☐ EXPEDITE
☐ No hearing set
☒ Hearing is set
Date: January 18, 2024
Time: 8:30 am
Judge: Mary Sue Wilson

STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT

IN RE DONALD J. TRUMP	No. 24-2-00119-34 OPPOSITION TO AFFIDAVIT AND THE RELIEF SOUGHT THEREIN

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I. Introduction.

The Republican Party was founded in opposition to slavery. In the first party platform of 1856, the party "Resolved: That the Constitution confers upon Congress sovereign powers over the Territories of the United States for their government; and that in the exercise of this power, it is both the right and the imperative duty of Congress to prohibit in the Territories those twin relics of barbarism—Polygamy, and Slavery."[1] Four years later, in a four way contest, Republican Abraham Lincoln won the presidency with 40% of the popular vote and 180 Electoral College votes. Twelve days after the Electoral College met to cast their votes, awarding Lincoln the presidency, the South Carolina legislature voted for the state to secede from the Union. The grounds it gave in its Declaration of Secession specifically cited the refusal of northern states to return fugitive slaves to South Carolina. It condemned Lincoln's election, because his "opinions and purposes are hostile to slavery."[2] South Carolina complained that Lincoln, The Great Emancipator, "is to be entrusted with the administration of Government, because he has declared that 'Government cannot endure permanently half slave, half free, and that the public mind must rest in the belief that Slavery is in the course of ultimate extinction."[3]

South Carolina's secession instigated an insurrection in support of enslaving Black Americans. The southern states turned the entire machinery of their governments to wage a war for the purpose of maintaining and expanding slavery across North America. After four years and nearly one million deaths of soldiers and civilians, the Union emerged victorious over the slave states. Vindicating the victory over slavery, subsequent Republican-majority Congresses adopted the Thirteenth Amendment, abolishing slavery; the Fourteenth, extending to former slaves the rights of all Americans; and the Fifteenth Amendment, guaranteeing the former slaves' franchise.

[1] The Republican Party Platform of 1856, available at https://www.presidency.ucsb.edu/documents/republican-party-platform-1856.

[2] Declaration of the Immediate Causes which Induce and Justify the Secession of South Carolina from the Federal Union; and the Ordinance of Secession, available at https://books.google.com/books?id=MhTVAAAAMAAJ.

[3] *Id.*

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Today, six Kitsap electors ask this Court to issue a writ of mandamus forbidding the Washington Secretary of State and all county auditors from printing one prospective candidate's name on Washington presidential primary ballots. They rely on U.S. Const. amend. XIV, § 3 which states that:

> No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof.

Setting aside the question of whether an "insurrection or rebellion" has taken place in this country since Robert Lee laid down his arms and surrendered his army at Appomattox Courthouse on April 9, 1865, Affiants are not entitled to the relief they seek under RCW 29A.68.011.

First, RCW 29A.68.011 has no bearing on, and does not allow, court intervention in or executive branch alteration to, the presidential primary process under Chapter 29A.56 RCW.

Second, even if the Court could read RCW 29A.68.011 as allowing an affidavit challenge to a name on the presidential primary ballot, the deadline for that filing is passed no later than December 13, 2023. The affidavit, if permitted under state law, is a month late.

Third, U.S. Const. amend. XIV, § 3 does not mean what Affiants claim, and no Congressional authority exists for this state court to enforce the amendment as proposed.

Importantly, in evaluating the Affiants' request, the Court does not write on a blank slate. Far from it: the state Supreme Court has repeatedly cautioned that "strong public policy exists in favor of eligibility for public office, and the constitution, where the language and context allows, should be construed so as to preserve this eligibility." *State ex rel. O'Connell v. Dubuque*, 68 Wash. 2d 553, 566 (1966). In furtherance of this policy, the Supreme Court has also "stated the general rule that election statutes are considered remedial and should be liberally construed. In particular, statutes establishing qualifications for office are to be construed to unfetter the process of election rather than curtail the freedom to stand for office." *Dumas v. Gagner*, 137 Wash. 2d 268, 284 (1999) (cleaned up).

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Furthermore, the state Supreme Court has cautioned that the term "office," as used repeatedly in statutes, constitutions, and common parlance, has a wide range of possible meanings, which must be determined from the specific context in which it is used:

> Because of the variety of meanings or shades of meaning in which the terms 'office' and 'officer' may be employed, in determining whether or not a given employment is an office within the meaning of a particular statute or other written law, each case must be determined by a consideration of the particular facts and circumstances involved, and of the intention and subject matter of the enactment.

Brown v. Blew, 20 Wash. 2d 47, 50-51 (1944) (quoting *State ex rel. Johnston v. Melton*, 192 Wash. 379, 384 (1937)). Here, federal law governs the meaning of "officer of the United States," as used in the Fourteenth Amendment. It does not mean the presidency.

II. The State Presidential Primary Process Precludes Relief.

A. The Affidavit Challenge Statute Does Not Affect The Presidential Primary.

This year's presidential primary process was established by ESSB 5273, Chapter 7, Laws of 2019. That statute added current RCW 29A.56.031, which grants the Washington State Republican Party the sole discretion to "determine which candidates are to be placed on the presidential primary ballot for that party." *Id.* § 2, RCW 29A.56.031. After Chairman Walsh submitted the party's list of names to the Secretary of State, "changes ***must not*** be made to the candidates that will appear on the ballot." *Id.* (emphasis added).

On January 9, 2024, Secretary of State Hobbs sent the state's 39 county auditors an official, sealed certification of the names of candidates "to be printed by all County Auditors on the official ballots to be used for the Tuesday, March 12, 2024 Presidential Primary."[4] Appended to his letter were the candidate lists he received from Chairman Jim Walsh for the Republican Party and Shasti Conrad, Chair of the Democratic Party. Unsurprisingly, given the absolute legal mandate on the Secretary of State and all county auditors, the two lists which the Secretary thereby required the

[4] Secretary Hobbs' transmittal is appended to this brief as Exhibit A to the Declaration of Joel Ard and is available at: https://www.sos.wa.gov/sites/default/files/2024-01/Official%20Certification%20of%20Candidates%20Presidential%20Primary%202024%20with%20both%20Major%20Political%20Parties_0.pdf?uid=65a40fe4b7694

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auditors to print are identical to the lists he received from the two party chairs (albeit alphabetized by surname as required by RCW 29A.56.040(3)).

