No. 14-145

IN THE

Supreme Court of the United States

IN RE MICHAEL VOELTZ,

Petitioner,

v.

BARACK OBAMA, FLORIDA SECRETARY OF STATE KEN DETZNER, AND THE FLORIDA ELECTIONS CANVASSING COMMISSION,

Respondents.

On Petition for a Writ of Mandamus to the Supreme Court of Florida

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF MANDAMUS

STEPHEN F. ROSENTHAL
PODHURST ORSECK, P.A.
25 West Flagler Street
Suite 800
Miami, FL 33130
(305) 358-2500
srosenthal@podhurst

RICHARD B. ROSENTHAL
THE LAW OFFICES OF
RICHARD B. ROSENTHAL, P.A.
1581 Brickell Avenue
Suite 1408
Miami, FL 33129
(305) 992-6089
rbr@rosenthalappeals.com

MARK HERRON
Counsel of Record
ROBERT J. TELFER, III
GIGI ROLLINI
J. BRENNAN DONNELLY
MESSER CAPARELLO, P.A.
2618 Centennial Place
Tallahassee, FL 32308
(850) 222-0720
mherron@lawfla.com

September 10, 2014

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether 28 U.S.C. § 1651 empowers this Court to issue a writ of mandamus to compel a state court to further hear and decide Petitioner's case, where the state court dismissed the action, *inter alia*, on the basis that the courts of Florida lack jurisdiction to determine the qualifications of a candidate for the office of President of the United States, and where the dismissal was affirmed on appeal.

PARTIES TO THE PROCEEDINGS

Respondent does not dispute the identification and description of the parties to the proceeding as described by Petitioner.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OPINIONS AND ORDERS BELOW

The Petitioner seeks review of following opinions and orders: *Voeltz v. Obama et al*, 139 So. 3d 889 (Fla. 2014); *Voeltz v. Obama et al*, 134 So. 3d 957 (Fla. 1st DCA 2014); and *Voeltz v. Obama et al*, Case No. 2012-CA-3857 (Fla. 2d Cir. Leon County Dec. 20, 2012).

BASIS FOR JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C § 1651.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article II, Section 1, Clause 5, United States Constitution:

> No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty five years, and been fourteen Years a resident within the United States.

Amendment XII, United States Constitution:

> The electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of

the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—the person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-

> President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

Amendment XX, Section 3, United States Constitution:

> If, at the time fixed for the beginning of the term of the President, the President elect shall have died, the Vice President elect shall become President. 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; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

Title 3 U.S.C. § 5:

> Congress shall be in session on the sixth day of January succeeding every meeting of the electors. The Senate and House of Representatives shall meet in the Hall of the House of Representatives at the hour of 1 o'clock in the afternoon on that day, and the President of the Senate shall be their

presiding officer. Two tellers shall be previously appointed on the part of the Senate and two on the part of the House of Representatives, to whom shall be handed, as they are opened by the President of the Senate, all the certificates and papers purporting to be certificates of the electoral votes, which certificates and papers shall be opened, presented, and acted upon in the alphabetical order of the States, beginning with the letter A; and said tellers, having then read the same in the presence and hearing of the two Houses, shall make a list of the votes as they shall appear from the said certificates; and the votes having been ascertained and counted according to the rules in this subchapter provided, the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote, which announcement shall be deemed a sufficient declaration of the persons, if any, elected President and Vice President of the United States, and, together with a list of the votes, be entered on the Journals of the two Houses. Upon such reading of any such certificate or paper, the President of the Senate shall call for objections, if any. Every objection shall be made in writing, and shall state clearly and concisely, and without argument, the ground thereof, and shall be signed by at least one Senator and one Member of the House of Representatives before the same shall be received. When all objections so made to any vote or paper from a State shall have been received and read, the Senate shall thereupon

withdraw, and such objections shall be submitted to the Senate for its decision; and the Speaker of the House of Representatives shall, in like manner, submit such objections to the House of Representatives for its decision; and no electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to according to section 6 of this title from which but one return has been received shall be rejected, but the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified. If more than one return or paper purporting to be a return from a State shall have been received by the President of the Senate, those votes, and those only, shall be counted which shall have been regularly given by the electors who are shown by the determination mentioned in section 5 of this title to have been appointed, if the determination in said section provided for shall have been made, or by such successors or substitutes, in case of a vacancy in the board of electors so ascertained, as have been appointed to fill such vacancy in the mode provided by the laws of the State; but in case there shall arise the question which of two or more of such State authorities determining what electors have been appointed, as mentioned in section 5 of this title, is the lawful tribunal of such State, the votes regularly given of those electors, and those only, of such State shall be counted whose title as electors the two Houses, acting

> separately, shall concurrently decide is supported by the decision of such State so authorized by its law; and in such case of more than one return or paper purporting to be a return from a State, if there shall have been no such determination of the question in the State aforesaid, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State. But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the executive of the State, under the seal thereof, shall be counted. When the two Houses have voted, they shall immediately again meet, and the presiding officer shall then announce the decision of the questions submitted. No votes or papers from any other State shall be acted upon until the objections previously made to the votes or papers from any State shall have been finally disposed of.

