

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 C. CLARKE,

Appellant,

v.

KIM WYMAN, Thurston County Auditor, and
CHRISTINE SCHALLER- KRADJAN,

Respondents.

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REPLY BRIEF OF APPELLANT MARIE CLARKE

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I. INTRODUCTION

For 157 years, Washington law has required all elected officials to have the same qualifications as those who vote for them. Article XXVII, Section Two of Washington's Constitution serves the important role of ensuring that important, long-standing laws are not invalidated on technical grounds. While the outcome of this case turns on the straightforward application of Article XXVII, Section Two, both Ms. Wyman and Ms. Schaller almost entirely ignore it. Instead, Ms. Schaller seeks to distract this Court from the merits of this appeal by filing a brief replete with ad hominem attacks, an improper discussion of evidence excluded by the trial court, and an unprecedented request that a Superior Court judge be the final arbiter of the constitutionality of a statute.

Despite these tactics, Ms. Wyman and Ms. Schaller cannot avoid the heavy burden they face: They must prove beyond a reasonable doubt that the Constitution's framers intended to mandate that non-United States citizens, non-Washington residents and non-county residents be eligible to serve on Washington's Supreme and Superior Courts. As indicated below, they have fallen far short of carrying that burden.

II. ARGUMENT

A. **This Court, Not The Trial Court, Has The Final Word On The Constitutionality And Construction Of Statutes.**

1. This Court Has The Inherent Power To Review Trial Court Decisions That Are “Contrary To Law.”

Despite having twice represented to this Court that Ms. Clarke had the right to appeal,¹ Ms. Schaller² now takes the exact opposite position.³ She contends that the trial court’s construction of Washington’s Constitution and statutes is not subject to appellate review at all, because pre-general election decisions arising under RCW 29.68.011 are not appealable as a matter of right.⁴

Yet even in the election context, this Court retains its inherent power to review trial court decisions that are “arbitrary, capricious, or

¹ Respondent Schaller’s Consolidated Answer To Petitioners’ Statements Of Grounds For Direct Review at 3 (“Petitioners seek direct review by this [C]ourt ... rather than pursue their right to appeal to the Court of Appeals.”); Respondent Schaller’s Answer To The Petitioners’ Motions For Expedited Review at 6 (“Further, expedited review is hardly necessary when petitioners not only have this appeal, undertaken in the normal course ...”).

² Ms. Wyman advances no arguments that Ms. Schaller does not also advance. For simplicity’s sake, and to comply with RAP 10.4(e)’s directive to minimize the use of the term “Respondents,” this brief describes all arguments by Respondents as being presented by Ms. Schaller. Ms. Clarke intends no disrespect toward Ms. Wyman or Ms. Schaller in using this convention.

³ It must be noted that Ms. Schaller’s argument regarding lack of appealability only applies to Ms. Clarke’s claim under RCW 29A.68.011, but not to her claims seeking writs of mandamus or prohibition, or declaratory relief. Those claims remain appealable as a matter of right.

⁴ Brief of Respondent Schaller (“Schaller Br.”) at 12-15. Ms. Schaller should be estopped from raising appealability so late in these proceedings. She could and should have raised this issue when responding to Ms. Clarke’s request that this Court grant direct review, but did not do so. Instead, she *twice* represented to this Court that Ms. Clarke had the right to appeal. To allow this argument to be raised after this Court has expended resources preparing to hear it, after Appellants expended significant time and money perfecting this appeal and preparing their briefs, and after Respondents have had the benefit of reviewing Appellants’ briefs, would “work a virtual fraud on the [C]ourt and opposing litigants.” *Hill v. Blind Indus. and Servs. of Maryland*, 179 F.3d 754, 758-59 (9th Cir. 1999) (rejecting defendant’s attempt to argue late in proceedings that court lacked authority to hear the claim).

contrary to law.”⁵ As a result, this Court properly granted review in this case because the trial court’s erroneous construction of Washington’s Constitution and statutes was, by definition, “contrary to law.”⁶

While Ms. Schaller recognizes that this Court has the inherent power to review decisions that are “arbitrary, capricious, or contrary to law,”⁷ she ignores the “contrary to law” portion of this power.⁸ She incorrectly asserts that this Court in *Kriendler v. Eikenberry* held that this power is limited to cases involving a trial court’s “willful and unreasoning action, without consideration and in disregard of facts and circumstances.”⁹ But *Kriendler* used that language to define “arbitrary or capricious,” not “contrary to the law,” and thus this standard has no bearing on cases, such as this one, that turn solely on an issue of law. In fact, this Court in *Kriendler* expressly distinguished cases that present “constitutional issues,”¹⁰ indicating that such cases *would be* subject to

⁵ *Kriendler v. Eikenberry*, 111 Wn.2d 828, 837, 766 P.2d 738 (1989).

⁶ Further, an erroneous construction of the law would also be “arbitrary and capricious.” *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (holding that “applying the wrong legal standard” amounts to a “manifest abuse of discretion”); *Bd. of County Comm’rs for Saint Mary’s County*, 154 Md. App. 10, 26, 837 A.2d 1059 (2003) (When “an incorrect legal standard is used . . . the decision is considered arbitrary and capricious and, therefore, must be reversed.”).

⁷ Schaller Br. at 14-15.

⁸ Ms. Schaller also asserts that Ms. Clarke did not “specifically invoke[] the Court’s inherent authority,” Schaller Br. at 15, but she cites no authority for such a “magic words” requirement. Any such requirement would be contrary to RAP 1.2 requiring that the Rules of Appellate Procedure be “be liberally interpreted to promote justice and facilitate the decision of cases on the merits.”

