

1 EXPEDITE
2 No Hearing Set
3 Hearing is set: Wed. August 29, 2012
4 The Honorable Wm. Thomas McPhee
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8 **STATE OF WASHINGTON**
9 **THURSTON COUNTY SUPERIOR COURT**

10 LINDA JORDAN,

11 Plaintiff,

12 v.

13 SECRETARY OF STATE SAM
14 REED,

15 Defendant.

NO. 12-2-01763-5

SECRETARY OF STATE'S
RESPONSE MEMORANDUM

16 **I. INTRODUCTION**

17 Plaintiff, Linda Jordan, commenced this action under the authority of
18 RCW 29A.68.011(1) and (3), and asks this Court to exclude Barack Obama from the 2012
19 general election ballot in the state of Washington. This case should be dismissed for any of
20 three reasons: (1) Ms. Jordan has failed to join an indispensable party, specifically the
21 candidate whose right to appear on the ballot is at stake; (2) this Court lacks subject matter
22 jurisdiction over this matter because this case raises a non-justiciable political question, which
23 the United States Constitution textually commits to the Congress of the United States; and (3)
24 Ms. Jordan fails to state a claim on which relief can be granted as to the Secretary of State
25 because state law precludes the Secretary from inquiring into the eligibility of candidates for
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1 President and Vice President beyond the face of the documents submitted to qualify
2 candidates to the ballot.

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4 **II. PARTY FILING PLEADING AND STATEMENT OF RELIEF SOUGHT**

5 Defendant, Secretary of State Sam Reed, respectfully requests that this Court deny the
6 relief sought by Ms. Jordan. Secretary Reed additionally requests that this Court fully resolve
7 the issues of this case and enter a final order dismissing this case at the hearing on this matter.
8 RCW 29A.68.011 (directing Court to fully resolve case promptly).

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10 **III. STATEMENT OF THE CASE**

11 Washington law directs the Secretary of State to certify the names of candidates for
12 President and Vice President who have qualified to the ballot pursuant to state law.
13 RCW 29A.56.360. By statute, the Secretary must certify “the names of all candidates for
14 president and vice president who . . . have been nominated either (1) by a major political
15 party, as certified by the appropriate authority under party rules, or (2) by a minor party or as
16 independent candidates under chapter 29A.20 RCW.” RCW 29A.56.360. The presidential
17 ticket of a major political party need only be certified to the Secretary “by the appropriate
18 authority under party rules.” *Id.*

19
20 On August 24, 2012, the Secretary of State provisionally certified to the county
21 auditors the names of the candidates for President and Vice President to appear on the 2012
22 general election ballot. Moss Dec., Ex. A. Ms. Jordan seeks the extraordinary relief of
23 entering an order excluding the sitting President of the United States, and presumptive
24 nominee of one of the two major national political parties, from the general election ballot in
25 Washington.
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IV. ARGUMENT

A. This Case Should Be Dismissed For Failure To Join An Indispensible Party

A candidate running for elective office exercises a constitutional right. “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 Ms. Jordan’s claim lies the constitutional right of Barack Obama to seek public office, but Ms. Jordan has 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.

Civil Rule 19 provides in pertinent part:

A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (A) as a practical matter impair or impede his ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party.

The civil rules set forth a two-step analysis for determining whether a party is necessary to an action. “First, we determine whether a party is needed for a just adjudication.” *Burt v. State*, 168 Wn.2d 828, 833, 231 P.3d 191 (2010). A party is necessary if that party has an interest related to the subject matter of the action and that party is “so situated that the disposition of the action in his absence *may . . .* impair or impede his ability to protect that interest.” *Id.* (quoting CR 19(a)(2)(A); emphasis by the court). In this case, Mr. Obama

1 clearly has an interest in his right to appear on the Washington ballot as a candidate for re-
2 election as President of the United States. *Dumas*, 137 Wn.2d at 285.