STATEMENT OF THE CASE

It is well settled that, contrary to Petitioner's arguments, and those of each and every "birther" plaintiff that has preceded him in state and federal courts throughout the country, President Obama is a natural born citizen, by virtue of his birth in Honolulu, Hawaii in 1961. Nonetheless this case involves the third of three nearly identical lawsuits brought by this

Petitioner to challenge President Obama's eligibility to serve as President of the United States. These cases, all filed in the Circuit Court of the Second Judicial Circuit of Florida, are: (1) *Voeltz v. Obama, et al*., L.T. No. 2012-CA-00467 (Second Judicial Circuit, Leon County, Florida), Case No. 1D12-3489 (First District Court of Appeal), SC13-560 (Florida Supreme Court) (hereinafter, "*Voeltz I*"); (2) *Voeltz v. Obama, et al*., Case No. 2012-CA-02063 (Second Judicial Circuit, Leon County, Florida) (hereinafter, "*Voeltz II*"); and (3) *Voeltz v. Obama, et al*., L.T. No. 2012-CA-003857 (Second Judicial Circuit, Leon County, Florida), Case No. 1D13-83 (First District Court of Appeal), SC14-715 (Florida Supreme Court) (hereinafter, "*Voeltz III*"). The procedural history of these cases is set forth herein.

A. *Voeltz I*

In *Voeltz I*, Voeltz's Amended Complaint contested the nomination of President Obama as the Democratic Party nominee for the office of the President of the United States, as a result of the Presidential Preference Primary held in Florida on January 31, 2012. Appendix A. The Amended Complaint was brought pursuant to Florida's election contest statute, Section 102.168, Florida Statutes. As specific grounds for the contest, Appellant alleged that President Obama has not established the eligibility requirements set forth by the U.S. Constitution of being a natural born citizen, or even a citizen, of the United States, and is thus "ineligible for the Office of the President of the United States." Appellant requested that the trial court issue a writ of mandamus requiring Florida Secretary of State Detzner to adhere to the U.S. Constitution and verify the eligibility of Barack Hussein Obama for the Office of the President of the

United States, or rule that the failure to do so is an abuse of discretion, arbitrary and capricious and contrary to law. Appellant further requested that alternatively, this court must determine Barack Hussein Obama's eligibility for President of the United States. Appellant also requested the trial court issue an injunction preventing the certification, by the Florida Election Canvassing Commission, of Barack Hussein Obama as Democratic Party nominee for the 2012 Florida General Election, and preventing the placement of Barack Hussein Obama on the Florida General Election Ballot for the 2012 Florida General Election.

President Obama moved to dismiss Appellant's Amended Complaint. Secretary Detzner also moved to dismiss Appellant's Amended Complaint, or, alternatively, for summary judgment.

On June 29, 2012, the trial court granted the motions to dismiss filed by President Obama and Secretary Detzner, and dismissed Appellant's Amended Complaint with prejudice. ("*Voeltz I* Final Order"). Appendix A. The trial court ruled, in pertinent part, that Section 102.168, Florida Statutes, was inapplicable to the nomination of a candidate for President of the United States; that there was no "nomination" or "certification of nomination" of President Obama, as those terms are used in the Florida Election Code, because President Obama had no opposition for the Presidential Preference Primary Election; that Secretary Detzner had no duty or authority to inquire into or determine the eligibility of a nominee for office; that Voeltz, as an individual voter, lacked standing to bring his declaratory judgment action; and that, in any event, President Obama is a "natural born citizen" under Article II, Section 1,

Clause 5 of the U.S. Constitution, notwithstanding the fact that at the time of his birth, one of his parents was not an American citizen. *See United States v. Wong Kim Ark*, 169 U.S. 649, 702 (1898) ("Every person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States."); *Hollander v. McCain*, 566 F. Supp. 2d 63, 66 (D.N.H. 2008); *Ankeny v. Governor of Indiana*, 916 N.E. 2d 678, 688 (Ind. Ct. App. 2009).

Voeltz appealed the trial court's order to Florida's First District Court of Appeal. On February 8, 2013, the First District dismissed *Voeltz I* as moot. Appendix B. Voeltz then attempted to appeal that dismissal to the Florida Supreme Court by filing a notice of appeal. On April 8, 2013, the Florida Supreme Court stated that it would treat Voeltz's notice of appeal as a petition for writ of mandamus seeking reinstatement of the proceedings in the First District. Voeltz then filed in the Florida Supreme Court a petition for mandamus, which the Florida Supreme Court denied on September 27, 2013 "[b]ecause petitioner has failed to show a clear legal right to the relief requested." Appendix C.

B. *Voeltz II*

While *Voeltz I* was pending, Voeltz also filed a "Complaint for Declaratory Relief" in Florida's Second Judicial Circuit. *Voeltz II* sought a declaratory judgment pursuant to Section 86.011, Florida Statutes, that President Obama "is not eligible to serve as the President of the United States." Voeltz's complaint alleged that President Obama is not a natural born citizen, is thus ineligible to serve as President of the United States, and therefore his name cannot appear on the Primary and Florida General Election Ballots for 2012 and nor can Florida

Presidential Electors vote for him should he 'win' the Florida General Election.

President Obama moved to dismiss the *Voeltz II* complaint for failure to state a claim. Secretary Detzner filed a motion to dismiss, or in the alternative, for summary judgment.

On September 6, 2012, the trial court granted the motions to dismiss, and also granted Secretary Detzner's alternative motion for summary judgment ("*Voeltz II* Final Order"). Appendix D. The trial court ruled, in pertinent part, that it lacked jurisdiction to grant the declaratory relief Voeltz requested; that federal law—specifically Article II, Section 1 of the U.S. Constitution, the Twelfth and Twentieth Amendments, and 3 U.S.C. § 15—are the exclusive method for hearing and deciding objections to the qualifications of presidential candidates; that persons born within the borders of the United States are "natural born citizens" under Article II, Section I; that Secretary Detzner had no duty or authority to inquire into or determine the eligibility of a nominee for office; that Voeltz lacked standing to bring a declaratory action because he had no particular or special interest different from any other elector, Democratic Party member, or taxpayer; and that the action was barred by *res judicata* and collateral estoppel, in that it was attempting to relitigate the same issues that the trial court dismissed with prejudice in *Voeltz I*.

Voeltz did not appeal the *Voeltz II* Final Order.