This Court cannot rely on any grant of authority from RCW 29A.68.011 to order the Secretary of State to violate RCW 29A.56.031. Affiants appear to rely on RCW 29A.68.011(3), but neither the Secretary of State nor any county auditor acts "wrongfully" to comply with two statutes which give them no alternative, discretion, or authority. They ***must*** print ballots with the names submitted by each party chair; they ***may not*** make any change to the names they are given.

This can hardly come as a surprise to anyone who understands the presidential primary and general election process, a process entirely ignored by Affiants. While legally open to others, the state presidential primary is only used by "major" parties, each of which is "a political party whose nominees for president and vice president received at least five percent of the total vote cast at the last presidential election." RCW 29A.04.086. All other political organizations are "minor political parties." *See* RCW 29A.04.097. Minor political parties are given an entirely different process for allowing their candidates to appear on the general election ballot.[5] *See generally* RCW 29A.56.600 to 29A.56.670. The names of perhaps a dozen presidential and vice-presidential candidates will appear on the November 2024 ballot, and every name which will appear does so because the individuals were nominated by a national party convention.[6] Although the presidential primary expenses are paid by the state, *see* RCW 29A.56.060, the presidential primary is nothing more than an opportunity for the two parties who have chosen to use the primary process to learn the candidate preferences of their members, chosen from among candidates named by that party. Each party, subject to its own internal rules, will give some degree of weight to the expressed preferences of its Washington members, for the purpose of selecting, instructing, and sending state delegates

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[5] Actually, the slate of Washington electors nominated by their national convention, who appear under the proxy of the name of the candidate to whom they are pledged. *See* RCW 29A.56.320(2).

[6] Again, the national party conventions actually nominate 12 electors from Washington state, who pledge to cast votes in the electoral college for the candidate nominated by their respective party. *See, e.g.*, RCW 29A.56.080 to 29A.56.092, the "Uniform Faithful Presidential Electors Act;" *Chiafalo v. Washington*, 140 S. Ct. 2316 (2020) (upholding the right of the Washington Legislature to require electors to comply with their pledge).

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to exert influence at the party's national convention. That convention, in turn, will select the party's presidential standard bearer. Because no minor political party chose to use this process in Washington, only the names of candidates submitted to the Washington Secretary of State by the chairs of the two major parties will appear on the presidential primary ballot.

Depending on party rules, the preferences expressed by Washington voters to each party may carry some weight, or none at all, by the time the national convention occurs. Delegates may be pledged to one or another candidate as a result of the primary, or as a result of the state convention. The candidate holding their pledge may be allowed to release them, or they may be free to switch their support after a certain number of rounds of voting at the national convention. Perhaps the candidate they are sent to support by the state convention has dropped out by the time of the national convention. If so, internal party rules govern what happens next.

Indeed, that very thing could occur in Washington. Because the state law has absolutely nothing at all to say about how the parties conduct their process for selecting a presidential nominee (and the attendant pledged state electors), state law also mandates that the presidential primary ballots contain exactly the list of candidates delivered to the Secretary of State by the party leader. In accordance with state party rules, Chairman Walsh delivered a list that includes the name of two prospective candidates who have subsequently announced they no longer seek the presidency. One of those candidates did so just yesterday, and the other one of those (former) candidates will appear alphabetically at the top of the Republican Party list. Neither this Court, nor the Secretary of State, nor any county auditor can alter the list to remove either name, even if Chairman Walsh were to inform them that party rules no longer allow the names to appear. The list is the list, as it was delivered on the deadline.

If Chairman Walsh had chosen to deliver a list with the names of cartoon characters and mythical superheroes, such conduct might have violated internal Washington State Republican Party rules. The Party rules might create a mechanism to oust him. But they would not create a mechanism to change the list, nor a mechanism for Secretary Hobbs or this Court to mandate printing a different list on the grounds that Superman is not a natural born citizen or that Bart

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Simpson is not yet 35 years of age. Such conduct by Chairman Walsh would deny Washington State Republican Party members a genuine opportunity to use the primary ballot to express their preferences to the state and national party, but that's the party's problem, not an occasion for internal party rules to become subject to court or executive branch meddling.

This hands-off approach in state law is consistent with, and actually mandated by, the protections that the First Amendment affords to "the process by which a political party selects a standard bearer who best represents the party's ideologies and preferences." *California Democratic Party v. Jones*, 530 U.S. 567, 575 (2000). "When States regulate parties' internal processes they must act within limits imposed by the Constitution" because those processes are not "wholly public affairs that States may regulate freely." *Id.* at 572–73. The right to regulate is perhaps at its nadir in the primary process, because First Amendment freedom of association includes the right to exclude. "In no area is the political association's right to exclude more important than in the process of selecting its nominee. That process often determines the party's positions on the most significant public policy issues of the day …" *Id.* at 575. Affiants ask this Court to order Secretary Hobbs to violate RCW 29A.56.031, in order for him to disturb the operation of Washington Sate Republican party rules, all of which were established by members of the Party who joined it to create its operational and governance structure. Here, it merits remark that Secretary Hobbs is ***not*** a member of the Washington State Republican Party. Allowing him to revise a list that was created by the Party in accordance with Party rules would not only violate the statute but also violate the First Amendment associational rights of Washington State Republican Party members.

B. The Specific Presidential Primary Statute Supersedes The General Affidavit Challenge.

"A general statutory provision must yield to a more specific statutory provision. This does not mean that the more specific statute invalidates the general statute. Instead, the specific statute will be considered as an exception to, or qualification of, the general statute, whether it was passed before or after such general enactment." *Washington State Ass'n of Ctys. v. State*, 199 Wash. 2d 1, 13 (2022). Here, the statutory mandate that one specific, sui generis primary process proceed

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according to unique rules supersedes any application of the general ballot challenge statute that governs the process of every other primary in Washington state.