3 The second step of the inquiry examines whether, in the absence of a necessary party,
4 “in equity and good conscience the action should proceed with the parties before it and without
5 the necessary party.” *Burt*, 168 Wn.2d at 834; CR 19(b). Since Mr. Obama’s interests are
6 clearly at issue in this case, the burden falls upon Ms. Jordan, and upon no one else, to join him
7 in this matter. CR 19. Under the circumstances of this case, however, there would be no point
8 in permitting Ms. Jordan time to join Mr. Obama. The time for printing ballots and the Voters’
9 Pamphlet for the upcoming election is upon us. Moss Decl., ¶¶ 4-8; Davis Decl. ¶¶ 2-6.
10 Rather, her failure to join indispensable parties constitutes inexcusable neglect and, under the
11 circumstances, justifies dismissing this action. *See Tellinghuisen v. King Cy. Council*, 103
12 Wn.2d 221, 224, 691 P.2d 575 (1984) (failure to initially name necessary parties constituted
13 inexcusable neglect); *see also Suquamish Indian Tribe v. Kitsap Cy.*, 92 Wn. App. 816, 824,
14 965 P.2d 636 (1998) (inexcusable neglect found where a party knew the identity of necessary
15 parties at all times and failed to name them). Ms. Jordan’s own affidavit acknowledges that
16 she knew Mr. Obama’s rights are at stake and that the printing schedule for ballots and the
17 Voters’ Pamphlet would necessitate the prompt joinder of all parties. Plaintiff’s Affidavit With
18 Exhibits In Support Of Motion For Order To Show Cause, ¶¶ 3, 13. She was also on notice
19 that state law requires a prompt adjudication of her claim. RCW 29A.68.011. Her neglect in
20 naming Mr. Obama, or any entity that might adequately represent his interests, is inexcusable.
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24 This case should be dismissed.
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1 **B. This Court Lacks Subject Matter Jurisdiction Because The United States**
2 **Constitution Vests The Authority To Determine The Qualifications Of**
3 **Presidential Candidates In The United States Congress**

4 Ms. Jordan's claims are based upon the assertion that Mr. Obama fails to satisfy the
5 requirement that the President be a "natural born citizen" of the United States. Const. art. II, §
6 1 (copy provided). The United States Constitution assigns to the Congress, in joint session, the
7 task of vetting the President's qualifications under the Constitution. It charges the Congress
8 with the role of receiving the electoral votes from the states and declaring the next President of
9 the United States. U.S. Const. amend. XII (copy provided). By law, the President of the Senate
10 receives the electoral votes in a joint session convened for the purpose, and opens them in the
11 presence of Congress. Members of Congress may then pose any objections that may arise. *Id.*;
12 3 U.S.C. § 15 (copy provided).

13 Since the United States Constitution vests the role of determining the President's
14 qualifications in the Congress, a claim that a candidate lacks one or more of the qualifications
15 specified in the Constitution is a political question and may not be adjudicated in the courts of
16 a single state. A Hawaii court recently rejected a lawsuit seeking the public disclosure of the
17 President's birth certificate, noting that the authority to determine the President's
18 qualifications to serve in office is constitutionally vested in the Congress. *Justice v. Fuddy*,
19 253 P.3d 665, 673 (Haw. Ct. App. 2011) (referring to the authority to remove a sitting
20 President; copy provided). As a California court aptly expressed the matter when confronted
21 with a challenge to Mr. Obama's citizenship, "the presidential nominating process is not
22 subject to each of the 50 states' election officials independently deciding whether a
23 presidential nominee is qualified, as this could lead to chaotic results." *Keyes v. Bowen*, 117
24 Cal. Rptr.3d 207, 209 (Cal. Ct. App. 2010) (copy provided). "Were the courts of 50 states at
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1 liberty to issue injunctions restricting certification of duly-elected presidential electors, the
2 result could be conflicting rulings and delayed transition of power in derogation of statutory
3 and constitutional deadlines.” *Id.*

4 Accordingly, Ms. Jordan’s claims cannot be adjudicated under RCW 29A.68.011. The
5 challenge she seeks to raise is constitutionally committed to the United States Congress and
6 not to piecemeal adjudication state by state. U.S. Const. amend. XII. “Arguments concerning
7 qualifications or lack thereof can be laid before the voting public before the election and, once
8 the election is over, can be raised as objections as the electoral votes are counted in
9 Congress.” *Keyes*, 117 Cal.Rptr.3d at 216.¹

11
12 **C. Washington Law Prohibits The Secretary of State From Investigating A**
13 **Candidate’s Qualifications, And Eligibility For Office Is Presumed Until A**
14 **Plaintiff Proves Otherwise**

15 Ms. Jordan’s case depends entirely on a dramatic misconception of Washington law:
16 Ms. Jordan asserts that the Secretary of State is required by law to investigate the qualifications
17 of candidates for President and Vice President, and exclude them from the ballot if found not
18 to be natural born citizens of the United States. The law is precisely the opposite: in
19 Washington, the Secretary of State is prohibited from investigating a candidate’s qualifications
20 for office beyond the four corners of the filing documents. “[I]t is clear that an officer with
21 whom an aspiring candidate must file may not reject a declaration of candidacy on the grounds

22 _____
23 ¹ Ms. Jordan cites a law review article by an Ohio law professor as her only authority for asserting that
24 the qualifications of Presidential candidates under the federal Constitution can be adjudicated piecemeal in the
25 states. Memorandum and Appendix of Law in Support of Plaintiff’s Motion For Order To Show Cause at 4
26 (citing Daniel P. Tokaji, *The Justiciability of Eligibility: May Courts Decide Who Can Be President?*, incomplete
excerpt attached to Ms. Jordan’s Memorandum as Ex. 5, without citation to full article). The passage quoted by
Ms. Jordan refers only to state-specific procedural requirements for qualifying to the ballot, and suggests no
authority that state courts may adjudicate piecemeal the question of whether a Presidential candidate satisfies the
eligibility requirements specified in the federal Constitution, which the federal Constitution vests in the Congress.

