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No. 87823-4

SUPREME COURT
OF THE STATE OF WASHINGTON

VICKI LEE ANNE PARKER and JAMES S. JOHNSON, Appellants,

v.

KIM WYMAN, in her capacity as Thurston County Auditor, and
CHRISTINE SCHALLER-KRADJAN, MARIE CLARKE, and VICTOR
MINJARES, Respondents.

And

MARIE S. CLARKE, Appellant,

v.

KIM WYMAN, in her capacity as Thurston County Auditor, and
CHRISTINE SCHALLER-KRADJAN, Respondents.

BRIEF OF APPELLANT JOHNSON

JAMES S. JOHNSON
WSBA No. 23093
PO Box 6024
Olympia, WA 98507
(360) 339-3130

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I. INTRODUCTION

On October 1, 1889, over 52,000 voters went to the polls to decide whether to ratify Washington's Constitution.

For thirty-five years, Washington had been ruled by a government thousands of miles away. Washington bristled at being ruled by outsiders. It petitioned the President to fill appointive offices with people from the territory.¹ It petitioned the Congress to change federal law so that offices that were being filled by people from outside from territory could be filled by its own citizens.² It invoked the language of the Declaration of Independence³ and likened its suffering under the rule of outsiders to that of the colonists at the time of the Revolution.⁴

As a territory, Washington required every public officeholder to live in the area served by the office, and every elected officeholder to live in the area voting for the office prior to being elected.⁵ It declared vacant any office if the officeholder ceased to live in the area that elected them.⁶

¹ LAWS of 1865-66 at 219-20.

² Id.

³ LAWS of 1875 at 305.

⁴ LAWS of 1883 at 432.

⁵ LAWS of 1854-55 § 1, at 7; CODE OF 1881 § 3050.

⁶ LAWS of 1854 ch. 2 § 2, at 74; CODE OF 1881 § 3063.

It specifically required all its judges to live in the area they served, and its elected judges to be qualified voters from the area that elected them.⁷

The proposed Constitution promised to bring self-government to Washington. It replaced appointed executive officers with elected executive officers who were required to be qualified electors.⁸ It replaced appointed supreme court justices with justices elected by the people,⁹ and replaced a combination of regional courts staffed by appointed judges and county probate courts staffed by elected judges with county courts of general jurisdiction staffed by elected judges.¹⁰

The question this case presents is whether by approving the Constitution, without anyone saying a word, the voters who ratified the Constitution did away with the long-standing residency requirement for judges.

⁷ REV. STAT. § 1865 (1874) and LAWS of 1887-88 at xiii (supreme court justices); CODE OF 1881 § 1297 (probate court judges); CODE OF 1881 §§ 1689, 1691 & 1704 (justices of the peace).

⁸ Compare CONST. art III, §§ 1 & 25 with REV. STAT. §§ 1877 & 1857 (1874).

⁹ Compare REV. STAT. § 1877 (1874) with CONST. art. IV, § 3.

¹⁰ Compare REV. STAT. § 1865 (1874) and CODE OF 1881 §§ 1297 with CONST. art. IV, §§ 5 & 6.

The answer, of course, is no. The Constitution provided for continuity with the past by retaining territorial laws not in conflict with it.¹¹ And since territorial law at the time unequivocally required all elected officeholders to live in the county that voted for them, required all appointed judges to live in the areas they served, and required all elected judges to have done so prior to their election, there is simply no reason not to see these general laws as continuing in force, thereby applying to superior court judgeships created by ratification of the Constitution.

Today Washington has general laws requiring all elective officeholders to be qualified electors in the area that votes for the office that can trace their roots to these territorial laws. Because Washington has always required its judges to live in the area they serve and continues to do so today, this Court should reverse the judgment of the trial court, declare Christine Schaller ineligible to appear on the the ballot for the office she seeks because she does not live in the county voting for the office, and take what further action it can at this point to remedy as best it can the errors that have taken place to date.

¹¹ CONST. art. XXVII, § 2.

II. ASSIGNMENTS OF ERROR

- 1. The trial court erred in ruling that sections 3(a) and 17 of Article IV of our Constitution are the exclusive source for qualifications for superior court judges.*
- 2. The trial court erred in ruling that RCW 42.04.020 does not apply to superior court judges.*
- 3. The trial court erred in directing that Schaller's name remain on the general election ballot.*

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- 1. Is applying to superior court judges and candidates for the office the several laws which require all elected officeholders and candidates for elective office to live in the county they serve or seek to serve repugnant to our state's Constitution?*
- 2. Is there any reason not to apply to superior court judges and candidates for the office the several laws which require all elected officeholders and candidates for elective office to live in the county they serve or seek to serve?*
- 3. What should be done at this point to remedy the error of putting Ms. Schaller's name on the ballot in violation of RCW 29A.20.021?*

IV. STATEMENT OF THE CASE

A. Substantive facts

On Monday, May 14, 2012, Christine Schaller filed a declaration of candidacy in Thurston County for the office of superior court judge, position 2.¹² She is an attorney admitted to the practice of law in

¹² CP at 39.