There are three key differences demonstrating that the presidential primary supersedes the affidavit ballot challenge statute. ***First***, while RCW 29A.68.011 allows an order from a court to change a ballot, RCW 29A.56.031 absolutely forbids anyone from changing the primary candidate lists submitted by party leaders, only in the case of the presidential primary. ***Second***, the timing of the presidential primary process compared to all others precludes application of the affidavit. ***Third***, the lack of filing in the presidential primary compared to all others renders the affidavit inapplicable.

First, the specific statute governing the presidential primary explicitly forbids any change to the names submitted by the party leaders. "Once submitted, changes ***must not*** be made to the candidates that will appear on the ballot." RCW 29A.56.031. No command in statute law is stronger than "must," and this ***specific*** statute governing this ***specific*** primary supersedes the more general affidavit statute allowing changes.

Second, ***timing***. It is impossible to fit even the very quick timing of RCW 29A.68.011 into the presidential primary process. Affiants seek to apply subsection three of that statute, which allows a court to direct "any person charged with error [or] wrongful act" to desist. Here, the claimed "wrongful act" is that of either the Secretary of State or of the 39 county auditors in printing ballots with the name of a candidate who the Affiants claim is ineligible for the presidency. If the act is that of the Secretary, it is completed and can't be undone: It occurred when he sent the letter forwarding to each auditor the lists he received from the Jim Walsh (on behalf of WSRP) and Shasta Conrad (for the Democratic Party). If the target is the auditors, most of them, too, have sent their print orders, and ballots are already being printed for delivery to the U.S. Post Office. Where the remedy for a "wrongful act" under RCW 29A.68.011(3) is that the court order that "the wrongful act [be] desisted from," the Court cannot issue an order that the Secretary or an auditor "desist" from a completed act.

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Second, filing. "An affidavit of an elector under this section when relating to a primary election must be filed with the appropriate court no later than ***two days following the closing of the filing period for such office*** and shall be heard and finally disposed of by the court not later than five days after the filing thereof." But there is no "filing period" in Washington state law for the office of president. Instead, it is specifically exempted from filing. "A candidate who desires to have his or her name printed on the ballot for election to an office ***other than president of the United States***, vice president of the United States, or an office for which ownership of property is a prerequisite to voting shall complete and file a declaration of candidacy." RCW 29A.24.031. The affidavit statute allows a challenge to the candidacy of a person who declared his candidacy by filing the declaration under RCW 29A.24.031. No person did so, or ever does so, for the presidency. As such, RCW 29A.68.011 is never triggered with respect to the presidency.

Third, timing once again. True, the affidavit challenge moves very quickly—even more quickly than ballot title challenges, with which this Court is very familiar. But compare the time between the filing period for office and the primary for all offices for which a filing period exists: filing week is the first week of May, *see* RCW 29A.24.050, and the primary for those offices occurs in August, three months later. *See* RCW 29A.04.311. Here, the party leaders were required to deliver their lists of names 63 days before the presidential primary. *See* RCW 29A.56.031. The extra thirty days is actually quite significant. The fast challenge window under 29A.68.011 still leaves time to print voters' pamphlets and ballots (for example, for mailing to military and overseas voters in accordance with federal law). The required lead time for that process means that there is simply no time at all, even under the "rocket docket" of RCW 29A.68.011, to alter the ballots in response to a court order. No wonder the Legislature mandated that the names must not be changed.

C. If The Affidavit Challenge Is Relevant, This Challenge Came A Month Late.

Finally, the Court could conclude that RCW 29A.68.011 does not require a declaration of candidacy under RCW 29A.24.031 to be triggered. What declaration matters, then? If an affidavit is permitted against the presidential primary, there must be something that triggers the challenge window. What is the "filing period" that opened this Court's jurisdictional window? It can't be

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the letter from Chairman Walsh to Secretary Hobbs, because that's not a "filing" and isn't for "such office," namely, the presidency. The only "filing" related to candidacy for president is a filing that candidates make with the Federal Elections Commission. Like the state filing under RCW 29A.24.031, the challenged candidate here made just such a filing with the FEC. The multiple copies of that "statement of candidacy" are all available on the FEC's website.[7] The most recent was filed on December 11, 2023.[8] If that's the filing, and it's the only thing filed "for such office," the window closed on December 13, 2023.

III. Affiants' Fourteenth Amendment Claim Is Legally Wrong.

Affiants' reliance on amend. XIV, § 3 has at least three fundamental legal errors, all of which preclude the relief they seek.

First, the president is not an "officer of the United States." ***Second***, the president does not "take[] an oath … to support the Constitution of the United States," and Affiants identify no occasion on which the particular candidate they seek to exclude took the disabling oath. ***Third***, the Fourteenth Amendment is not self-executing. Instead, "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amend. XIV, § 5. Congress has done so. *See, e.g.*, 18 U.S.C. § 2383. In the absence of any conviction under that statute, or action under another Congressionally-established enforcement provision, this Court cannot act.

A. The Presidency Of The United States Is Not An "Office" Under The Fourteenth Amendment.

The text and structure of amend. XIV, § 3 show that the Presidency is excluded, tracking as it does the four provisions in the Constitution of 1788 that use the phrase "Officers of the United States." Those are the Appointments Clause, the Impeachment Clause, the Commissions Clause, and the Oaths Clause. None of these clauses use the phrase "Officers of the United States" to refer to the President. Instead, each of them excludes the presidency from "office of the United

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[7] *See* https://www.fec.gov/data/candidate/P80001571/?cycle=2024&election_full=true&tab=filings, last accessed January 17, 2024.

[8] *See* https://docquery.fec.gov/cgi-bin/forms/P80001571/1738208/, last accessed January 17, 2024 and attached to the Ard Decl. as Exhibit B.

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States." Amend. XIV, § 3 adopted this same meaning, excluding that office from its coverage. Furthermore, the drafting history of the Fourteenth Amendment demonstrates that the presidency was intentionally excluded.