1 that the candidate is ineligible if that rejection is based on extrinsic factual knowledge or
2 involves the interpretation of statutory or constitutional provisions.” *Fischnaller v. Thurston*
3 *Cy.*, 21 Wn. App. 280, 282-83, 584 P.2d 483 (1978) (citing *State ex rel. McCaffrey v. Superior*
4 *Court*, 20 Wn.2d 704, 149 P.2d 156 (1944)); *see also State ex rel. McAulay v. Reeves*, 196
5 Wash. 1, 3, 81 P.2d 860 (1938).

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7 Moreover, a candidate for office is presumed to hold the qualifications to seek and hold
8 that office, unless and until a party proves to a court of competent jurisdiction that the
9 candidate is not qualified. *Dumas*, 137 Wn.2d at 284 (noting the strong public policy in favor
10 of eligibility for office).² This policy serves both the public interest in affording the voters
11 choices from whom to select their public officials, and the interest in permitting a broad array
12 of candidates to seek office. *Id.* Thus, the burden of proving that Mr. Obama fails to hold the
13 necessary qualifications lies squarely with Ms. Jordan, and not with Secretary Reed or even
14 with the candidate. *Baldwin v. Sisters of Providence*, 112 Wn.2d 127, 135, 769 P.2d 298
15 (1989) (noting the general rule that a plaintiff is required to prove all elements of his or her
16 case); *see also Ankeny v. Governor of Indiana*, 916 N.E.2d 678, 681 (Ind. Ct. App. 2009)
17 (observing that, because the plaintiff in that case failed to cite any authority recognizing a duty
18 by a state official to determine Mr. Obama’s eligibility for President, no cogent legal argument
19 had been presented; copy provided).

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22 Unlike candidates for other offices, candidates for President and Vice-President do not
23 file declarations of candidacy. RCW 29A.24.030 (requiring a declaration of candidacy for

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26 ² Nowhere in Ms. Jordan’s pleadings does she claim to have proven that Mr. Obama is not a natural born
citizen. She merely claims to have offered evidence of a forged birth certificate — a birth certificate that has
never been requested by, or submitted to, the Secretary of State — and to have offered additional suspicions
regarding a social security number.

1 candidates for all offices “other than president of the United States, vice president of the
2 United States, or an office for which ownership of property is a prerequisite to voting”).
3 Instead, Presidential and Vice-Presidential candidates qualify to the ballot through a
4 certification to the Secretary that they have been nominated by a convention of a major or
5 minor political party. RCW 29A.56.320, .360.³
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7 The Secretary has no authority to inquire beyond the four corners of the
8 documentation into Mr. Obama’s qualifications. *Fischnaller*, 21 Wn. App. at 283. By statute,
9 the Secretary’s only duty is, upon receiving certification from a major political party of the
10 party’s nominees, to include those names in his certification of candidates to appear on the
11 general election ballot. RCW 29A.56.360. The statute provides no discretion, and makes no
12 mention of any investigation or inquiry by elections officials into the candidates’ federal
13 constitutional qualifications. *Id.*
14

15 This makes sense because it is the role of the elections official to fairly and neutrally
16 conduct the election, not to become the arbiter of candidate qualifications. *McAulay*, 196
17 Wash. at 3 (concluding that the Secretary could not assume the authority to investigate and
18 determine candidate qualifications). Nor, in the case of candidates for President and Vice
19 President, would it make any sense to conduct such an inquiry piecemeal, state by state.
20 “[T]he truly absurd result would be to require each state’s election official to investigate and
21 determine whether the proffered candidate met eligibility criteria of the United States
22 Constitution, giving each the power to override a party’s selection of a presidential
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25 ³ This certification is submitted to the Secretary, and his office is the filing office for candidates for
26 President and Vice President. Ms. Jordan’s consistent reliance upon King County materials is accordingly irrelevant.

1 candidate.” *Keyes*, 117 Cal. Rptr.3d at 215. By failing to identify any statute requiring the
2 Secretary of State to ascertain the qualifications of presidential candidates, Ms. Jordan fails to
3 offer any basis on which this Court could rule in her favor. *See Wrotnowski v. Bysiewicz*, 958
4 A.2d 709, 713 (Conn. 2008) (holding that a voter lacked standing to contest Mr. Obama’s
5 citizenship; copy provided). If the courts of each of the 50 states were permitted to
6 individually decide the qualifications of Presidential candidates, the result could be chaos,
7 with inconsistent rulings precluding any meaningful presidential election nationwide. *Keyes*,
8 117 Cal. Rptr.3d at 215.

