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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12

13 **MARKHAM ROBINSON, in his capacity as the**
14 **Presidential Elector and Chairperson-Elect of the**
American Independent Party,

15 Plaintiff,

16 v.

17 **SECRETARY OF STATE DEBRA BOWEN, in her**
18 **individual and official capacities, THE**
19 **REPUBLICAN NATIONAL COMMITTEE, and**
20 **organization, form unknown, THE REPUBLICAN**
21 **PARTY OF CALIFORNIA, an organization, form**
22 **unknown, SENATOR JOHN McCain, in his**
23 **individual and official capacities, DOES ONE**
24 **through FIFTY FIVE, inclusive,**

25 Defendants.

3:08-CV-03836 WHA

SECRETARY OF STATE
DEBRA BOWEN'S
OPPOSITION TO
PLAINTIFF'S COMPLAINT
FOR DECLARATORY AND
INJUNCTIVE RELIEF

Date: September 11, 2008
Time: 7:30 a.m.
Dept: 9
Judge: The Honorable William
Alsup

Trial Date:

Action Filed: August 11, 2008

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I. INTRODUCTION

Plaintiff Markham Robinson has filed a complaint seeking, among other things, an injunction barring the California Secretary of State from including Senator John McCain on the 2008 Presidential Election Ballot as the Republican nominee for President of the United States. Plaintiff argues that such relief is appropriate because, he alleges, Senator McCain does not meet the qualifications for President as established in the United States Constitution. The Secretary of State does not take a position on the merits of Plaintiff's claims, but submits that the injunction sought against her should be denied for two reasons.

First, Plaintiff's request for injunctive relief against the Secretary of State fails to state a claim upon which relief may be granted. Because Plaintiff does not, and cannot, allege that the Secretary of State has committed any violation of law or infringed on any right held by Plaintiff by including Senator McCain as the Republican nominee for President on the ballot, his claim against the Secretary should be dismissed. Second, Plaintiff's failure to timely file his complaint will prevent the Court from ruling on the injunction prior to the printing and distribution, pursuant to statutory mandates, of ballots containing Senator McCain's name as the Republican Presidential nominee. Indeed, thousands of California voters residing overseas will have received and be able to cast their votes for President before this Court is able to rule on Plaintiff's complaint. Accordingly, Plaintiff's request for injunctive relief should be denied because it would result in an unprecedented disruption of an ongoing election.

II. STATEMENT OF RELEVANT FACTS AND LAW

The California Secretary of State [hereafter "Secretary"] is the State's chief elections officer. Cal. Gov't Code, § 12172.5. She is responsible for ensuring that State elections are conducted efficiently and that the election laws are enforced. *Id.* Consistent with these obligations, the Secretary is required to provide local elections officials with a certified list of the names, party affiliations, and ballot designations of candidates nominated by their respective parties to appear on the November 4, 2008 Presidential General Election ballot. Cal. Elec. Code, §§ 6901, 8148.

Specifically, the Secretary was required to distribute a certified list of candidates to

1 local elections officials by August 28, 2008. *Id.* § 8148 [certificate shall be delivered not less
2 than 68 days before the election]. For purposes of the Republican candidates for President and
3 Vice President, the Secretary is required to include in her certified list the names of the nominees
4 provided by the Chairperson of the California Republican State Central Committee (or California
5 Republican Party). *Id.* §§ 6901, 7310(b).

6 Where, as this year, the Republican National Convention is scheduled to conclude after
7 the deadline for the Secretary to deliver the certified candidate list to local elections officials, the
8 California Republican Party must notify the Secretary of its nominees once the candidate for
9 President has secured a sufficient number of delegate votes to assure his or her nomination and
10 selected a Vice Presidential nominee. *Id.* § 7310(a). Once she was informed of the Republican
11 Party's nominees, on August 29, 2008, the Secretary distributed a certified list of candidates that
12 included Senator McCain and Governor Sarah Palin as the Republican nominees for President
13 and Vice President, respectively.¹ Declaration of Cathy Mitchell [hereafter "Mitchell Decl."] ¶ 5.

14 Upon receiving the certified list of candidates, local elections officials are responsible
15 for printing and distributing sample ballots and ballots to registered California voters. Cal. Elec.
16 Code, §§ 13000, 13303. And in federal elections, local officials are required to send a ballot to
17 voters residing abroad "as soon as possible" after September 5, 2008 (60 days prior to the general
18 election). *Id.* § 3307. Once they receive their ballots, overseas voters are entitled to cast their
19 vote for the candidates of their choice and return their ballots to local elections officials. *Id.* §§
20 3304, 3311.

21 By September 25, 2008, local elections officials may begin mailing sample ballots to
22 registered voters throughout California. *Id.* § 13303(a). The sample ballots are identical to the
23 official ballots that will be used in the November 4, 2008 Presidential General Election, and
24 therefore will include the offices and names of candidates for each office. *Id.* Local elections
25

26 1. Although Senator McCain was clearly the presumptive Republican nominee for President
27 as of August 28, 2008, he did not select a Vice Presidential running mate until one day later, on
28 August 29, 2008. In compliance with statute, the Secretary distributed a certified list of candidates
identifying Senator McCain as the Republican nominee for President on August 28, 2008, and
updated the list the following day to include Governor Palin as his running mate.