1. The Text And Structure Exclude The Presidency.

Section Three begins "[n]o person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State . . ." It does not list the presidency. Moreover, it lists offices in descending order, beginning with the highest federal officers and progressing to the catch-all term "any office, civil or military, under the United States." Thus, to find that Section Three includes the presidency, one must conclude that the drafters decided to bury the most visible and prominent national office in a catch-all term that includes low ranking military officers, while choosing to explicitly reference presidential electors. This reading defies common sense and is not correct.

The Constitution creates five positions: President, Vice-President, Senator, Representative, and Presidential Elector; but the plain text of Section Three excludes the President and Vice-President. This omission is controlling. "The expression of one thing implies the exclusion of others." Bryan A. Garner & Antonin Scalia, Reading Law, 96-98 (West, 2012).

Next, Section Three uses the disjunctive "or" to create two distinct, separate prohibitions; one may not "be" a Senator, Representative or Elector. Or one may not "hold" any office "under the United States, or a State." The first category identifies specific Constitutional positions. The second refers to offices one "holds." "[N]othing is to be added to what the text states or reasonably implies." *Id.* at 87-91. The exclusion of the President from the first category cannot imply the opposite—that the most important elected, Constitutional position is implicitly (and silently) included in a generalized, catch-all phrase. To the contrary, the Supreme Court has "often remarked that Congress does not hide elephants in mouseholes by altering the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Whitman v. American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001) (cleaned up); *Sackett v. EPA*, 143 S. Ct. 1322, 1340 (2023).

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Section Three also lists disqualified positions in descending order from the weightiest Constitutional position (Senator) to the lowest (state officers). It is wholly illogical to exclude the most important Constitutional offices in the enumerated list while including them in a general catch-all focused on less important offices.

2. The Fourteenth Amendment Mimics The Four Office Clauses In The 1788 Constitution.

(a) The Appointments Clause.

Officers of the United States are appointed by the president, who

> shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and ***all other*** Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law …

U.S. Const. art. II, § 2, cl. 2 (emphasis added). This exhaustive list of "officers of the United States" includes only ***appointed*** positions: Ambassadors and other ministers and consuls; judges of the Supreme Court;[9] and "all other Officers." The final group comprised positions "established by Law," or, in other words, created by Congress. The presidency is not created by Congress. Instead, "the President is responsible for the actions of the Executive Branch and cannot delegate that ultimate responsibility or the active obligation to supervise that goes with it," *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1978–79 (2021) (cleaned up), and is assisted in this task by two tiers of "officers," principal and inferior officers.

The Supreme Court has given detailed explanations of the three-tiered executive organization created by art. II, § 2. It has held that "the Appointments Clause of Article II … vest[s] the President with the exclusive power to select the principal (noninferior) officers of the United States …" *Edmond v. United States*, 520 U.S. 651, 659 (1997). Tier one: President. Tier two: principal (noninferior) officers of the United States. Tier three: inferior officers. "The Appointments Clause provides that [the president] may be assisted in carrying out that responsibility by officers nominated by him and confirmed by the Senate, as well as by other officers

[9] Recall that the Constitution only created a Supreme Court, with the creation of inferior Art. III courts left to the discretion of Congress. Of course, those judges are also appointed.

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not appointed in that manner but whose work, we have held, must be directed and supervised by an officer who has been." *Arthrex*, 141 S. Ct. at 1976. But all ***officers*** are direct or indirect presidential appointees. "Only the President, with the advice and consent of the Senate, can appoint noninferior officers, called 'principal' officers as shorthand in our cases. … only for inferior officers … Congress may vest the appointment of such officers 'in the President alone, in the Courts of Law, or in the Heads of Departments.'" *Arthrex*, 141 S. Ct. at 1979 (quoting art. II, § 2, cl. 2). In all these explanations of executive branch structure, the Court has never held that the President is one of the "officers" of the United States. How could she be? The position is not appointed, and not subject to Senate advice and consent.

(b) The Impeachment Clause.

The Impeachment Clause identifies three distinct and different entities subject to impeachment: "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." U.S. Const. art. II, § 4. If either the President or Vice President were "officers of the United States," the first five words of this clause would be entirely superfluous. If they were officers of the United States, then subjecting them to removal by impeachment would be accomplished if simply "all civil officers of the United States" could be impeached.[10] By distinguishing among the positions of (1) President, (2) Vice President, and (3) all civil officers, the Constitution's Impeachment Clause clarifies that the president is not an officer.[11]

(c) The Commissions Clause.

The President's duties include that she "shall Commission all the Officers of the United States." U.S. Const. art. II, § 3. Plainly, the President does not commission herself. Because ***all***

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[10] The Presidency is a civil position, not a military one, despite that the President is Commander-in Chief. *See, e.g.*, *Parker v. Levy*, 417 U.S. 733, 751 (1974) ("The military establishment is subject to the control of the ***civilian*** Commander in Chief and the ***civilian*** departmental heads under him, and its function is to carry out the policies made by those ***civilian superiors***") (emphasis added).

[11] Historical practice under the Oaths Clause suggests the Vice President may be an Officer of the United States in her role as President of the Senate, discussed below.

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Officers of the United States are commissioned by the President, the holder of that position cannot be among the Officers.

In the most famous case arising under the Commissions Clause, Chief Justice Marshall restated the position that the President was not an officer of the United States. He construed a statute stating that "The supreme court … shall have power to issue … writs of mandamus … to persons holding office, under the authority of the United States." *Marbury v. Madison*, 5 U.S. 137, 148 (1803). Marshall acknowledged that "This is the supreme court, and by reason of its supremacy must have the superintendance of the inferior tribunals and officers, whether judicial or ministerial." *Id.* at 146. And yet, before holding that the purported grant of authority exceeded Congress' constitutional authority to create original jurisdiction in the Supreme Court, Marshall distinguished between the President on the one hand, and officers who might be subject to mandamus under the statute on the other hand:

> Can a mandamus go to a secretary of state in any case? It certainly cannot in all cases; ***nor to the President in any case***. … I declare it to be my opinion, grounded on a comprehensive view of the subject, that the President is not amenable to any court of judicature for the exercise of his high functions, but is responsible only in the mode pointed out in the constitution. The secretary of state acts, as before observed, in two capacities. ***As the agent of the President, he is not liable to a mandamus***; but as a recorder of the laws of the United States; as keeper of the great seal, as recorder of deeds of land, of letters patent, and of commissions, &c. he is a ***ministerial officer of the people of the United States***. As such he has duties assigned him by law, in the execution of which he is independent of all control, but that of the laws.