Washington, over 18 years old, and a citizen.¹³ She is registered to vote in Pierce County because she lives in Pierce County.¹⁴ Three other candidates filed for the same office: Marie Clarke, Victor Minjares, and Jim Johnson.¹⁵ All three are attorneys, over 18 years old, citizens, and registered voters in Thurston County.¹⁶

Thurston County Auditor Kim Wyman is the election official responsible for this year's election being held to determine the next Thurston County Superior Court judge, position two.¹⁷ Ms. Wyman put the names of all four candidates on the primary election ballot. On August 21, 2012, Thurston County's canvassing board certified the results of the August 7 primary as follows: Ms. Schaller, 23,681 votes; Mr. Johnson, 10,748; Ms. Clarke, 8,352; and Mr. Minjares, 5,801.¹⁸

¹³ CP at 39.

¹⁴ CP at 39. *See* RCW 29A.08.010.

¹⁵ CP at 7.

¹⁶ CP at 7.

¹⁷ CP at 7.

¹⁸ CP at 39.

B. Procedural history

On August 22, 2012, Vicki Lee Anne Parker¹⁹ and Mr. Johnson filed an action under RCW 29A.68.011, contesting Ms. Schaller's right to appear on the general election ballot.²⁰ Ms. Clarke filed a similar action.²¹ The superior court scheduled a hearing for August 29, 2012, and ordered Ms. Schaller and Ms. Wyman to show cause why Ms. Schaller's name should be permitted to appear on the general election ballot.²² Ms. Schaller and Ms. Wyman answered the petition, making clear that there was no factual dispute about Ms. Schaller's residence.²³ On August 29, 2012, the court heard arguments, and on August 31, 2012, issued its decision.²⁴ The trial court found that Article IV, sections 17 and 3(a) of our Constitution contain the exclusive qualifications for superior court

¹⁹ Ms. Parker is a registered voter in Thurston County (CP at 6), and as such has standing under RCW 29A.68.011.

²⁰ CP at 6-9.

²¹ CP at 63-68.

²² CP 17-23, 95-98.

²³ CP at 25-28, 29-30.

²⁴ CP at 38-48.

judges.²⁵ It ruled that RCW 42.04.020 did not apply to judges.²⁶ It ordered Ms. Schaller's name to appear on the general election ballot.²⁷

On Tuesday, September 4, Ms. Clarke, and Ms. Parker and Mr. Johnson filed separate appeals with this Court, seeking direct review and asking this Court to decide the case before ballots for the general election would be mailed. This Court granted direct review, denied the motions asking this Court to decide the case before ballots were mailed, and set a litigation schedule that will result in this case being argued less than two months after it was filed in the superior court.

V. ARGUMENT

A. Standard of review

This Court reviews questions of law de novo.²⁸ There is a strong presumption in favor of eligibility for office.²⁹ However, statutes are presumed to be constitutional, and unconstitutionality must be established

²⁵ CP at 41.

²⁶ CP at 41.

²⁷ CP at 47.

²⁸ *Federal Way Sch. Dist. No. 210 v. Vinson*, 172 Wash.2d 756, 765, 261 P.3d 145 (2011).

²⁹ *Gerberding v. Munro*, 134 Wash.2d 188, 202, 949 P.2d 1366 (1998).

beyond a reasonable doubt.³⁰ In the end, this Court will need to decide whether our Constitution bars the Legislature from imposing a residency requirement on superior court judges and candidates for the office, a requirement that it has imposed on virtually all elective officeholders.

B. Current statutes require all candidates for elective office to live in the area that votes for the office.

RCW 29A.24.030 & .031 require candidates wanting their names to appear on a ballot to file a declaration of candidacy. They require the Secretary of State to adopt as a rule a declaration-of-candidacy form that includes a place for the candidate to declare that she is a registered voter in the jurisdiction voting for the office.³¹ RCW 29A.20.021(3) says:

The name of a candidate for an office shall not appear on a ballot for that office unless, except as provided in RCW *3.46.067 and 3.50.057, the candidate is, at the time the candidate's declaration of candidacy is filed, properly registered to vote in the geographic area represented by the office. For the purposes of this section, each geographic area in which registered voters may cast ballots for an office is represented by that office. If a person elected to an office must be nominated from a district or similar division of the geographic area represented by the office, the name of a candidate for the office shall not appear on a primary ballot for that office unless the candidate is, at the time

³⁰ *City of Seattle v. Montana*, 129 Wash.2d 583, 589, 919 P.2d 1218 (1996).

