

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO**

DATE/TIME	: 9:00 a.m. 3/13/09	DEPT. NO	: 31
JUDGE	: HON. MICHAEL P. KENNY	CLERK	: LEE
<p>AMBASSADOR DR. ALAN KEYES, et al., Petitioners,</p> <p>VS.</p> <p>CALIFORNIA SECRETARY OF STATE DEBRA BOWEN, et al., Respondents.</p>		<p>Case No.: 34-2008-8000096-CU-WM-GDS</p>	
Nature of Proceedings:		<p>PETITION FOR WRIT OF MANDATE –</p> <p>1. APPLICATION OF ROBERT F. BAUER FOR APPROVAL TO APPEAR AS COUNSEL PRO HAC VICE</p> <p>2. SECRETARY OF STATE DEBRA BOWEN’S DEMURRER TO FIRST AMENDED PETITION FOR WRIT OF MANDATE</p> <p>3. DEMURRER OF PRESIDENT BARACK OBAMA, VICE PRESIDENT JOE BIDEN, AND CALIFORNIA ELECTORS TO PETITIONERS’ FIRST AMENDED PETITION FOR WRIT OF MANDATE</p> <p>4. MOTION TO QUASH OF PRESIDENT BARACK OBAMA, VICE PRESIDENT JOE BIDEN, AND 55 CALIFORNIA ELECTORS OR, IN THE ALTERNATIVE, FOR AN ORDER THAT THE DEPOSITION OF THE CUSTODIAN OF RECORDS OF OCCIDENTAL COLLEGE NOT BE TAKEN.</p>	

The following shall constitute the Court's tentative rulings on (1) the Application of Robert F. Bauer for Approval to Appear as Counsel Pro Hac Vice, (2) the Demurrer of Secretary of State Debra Bowen to First Amended Petition for Writ of Mandate, (3) the Demurrer of President Barack Obama, Vice President Joe Biden, and California Electors to Petitioners’ First Amended Petition for Writ of Mandate, and (4) the Motion to Quash of President Barack Obama, Vice President Joe Biden, and 55 California Electors or, in the Alternative, for an order that the

Deposition of the Custodian of Records of Occidental College Not be Taken, set for hearing in Department 31 on Friday, March 13, 2009 at 9:00 a.m. 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.

1. APPLICATION OF ROBERT F. BAUER FOR APPROVAL TO APPEAR AS COUNSEL PRO HAC VICE

Robert F. Bauer applies for an order permitting him to appear as counsel pro hac vice in this action on behalf of respondents President-elect Barack Obama and Vice President-elect Joe Biden. No opposition has been received. The Court finds that the application complies with the requirements of rule 9.40 of the California Rules of Court. Accordingly, the application is GRANTED.

Respondents are directed to prepare a formal order, incorporating the Court's ruling herein verbatim or attaching it as an Exhibit, submit it to opposing counsel for approval as to form; and thereafter submit it to the Court for signature and in accordance with California Rules of Court, rule 3.1312.

2. SECRETARY OF STATE DEBRA BOWEN'S DEMURRER TO FIRST AMENDED PETITION FOR WRIT OF MANDATE

Secretary of State Debra Bowen demurs to the First Amended Petition for Writ of Mandate, filed on February 23, 2009, on the ground that it fails to state facts sufficient to constitute a cause of action against her. (Code Civ. Proc., § 430.10(e).)

In the First Amended Petition, petitioners allege that documents as well as statements by a relative and a step-relative of President Obama raise doubts about whether he was a natural born citizen of the United States and thus eligible for the office of President of the United States pursuant to Article II, section 1 of the United States Constitution. The petition contains numerous allegations concerning President Obama, but on page 17 of the First Amended Petition, petitioners pray only for writ relief against the Secretary of State and future California Electors regarding "any future Presidential candidate." They pray that the Secretary of State be barred "from both certifying to the Governor the names of the California Electors, and from transmitting to each Presidential Elector a Certificate of Election, until such documentary proof is produced and verified showing that any future Presidential candidate is qualified to serve as President of the United States.