Marbury, 5 U.S. at 149 (emphasis added). The Secretary of State, unlike the President, acts in at least some capacities as an officer subject to mandamus. The President is never an officer, and never subject to mandamus from the co-equal branch.

(d) The Oaths Clause.

"The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution …" U.S. Const. art. VI, cl. 3. ***All*** executive Officers must take the art. VI oath—but the President does not. The presidential oath is found in U.S. Const. art. II, § 1, cl. 8. And unlike the art. VI oath, the President

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does not take an oath "to support this constitution." The President, before taking office must "solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States." Art. II, § 1, cl. 8. The President must preserve, protect, and defend the Constitution. But unlike the officers of the United States, he does not promise to "support" it. The two different oath clauses, with substantively different words, make clear that the President is not among the officers of the United States.

3. The Drafting History Of The Fourteenth Amendment Demonstrates That The Presidency Is Excluded.

Legislative history demonstrates that drafters rejected inclusion of the Presidency. Courts properly infer legislative intent by comparing committee drafts to the final language. *See Nixon v. United States*, 506 U.S. 224, 231-232 (1993) (rejecting second to last draft and relying on the plain textual language); *Lee v. Weisman*, 505 U.S. 577, 613 (1992) (Souter, J., concurring)(looking to sequence of amendments); *Utah v. Evans*, 536 U.S. 452, 474 (2002) (reviewing previous drafts); *District of Columbia v. Heller*, 554 U.S. 570, 604 (2008) (analysis of precursors to amendment); *Id.* at 590 n. 12 (Stevens, J. dissenting)(relying on previous draft); *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 143 S. Ct. 2141, 2180-2181 (2023) (analyzing Thaddeus Stevens' introduced version of the Fourteenth Amendment); *Evenwel v. Abbott*, 578 U.S. 54, 66 (2016) (same).

The first draft began: "No person shall be qualified or shall hold the office of *President or Vice-President* of the United States, Senator or Representative in the national congress." Cong. Globe 39th Cong., 1st Sess. 919 (1866) (emphasis supplied). Congress subsequently and consciously ***removed*** the office of the President from this list, substituting instead presidential Electors. The phrase "any office now held under appointment from the President of the United States, requiring the confirmation of the Senate" was broadened to explicitly include lesser federal offices not subject to Senate consent, and state offices. The counterintuitive inference that the

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tailing catch-all simultaneously included the higher office of President cannot overcome the decision to remove explicit language identifying the President.

The use of "office under the United States" in Article I refers to appointed federal offices, not the presidency. That clause prohibits a person from first being elected Senator or Representative and then subsequently being appointed federal office at the same time, or likewise holding an office and subsequently becoming a Senator or Representative. Thus, "holding any office under the United States" parallels "being appointed to any civil Office under the Authority of the United States" and properly refers to an office, not an elected President or Vice-President. And the Framers never considered that a person might hold two federal offices simultaneously.

4. Section Three Of The Fourteenth Amendment Uses The Language Of The Oaths Clause, Excluding The President From Its Coverage.

Section Three of the Fourteenth Amendment embodies one of the many compromises of post-civil was reconstruction. The clause did not exclude from office every person who had engaged in rebellion, extending to all those who "would make war rather than let the nation survive …"[12] Instead, "With malice toward none with charity for all … to bind up the nation's wounds,"[13] its restriction only extended to those persons who had previously held an office subject to the art. VI oath. Just as art. VI covered U.S. Senators and Representatives, amend. XIV, § 3 covered "member[s] of Congress." Art. VI covered "all executive and judicial officers, both of the United States and the several states." Amend. XIV § 3 covered officers of the United States and executive or judicial officers of any state. Art. VI covered members of the several state legislatures; amend. XIV, § 3 covered members of any state legislature. By adopting the same categories as found in the Oaths Clause, the drafters of the Fourteenth Amendment crafted a compromise. Those who had held these positions, and thereafter rebelled in the Civil War, could not hold those positions again in the future. The drafters made one addition. An elector of the president or vice president was not

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[12] Lincoln, Abraham, Second inaugural address of the late President Lincoln, available at https://www.nps.gov/linc/learn/historyculture/lincoln-second-inaugural.htm.

[13] *Id.*

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covered by the art. VI oath, but the Fourteenth Amendment banned that position from being held by a covered person. To the extent the drafters were concerned about the presidency, they protected it indirectly, just as it is elected indirectly, by excluding rebels from being electors.

B. The Constitution Mandates Two Different Oaths; The Presidential Oath Is Not The Debilitating Oath Identified In The Fourteenth Amendment.

Even if the President were an "officer of the United States" in Section Three, there is a further qualification that excludes from the scope of amend. XIV, § 3 one specific category of persons: a person who has only ever held one public position, that of President.[14] Persons excluded by the Fourteenth Amendment from future office holding must have "previously taken an oath … as an officer of the United States … to ***support*** the Constitution of the United States …" Amend. XIV, § 3 (emphasis added). This is the form of oath required by art. VI of all U.S. Senators and Representatives, all members of state legislatures, and all executive and judicial officers of both the United States and all states. But it is ***not*** the form of oath required of the President. A person who has only ever held the position of President, but never held an office subject to the art. VI oath, has therefore never taken an oath to ***support*** the Constitution. He has only taken an oath, as prescribed by art. II, § 1, cl. 8, to "protect, preserve, and defend" the Constitution. The Affiants ask the Court to disqualify from appearing on the Washington ballot a person who has never taken the form of oath that is the condition precedent to disqualification under the Fourteenth Amendment.[15]

[14] The vice presidency was largely an afterthought in the Constitution of 1788, and had no oath prescribed by the Constitution. The First Congress instead subjected the Vice President to the art. VI oath on the basis that he is also the president of the Senate. *See* 1 Stat. 23 § 1 (the art. VI oath shall be administered "to the President of the Senate …"). That remains the vice presidential oath. *See* 2 U.S.C. § 22.