⁹ Schaller Br. at 14 (quoting *Kriendler*, 111 Wn.2d at 837).

¹⁰ 111 Wn.2d at 835.

review. Further, *Hatfield v. Greco*¹¹ does not alter this conclusion.¹²

In short, the position that the trial court's decision is not appealable is itself contrary to law and should be rejected.¹³

2. This Court Reviews Issues Of Law, Including The Construction Of Constitutional And Statutory Provisions, De Novo.

Ms. Schaller further argues that, even if this Court reviews the trial court's decision, an unprecedented "arbitrary and capricious" standard of review should be applied to the trial court's constitutional and statutory construction.¹⁴ However, constitutional and statutory construction are issues of law this Court reviews de novo.¹⁵ Ms. Schaller cites *no* cases

¹¹ 87 Wn.2d 780, 557 P.2d 340 (1976).

¹² In *Hatfield*, this Court did not even consider whether it had the inherent authority to review the trial court's decision. The sole question in that case was a disputed issue of fact that the trial court decided after a trial. *Hatfield* is inapplicable to cases with no disputed facts that turn solely on issues of constitutional and statutory construction. The remaining cases cited by Ms. Schaller are in accord—they involve circumstances where either the appellant did not contend the appealed decision was "contrary to law" or this Court considered and rejected the claim that the relevant decision was "contrary to law." *Cnty. Care Coalition of Wash. v. Reed*, 165 Wn.2d 606, 618, 200 P.3d 701 (2009) (rejecting appellant's argument that Secretary of State had acted "contrary to law" because statute provided him discretion regarding the acts at issue); *Schrempp v. Munro*, 116 Wn.2d 929, 937-38, 809 P.2d 1381 (1991) (same); *Kreidler*, 111 Wn.2d at 837-838 (rejecting right to appeal ballot title decision where appellants simply disagreed with the title at issue and did not contend trial court's decision was contrary to law).

¹³ Ms. Schaller also argues that this Court should decline, on prudential grounds, to conduct a constitutional analysis of RCW 42.04.020. Schaller Br. at 19. The only cases cited in support of this proposition relate to pre-election, substantive challenges to *initiatives*, which are not permitted even before trial courts. In this case, the trial court plainly had the authority to consider this election challenge, and this Court just as plainly has the power to review the trial court's decision.

¹⁴ Schaller Br. at 19.

¹⁵ *State v. Gresham*, 173 Wn.2d 405, 419, 269 P.3d 207 (2012).

where this Court has delegated its role as the final arbiter of issues of law¹⁶ by subjecting them to anything other than de novo review.¹⁷ This Court should review the trial court's decision de novo.

B. Respondents Cannot Avoid Their Heavy Burden Of Proving RCW 42.04.020 Unconstitutional Beyond A Reasonable Doubt.

Ms. Schaller concedes that, to the extent RCW 42.04.020 purports to apply to Supreme Court Justices and Superior Court judges, her argument is that RCW 42.04.020 is unconstitutional.¹⁸ It is undisputed that a party challenging the constitutionality of a statute faces the “heavy burden” of proving unconstitutionality “beyond a reasonable doubt.”¹⁹

As a result, by Ms. Schaller's own reasoning, the only way she can avoid this “heavy burden” is to demonstrate, without any reference to *Gerberding* or the purported exclusivity of constitutional qualifications, that RCW 42.04.020 does not apply to Supreme Court Justices or Superior Court judges. Ms. Schaller advances three arguments in an effort to make this showing. All three arguments, however, fail.

¹⁶ *Stringer v. Black*, 503 U.S. 222, 223, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992) (holding that a state supreme court is “final authority” on the meaning of state law).

¹⁷ Further, even when a more deferential standard of review applies to a decision generally, courts still review a trial court's legal conclusions of law de novo. *Kelley v. Centennial Contractors Enters., Inc.*, 169 Wn.2d 381, 386, 236 P.3d 197 (2010) (holding that where trial court's decision is reviewed for abuse of discretion, the legal conclusions that decision is based upon are reviewed de novo); *Harrison v. Metropolitan Life Ins. Co.*, 417 F. Supp. 2d 424, 436 (S.D.N.Y. 2006) (“However, even under the arbitrary and capricious standard, questions of law are reviewed de novo.”).

¹⁸ Schaller. Br. at 34 (“As noted in *Gerberding*, a statute purporting to add qualifications to a constitutional office would violate the Constitution”)

¹⁹ *Sch. Dists. Alliance for Adequate Funding of Special Educ. v. State*, 170 Wn.2d 599, 605-06, 244 P.3d 1 (2010).

First, she contends that “[s]pecific statutes prevail over general ones when there is a conflict.”²⁰ Yet she fails to identify *any* statute concerning Supreme Court Justices or Superior Court judges that conflicts with RCW 42.04.020.²¹ *Flight Options LLC v. Department of Revenue*,²² the sole case cited in support of this argument is inapposite. In that case, this Court held that specific statutes holding nonowners liable for property taxes for certain types of property conflicted with, and prevailed over, general statutes stating that only owners are liable for property taxes.²³ There is no such conflict in this case.

Second, she cites *In re Bartz*²⁴ for the proposition that RCW 42.04.020 does not apply to the judiciary.²⁵ In *Bartz*, this Court held that Article III, Section 25 of Washington’s Constitution, which concerns “state officers,” does not apply to “judicial officers.”²⁶ But RCW 42.04.020 does not refer to “state officers,” it refers to “public officers,”

²⁰ Schaller Br. at 34.

