the California Secretary of State to investigate the eligibility of a presidential candidate, stating:

"[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. [...] 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 electoral votes." (*Id.*, at 660.)

Although the opinion in the *Keyes* case involved a challenge brought after a general election, rather than before a primary election, which is the case here, the

Court indicated that the same holding would apply where the challenge involved a case brought before a primary election. Analyzing Elections Code section 6041, which the Court found gives the Secretary of State "some discretion in determining whether to place a name on the primary ballot", the Court concluded that the statute did 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 a more recent opinion issued on March 1, 2012, *Fuller v. Bowen* (2012) 203 Cal. App. 4th 1476, the Third District Court of Appeal held that California courts lack jurisdiction to judge the qualifications of a candidate for the State Senate because the California Constitution vested the power to do so in the State Senate itself. The Court specifically held:

'The California Constitution vests in each house of the Legislature the sole authority to judge the qualifications and elections of a candidate for membership in that house, even when the challenge to the candidate's qualifications is brought prior to a primary election." (*Id*., at page 1479.)

Even though *Fuller* involved a state office, rather than a federal office, the Court's holding indicates that the courts lack jurisdiction to make a determination of the eligibility of any candidate for office, state or federal, if the right to make that determination is vested by law in a legislative body. As found in the *Keyes* case, the right to make any determination

regarding a presidential candidate's eligibility to hold office under the provisions of the United States Constitution belongs to Congress. This Court therefore concludes that it lacks jurisdiction to make the determination regarding President Obama's eligibility that the petitioners seek as the basis for relief, or to order that the Secretary of State make such a determination.

Petitioners' claim that President Obama and respondent Obama for America (California) should be restrained from fund-raising in California is based entirely on the allegation that President Obama is not eligible to hold or run for the office of President of the United States. Any relief that could be granted therefore would be entirely dependent upon a factual determination by the Court or the Secretary of State that he is not eligible. As found above, the Court may not make that determination, or order the Secretary of State to make it. In the absence of any such determination, there is no factual basis under the petition for the Court to issue an order restraining President Obama or respondent Obama for America (California) from engaging in fund-raising activities in California related to the presidential campaign.

Finally, petitioners contend that Elections Code section 6901 is unconstitutional and unenforceable, because it prevents respondent Bowen from fulfilling her duties as the Chief Election Officer of California. The statute provides:

"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."

Petitioners' contention that this provision of law is unconstitutional is without merit. As before, petitioner's 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.

The demurrers therefore are sustained.

The remaining issue is whether the demurrers should be sustained without leave to amend.

"A demurrer may be sustained without leave to amend where the facts are not in dispute and the nature of the plaintiffs claim is clear, but, under substantive law, no liability exists." (*Keyes v. Bowen, supra,* 189 Cal. App. 4th at 655.) Here, there is no dispute that petitioners base their claims on allegations of fact regarding President Obama's supposed ineligibility to hold the office of President of the United States, and that they would continue to do so if the petition were to be further amended. Thus,

the nature of petitioners' claim is clear. Any further amended petition still would require the Court either to make a factual determination as to whether President Obama is a natural born citizen who is eligible to run for or hold the office of President of the United States under Article 2, Section 1 of the United States Constitution, or to find that the Secretary of State is legally required to make such a determination. Under the controlling authority of the *Keyes* and *Fuller* cases, as discussed above, the Court lacks jurisdiction to make such a determination, and the Secretary of State has no legal duty to do so. No liability, and no right to relief, exists on the basis of the facts alleged by petitioners.

Moreover, the opposition to the demurrers filed on behalf of petitioner Noonan on May 14, 2012, makes no offer of proof as to how the amended petition could be further amended in an effort to state a cause of action for the relief sought. Nor does petitioner Barnett's untimely opposition.

The demurrers therefore are sustained without leave to amend. Judgment of dismissal shall be entered in favor of respondents.

In their reply brief, respondents President Obama and Obama for California ask the Court to consider issuing an order to show cause regarding sanctions against petitioner Noonan's counsel under Code of Civil Procedure section 128.7(c)(2). Respondents contend that the opposition to the demurrer violates Code of Civil Procedure section 128.7(b)(2), which requires counsel to certify that "[t]he claims, defenses,

and other legal contentions [in the pleading signed by counsel] are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law."

The Court concludes that an order to show cause regarding sanctions is not appropriate in this case. Although several of the arguments petitioner Noonan advanced in the opposition to the demurrer were addressed and resolved by the appellate court in *Keyes v. Bowen*, the contention that Elections Code 6901 is unconstitutional was not. The court found that the plaintiffs in that case had forfeited that contention by raising it for the first time in their reply brief without a showing of good cause. (See, 189 Cal. App. 4th at 660.) The appellate court accordingly did not squarely address the alleged unconstitutionality of the statute. The Court therefore concludes that petitioner Noonan's counsel did not violate Code of Civil Procedure section 128.7(b)(2) in the opposition to the demurrer.

In the event that this tentative ruling becomes the final ruling of the Court, in accordance with Local Rule 9.16, counsel for respondent Secretary of State is directed to prepare a formal order and judgment of dismissal in conformity with this ruling; submit them to counsel for petitioner Noonan, to petitioner Barnett, and to counsel for the other respondents for approval as to form in accordance with Rule of Court 3.1312(a); and thereafter submit them to the Court for signature and entry of judgment in accordance with Rule of Court 3.1312(b).

COURT RULING

The matter is argued and submitted.

The Court AFFIRMS the tentative ruling.

Appendix C.1

JOHN ALBERT DUMMETT, JR., et al.,
Plaintiffs and Appellants,
v.
DEBRA BOWEN, as Secretary of State, etc.,
Defendant and Respondent.

S220934

IN THE SUPREME COURT OF CALIFORNIA,
En Banc

October 15, 2014

The petition for review is denied.

/s/ CANTIL-SAKAUYE
Chief Justice

Appendix C.2

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

S221700

IN THE SUPREME COURT OF CALIFORNIA,
En Banc

October 29, 2014

The petition for review is denied.

/s/ CANTIL-SAKAUYE
Chief Justice

Appendix D
U.S. Constitutional Provisions

Article II, Section 1, Clause 2

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.

Article II, Section 1, Clause 5

No 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; 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.

Appendix E
California Statutory Provisions

California Elections Code, § 6901

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.

California Government Code, § 12172.5(a)

(a) The Secretary of State is the chief elections officer of the state, and shall administer the provisions of the Elections Code. The Secretary of State shall see that elections are efficiently conducted and that state election laws are enforced. The Secretary of State may require elections officers to make reports concerning elections in their jurisdictions.