[15] Perhaps the drafters of the Fourteenth Amendment could not imagine a person being elected President who had never previously held any public office subject to the art. VI Oaths Clause. If so, it is an understandable oversight. Up to that point in time, and for almost 150 years thereafter, the only person to hold the Presidency who had not previously taken the art. VI oath was George Washington. His prior exemplary service to the Nation occurred before the Constitution was adopted and that specific oath was therefore required.

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C. The Fourteenth Amendment Is Not Self Executing, And The Candidate Sought To Be Barred Has Neither Been Charged Nor Convicted Of Violating 18 U.S.C. § 2383.

The Affiants failed to correctly identify an "office of the United States" subject to the disqualifying language of amend. XIV, § 3. They failed to identify a prospective candidate who had taken the oath that is a condition precedent to falling under the disqualification. And while they baldly assert that they have identified an occasion that constitutes a disqualifying "insurrection," this Court faces an additional hurdle before accepting as adjudicated or even justiciable that statement in the affidavit: no portion of the Fourteenth Amendment is self-executing. Instead, the final section states that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Amend. XIV, § 5. Appearing as a stand-alone final section of the amendment, it plainly applies to all four previous sections, including section three.

In 1869, just one year after its adoption, Supreme Court Justice Chase agreed in *Griffin's Case*, 11 F. Cas. 7 (C.C.D. Va. 1869). In that case, a convicted murderer sought habeas relief on the grounds that the federal judge overseeing his trial and conviction had been a member of the Virginia House of Delegates from 1849 through the Civil War, and that in 1862 he had "voted men, money, and supplies to support the state of Virginia and the Confederate States, in the war then waging with the United States." *Griffin's Case*, 11 F. Cas. at 15-16. He thereafter was appointed to the federal bench in 1866, without Congress ever acting to remove the disability created by the subsequent adoption of amend. XIV, § 3.

Justice Chase came directly to the issue the case presented:

> The question to be considered, therefore, is whether upon a sound construction of the amendment, it must be regarded as operating directly, without any intermediate proceeding whatever, upon all persons within the category of prohibition, and as depriving them at once, and absolutely, of all official authority and power.

Griffin's Case, 11 F. Cas. at 23. In other words, is Section Three of the Fourteenth Amendment self-executing? His answer was "No."

> The object of the amendment is to exclude from certain offices a certain class of persons. Now, it is obviously impossible to do this by a simple declaration, whether in the constitution or in an act of congress, that all persons included within a particular description shall not hold office. For, in the very nature of things, it must be ascertained

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> what particular individuals are embraced by the definition, before any sentence of exclusion can be made to operate. To accomplish this ascertainment and ensure effective results, proceedings, evidence, decisions, and enforcements of decisions, more or less formal, are indispensable; and these can only be provided for by congress.

Id., 11 F. Cas. at 26. Chase found this requirement in the fifth section, providing for Congress to enact enforcement legislation. "There are, indeed, other sections than the third, to the enforcement of which legislation is necessary; but ***there is no one which more clearly requires legislation in order to give effect to it***." *Id.* (emphasis added). Even without the fifth section, Chase found that "the final clause of the third section itself is significant. It gives to congress absolute control of the whole operation of the amendment." *Id.* [16]

Congress has acted to enforce the disability clause. In 1868, even before full ratification of the Fourteenth Amendment, Congress conditioned the southern states' congressional delegations readmission to Congress on their enforcement of Section Three. *See* 15 Stat. 73 (conditioning readmission to Congress on ratification of the Fourteenth Amendment and that "no person prohibited from holding office under the United States, or under any State, by section three of the proposed amendment to the Constitution of the United States, known as article fourteen, shall be deemed eligible to any office in either of said States, unless relieved from disability as provided in said amendment …").

Two years later, in 1870, Congress enacted "An Act to enforce the Right of Citizens of the United States to vote in several States of this Union, and for other Purposes," Ch. 94, 16 Stat. 140 (1870). In Sec. 14, Congress made it "the duty of the district attorney of the United States" to bring an action *quo warranto* against any person who "h[e]ld office, except as a member of Congress or of some State legislature, contrary to the provisions of the third section of the fourteenth article

[16] The Supreme Court thereafter cited Justice Chase's decision in *Griffin's Case* as good law. *See Ex parte Ward*, 173 U.S. 452, 455 (1899). So, too, have subsequent federal appellate courts. *See, e.g.*, *Cale v. City of Covington, Va.*, 586 F.2d 311, 316 (4th Cir. 1978) ("*Griffin's Case*, 11 Fed.Cases 7 (C.C.D.Va.1869), which held that the third section of the Fourteenth Amendment, concerning disqualifications to hold office, was not self-executing absent congressional action"); *In re Brosnahan*, 18 F. 62, 81 (C.C.W.D. Mo. 1883) ("the provision of the fourteenth amendment, prohibiting such persons from holding office, was not self-enforcing, but needed the aid of an act of congress").

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of amendment to the Constitution of the United States ..." Sec. 15 of the Act made it a misdemeanor to hold or attempt to hold or exercise the duties of such an office when ineligible, but enforcement required conviction "before the circuit or district court of the United States." *Id.* at 144. In an 1871 amendment, Congress made federal jurisdiction exclusive. *See* Ch. 99, 16 Stat. 433, 438 (1871).

However, there is no authorization statute currently in force. The Enforcement Act was codified as 13 Judiciary ch. 3, sec. 563 and later recodified into 28 Judicial Code 41. But in 1948, Congress repealed 28 U.S.C. § 41 in its entirety.[17]

More recently,[18] Congress made insurrection a federal crime. Mimicking the disability language of amend. XIV, § 3, "Whoever incites, sets on foot, assists, or engages in any rebellion or insurrection against the authority of the United States or the laws thereof, or gives aid or comfort thereto, shall be fined under this title or imprisoned not more than ten years, or both; ***and shall be incapable of holding any office under the United States***." 18 U.S.C. § 2383 (emphasis added).[19]

Congress has not given this Court any remit to enforce Section Three of the Fourteenth Amendment, whether through an evidentiary trial or based on Affiants' say-so. This Court cannot find that the Washington state legislature has done so through RCW 29A.68.011. After all, that statute requires this Court to issue a decision within five days, which in no way could afford the

[17] *See* Act of June 25, 1948, ch. 646, § 39, 62 Stat. 869, 993; Act of June 25, 1948, ch. 645, §2383, 62 Stat. 683, 808.

