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No. 87823-4

SUPREME COURT
OF THE STATE OF WASHINGTON

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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; CHRISTINE SCHALLER-
KRADJAN, Candidate for Thurston County Superior Court, Position 2,

Respondents.

ANSWER OF RESPONDENT SCHALLER TO
STATE'S AMICUS BRIEF

 ORIGINAL

Philip A. Talmadge #6937
Talmadge/Fitzpatrick
Attorney for Respondent
Christine Schaller
18010 Southcenter Pkwy.
Tukwila, WA 98188
(206) 574-6661
phil@tal-fitzlaw.com

Shawn Newman #14193
Attorney at Law, Inc., P.S.
Attorney for Respondent
Christine Schaller
2507 Crestline Dr. NW
Olympia, WA 98502
(360) 866-2322
shawn@newmanlaw.us

Attorneys for Respondent Schaller

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A. INTRODUCTION

The State of Washington filed an amicus curiae brief in this case designed to uphold the general statutes pertaining to eligibility for public office. These statutes are inapplicable here. However, the State's brief misstates the applicable standard of review for this case, largely ignores the applicable constitutional provision on the qualifications of superior court judges and Justices of this Court, article IV, § 17, and offers an argument that provides no principled limitation on the ability of the Legislature or the people to impose added statutory qualifications for service as superior court judges and Justices despite this Court's clear precedents that forbid the addition of qualifications by statute where the Constitution specifies the qualifications for office holders. This Court should reject the State's unsupported, and dangerous, arguments.

The reasons this Court should affirm the trial court's well-reasoned decision are straightforward:

- The Constitution has spoken to the qualifications for superior court judges and Justices of this Court; by the plain text of article IV, § 17, there is no residency requirement for such judicial officers;¹

¹ The unambiguous fact here is that the plain text of IV, § 17 contains no residency requirements for judges and Justices. The plain constitutional text controls. *Wash. Water Jet Workers Ass'n v. Yarbrough*, 151 Wn.2d 470, 477, 90 P.3d 42 (2004). The constitutional qualifications are *exclusive*. *Gerberding v. Munro*, 134 Wn.2d 188, 201-10, 949 P.2d 1366 (1998). While courts should interpret the Constitution to avoid absurd results, *State ex rel. Willis v. Munfort*, 93 Wash. 4, 5, 159 Pac. 889 (1916) (judicial candidate who had been disbarred was ineligible under article IV, § 17), courts

- The 1889 Convention specifically *rejected* residency requirements for judicial officers, while adopting them for legislators and executive officers;
- This Court has *three times* recognized that admission to the bar is the *sole* qualification for superior court judges and Justices;²
- As superior court judges and Justices are constitutional officers, the constitutional prescription of qualifications is exclusive;
- Territorial era statutes relating to residency requirements for probate judges are inapplicable and general statutes establishing residency requirements for public officers are inapplicable to judicial officers, as they are repugnant to the exclusive qualifications set in article IV, § 17 for judges and Justices.³

are not free to disregard the plain text of the Constitution or to add to the text of the Constitution in the guise of interpreting it.

² Appellant Johnson asserts not only that this Court was wrong in arriving at that conclusion but so was the trial court here; moreover, he argues the Thurston County Prosecutor's Office was also wrong in its opinion rendered 26 years ago as were the sitting and retired judges who endorsed Schaller. Johnson reply br. at 9. The very fact that experienced prosecuting attorneys like Patrick Sutherland and Jon Tunheim rendered those opinions or well-respected retired jurists like Gerry Alexander, Daniel Berschauer, Richard Strophy, Robert Doran, Paula Casey, Christine Pomeroy, and Richard Hicks, and current jurist Thomas McPhee at least implicitly agreed with this interpretation of article IV, § 17 by endorsing Schaller certainly demonstrates the trial court position here was far from "arbitrary" or "capricious."