²¹ Ms. Schaller does generally refer to Title 2 of the Revised Code. But she then immediately concedes that Title 2 contains no statutes concerning a residency requirement, which necessarily means there are no statutes that *conflict* with RCW 42.04.020’s residency requirements. Schaller Br. at 34. She also erroneously states that Title 42 is “the general chapter on state government.” Schaller Br. at 34. The title of Title 42 is actually “Public officers and agencies” and its expansive provisions apply to both state and local government.

²² 172 Wn.2d 487, 259 P.3d 234 (2011).

²³ 172 Wn.2d at 503-04.

²⁴ 47 Wn.2d 161, 287 P.2d 119 (1955).

²⁵ Schaller Br. at 34.

²⁶ 47 Wn.2d at 163-67. This Court was careful to clarify, however, that, due to Article XXVII, § 2 and territorial law, justices of the peace, the judicial officers at issue in that case, still had to be electors.

and both the Constitution and this Court have been very clear that “public officers” includes the judiciary.²⁷ Ms. Schaller simply misapprehends the holding of *Bartz*.

Third, Ms. Schaller relies upon the principle that, where possible, an ambiguous statute should be construed to avoid unconstitutionality.²⁸ But this principle requires, first, that a statute be ambiguous.²⁹ RCW 42.04.020 is not ambiguous—it applies to all elective public officers, which includes judges.³⁰ Second, this principle requires that a proposed construction would *actually be* unconstitutional. Ms. Schaller’s argument thus puts the cart before the horse—she cannot rely upon this principle without first demonstrating that applying RCW 42.04.020 to the judiciary would, in fact, be unconstitutional.

In short, the plain, unambiguous text of RCW 42.04.020 means

²⁷ Wash. Const. art. I, § 33 (“Every elective public officer of the state of Washington expect [except] judges of courts of record...”); Art. XXX “Compensation of Public Officers”, § 1 (“The compensation of all elective and appointive state, county, and municipal officers who do not fix their own compensation, including judges of courts of record and the justice courts...”); *City of Everett v. Johnson*, 37 Wn.2d 505, 508, 224 P.2d 617 (1950) (applying RCW 42 to judiciary); *see also In re Disciplinary Proceedings of Simmons*, 65 Wn.2d 88, 94, 395 P.2d 1013 (1964) (applying RCW 9.92.120 and 42.12.010, both of which concern public officers, to a judge); RCW 9A.04.110 (“[P]ublic officer’ means a person holding office under a city, county, or state government, or the federal government who performs a public function and in so doing is vested with the exercise of some sovereign power of government[.]”)

²⁸ Schaller Br. at 34.

²⁹ *George v. Day*, 69 Wn.2d 836, 841, 420 P.2d 677 (1966) (“If a legislative enactment can be given two interpretations, one rendering it constitutional and the other unconstitutional, we sustain the constitutionality of the act.”).

³⁰ *State v. Costich*, 152 Wn.2d 463, 470, 98 P.3d 795 (2004) (“If the language is unambiguous, we give effect to that language and that language alone because we presume the legislature says what it means and means what it says.”).

what it says: *All* elective public officers in Washington, including judges, must reside in the community they seek to serve.³¹ Ms. Schaller thus cannot escape the “heavy burden” of proving that RCW 42.04.020 is unconstitutional “beyond a reasonable doubt.”

C. A Plain Text Analysis Must Include Article XXVII, Section Two, Which Conclusively Demonstrates RCW 42.04.020’s Constitutionality.

1. Due To Article XXVII, Section Two, Statutes Traceable To Territorial Laws Have Unique “Constitutional Sanction And Approval.”

Although Ms. Schaller agrees that the starting point of the proper analysis is the plain text of the Constitution,³² she largely ignores Article XXVII, Section Two, which, like all provisions in the Constitution, is mandatory.³³ Instead she attempts to minimize its impact by arguing that it did nothing more than turn territorial laws into state statutes.³⁴

This argument ignores this Court’s statement in *Gerberding* that, due to Article XXVII, Section Two, “Territorial laws have a specific constitutional sanction and approval which subsequent state statutes do not

³¹ It must also be noted that RCW 42.04.020 is not the only statute that imposes a residency requirement upon the judiciary. *See also* RCW 29A.20.021(3) (“The name of a candidate for an office shall not appear on a ballot for that office unless ... the candidate is, at the time the candidate’s declaration of candidacy is filed, properly registered to vote in the geographic area represented by that office.”). Under Wash. Const. art. IV, § 5, superior court judges are elected by the qualified voters “of the county.”

³² Schaller Br. at 20-21.

³³ Wash. Const. art I, § 29.

³⁴ Schaller Br. at 36.

have.”³⁵ This Court then relied upon this principle to hold that, while the Legislature lacked the authority *after* the Constitution was enacted to add a requirement that the Attorney General be an attorney, the statute creating that requirement was valid because it was passed *before* the Constitution was enacted.³⁶

At least 38 states have provisions in their constitution similar to Article XXVII, Section Two,³⁷ and cases from Washington and other states concur with *Gerberding*’s result: Article XXVII, Section Two has the effect of validating statutes traced to pre-Constitution laws even when the Legislature would have been powerless to pass such statutes post-Constitution.³⁸

The exception to this is where the statute at issue is “repugnant” to the Constitution. This Court has been clear that “repugnant” is a high

³⁵ *Gerberding v. Munro*, 134 Wn.2d 188, 209, 949 P.2d 1366 (1998) (quoting *State v. Estill*, 55 Wn.2d 576, 582, 349 P.2d 210 (1960) (Mallery, J., concurring)).

