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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

THE PEACE AND FREEDOM PARTY PETA LINDSAY, AND RICHARD BECKER, Plaintiffs, V. DEBRA BOWEN, in her official capacity as Secretary of State of California, Defendant.	Case No. 2:12-cv-00853-GEB-EFB HON. GARLAND E. BURRELL JR.

MEMORANDUM OF LAW IN REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs respectfully submit this Memorandum of Law in support of their Motion, pursuant to Rule 65 of the Federal Rules of Civil Procedure and Local Rule 231, to preliminarily enjoin Defendant from excluding Peta Lindsay from the primary ballot for the Presidential nomination of the Peace and Freedom Party. The election is still more than a month away, with mail-in voting commencing May 7, 2012. The plaintiffs request only inclusion on the June 5th primary ballot, the mail-in voting that cannot commence prior to May 7, 2012, and ultimately, declaratory relief concerning their ongoing rights. Herein, the plaintiffs only seek injunctive and equitable relief to afford most of their primary voters the choice of their preferred candidates on their primary ballot.

I. Nothing is Moot When the Election Has Not Even Occurred

The Secretary bears the burden of proving mootness and that burden "is a heavy one." United States v. W.T. Grant Co., 345 U.S. 629, 633 (1953). For any matter to be moot, the Secretary must prove "it can be said with assurance that there is no reasonable expectation that the alleged violation will recur" and that "interim relief of events have completely and irrevocable eradicated the effects of the alleged violation." Los Angeles County v. Davis, 440 U.S. 625, 631 (1979) (internal quotations and internal citations omitted).

No court has found an election dispute moot prior to an election even occurring. See Padilla v. Lever, 463 F.3d 1046, 1049 (9th Cir. 2006) (injunctive issue only moot after "election has occurred"). To the contrary, election disputes, by their very nature (capable of repetition yet evading review), are precisely the kind of dispute that is rarely ever moot. See Nader v. Brewer, 531 F.3d 1028, 1034 (9th Cir. 2008); See Norman v. Reed, 502 U.S. 279 (1992). Even when "the election has passed," that does not render an election law dispute moot. See Schaefer v. Townsend, 215 F.3d 1031, 1033 (9th Cir. 2000).

Nor is the relief requested here that unusual for a court to afford; the United States Supreme Court did so itself. See Norman v. Reed, 502 U.S. 279 (1992) (Supreme Court's stay order, 498 U.S. 931 (1990), a stay which required the state of Illinois to print 3,000,000 new ballots about a week before national election day due to wrongful exclusion of party from ballot).

II. No Court Has Ever Allowed a State Official to Unilaterally Determine Which Party's Primary Candidates for the Presidency Are Qualified

Bowen misplaces reliance upon a California appellate jurisdiction.[1] Contrary to Bowen's assertion, the court gave no authorization to Bowen removing a candidate from the ballot on the basis of perceived qualifications. To the contrary, the California appellate court called such state actions by individual state officials "absurd." Keyes v. Bowen, 189 Cal.App.4th 647, 600, 117 Cal.Rptr.3d 207, 216 (Cal.App. 3 Dist. 2010).

> In any event, the truly absurd result would be to require each state's election official to investigate and determine whether the proffered candidate met eligibility criteria of the United States Constitution, giving each the power to override a party's selection of a presidential candidate. **The presidential nominating process is not subject to each of the 50 states' election officials independently deciding whether a presidential nominee is qualified, as this could lead to chaotic results.**

Keyes v. Bowen, 189 Cal.App.4th 647, 600, 117 Cal.Rptr.3d 207, 216 (Cal.App. 3 Dist. 2010) (emphasis added).

Instead, as the court concluded, in uniform accord across the jurisdictions: "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 v. Bowen, 189 Cal.App.4th 647, 600, 117 Cal.Rptr.3d 207, 216 (Cal.App. 3 Dist. 2010).

