

1 BILL LOCKYER, Attorney General
of the State of California
2 MANUEL M. MEDEIROS, Senior Assistant
Attorney General
3 ANDREA LYNN HOCH, Supervising
Deputy Attorney General
4 GEOFFREY L. GRAYBILL, SBN 53643
Deputy Attorney General
5 1300 I Street, Suite 1101
Post Office Box 944255
6 Sacramento, CA 94244-2550
Telephone: (916) 324-5465
7

8 Attorneys for State Defendants
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10 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 IN AND FOR THE COUNTY OF SAN FRANCISCO
12 UNLIMITED CIVIL JURISDICTION

13 CAROL L. MITTLESTEADT,
14 Plaintiff,
15 v.
16 STATE OF CALIFORNIA, BILL JONES,
17 Defendants.

18 QUENTIN KOPP,
19 Plaintiff,
20 v.
21 STATE OF CALIFORNIA, BILL JONES IN HIS
22 CAPACITY AS CALIFORNIA SECRETARY OF
23 STATE, et al.
24 Defendants.

Case No. 305070, 304978

STATE DEFENDANTS' TRIAL
BRIEF

25
26 INTRODUCTION

27 Defendant BILL JONES, acting in his capacity as SECRETARY OF STATE
28 FOR THE STATE OF CALIFORNIA, agrees with plaintiffs KOPP and MITTLESTEADT that

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1 Government Code section 69502, which requires that judges reside in the county where they sit
2 in that capacity, is inconsistent with the provisions of the California Constitution regarding the
3 qualifications for superior court judges and is therefor unenforceable. Moreover, the State
4 defendants perceive no duty on their part, nor have they any intention, to take any action
5 pursuant to Government Code section 69502 or any other provision of law to reject or cause any
6 other person to reject plaintiffs' declarations of candidacy or intention to become candidates for
7 superior court judge in San Mateo County.

8 Defendants STATE OF CALIFORNIA acting by and through its SECRETARY
9 OF STATE, BILL JONES, have denied items 8, 20, 22 through 25, and 28 through 29 of the
10 statements of stipulated facts proposed by plaintiffs. These denials establish that the STATE
11 DEFENDANTS have no intention and do not perceive it to be their duty to reject or cause
12 anyone else to reject plaintiffs' declarations of intention to run for candidacy for superior court
13 judge for failure to comply with the residency requirements of Government Code section 69502.
14 Plaintiffs have not disclosed to State defendants any evidence as required by this Court's status
15 conference orders which would establish any facts demonstrating that State defendants are taking
16 or threatening to take any action to reject plaintiffs' declarations of candidacy or intention to
17 become a candidate for superior court judge in San Mateo County.

18 If necessary, the SECRETARY OF STATE will present documentary and
19 testimonial rebuttal evidence at trial which will establish that his office, during his tenure and
20 that of his predecessor, has consistently advised county election officials and others that
21 Government Code section 69502 is unenforceable. Moreover, Government Code section 69502
22 applies on its face only to sitting judges not candidates for superior court judge. There is nothing
23 in Elections Code sections 8023 or 8040 which requires that the declarations of candidacy or
24 intention to become a candidate be rejected for filing or that the candidate precluded from the
25 ballot because he or she does not reside in the county of the judgeship for which election is
26 sought.

27 Thus, there is no justiciable controversy between the defendant STATE OF
28 CALIFORNIA acting by and through its SECRETARY OF STATE, BILL JONES, and plaintiffs

1 Since State defendants disavow any such intention or duty, they must be dismissed from this
2 action.

3 *State of California v. Superior Court (St. Mary's)* (1986) 184 Cal.App.3d 394,
4 precludes plaintiffs from involving State defendants in its controversy with defendant Slocum.
5 In *St. Mary's*, a church sought declaratory relief² and an injunction against a city to prohibit it
6 from enforcing a provision of the Penal Code which according to the city banned the type of
7 bingo machine the church was using. (*Id.* at 396.) The city advised the church that several
8 opinions of the California Attorney General concluded that the devices in question violated the
9 subject provisions of the Penal Code and accordingly the city would prosecute. (*Id.*) At the
10 suggestion of the city, the court ordered the State of California be joined as a defendant. (*Id.*)
11 The State moved to strike itself as a party but the court denied the motion. (*Id.*) The court of
12 appeal granted the State's petition for a writ of mandate to compel the trial court to dismiss the
13 State. The Court of Appeal held that although the application of a State statute in the manner
14 prescribed by opinions of a state official, the Attorney General, was in question, no state official
15 was involved in the enforcement of the statute against the church, and therefore, the State could
16 not be joined as a party. (*Id.* at 397.)