³⁶ 134 Wn.2d at 208-09.

³⁷ Notably, California does not have such a provision, which explains the result noted by Ms. Schaller at page 21 n.13 of her brief. There is also no indication that California had a statute akin to RCW 42.04.020 that applied to all elective public officers. Finally, it must be noted that if California does not require county residency for its trial court judges (California’s Supreme Court has not yet reached the issue), it would appear to be the *only* state in the United States that does not have such a requirement for elected trial court judges.

³⁸ See, e.g., *Tacoma Land Co. v. Bd. of County Comm’rs of Pierce County*, 1 Wash. 482 (1890) (validating special legislation passed before constitutional prohibition against such legislation); *Butler v. City of Lewiston*, 11 Idaho 393 (1905) (same); *City of Covington v. Dist. of Highlands*, 68 S.W. 669 (Ky. App. 1902) (same); *People ex rel. Dean v. Bd. of County Comm’rs of Grand County*, 6 Colo. 202, 204-05 (1882) (same).

standard. In *Town of Tekoa v. Reilly*,³⁹ a case Ms. Schaller fails to address, this Court held that a longstanding poll tax was not “repugnant” to the Constitution because any purported disapproval of that tax in the Constitution was insufficiently clear.⁴⁰

Other jurisdictions concur with the approach in *Tekoa*, and have held state constitutions invalidate prior territorial laws only where there is either (a) an express declaration of intention by the framers to repeal the statute at issue, or (b) an “absolute” or “unavoidable” inconsistency between the statute and the Constitution.⁴¹

2. Article XXVII, Section Two Ratified RCW 42.04.020, Which Is Wholly Consistent With The Constitution.

The question thus becomes: Does the Constitution contain either an express repeal of, or an absolute inconsistency with, RCW 42.04.020? As is readily apparent, the answer is “No.” There is no language in the

³⁹ 47 Wash. 202, 206-07, 91 P. 769 (1907).

⁴⁰ This Court stated, “Had the framers of the Constitution been dissatisfied with the existing order of things, would we not expect to find some more satisfactory evidence of their discontent?” 47 Wash. at 208 (holding poll tax to be constitutional under Article XXVII, Section Two and contrasting Ohio’s constitution, which stated, “‘That the levying taxes by the poll is grievous and oppressive therefore the Legislature shall never levy a poll tax for county or state purposes.’ No such prohibition as this is contained in the Constitution of this state.” (quotation marks omitted)).

⁴¹ *People v. Young*, 18 A.D. 162, 166 (N.Y. 1897) (“If it had intended to abrogate the power of the Governor to call extraordinary terms of the court, it surely would have done so by express words. Repeals by implication are not favored and are never allowed except where inconsistency and repugnancy are plain and unavoidable.”); *Wright v. Woods’ Adm’r*, 27 S.W. 979, 980 (Ky. App. 1894) (“There being no express declaration of intention by those who framed the constitution to thereby repeal section 3, c. 57, Gen. St., section 241 cannot, according to a well-settled rule of construction, be regarded as having so operated, unless there is absolute inconsistency between the two.”).

Constitution referencing RCW 42.04.020, its predecessors, or residency requirements for judges that would expressly repeal RCW 42.04.020.

Nor is there any absolute or unavoidable inconsistency between RCW 42.04.020 and the Constitution. No one would argue that there is any absolute or unavoidable inconsistency between Sections 3(a) (requiring judges to be under 75 years of age) and 17 (requiring judges to be attorneys) of Article IV. They simply both apply. Similarly, there is no inconsistency between RCW 42.04.020 and these sections of the Constitution. They simply all apply. Supreme Court Justices and Superior Court judges must be attorneys, under 75 years of age, and qualified electors of the community they seek to serve.

Ms. Schaller disagrees, and argues at length that RCW 42.04.020 is inconsistent because the Constitution lacks an express residency requirement.⁴² The only way RCW 42.04.020 would be absolutely or unavoidably inconsistent with the Constitution would be if it stated something such as, “Judges shall not be required to be qualified electors.”

⁴² She also misstates Ms. Clarke’s argument throughout her brief by referencing territorial residency requirements for probate judges. While there was a specific statute establishing a residency requirement for probate judges, which is additional evidence of RCW 42.04.020’s continued validity, that is not the primary statute upon which Ms. Clarke relies. Rather, she principally relies upon the territorial statute that established a residency requirement for *all* public offices, Code 1881 § 3050, which the Code Reviser traces RCW 42.04.020’s origins to: “[2012 c 117 § 94; 1919 c 139 § 1; RRS § 9929. FORMER PART OF SECTION: Code 1881 § 3050 codified as RCW 42.04.021.]”

But there is no such language in the Constitution.⁴³

3. Article XXVII, Section Two Obviates The Need For Any Further Analysis.

The analysis in this case should stop here. The plain text of the Constitution, including Article XXVII, Section Two, and RCW 42.04.020, is unambiguous: RCW 42.04.020 was neither expressly repealed by, nor is it absolutely or unavoidably inconsistent with, other sections of the Constitution. Given this lack of ambiguity, no further analysis is appropriate.⁴⁴ As a result, RCW 42.04.020 is constitutional, Ms. Schaller is ineligible, and the trial court should be reversed.

D. Considerations Beyond The Plain Text Of The Law Prove The Framers Did Not Intend To Prohibit Citizenship And Residency Requirements.