³ Appellant Clarke contends that in order for a territorial statute to be repugnant to the Constitution, such repugnancy must be "clear." Clarke br. at 17, 20. Her only support for this position is a poll tax case. *Town of Tekoa v. Reilly*, 47 Wash. 202, 91 Pac. 769 (1907). Poll taxes were often used to prevent minorities from voting and are now banned by the 24th Amendment to the United States Constitution. In *Town of Tekoa*, this Court upheld an ordinance establishing a poll tax for roads of two dollars on every male resident between the ages of 21 and 50, and exempting volunteer firefighters. The likelihood of such a tax surviving a Uniformity Clause (article VII, § 1) challenge in light of *Covell v. City of Seattle*, 127 Wn.2d 874, 905 P.2d 324 (1995), or an Equal Rights Amendment (article XXXI, § 1) / equal protection challenge in light of the rather obvious age and gender discrimination features of the ordinance is slight.

Commissioner Christine Schaller is eligible for Position 2 on the Thurston County Superior Court.

B. ARGUMENT

(1) Review Under This Court's Inherent Power

The State acknowledges that the appellants have no right of review of the trial court's decision here under the language of RCW 29A.68.011 and this Court's interpretation of it in *Hatfield v. Greco*, 87 Wn.2d 780, 557 P.2d 340 (1976). Amicus Br. at 3-5. The State further concedes that if review is to occur in this case, it is under this Court's inherent review power described in *Kreidler v. Eikenberry*, 111 Wn.2d 828, 766 P.2d 439 (1989), where this Court limited any review to whether "the trial court's decision is arbitrary, capricious, or contrary to law." *Id.* at 837. Amicus Br. at 5-6. But the State's discussion of the *Kreidler* test effectively collapses the "arbitrary/capricious" standard into the "contrary to law" standard, effectively rendering this situation nothing more than the routine appellate review the *Hatfield* court said was unavailable to appellants.

In any event, the standard for article XXVII, § 2 is whether the territorial statute is repugnant to, or inconsistent with, the Constitution. Where the Constitution in article IV, § 17 imposed no residency requirement for judges and Justices, a residency requirement is obviously inconsistent with the exclusive qualifications set in the Constitution.

This Court in *Kreidler* stated that the Court's inherent review power was not meant to be routinely exercised. Rather, it is confined to situations where the decision of the trial court was a "willful and unreasoning action, without consideration and in disregard of the facts or circumstances." *Id.* (quoting *Equitable Shipyards, Inc. v. State*, 93 Wn.2d 465, 474, 611 P.2d 396 (1980)). Moreover, as this Court further noted in *Saldin Securities, Inc. v. Snohomish County*, 134 Wn.2d 288, 294, 949 P.2d 370 (1998), there must be no other avenue of appeal available.

Nothing in this case indicates the trial court's decision met the test under *Kreidler*, a test reinforced by this Court in *Schrempp v. Munro*, 116 Wn.2d 929, 809 P.2d 1381 (1991) and more recently in *Community Care Coalition of Wash. v. Reed*, 165 Wn.2d 606, 200 P.3d 701 (2009). Moreover, the appellants have other avenues of appeal available to them. *See* Br. of Resp't at 15 n.7. Appellants have no right of appeal under RCW 29A.68.011. Any review by this Court under its inherent review power is narrow in scope. The appellants must demonstrate that the trial court's well-reasoned decision somehow was arbitrary or capricious.

(2) The State Ignores Article IV, § 17

The State's amicus brief is virtually silent on article IV, § 17, the constitutional provision that actually specifies the qualifications for superior court judges. *Nowhere* in article IV, § 17 is there any residency

requirement for a superior court judge.⁴ Similarly, Title 2 of the RCW, the Chapter of the Code addressing the judiciary, is *silent* on residency requirements for superior court judges and Justices.

To support its contention that RCW 42.04.020, a general statute relating to the qualifications for officials, controls, the State offers an argument that *misrepresents* the holding in *Gerberding*, effectively overruling it. It also *misrepresents* what occurred at the 1889 Constitutional Convention.