C. *Voeltz III*

On November 29, 2012, after the trial court rendered the *Voeltz II* Final Order, but while *Voeltz I* was still pending, Voeltz filed a third action in Florida's Second Judicial Circuit Court, entitled

"Complaint Contesting Election of Barack Hussein Obama." The *Voeltz III* Complaint contested the election of President Obama to the office of President of the United States, pursuant to Section 102.168, Florida Statutes, again on the assertion that President Obama was not a "natural born citizen."

President Obama filed a Motion to Dismiss Complaint for Lack of Subject Matter Jurisdiction and Failure to State a Cause of Action, and a Notice of Applicability of Title 3 U.S.C. Section 5. Secretary Detzner and the Canvassing Commission filed a Motion to Dismiss.

On December 20, 2102, the trial court granted the motions ("*Voeltz III* Final Order"). Appendix E. The trial court ruled, *inter alia*, that it had twice before rejected Voeltz's claim; that the matter was one for Congress under 3 U.S.C. § 15; and that the Electoral College had already met and elected President Obama.

Voeltz then appealed the *Voeltz III* Final Order to the First District Court of Appeal. On February 8, 2013, the First District *per curiam*, affirmed without opinion. Appendix F. Voeltz then attempted to appeal the District Court's decision to the Florida Supreme Court by filing a Notice of Appeal. On April 16, 2013, the Florida Supreme Court dismissed the appeal, because under Florida law the Florida Supreme Court lacks jurisdiction to hear *per curiam* affirmances without opinion. Appendix G.

It is from the dismissal of this appeal by the Florida Supreme Court in *Voeltz III* for lack of jurisdiction that Petitioner now seeks relief by issuance of an extraordinary writ authorized by 28 U.S.C § 1651(a).

SUMMARY OF ARGUMENT

While Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C § 1651, Petitioner has failed to show any circumstance that would warrant this Court's issuance of this extraordinary remedy. The Florida courts acted within the bounds of their powers and duties in considering and disposing of Petitioner's claims. The Florida Supreme Court has no clear, indisputable duty to compel the Second Judicial Circuit Court to further hear the merits of the Petitioner's claim, or to issue the declaratory judgment Petitioner desires. Petitioner seeks to use this Court's mandamus jurisdiction as a substitute for other avenues of seeking review of the decisions of the Florida courts.

With respect to the Petitioner's claim that the state courts have jurisdiction to determine the issue of qualification for the office of President of the United States, the Florida courts correctly concluded that they lacked jurisdiction to do so, and that Petitioner's remedy, if any, was with Congress. The question of whether a candidate for the office of President of the United States is qualified under Article II, Section 1, Clause 5, of the Constitution of the United States is committed under the Constitution to the electors and to Congress, and not to the courts of Florida.

President Obama is a natural born citizen, by virtue of his birth in Honolulu, Hawaii in 1961 and, thus, is qualified under Article II, Section 5, of the Constitution of the United States for the office of President of the United States.

ARGUMENT

I. THERE IS NO BASIS FOR MANDAMUS.

This Court requires that the party seeking issuance of the writ demonstrate that his "right to issuance of the writ is 'clear and indisputable,'" and that there exist no other adequate means to attain the desired relief. *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 384 (1953) (quoting *United States v. Duell*, 172 U.S. 576, 582 (1899)).

Here, Petitioner claims to be entitled to a "Writ of Mandamus to the Supreme Court of Florida" to compel "the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida to hear to [sic] the case on the merits and issue a declaratory judgment as to the eligibility of Barack Obama to serve as President of the United States." While difficult to discern from his petition, Petitioner seems to ask the Court either to compel the Florida Supreme Court to review the previous *per curiam* affirmed decisions issued by Florida's First District Court of Appeal without opinion, or to compel a Second Judicial Circuit Court judge to vacate his order dismissing Petitioner's *Voeltz III* complaint in favor of further hearing on the merits of the case. Regardless of how Petitioner's request is construed, mandamus is inappropriate.

The Florida Supreme Court has no clear, indisputable duty to compel the Second Judicial Circuit Court to entertain further proceedings in the *Voeltz III* case, or to issue the declaratory judgment Petitioner desires. Indeed, contrary to Petitioner's assertion that the Florida Supreme Court had a clear legal duty to review the First District's *per curiam* affirmed decisions, well-established Florida law makes clear that the Florida Supreme Court *lacks jurisdiction* to

review a *per curiam* affirmed decision without opinion. *Jenkins v. State*, 385 So. 2d 1356, 1357-1359 (Fla. 1980) (explaining history of Florida's constitutional prohibition on Florida Supreme Court review of *per curiam* decisions without opinion issued by Florida's district courts of appeal); *see also Stallworth v. Moore*, 827 So. 2d 974, 975-979 (Fla. 2002) (holding that the Florida Supreme Court lacked either discretionary review jurisdiction or extraordinary writ jurisdiction to review *per curiam* denials of relief, issued without opinion or explanation, whether they be in opinion form or by way of unpublished order). The Florida Supreme Court correctly determined it lacked jurisdiction to review *Voeltz III*. In short, Voeltz cannot allege any clear legal duty the Florida Supreme Court refused to fulfill.

Nor does Judge Carroll, the trial judge who issued the order dismissing *Voeltz III*, have a clear duty to undertake further proceedings in that case, which mirrored one already heard and decided on the merits in *Voeltz II*, and which was rendered final by Petitioner's own failure to take a direct appeal of the decision. Voeltz appealed Judge Carroll's decision in *Voeltz III* to Florida's First District Court of Appeal, which considered the appeal and issued a *per curiam* affirmance without opinion. *See*, *e.g.*, *S. Fla. Hosp. Corp. v. McCrea*, 118 So. 2d 25, 31 (Fla. 1960) (explaining that the word "affirmed," even when used as the "sole utterance of [an] appellate court[] in disposing of a case," "necessarily means that the appellate court has carefully examined all points raised by all appealing parties and found them to be without merit"). In short, mandamus relief is improper because Voeltz cannot allege any clear legal duty the Second Judicial Circuit Court refused to fulfill.

