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26 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
27 **FOR THE COUNTY OF SACRAMENTO**

28 AMBASSADOR DR. ALAN KEYES, et al.,

Petitioners,

v.

CALIFORNIA SECRETARY OF STATE
DEBRA BOWEN, et al.,

Respondents.

Case No. 34-2008-8000096-CU-WM-GDS

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
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**

Hearing Date: March 13, 2009
Time: 9:00 a.m.
Dept.: 31
Judge: Hon. Michael P. Kenny
Action Filed: November 13, 2008

BY FAX

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1 **INTRODUCTION**

2 With two demurrers and a motion for judgment on the pleadings pending — all of which
3 make clear that this lawsuit is improper, untimely, and frivolous — Petitioners Ambassador Dr. Alan
4 Keyes, Dr. Wiley S. Drake, Sr., and Markham Robinson (collectively, “Petitioners”) served a
5 deposition subpoena on third-party Occidental College, demanding access to all of President Barack
6 Obama’s three-decade-old college “academic and housing records.” Although Petitioners have made
7 no effort to advance this case since they first filed suit nearly three months ago, they now claim an
8 immediate and broad right of access to these ill-defined categories of student records — records that
9 plainly have no bearing on this utterly moot litigation.

10 The twin grounds for quashing this subpoena are simple. First, Petitioners failed to timely
11 serve President Obama with a copy of the subpoena in accordance with the mandatory provisions
12 of Code of Civil Procedure section 1985.3, which sets forth strict requirements for seeking access
13 to confidential consumer records, such as those at issue here. Failure to comply with this statute,
14 alone, invalidates the subpoena. Second, the subpoena is in any event defective because it is vague
15 and overbroad, and because it seeks irrelevant information that could not, under any circumstances,
16 lead to the discovery of admissible evidence in this case. Nothing in these “academic and housing
17 records” could possibly aid Petitioners in establishing that either the California Secretary of State
18 or the California Electors had any mandatory duty “to obtain proper documentation of [former]
19 Senator Obama’s citizenship to confirm his eligibility” to serve as President. (Petition for Writ of
20 Mandate (“Petition” or “Pet.”) ¶ 84.) And nothing in these records could possibly assist Petitioners
21 in obtaining a writ to enjoin a series of acts that have already taken place.

22 For all these reasons, and as set forth more fully below, Respondents President Obama, Vice
23 President Joe Biden, and California’s 55 Democratic Party Electors (collectively, “California
24 Electors”) respectfully request that this Court either quash the subpoena directed to Occidental
25 College, or issue an order precluding the deposition of the Occidental College custodian of records
26 from being taken.

1 **BACKGROUND**

2 Petitioners filed this action on November 13, 2008, nine days after the November 4, 2008
3 General Election. The Petition alleges that at least seventeen actions have been filed questioning
4 whether the President is a “natural born citizen” under Article II, Section I, Clause 4 of the United
5 States Constitution. (Pet. ¶¶ 62-63, 68, 73.) According to the Petition, these lawsuits suggest
6 variously that although President Obama was born a United States citizen he somehow lost this
7 status by subsequently obtaining citizenship in Indonesia, or, alternatively, that he was actually born
8 in Kenya and is therefore either a Kenyan or British citizen. (*Id.* ¶¶ 73, 79-83.) The Petition alleges
9 that “[i]n the course of those lawsuits . . . it has been determined that there exists no designated
10 official in the federal government, or the government of the states, directly charged with the
11 responsibility of determining whether any Presidential candidate meets the qualifications of Article
12 II of the Constitution of the United States.” (*Id.* ¶ 73.) The Petition then avers — without citation
13 to any legal authority — that “[b]ased on all of the above [allegations], it is the duty of [the Secretary
14 of State] . . . to obtain proper documentation of [former] Senator Obama’s citizenship to confirm
15 his eligibility” to serve as President. (*Id.* ¶ 84.) It also claims that each California Elector has “an
16 affirmative duty to discover whether the candidate for President for which the elector is seeking
17 election is a ‘natural born’ citizen.” (*Id.* ¶ 71.)

