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FILED

NOV 01 2013

SAN LUIS OBISPO SUPERIOR COURT

BY

Erin Brown, Deputy Clerk

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN LUIS OBISPO

JOHN BARTA,

Plaintiff/Petitioner,

v.

DEBRA BOWEN, in her official capacity
as California Secretary of State, KAMALA
HARRIS, in her official capacity as
California Attorney General; JULIE
RODEWALD, in her official capacity as
San Luis Obispo County Clerk-Recorder;
and DOES 1-100,

Defendants/Respondents.

Case No.: CV 110665

RULING AND NOTICE OF RULING

John Barta (hereinafter Petitioner or Barta), in his capacity as a taxpayer, brings this action against Debra Bowen, California Secretary of State, and Kamala Harris, California Attorney General (collectively State), challenging Elections Code §§7210, 7408, 7655 and 10512 as unconstitutional. The Petition also names Julie Rodewald, San Luis Obispo County

1 Clerk-Recorder, and Gerald Shea, San Luis Obispo County District Attorney.¹ The State and
2 County Defendants are collectively referred to as Defendants.

3 These Elections Code sections mandate that members of various local political central
4 committees must take and subscribe the loyalty oath set forth in Section 3 of Article XX of
5 the California Constitution.

6 The First Amended Petition for Writ of Mandate and Complaint for Declaratory and
7 Injunctive Relief (Petition) sets forth four causes of action premised upon alleged violations
8 of First Amendment rights, California Constitutional free speech rights, and preemption.

9 Barta summarizes the action as follows:

10 By requiring a loyalty oath as a prerequisite to run for, or be qualified as the
11 winner of, an election to membership on political county central committees
12 the State is unjustifiably interfering with the members' free speech rights
13 because it cannot be shown that requiring such an oath is necessary for it to
14 ensure an orderly and fair election process.

15 Barta seeks the following remedies: (1) injunctive relief prohibiting Defendants from
16 expending public funds to administer and enforce the statutes; (2) a declaration that the
17 statutes are unconstitutional and void on their face; (3) a writ of mandate enjoining
18 Defendants from enforcing the statutes; (4) a writ of mandate requiring the Secretary of State
19 to notify elections officers in every county and city in the state that the statutes are
20 unconstitutional; and (5) an order requiring the Attorney General to issue a published opinion
21 setting aside Attorney General Opinion No. 95-514.

22 In opposition, the State concedes that some of Barta's claims have merit and that the
23 State has no objection to the Court entering a declaratory judgment declaring certain statutes
24 unconstitutional. However, the State is opposed to the issuance of any writ or injunctive
25 relief compelling it to take certain actions.

26 The crux of the Petition is a challenge to the loyalty oath in the context of
27 membership in county political central committees. Barta claims that this requirement is

28 ¹ Shea was dismissed on February 27, 2012. The County Clerk-Recorder elected not to answer the Petition
and a default was entered on June 10, 2013.

1 unconstitutional because it interferes with the members' free association and speech rights.
2 Barta also alleges that Elections Code §10512 is unconstitutional because it requires that
3 even before members are elected to a county political central committee, the candidates are
4 required to take the loyalty oath. It is the State's position that Elections Code §10512 only
5 applies to local and special districts and not to county political central committees. Barta
6 responds that Elections Code §10512 is a "further expression" of Elections Code §200, which
7 applies to nominations for primary or final elections. However, Barta failed to identify
8 Elections Code §200 in the Petition and never sought leave to file an amended Petition.

9 The role of pleadings is to define the issues to be tried. Weil & Brown, *California*
10 *Practice Guide, Civil Pro. Before Trial*, §6:8. If a party offers evidence or argument on
11 issues not pleaded, the opposing party may object. *Id.* The Petition does not allege any facts
12 or law contesting the constitutionality of Elections Code §200, or any other Elections Code
13 section that mandates compliance with the loyalty oath prior to running for election as a
14 member of a county political central committee.