II. THE FLORIDA COURTS CORRECTLY DECIDED THAT THEY DID NOT HAVE JURISDICTION TO CONSIDER THE ISSUE OF QUALIFICATIONS FOR THE OFFICE OF PRESIDENT OF THE UNITED STATES.

Section 102.168(1), Florida Statutes (2011), provides, in pertinent part, as follows:

> (1) Except as provided in s. 102.171, the certification of election or nomination of any person to office, or of the result on any question submitted by referendum, may be contested in the circuit court by any unsuccessful candidate for such office or nomination thereto or by any elector qualified to vote in the election related to such candidacy, or by any taxpayer, respectively.

"At common law, except for limited application of quo warranto, there was no right to contest in court any public election, because such a contest is political in nature and therefore outside the judicial power." *McPherson v. Flynn*, 397 So. 2d 665, 667 (Fla. 1981). Thus, "the right to contest an election is created by statute . . ." *Gore v. Harris*, 772 So. 2d 1243, 1251 (Fla. 2000), *rev'd on other grounds*, 531 U.S. 98 (2000).

The question of whether a candidate for the office of President of the United States is qualified under Article II, Section 1, Clause 5, of the Constitution of the United States is "committed under the Constitution to the electors and the legislative branch. Judicial review—if any—should occur only after the electoral and Congressional processes have run their course." *Robinson v. Bowen*, 567 F. Supp. 2d 1144,

1147 (N.D. Cal. 2008) (citing *Texas v. United States*, 523 U.S. 296, 300-02, 118 S. Ct. 1257 (1998)).

The Constitution of the United States provides procedures governing the election of the President. Specifically, Article II, Section 1, Clause 2 provides that each state shall appoint, in a manner directed by the state Legislature, "a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . ."[1] The Twelfth Amendment prescribes the manner in which electors shall elect the President.

The Twentieth Amendment and Title 3, U.S.C. § 15 describe, in detail, the process for raising and resolving challenges to the qualifications of candidates for the office of President of the United States. Title 3, U.S.C. § 15 sets forth procedures for the counting of the electors' votes by the Congress and for the submission and resolution of objections.

Thus, as recognized by *Robinson v. Bowen*, these provisions of federal law, working in tandem, are the exclusive method for hearing and deciding objections to the qualifications of presidential candidates. *Robinson*, 567 F. Supp. 2d at 1147.

The Florida courts correctly concluded that they lacked jurisdiction to determine the issue of qualification for the office of President of the United States, and that Petitioner's remedy, if any, was with Congress.

---

[1] Sections 103.011 and 103.021, Florida Statutes (2011), provide for the nomination and appointment of electors.

CONCLUSION

For the foregoing reasons, Respondent Barack Obama respectfully requests that this Court deny the Petitioner's request to issue a writ of mandamus to compel additional proceedings before the courts of the State of Florida to determine the qualifications of a candidate for the office of President of the United States.

Respectfully submitted,

STEPHEN F. ROSENTHAL
PODHURST ORSECK, P.A.
25 West Flagler Street
Suite 800
Miami, FL 33130
(305) 358-2500
srosenthal@podhurst

RICHARD B. ROSENTHAL
THE LAW OFFICES OF
RICHARD B. ROSENTHAL, P.A.
1581 Brickell Avenue
Suite 1408
Miami, FL 33129
(305) 992-6089
rbr@rosenthalappeals.com

MARK HERRON
Counsel of Record
ROBERT J. TELFER, III
GIGI ROLLINI
J. BRENNAN DONNELLY
MESSER CAPARELLO, P.A.
2618 Centennial Place
Tallahassee, FL 32308
(850) 222-0720
mherron@lawfla.com

September 10, 2014

APPENDIX

APPENDIX A

IN THE CIRCUIT COURT OF THE
SECOND JUDICAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

[Filed Jun 29 2012]

Case No. 2012-CA-00467

MICHAEL C. VOELTZ,

Plaintiff,

BARACK HUSSEIN OBAMA, Florida Democratic Party Nominee to the 2012 Democratic Party Convention,
KEN DETZNER, Secretary of State of Florida, and
FLORIDA ELECTIONS CANVASSING COMMISSION.

Defendants.

ORDER GRANTING BARACK OBAMA'S AND SECRETARY OF STATE KEN DETZNER'S MOTION TO DISMISS AMENDED COMPLAINT

This case is before me on motions to dismiss filed by Defendants Obama and Detzner. The amended complaint challenges the nomination of Defendant Obama as the Democratic Party's nominee for the office of President of the United States, pursuant to Section 102.168, Florida Statutes. The Plaintiff alleges that candidate Obama is not eligible for that office because he is not a "natural-born citizen" within the meaning of Article II, Section 1 of the Constitution of the United States. Because I find that the plaintiff has not and cannot state a cause of action for the relief requested under Section 102.168, Florida Statutes, I grant the motions to dismiss with prejudice.

There are several deficiencies in the complaint, but the biggest problem, and one which cannot be overcome by amending the complaint, is that Section 102.168, Florida Statutes, is not applicable to the nomination of a candidate for Office of President of the United States. This statute provides, in pertinent part, as follows:

> (1) Except as provided in s. 102.171, the certification of election or nomination of any person to office, or of the result on any question submitted by referendum, may be contested in the circuit court by any unsuccessful candidate for such office or nomination thereto or by any elector qualified to vote in the election related to such candidacy, or by any taxpayer, respectively.