1 officials must have completed mailing out the sample ballots no later than October 14, 2008. *Id.*

2 On August 11, 2008, Plaintiff filed a complaint (hereafter "Pl. Compl.") seeking
3 declaratory and injunctive relief against the defendants. As against the Secretary of State,
4 Plaintiff seeks only injunctive relief precluding her from "following California law and placing
5 Senator McCain's name on the California Ballot." Pl. Compl. ¶ 24. On August 21, 2008, the
6 Court issued a scheduling order setting a hearing on Plaintiff's complaint for September 11,
7 2008.

8 III. ARGUMENT

9 A. Plaintiff's Cause Of Action Seeking Injunctive Relief Against The Secretary Of 10 State Should Be Denied Because It Fails To State A Claim Against The Secretary And Is Contrary To The Public Interest.

11 The Secretary does not take a position on the merits of Plaintiff's claim challenging
12 Senator McCain's eligibility to be President. As the State's chief elections officer, the Secretary
13 is obligated to ensure that the Presidential election is conducted efficiently, fairly, and in
14 compliance with State law. Cal. Elec. Code, § 12172.5. The Secretary, however, is not
15 responsible for evaluating the personal qualifications of the respective political parties'
16 presidential nominees. Therefore, it would be inconsistent with the Secretary's statutory duties
17 to opine on whether Senator McCain meets the federal constitution's qualifications for President
18 of the United States. However, because the Secretary is responsible for ensuring the 2008
19 Presidential Election is properly administered, she objects to Plaintiff's effort to enjoin her from
20 complying with California law by providing Senator McCain's name as the Republican nominee
21 for President of the United States to local elections officials.

22 1. Plaintiff's Claim Against The California Secretary Of State Should Be 23 Dismissed Because It Fails To Allege That She Has Violated Any Law.

24 Plaintiff does not allege that the Secretary of State, by performing her official duties,
25 has committed a violation of either federal or State law. Plaintiff does accurately state that the
26 Secretary is required by "*State law* to place Senator McCain on the ballot as a presidential
27 candidate." Pl. Compl. ¶ 21 [citing Cal. Elec. Code, § 6901] [emphasis added]. However,
28 neither State nor federal law impose any obligation on the Secretary to verify that the respective

1 parties' nominees are eligible to hold the office of President or Vice President prior to placing
2 their names on the ballot.²¹ Because Plaintiff does not, and cannot, allege that the Secretary is
3 violating any law or infringing on any right held by Plaintiff by placing Senator McCain on the
4 California ballot, Plaintiff's claim against the Secretary should be dismissed because it fails to
5 state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6); *Balisteri v. Pacifica*
6 *Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990) [dismissal proper when based on lack of a
7 cognizable legal theory].

8 **2. Plaintiff's Request For Injunctive Relief Against The Secretary Of State**
9 **Should Be Denied Because Denial Is In The Public Interest.**

10 Even if Plaintiff could establish a valid claim against the Secretary of State, his belated
11 request for injunctive relief should be denied because relief cannot be granted until after the
12 election is underway. In evaluating a request for injunctive relief, the Court must evaluate
13 whether it is in the public interest to do so. *Sammartano v. First Judicial Dist. Court*, 303 F.3d
14 959, 974 (9th Cir. 2002). This inquiry causes the Court to address the impact of its decision on
15 parties and nonparties, alike. *Id.* And where the proposed injunctive relief threatens to disrupt a
16 scheduled election, a "court is entitled to and should consider the proximity of a forthcoming
17 election and the mechanics and complexities of state election laws, and should act and rely upon
18 general equitable principles." *Reynolds v. Sims*, 377 U.S. 533, 584 (1964). Thus, "[i]nterference
19 with impending elections is extraordinary, and interference with an election after voting has
20 begun is unprecedented." *Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914,
21 919 (9th Cir. 2003) [internal citation omitted]. In the instant case, the public interest tilts
22 strongly in favor of allowing the November 4, 2008 Presidential Election to take place as planned
23 and permitting the duly selected nominee of the Republican Party, John McCain, to appear on the
24 ballot.

25 As previously noted, by September 5, 2008, local elections officials will begin mailing
26 ballots containing Senator McCain's name to overseas voters. Cal. Elec. Code, § 3307; Mitchell

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28 2. Federal law appears to delegate to the United States Congress responsibility for
evaluating the qualifications of the President and Vice President. 3 U.S.C. § 15.

1 Decl. ¶ 6. Thus, as of tomorrow, the presidential election will officially be underway in
2 California as overseas voters begin to receive, fill out, and return their ballots for counting by
3 local elections officials. Further, in order to comply with statutory deadlines and ensure
4 California voters receive their sample ballots sufficiently in advance of the November election to
5 make informed choices, local elections officials began preparing sample ballots upon receiving
6 the certified list of candidates from the Secretary of State on August 29, 2008. Mitchell Decl. ¶
7 8. Because this Court will not be able to rule on Plaintiff's request for a preliminary injunction
8 until, at the earliest, the matter is heard on September 11, 2008, any ruling that requires alteration
9 of ballots that have already been distributed to overseas voters will have the unprecedented effect
10 of disrupting an ongoing election.

11 **IV. CONCLUSION**

12 For the foregoing reasons, the Secretary respectfully requests the Court deny Plaintiff's
13 request for injunctive relief and dismiss this action to the extent it seeks relief against the
14 Secretary of State.

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16 Dated: September 4, 2008

17 Respectfully submitted,

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