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Superior Court of California,

Sacramento

12/22/2023

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By \_\_\_\_\_, Deputy

23WMD000137

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 VINCE FONG

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
 9 **COUNTY OF SACRAMENTO**

10 VINCE FONG, an individual,

11 Petitioner,

12 v.

13 DR. SHIRLEY N. WEBER, in her official  
 14 capacity as the California Secretary of State; and  
 DOES 1 through 100. Inclusive,

15 Respondent.

Case No.

**VERIFIED PETITION FOR WRIT OF  
 MANDATE**

**IMMEDIATE ACTION REQUIRED:**  
**ELECTION LAW MATTER ENTITLED**  
**TO CALENDAR PREFERENCE**  
**PURSUANT TO C.C.P. §35**

Petition Filed: December 22, 2023

17  
 18 **INTRODUCTION**

19 Petitioner VINCE FONG (“Fong”) petitions this court for a writ of mandate compelling  
 20 Respondent Dr. Shirley N. Weber, California Secretary of State (“Secretary of State”) to include  
 21 his name on the list of candidates for California’s 20<sup>th</sup> Congressional District in the statewide  
 22 primary election scheduled for March 4, 2024. Emergency relief is needed to correct a substantial  
 23 violation of state law by the California Secretary of State who is at this moment blocking a duly  
 24 qualified candidate for the United States House of Representatives from the March 5, 2024  
 25 primary ballot.

26 Petitioner Fong is a current member of the California State Assembly and now seeks  
 27 election to the United States House of Representatives in California’s 20<sup>th</sup> Congressional District.  
 28 It is undisputed that Mr. Fong timely filed his candidacy papers and his declaration of candidacy,

1 and submitted the required number of valid nomination signatures to the Registrar of Voters of  
2 Kern County as required by the Elections Code. It is further undisputed that his nomination  
3 documents were timely reviewed and approved, and that he was issued the Oath of Office for the  
4 U.S. House of Representatives on Monday, December 11, 2023 2023 by the Kern County  
5 Registrar of Voters. Mr. Fong completed *every* aspect of the candidate filing process required by  
6 the Elections Code and is now legally qualified to appear on the CD-20 ballot.

7         However, on Friday December 15, 2023, the California Secretary of State notified Mr.  
8 Fong that she will block his access to the CD-20 ballot. The Secretary of State cited a century-old  
9 statute (Elections Code section 8003) that on its face applies only to “independent candidate  
10 nominations,” a process that was long ago abandoned by the state in favor of its current “top two”  
11 nomination process. Section 8003 purportedly allows independently nominated candidates to  
12 seek only one office at any election. The Secretary of State seeks to apply this statute to Mr.  
13 Fong’s *voter-nominated* candidacies for State Assembly and the United States House of  
14 Representatives.

15         By the Secretary of State’s own admission on her website, section 8003 is a statute  
16 without *any* attendant applicability or remedy since the passage of Proposition 14, which took  
17 effect January 1, 2011, and the Secretary of State simply cannot make up a remedy that blocks a  
18 qualified congressional candidate from the ballot. Likewise, there are no judicial decisions  
19 affording the Secretary of State the broad discretionary powers she seeks here to prohibit a  
20 qualified congressional candidate from appearing on the ballot.

21         The Secretary’s attempted unilateral expansion of her powers must be rejected by this  
22 Court and Mr. Fong must be restored to the ballot for CD-20. Under the United States  
23 Constitution, deciding who runs and is elected to federal legislative office is a question *only* for  
24 the candidate, the voters, and the legislative body itself. The executive branch is a ministerial  
25 participant without *any* powers not expressly provided to it by the legislative branch.

26         This Court’s immediate attention and intervention is necessary to preserve Mr. Fong’s  
27 access to the ballot, preserve voters’ ability to vote for the candidate of their choosing, and  
28 prevent a grave violation of the constitutional and statutory limitations on the power of the state’s

1 executive branch to prevent a duly qualified candidate from appearing on the congressional  
2 ballot.

### 3 BACKGROUND

4 1. On December 11, 2023, Petitioner VINCE FONG (“Petitioner”) completed and  
5 filed his declaration of candidacy and nomination papers to run for the House of Representatives  
6 in California’s 20<sup>th</sup> Congressional District. The filing officer for these papers, the Kern County  
7 Registrar of Voters, verified that the nominating signatures were valid, accepted the nomination  
8 papers as valid, and issued Mr. Fong the formal Oath of Office for the U.S. House of  
9 Representatives.

10 2. Prior to successfully filing to run for the House of Representatives, Mr. Fong had  
11 also successfully filed candidacy papers for election to the State Assembly.

12 3. Mr. Fong properly and successfully completed his nomination papers for both  
13 offices, and was issued the Oath of Office for these two offices.