15 The State's concession that Elections Code §§7210, 7408 and 7655 are
16 unconstitutional limits the Court's inquiry to the appropriate remedies. Barta will prevail on
17 his declaratory relief cause of action seeking a determination that Elections Code §§7210,
18 7408 and 7655 are unconstitutional and void on their face. However, the State opposes any
19 injunctive relief prohibiting it from expending funds administering the oath or enforcing the
20 unconstitutional provisions, and requiring it to inform all county clerks not to administer the
21 oath, and directing the Attorney General to publish an opinion reversing Opinion No. 95-514.

22 The State argues that prevailing on the declaratory relief claim provides Barta with an
23 adequate remedy at law. "Mandate will issue only when the petitioner has no plain, speedy
24 or adequate remedy at law." CEB, *California Civil Writ Practice*, §2.15; *Agosto v. Board of*
25 *Trustees of Grossmont-Cuyamaca Community College Dist.* (2010) 189 Cal.App.4th 330,
26 345 and *Connerly v. Schwarzenegger* (2007) 146 Cal.App.4th 739, 747. Likewise, "the fact
27 that a void law is on the books is not sufficient, by itself, to justify the issuance of an
28 injunction. (Citation)" *Connerly* at 748.

1 Barta's request for a writ of mandate enjoining the State from enforcing the statutes
2 and directing it to inform all counties that the statutes are unconstitutional is overbroad and
3 unnecessary. The purpose of a traditional writ of mandate under CCP §1085 is "to compel a
4 clear, present, and usually ministerial duty on the part of the respondent." CEB, *California*
5 *Civil Writ Practice*, §2.5. "A ministerial duty is one that is required to be performed in a
6 prescribed manner under the mandate of legal authority without the exercise of discretion or
7 judgment." *County of San Diego v. State* (2008) 164 Cal.App.4th 580, 593. Conversely, a
8 discretionary act involves the use of judgment in deciding what action to take, and the
9 exercise of discretion is not susceptible to mandate, except for a refusal to exercise the
10 discretion. CEB, *California Civil Writ Practice*, §2.5. This distinction is summarized as
11 follows:

12 Mandamus will lie to compel a public official to perform an official act
13 required by law. (Code Civ. Proc., §1085.) While mandamus will not lie to
14 control an exercise of discretion, i.e. to compel an official to exercise
15 discretion in a particular manner, mandamus may issue to compel an official
16 both to exercise his or her discretion (if he or she is required by law to do so)
17 and to exercise it under a proper interpretation of the applicable law.
18 *California Hosp. Assn. v. Maxwell-Jolly* (2010) 188 Cal.App.4th 559, 569–
19 570; see also *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432,
20 442; *California Assn. for Health Services at Home v. State Dept. of Health*
21 *Care Services, supra*, 204 Cal.App.4th 676, 683.

22 Thus, the Court may issue a writ of mandate directing the agency to exercise its
23 discretion, but cannot dictate how that discretion is to be exercised. That being said, the
24 agency's exercise of its discretion is subject to mandamus review if the decision is arbitrary,
25 capricious or entirely lacking in evidentiary support. *Id.*

26 There is no showing that the State has any ministerial duty to perform the acts
27 requested by Barta. There is no mandate that it inform all counties that the statutes are
28 unconstitutional, that it direct the counties to not enforce the statutes, or that the Attorney
General must issue an opinion. Whether the State chooses to notify counties and whether the
Attorney General intends to issue an opinion appear to be discretionary actions only subject

1 to judicial review if the exercise of that discretion is abused. In other words, the State's
2 enforcement of statutes that have been determined to be unconstitutional *potentially* subjects
3 the State to mandamus review, if and when such action might occur. Until that occurs, the
4 Court cannot direct the State how to respond to the determination that Elections Code
5 §§7210, 7408 and 7655 are unconstitutional.