18 The Petition prays for a peremptory writ directed to California Secretary of State Debra
19 Bowen and to the California Electors. Specifically, Petitioners seek to enjoin Secretary Bowen from
20 “both certifying to the Governor the names of the California Electors, and from transmitting to each
21 presidential Elector a Certificate of Election, until such documentary proof is produced and verified
22 showing that [President Obama] is a ‘natural born’ citizen of the United States and does not hold
23 citizenship in Indonesia, Kenya or Great Britain.” (*Id.* ¶ 69.) With respect to the California Electors,
24 Petitioners demand an “order barring the California Electors from signing the Certificate of the
25 Vote” pending production of the same “documentary proof.” (*Id.*) But Petitioners admit in their
26 Petition that Secretary Bowen and the California Electors will have discharged all duties associated
27 with the November 2008 General Election on or before December 15, 2008 — which they in fact
28 proceeded to do, without further objection or judicial action by Petitioners. (*Id.* ¶ 64.) And it is

1 judicially noticeable that President Obama and Vice President Biden have now been sworn into
2 office.

3 Since filing suit nearly three months ago, Petitioners have made no effort whatsoever to
4 obtain interlocutory relief. They originally noticed a hearing on the merits of the Petition for March
5 13, 2009, long after the California officials sued in this case completed all of their duties associated
6 with the 2008 Presidential Election. This hearing date has since been continued by stipulation of all
7 parties to allow the Court to first resolve three pending challenges to the sufficiency of Petitioners'
8 pleadings: a Demurrer by Secretary Bowen; a Demurrer by President Obama, Vice President Biden,
9 and 54 California Electors; and a Motion for Judgment on the Pleadings by California Elector Joe
10 Perez.¹ Each of these motions identifies obvious legal deficiencies on the face of Petitioners'
11 pleading, including the fact that Petitioners cannot identify any mandatory duty with which
12 Respondents have failed to comply and the fact that the entire suit has long been moot. These three
13 motions are set to be heard by the Court on March 13, 2009.

14 Nevertheless, on January 15 or 16, 2009, Petitioners served the business records subpoena
15 at issue in this motion on Occidental College. (Declaration of Fredric D. Woocher in Support of
16 Motion to Quash ("Woocher Decl.") ¶ 2 & Ex. 1.) On January 15, 2009, Petitioners served all
17 Respondents, including President Obama, with a copy of the subpoena by regular U.S. Mail. (*Id.*
18 ¶ 3 & Ex. 2.) After receiving the subpoena, on January 16, 2009, Mr. Woocher, counsel for
19 President Obama, Vice President Biden, and the California Electors, emailed counsel for Petitioners
20 to request that Petitioners "cancel or withdraw the subpoena, at least until such time as the Superior
21 Court rules upon the pending demurrers and motion for judgment on the pleadings." (*Id.* ¶ 4 & Ex.
22 3.) Mr. Woocher made clear that "[s]uch cancellation would be without prejudice to [Petitioners']
23 right to re-issue the subpoena should the litigation remain alive following the court's ruling on those
24 motions." (*Id.*) After receiving no response, Mr. Woocher again contacted counsel for Petitioners
25 on January 27, 2009 to inquire whether they would agree to postpone the response to the subpoena
26 until after the hearing on March 13, 2009. (*Id.* ¶ 5 & Ex. 4.) On February 2, 2009, counsel for
27

28 ¹The Demurrer of the President, Vice President, and the 54 California Electors, and the Motion for Judgment on the Pleadings of California Elector Perez are supported by a single Memorandum of Points and Authorities.

1 Petitioners informed Mr. Woocher via email that Petitioners insisted on proceeding with the
2 subpoena, thereby necessitating the filing of the instant motion. (*Id.* ¶ 6 & Ex. 5.)