14 4. The Kern County Registrar of Voters thereafter transmitted the nomination papers  
15 to the Secretary of State’s Office, whose only duty with respect to the nomination documents is to  
16 “receive and file” them. (Elec. Code, § 8082.)

17 5. On December 15, 2023, the Secretary of State published a media release on its  
18 website announcing that “Mr. Fong will not appear on the list of certified candidates for  
19 Congressional District 20 that our office will transmit to county election officials on candidates  
20 on December 28.” ([https://www.sos.ca.gov/administration/news-releases-and-advisories/2023-  
21 news-releases-and-advisories/secretary-state-announces-determination-californias-20th-  
22 congressional-district.](https://www.sos.ca.gov/administration/news-releases-and-advisories/2023-news-releases-and-advisories/secretary-state-announces-determination-californias-20th-congressional-district))

23 6. The media release only by the Secretary of State’s office notes only that they had  
24 received two duly filed declarations of candidacy for Mr. Fong. (*Id.*) No issue as to the *validity*  
25 of Mr. Fong’s candidacy papers or his taking of the Oath of Office for CD-20, or any other defect,  
26 was raised.

27 7. On December 28, 2023, the Secretary of State will transmit to each county  
28 elections official a certified list of candidates who are eligible to be voted for in his or her county

1 at the direct primary. (Elec Code, § 8120.) This list will unlawfully exclude Mr. Fong from the  
2 CD-20 race.

### 3 LEGAL BACKGROUND

#### 4 Candidate Filings And The Limited Ministerial Powers Of The Secretary Of State

5  
6 8. Numerous courts have held that the Secretary of State's powers governing  
7 elections are purely ministerial. (See, e.g., *McDonald v. Curry* (!910) 158 Cal. 160, 164  
8 ["Secretary of State and the several county clerks and registrars are invested with merely  
9 ministerial functions, and their duties in respect to the preparation of the official ballots to be used  
10 at the primary election are exactly prescribed"]; *Keyes v. Bowen* (2010) 189 Cal. App. 4th 647,  
11 650 [Secretary of State has no ministerial duty to investigate and determine whether candidate is  
12 constitutionally eligible to run for office]; *Lockyer v. City and County of San Francisco* (2004) 33  
13 Cal.4th 1055, 1081 [ministerial duties are those that are "prescribed by the statute"].)

14 9. Candidate filing process first requires the candidate to file a declaration of  
15 candidacy and nomination signatures with the county elections official. (Elec. Code, §§ 305, 333,  
16 8020, 8028, 8040, 8064.) The declaration of candidacy includes the following statement: "I meet  
17 the statutory and constitutional qualifications for this office," and requires the candidate's  
18 signature. (Elec. Code, § 8040.)

19 10. Thereafter, the county elections official transmits to the Secretary of State the  
20 nomination documents, which include the declaration of candidacy, for each candidate for  
21 legislative office. (Elec. Code, §§ 333, 8070, 8082.)

22 11. Pursuant to the Elections Code, the Secretary of State is empowered to only  
23 "receive and file" the nomination documents. (Elec. Code, § 8082.) This is a purely ministerial  
24 duty.

25 12. Once the Secretary of State has "receive[d] and file[d]" the declarations of  
26 candidacies from the counties, the Secretary of State prepares a list of candidates to be voted on  
27 throughout the state and distributes that list to the counties for printing of ballots. (Elec. Code, §§  
28 8120-8125.)

1           13.     Simply put, there is no intervening statutory step between the Secretary of State  
2 receiving the declarations of candidacies who have been duly qualified by the counties and  
3 printing the names of those candidates on the ballot. There certainly is no discretionary authority  
4 of the Secretary of State to entirely reject those candidacies, and the Secretary of State's efforts to  
5 unilaterally create such authority should be summarily rejected.

6           14.     In attempting to block Mr. Fong from the CD-20 ballot, the Secretary of State cites  
7 Elections Code section 8003 as authority. However, section 8003 is explicit in that it applies *only*  
8 to candidates seeking an independent nomination. That statute provides in full:

9                   § 8003. Independent nomination of candidates

10                   This chapter does not prohibit the independent nomination of  
11 candidates under Part 2 (commencing with Section 8300), subject  
12 to the following limitations:

13                   (a) A candidate whose name has been on the ballot as a candidate  
14 of a party at the direct primary and who has been defeated for that  
15 party nomination is ineligible for nomination as an independent  
16 candidate. He is also ineligible as a candidate named by a party  
17 central committee to fill a vacancy on the ballot for a general  
18 election.

19                   (b) No person may file nomination papers for a party nomination  
20 and an independent nomination for the same office, or for more  
21 than one office at the same election.