6 Barta cites to *Schmid v. Lovette* (1984) 154 Cal.App.3d 466 for the proposition that
7 the injunctive and mandamus remedies are necessary to give the declaratory relief judgment
8 substance and meaning. The plaintiff in *Schmid* sought injunctive and declaratory relief to
9 enjoin the Richmond Unified School District's administering of an oath disavowing
10 membership in the communist party. The trial court issued an order restraining the
11 administration's enforcement of the unconstitutional oath and ordered the State to notify all
12 school and community college districts that the statutes are unconstitutional, and further
13 required the State Board of Education to promulgate regulations forbidding their
14 enforcement.

15 In *Schmid*, the subject Education Code statutes had previously been declared
16 unconstitutional by both state and federal authorities. *Id.* at 474. Nevertheless, the
17 Richmond Unified School District continued to enforce them. *Id.* The plaintiff in *Schmid*
18 was therefore able to show a need for injunctive relief, because some school districts in the
19 state were still administering the oath *even though it had been declared unconstitutional*.
20 Thus, the trial court's order was designed to make it clear "the non-Communist loyalty oaths
21 were patently unconstitutional following decisions rendered long ago by both state and
22 federal authorities." *Id.*

23 Finally, the State contends that there is no need for injunctive relief in this case
24 because it has conceded the unconstitutionality of the statutes, thereby removing the threat of
25 any potential for enforcement of these statutes by the State. In addition, the County Clerk-
26 Recorder allowed a default to be taken rather than contest the allegations. In Respondent
27 County Clerk-Recorder's Notice of Election to Not Answer Petition and Complaint, filed on
28 April 2, 2012, Defendant County Clerk-Recorder maintained "that she has no position as to

1 the validity (or lack thereof) of the Elections Code provisions that are being challenged in
2 this action.” That filing makes clear that Defendant County Clerk-Recorder’s position is one
3 of complete neutrality with regard to the Elections Code sections at issue. Citing *Lockyer v.*
4 *City and County of San Francisco* (2004) 33 Cal.4th 1055, 1082, the County Clerk-Recorder
5 stated :

6 The Clerk-Recorder has no discretion to refuse to follow the Elections Code
7 provisions and disclaims any interest in affirming or challenging the validity
8 of the provisions. *Id.*

9 The County Clerk continued to state as follows:

10 Moreover, the Clerk-Recorder has no interest in exposing the County of San
11 Luis Obispo to an award of private attorney general fees, were such fees to be
12 awarded in this matter, by defending the Election Code provision that
13 Petitioner challenges on constitutional grounds. In this regard, the Clerk-
14 Recorder lacks information or belief sufficient to enable her to defend or join
15 in the challenge to the Election Code provisions that Petitioner makes. *Id.*

16 Accordingly, it appears that there is no basis for a contention that there exists a
17 present threat of attempted enforcement of the Elections Code provisions at issue in this case
18 by any of the Defendants involved in this case. Nevertheless, Barta argues that an injunction
19 is necessary and appropriate, relying upon *Vogel v. County of Los Angeles* (1967) 68 Cal.2d
20 18, and distinguishing that case relied upon by the State, i.e., *Connerly v. Schwarzenegger*
21 (2007) 146 Cal.App.4th 739.

22 *Vogel v. County of San Luis Obispo, supra*, is not helpful to this analysis. In that
23 case, the trial court granted judgment enjoining defendants from expending public funds for
24 administering or enforcing an oath required of public employees by section 3 of article XX of
25 the California Constitution, in the context of a CCP §526a action for injunctive relief.

26 Without discussing the issue presented here, the California Supreme Court affirmed the trial
27 court’s judgment granting declaratory and injunctive relief. It should be noted, however, that
28 in that case the defendants contested the requested relief at both the trial and appellate court
levels.

1 Barta also argues that *Connerly v. Schwarzenegger, supra*, relief upon by the State, is
2 distinguishable. He correctly points out that in that case, an intervening appellate court
3 opinion decided the issue of constitutionality of the underlying statute. This led to a lengthy
4 discussion of whether the plaintiff/petitioner in *Connerly* continued to have standing in a
5 taxpayer injunctive relief action filed under CCP §526a. Without deciding that question, the
6 Court of Appeal held that no injunction would lie where an intervening appellate court
7 decision determined that the underlying statute was unconstitutional and where no threat of
8 continued attempts to enforce the underlying statute remained.

