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 SENATOR JOHN McCAIN and  
 6 THE REPUBLICAN NATIONAL COMMITTEE

7  
 8 UNITED STATES DISTRICT COURT  
 9 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
 10 SAN FRANCISCO DIVISION

11  
 12 MARKHAM ROBINSON,

13 Plaintiff,

14 v.

15 SECRETARY OF STATE DEBRA BOWEN,  
 THE REPUBLICAN NATIONAL  
 16 COMMITTEE, THE REPUBLICAN PARTY  
 OF CALIFORNIA, SENATOR JOHN S.  
 17 McCAIN, III, et al.

18 Defendants.

CASE NO. C 3-08-cv-03836 WHA

**SUBMISSION OF DEFENDANTS  
 REPUBLICAN NATIONAL COMMITTEE  
 AND SENATOR JOHN McCAIN  
 REGARDING SCHEDULING**

[Honorable William H. Alsup]

19 In anticipation of the scheduling hearing to be held on August 21, 2008, defendants the  
 20 Republican National Committee (“RNC”) and Senator John McCain respectfully file this pre-hearing  
 21 submission to apprise the Court of several considerations that may be relevant to the briefing and  
 22 hearing schedule in this case.

23 *First*, it appears doubtful that plaintiff’s complaint alleges facts sufficient to establish his  
 24 standing to pursue his claims for relief. Plaintiff’s complaint alleges that he is suing in his capacity as  
 25 a hypothetical “Presidential Elector” of the American Independent Party (AIP)—a position plaintiff  
 26 can attain only if the AIP’s candidate for President, Alan Keyes, wins California’s general election—  
 27 and as “Chairperson-Elect” of that party. Compl. ¶ 1 (emphasis added). Plaintiff’s complaint does  
 28 *not* allege that he is suing on behalf of the AIP or its candidate for President. Indeed, it does not

1 allege that plaintiff is authorized to act on behalf of the AIP; plaintiff asserts only that he is the  
2 party's *future* chairperson. If he is not suing on behalf of his party, plaintiff's standing would appear  
3 to be predicated solely on his status as a voter. At least one court, however, has already determined  
4 that such allegations are insufficient to confer standing on a plaintiff seeking to challenge a  
5 candidate's eligibility for the Presidency. See *Hollander v. McCain*, No. 08-99, \_ F. Supp. 2d \_,  
6 2008 WL 2853250 (D.N.H. July 24, 2008). It is axiomatic that this Court must assure itself of its  
7 jurisdiction before it can address the merits of plaintiff's claims for relief, see *Steel Co. v. Citizens for*  
8 *Better Env't*, 523 U.S. 83, 94-95 (1998)—a limitation of the Article III judicial power that applies  
9 with particular force when a litigant asks a court, as plaintiff does here, to opine on novel questions of  
10 constitutional law. See *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J.,  
11 concurring). This suggests that defendants should be permitted to move to dismiss plaintiff's  
12 complaint before proceeding to brief the merits of the constitutional question presented by plaintiff's  
13 motions.

14 *Second*, though plaintiff's *ex parte* application suggests that this Court must resolve the merits  
15 of his constitutional claim before county election officials begin printing the ballots for the general  
16 election, see D.E. 6, at 2; see also Cal. Elec. Code § 8148 (requiring the Secretary of State to notify  
17 county election officials of the names of each party's nominees 68 days before the general election,  
18 here August 28, 2008); *id.* § 7310(a)(2) (extending Republican Party's deadline to 61 days before the  
19 general election, September 4), in fact, there is no such emergency. The law is clear that Senator  
20 McCain will be entitled to have his name appear on the State's general election ballot  
21 notwithstanding any dispute as to his eligibility to hold the office of President.

22 As plaintiff acknowledges (Compl. ¶ 21), California law absolutely requires the Secretary of  
23 State to place the name of each party's nominee for President—whoever that person may be—on the  
24 general election ballot. See Cal. Elec. Code § 6901 (“The Secretary of State shall cause the names of  
25 the candidates for President and Vice President of the several political parties to be placed upon the  
26 ballot for the ensuing general election”). Thus, plaintiff possibly could strip Senator McCain's name  
27 from the State's general election ballot only if he first could persuade this Court to enjoin the  
28 Republican Party from nominating Senator McCain as its candidate for President at its soon-

1 forthcoming national convention. But the relief plaintiff requests—a judicial decree instructing a  
2 political party as to the identity of its standard-bearer in the general election—is simply unimaginable  
3 in our political system. The Supreme Court has repeatedly held that the First Amendment prohibits  
4 the government from intruding so deeply into the expressive activities of political parties—even  
5 when the candidate is asserted to be “ineligible for office” or “unwilling to serve.” *Timmons v. Twin*  
6 *Cities Area New Party*, 520 U.S. 351, 359 (1997); see also *Cal. Democratic Party v. Jones*, 530 U.S.  
7 567, 575 (2000) (“our cases vigorously affirm the special place the First Amendment reserves for,  
8 and the special protection it accords, the process by which a political party selects a standard bearer  
9 who best represents the party’s ideologies and preferences”) (internal quotation marks omitted).

10 Thus, even if plaintiff’s assertion that Senator McCain is ineligible to hold the Office of  
11 President were correct—and it most certainly is not—the Court still could not, consistent with the  
12 First Amendment, enjoin the Republican Party from nominating the candidate of its choice. Against  
13 that backdrop, there is no need to decide plaintiff’s motion for a preliminary injunction before the  
14 State’s counties begin printing the general election ballots. Once he is designated as the Republican  
15 Party’s candidate for President, Senator McCain is entitled, under California law, to have his name  
16 appear on the State’s general election ballot and the Secretary of State has no discretion to withhold  
17 it.

18 *Third*, as the Court observed in its order setting the upcoming scheduling conference,  
19 whatever exigency exists is entirely of plaintiff’s own making. The circumstances of Senator  
20 McCain’s birth have been widely known at least since his campaign for President in 2000. Senator  
21 McCain became the presumptive nominee of the Republican Party no later than March 4, 2008. If  
22 plaintiff has a good reason for waiting until two weeks before the Republican National Convention  
23 before asking this Court to enjoin that meeting’s central purpose, he has yet to disclose it.

24 While Senator McCain and the RNC do not object to according this case some manner of  
25 expedited treatment, in view of the considerations outlined above, Senator McCain and the RNC  
26 respectfully submit that there is no need for this Court to resolve the merits of plaintiff’s voluminous  
27 and multiplying motions on the breakneck schedule plaintiff demands. In view of the Article III  
28 questions apparent on the face of plaintiff’s complaint, Senator McCain and the RNC respectfully

1 submit that it would be appropriate for the Court to resolve any questions surrounding the  
2 justiciability of plaintiff's allegations before compelling the defendants to respond to the merits of  
3 plaintiff's motion for a preliminary injunction and motion for summary judgment. Accordingly,  
4 Senator McCain and the RNC respectfully request the opportunity to file, on whatever timetable the  
5 Court deems appropriate, a motion to dismiss plaintiff's complaint, and further request that this Court  
6 resolve that motion before compelling the defendants to respond to plaintiff's pending motions.

7 DATED: August 20, 2008

8 Respectfully submitted,

9  
10 By: \_\_\_\_\_ /s/ \_\_\_\_\_  
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