22           15.     The plain language of the introductory clause of section 8003 describes specific  
23 instances where the "independent nomination of candidates" is "not prohibit[ed]": "This chapter  
24 does not prohibit the **independent nomination** of candidates under Part 2 (commencing with  
25 Section 8300), subject to the following limitations."

26           16.     The statute then continues by identifying two "limitations" specifically on the right  
27 of a candidate to seek an "**independent nomination**":

28                   (a) A candidate whose name has been on the ballot as a candidate  
of a party at the direct primary and who has been defeated for that  
party nomination is ineligible for nomination as an **independent  
candidate**. He is also ineligible as a candidate named by a party  
central committee to fill a vacancy on the ballot for a general  
election.

1  
2 (b) No person may file nomination papers for a party nomination  
3 and an **independent nomination** for the same office, or for more  
4 than one office at the same election.

5 (Emphasis added.)

6 17. The plain language of section 8003 further indicates it applies *only* to the Code's  
7 independent nomination statutes "*under Part 2 (commencing with Section 8300.*" Part 2, section  
8 8300 entitled "Nomination subsequent to or in lieu of primary election" **applies solely to general**  
9 **elections, and not primary elections** (as the Secretary of State seeks to do here). Section 8300  
10 provides:

11 A candidate for a partisan office, including that of presidential  
12 elector, may be nominated subsequent to, or by other means than,  
13 a primary election pursuant to this chapter. A candidate for  
14 nonpartisan office or for voter-nominated office may be nominated  
15 subsequent to, or by other means than, a primary election pursuant  
16 to this chapter only if a candidate was not nominated or elected at  
17 the primary election for that office.

18 (Emphasis added.)

19 18. As is clear from the express terms of section 8003, its subdivisions, and even its  
20 title ("Independent nomination of candidates"), the statute was meant to govern independent  
21 nominations of candidates only, and nothing else.

22 19. Mr. Fong is not seeking an "independent nomination" or seeking nomination  
23 directly to the general election. Therefore, section 8003 does not apply to him.

24 20. Even if the Secretary of State is not empowered with *any* ministerial authority to  
25 remove a qualified congressional candidate from the ballot.

26 21. To the contrary, the Secretary of State has a mandatory duty to place on the  
27 certified list of candidates every congressional candidate who has completed the candidate filing  
28 process.

29 22. Compounding the Secretary of State's improper reliance on section 8003 is that  
30 section 8003 has no application after the state abandoned "independent nominations" altogether  
31 in 2010.

1           23. California replaced its candidate nomination process for virtually every type of  
2 candidacy in 2010 and now uses a top-two primary system. This system was adopted by voters in  
3 2010 as the “Top Two Candidates Open Primary Act” (Proposition 14) which became effective  
4 January 1, 2011.

5           24. The webpage of the Secretary of State explains the changes to the nomination  
6 process after the passage of Proposition 14, and notes specifically the abandonment of  
7 independent nomination of candidates:

8                           The Top Two Candidates Open Primary Act, which took  
9 effect January 1, 2011, requires that all candidates for a  
10 voter-nominated office be listed on the same ballot.  
11 Previously known as partisan offices, voter-nominated  
12 offices are state legislative offices, U.S. congressional  
13 offices, and state constitutional offices. Only the two  
14 candidates receiving the most votes—regardless of party  
15 preference—move on to the general election regardless of  
16 vote totals. \*\*\*

17                           **Additionally, there is no independent nomination  
18 process for a general election.**

19                           ([https://www.sos.ca.gov/elections/political-parties/no-party-preference#top-two-](https://www.sos.ca.gov/elections/political-parties/no-party-preference#top-two-candidates)  
20 [candidates](https://www.sos.ca.gov/elections/political-parties/no-party-preference#top-two-candidates) (emphasis added).)

21           25. It is undisputed by the Secretary of State that section 8003 was superseded by  
22 Proposition 14.

23           26. Section 8003 is a statute, with no force or effect of law. It is void as any authority  
24 for use by the Secretary of State to block a qualified candidate for legislative office.

25           27. The Secretary of State’s barring Mr. Fong’s candidacy for the United States House  
26 of Representatives also blatantly violates the United States Constitution and concepts of  
27 Separation of Powers. (*United States Term Limits v. Thornton* (1995) 514 U.S. 779, 833-834  
28 [States are not empowered “to dictate electoral outcomes, to favor or disfavor a class of  
candidates, or to evade important constitutional restraints”]; and see *Fuller v. Bowen*, 203  
Cal.App.4th 1476, 1487 [“The prospect that separate branches of government could judge the

1 qualifications and elections of candidates for membership in the Legislature ... is something to be  
2 avoided, no matter when the challenge first arises”].)

3 28. There are three, and only three, standing qualifications for U.S. Senator or  
4 Representative in Congress which are expressly set out in the U.S. Constitution: age (25 for the  
5 House, 30 for the Senate); citizenship (at least seven years for the House, nine years for the  
6 Senate); and inhabitancy in the state at the time elected. (U.S. Const., art. I, § 2, cl. 2 (House);  
7 and art. I, § 3, cl. 3 (Senate).)