3 **ARGUMENT**

4 **I. BECAUSE PETITIONERS FAILED TO COMPLY WITH CODE OF CIVIL**
5 **PROCEDURE SECTION 1985.3, THE SUBPOENA IS DEFECTIVE AND MUST BE**
6 **QUASHED.**

7 As an initial matter, the subpoena is invalid for failure to abide by the strict service
8 requirements of Code of Civil Procedure section 1985.3 (“Section 1985.3”).

9 “Section 1985.3 protects personal records from discovery unless the requesting party
10 complies with certain time and notice requirements.” *Sasson v. Katash*, 146 Cal. App. 3d 119, 122
11 (1983); *see also Lantz v. Superior Court*, 28 Cal. App. 4th 1839, 1848 (1994). One such requirement
12 is that the subpoenaing party must serve the subpoena on the consumer *at least five days before*
13 *service on the custodian of records.* Cal. Civ. Proc. Code § 1985.3(b)(3). If served by mail within
14 this State, this time limit is extended pursuant to Code of Civil Procedure section 1013(a) to require
15 service on the consumer *at least ten days before* service on the custodian of records. *Id.*; *see also*
16 Cal. Civ. Proc. Code § 1013(a). The subpoenaing party must also serve the custodian of records with
17 proof of service of the required notice on the consumer whose records are at issue. Cal. Civ. Proc.
18 Code § 1985.3(c). The Civil Discovery Act also incorporates this same requirement, mandating that
19 a subpoena for personal records be accompanied by a proof of service establishing that Section
20 1985.3’s consumer notice provisions have been satisfied. Cal. Civ. Proc. Code § 2020.410(d).
21 Failure to comply with *any* of Section 1985.3’s dictates “shall be sufficient basis for the witness to
22 refuse to produce the personal records sought by the subpoena duces tecum.” Cal. Civ. Proc. Code
23 § 1985.3(k).

24 Petitioners readily acknowledge that the procedural protections of Section 1983.5 apply here.
25 Indeed, they complied in part with Section 1985.3, subdivision (b), by serving on the President’s
26 counsel a “Notice to Consumer or Employee” as required by Section 1985.3. (*See Woocher Decl.*
27 *¶ 3 & Ex. 2.*) They even attached to the subpoena served on Occidental College a “Certificate of
28 Compliance,” in which they purport to have complied with the statute’s clear dictates. (*Id.*)
However, rather than mailing the Notice and a copy of the subpoena to the President’s counsel ten

1 days before the subpoena was served on third-party Occidental College, the Notice and subpoena
2 were mailed either the day before or the very same day Occidental College was served. (Id. ¶¶ 2-3
3 & Exs. 1-2.) This is plainly insufficient under Section 1985.3. Accordingly, Occidental College
4 need not comply with the subpoena, Cal. Civ. Proc. Code § 1985.3(k), and the subpoena must be
5 quashed.

6 **II. THE TWO CATEGORIES OF DOCUMENTS PETITIONERS SEEK ARE VAGUE,**
7 **OVERBROAD, AND ARE OF NO RELEVANCE WHATSOEVER TO THIS MOOT**
8 **LITIGATION.**

8 In addition to the fact that Petitioners failed to comply with Section 1985.3, the subpoena is
9 also vague and overbroad, and seeks documents that are irrelevant to the limited scope of this writ
10 action — an action which, in any event, has long since been moot.

11 “Although the scope of civil discovery is broad, it is not limitless.” *Calcor Space Facility,*
12 *Inc. v. Superior Court*, 53 Cal. App. 4th 216, 223 (1997). Under Code of Civil Procedure section
13 2017.010, a matter is only discoverable if it is either “itself admissible in evidence or [if it] appears
14 reasonably calculated to lead to the discovery of admissible evidence.” Cal. Civ. Proc. Code §
15 2017.10; *Pacific Architects Collaborative v. State of California*, 100 Cal. App. 3d 110, 127 (1979)
16 (affirming trial court order denying discovery that was irrelevant); *see also Calcor Space Facility,*
17 *53 Cal. App. 4th at 223* (third party deposition subpoena for documents is invalid where subpoena
18 was overbroad and sought irrelevant information). Petitioners cannot satisfy this most basic
19 requirement.