Plaintiff argues that President Obama has been nominated as the Democratic Party's candidate for the office by virtue of the fact that he had no opposition for the Presidential Preference Primary Election. Under Florida Statutes Section 97.021(28), "'Primary election' means an election held preceding the general election for the purpose of nominating a party nominee to be voted for in the general election to fill a national, state, county, or district office." Because Mr. Obama was the only candidate for that primary election, Plaintiff argues that Florida Statutes, Section 101,252(1) applies. That provision reads as follows:

> "Any candidate for nomination who has qualified as prescribed by law is entitled to have his or her name printed on the official primary election ballot. However, when there is only one candidate of any political party qualified for an office, the name of the candidate shall not be printed on the primary election ballot, **and such candidate shall**

> **be declared nominated for the office**." [Emphasis added].

Florida's Supreme Court has confirmed that " [w]hen only one candidate for a political party qualifies, that candidate is the party's nominee." *Republican State Exec. Comm. v. Graham*, 388 So. 2d 556, 557 (1980).

If the plaintiff was challenging the candidate's eligibility for any other office, his analysis would be correct and these provisions would apply. The Office of President of the United States, however, is treated differently under Florida law. In every other political office, any person can qualify to run as a Democrat or Republican in a primary election and if she receives the greatest number of votes, she is, by law, that party's nominee for the general election, Candidates for these other offices are required to file certain documents and pay a qualifying fee (or sufficient petitions) during a specific time period. In 2012 that qualifying period ran from noon on Monday, June 4, 2012 until noon on Friday, June 8, 2012,

Presidential candidates do not qualify during that period or pursuant to that process. Rather, Section 103.021, Florida Statutes, provides that presidential electors are designated by the respective political parties before September 1 of each presidential election year and nominated by the Governor.[1] The

---

[1] Section 103.021(1) and (2), Florida Statutes (2011), provides as follows:

> Nomination for presidential electors.—Candidates for presidential electors shall be nominated in the following manner:
>
> (1) The Governor shall nominate the presidential electors of each political party. The state executive committee of each political party shall by resolution recommend

respective major political parties determine their nominee at a national convention pursuant to rules that the parties draft and approve. The Presidential Preference Primary Election in Florida is an integral part of that process for the parties, but as it relates to Florida law, there is no qualifying and no certification of nomination of the candidate as a result. Thus, under Florida law, Mr. Obama is not presently the nominee of the Democratic Party for the office.

The question remains whether or not this case should be stayed in anticipation that Mr. Obama will, in fact, be nominated at the national convention of the Democratic Party. Will the Plaintiff's election contest then be ripe for adjudication? I conclude not, as there has not been and never will be, a nomination by primary election or qualification as contemplated under Florida law. Neither the Plaintiff nor any other

---

candidates for presidential electors and deliver a certified copy thereof to the Governor before September 1 of each presidential election year. The Governor shall nominate only the electors recommended by the state executive committee of the respective political party. Each such elector shall be a qualified elector of the party he or she represents who has taken an oath that he or she will vote for the candidates of the party that he or she is nominated to represent. The Governor shall certify to the Department of State on or before September 1, in each presidential election year, the names of a number of electors for each political party equal to the number of senators and representatives which this state has in Congress.

(2) The names of the presidential electors shall not be printed on the general election ballot, but the names of the actual candidates for President and Vice President for whom the presidential electors will vote if elected shall be printed on the ballot in the order in which the party of which the candidate is a nominee polled the highest number of votes for Governor in the last general election.

elector will determine by vote the nomination. Thus, regardless of who is nominated by the party at the national convention, Plaintiff would not be able to amend his complaint to challenge the nomination under Section 102.168, Florida Statutes.

Even if Section 102.168, Florida Statutes, was applicable to a challenge to the "nomination" of a candidate for Office of the President of the United States, the amended complaint fails to state a cause of action for the relief requested. Specifically, the amended complaint alleges that the candidate has not demonstrated, and the Secretary of State has not confirmed, that the candidate is a "natural born citizen" as required by the United States Constitution. It is the plaintiff's burden, however, to allege and prove that a candidate is not eligible. The Secretary of State also has no affirmative duty, or even authority, "to inquire into or pass upon the eligibility of a candidate to hold office for the nomination for which he is running." *Taylor v. Crawford*, 116 So. 41. 42 (Fla. 1928); *see also Cherry*, 265 So. 2d at 57 (stating that nothing "places a duty upon or empowers the Secretary of State to conduct an independent inquiry with respect to circumstances or fact dehors the qualifying papers"); *Hall v. Hildebrand*, 168 So. 531, 364 (Fla. 1936) (finding that the tiling officer "has neither the responsibility nor the authority to pass judgment upon the supposed ineligibility of candidates for office").

Plaintiff alleges that the Secretary's oath to "support the U.S. Constitution" "creates an absolute ministerial duty" on him to determine the eligibility of presidential nominees. I disagree. The duties that fall within the scope of mandamus are legal duties of a specific, imperative, and ministerial character as

distinguished from those that arc discretionary." *Cherry v. Stone*, 265 So. 2d 56, 51 (Fla. 1972). An oath to "support the U.S. Constitution" is not a "specific, imperative" duty to do anything of a ministerial character, let alone a specific imperative to verify the eligibility of presidential nominees or candidates. *Cherry v. Stone*, *supra* at 57. Plaintiff's allegations are thus insufficient to justify a writ of mandamus directed to the Secretary.