Although Ms. Schaller's brief is almost entirely silent on this point, it is undisputed that the keystone principle of constitutional construction is to give effect to the intent of the framers of the Constitution.⁴⁵ Should this Court move beyond the plain text of the law in this case, which, as

⁴³ Ms. Schaller makes numerous additional arguments in her brief, but none arise out of the plain text of Washington's constitutional or statutory provisions concerning the qualifications for Supreme Court Justices or Superior Court judges, and thus are not properly considered at this stage. Instead, they are discussed later in this brief with other considerations that arise beyond the plain text of the relevant laws.

⁴⁴ *Cerrillo v. Esparanza*, 158 Wn.2d 194, 201, 142 P.3d 155 (2006); *State ex rel. Evans v. Bhd. Of Friends*, 41 Wn.2d 133, 145, 247 P.2d 787 (1952) ("It is a cardinal principle of judicial review and interpretation that unambiguous statutes and constitutional provisions are not subject to interpretation and construction.").

⁴⁵ *Boeing Aircraft Co. v. Reconstruction Fin. Corp.*, 25 Wn.2d 652, 659, 171 P.2d 838 (1946).

indicated above, it should not do, it would become even clearer that Ms. Schaller has failed to prove beyond a reasonable doubt that the framers intended to prohibit citizenship and residency requirements.

1. Most Of The Facts Demonstrating The Framers' Intent To Not Prohibit Residency And Citizenship Requirements Are Undisputed.

Ms. Schaller fails to even mention, much less dispute, most of the facts cited by Ms. Clarke that prove the framers simply could not have intended to prohibit residency and citizenship requirements for Supreme Court and Superior Court justices. These include:

- In 1889, Washington law required all elective officials, including judges, to reside in the communities they served.⁴⁶
- In 1889, non-citizens were not even permitted to own land or be members of the bar in Washington.⁴⁷
- Given the modes of transportation available in 1889, the framers would not have considered non-resident judges to be a viable option.⁴⁸
- There are numerous compelling policy reasons that would have motivated the framers to retain citizenship and residency requirements for judges.⁴⁹

⁴⁶ Brief of Appellant Marie Clarke (“Clarke Br.”) at 21.

⁴⁷ *Id.*

⁴⁸ Clarke Br. at 22.

⁴⁹ Clarke Br. at 9-11. Ms. Schaller does not deny any of these compelling policies. Instead, she urges the Court, without citing any authorities, to ignore them. She further presents her own self-serving policy for prohibiting citizenship and residency requirements—to allow for an expansive candidate pool without regard to residency purportedly to allow the best qualified candidates to serve as judges, Schaller Br. at 26—but cites no authority supporting her argument.

- RCW 42.04.020 was reenacted in 1919 and 2012 without any changes to exclude the Supreme Court or Superior Courts from its scope.⁵⁰
- There is no evidence that any non-resident has ever been elected, or even *attempted* to be elected, to Washington’s Supreme Court or Superior Courts.⁵¹

These considerations alone are more than sufficient to prevent Ms. Schaller from proving beyond a reasonable doubt that the framers intended to prohibit residency and citizenship requirements.

2. The Absurdity Of The Consequences Of Respondents’ Proposed Construction Is Sufficient To Demonstrate RCW 42.04.020’s Constitutionality.

It is undisputed that this Court “avoid[s] constructions that yield unlikely, absurd or strained consequences.”⁵² Nor is it disputed that the trial court’s decision, in addition to voiding a county residency requirement for Superior Court judges, necessarily results in both non-United States citizens and non-Washington residents being eligible to serve on the Supreme Court and Superior Courts.⁵³ However, the only

⁵⁰ Clarke Br. at 25.

⁵¹ *Id.*

⁵² *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002).

⁵³ Ms. Schaller improperly seeks to distract this Court from this issue by personally attacking Ms. Clarke as “xenophobic” and “anti-democratic.” Schaller Br. at 26-27. It is clear that, “When voters have good information, they make good decisions.” *No Campaign, But Court Candidate Gets 300k Votes*, SEATTLE TIMES, Aug. 9, 2012. Unfortunately, given the impact of budget cuts on voter pamphlets, limitations on statements in those pamphlets, and competing demands for the attention of voters, it is not clear that voters will always have good information. Voters understandably rely, therefore, on election officials to ensure that only the names of eligible candidates are placed on the ballot. In this election, not only did this not occur but, for those voters who

time this Court construed Article IV, Section 17—the provision Ms. Schaller hinges her argument on—this Court emphasized the importance of avoiding absurd results with respect to qualifications for the judiciary.

In *State ex rel. Willis v. Monfort*,⁵⁴ the question was whether an attorney is eligible to serve as a Superior Court judge while suspended from the practice of law. Based on the plain language of Article IV, Section 17, a suspended attorney *would* be eligible to serve—the text only requires that an individual have been admitted to the bar in the past. Nonetheless, this Court held that such a result would be absurd and, in such circumstances, the plain text was not controlling.⁵⁵ Thus, the Court held that an individual must be presently practicing law to be eligible.⁵⁶

The constitutionality of RCW 42.04.020 presents a much clearer case. Unlike *Willis*, avoiding an absurd result here does not require rewriting the Constitution. It is simply the result mandated by the proper operation of Article XXVII, Section Two.

relied solely on the Thurston County voter pamphlet, they saw a misleading Thurston County address, which was not identified as a campaign address, listed for Ms. Schaller.

⁵⁴ 93 Wash. 4, 159 P. 889 (1916).

⁵⁵ 93 Wash. at 5 (“It is, no doubt, correct to say that a constitutional provision should be given a strict construction, especially where its terms are clear; but the rule is that the reason and intention of the lawgiver will control the strict letter of the law when the latter would lead to palpable injustice, contradiction, and absurdity.”).