Secretary of State Debra Bowen contends that there is no basis for mandamus relief because the Secretary of State has no "ministerial duty" to demand detailed proof of citizenship from Presidential candidates. The Court finds this argument persuasive and sustains the demurrer on

this ground. A traditional writ of mandate can only issue if the respondent has a clear, present, and usually ministerial duty and the petitioner has a clear, present, and beneficial interest in the performance of that duty. (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 731-732; *Taylor v. Board of Trustees* (1984) 36 Cal.3d 500, 507; *McCabe v. Snyder* (1999) 75 Cal.App.4th 337, 340.) Code of Civil Procedure section 1085 provides that a writ of mandate will lie “to compel the performance of an act which the law specially enjoins, as a duty resulting from office, trust or station, or to compel the admission of a party to the use and enjoyment of a right or office to which the party is entitled.” (Code Civ. Proc., § 1085, subd. (a).)

Petitioners have not identified any authority requiring the Secretary of State to make an inquiry into or demand detailed proof of citizenship from Presidential candidates. Elections Code section 6901 requires the Secretary of State to provide local elections officials with a certified list of the names and party affiliations of candidates nominated by their respective parties to appear on the November 4, 2008 Presidential General Election ballot. Elections Code section 15505 requires the Secretary of State to certify to the Governor the names of the electors receiving the highest number of votes. Petitioners have not met their burden of demonstrating that the Secretary of State has a clear or present ministerial duty to demand documentary proof that any future Presidential candidate is qualified to serve as President of the United States. Such a duty is not imposed by Elections Code section 12172.5 which provides that the secretary of state “shall see that state election laws are enforced.” Accordingly, there is no basis for mandamus relief. (See *Barnes v. Wong* (1995) 33 Cal.App.4th 390, 395.)

The Secretary of State also demurs on the ground that the petition is moot and there is no judicable controversy insofar as it relates to the 2008 General Election. The Court agrees and sustains the demurrer on this ground. Elections Code section 15505 requires that on December 1, or as soon thereafter as the election results have been received from all counties, the Secretary of State shall certify the names of the ascertained Electors and then transmit to each presidential elector a certificate of election. Petitioners refer to this code provision in the First Amended Petition filed February 23, 2009. (See FAP, par. 65.) Nowhere do petitioners allege that the Secretary of State failed to perform that duty. They do, however, allege that the Electoral College has voted (FAP, par. 79) and that Mr. Obama has been inaugurated as the President of the United States. (FAP, par. 63.) The action is moot insofar as it relates to the 2008 General Election. (See *Treber v. Superior Court* (1968) 68 Cal.2d 128, 134.)

The Secretary of State also demurs on the ground that the controversy is not ripe as it relates to future elections. The Court sustains the demurrer on this ground as well. A controversy is “ripe” when it has reached, but has not passed, the point that the facts have sufficiently congealed to permit an intelligent and useful decision to be made. (*Pacific Legal Foundation v. California Coastal Comm’n* (1982) 33 Cal.3d 158, 171.) The issues must be framed with sufficient concreteness and immediacy to allow the Court to render a conclusive and definitive judgment, rather than an advisory opinion based on hypothetical facts or speculative future events. (*Id.* at pp. 170-173.) The Court concludes the petition does not meet these criteria.

The First Amended Petition also contains allegations concerning the appointment of one of the electors for the 28th Congressional District. Petitioners allege that the person appointed was named Ilene Huber, that there was no such person registered to vote in the 28th District at that

time. Petitioners allege that a person by that name had lived in the County of Humboldt but had died on October 22, 2001. They allege that a woman named Ilene Haber was allowed to vote instead of Ilene Huber without following the procedures required by Elections Code section 6905 in the case of the death of an elector. (FAP, par. 79.)

However, Exhibit “E” to the Request for Judicial Notice filed by the Electors and President Obama show that was a typographical error that was corrected on another document. Petitioners have failed to allege facts sufficient to show that Ms. Haber was improperly substituted as an Elector.

The Secretary of State also contends the action is barred by the doctrine of laches. This may be more properly considered a defense to be pleaded and proved rather than as a ground for demurrer in this action. Neither the opposition nor the reply address the issue of laches.

Finally, the Secretary of State persuasively argues that the appropriate remedy for an issue concerning the qualifications of a President is an action before the United States Congress pursuant to the Twelfth Amendment to the United States Constitution and 3 U.S.C. section 15. (See *Robinson v. Bowen* (N.D. Cal. 2008) 567 F.Supp.2d 114.)