First, the State asserts that *Gerberding's* holding that neither the Legislature nor the people by statute may impose added qualifications for a constitutional officer is based only on the presumption in favor of eligibility for public office. Amicus Br. at 13. The State then claims that this Court's seminal case on the eligibility presumption, *State ex rel. Weston v. Schragg*, 158 Wash. 74, 291 Pac. 321 (1930), limits this presumption to offices for which the person is entitled to vote, citing an 1861 Wisconsin case and 19th Century treatises. The State actually has the audacity to assert that this is a "long standing principle in our state." Amicus Br. at 13-17. This elaborate construct, far from being a "long-

⁴ The State, like appellants, have no answer to the fact that article IV, § 17 is based on a similarly worded California constitutional provision that has been interpreted just as the trial court interpreted article IV, § 17. Br. of Resp't at 21 n.13. Such interpretations of analogous sister state constitutional provisions are significant. *Wash. Water Jet Workers Ass'n*, 151 Wn.2d at 493-501.

standing" principle of Washington law, is an invention of the amicus brief's authors.⁵

Nowhere does *Schragg* adopt the principle that the State espouses.

Rather, this Court articulated the presumption in this fashion:

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. It must follow from these considerations that eligibility to an office in the state is to be presumed rather than to be denied, and must further follow that any doubt as to the eligibility of any person to hold an office must be resolved against the doubt.

Id. at 78. This is an interpretative principle. Whenever there is a question about a candidate's eligibility, all doubts are resolved in favor of eligibility.

More critically, *Gerberding* did not rely on the eligibility presumption as the basis for its holding. This Court rested its decision on the earlier decision of *In re Bartz*, 47 Wn.2d 161, 163-64, 287 P.2d 119 (1955):

⁵ This "long standing principle" is contradicted by numerous obvious exceptions to it peppered throughout the very statutes upon which the State and appellants rely. Members of the United States House of Representatives need not be residents of the districts from which they are elected. RCW 29A.20.021(4). Municipal court judges may reside outside the city for which they are a judge. RCW 29A.20.021(3). Candidates may be nominated by a smaller unit of a larger government. For example, members of the Seattle School Board are nominated in a district and then elected city-wide. RCW 29A.20.021(3).

State constitutions which prescribe qualifications for office holders generally and specific qualifications for certain officers, but are silent as to the qualifications for a particular office, have been construed to prohibit the legislative imposition of any additional qualifications.

The *Gerberding* court also looked to the text of article II, § 7 and article III, § 25 for its analysis, 134 Wn.2d at 202-05, and reaffirmed the *Bartz* court's articulation of the general constitutional principle, citing *numerous* cases from around the country that joined in adopting that exclusivity principle. *Id.* at 205-07. The eligibility presumption was not the conclusive basis for the Court's holding. *Id.* at 201-02.

The State also repeats the appellants' argument that the 1889 Convention's decision on judicial qualifications in article IV, § 17 did not foreclose added statutory residency requirements. Amicus Br. at 18-19. This argument is meritless. The argument ignores history. The Convention in its Committee of the Whole *twice rejected* residency requirements for superior court judges and justices of this Court.⁶

⁶ The State, like the appellants, claims that this rejection carries no interpretative significance, citing cases relating to the Legislature's inaction on a bill. Amicus Br. at 19; Clarke br. at 32 n.86. The cited cases, *State v. Cronin*, 130 Wn.2d 392, 399, 923 P.2d 694 (1996) and *City of Medina v. Primm*, 160 Wn.2d 268, 279-80, 157 P.3d 379 (2007) each deal with the failure of the Legislature to enact a bill. The Legislature's failure to enact a bill can result from a legion of reasons, including the personal and political. The acts of the Convention are different, particularly where there is an actual vote on an amendment to the text of the Constitution. This Court has referenced the Conventions rejection of amendments to the text of the Constitution on *numerous* occasions. See, e.g., *Gerberding*, 134 Wn.2d at 203-04; *State ex rel. Quick-Ruben v. Verharen*, 136 Wn.2d 888, 902 n.11, 969 P.2d 64 (1998).