⁵⁶ In reaching this decision, the Court also implied that being a qualified elector is required to sit on the Supreme or Superior Courts. *Willis*, 93 Wash. at 4-5 (“It appears from the petition that the relator *is a citizen of the United States and of this state and a qualified voter in Lewis county*; that he is and was at all times stated in the application duly admitted to practice law in the courts of record of this state[.]” (emphasis added)).

3. The History Of The Constitutional Convention Confirms That The Framers Did Not Intend To Prohibit Residency Requirements.

Ms. Schaller repeatedly refers to the fact that an amendment proposing a “qualified elector” requirement for Supreme Court Justices and Superior Court judges was rejected at Washington’s Constitutional Convention. But she fails to address, much less dispute, that (a) this Court declines to assign *any* weight to rejected amendments because doing so would amount to “pure speculation,”⁵⁷ or that (b) the debate concerning the rejection of this amendment indicates a consensus that residency requirements should be *retained*.⁵⁸ Thus, to the extent this fact is at all relevant, it supports the constitutionality of RCW 42.040.020.

4. Gerberding’s Treatment Of Qualifications For Attorney General Cannot Be Distinguished.

The constitutionality of RCW 42.04.020 is directly supported by this Court’s treatment in *Gerberding* of the qualifications for Attorney General. Ms. Schaller seeks to distinguish *Gerberding* in three ways.

First, she points to the fact that, unlike residency requirements for judges, the requirement that the Attorney General be an attorney was not

⁵⁷ *State v. Cronin*, 130 Wn.2d 392, 400, 923 P.2d 694 (1996); see also *City of Medina v. Primm*, 160 Wn.2d 268, 280, 157 P.3d 379 (2007).

⁵⁸ *Taking A Rest*, SPOKANE FALLS REVIEW, July 21, 1889, at 1, reprinted in WASHINGTON STATE CONSTITUTIONAL CONVENTION 1889: CONTEMPORARY NEWSPAPER ARTICLES 3-31 (Marian Gould Gallagher Law Library 1998).

rejected at the Constitutional Convention.⁵⁹ But this Court does not assign any weight to rejected amendments. Further, Ms. Schaller fails to even address the Spokane Falls Review newspaper article showing this rejection was not due to any desire to prohibit residency requirements.

Second, Ms. Schaller contends that the relevant discussion in *Gerberding* was unnecessary because the requirement that the Attorney General be an attorney is implicit.⁶⁰ She claims that if the Attorney General were not an attorney, he or she would be guilty of the unauthorized practice of law. Yet this ignores the constitutional protection afforded the Attorney General if the Constitution does not mandate bar membership. Further, this was not the basis for this Court's conclusion in *Gerberding*. Rather, this Court held that Article XXVII, Section Two, controlled and sanctioned the statutory requirement that the Attorney General be an attorney.

Third, Ms. Schaller points to the fact that "Superior Courts" did not exist during territorial times.⁶¹ As noted by this Court in *Orrock v. South Moran Township*,⁶² however, Article XXVII, Section Two gives effect to statutes even when new circumstances arise that did not exist during territorial times. Ms. Schaller seeks to distinguish *Orrock* because,

⁵⁹ Schaller Br. at 41.

⁶⁰ Schaller Br. at 41-42.

⁶¹ Schaller Br. at 42-43.

⁶² 97 Wash. 144, 165 P. 1096 (1917).

“In *Orrock*, there was nothing like article IV, Sec. 17 that specifically addressed in the Constitution the qualifications of the newly created position.”⁶³ Yet she fails to explain why this is relevant. Further, this is incorrect—the Constitution *did* contain a provision addressing the waiver of sovereign immunity, which was the issue in *Orrock*.⁶⁴

In short, *Gerberding*’s treatment of the Attorney General is on point and strongly supports the constitutionality of RCW 42.04.020.

5. This Court’s Precedent Is Wholly Consistent With, And Fully Supports, RCW 42.04.020’s Constitutionality.

Ms. Schaller is patently incorrect when she states that “this Court would effectively have to overrule *Bartz*, *Nielsen*, and *Quick-Ruben*, and *Gerberding*” to uphold RCW 42.04.020.⁶⁵ Her attorney conceded before the trial court that any allegedly relevant language in these cases is *dicta*.⁶⁶ Further, and more fundamentally, *none* of these four cases discussed the impact of territorial laws on the constitutionality of RCW 42.04.020.

In *Gerberding*, this Court did not even discuss residency requirements for the judiciary, and expressly stated that qualifications that can be traced to territorial laws *remain valid*.⁶⁷ In *Quick-Ruben*, this Court *expressly disclaimed* that it was opining on the validity of residency

⁶³ Schaller Br. at 39-40.

⁶⁴ Wash Const. art. 2, § 26.

⁶⁵ Schaller Br. at 35.

⁶⁶ RP 30.

⁶⁷ 134 Wn.2d at 208-09.

requirements for the judiciary.⁶⁸ In *Nielsen*, this Court only decided the legality of excluding non-citizens from membership in the bar. The possibility that noncitizens would be permitted to serve as judges was referenced but this Court spent little time on this issue, deeming it irrelevant to its final decision.⁶⁹

Finally, in *Bartz*, a case that only decided the validity of requirements that justices of the peace be attorneys, the issue of residency requirements for judges was raised by a party to explain the potential impact validating such requirements would have. Rather than ignoring this argument, this Court stated that (a) the framers of the Constitution would not have intended for non-citizens to be permitted to be judges, and (b) there continued to be residency and citizenship requirements for justices of the peace due to Article XXVII, Section Two.⁷⁰

In short, RCW 42.04.020's constitutionality is *supported* by these cases, and none are required to be overruled.

