C065237

COURT OF APPEAL
OF THE STATE OF CALIFORNIA
3RD APPELLATE DISTRICT

HEIDI FULLER
Petitioner and Appellant

v.

DEBRA BOWEN, Secretary of State, et al.,
Defendants and Respondents

TOM BERRYHILL
Real Party in Interest

APPELLANT'S REPLY BRIEF

FROM THE SUPERIOR COURT
FOR THE COUNTY OF SACRAMENTO
THE HONORABLE TIMOTHY M. FRAWLEY
Superior Court Case Number 34-2010-80000452

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Appellant, Pro per

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
(Cal. Rules of Court, rule 8.208)

The following entities or persons have either (1) an ownership interest of 10 percent or more in the party or parties filing this certificate (Cal. Rules of Court, rule 8.208(e)(1)), or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves (Cal. Rules of Court, rule 8.208(e)(2)):

Dated: 5-5-11

Heidi Fuller, Pro per

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I. Legal Argument.

A. This Case is Not Moot.

Respondents and Real Party in Interest both erroneously contend that this case is moot. A case can become moot "when a court ruling can have no practical impact or cannot provide the parties with effective relief." *Simi Corp. v. Garamendi*, (2009) 109 Cal.App.4th 1496, 1503. This appeal, however, is firmly within the important public interest exception to the mootness doctrine. In *Dunn v. Blumstein,* 405 U.S. 330, the U.S. Supreme Court considered the constitutionality of a durational residency requirement for voter registration when no practical relief could be granted. The U.S. Supreme Court held that the case was not moot because the problem was "'capable of repetition, yet evading review.'" Id. at 333, n.2 (quoting *Moore* v. *Ogilvie,* 394 U. S. 814, 816 (1969); *Southern Pacific Terminal Co.* v. *ICC,* 219 U. S. 498, 515 (1911)). More recently the Ninth Circuit Court of Appeals, in *Schaefer v. Townsend*, 215 F.3d 1031 (2000) considered the validity of section 201 of the California Election Code requiring candidates for the U.S. House of Representatives to reside in the state when filing nomination papers, as opposed to when elected, held that regardless of "the fact that the court cannot give Schaefer the full relief he sought will not render the case moot... Schaefer's claim is capable of repetition because in the future California would deny him or any other

nonresident the right to file a declaration of candidacy. The short span of time between the filing deadline and the election makes such a challenge evasive of review." Id at 1032.

Finally, in *Howard Jarvis Taxpayer Association v. Bowen*, despite the passage of Proposition 1A and the appellants' acknowledgement that they were not seeking an injunction or invalidation of the election but rather "[s]imply want this Court to determine whether the Superior Court erred by not issuing a writ." 192 Cal. App. 4th 110, 120 (2011). The court decided to address the merits of the appeal holding that the issue "'is likely to recur in future elections, yet evade review due to the short deadline for printing ballots... We also agree with appellants that this appeal involves a matter 'of continuing public interest.'" Id. (citing *Huening v. Eu* (1991) 231 Cal.App.3d 766, 770).[1]

The Appellant in the case at bar is similarly asking for neither the invalidation of the election nor the removal of Senator Berryhill from office. Like the appellant in *Howard Jarvis Taxpayers Association v. Bowen*, the appellant is simply asking for this Court to determine whether the Superior Court erred by not issuing a writ based upon a declaration that Article IV, section 2(c) of the California Constitution violates the Equal

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[1] even if the relief sought in the superior court is no longer available, appellate review of disputes concerning election procedures "may be appropriate if the contentions raised are of general public interest and are likely to occur in future elections in a manner evasive of timely appellate review." see also *Clark v. Burleigh* (1992) 4 Cal.4th 474, 481

Protection Clause so that this injustice will not be perpetuated in future elections. This appeal challenges a practice that has been used by candidates for the Legislature for forty years and is likely to recur in future elections. It evades review due to the short deadline for printing ballots and loss of jurisdiction by the court after the primary elections. While the political establishment is aware of the current lack of enforcement of the one-year durational residency requirement, the general public is not. The confusion over the status of California's residency requirements is further exacerbated by high profile cases in other states in which the residency requirements are enforced. By the time the average citizen candidate realizes the Constitution is not being enforced, it is too late. The case at bar is unusual in that it was brought early because the Appellant, being an attorney herself, was able to quickly research the residency question and understand that the broader constitutional implications and the need to file suit early enough to have a decision before the primary elections.