8 29. The Supreme Court of the United States has affirmed the historical understanding  
9 that the Constitution provides the exclusive qualifications to be a Member of Congress, and that  
10 neither a state nor Congress itself may add to or change such qualifications to federal office,  
11 absent a constitutional amendment. (*Powell v. McCormack* (1969) 395 U.S. 486, 522; *Thornton*,  
12 *supra*, 514 U.S. at 800-801; *Cook v. Gralike* (2001) 531 U.S. 510.)

13 **Writs of Mandate Under Elections Code 13314 And CCP 1085**

14 30. Pursuant to Section 13314(a)(1) of the Elections Code, “An elector may seek a  
15 writ of mandate alleging that an error or omission has occurred, or is about to occur, in the  
16 placing of a name on, or in the printing of, a ballot, county voter information guide, state voter  
17 information guide, or other official matter...” An “elector” means a person who is a United  
18 States citizen 18 years of age or older and is a resident of an election precinct on or before the day  
19 of an election. (Elec. Code, § 321(a).) Petitioner is an “elector.”

20 31. There are two requirements essential to issuance of a writ of mandate under Code  
21 of Civil Procedure section 1085: (1) the respondent has a clear, present, and usually ministerial  
22 duty to act; and (2) the petitioner has a clear, present, and beneficial right to performance of that  
23 duty. (*Monterey Mechanical Co. v. Sacramento Regional County Sanitation Dist.* (1996) 44  
24 Cal.App.4th 1391, 1414; *Hutchinson v. City of Sacramento* (1993) 17 Cal.App.4th 791, 796.)  
25 Mr. Fong met all of these qualifications.

26 32. Here, the Secretary of State has an unambiguous ministerial duty to include on the  
27 certified list of candidates the names of all qualified candidates for each congressional office,  
28 including Mr. Fong.





1 District, because Respondent WEBER is abusing her discretion in erroneously interpreting  
2 Elections Code sections 8003 and 8020, *et seq.*

3 39. Based upon the Secretary of State's erroneous interpretation of various sections of  
4 the Elections Code, the Secretary of State has or will improperly exclude Mr. Fong's name from  
5 the list of qualified candidates for the March 5, 2024 primary election for California's 20<sup>th</sup>  
6 Congressional District on the basis that Mr. Fong has violated Elections Code section 8003.

7 40. Mr. Fong properly filed all nomination documents and was issued the Oath of  
8 Office for the United States House of Representatives for the 20<sup>th</sup> Congressional District. His  
9 nomination documents were timely transmitted to the Secretary of State.

10 41. All applicable statutory criteria were met and Mr. Fong complied with all requisite  
11 provisions of the Elections Code.

12 42. The Secretary of State's determination that Mr. Fong should be excluded from the  
13 Certified List of Candidates and the ballot for the 20<sup>th</sup> Congressional District violates the  
14 Secretary of State's ministerial duties and does not further the purposes of the Elections Code,  
15 which is to permit qualified candidates to seek elective office.

16 43. The Secretary of State's interpretation of the Elections Code renders the statutes at  
17 issue unconstitutional on the grounds that such a determination excludes otherwise qualified  
18 candidates from seeking elective federal legislative office where no specific provision of law  
19 requires such an exclusion.

20 44. The error, omission, and neglect of duty by the Secretary of State which has  
21 occurred, will continue to occur unless writ relief is granted.

22 45. The issuance of a Peremptory Writ of Mandate will not substantially interfere with  
23 the conduct of the March 5, 2024 election, provided the Court rules on or before December 28,  
24 2023, which is the date the Secretary of State will transmit the Certified List of Candidates to the  
25 counties for printing of ballots. Thus, a hearing on the matter as of first court priority is essential,  
26 and mandated by Elections Code section 13314.

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Date: December 22, 2023

Respectfully submitted,

BELL, McANDREWS & HILTACHK, LLP

BY:   
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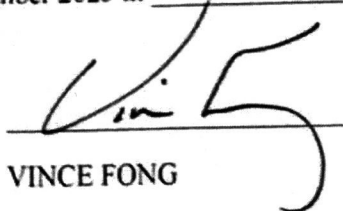
*Attorneys for Petitioner, VINCE FONG*

**VERIFICATION**

I, VINCE FONG have read the foregoing Verified Petition for Writ of Mandate and have personal knowledge of the contents stated therein and believe them to be true. If called as a witness, I could and would testify competently thereto.

I declare under penalty of perjury and under the laws of the state of California that the foregoing is true and correct.

Executed on this 21 day of December 2023 in 2023, California.

  
VINCE FONG

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