The State notes that the Convention proposed to limit offices in Washington to electors, but later abandoned that proposal. Amicus Br. at 18-19. The State repeats the appellants' argument that this residency provision was abandoned for judges and Justices because of fears regarding legislative pages and female clerks. *Id.* at 19. How legislative pages or female clerks have anything to do with the residency of superior court judges and Justices is something of a reach. Moreover, this argument makes little sense in light of the fact that the Convention retained residency requirements in article II, § 7 for legislators and in article III, § 25 for executive officials. *By the Constitution's plain text*, the Convention consciously retained residency requirements for the executive and legislative branches, but *not* for the judiciary, a fact that the State's constitutional analysis, like that of the appellants, cannot explain away. Neither the State nor the appellants can explain why if a general residency requirement for all office holders was "redundant" as to judges and Justices, the Convention then adopted such "redundant" residency requirements for legislators and executive branch officials.

Finally, the most pernicious aspect of the State's brief is its contention that in the absence of an *express prohibition* in article IV, the Legislature and the people are free to add whatever qualifications to service in the judiciary they might choose. Amicus Br. at 12. This is

exactly contrary to the holding in *Gerberding*. In fact, nothing in the Constitution *expressly* forbids term limits, the subject in *Gerberding*. The *Gerberding* holding was more precise. Any time the Constitution prescribes the qualifications for an office, those qualifications are *exclusive*.

Under the State's analysis here, the Legislature could enact term limits for Justices of this Court. But term limits would not be the ending point. Any time this Court decides controversial cases or makes an unpopular decision, it could be susceptible to an initiative or bill in the Legislature changing the qualifications for the Court. Only the collective imagination of the Legislature, or anti-judicial activists, would prevent the enactment of additional qualifications for service on the superior court bench or on this Court.⁷

The framers consciously chose not to add residency requirements as a qualification for service in article IV, § 17. That constitutional text controls.

⁷ Under the State's analysis, the Legislature or the people could enact a requirement that a candidate for the superior court bench must have at least 10 years of trial practice or, alternatively, 20 years of private practice. The Legislature or people could enact a statutory requirement that candidates for the Supreme Court could not have previously served as judges at any level of court, or, alternatively, had to have at least 20 years of service as a judge of the superior court or the court of appeals. *None* of these requirements are *expressly* forbidden by article IV, § 17.

(3) Even under RCW 42.04.020, Christine Schaller Is Eligible for the Thurston County Superior Court

Commissioner Schaller has consistently argued throughout this case that RCW 42.04.020 is inapplicable here. Br. of Resp't at 10. The trial court agreed. CP 47. However, the State's brief raises an intriguing argument that Schaller meets the requirements of that statute. Amicus Br. at 7-12.

The State asserts initially that RCW 42.04.020 applies to the judiciary. Amicus Br. at 7. For the reasons articulated in her brief, Schaller believes that is wrong. Br. of Resp't at 33-43.

However, the State also concedes that superior court judges serve in a dual capacity as county and state officers. Amicus Br. at 8-9. Thus, RCW 42.04.020 may only require superior court judges to be an elector in the State of Washington. It is undisputed that Commissioner Schaller is an elector in the State of Washington.⁸

The State then attempts to argue around its own statutory interpretation by citing RCW 29A.20.021(3) and mentioning multi-county judicial districts and vacancies in judicial offices. Amicus Br. at 9-11. Its arguments actually support its initial premise – if RCW 42.04.020 applies, superior court judges need only be electors in the state.

⁸ This interpretation would also address the appellants' xenophobic fear that the voters might elect an alien to the superior court bench or this Court.

First, RCW 29A.20.021(3) requires the exclusion of a candidate unless the candidate is registered to vote in the geographic area represented by the office. That is consistent with the State's initial interpretation of RCW 42.04.020 for superior court judge, a *state* office. But the State is compelled to address judges who represent multi-county districts. Article IV, § 5. Its argument as to multi-county judicial districts is weak. Obviously, if a judge resides in Chelan County, that judge is serving Douglas County, a county in which that judge is not a resident. The State strains to create a special interpretation of RCW 29A.20.021(3) to meet this problem. Amicus Br. at 10 n.4. The better analysis on this question is the State's initial treatment of RCW 42.04.020.