17 The court of appeal gave several reasons for this conclusion. One reason was that
18 a court may not issue a writ of mandate against a public official to control that official's exercise
19 of discretion unless the official is refusing to perform a function which he or she has a plain duty
20 to perform. (*Id.*) Since the Attorney General was not attempting to enforce the statute against
21 the church but had merely published opinions regarding applicability of the Penal Code
22 provisions in question, there was no basis for holding the State accountable in the action. (*Id.*)
23 The second reason was that the trial court's de facto presumption that the Attorney General
24 should have been involved in the prosecution or be considered involved in the prosecution of the
25 church pursuant to the published opinions violated the doctrine of separation of powers set forth
26 in Article III, section 3 of the California Constitution. Since the Attorney General was not
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28 ²Declaratory relief is available only "in cases of actual controversy relating to the legal
rights and duties of the respective parties." (Code Civ. Proc. § 1060.)

1 involved in the prosecution of the church and there was no evidence that he would be, it would
2 be a violation of the doctrine of separation of powers to mandate the State's participation in an
3 action to prohibit enforcement in accordance with the opinion of the Attorney General. (*Id.* at
4 397-398.)

5 In this case, the defendant Secretary of State is not threatening to take any action
6 to reject the declarations of candidacy or intention to become a candidate or preclude plaintiffs a
7 place on the ballot. He agrees with plaintiffs that Government Code section 69502 cannot
8 occasion such results. In *St. Mary's* it was held that a presumption the Attorney General will
9 automatically prosecute any violation of a Penal Code provision defined by his or her published
10 opinions cannot support jurisdiction over the State or its officer for mandate, injunctive or
11 declaratory relief. Plaintiffs are urging this Court to take an action which is significantly more
12 egregious a violation of the doctrine of separation of powers than the violation in *St. Mary's*
13 because the Secretary of State not only is not taking any action or threatening any action
14 prejudicial to plaintiffs, he agrees with petitioner's basic legal position that Government Code
15 section 69502 cannot preclude the filing of plaintiffs' declarations of candidacy and intention to
16 be a candidate or plaintiffs' placement on the ballot as candidates for superior court judge in the
17 County of San Mateo.

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CONCLUSION

For the reasons set forth herein State defendants move for dismissal of this action as to them at the conclusion of plaintiffs' opening statements or after presentation of their cases in chief.

Dated: September 20, 1999

Respectfully submitted,

BILL LOCKYER, Attorney General
of the State of California
MANUEL M. MEDEIROS, Senior Assistant
Attorney General
ANDREA LYNN HOCH, Supervising Deputy
Attorney General



GEOFFREY L. GRAYBILL,
Deputy Attorney General

Attorneys for State Defendants

Amended
DECLARATION OF SERVICE

Case Name: *Kopp, et al. v. State of California, et al.*
San Francisco County Superior Court Case No.: 304978

I declare:

I am employed in the County of Sacramento, California. I am 18 years of age or older and not a party to the within entitled cause; my business address is 1300 I Street, P.O. Box 944255, Sacramento, California 94244-2550. My facsimile machine telephone number is (916)324-8835.

On September 20, 1999 at Sacramento, California, I served the attached

STATE DEFENDANT'S TRIAL BRIEF

by transmitting a true copy by facsimile machine, pursuant to California Rules of Court, rule 2008. The facsimile machine numbers of the parties being served are as follows:

Nancy Leavitt Fineman : (650) 697-0577
Brenda B. Carlson: (650) 363-4034
Susan H. Handelman: (650) 367-0997

The facsimile machine I used complied with rule 2003, and no error was reported by the machine. Pursuant to rule 2008(e)(4), I caused the machine to print a record of the transmission, a copy of which is attached to this declaration. In addition, I placed a true copy thereof enclosed in a sealed envelope, with delivery fees paid or provided for, in a Golden State Overnight box or other facility regularly maintained by Golden State Overnight, at Sacramento, California, addressed as follows:

Nancy L. Fineman
Cotchett, Pitre & Simon
San Francisco Airport Office Center
840 Malcolm Road, Suite 200
Burlingame, CA 94010

Attorneys for Plaintiff
Kopp, et al., v. State of California, et al.
San Francisco County Superior Court Case
No. 304978
Facsimile #: (650) 697-0577

Susan H. Handelman
Ropers, Majeski, Kohn & Bentley
1001 Marshall Street
Redwood City, CA 94063

Attorneys for Plaintiff
Mirrlesteadt v. State of California, et al.
San Francisco County Superior Court Case
No. 305070
Facsimile #: (650) 367-0997

Brenda Carlson
County of San Mateo
Office of the County Counsel
400 County Center, Third Floor
Redwood City, CA 94063

Deputy County Counsel
Facsimile#: (650) 363-4034

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 20, 1999 at Sacramento, California.

Charlotte Spink, CCLS

Charlotte A. Spink
Signature