6. The Constitution's Treatment Of Qualifications For Non-Judicial Officers Did Not Repeal Residency Requirements For The Judiciary.

Ms. Schaller also points to the fact that the Constitution requires state officers and legislators, but not judges, to be qualified electors. Yet,

⁶⁸ 136 Wn.2d at 901-02.

⁶⁹ *Nielsen v. Washington State Bar Ass'n*, 90 Wn.2d 818, 585 P.2d 1191 (1978).

⁷⁰ *Bartz*, 47 Wn.2d at 167.

unlike judges, Washington had no prior experience electing state officers—they were appointed, not popularly elected, during territorial times.⁷¹ Moreover, the law governing residency requirements for legislators during territorial times, The Charter Act, was no longer going to be effective once the Constitution was enacted. Thus, there were good reasons for the framers to emphasize these requirements in the relevant articles, which were drafted by different committees than Article IV. Further, as previously discussed, there are numerous apparent reasons why such a requirement was not included in Article IV—none of which demonstrate that the framers intended, beyond a reasonable doubt, to prohibit such requirements.⁷²

Finally, Ms. Schaller's argument is also contrary to *Gerberding's* approval of statutory qualifications for the Attorney General. Under Ms. Schaller's analysis, the Legislature could not require bar membership for the Attorney General because this qualification was expressly stated in the Constitution for the judiciary but not for the Attorney General. But this

⁷¹ This includes the Attorney General (Laws of 1887-88, §2, p. 7), Secretary of State (The Organic Act), Auditor (Laws of 1854, §1, p. 409), Treasurer (Laws of 1854, §1, p. 413), and Superintendent of Common Schools (Laws of 1873, §1, p. 419). The remaining executive officers do not appear to have existed during territorial times. Further, many, if not most, of the Territory's governors were out-of-staters who appear to have not even visited Washington prior to holding office. *See, e.g.*, List of Governors of Washington, at http://en.wikipedia.org/wiki/List_of_Governors_of_Washington.

⁷² This lack of experience electing executive officers and the elimination of the existing statutory basis for residency requirements for legislators also explains why the framers may not have been confident that these provisions were redundant.

Court in *Gerberding* held just the opposite.

7. Any Public Policy Concerning Eligibility Does Not Change This Result.

Ms. Schaller also urges this Court to declare RCW 42.04.020 unconstitutional due to the public policy in favor of eligibility to public office.⁷³ Although this Court has applied this public policy in close calls—such as where a candidate’s residence is actually bisected by an election district boundary⁷⁴—this Court has not used it to declare a statute unconstitutional when doing so is otherwise contrary to the law. In fact, this Court has expressly held that (1) even in cases concerning eligibility for public office, litigants are required to prove statutes unconstitutional beyond a reasonable doubt,⁷⁵ and (2) a public policy in favor of eligibility may not be used to rewrite the law.⁷⁶

8. None Of Respondents’ Remaining Arguments Invalidate RCW 42.04.020.

Several other assorted arguments are advanced in an effort to have RCW 42.04.020 declared unconstitutional. None, however, come even remotely close to proving beyond a reasonable doubt that the framers intended to prohibit citizenship and residency requirements for judges.

⁷³ Schaller Br. at 17-18.

⁷⁴ See, e.g., *Dumas v. Gagner*, 137 Wn.2d 268, 971 P.2d 17 (1999).

⁷⁵ *Gerberding*, 134 Wn.2d at 196; *Bartz*, 47 Wn.2d at 163.

⁷⁶ *Oceanographic Comm’n v. O’Brien*, 74 Wn.2d 904, 914, 447 P.2d 707 (1968).

Ms. Schaller suggests the existence of multi-county judicial districts presents a problem, but judges are simply required to reside in the district (i.e., one of the counties) they serve. She also points to the fact that non-resident judges are permitted to serve as visiting judges, but constitutional provisions make clear that residency and jurisdictional issues are not obstacles in these limited circumstances.⁷⁷

She also argues that, based on the Constitution's treatment of justices of the peace and inferior courts, the framers knew how to delegate responsibility to the Legislature for setting qualifications for judges but did not do so for the Supreme or Superior Courts.⁷⁸ But the Constitution simply delegates *everything* about these judicial positions, including their existence, to the Legislature.⁷⁹ And this argument, like so many others, ignores Art. XXVII, Section Two.

Finally, Ms. Schaller argues that Washington was dissatisfied with

⁷⁷ Ms. Schaller also contends that other case law and statutes regarding visiting judges are not decisive in this case, Schaller Br. at 24-25, but she does not deny that they are consistent with an assumption that residency requirements exist for the judiciary. Further, she says that Art IV, § 5 does not condition a Governor's appointment on residency, but the Governor plainly may only appoint *eligible* individuals and it is undisputed that historically this has included appointments of only those who meet citizenship, state and county residency requirements.

⁷⁸ Schaller Br. at 23.