B. This Court Lacks Jurisdiction to Review the Lower Courts Decision on Jurisdiction Because No Cross Appeal was Filed.

Neither the Respondents nor the Real Party in Interest filed a cross-appeal challenging the lower court's holding that Article IV, section 5(a) of the California Constitution does not cut off the jurisdiction of the court before the primary election. By challenging the lower court's decision in their answers, the Respondents and Real Party in Interest are attempting to

bring a "stealth" appeal denying the appellant and the court a full briefing of the issue.

Filing deadlines for cross appeals are jurisdictional and appellate courts are without jurisdiction to consider late, or in this case nonexistent, appeals. *Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc.* (1997) 15 Cal.4th 51, 56, 61 Cal.Rptr.2d 166, 931 P.2d 344; *Estate of Hanley* (1943) 23 Cal.2d 120, 122, 142 P.2d 423; *MacPherson v. MacPherson*, (1939) 13 Cal.2d 271, 277. The deadline to file a cross-appeal from the lower court's decision has long passed.

C. The Lower Court Correctly Held It Had Jurisdiction under Article IV, Section 5(a) of the California Constitution.

Both the Respondents and Real Party in Interest challenge the court's jurisdiction based on Article IV, Section 5(a) of the California Constitution which states, "Each house shall judge the qualifications and election of its Members." This misconstrues the objective of this appeal. Appellant does not challenge the qualification of any one member of the state legislature, but rather seeks to reverse the lower courts holding that California's one-year durational residency requirement for members of the legislature in general violates the Equal Protection Clause of the U.S. Constitution.

The Respondents and Real Party in Interest argue that the Legislature has plenary jurisdiction to decide the qualifications and election

of its members. When considering the federal constitution's parallel provision to article IV, section 5, the U.S. Supreme Court held that "a determination of petitioner ['s]... right to sit would require no more than an interpretation of the Constitution. Such a determination falls within the traditional role accorded courts to interpret the law." *Powell v. McCormack* (1969) 395 U.S. 486, 548, 89 S.Ct. 1944, 1978, 23 L.Ed.2d 491. Thus, under *Powell v. McCormack*, the power of each house of Congress to be the judge of the qualifications of its members is not plenary but limited, and the role of construing the constitutional provision rests with the court.

From the clear reading of Article IV, section 5 of the California Constitution, the Legislature has jurisdiction over qualifications and election of any person duly elected in the general election. In the cases of *Allen v. Lelande* (1912) 164 Cal. 56, and *In re McGee* (1951) 36 Cal.2d 592 the California Supreme Court has determined the jurisdiction of the legislature extends to the post primary election period. A survey of cases demonstrates that our Supreme Court's interpretation is not universal.[2]

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[2] See *In re Primary Election Ballot Disputes 2004* (2004) 857 A.2d. 494, 2004 Me. 99 ("provision "does not vest exclusive authority in the Legislature over legislative primary... and does not prevent us from assuming jurisdiction."), *State ex rel. Gralike v. Walsh*, (1972) 483 S.W.2d 70 (declining to extend jurisdiction of the legislature to the primary election stating "This interpretation of the constitutional provision would mean that a 15-year-old resident of Illinois could file a declaration of candidacy for State Senator in Missouri, and even though the facts were undisputed, the courts could do nothing to prevent his name from appearing on the ballot."), *Comer v. Ashe* (1974) 514 S.W.2d 730 (constitution provision

Furthermore, there are cases expressly holding that jurisdiction passes to the legislature only after the primary election.[3] Additionally, we can cite no cases expressly holding that the legislature has exclusive jurisdiction over all matters regarding the qualifications and election of its members during the indefinite period before the primary elections. Thus, the court cannot interpret the holding of *In re McGee* as extinguishing the court's jurisdiction during the preelection period.

All of the cases cited by the Real Party in Interest address challenges to candidate qualifications after the primary or, indeed, general election. The defendants in all three of the following cases were seated members of their respective legislative bodies. *People v. Metzker* (1874) 47 Cal. 524, considered a challenge to a seated council member after the general election. Id. Construing language in a city charter that was identical to the state constitution, the court declined to take jurisdiction. Id at 525-526. In *French v. Senate* (1905) 146 Cal. 604 [80 P. 1031], four seated members of the state Senate were expelled for malfeasance in office. They petitioned

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"applies when a General Election has been held"), *Leu v. Montgomery* (1914) 31 N.D. 1, 148 N.W. 662 (courts to determine contests involving the nomination at a primary election), *Buskey v. Amos,* 294 Ala. 1, 310 So.2d 468 (1975) (jurisdiction of courts extinguished at general election), *State ex rel. O'Connell v. Dubuque* (1966) 68 Wash.2d 553, 413 P.2d 972 (provision does not divest the courts of jurisdiction at the primary election), *State ex rel. Cloud v. Election Bd. of State of Oklahoma* (1934) 169 Okla. 363, 36 P.2d 20 (court has jurisdiction to determine whether nominee for office of representative was eligible).