³¹ RCW 29A.24.030(1) & .031(1). See WAC 434-215-012.

the candidate's declaration of candidacy is filed, properly registered to vote in that district or division. The officer with whom declarations of candidacy must be filed under this title shall review each such declaration filed regarding compliance with this subsection.

The section exempts from this residency requirement only candidates for the United States Congress and candidates for municipal court judge.³²

RCW 42.04.020 says:

That no person shall be competent to qualify for or hold any elective public office within the state of Washington, or any county, district, precinct, school district, municipal corporation or other district or political subdivision, unless he or she be a citizen of the United States and state of Washington and an elector of such county, district, precinct, school district, municipality or other district or political subdivision.

The language of this section could not be broader. By its plain wording, it applies to any elective office in Washington.

RCW 42.12.010 provides:

Every elective office shall become vacant on the happening of any of the following events:

...

(4) Except as provided in RCW *3.46.067 and 3.50.057, his or her ceasing to be a legally registered voter of the district, county, city, town, or other municipal or quasi municipal corporation from which he or she shall have been elected or

³² RCW 29A.20.021(3) & (4). Elected municipal court judges are required to live in the county, but not the city, that elects them. RCW 3.50.057.

appointed, including where applicable the council district, commissioner district, or ward from which he or she shall have been elected or appointed . . .

Again, this section is worded to have universal application: it says it applies to every elective office.

None of these statutes specifically mentions superior court judges or candidates for the office. Yet each uses language that is universal in its scope.

The trial court decided not to read these statutes as applying to superior court judges and candidates for the office. It did so because it found that the Constitution contained the exclusive qualifications for superior court judges and the Constitution did not contain a requirement that superior court judges live in the county they serve.

C. The Constitution does not expressly address residency for judges, but does expressly provide for the continued effect of territorial laws.

Our Constitution requires executive branch officeholders to be qualified electors of Washington.³³ It requires legislators to be qualified voters in the districts they are elected to serve.³⁴ It contains no requirement that superior court judges be voters in or reside in the county

³³ CONST. art. III, § 25.

³⁴ CONST. art. II, § 7.

they are elected to serve. There is some evidence that this omission was deliberate.³⁵ The Constitution does require superior court judges to be admitted to the practice of law.³⁶

The Constitution contains another provision pertinent to this case.

Article XXVII, section 2 provides:

All laws now in force in the Territory of Washington, which are not repugnant to this Constitution, shall remain in force until they expire by their own limitation, or are altered or repealed by the legislature³⁷

³⁵ The Journal of the Washington State Constitutional Convention 1889 (Beverly Paulik Rosenow ed., 1962) (JOURNAL) contains no information that would shed light on this omission. However, the accompanying Analytical Index notes that one newspaper account reported that motions to add a residency requirement were defeated. JOURNAL at 623. For the Court's convenience, attached as an appendix to this brief is a copy of the newspaper account cited in the analytical index, which was published in the Tacoma Ledger Times on July 21, 1889.

³⁶ CONST. art. IV, § 17.

³⁷ CONST. art. XXVII, § 2.

D. This Court’s prior decisions dealing qualifications for offices mentioned in the Constitution permit requirements not found in the Constitution when those qualifications existed in territorial law.

1. State ex rel. Quick-Ruben v. Verharen

In *State ex rel. Quick-Ruben v. Verharen*³⁸ this Court came as close as it has come to deciding whether there is a residency requirement for superior court judges. Mr. Quick-Ruben filed a quo warranto action seeking a judgment that he held superior title to the office of Pierce County superior court judge because the apparent winner of the election for the office, Mr. Verharen, was not a resident of Pierce County. However, the Court never reached the merits of the issue. The Court found that Mr. Quick-Ruben had filed the action prematurely and failed to plead a sufficient private interest in the office. The Court concluded: “In light of our disposition of the foregoing issues, we do not reach the issue of whether residency in a county is a qualification for the office of superior court judge.”³⁹

³⁸ 136 Wash.2d 888, 969 P.2d 64 (1998).

³⁹ *Quick-Ruben*, 136 Wash.2d at 901.