⁷⁹ Wash. Const. art. IV, § 10 ("The legislature shall determine the number of justices of the peace to be elected and shall prescribe by law the powers, duties and jurisdiction of justices of the peace[.]"); Wash. Const. art. IV, § 12 ("The legislature shall prescribe by law the jurisdiction and powers of any of the inferior courts which may be established in pursuance of this Constitution.").

its judiciary and wanted to make a change.⁸⁰ That may very well have been the case with respect to other aspects of the judiciary, but there is *no evidence* that Washington was dissatisfied with, or desired to change, its long-standing residency requirements for judges.⁸¹

E. Ms. Schaller Failed To Cross-Appeal The Trial Court's Appropriate Exclusion Of Irrelevant Information.

Ms. Schaller asks this Court to reverse the trial court's decision to exclude evidence regarding her background and personal circumstances.⁸² Yet she failed to cross-appeal or assign error to this ruling.⁸³ Further, the trial court did not abuse its discretion in excluding this irrelevant evidence.⁸⁴ Given that this case turns solely on the construction of Washington's Constitution, alleged facts regarding Ms. Schaller are, in the most fundamental sense of the word, irrelevant.⁸⁵ Accordingly, the Court

⁸⁰ Schaller Br. at 38.

⁸¹ Ms. Schaller also points to residency requirements for judges in the Idaho and Montana Constitutions, Schaller Br. at 29 n.22, but she identifies no authority that these other constitutions, drafted by different individuals, have any relevance to the intent of the framers of *Washington's* Constitution.

⁸² Schaller Br. at 34-35.

⁸³ RAP 5.1(d) ("A party seeking cross review must file a notice of appeal or a notice for discretionary review within the time allowed by rule 5.2(f)"); RAP 10.3(a)(4) (requiring assignments of error). *See also Tellevik v. Real Property*, 120 Wn.2d 68, 89, 838 P.2d 111 (1992) ("We decline to rule on the participation issue because defendants failed to cross-appeal this ruling.").

⁸⁴ *State ex rel. Banker v. Clausen*, 142 Wash. 450, 454, 253 P. 805 (1927) ("[A] court should not allow the facts of the particular case to influence its decision on a question of constitutional law, nor should a statute be construed as constitutional in some cases and unconstitutional in others involving like circumstances and conditions." (quotation marks omitted)).

⁸⁵ The three cases Ms. Schaller cites regarding the admissibility of "background information" are inapplicable. All were criminal cases involving objections other than relevance and those cases turned on issues of fact, not law. *See State v. Brown*, 132

should disregard all references to such facts, including pages 3 through 8 and page 26 of Ms. Schaller's brief.⁸⁶

F. The Only Appropriate Remedy Is To Declare The Position Vacant.

In the event that Ms. Schaller receives the most votes in the general election but is declared by this Court to be ineligible, the only remedy is to declare the position at issue vacant, thus allowing the Governor to fill it. "When the candidate receiving the highest vote is ineligible, that cannot make his opponent, who has been rejected by them, the choice of the people. ... [A] candidate who receives fewer votes than are received by some other candidate cannot be said under *any circumstances* to be elected."⁸⁷ Thus, any remedy declaring Mr. Johnson to be the winner would be contrary to the law.

Wn.2d 529, 570-72, 940 P.2d 546 (1997) (discussing evidence of other misconduct under ER 404(b)); *State v. Lillard*, 122 Wn. App. 422, 437, 93 P.3d 969 (2004) (discussing hearsay objection); *State v. Tharp*, 27 Wn. App. 198, 204, 616 P.2d 693 (1980) (discussing evidence of other criminal activity).

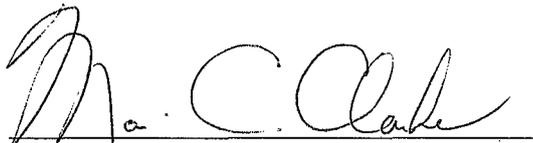
⁸⁶ Ms. Schaller's request for sanctions against Ms. Clarke is wholly without merit. There is no evidence that this appeal has been perfected for any reason other than to have this Court resolve an important question fundamental to Washington's judiciary. Also, as indicated in her Opening Brief and herein, Ms. Clarke's legal arguments are anything but frivolous.

⁸⁷ *People ex rel. Duncan v. Beach*, 294 N.C. 713, 242 S.E.2d 796 (1978) (emphasis added), cited with approval by *Quick-Ruben v. Verharen*, 136 Wn.2d 888, 899, 969 P.2d 64 (1998) ("Having thus been defeated in the election, the petitioner had no legal right to assume office by virtue of the election."). Mr. Johnson seeks to distinguish his case from *Quick-Ruben* on the basis that he filed a pre-general election challenge, but his remedy before the trial court in this case would have been to have Ms. Schaller replaced by the third place candidate, not to simply win the election after having come in second in the primary.

III. CONCLUSION

Washington law has consistently required, for more than 157 years, that all elected officials have the same qualifications as those who vote for them. Consequently, by operation of Article XXVII, Section Two, this Court should uphold as constitutional RCW 42.04.020's county residency, state residency and United States citizenship requirements for Supreme Court Justices and Superior Court judges.

RESPECTFULLY SUBMITTED this 8th day of October, 2012.

A handwritten signature in cursive script, appearing to read "Marie C. Clarke", written over a horizontal line.

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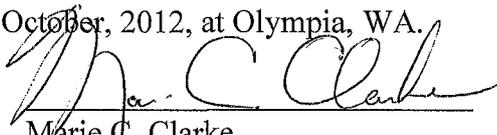
PROOF OF SERVICE

I hereby certify that on October 8, 2012, the original Reply Brief of Appellant Marie Clarke was filed with the Clerk of the Supreme Court and, due to the expedited briefing schedule and agreement of the parties, a copy was served via email on October 8, 2012, to the following parties or counsel of record:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 8th day of October, 2012, at Olympia, WA.


Marie C. Clarke

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