No court in the country has ever authorized a state's Secretary of State to exclude a candidate based on perceived Presidential qualifications for holding office, nor to self-select which qualifications of Presidential office to self-select for such self-appointed self-enforcement. Indeed, the Secretary enjoys no such Constitutional power nor does the Constitution prohibit a

[1] In fact, the court noted the matter of Cleaver's 1968 candidacy, and the ultimate resolution thereof, was unknown. Keyes v. Bowen, 189 Cal.App.4th 647, 600, 117 Cal.Rptr.3d 207, 216 (Cal.App. 3 Dist. 2010).

candidate from seeking Presidential electors due to age. See United States Constitution, Amendment XX. This separation of qualifications for running for office and qualifications for holding office are nothing new. See Schaefer v. Townsend, 215 F.3d 1031, 1033 (9th Cir. 2000). As the same rights attendant to Shaefer apply here, a comparable Constitutional concern is presented here – the state does not have the authority to declare which candidates for election it does not think may be qualified to actually hold office if elected.

At any rate, applying such a law uniquely and solely to the female candidate of a minor party, while refusing to apply it to male candidates for major party office, constitutes a dual-level equal protection violation. The Secretary's pretense that isolating one qualification for holding office is not discriminatory even after ignoring qualification issues for the same office is not tenable. Last but not least, to the extent any law could afford such broad discretion, the law would be void for vagueness for permitting such excess discretion in a state executive official over the primary voting process of an election for federal office.

III. Under Equity, The State's Delay Tactics Should Not Be Rewarded

The Secretary waited for the last possible day to take action concerning this matter, while refusing to respond to multiple counsel inquiries concerning the matter. Indeed, as no suit could be filed until the secretary certified the list (with the litigation not "ripe" until formal action occurred), the secretary's late-certification (the last possible day of certification), would leave injured parties without any remedy, ever. According to the Secretary's position, any suit adjudicated after March 29, 2012 is too late, but if the Secretary waits until March 29, 2012 to certify, then no suit could ever obtain injunctive relief (not ripe before March 29, 2012, the day of certification, yet, according to the Secretary, moot after March 29, 2012, a classic, and unwarranted, catch-22).

Separately, the Secretary's delays continued in this case. After plaintiffs' counsel sought and recommended an expedited hearing, the Secretary's counsel apprised Plaintiff's counsel no rush was needed, that a decision prior to the May 7, 2012 commencement of mail-in voting should suffice, and expressly made clear that: "The Secretary of State is not seeking expedited resolution and does not believe that it is necessary."

As is, the Secretary's complaints are not well grounded.

First of all, the plaintiffs only seek inclusion on the mail-in ballots, ballots that are not even legally available to the public until May 7, 2012, and the primary-day ballots, which cannot be provided to the public until June 5, 2012.

Secondly, the state has already certified vendors for "on-demand" ballot printing, which allows any elections registrar to print certified ballots from its offices with ease.

Third, with 51,000 registered party voters for this one-page Peace & Freedom Party presidential primary ballot; the time to print such ballots will be less than a day. Claiming the bugaboo of ballot difficulties is simply untenable. Of note, the secretary fails to submit a single piece of evidence that ballots cannot be correctly printed prior to the mail-in voting process or the June 5th primary.[2]

Last but not least, the absurdity of the Secretary's position is revealed when, in the name of "protecting" the party's rights and interests, it won't allow the party to include whom it wants on its own primary ballot for the Presidency. The point of the ballot is to effectuate voter choice; the point of the ballot is not to serve the government bureaucracy itself. The latter serves the former, not vice-versa. Such administrative tasks have never trumped the First and Fourteenth

[2] As the plaintiffs already noted in their complaint, and also previously apprised the Secretary's counsel, the plaintiffs do not seek inclusion on the overseas ballots or military ballots.

Amendment expressive, associational and voting rights implicated in ballot exclusion. See Norman v. Reed, 502 U.S. 279 (1992) (Supreme Court's stay order, 498 U.S. 931 (1990), required the state of Illinois to print 3,000,000 new ballots about a week before national election day due to wrongful exclusion of party from ballot). The rights implicated here govern a range of Constitutional rights, and warrant remedy.

CONCLUSION

The Secretary cites no authority for her actions, beyond a general "obey the Constitution" source of power, an obligation she claims she has the discretion to ignore whenever she sees fit, and to apply in a manner different based on which qualifications she cares about, usurping to herself duties and obligations solely within the Constitutionally vested control of Congress. As is the Secretary fails to even properly interpret the Constitution, impinging on the rights of 51,000 Californians in the process, depriving them of the simple right to include a candidate of their choice on the Presidential primary ballot of their party.

Dated at Malibu, California, on this the 20th day of April, 2012.

RESPECTFULLY SUBMITTED

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