2. *Gerberding v. Munro*

In *Gerberding v. Munro*⁴⁰ what was at issue was term limits enacted by a voter initiative for legislative and executive offices. The Court struck down the term limits, and in doing so said:

Initiative 573 improperly attempts to add qualifications to constitutional offices by statute. A statute . . . may not add qualifications for state constitutional officers where the Constitution sets those qualifications.⁴¹

During the case, the status qualifications for the attorney general became an issue. The Constitution does not require the attorney general to be an attorney. That requirement is found only in statute.⁴² This Court dismissed concerns about this requirement. The Court said:

RCW 43.10.010 requires the attorney general to be a qualified practitioner of the supreme court of this state. This qualification can be traced to Laws of 1887-88, § 3, at 7, which noted the "attorney general of this Territory shall be learned in the law and shall be a qualified practitioner before the supreme and district courts of this Territory." This then existing qualification was recognized by the Washington Constitution upon its adoption in 1889 via art. XXVII, § 2, which recognized and retained all territorial laws then in effect. *See* WASH. CONST. art. XXVII, § 2; *In re Bartz*, 47 Wash.2d 161, 167, 287 P.2d 119 (1955); *State v. Estill*, 55 Wash.2d 576, 582, 349 P.2d 210, 89 A.L.R.2d

⁴⁰ 134 Wash.2d 188, 949 P.2d 1366 (1998).

⁴¹ *Gerberding*, 134 Wash.2d at 211.

⁴² RCW 43.10.010.

1251 (1960) (Mallery, J., concurring) (noting the provisions of WASH. CONST. art. XXVII, § 2, and stating: "Territorial laws have a specific constitutional sanction and approval which subsequent state statutes do not have").⁴³

3. *In re Bartz*

In *In re Bartz*⁴⁴ what was at issue was a statutory requirement that certain justices of the peace must be attorneys. The Court upheld the requirement. In doing so, the Court assumed that the preferred rule would be:

where the constitution has set forth qualifications for an office, either general or specific, in the absence of an express grant of power to the legislature, there is an implied prohibition against the imposition of additional qualifications by the legislature.⁴⁵

However, the Court also noted that qualifications for justice of the peace had been in territorial statutes at the time the Constitution was adopted, and that such laws remained in effect after the Constitution was adopted pursuant to Article XXVII, section 2.⁴⁶

⁴³ *Gerberding*, 134 Wash.2d at 208-09.

⁴⁴ 47 Wash.2d 161, 287 P.2d 119 (1955).

⁴⁵ *Bartz*, 47 Wash.2d at 164.

⁴⁶ *Bartz*, 47 Wash.2d at 167.

4. *Nielsen v. Washington State Bar Ass'n*

In *Nielsen v. Washington State Bar Association*⁴⁷ the Court decided that non-citizens may be admitted to the bar in Washington. In the opinion the Court discussed being a lawyer as the only requirement for superior court judges. But it did so only in the context of dismissing an argument about judges as irrelevant. “[T]he constitutionally relevant focus is on the present status and responsibilities of that occupation, not on some speculative future status or responsibilities.”⁴⁸

E. Territorial laws universally required residence, both in general laws that apply to all elective officeholders, and in specific laws applying to all judicial officers then in existence.

This Court’s prior decisions leave room for qualifications found in territorial statutes at the time the constitution was adopted. This necessitates looking at the territorial laws closely.

Washington had two general laws that by their own terms both applied to all offices in the territory. Section 3050 of the Code of 1881 established qualifications for voters and for holding office. It required all officeholders and voters to have lived in the territory for six months and in

⁴⁷ 90 Wash.2d 818, 585 p.2d 1191 (1978).

⁴⁸ *Nielsen*, 90 Wash.2d at 825.

the county for 30 days.⁴⁹ It was first enacted in 1854 as solely qualifications for voting.⁵⁰ At the next legislative assembly, the qualifications for voting were made to apply to holding office as well.⁵¹

Section 3063 of the Code of 1881 also established a residency requirement for officeholders. It did so by declaring vacant any office if the officeholder ceased to live in the area that voted for the office. That section said:

Every office shall become vacant on the happening of either of the following events before the expiration of the term of such office:

...

4. His ceasing to be an inhabitant of the district, county, town, or village for which he shall have been elected or appointed, or within which the duties of his office are to be discharged.⁵²

If this sounds familiar, that's because it is. With only minor changes to the wording, this provision is still with us today as RCW 42.12.010.

As already noted, in addition to general laws requiring officeholders to live in the area they served, there were specific territorial laws requiring residency of every judicial officer in the state. Appointed

⁴⁹ CODE OF 1881 § 3050.

⁵⁰ LAWS of 1854 ch. 1 § 1, at 64.

⁵¹ LAWS of 1854-55 § 1, at 7.