Plaintiff's alternative request for mandamus against the Court is also insufficient for similar reasons. Plaintiff makes no allegation supporting any of the elements for a writ of mandamus against the Court. Additionally, this Court tacks jurisdiction to consider the issuance of mandamus directed to it. *See Davis v. State*, 982 So. 2d 1246 (Fla. 5th DCA 2008) (noting that "a court cannot logically issue a writ of mandamus to itself")

In oral argument on the motion, the plaintiff's attorney advised the court that if given an opportunity to amend the complaint, the plaintiff could affirmatively allege that the candidate was not born within the territorial jurisdiction of the United States. Thus, that defect could theoretically be remedied. The second prong of the plaintiffs challenge, however, is also deficient and cannot be remedied. Specifically, the plaintiff alleges that even if the candidate was born within the territorial jurisdiction of the United States, he was not born of two parents who were American citizens and therefore cannot be a "natural born citizen" as required by the Constitution.

I have reviewed and considered the legal authority submitted by the Plaintiff and the Defendants on this issue and conclude as a matter of law that this allegation, if true, would not make the candidate

ineligible for the office. Article II, Section 5 of the Constitution of the United States provides:

> No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty five years, and been fourteen Years a resident within the United States.

"The Constitution does not, in words, say who shall be natural-born citizens." *Minor v. Happersett*, 88 U.S. 162, 167 (1875). However, the United States Supreme Court has concluded that "[e]very person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States." Other courts that have considered the issue in the context of challenges to the qualifications of candidates for the office of President of the United States have come to the same conclusion. *See Hollander v. McCain*, 566 F. Supp. 2d 63, 66 (D.N.H. 2008) ("Those born 'in the United States, and subject to the jurisdiction thereof' have been considered American citizens under American law in effect since the time of the founding and thus eligible for the presidency.") (citations omitted); *Ankeny v. Governor of Indiana*, 916 N.E.2d 678, 688 (Ind. Ct. App. 2009) (citing *Wong Kim Ark*, and holding that both President Obama and Senator John McCain were "natural born citizens" because "persons born within the borders of the United States are 'natural born [c]itizens' for Article II, Section 1 purposes, regardless of the citizenship of their parents.").

Thus, for procedural and substantive reasons, the complaint is legally deficient and should be dismissed.

The question remains, should it be dismissed with prejudice, i.e., without leave to amend. Dismissal with prejudice should only be granted if it conclusively appears there is no possible way to amend the complaint to state a cause of action. As noted above, I can't see how the Plaintiff could amend the complaint and proceed under Section 102,168, Florida Statutes.

Plaintiff could perhaps contest the election if the candidate is successful. The Defendants argue that such a challenge is foreclosed as well, but as the complaint sought to challenge only the nomination, I do not reach the issue of whether Plaintiff might properly file an election contest action after the general election. Suffice it to say that Plaintiff could not, under any existing facts, amend the complaint to contest an election that has not occurred.

Plaintiff suggests the possibility of a declaratory judgment claim, but I don't see how Plaintiff, as an individual voter, would have standing to seek declaratory relief. In short, I am unable to conceive of any other legal theory upon which the Plaintiff could proceed at this time relative to the relief sought.

While these motions to dismiss were under advisement, Plaintiff filed a second amended complaint which was not authorized. The Secretary and the Commission have moved to strike it, which I grant.

Therefore, for the reasons expressed herein, it is ORDERED AND ADJUDGED, that:

The Motions to Dismiss the Amended Complaint are GRANTED and the Plaintiff's Amended Complaint is hereby dismissed with prejudice. The Second Amended Complaint is stricken.

DONE AND ORDERED in Chambers at Tallahassee, Leon County, Florida, this 29th day of June, 2012.

/s/ Terry P. Lewis
Terry P. Lewis, Circuit Judge

cc: Copies to Counsel of Record

APPENDIX B

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE
MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

———

Case No. 1D12-3489

———

MICHAEL VOELTZ,

Appellant,

v.

BARACK HUSSEIN OBAMA, Florida Democratic Party Nominee for President to the 2012 Democratic National Convention; KEN DETZNER, Secretary of State of Florida; and FLORIDA ELECTIONS CANVASSING COMMISSION,

Appellees.

———

Opinion filed February 8, 2013.

An appeal from the Circuit Court for Leon County. Terry P. Lewis, Judge.

Larry Klayman, Washington D.C., for Appellant.

Mark Herron, Joseph B. Donnelly, and Robert J. Telfer, III, of Messer, Caparello & Self, Tallahassee; Stephen F. Rosenthal of Podhurst Orseck, Miami; and Richard B. Rosenthal of The Law Offices of Richard B.

Rosenthal, P.A., Miami., for Appellee President Barack Obama.

Daniel E. Nordby, General Counsel, Ashley E. Davis, Assistant General Counsel, Pamela Jo Bondi, Attorney General, and James A. Peters, Assistant Attorney General, Tallahassee, for Appellees Ken Detzner, Secretary of State of Florida, and The Florida Elections Canvassing Commission.

PER CURIAM.

DISMISSED as moot.

BENTON, C.J., DAVIS, and ROBERTS, M., CONCUR.

APPENDIX C

SUPREME COURT OF FLORIDA

Case No.: SC13-560

Lower Tribunal No(s).:
1D12-3489, 2012-CA-00467

MICHAEL VOELTZ

Petitioner(s),

vs.

BARACK HUSSEIN OBAMA, ETC., ET AL.

Respondent(s).

FRIDAY, SEPTEMBER 27, 2013

Because petitioner has failed to show a clear legal right to the relief requested, he is not entitled to mandamus relief. Accordingly, the petition for writ of mandamus is hereby denied. *See Huffman v. State*, 813 So. 2d 10, 11 (Fla. 2000).

PARIENTE, LEWIS, CANADY, LABARGA, and PERRY, J.J., concur.