[18] In 1948, the dawn of the "Red Scare."

[19] Perhaps unsurprisingly, a statute sharing philosophical provenance with the Alien & Sedition Acts was rarely cited in federal proceedings for most of its existence. The vast majority of federal case decisions citing the statute are decision dismissing pro se plaintiffs, apparently *no compos mentis*, suing government officials for violations of the statute. The government did not charge the Armed Resistance Unit under that statute for bombing the Capitol. It did not include charges under that statute against the Puerto Rican separatists who shot up Congress in 1954. It did not use the statute against any person involved in the months-long assaults attempting to burn down the Portland, OR federal courthouse. No person charged for conduct in or around the United States Capitol on January 6, 2021 has been charged under that statute. *See United States v. Griffith*, No. 21-cr-244-2 (CKK), 2023 WL 2043223, at *3 fn. 5 (D.D.C. Feb. 16, 2023), (finding that "no defendant has been charged with [18 U.S.C. § 2383]"); Despite that history, and the lack of any court proceeding under the statute, Affiants here adopt the approach of the Red Queen: "Sentence first—verdict afterwards." Carroll, Lewis. Alice's Adventures in Wonderland. New York: Dover Publications, 1993.

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1 Court sufficient time to afford a defendant the due process required even for a misdemeanor
2 conviction as under 16 Stat. 140. Nor do Affiants point to a federal court conviction under 18 U.S.C.
3 § 2383 that this Court could rely on as rendering a prospective candidate barred from office
4 pursuant to the operation of enabling legislation. Such a conviction after a criminal trial would
5 constitute the necessary "proceedings, evidence, decisions, and enforcements of decisions …
6 provided for by congress", *Griffin's Case*, 11 F. Cas at 26 as called for by Justice Chase. Because
7 the amendment is not self-executing, and because Affiants cannot point to congressionally-
8 authorized procedures, duly undertaken, which demonstrate any prospective candidate's unfitness
9 has been determined according to federal enabling legislation, this Court cannot act on the affidavit.

10 **D. The Fourteenth Amendment Does Not Render Any Person Unqualified For Candidacy.**

11 Even if the Court accepts every premise of the affidavit—a prospective candidate engaged
12 in insurrection, the presidency is an office of the United States, the candidate previously took an
13 oath to "support" the Constitution, and the disqualifying clause is self-executing or enforceable
14 by this Court without an evidentiary hearing, witnesses, cross-examination, notice to the
15 prospective candidate, or any other due process—even after all that, amend. XIV, § 3 cannot be
16 read as a disqualification for ***candidacy***.

17 ***First***, the various clauses of the Constitution that establish qualifications for elected
18 positions distinguish between eligibility and taking or holding office. ***Second***, Congress' ability to
19 waive or remove the barrier to holding office would be rendered meaningless if state officials could
20 prevent a person from ever attaining the position where the relief mattered.

21 **1. Art. I Qualifications Do Not Attach Until Election Day.**

22 "No Person ***shall be*** a Representative who shall not have attained to the Age of twenty five
23 Years, and been seven Years a Citizen of the United States, and who ***shall not, when elected, be*** an
24 Inhabitant of that State in which he shall be chosen." U.S. Const. art. I, § 2, cl. 2 (emphasis added).
25 In *Schaefer v. Townsend*, 215 F.3d 1031 (9th Cir. 2000), the Court held that these requirements only
26 required a prospective candidate to be a resident on election day, not before. It invalidated as
27 unconstitutional a California law that precluded a non-resident from filing to run for office. Noting

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1 that "neither Congress nor the States should possess the power to supplement the exclusive qualifications set forth in the text of the Constitution," *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 827 (1995), the Ninth Circuit held that the "specific time at which the Constitution mandates residency bars the states from requiring residency before the election." *Schaefer*, 215 F.3d at 1036.[20]

Section Three of the Fourteenth Amendment uses the same verb and tense: "No person shall be …" then reciting the list of relevant offices. This contrasts with the description of conditions for president: "No person … shall be ***eligible***." U.S. Const. art. II, § 1, cl. 5 (emphasis added). To whatever extent art. II establishes conditions for candidacy, amend. XIV, § 3 must be read harmoniously with art. I, § 2 to establish conditions for ***taking*** the position, not ***seeking*** the position. This not only harmonizes the constitutional language across the different sections, but puts all the offices[21] covered by amend. XIV, § 3 on an equal footing. After all, some are elected, while some are appointed. Some are often both—judicial officers of the state of Washington, covered by the clause, can be appointed by the governor or elected, depending on the circumstances. The disability of the amendment attaches when taking office, not before.

2. Congress Must Have Leeway To Act.

This interpretation also gives force to the opportunity for Congressional action to remove the disability. President Johnson announced a general amnesty in December 1868, ending criminal prosecutions for treason (for example) against former Confederates—most notably including Jefferson Davis. Suddenly, persons who might have been convicted of treason (and thus clearly tarred, after due process, as barred from office under Section Three) were forgiven their crimes, in part of the ongoing attempts to knit one nation back together after the Civil War. Nonetheless, although amnesty had been granted, the Fourteenth Amendment still contained congressionally enforceable and congressionally forgivable bars on Civil War rebels holding office. And, as detailed above, congressional enforcement mechanisms for Section Three followed that general amnesty.

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[20] Accord *Thorsted v. Gregoire*, 841 F. Supp. 1068, 1076 (W.D. Wash. 1994), aff'd sub nom. *Thorsted v. Munro*, 75 F.3d 454 (9th Cir. 1996) (invalidating Washington's term limit ballot access law).

[21] Again, assuming the presidency is one of those offices.