[3] See *State ex rel. McGrath v. Erickson* (1938) 203 Minn. 390, 281 N.W. 366 (courts must yield to the senate upon receiving the votes cast).

the Supreme Court for writ of mandate to compel the Senate to reinstate them. *Id.*, at p. 605. The court held that it had no jurisdiction over the dispute. *Id.* at 987. In *California War Veterans for Justice v. Hayden* (1986) 176 Cal.App.3d. 982, the plaintiff filed a challenge to the candidate's qualifications almost two full years after the candidate won the general election.

The cases of *Allen v. Lelande* (1912) 164 Cal. 56, and *In re McGee* (1951) 36 Cal.2d 592, considered the issue of court's jurisdiction during the period between the primary election and the general election.

In *Allen*, a post primary election challenge to the party's nominee, the court held that "the assembly should be the sole and exclusive judge of the eligibility of those **whose election is properly certified** (emphasis added)." 164 Cal. at 57.

In re McGee considered a post primary election challenge on the grounds that the defendant failed to meet the constitutional durational residency requirement. *In re McGee* at 593. The plaintiff sought to strike the defendant's name from the general ballot. *Id.* The court held that primary elections are an integral part of the election process, and since the Assembly has exclusive jurisdiction to judge qualifications and elections of Assemblymen it cannot delegate that duty nor achieve that result indirectly by authorizing the courts to decide contests after primary elections. *Id.* at 597. The court stated that "If the trial court gave its judgment, either

Finally, the legislature may not delegate its constitutional duty; therefore, if the legislature's jurisdiction is extended, Election Code section 13314 would be an impermissible encroachment on the legislature's jurisdiction over the "election of it Members." This leads to untenable circumstance that Californians would be denied judicial recourse in all things related to the election of an Assemblyman or Senator.

D. Appellant Met the Requirements for a Writ.

The respondents argue that the trial court's decision was appropriate because the respondents lacked "a ministerial duty to perform" and the implication that the enforcement of the Constitution is another's responsibility. The lower court is silent on this issue.

The court must disregard the opinions of the Attorney General at issue. The Attorney General opinions are faulty and in direct contravention of the California Constitution. It is well established that "[a]lthough opinions of Attorney General are entitled to great weight, such opinions are not controlling as to meaning of a constitutional provision or statute." (*Unger v. Superior Court (1980)* 102 Cal.App.3d 681, 688, disapproved on other grounds by *Unger v. Superior Court* (1984) 37 Cal.3d 612, 618.) Furthermore, weight should only be given Attorney General opinions "where Attorney General regularly advises agencies that administer law and when opinion is consistent with long line of authority both before and after its issuance." *State of Cal. Ex rel State Lands Commission v. Superior*

Court (1995) 11 Cal.4th 50, 900 P.2d 648, 44 Cal.Rptr.2d 399. A long line of authority did not exist either before or after issuance of the opinions to support the Attorney General conclusions; indeed the weight of forty years of subsequent authority is contrary to the conclusions of the Attorney General.

The question the Secretary of State posed to the Attorney General in 1973 demonstrates that the Secretary of State assumes he has the authority to grant or prohibit the placement of names on the ballot; he is only questioning how he should use this authority when presented with this particular set of facts.

The Attorney General's 1973 opinion answered the following question: "should the Secretary of State permit a candidate's name to be placed on the ballot under the following circumstances: a. Facts have come to the attention of the county clerk or the Secretary of State suggesting that the candidate fails to meet the residency requirements; b. Official documents within the custody of the county clerk or Secretary of State, such as an affidavit of registration, suggest that the candidate fails to meet the residency requirement; c. It appears from the face of the candidate's declaration of candidacy that the candidate fails to meet the residency requirement." 56 Op.Atty.Gen. 365 (1973).