A True Copy
Test:

/s/ Thomas D. Hall

Thomas D. Hall
Clerk, Supreme Court

kb

[SEAL]

Supreme Court of
the State of Florida

Served:

SCOTT RILLE
HON. JON S. WHEELER, CLERK
STEPHEN F. ROSENTHAL
RICHARD BRIAN ROSENTHAL
LARRY ELLIOT KLAYMAN
ROBERT J. TELFER, III
MARK HERRON
JOSEPH BRENNAN DONNELLY
BARACK HUSSEIN OBAMA, PRESIDENT
JAMES AARON PETERS
ASHLEY DAVIS
DANIEL ELDEN NORDBY
HON. BOB INZER, CLERK

APPENDIX D

IN THE CIRCUIT COURT OF THE
SECOND JUDICAL CIRCUIT, IN AND
FOR LEON COUNTY, FLORIDA

Case No. 2012-CA-02063

MICHAEL C. VOELTZ,

Plaintiff,

BARACK HUSSEIN OBAMA,
Florida Democratic Party Nominee to the
2012 Democratic Party Convention,

v.

KEN DETZNER, Secretary of State of Florida,
and FLORIDA ELECTIONS CANVASSING COMMISSION,

Defendants.

ORDER GRANTING MOTIONS TO DISMISS
OR, IN THE ALTERNATIVE, GRANTING THE
SECRETARY AND COMMISSION'S MOTION
FOR SUMMARY JUDGMENT

This case came before the Court on the motion to dismiss filed by Defendant Barack Obama (hereinafter referred to as "President Obama") and a motion to dismiss or, in the alternative, a motion for summary judgment filed by Defendants Ken Detzner, the Secretary of State of the State of Florida, and the Florida Elections Canvassing Commission (hereinafter referred to collectively as the "Secretary"). The complaint "seeks to have this Court declare that

Barack Hussein Obama is not eligible to serve as the President of the United States." See Complaint at 1. For the reasons set forth below, the Court finds and concludes that it lacks jurisdiction under Chapter 86, Florida Statutes, to grant the declaratory relief sought by the Plaintiff.

I. Introduction

Plaintiff seeks to invoke the jurisdiction of this Court pursuant to Section 86.011, Florida Statutes. *See Complaint* at ¶ 37. The complaint "seeks to have this Court declare that Barack Hussein Obama is not eligible to serve as President of the United States" "now or anytime in the future? *See Complaint* at ¶¶ 1, 39. Because he is not eligible, the complaint alleges, "his name cannot appear on the Primary and Florida General Election Ballots for 2012 and nor can Florida Presidential Electors vote for him should he 'win' the Florida General Election? *See Complaint* at ¶ 2. The complaint further alleges that President Obama was not born in the United States, thus making him ineligible under Article II, Section 1 of the United States Constitution to serve as the President of the United States. *See Complaint* at ¶¶ 11-12, 27. Alternatively, the complaint alleges that even if born within the United States, President Obarna "is not a natural born citizen as set forth in the U.S. Constitution because he was not horn in the United States and to two U.S. citizen parents . . . " See Complaint at ¶ 38 and ¶¶ 13-19.

In addition, the complaint

> seeks to have this Court declare that the Secretary of State of Florida has an affirmative duty to determine the eligibility of Defendant Barack Hussein Obama before his name is placed

> on the Florida Primary or General Election Ballots or before the Presidential Electors for the state of Florida cast their votes after 2012 General Election should he 'win' the Florida General Election."

See Complaint at ¶ 40 and ¶¶ 24-26, The basis for Plaintiff's allegation of such a duty exists is that the Secretary took an oath to "support, protect, and defend the U.S. Constitution." *See Complaint* at ¶¶ 21-24.

The complaint seeks the following relief: A declaration that President Obama is not a United States citizen as he was not born in the United States; a declaration that President Obama is not a natural born citizen as he was not born to two citizen parents; a declaration that President Obama is not eligible to be placed on the 2012 Presidential Primary and General Election Ballots because he was not born in the United States or, in the alternative, be was not born to two citizen parents; a declaration that President Obama is not eligible for the office of President of the United States because he was not born in the United States or, in the alternative, he was not born to two citizen parents; a declaration that the Secretary of State has an affirmative duty to determine eligibility of President Obama before he is placed on the 2012 Presidential Primary and General Election Ballots; and a declaration that the Secretary of State has an affirmative duty to determine eligibility of President Obama before the presidential electors for the State of Florida cast their votes after the 2012 General Election should he win the 2012 Florida general election. *See Complaint*, "Prayer for Relief."

President Obama filed a motion to dismiss the complaint for lack of subject-matter jurisdiction and

for failure to state a cause of action in that there is no bona fide justiciable controversy between the parties and that the judgment of the Court is sought merely to answer questions propounded out of curiosity or for political purposes. The motion to dismiss argued that the complaint fails to satisfy the jurisdictional threshold necessary to maintain an action for declaratory judgment.

The Secretary moved to dismiss the complaint for for lack of subject matter jurisdiction. Alternatively, the Secretary moved for summary judgment as to the claims against them for the same reasons and additionally, because the complaint is barred by principles of *res judicata* and collateral estoppel.

II. Legal Analysis

In *May v. Holley*, 59 So. 636, 639 (Fla. 1952), the Florida Supreme Court set forth the general rule for determining whether a court has jurisdiction over an action brought pursuant to Chapter 86, Florida Statutes:

Before any proceeding for declaratory relief should be entertained it should be clearly made to appear that there is a bona Ode, actual, present practical need for the declaration; that the declaration should deal with a present, ascertained or ascertainable state of facts or present controversy as to a state of facts; that some immunity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts; that there is some person or persons who have, or reasonably may have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law; that the antagonistic and adverse interest[s] are all before the court by proper process or class representation and that the relief

sought is not merely the giving of legal advice by the courts or the answer to questions propounded from curiosity. *These elements are necessary in order to maintain the status of the proceeding as being judicial in nature and therefore within the constitutional powers of the courts.*

(Emphasis added.) *See also Martinez v. Scanlan*, 582 So. 2d 1167, 1170 (Fla. 1991) (citing *May v Halley*, 59 So. 2d 636, 639 (Fla. 1952)). Without each and every one of these elements, the Court is without jurisdiction to entertain the action. *Id*. (emphasizing that [*t*]*hese elements are necessary in order to maintain the status of the proceeding as being judicial in nature and therefore within the constitutional powers of the courts*"). Applying these principles, the Court finds and concludes that it lacks jurisdiction under Chapter 86, Florida Statutes, to grant the declaratory relief sought by the Plaintiff.