The Court is not persuaded that petitioners will be able to amend their First Amended Petition to state a cause of action against the Secretary of State. Therefore, the demurrer is SUSTAINED WITHOUT LEAVE TO AMEND.

Respondent is directed to prepare a formal order, incorporating the Court's ruling herein verbatim or attaching it as an Exhibit, submit it to opposing counsel for approval as to form; and thereafter submit it to the Court for signature in accordance with California Rules of Court, rule 3.1312.

3. DEMURRER OF PRESIDENT BARACK OBAMA, VICE PRESIDENT JOE BIDEN, AND CALIFORNIA ELECTORS TO PETITIONERS' FIRST AMENDED PETITION FOR WRIT OF MANDATE

President Barack Obama, Vice President Joe Biden, and the California Electors named as respondents demur to petitioners' first amended petition for writ of mandate on the grounds that it does not state facts sufficient to constitute a cause of action against any of the named Respondents (Code Civ. Proc. § 430.10(e)), that the Court has no jurisdiction over the subject of this action (Code Civ. Proc. § 430.10(a)), and that to the extent the First Amended Petition seeks relief as to future elections, it suffers from a defect or misjoinder of parties (Code Civ. Proc. § 430.10(d)).

The Court sustains the demurrer on the ground that the First Amended Petition does not state facts sufficient to constitute a cause of action against any of the named Respondents (Code Civ. Proc. § 430.10(e)). The current pleading does not seek any relief as to either President Obama or Vice President Biden.

Although petitioners allege that documents, statements or other lawsuits raise questions about whether President Obama is a natural born citizen, it does not allege that either the President or the Vice President has failed to perform any mandatory duty under either state or federal law. The allegation that “it is incumbent on the candidates to present the necessary documentation confirming his or her eligibility” (FAP, par. 68) is insufficient to satisfy the pleading requirements for a petition for writ of mandate. (See *San Diego Cotton Club v. State Bd. of Equalization* (1934) 139 Cal.App. 655, 658.)

As to claims against the named Electors, the First Amended Petition does not cite any law imposing a duty on California Electors to review their candidate’s eligibility. In paragraph 72 of the First Amended Petition, petitioners rely on section 8 of title 3 of the United States Code, which provides that the electors shall vote “in the manner directed by the Constitution.” The Court concludes that, contrary to petitioners’ allegation, this does not provide an affirmative duty on the electors to discover whether the candidate is a natural born citizen. As respondents contend, the language of 3 U.S.C. section 8 is more properly construed as referring to the mechanics of casting votes, found in article II, section 3 of the United States Constitution and the Twelfth Amendment. And as respondents further contend, the California Electors have no discretion whatsoever, as section 6906 of the California Elections Code requires California’s electors to vote for their party’s nominee.

The Court also sustains the demurrer to the First Amended Petition on the ground that it suffers from a defect or misjoinder of parties (Code Civ. Proc. § 430.10(d)). The First Amended Petition contains allegations concerning future elections and a prayer seeking a writ directed to future Electors. The future Electors are not before the court. They are indispensable parties pursuant to Code of Civil Procedure section 389.

The Court further finds that the allegations that Elector Ilene Haber was improperly designated fail to state a cause of action. The Request for Judicial Notice, and in particular Exhibit E thereto, shows that Representative Howard L. Berman designated Ilene Haber as a 2008 Presidential Elector in accordance with sections 6901 and 7100 of the California Elections Code. Petitioners’ allegation that she was required to be elected pursuant to Elections Code section 6905 because she was replacing a deceased elector is factually and legally without merit.

President Barack Obama, Vice President Joe Biden, and the California Electors also contend that the First Amended Petition does not and cannot state a cause of action against the Secretary of State. They contend that Elections Code section 6901 requires the Secretary of State to place on the ballot the names of the candidates submitted to her by a recognized political party and that she has no discretion to override the party’s selection. The Court finds that the First Amended Petition fails to state a cause of action against the Secretary of State. See this Court’s tentative ruling regarding the demurrer of the Secretary of State.

These respondents demur that the Court has no jurisdiction over the subject of this action (Code Civ. Proc. § 430.10(a)). The demurrer is sustained on this ground as well. Federal law establishes the procedure for election of the President and Vice President and establishes the exclusive means for challenges to the qualifications of the President and Vice President. That procedure is for objections to be presented before the United States Congress pursuant to 3

U.S.C. section 15. Petitioners' belief in the importance of their arguments is not sufficient to confer jurisdiction upon this Court.