The Attorney General concluded, "The Secretary of State is without authority or jurisdiction to refuse to file the declaration of candidacy of a

favorable or unfavorable, to the candidate **after the primary election** but nevertheless the candidate at the ensuing election received the majority of the votes cast, there can be little doubt that he could present his credentials to the legislative house to which he was elected and that body would be required to pass upon any claimed defect in his selection, regardless of the conclusion reached by the court (emphasis added)." *Id.*

The court clearly considers the occurrence of the primary election as the logical threshold moment for the passing of jurisdiction from the courts to the legislature. The case at bar was filed and decided by the lower court well before the primary election and is firmly within the jurisdiction of this court.

This threshold is reflected in our statutory framework. Before the primary elections, an elector may seek recourse under section 13314 of the Election Code while post-election challenges must be brought under section 16100 (see *McKinney v. Superior Court* (2005) 124 Cal.App.4th 951, 21 Cal.Rptr.3d 773, stating in its dismissal of the case that the appellant "had a preelection remedy he could have exercised" and *Kilbourne v. City of Carpinteria* (1976) 56 Cal.App.3d 11, 16, 128 Cal.Rptr. 133 stating the rule that "one cannot pass up a preelection remedy in favor of a post-election challenge" and dismissing the case for lack of jurisdiction because while the relief sought would have been available before the election, post-election relief was not in the statute.) Additionally, an elector may seek

relief in the courts if the post-election misconduct rises to constitutional levels. *Horwath v. City of East Palo Alto* (1989) 212 Cal.App.3d 766, 775, 261 Cal.Rptr. 108. **Both the legislature and courts recognize a fundamental change in the nature of the candidacies once a primary election has taken place.**

The court cannot extend the holding in *In re McGee* to preelection controversies as it relates to "qualifications" without also extending the legislature's exclusive jurisdiction over preprimary matters of "election" and expanding the definition of "Members" to include an absurd number of individuals.

Extending *In re McGee* to preelection controversies would necessarily broaden the definition of "Members" to the whole of the general public before a single form had been filed or a single ballot had been cast. Furthermore, at some point the definition of "Members" becomes so broad as to be impossible to harmonize with the definition of the word "member" as used in the same or other sections of the constitution.[4] Expanding the definition of "election" would bring into question the jurisdiction over matters as diverse and complex as campaign finance and election advertising.

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[4] For example, Art IV, sec 5(b) "No Member of the Legislature may accept any honorarium".

candidate for the Assembly or Senate on the grounds of the candidate failed to reside within the district for one year." *Id.* At the end of his analysis, he adds, "the Secretary of State cannot, **in the absence of a judicial order under Election Code section 6403,** refuse to file a declaration of candidacy...." *Id.* at 369.[5] Appellant in this case was seeking just such a judicial order.

The Attorney General did not conclude that the Secretary of State is without authority or jurisdiction to refuse to file declarations of candidacy under any set of circumstances; but rather that the Secretary of State has no authority when a) the refusal is based on the grounds of the constitutional residency requirement, and b) there is the absence of a judicial order.

The Attorney General's analysis begins with a 'truism that public officers have only such powers as are conferred upon them by law." Id. at 366 (citing 41 Cal.Jur.2d Public Officers §§ 124-125, pp.10-12.) He states that the courts are reluctant to use constructions "granting investigative or discretionary function to ... state election officials. Id. He concludes that while the Secretary of State has ministerial duties, she must carry out those duties blindly, without the ability to question the veracity of the information gleaned during the process or even require verification of compliance with the constitutional qualifications. Id. (citing conflicting authority.) He concludes that, "even assuming implied authority, the Secretary of State

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[5] Section 6403 repealed, see now Election Code section 13314.

could not act upon facts presented by opposing candidates or parties or even act upon other documents within the custody of the county clerk, such as the affidavits of registration." Id. at 367.

The Attorney General acknowledges that, at the time his opinion issued, "the Declaration of Candidacy, requires a statement of the candidate's address for the past five years and arguably the Legislature intended that if the address revealed noncompliance with article IV, section 2, subdivision (c), the declaration should not be filed," but dismisses it as merely an effort to "better identify the candidate." [6] Id. at 368.

The Attorney General then turns to an analysis of *In re McGee,* discussed above, which has been demonstrated to be inapplicable to preelection matters including the instant case. *Id.*

The Attorney General gives cursory treatment to the issue of a possible conflict between article IV, section 2(c) of the California Constitution and the equal protection clause in the U.S. Constitution in his 1973 opinion. Id. at 369.

