

SUPREME COURT OF THE STATE OF WASHINGTON

JAMES E. BROE, KENNETH R. SEAL, ROBERT BAKER, MARK SUSSMAN, STAN WALTER, BILL WISE, ANDY STEVENS, ED CRAWFORD, JASON LAGEN, LOUISE WORKMAN, JOCELYN MURCELLI, MIKE MURCELLI, and KEVIN MCDOWELL, American Citizens, Washington Residents and Registered Voters in the State of Washington,

Petitioners,

v.

SAMUAL S. REED, Secretary of State for the State of Washington,

Respondent.

SECRETARY OF STATE'S RESPONSE TO AMENDED PETITION FOR WRIT OF MANDAMUS AND MOTION TO DISMISS

I. INTRODUCTION

This case plainly lacks merit and should be dismissed. Petitioners challenge the qualifications of Barack Obama to serve as President of the United States, based simply upon rumors of a kind all too common in the era of the Internet. Petitioners seek a writ of mandamus ordering Secretary Reed to set aside the votes cast for President-elect Obama. Am. Pet. at 11-12. This case should be dismissed for at least four reasons: (1) it is moot; (2) petitioners have failed to join an indispensable party,

President-elect Obama; (3) Petitioners fail to state a claim in mandamus because a candidate's eligibility for office is presumed and the Secretary of State not only has no duty but is prohibited from investigating a candidate's qualifications; and (4) the qualifications of the President-elect is a federal question, assigned by the United States Constitution to the United States Congress, not state courts.

II. PARTY FILING MEMORANDUM AND MOTION

Respondent, Secretary of State Sam Reed, hereby provides this Response to Amended Petition For Writ of Mandamus And Motion to Dismiss.

III. STATEMENT OF RELIEF SOUGHT

Secretary Reed respectfully requests that this Court dismiss this action with prejudice.

IV. STATEMENT OF THE CASE

A. Facts And Procedure

Petitioners allege that President-elect Barack Obama is ineligible to run for the office of President of the United States. Based on nothing more than rumor, they question whether he is a natural born citizen as

required by the Constitution. Am. Pet. at 6 (citing U.S. Const. art. II, § 1).¹

The general election was held on November 4, 2008, and the final results were certified on December 4. A majority of Washington's voters cast their ballots for President-elect Obama and for his running mate, Joe Biden.² Accordingly, the slate of presidential electors submitted by the Democratic Party became the electors for the state of Washington. RCW 29A.56.320. On December 15, 2008, those electors met at the State

¹ Beneath all arguments and assertions put forward by the Petitioners lurks one salient fact: As Petitioners acknowledge, Barack Obama has publicly produced a certified copy of a birth certificate showing that he was born on August 4, 1961, in Honolulu, Hawaii. Am. Pet. at 12 (date and place of birth); *Id.* at 10-11 (birth certificate); *see also*, FactCheck.org, "Born in the U.S.A.: The truth about Obama's birth certificate," http://factcheck.org/elections-2008/born_in_the_usa.html (concluding the birth certificate is genuine, and noting a contemporaneous birth announcement published in a Honolulu newspaper; accessed Dec. 17, 2008). Hawaii officials have publicly verified that they have President-elect Obama's "original birth certificate on record in accordance with state policies and procedures." "Certified," *Honolulu Star Bulletin*, Oct. 31, 2008 (accessed online at <http://blogs.starbulletin.com/inpolitics/certified/> on Dec. 17, 2008).

A person born in the United States is a natural born United States citizen. U.S. Const. amend. XIV. Absent *competent* evidence proving that the publicly-acknowledged version of the President-elect's biography are false, there is simply no legal question as to his citizenship.

The judicial system is not the proper forum for a fishing expedition in quest of evidence that Petitioners might hope would verify the conspiracy theories they find posted on the Internet.

Petitioners additionally contend that "Barack Obama" is not the true name of the President-elect. Am. Pet. at 6. Petitioners offer no legal analysis demonstrating that, even if this unsupported allegation were true, it would have any legal consequence. Accordingly, it can be disregarded. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (court may disregard issues unsupported by argument or authority).

² The official final Canvass of Returns can be found on the Secretary's Web site, at the link for "2008 Canvass of Returns": <http://www.secstate.wa.gov/elections> (accessed Dec. 19, 2008).

Capitol, as required by federal and state law, and cast Washington's electoral votes in favor of President-elect Obama.³ Decl. of Nick Handy, Ex. E.