⁵² CODE OF 1881 § 3063; LAWS of 1854 ch. 2, § 2, at 74.

supreme court justices were required to live in the judicial district they were assigned to.⁵³ Elected probate court judges were required to be qualified electors.⁵⁴ And elected justices of the peace were required to live in the precinct they were elected to serve.⁵⁵

There was no territorial law specifically addressing residence for superior court judges. This is not surprising since the superior courts were created by the Constitution. And while the specific laws pertaining to territorial supreme court justices, probate court judges, and justices of the peace would not apply to the new superior court judges, they do help us understand what the world looked like as the delegates got together to draft the Constitution. And in that world, Washington required residency of all public officeholders, including judges.

F. Judge Hill

No single person is more responsible for the design of our courts than Judge William Lair Hill. Judge Hill drafted a proposed constitution

⁵³ REV. STAT. § 1865 (1874).

⁵⁴ CODE OF 1881 § 1297.

⁵⁵ CODE OF 1881 §§ 1689, 1691 & 1704.

that served as a basis of discussion throughout the convention.⁵⁶ Article IV of our Constitution finds as its source Judge Hill's draft constitution.⁵⁷ In his draft constitution, Judge Hill commented on all the changes he was proposing from the the current district system. Yet no where in his comments does he say anything about doing away with existing residency requirements for judges.⁵⁸

Judge Hill played another role relevant to this issue. He also was Washington's first code commissioner.⁵⁹ As such, he produced the state's first compilation of statutes.⁶⁰ In putting together his code, he had to decide whether Sections 3050 and 3063 of the Code of 1881 survived the adoption of the Constitution.

Section 3050 had an obvious problem. Remember, that section did two things. It established the qualifications for voting. It also applied

⁵⁶ JOURNAL at v. *See* William Lair Hill, A Constitution Adapted to the Coming State: Suggestions by Hon. W. Lair Hill: Main Features Considered in Light of Modern Experience: Outline and Comment Together. 1889 (HILL CONST.).

⁵⁷ JOURNAL at 593.

⁵⁸ HILL CONST. art. VI at 46-61.

⁵⁹ LAWS of 1889-90 § 1, at 236.

⁶⁰ Hill, The General Statutes and Codes of the State of Washington (1891) (HILL'S GEN. STAT.).

those qualifications to someone wanting to hold office. The Constitution changed the qualifications for voting.⁶¹ So it is not surprising that when we look at his code, we see that Judge Hill viewed section 3050 as having a problem. In his comments to the section, he wrote:

It will be seen at a glance, by comparing this section of the territorial statutes with the provisions of the constitution on the same subject, that this section is, for the most part, if not wholly, superseded by the constitution, excepting perhaps the statutory provisions concerning election to office of persons belonging to the army. This section is preserved as a part of the text, however, in view of the provisions just mentioned, and also because it is essential to an understanding of the last proviso in section 1, Article VI. of the constitution; and it has not been deemed advisable to substitute "state" for "territory," or make any other correction of terms. Consult constitution of the state, especially Article VI., sections 1-4, both inclusive, and Article XXVII., section 2.⁶²

If he had viewed the Constitution as eliminating the residency requirement for judges, we could expect that his comments to address more than just the Article VI problem. And we might also expect to find comments from him about Section 3063 of the Code of 1881. Yet he includes section 3063 in his code without comment.⁶³

⁶¹ Compare CONST. art. VI, §1 (1889) with CODE OF 1881 §3050.

⁶² HILL'S GEN. STAT., Title VIII, ch. I, §344 (1891).

⁶³ See HILL'S GEN. STAT. Title VII, § 342 (1891).

The point of this discussion is that if Article IV of the Constitution had been intended to affect a change to the existing law that judges must live in the area they serve, Judge Hill is one voice we would expect to have heard something from on the subject. Yet neither in his draft constitution nor in his code compiled almost immediately after ratification of the Constitution do we find so much as one word from him on the subject.

G. Laws enacted since statehood give no indication that superior court judges should be treated differently than all other elective officeholders.

In 1907, the Legislature provided for primary elections, and as part of doing so required that candidates for public office file declarations of candidacy.⁶⁴ There can be no doubt that these declarations were required of candidates for superior court, as the statute had a specific proviso exempting superior court candidates from certifying their party affiliation.⁶⁵ As part of the declaration, the Legislature required candidates - including candidates for superior court - to declare upon their honor where in Washington they lived, that they were a qualified voter there.⁶⁶

⁶⁴ LAWS of 1907, ch. 209, at 457.

⁶⁵ LAWS of 1907, ch. 209, § 4, at 458.

⁶⁶ LAWS of 1907, ch. 209, § 4, at 458.