The question in 1979 was the following: "In view of the provisions of article III, section 3.5 of the California Constitution, is the Secretary of State required to enforce the provisions of article IV, section 2, subdivision

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[6] The Attorney General's acknowledgement that the Legislature may have intended that the Secretary of State enforce the constitution by refusing to file declarations seems to conflict with his earlier conclusion that the Secretary of State could not act even with implied authority.

(c) of the California Constitution imposing a one year residence prerequisite membership in the Legislature, where said provision has never been determined by an appellate court to be unconstitutional?" *62 Ops.Atty.Gen 365, 366 (1979).*

The ineffectual automaton envisioned in the Attorney General's 1973 conclusion barely resembles the role contemplated for the Secretary of State in section 12172.5 of the Government Code enacted in 1975. The new section states, the Secretary of State is the chief elections officer of the state and is responsible to see that the "election laws are enforced... If, at any time, the Secretary of State concludes that state election laws are not being enforced, the Secretary of State shall call the violation to the attention of the district attorney of the county or to the Attorney General. In these instances, the Secretary of State may assist the county elections officer in discharging his or her duties... The Secretary of State may adopt regulations to assure the uniform application and administration of state election laws." Government Code § 12172.5.

The Attorney General reaffirms the defective holding in his 1973 opinion and wrongly concludes that "[n]othing in the new enactments provides the authority found lacking in our earlier opinion." *62 Ops.Atty.Gen at 368.* He did not "reach the question of the effect of article III, section 3.5 of the California Constitution upon the exercise of such authority. *Id.* at 369.

Ironically, after declaring a 100 year old provision of the constitution void and unenforceable, the Attorney General demonstrates his lack of power as an officer by citing a case in which the California Supreme Court held that the Attorney General "could not refuse to prepare and issue the title and summary for a proposed initiative measure on the ground that said proposed initiative failed to meet certain constitutional standards." Id. at 368 (citing *Schmitz v. Younger* (1978) 21 Cal.3d 90, 92-93).

The Secretary of State clearly has an enforcement role relative to the election laws whether it is to adopt regulations designed to ensure the laws are applied and administered or enlisting the aid of the offices of the district attorneys or Attorney General (and presumably the legislature). The election laws contained within the provisions of the constitution, the supreme law of California, are included in that mandate.

Finally, the Attorney General approvingly reviews the Secretary of State's analysis in a 1976 opinion holding that "the one year residence requirement contained therein is constitutionally deficient." Id. at 367. The Attorney General recognizes without challenge that "the Secretary has *declined* to enforce such provision (emphasis added)" Id. If the Secretary is without authority to enforce the provision, then, she is also without authority to decline to enforce it; the provision's constitutionality would be immaterial relative to the Secretary of State. Furthermore, if the Legislature has exclusive jurisdiction over the qualifications of its

members, the Secretary of State should refer to the Legislature for guidance and not the Attorney General because both the Attorney General and the Secretary of State also have their jurisdiction extinguished.

E. A One-Year Durational Residency Requirement Does Not Violate the Equal Protection Clause of the Constitution.

The Real Party in Interest's opposition primarily relies on Justice Friedman's cutting-edge opinion in *Smith v. Evans,* (1974) 42 Cal.3d 154. At the time, Justice Friedman may have been certain that his decision in *Smith*, like so many of his other decisions, stood on firm ground would become a standard for the rest of the nation; but the subsequent tsunami of forty years of judicial opinion from around the nation has left it standing alone on a tiny island. Justice Friedman's interpretation has been rejected as recently as March of this year when the 11th Circuit Court of Appeals, considered a case in which the plaintiffs were completely barred by an anti-nepotism statute from running for the school board. The Court, relied on both *Clements* and *Anderson*, holding that "the District Court erred in reviewing Plaintiffs' First and Fourteenth Amendment claims under the strict scrutiny standard." *Grizzle v. Kemp*, No. 10-12179, 2011 WL 782033 (11th Cir. Mar. 8, 2011).

Finally, the *Smith* decision was never applied to invalidate California's constitutional durational residency requirements; that was accomplished by

the decision of the lower court in this case, a decision which the appellant respectfully appeals.

Dated: May 5, 2011

by 

Heidi Fuller
Appellant, Pro per.

CERTIFICATE OF WORD COUNT
(CAL RULES OF COURT, RULES 8.204, 8.490)

The text of this petition consists of 3,988 words as counted by the Microsoft Word version 2000 word-processing program used to generate the petition which is less that the total words permitted by the rules of the court.

Dated: 5-5-11

Heidi Fuller
Appellant, Pro per.