20 Petitioners’ subpoena demands unrestricted access to all of President Obama’s “academic
21 and housing records” at Occidental College. But Petitioners could never establish the relevance of
22 any such documents to the subject matter of the case at hand. *See Southern Pac. Co. v. Superior*
23 *Court*, 15 Cal. 2d 206, 209 (1940) (it is court’s task on such a motion “to examine the issues raised
24 by the pleadings in the cause, and in light thereof to determine the apparent relevancy); *Calcor Space*
25 *Facility*, 53 Cal. App. 4th at 223 (propounding party “must be able to produce *evidence* from which
26 a court may determine” whether documents sought are relevant) (emphasis in original). The central
27 issue in this lawsuit — putting aside the significant jurisdictional and timeliness questions — is
28 whether any Respondent had a legal duty to demand proof of natural born citizenship from the

1 Democratic Party's presidential nominee. None of the documents sought by Petitioners could
2 possibly assist in answering this question. *Cf. Shaffer v. Superior Court*, 33 Cal. App. 4th 993, 999-
3 1003 (1995) (former law firm client who brought malpractice action against firm claiming
4 unconscionable rates was not entitled to discovery regarding amount paid by law firm to contract
5 staff attorney because such information is irrelevant to unconscionability claim).

6 The irrelevance of the documents sought is further underscored by the fact that this lawsuit
7 is unquestionably moot. All three pending motions by Respondents seek to dismiss this action in
8 large part because Secretary Bowen and the California Electors have long since completed their
9 respective legal duties in connection with the November 2008 General Election in California.
10 Secretary Bowen already placed the candidates' names on the ballot and, of course, the November
11 election has already taken place. The California Electors were certified by Secretary Bowen on
12 December 1, 2008, and they met and cast their votes for President Obama and Vice President Biden
13 on December 15, 2008. The Governor of California certified those results and transmitted them to
14 the President of the Senate on December 15, 2008, and President Obama and Vice President Biden
15 were sworn into office on or about January 20, 2009.² It is now far too late for a writ of mandate
16 "barring Respondent Secretary of State . . . from both certifying to the Governor the names of the
17 California Electors, [and] from transmitting to each presidential Elector a Certificate of Election,"
18 and it is likewise too late for a "writ barring Respondent California Electors from signing the
19 Certificate of Vote." (Pet. ¶ 69.) Those are now completed acts. And there is nothing in President
20 Obama's "academic and housing records" from thirty years ago that could in any way aid Petitioners
21 in reviving their case. *Cf. Terminals Equipment Co., Inc. v. City and County of San Francisco*, 221
22 Cal. App. 3d 234, 247 (1990) (denying additional discovery following sustaining of defendant's
23 demurrer as irrelevant and stating that "if appellants were unable to state a viable cause of action on
24 the basis of the facts already available to them, nothing in these disputed documents could do
25 anything to change that").

26
27
28 ²With the exception of the date on which the President and Vice President were sworn into
office, which is judicially noticeable, all of the above dates are supported by Respondent moving
parties' Request for Judicial Notice that was filed in connection with their pending Demurrer and
Motion for Judgment on the Pleadings.

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CONCLUSION

The records Petitioners seek are of no relevance to this moot litigation, and Petitioners failed, in any event, to properly serve the subpoena and notice. The subpoena directed to Occidental College should therefore be quashed. Alternatively, this Court should issue an order directing that the deposition of the custodian of records of Occidental College not take place.³

DATED: February 11, 2009

STRUMWASSER & WOOCHELLP
Michael J. Strumwasser
Fredric D. Woocher
Aimee Dudovitz

By: 
Aimee Dudovitz

Attorneys for Respondents President Barack Obama, Vice President Joe Biden, and the California Electors

³Respondent moving parties do not, with this motion, exercise their rights under Code of Civil Procedure sections 1987.2, 2025.410, and 2025.420 to seek recompense for their reasonable attorneys' fees and costs necessarily incurred in bringing this motion. However, Respondent moving may do so in the future if Petitioners continue to misuse the discovery process.