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However, in light of the sheer number of potential office-seekers, for essentially every single state office in the formerly rebellious South, it would have made no sense to condition Congressional waiver of disability on the act of ***seeking*** office. Instead, the clause requires Congress to act only after someone is elected and seeks to take the office, thereby limiting the need for broad congressional action (no general amnesty) while also focusing that action on persons actually ready and otherwise able to take office.

Finally, this interpretation functions smoothly with U.S. Const. amend. XX: "If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified ..." Amend. XX. Although, as shown above, the Reconstruction Congress did not draft for nor even contemplate the prospect of a disqualified person being elected president at the meeting of the Electoral College, if that provision did govern the presidency, amend. XX allows the Vice President to "act as President" while Congress considers whether to cast the 2/3 votes in both houses to remove the disability.

IV. Affiants Failed To Serve Any Party At All.

This Court also lacks authority to proceed because Affiants did not serve anyone. They did not serve the captioned defendant they named, and only the actions of the Kitsap County Superior Court alerted the Washington State Republican Party and Chairman Walsh to their challenge to reprinting the list he provided, and thus challenge to the First Amendment speech rights of the party and associational rights of its members. Indeed, it was only during the hearing on the Kitsap challenge, when Affiants alerted *that* court to the existence of *this* challenge, that the Washington State Republican Party learned of this pending second case.[22] Notably, although the Kitsap County Superior Court challenged the Affiants that no one, including the candidate, had apparently been served, they did not attempt to rebut the Court and affirm service.[23] The Washington State

[22] Like Kitsap County Superior Court, this Court sent notice of the January 18th hearing to the Secretary of State and party leaders. It did so on the afternoon of January 16th. The Court's action, while appreciated, is not service of process, and there is no indication the Court notified the candidate named in the caption.

[23] There is not yet a transcript of Tuesday morning's hearing.

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1 Republican Party has a protectable interest that the presidential primary be run according to state
2 law and the internal rules of the party that govern Chairman Walsh's creation of the primary ballot
3 list. It has no institutional interest or concern about the *results* of the primary, which simply
4 produces information the Party uses to inform the operation of the state convention process.
5 However, each named candidate has a separate and unique interest in appearing on that list, and,
6 presumably, in winning a majority of votes cast, so that the party's rules would subsequently work
7 to promote that candidacy over others at the state and national conventions. Affiants apparently
8 propose to ask this Court to dispose of the separate and personal interest of one candidate without
9 ever serving the candidate with process. This is forbidden by the state and federal constitutions.
10 "At minimum, due process requires that in any proceeding which is to be accorded finality notice
11 must be given and reasonably calculated, under all the circumstances, to apprise interested parties
12 of the pendency of the action and afford them an opportunity to present their objections. Further,
13 to obtain personal jurisdiction over a party, Washington law requires that beyond due process
14 requirements, statutory service requirements must be complied with in order for the court to finally
15 adjudicate the dispute between the parties." *Ronald Wastewater Dist. v. Olympic View Water &*
16 *Sewer Dist.*, 196 Wash. 2d 353, 369–70 (2020) (cleaned up).

17 Finally, both WSRP and the challenged candidate are obviously necessary parties. "A
18 necessary party is one which has a sufficient interest in the litigation that the judgment cannot be
19 determined without affecting that interest or leaving it unresolved." *Kitsap Cnty. Fire Prot. Dist.*
20 *No. 7 v. Kitsap Cnty. Boundary Rev. Bd.*, 87 Wash. App. 753, 761, 943 P.2d 380, 385 (1997). A
21 judgment here would affect the Party's interest, but it would also affect the separate and distinct
22 interest of a candidate. The Party seeks to see the primary operate according to law and rules; the
23 candidate seeks to win. A judgment here would plainly affect that interest. The Supreme Court in
24 that case continued:

25 > CR 19(a) requires a person be joined as a party if: the person "is subject to service of process"; the "joinder will not deprive the court of jurisdiction over the subject
26 > matter"; and the person "claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may ... as a practical matter
27 > impair or impede his ability to protect that interest...."

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Id. at 761–62. This Court's immediate response to the filed Affidavit was to put the candidate's name in the case caption, obviously recognizing the separate interest the candidate has in this case and its outcome. Affiants' refusal to even attempt service deprives the Court of jurisdiction over WSRP and that party and compels dismissal on this, the final day allowed for action under RCW 29A.68.011.

V. Conclusion.

It is impossible for Secretary Hobbs or any county auditor to commit a wrongful act by complying with the non-discretionary legislative order to print on the presidential primary ballot the list of names delivered to Secretary Hobbs by Washington State Republican Party Chairman Jim Walsh. To do otherwise would not only violate RCW 29A.56.031, but also violate the First Amendment associational rights of the members of the Washington State Republican Party protected by that statute. For this and other reason, the affidavit statue simply does not apply to the presidential primary.

Affiants further misconstrue and mis-apply the Fourteenth Amendment, Section Three, which in any event is not self-executing. This Court has no authority to evaluate their fact claims.

Finally, Affiants made no attempt to serve WSRP or the challenged candidate, who has a separate and personal interest in appearing on the ballot to contest and promote his candidacy. The Court has no authority to exercise jurisdiction over these two necessary parties, who have not been served—indeed, no attempt has ever been made to serve them. This Court should dismiss the matter and leave Secretary Hobbs and the county auditors to obey the law by printing the presidential primary ballots as they are mandated to do.

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January 17, 2024.

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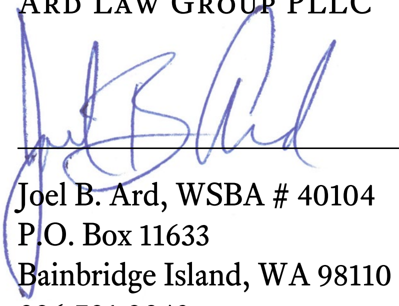
By: 

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the United States of America that on January 17, 2024, I served the foregoing OPPOSITION OF WSRP, together with the Declaration of Joel Ard and exhibits in support and a proposed Order, in *IN RE DONAL J. TRIUMP*, NO. 24-2-00119-34 (THURSTON C'TY SUP. CT.), via email by prior agreement among the parties who have appeared in the matter, as follows:

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