While it is true that this 1907 law does not expressly require candidates for judicial office to declare that they are qualified voters in the county they are running for office for, it is important to remember that the position advanced by Ms. Wyman and Ms. Schaller and adopted by the trial court would prohibit requiring superior court judges to be registered voters anywhere in the state of Washington. Thus, the Legislature's adoption of this 1907 law, the direct predecessor to RCW 29A.24.030 & .031, was consistent with the position advanced by the appellants, and fundamentally inconsistent with the position adopted by the trial court.

In 1919, the Legislature again enacted a law requiring anyone wishing to hold elective office to live in the area voting for the office.⁶⁷ The statute's language could not be broader, and there is nothing in the law or the legislative history to suggest it should be interpreted more narrowly than its language suggests, or that superior court judges should be given different treatment. It is this law that, with minor amendments, exists today as RCW 42.04.020.

⁶⁷ LAWS of 1919, ch. 139, § 1, at 390.

H. There was a good reason not to include the residency requirement in the Constitution: the need for some flexibility

The Constitution was doing two things at the same time. First, it was bringing courts of general jurisdiction closer to the people. Second, it was professionalizing judges.

The Constitution was replacing courts of general jurisdiction that came to a few county seats for a week or two once or twice a year⁶⁸ with courts of general jurisdiction sitting in every county year-round.⁶⁹ At the same time, it was for the first time requiring judges to be lawyers,⁷⁰ and prohibiting them from practicing law or holding other employment while in office.⁷¹

Although every county had a probate court, the probate court was a court of limited jurisdiction, and its judges were not required to be lawyers. So as Washington looked at transitioning from a system that had judges traveling from town to town to permanent full-time courts in every county, it was foreseeable that there could be problems. Many counties

⁶⁸ See CODE OF 1881, §§ 2114 through 2120.

⁶⁹ See CONST. art. IV, § 5.

⁷⁰ CONST. art. IV, § 17.

⁷¹ CONST. art IV, §§ 15 & 19.

probably had few if any lawyers in permanent residence from which to draw judges.

But while this problem was foreseeable, it was not immediate. Although the Constitution aspired to have separate superior courts in each county, its practical starting point was just three counties with their own judges, and the remaining 31 counties sharing nine judges.⁷² As county populations grew, these multi-county superior courts would need to be divided, and that is when problems might arise.

This meant that it was foreseeable that there would be problems the Legislature would need to deal with, but exactly what those problems might be and what the optimum solution would be might not be known for years. In this context, enshrining in the Constitution a residency requirement could make it more difficult for the Legislature to deal with any problems that came up. And since territorial law already required all elective officeholders to live in the area that elected them or have their office declared vacant, there was no pressing need to put something in the Constitution that might cause problems down the road.

⁷² See CONST. art. IV, § 5.

I. This Court should conclude that the Constitution was not intended to eliminate existing residency requirements found in territorial law, and that consequently current laws requiring residency apply to superior court judges and candidates for the office.

In sum, Washington has a history both before and after adoption of the Constitution of requiring residency for all elective officeholders, including at least one law that has been universally recognized as having been continuously in place since 1854.⁷³ We have no history of expressly exempting judges or any other class of elective officeholder from a residency requirement, and during territorial days, we have laws that expressly apply residency requirements to all judges. We have a Constitution that provides for existing territorial laws not in conflict with the Constitution to remain the law of the land, and we have a historical record that is devoid of any comment expressing the intent to make a change. This Court should conclude from all this that the omission from Article IV of a residency requirement was not intended to, and did not, supersede the existing territorial law⁷⁴ requiring elective officeholders to live in the area they were elected to serve or have their office declared vacant.

⁷³ RCW 42.12.010, first adopted as LAWS of 1854 ch. 2, § 2, at 74.

⁷⁴ CODE OF 1881 § 3063.

And given that the existing law requiring residency was not superseded, this Court should find that it did not offend our Constitution for the Legislature in 1907 to require all candidates seeking office, including candidates for superior court judge, to declare that they are qualified electors in the county they seek to serve, a requirement that continues to this day in RCW 29A.24.030 & .31; it did not offend our Constitution for the Legislature in 1919 to express as a qualification for any office, including superior court judge, residence in the area that votes for the office, a requirement that continues to this day in RCW 42.04.020; and it does not offend our Constitution to deny candidates who do not meet this long-standing residency requirement at the time they file their declaration of candidacy the right to have their name appear on the ballot, as required by RCW 29A.20.021.

Since these statutes are not in conflict with our Constitution, it was error for Ms. Wyman to put Ms. Schaller on the primary election ballot, and error for the trial court to order Ms. Wyman to put Ms. Schaller on the general election ballot.