9
10 Ms. Jordan stresses that, on the form the Secretary of State uses for those who declare
11 as write-in candidates, an oath is included by which the candidates swears to be a natural born
12 citizen. *Jordan Ex. 9*. Ms. Jordan suggests no basis for excluding Mr. Obama from the ballot
13 on this basis. As noted, by statute, Secretary Reed is required to certify to the ballot the
14 nominees of the major political parties. RCW 29A.56.360. The political parties therefore
15 shoulder the burden of properly vetting their nominees. “Any investigation of eligibility is
16 best left to each party, which presumably will conduct the appropriate background check or
17 risk that its nominee’s election will be derailed by an objection in Congress, which is
18 authorized to entertain and resolve the validity of objections following the submission of the
19 electoral votes.” *Keyes*, 117 Cal. Rptr.3d 215-16 (citing 3 U.S.C. § 15). In contrast,
20 individuals filing as write-in candidates have no party to play a similar role.
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23 Ms. Jordan also contends that Mr. Obama should be excluded from the ballot because
24 the Secretary certified his appearance there before his party actually completed its national
25 convention. The Secretary, however, merely *provisionally* certified Presidential and Vice
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1 Presidential candidates. Moss Decl. Ex. A. The Secretary did so in order to avoid delays that
2 “would jeopardize the timely printing and mailing of the military and overseas ballots.” Moss
3 Decl., ¶ 2(b). The printing schedule for ballots, in particular, is driven by both federal and
4 state law. 42 U.S.C.A. § 1973ff-1(8)(A); RCW 29A.40.070 (both requiring ballots be mailed
5 to military and overseas voters 45 days before the election). Advance time is needed to print
6 ballots and the Voters’ Pamphlet. Moss Decl., ¶¶ 4-8; Davis Decl. ¶¶ 2-6. The Secretary’s
7 provisional certification was therefore necessary in order to comply with state and federal law,
8 and suggests no basis for excluding any candidate from the ballot.
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10 Finally, Ms. Jordan claims that the Secretary has the authority to investigate and vet
11 the question of whether Presidential candidates are natural born citizens of the United States,
12 citing a statute that has nothing to do with candidates for President and Vice President and, in
13 any event, only addresses candidate residency requirements under state law.⁴ The statute in
14 question requires that, “A person filing a declaration of candidacy for an office shall, at the
15 time of filing, be a registered voter and possess the qualifications specified by law for persons
16 who may be elected to the office.” RCW 29A.20.021(1). But candidates for President and
17 Vice President do not file declarations of candidacy. RCW 29A.24.030. Accordingly RCW
18 29A.20.021 has no application to them. Moreover, the only qualification for office that the
19 statute authorizes the filing officer to determine is a state law requirement that the candidate
20 be a registered voter of the geographic area represented by the office. RCW 29A.20.021(3).
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⁴ The residency of candidates for Washington offices is a matter of public record, and therefore requires no external inquiry. RCW 29A.08.010 (information required for voter registration).

1 authority to inquire beyond the four corners of the documentation into a candidate's
2 qualifications. *Fischnaller*, 21 Wn. App. at 283.⁵

3 Given the strong public policy in favor of eligibility for public office (*Dumas*, 137
4 Wn.2d at 284), Washington law is clear that the Secretary may not look beyond the political
5 party's certification. *Fischnaller*, 21 Wn. App. at 283. Ms. Jordan's action has no merit and
6 should be dismissed.
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8 **V. CONCLUSION**

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

10 DATED this 28th day of August, 2012.

11
12 ROBERT M. MCKENNA
13 Attorney General

14 

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25 ⁵ Obviously, candidates for President and Vice President will often — usually — not be registered voters
26 in Washington, but registered voters of some other state. For this reason as well, RCW 29A.20.021 cannot be
applied to them.

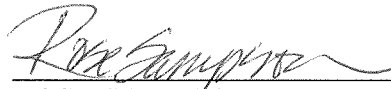
Ms. Jordan also cites to RCW 29A.56.030 for the proposition that the Secretary has discretion as to
which Presidential candidates to include on the presidential primary ballot. That statute, quite obviously,
addresses only the presidential primary and not the inclusion of candidates on the general election ballot. It is
irrelevant.

1 **CERTIFICATE OF SERVICE**

2 I certify, under penalty of perjury under the laws of the state of Washington, that on this
3 date I served a true and correct copy of the foregoing document via electronic mail, and USPS
4 first class mail on the following:

5 LINDA JORDAN
6 4419 S DAWSON STREET
7 SEATTLE, WA 98118
8 d.lizzy@comcast.net

9 DATED this 28th day of August, 2012.

10 

11 ROSE SAMPSON
12 Legal Assistant