B. Law Governing Presidential Electors

The United States Constitution, as well as state and federal statutes, govern the manner in which electors from the various states cast their electoral votes for President and Vice-President. Each state is apportioned a number of electors "equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress." U.S. Const. art. II, § 1. Each state appoints those electors "in such manner as the Legislature thereof may direct." *Id.*

In Washington, each political party or independent candidate convention that nominates candidates for President and Vice-President must submit to the Secretary of State a slate of electors pledged in support of those candidates. RCW 29A.56.320. The votes cast for the candidates are then counted for the slates of electors pledged to those candidates. *Id.*

³ Numerous other cases have been filed in other jurisdictions challenging President-elect Obama's qualifications to serve as President, but no court has granted any relief. Three of these cases have resulted in published opinions. *Berg v. Obama*, 574 F. Supp. 2d 509, 511-12 (E.D. Pa 2008) (dismissing for lack of standing); *Cohen v. Obama*, 2008 WL 5191864, *1 (D.D.C. 2008) (same); *Wrotnowski v. Bysiewicz*, 958 A.2d 709, 713 (Conn. 2008) (same). Among other cases raising alleged concerns regarding the President-elect's citizenship, shortly before Election Day the King County Superior Court dismissed an action seeking the removal of Mr. Obama from Washington's ballots. *Marquis v. Reed*, King County Superior Court No. 08-2-34955-1SEA (dismissed Oct. 27, 2008). That decision was not appealed.

The electors chosen in this way are then obligated by state law to vote for the candidates for whom they are pledged. RCW 29A.56.340.

The electors meet at their state capitols and cast the electoral votes of their respective states.⁴ The Constitution then requires that they certify their votes in writing, and transmit them to Washington, D.C., directed to the President of the Senate.⁵ U.S. Const., Amend. XII; *see also* 3 U.S.C. § 9 (requiring the electors to make and sign six certificates of their votes).⁶

The President of the Senate opens the certificates and the votes are counted in the presence of a joint session of the United States Senate and House of Representatives. U.S. Const. amend. XII. This joint session of Congress is required by statute to occur on January 8, 2009. Pub.L. 110-430, § 2, Oct. 15, 2008, 122 Stat. 4846 (amending 3 U.S.C. § 15 solely for 2009). The candidate receiving a majority of the electoral votes for President is elected President. U.S. Const., amend. XII.

Federal law sets forth a procedure for resolving objections to any electoral votes. The President of the Senate must announce the result of

⁴ U.S. Const. art. II, § 1 (electors meet in their respective states); 3 U.S.C. § 7 (meeting must occur on the first Monday after the second Wednesday in December); RCW 29A.56.340 (meeting occurs at the State Capitol at noon on that day).

⁵ The incumbent Vice-President serves as President of the Senate. U.S. Const., art. I, § 3.

⁶ In addition to the certificate transmitted to the President of the Senate, the other five certificates are directed as follows: two to the Secretary of State of the state, two to the Archivist of the United States, and the remaining one to the federal district court of the district in which the electors assemble. 3 U.S.C. § 11.

the vote to the joint session of Congress, and call for objections. Every objection must be made in writing, stating the ground, and be signed by at least one Senator and one Representative. After all objections are made, each house of Congress convenes separately to consider each of the objections. The federal statute specifically addresses circumstances in which a state's certification of its electors is at issue, or when certifications for more than one slate of electors are received from a particular state, but does not expressly limit the nature of objections to such circumstances. When both houses have voted to resolve the objections, they again convene in joint session and announce the results. 3 U.S.C. § 15.

V. GROUNDS FOR RELIEF SOUGHT

A. This Case Is Moot Because The Presidential Electors Have Voted

A case is moot when it involves only abstract questions or the court can no longer provide effective relief. *Spokane Research & Def. Fund v. City of Spokane*, 155 Wn.2d 89, 99, 117 P.3d 1117 (2005). The relief that Petitioners request is to order the Secretary of State to invalidate all of the votes cast for President-elect Obama at the November 4, 2008, general election. Am. Pet. at 11-12. Those votes determined that the slate of electors committed to voting for President-elect Obama would cast

Washington's electoral votes. RCW 29A.56.320. Wholly apart from the fact that the Secretary of State has no duty, let alone authority, to set aside those votes based on allegations questioning a candidate's qualifications, Washington's electors have already voted, casting their electoral votes for the President-elect. Handy Decl., Ex. E. They were required to do so on December 15, 2008, by both state and federal law. 3 U.S.C. § 7; RCW 29A.56.340. They were prohibited by state law from casting those electoral votes for anybody other than President-elect Obama. *Id.*

After the electoral votes were cast, federal law required that the written certification of those votes be promptly transmitted to the President of the United States Senate, as well as to other officials. 3 U.S.C. § 11. Thus, the last act by any state officer with regard to the 2008 Presidential election has occurred. To coin a phrase (or two), the bird has left the nest; the horse has left the barn. What happens to those certified electoral votes is no longer subject to the control of the state of Washington.