J. Remedies

These cases were filed under RCW 29A.68.011 in an attempt to keep an unqualified candidate off the general election ballot. By the time

this Court hears arguments in this case, the ballots will have been mailed to the voters. Even if this Court were to issue an order immediately after oral argument, there is not time to remove Ms. Schaller's name from the ballot, and there is not time to place another name on the ballot, as appellants asked the trial court to do. The reality is, that in all likelihood, this Court will be issuing its decision after the results of the general election are known.

If Mr. Johnson receives the most votes, this Court should not declare this case moot. The people of this state should not be put through this again, but should be told by this Court that their laws requiring all elective candidates to live in the area that votes for the office apply to candidates for superior court.

If Ms. Schaller receives the most votes, this Court can and should stop her from assuming office. But beyond issuing a decision and blocking Ms. Schaller from taking office is there any more relief this Court should grant?

The Court basically has two options. It can declare the election void, thereby leaving the office vacant. The governor can then appoint someone to fill the vacancy until an election for the remainder of the term can be held two years from now. Or it can find Mr. Johnson to have been

the only person legally entitled to appear on the general election ballot, and declare him elected.⁷⁵ In *State ex rel. Quick-Ruben*, this Court was faced with a similar claim and decided that once the general election was held, the latter argument goes away.⁷⁶ This case is somewhat different because Mr. Johnson filled this timely challenge to Ms. Schaller being placed on the ballot before the election. In this case, what is at issue is who should appear on the general election ballot. When this Court finds that the trial court erred in deciding that Ms. Schaller could appear on the general election ballot, it will be finding that only Mr. Johnson had a legal right to appear on the general election ballot. In August there was still time for the trial court to fashion a remedy by putting another name or two on the ballot. It is now too late for that to happen.

Declaring the second-place finisher in a four-candidate primary the winner of the election is a profoundly unsatisfying prospect. However, so too should be creating a vacancy for the governor to fill. Our Constitution promises the voters of Thurston County the right to choose who their judge will be, and our laws are supposed to ensure that the voters will only be presented with candidates capable of taking office if elected. Delegates

⁷⁵ CONST. art. IV § 29.

⁷⁶ *State ex rel. Quick-Ruben*, 136 Wash.2d 888, 899, 969 P.2d 64 (1998).

to the constitutional convention specifically chose to have superior court judges elected, not appointed by the governor. While they did give the governor the power to fill vacancies until the next general election, a vacancy created as the result of government officials not following election laws seems fundamentally different in character than a judicial retirement or resignation.

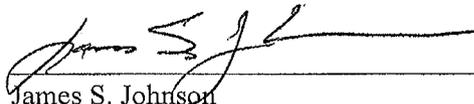
Whatever this Court decides to do, ultimately there can be no satisfying end to this case. Regardless of the outcome of the election, Ms. Schaller's presence on the ballot will have denied voters something their laws should have guaranteed them: a choice between qualified candidates.

VI. CONCLUSION

For the reasons stated, appellant Johnson asks this Court to reverse the decision of the trial court, declare that laws requiring officeholders and candidates for office to live in the area that votes for the office do apply to superior court judges and candidates for that office including Ms. Schaller, and take such other action as this Court determines is warranted.

September 21, 2012.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "James S. Johnson", written over a horizontal line.

James S. Johnson
WSBA No. 23093

Appendix

From the Tacoma Ledger Times, Sunday July 21, 1889.

number 16, which permits
ges to review the evidence to
jury as a part of their charge. It
s adopted.

The section (No. 23) providing that
case of any judge of the supreme
rt being disqualified in any cause the
aining judges may elect some mem-
of the bar to sit with them and hear
case, was stricken out.

A new section was introduced by P. C.
llivan, of Tacoma, and adopted, pro-
ing that judges may be called upon
advise the legislature concerning bills
fore them.

The steamer State of Washington,
hich left for Tacoma and Seattle at
out 4 o'clock this afternoon, was
wded with delegates and visitors.

W.

THE COMMITTEE OF THE WHOLE.

ork Resumed on the Judicial Clause
and Completed.

The convention now resumed, in com-
tee of the whole, consideration of the
ficial clause.

Section 15 was adopted as reported by
mmittee as follows:

Section 15. The judges of the supreme
urt and the judges of the superior court
all be ineligible to any other office or pub-
employment than a judicial office or em-
pment during the term for which they
ve been elected.

Section 16. "That judges shall not
arge juries with respect to matters of
ct, nor comment thereon, but shall
clare the law," occasioned some de-
te.