These respondents also contend that the case is not justiciable—that it is moot in all respects except those that are unripe. The Court finds this argument well taken. The case is clearly moot. The Secretary of State already placed the candidates' names on the ballot, the election has already taken place, the Electors were certified elected by the Secretary of State, met and cast their votes, the governor certified those results and transmitted them to the President of the Senate, and President Obama and Vice President Biden have now been inaugurated and are engaged in the duties of their offices. It is too late for relief against the Secretary of State and the California Electors as to the 2008 General Election. And as to any future election, the claims are not ripe. There is no actual controversy which admits of definitive and conclusive relief, as distinguished from an advisory opinion upon a hypothetical state of facts. (*Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 117; *Pacific Legal Foundation v. California Coastal Comm'n* (1982) 33 Cal.3d 158.)

The Request of President Barack Obama et al. for Judicial Notice in Support of Demurrer is GRANTED.

The Court is not persuaded that petitioners will be able to amend their First Amended Petition to state a cause of action against President Barack Obama, Vice President Joe Biden, or the named California Electors. Therefore, the demurrer is SUSTAINED WITHOUT LEAVE TO AMEND.

Respondents are directed to prepare a formal order, incorporating the Court's ruling herein verbatim or attaching it as an Exhibit, submit it to opposing counsel for approval as to form; and thereafter submit it to the Court for signature in accordance with California Rules of Court, rule 3.1312.

4. MOTION TO QUASH OF PRESIDENT BARACK OBAMA, VICE PRESIDENT JOE BIDEN, AND 55 CALIFORNIA ELECTORS OR, IN THE ALTERNATIVE, FOR AN ORDER THAT THE DEPOSITION OF THE CUSTODIAN OF RECORDS OF OCCIDENTAL COLLEGE NOT BE TAKEN.

Respondents President Barack Obama, Vice President Joe Biden, and the 55 California Electors named as respondents move for an order quashing the subpoena by petitioners directed to third party Occidental College demanding access to President Barack Obama's "academic and housing records." In the alternative, they seek an order that the deposition of the custodian of records of Occidental College not be taken.

The moving parties seek relief pursuant to Code of Civil Procedure sections 1987.1, 2025.410, and 2025.420. They contend that the subpoena and the associated notice to the consumer were improperly served. They contend that the subpoena is vague and overbroad and seeks information that is neither relevant to this lawsuit nor reasonably calculated to lead to the discovery of admissible evidence.

The motion is granted on all grounds stated. Code of Civil Procedure section 1985.3 requires that a copy of subpoena seeking access to confidential consumer records be served on the consumer whose records are sought at least five days before service on the custodian of records. (Code Civ. Proc. § 1985.3(b)(3).) If served by mail within this State, this time limit is extended to ten days pursuant to Code of Civil Procedure section 1013(a). In this case, the notice and subpoena to Occidental College were mailed either the day before or the very same day Occidental College was served. (Woocher Decl., pars. 2-3 and Exs. 1-2.) This is insufficient.

Petitioners contend that respondents waived any objection by failing to object for twenty-seven days. The Court finds this argument without merit. The motion to quash was filed within the period provided for by Code of Civil Procedure section 2025.410(b).

The Court further finds that the two categories of documents petitioners seek are vague, overbroad, and are of no relevance to this litigation. Petitioners demand access to all of President Obama's "academic and housing records." However, the relevance of such records is not established. The issues raised in the First Amended Petition concern the duties, if any, of the respondents to demand proof of natural born citizenship of a candidate for President. Petitioners have not shown that any of the documents sought could assist in answering this question. Petitioners' argument that they could have sought even more documents is not persuasive, nor is their argument that more specific objection was needed pursuant to Code of Civil Procedure section 2031.240(b).

Moreover, this lawsuit is moot as to issues concerning President Obama. The Court on this date is prepared to sustain demurrers to the petition without leave to amend. But even if the court were to overrule the demurrers, the First Amended Petition contains no claims as to which the records sought are relevant.

The motion to quash the subpoena is GRANTED.

Respondents are directed to prepare a formal order, incorporating the Court's ruling herein verbatim or attaching it as an Exhibit, submit it to opposing counsel for approval as to form; and thereafter submit it to the Court for signature in accordance with California Rules of Court, rule 3.1312.