Second, the State contends that the vacancy provisions of RCW 47.12.010(4) mandate that a judge who is not a county resident be barred from serving. Plainly, the State is either unaware of, or oblivious to, article IV, § 8 that specifically addresses judicial vacancies:

Any judicial officer who shall absent himself from the state for more than 60 consecutive days shall be deemed to have forfeited his office. *Provided* that in the case of extreme necessity the governor may extend the leave of absence such time as the necessity therefore shall exist.

Here, the Constitution itself controls. The language of the Constitution is more in line with the fact that superior court judges, like Justices of this Court, are state officers.

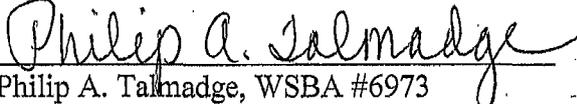
In sum, while the better analysis is that RCW 42.04.020 is inapplicable to superior court judges or Justices in light of article IV, § 17, even if RCW 42.04.020 applies, Christine Schaller is eligible for Position 2 on the Thurston County Superior Court.

C. CONCLUSION

Nothing presented in the State's amicus brief should dissuade this Court from affirming the trial court's well-reasoned decision. The trial court's decision was neither arbitrary, capricious, nor contrary to law.

DATED this 12th day of October, 2012.

Respectfully submitted,


Philip A. Talmadge, WSBA #6973

Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98188
(206) 574-6661

Shawn Newman, WSBA #14193
2507 Crestline Drive NW
Olympia, WA 98502-4327
(360) 866-2322
Attorneys for Respondent Christine Schaller

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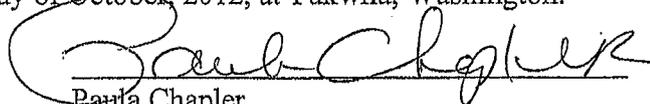
Shawn Newman 2507 Crestline Drive NW Olympia, WA 98502-4327	Jon Tunheim, Prosecuting Attorney David Klumpp, Chief Civil Deputy Linda Olsen Thurston County Prosecutor's Office Civil Division—Glenn Bldg. 2000 Lakeridge Drive SW, Bldg #2 Olympia, WA 98502-6045
Vicki Lee Anne Parker Attorney at Law 5108 71 st Way NE Olympia, WA 98516-9180	James Johnson Attorney at Law PO Box 6024 Olympia, WA 98507
Sent by email only: Marie C. Clarke Attorney at Law PO Box 15209 Tumwater, WA 98511	Victor Minjares Attorney at Law PO Box 7447 Olympia, WA 98507
Sent by email only: Peter Gonick Jeff Even Kristin Jensen Deputy Solicitor General Office of the Attorney General PO Box 40100 Olympia, WA 98504-0100	

Original efiled with:

Washington Supreme Court
Clerk's Office
415 12th Street W.
Olympia, WA 98504-0929

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

Dated this 12th day of October, 2012, at Tukwila, Washington.


Paula Chapler
Talmadge/Fitzpatrick

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Sent: Friday, October 12, 2012 4:03 PM
To: OFFICE RECEPTIONIST, CLERK
Subject: Parker et al., v. Wyman et al., Cause. No. 87823-4

Per Mr. Talmadge's request, attached please find a scanned copy of the, "Answer of Respondent Schaller to State's Amicus Brief" of the following case:

Case Name: Parker et al., v. Wyman et al.,
Cause No. 87823-4
Attorney: Philip Talmadge, WSBA #6973
Talmadge/Fitzpatrick, PLLC
18010 South Center Parkway
Tukwila, WA 98188
(206) 574-6661

Sincerely,

Ireli Colon (Iris)
Legal Assistant
Talmadge/Fitzpatrick
206.574.6661
206.575.1397
assistant@tal-fitzlaw.com