Suksdorf moved that the words "nor
ment thereon" be stricken out.

Mr. Crowley spoke against the amend-
ent, because he thought that facts
ould be left to the jury. Many judges
e too anxious to control the juries.
e believed that the functions of judge
d jury should be separate.

Judge Turner said he had stood by
e report while other members of the
mmittee were deserting. He now
ought, in connection with this section,
would become a deserter, as he was
the opinion that judges should have
e right to refer to facts.

Judge Hoyt said the necessity of re-

trial judge has made the matter clear to
them. He did not favor the amendment
as it stood, but would like to see the
words "nor comment thereon" stricken
out.

The amendment was voted down.

MORE AMENDMENTS.

Set Up Only to Be Knocked Down
After Long Discussion.

Mr. Stiles moved that the word "dis-
puted" be placed before the word "mat-
ters" in the section, making it read that
"judges shall not charge juries with re-
spect to disputed matters of fact."
Lost.

Section 16 was then approved.

Mr. Buchanan, when section 17 had
been read, offered as an amendment,
"and a citizen thereof for two years,"
be added thereto. He explained that as
the matter now stands a person admit-
ted to the bar, though only in the terri-
tory for a few days, would be eligible to
election.

Judge Turner thought that some limi-
tation should be made.

Mr. Dunbar moved that the words
"and a citizen of the state of Washing-
ton" be added.

Mr. Power moved that the words "and
a qualified elector" be substituted for
Mr. Dunbar's amendment.

Mr. Dunbar accepted the substitute.
The amendments were all lost and
section 17 was approved and will read
as follows:

Section 17. No person shall be eligible to
the office of judge of the supreme court, or
judge of a superior court, unless he shall
have been admitted to practice in the courts
of record of this state or of the territory of
Washington.

FOUR SECTIONS APPROVED.

A Slight Relief from the Steady Course
of Contention.

Sections 18, 19, 20 and 21 were then
approved without amendment or debate.
They read as follows:

Section 18. The judges of the supreme
court shall appoint a reporter for the de-
cisions of that court, who shall be remova-
ble at their pleasure. He shall receive such
annual salary as shall be prescribed by law.

Sec. 19. No judge of a court of record
shall practice law in any court of this state
during his continuance in office.

Sec. 20. Every cause submitted to a judge
of a superior court for his decision shall be

facts and omissions" be
Carried.

The new section was
the amendments noted.

WITHOUT AMEN

Three More Sections Lig
the Constituti

The following section
were adopted without am

Section 26. The county c
virtue of his office, clerk
court.

Sec. 27. The style of all
"The State of Washington,"
tions shall be conducted in it
authority.

Sec. 28. Every judge of tl
and every judge of a superior
fore entering upon the dut
take and subscribe on oath t
port the constitution of the l
the constitution of the state
and will faithfully and imp
the duties of judge to the bes
which oath shall be filed in
secretary of state.

SECTION TH

The Committee's Rep
Adopted—The Fu

Section 8 of the judic
then read as changed in
structions of the commit
as follows:

Sec. 8. The judges of th
shall be elected by the qua
the state at large at the gene
at the times and places at w
are elected.

The first election of judge
court shall be at the electi
held upon the adoption of
and the judges elected there
ned by lot, so that two shall
for the term of three years,
of five years, and one for t
years.

The lot shall be drawn by
shall for that purpose asse
government and they sha
thereof to be certified to
state and filed in his offic
ing the shortest term to ser
office by appointment or
vacancy, shall be the chief
preside at all sessions of th
and in case there shall be t
in like manner the same sh
judges of the supreme cou
which of them shall be chie

In case of the absence of
the judge having in like ma
or next shortest term to se
in his stead.

After the first election th
elected shall be six years f
first Monday in January n
election.

OFFICE RECEPTIONIST, CLERK

To: Jim Johnson
Cc: mcclarke24@comcast.net; victorminjaresforjudge@gmail.com; phil@tal-fitzlaw.com; newmanlaw@comcast.net; klumppd@co.thurston.wa.us; Vicki Lee Anne Parker; peterg@atg.wa.gov; JeffE@ATG.WA.GOV; kristinj@atg.wa.gov
Subject: RE: 87823-4 - Parker v Wyman and Clarke v Wyman; Brief of Appellant Johnson

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Subject: 87823-4 - Parker v Wyman and Clarke v Wyman; Brief of Appellant Johnson

Attached please find my Brief of Appellant with a two-page appendix, in the matter of Parker v Wyman and Clarke v Wyman, No. 87823-4.

James S. Johnson
WBSA No. 23093
onlyjimjohnson@comcast.net
360-339-3130