9 It is true, as Barta points out, that there has been no intervening determination of
10 unconstitutionality of the underlying statutes present here. However, the County Clerk-
11 Recorder has refused to defend the constitutionality of the statutes, stating in essence that her
12 sole duty is to comply with the law. The State has conceded the unconstitutionality of the
13 subject statutes, stating that there is no need for injunctive relief because it will not attempt to
14 enforce those admittedly unconstitutional statutes. Under these circumstances, the *Connerly*
15 court's analysis of *Lee v. Gates* (1983) 141 Cal.App.3d 989 is applicable.

16 *Lee v. Gates, supra*, presented an issue involving the enforcement of city ordinances
17 that regulated nude entertainment. After an injunction had issued, the California Supreme
18 Court issued a decision in a separate case "which all parties agreed rendered the city code
19 sections unconstitutional". *Id.* at p. 750. As noted in *Connerly v. Schwarzenegger*, the *Lee*
20 court reversed the judgment in reliance upon "case authority holding that there was no
21 equitable reason for an injunction where the conduct to be proscribed has, in good faith, been
22 discontinued and there is no evidence that the acts will recur." *Id.* at 750. In applying the
23 holding of *Lee v. Gates*, the *Connerly* court continued as follows:

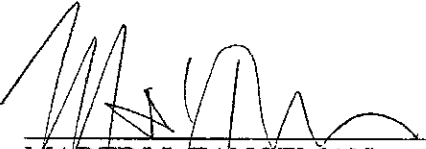
24 The principles of *Lee* apply with even greater force here, since a final
25 appellate decision declaring the statute unconstitutional was issued *before* the
26 trial court issued its injunction. At no time after [the intervening appellate
27 court decision] did defendants threaten to defy its holding by attempting to
28 enforce section 8315. To the contrary, defendants have admitted that [the
intervening appellate court decision] binds them and all state agencies." *Id.* at
p. 750.

1 There has been no intervening appellate court decision in this case. Nevertheless,
2 Defendants have conceded the unconstitutionality of the statutes challenged in this case, and
3 have asserted that no injunctive relief is necessary because they will not attempt to enforce an
4 admittedly unconstitutional statute. Under the reasoning set forth in *Connerly v.*
5 *Schwarzenegger, supra*, and *Lee v. Gates, supra*, this should be enough. Quoting from
6 *Connerly*, which cites from *Lee*:

7 There is no equitable reason for an injunction where the conduct to be
8 proscribed has, in good faith, been discontinued and there is no evidence that
9 the acts will occur. *Connerly, supra*, at p. 750.

10 Barta's request for a declaratory judgment that Elections Code §§7210, 7408 and
11 7655 are unconstitutional is granted, but denied as to Elections Code §10512. Barta's
12 requests for injunctive relief and writ of mandate relief are denied. Petitioner shall prepare a
13 judgment against Defendants, and each of them, consistent with this Ruling and Notice of
14 Ruling.

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16 Dated: November 1, 2013


MARTIN J. TANGEMAN
Judge of the Superior Court

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STATE OF CALIFORNIA, COUNTY OF SAN LUIS OBISPO

Civil Division

CERTIFICATE OF MAILING

JOHN BARTA VS. DEBRA BOWEN	CV110665
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Attached order dated 11-01-13

Under penalty of perjury, I hereby certify that I deposited in the United States mail, at San Luis Obispo, California, first class postage prepaid, in a sealed envelope, a copy of the foregoing addressed to each of the above
OR

If counsel has a pickup box in the Courthouse that a copy was placed in said pickup box this date.

SUSAN MATHERLY, Court Executive Officer

by *[Signature]*, Deputy

Dated: 11-01-13