The President of the Senate is scheduled to open the certificates before a joint session of Congress on the same date that this Court is scheduled to consider this Amended Petition. Washington's electoral votes are now the subject of Congressional action, and no order directed by this Court to Secretary Reed can have any effect upon their tabulation

by Congress. This Court can no longer afford effective relief, and the case should be dismissed as moot. *Spokane Research & Def. Fund*, 155 Wn.2d at 99.

B. Petitioners Have Failed To Join An Indispensible Party: President-Elect Obama

A candidate running for elective office exercises a constitutional right. As this Court has held, “Since the right to participate in the government is the common right of all, it is the unqualified right of any eligible person within the state to aspire to any of these offices, and equally the unqualified right of the people of the state to choose from among those aspiring the persons who shall hold such offices.” *Dumas v. Gagner*, 137 Wn.2d 268, 285, 971 P.2d 17 (1999). At the heart of Petitioners’ claim lies the constitutional right of President-elect Obama to seek public office, but Petitioners have not joined him—or any group or person representing his interest—as a party to this case. This Court cannot reasonably adjudicate a candidate’s qualifications for public office without obtaining jurisdiction over the candidate.

Since Mr. Obama’s interests are clearly at issue in this case, the burden falls upon Petitioners, and upon no one else, to join him in this matter. CR 19. Under the circumstances of this case, however, there would be no point in permitting the Petitioners time to join the President-

elect. The case has already become moot, as discussed above, and there is no merit to the case, as discussed below. Rather, their failure to join indispensable parties constitutes inexcusable neglect and, under the circumstances, justifies dismissing this action. *Tellinghuisen v. King Cy. Council*, 103 Wn.2d 221, 224, 691 P.2d 575 (1984) (failure to initially name necessary parties constituted inexcusable neglect); *Suquamish Indian Tribe v. Kitsap Cy.*, 92 Wn. App. 816, 824, 965 P.2d 636 (1998) (inexcusable neglect found where a party knew the identity of necessary parties at all times and failed to name them). For this additional reason, the Amended Petition should be dismissed.

C. Washington Law Prohibits The Secretary Of State From Investigating A Candidate's Qualifications, And Eligibility For Office Is Presumed Until A Plaintiff Proves Otherwise

Petitioners' request for mandamus to the Secretary of State depends entirely on a dramatic misconception of Washington law: They assert that, "The Secretary of State has a statutorily imposed duty to apply the law to the facts to determine a candidate's eligibility." Am. Pet. at 10. One might reasonably assume that a party arguing for a "statutorily imposed duty" might cite the statute alleged to give rise to the duty. Petitioners cite no statute for this proposition, and there is none.

The law is precisely the opposite: in Washington, the Secretary of State is prohibited from investigating a candidate's qualifications for

office beyond the four corners of the filing documents. “[I]t is clear that an officer with whom an aspiring candidate must file may not reject a declaration of candidacy on the grounds that the candidate is ineligible if that rejection is based on extrinsic factual knowledge or involves the interpretation of statutory or constitutional provisions.” *Fischnaller v. Thurston Cy.*, 21 Wn. App. 280, 282-83, 584 P.2d 483 (1978) (citing *State ex rel. McCaffrey v. Superior Court*, 20 Wn.2d 704, 149 P.2d 156 (1944)); see also *State ex rel. McAulay v. Reeves*, 196 Wash. 1, 3, 81 P.2d 860 (1938).

Moreover, a candidate for office is presumed to hold the qualifications to seek and hold that office, unless and until a party proves to a court of competent jurisdiction that the candidate is not qualified. *Dumas*, 137 Wn.2d at 284 (noting the strong public policy in favor of eligibility for office). This policy serves both the public interest in affording the voters with choices from whom to select their public officials, and the interest in permitting a broad array of candidates to seek office. *Id.* Thus, the burden of proving that the President-elect fails to hold the necessary qualifications lies squarely with the Petitioners, and not with Secretary Reed or even with the candidate. They do not satisfy their burden by enshrining rumors in pleadings. *Baldwin v. Sisters of Providence*, 112 Wn.2d 127, 135, 769 P.2d 298 (1989) (noting the general

rule that a plaintiff is required to prove all elements of his or her case). Absent such a duty on the part of the Secretary of State, mandamus does not lie. *Wash. State Farm Bur. v. Reed*, 154 Wn.2d 668, 672, 115 P.3d 301 (2005).

Unlike candidates for other offices, candidates for President and Vice-President do not file declarations of candidacy. RCW 29A.24.030 (requiring a declaration of candidacy for candidates for all offices “other than president of the United States, vice president of the United States, or an office for which ownership of property is a prerequisite to voting”). Instead, Presidential and Vice-Presidential candidates qualify to the ballot through a certification that they have been nominated by a convention of a major or minor political party. RCW 29A.56.320, .360. The National Convention of the Democratic Party officially certified Barack Obama and Joe Biden to the Secretary of State as their nominees. Handy Decl., Ex. A. The Party also filed a slate of candidates for presidential elector. *Id.*, Ex. B.

Having received the documentation required by law, the Secretary had no authority to inquire beyond the four corners of the documentation into President-elect Obama’s qualifications. *Fischnaller*, 21 Wn. App. at 283. This makes sense because it is the role of the elections official to fairly and neutrally conduct the election, not to become the arbiter of

candidate qualifications. *McAulay*, 196 Wash. at 3 (concluding that the Secretary could not assume the authority to investigate and determine candidate qualifications). Given the strong public policy in favor of eligibility for public office (*Dumas*, 137 Wn.2d at 284), Washington law is clear that the Secretary may not look beyond the Democratic Party's certification. *Fischnaller*, 21 Wn. App. at 283. That document suggests no basis for concluding that the President-elect is not qualified.⁷ Handy Decl., Ex. A. This action in mandamus fails for this additional reason.

D. The Qualifications Of The President-Elect Is A Federal Question, Assigned By The Constitution To The United States Congress, Not To State Courts

The United States Constitution assigns to the Congress, in joint session, the task of receiving the electoral votes from the states and declaring the next President of the United States. U.S. Const. amend. XII. The President of the Senate receives the electoral votes and opens them in the presence of Congress, entertaining any objections that may arise. *Id.*; 3 U.S.C. § 15.

The 2008 Presidential election is over, and the only remaining step is for Congress to declare a winner in joint session, as provided by the

⁷ See also Resp. to Mot. For Expedited Disc. & For Auth. To Issue Subpoenas, at 4-5 (demonstrating as factually untrue Petitioners' suggestion that perhaps the Secretary might have excluded another presidential candidate from the ballot in 2008 based on his own evaluation of that candidate's qualifications); see also Handy Decl., ¶ 4 (same).

Constitution. The point at which individual states have a role to play in the process through the administration of the election has passed. If any question remains as to who should be declared the winner, that question demands, and the U.S. Constitution provides for, a single unified answer for the entire nation. The Constitution vests that determination in Congress. U.S. Const. amend. XII. It is not a question for state courts to adjudicate seriatim, in the guise of evaluating the qualifications of candidates on individual state ballots. Rather, the United States Constitution vests the determination of the next President of the United States in the United States Congress. U.S. Const. amend. XII; 3 U.S.C. § 15.

E. The Court Should Dismiss This Action, Rather Than Schedule It For Briefing And Argument Or Transfer It To A Superior Court

In any original action, this Court must decide whether to retain jurisdiction, dismiss the action, or transfer it to a superior court. RAP 16.2(d). For the reasons expressed above, the Court should dismiss this case. Since the Amended Petition fails to state a claim, there is no need to schedule the case for further briefing and argument.

If this Court does not dismiss the case at the outset, the appropriate course of action would be to transfer it to the Thurston County Superior Court for development of a factual record and initial consideration of legal

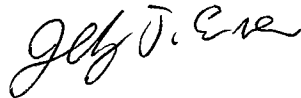
issues. RCW 4.12.020 (providing that the proper venue for an action against a public officer is the county in which that officer performs his or her duties, in this case Thurston).

VI. CONCLUSION

For these reasons, the Court should dismiss this action with prejudice.

RESPECTFULLY SUBMITTED this 19th day of December, 2008.

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