A. There is a no bona fide, actual, present practical need for the declaration

Plaintiff argues that this case is a case of first impression for Florida courts and, as such, the Court should not consider the decisions and opinions of other courts that have been presented with allegations that a candidate for President of the United States is not qualified under Article II, Section 5, of the Constitution of the United States to hold the office of President of the United States.[1] Contrary to the

[1] Article II, Section 5 of the Constitution of the United States provides:

> No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall

argument of the Plaintiff, it is appropriate for the Court to consider the decisions and opinions of other courts that have considered the question.

To the extent the complaint challenges the citizenship of President Obama and, thus his eligibility to hold the office of President of the United States under Article II, Section 5, of the Constitution of the United States, the United States District Court for the Northern District of California, when presented with a challenge to John McCain's eligibility under Article II, Section 5, concluded that this question is "committed under the Constitution to the electors and the legislative branch. Judicial review—if any—should occur only after the electoral and Congressional processes have run their course." *Robinson v Bowen*, 567 F. Supp. 2d 1144, 1147 (N.D. Cal. 2008).

In its decision, the court outlined that the Constitution of the United States uniquely and specially provides for the election of the President. *See Robinson v, Bowen*, 567 F. Supp. 2d at 1147. This is a matter of federal constitutional law, separate and distinct from the election of any other candidate. Specifically, Article II, Section 1 provides that each state shall appoint, in a manner directed by the state legislature, "a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress...."[2] The Twelfth Amendment prescribes the manner in which the electors shall elect the president:

---

not have attained to the age of thirty five years, and been fourteen Years a resident within the United States

[2] Florida law is consistent with these requirements. Sections 103.011 and 103.021, Florida Statutes (2011), provide for the nomination and appointment of electors.

> The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed;....[3]

The Twentieth Amendment and Title 3 U.S.C. § 15 describe, in detail, the process for raising and resolving challenges to the qualifications of candidates for the office of President of the United States. Section 3 of the Twentieth Amendment provides, in pertinent part, as follows:

> 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

[3] Section 103.051, Florida Statutes (2011), provides for the meeting of Florida's electors in Tallahassee, Florida, on the date set by Congress. Sections 103.061 - 103.071, Florida Statutes (2011), set forth additional procedures for the meeting of the electors.

> President until a President shall have qualified; and the Congress may by law provide for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.

(Emphasis added).

The provisions of Title 3 U.S.C. § 15 set forth procedures for the counting of the electors' votes by the Congress and for the submission and resolution of objections:

> Every objection shall be made in writing, and shall state clearly and concisely, and without argument, the ground thereof, and shall be signed by at least one Senator and one Member of the House of Representatives before the same shall be received. When all objections so made to any vote or paper from a State shall have been received and read, the Senate shall thereupon withdraw, and such objections shall be submitted to the Senate for its decision; and the Speaker of the House of Representatives shall, in like manner, submit such objections to the House of Representatives for its decision; . . . No votes or papers from any other State shall be acted upon until the objections previously made to the votes or papers from any State shall have been finally disposed of.

Thus, these provisions of federal law, working in tandem, are the exclusive method for hearing and deciding objections to the qualifications of presidential candidates.

> It is clear that mechanisms exist under the *Twelfth Amendment* and 3 *U.S.C. 15* for any challenge to any candidate to be ventilated when electoral votes are counted, and that the *Twentieth Amendment* provides guidance regarding how to proceed if a president elect shall have failed to qualify. Issues regarding qualifications for president are quintessentially suited to the foregoing process. Arguments concerning qualifycations or lack thereof can be laid before the voting public before the election is over, can be raised as objections as the electoral votes are counted in Congress. The members of the Senate and the House of Representatives are well qualified to adjudicate any objections to ballots for allegedly unqualified candidates.

Robinson v. Bowen, 567 F. Supp. 2d at 1147.

This Court is also guided and persuaded by the decision of the California Court of Appeal in *Keyes v Bowen*, 189 Cal. App. 4th 647 (Cal. App. 3d Dist. 2010), *cert. denied* ___ U.S. ___, 132 S. Ct 199 (2011), which involved a challenge to the certification of the 2008 electors pledged to President Mama. In its opinion, the Court considered the appropriateness of each state independently deciding whether a particular presidential candidate meets the eligibility requirements of the United States Constitution. The Court concluded:

> [The presidential nominating process is not subject to each of the 50 states' election officials independently deciding whether a presidential nominee is qualified, as this could lead to chaotic results, Were the courts of 50 states at liberty to issue injunctions restricting certification of duly elected presidential electors, the result could be

> conflicting rulings and delayed transition of power in derogation of statutory and constitutional deadlines. Any investigation of eligibility is best left to each party, which presumably will conduct the appropriate background check or risk that its nominee's election will be derailed by an objection in Congress, which is authorized to entertain and resolve the validity of objections following the submission of the electoral votes.

Keyes v. Bowen, 189 Cal. App. 4th at 652.

It is the conclusion of this Court that issues concerning President Obama's eligibility to be President of United States have been committed under the Constitution to the presidential electors and the Congress and, as a consequence, this Court lacks subject matter jurisdiction to consider the issue,

In addition, to the extent that the complaint alleges that President Obama is not a "natural born citizen" even though born within the United States, the Court is in agreement with other courts that have considered this issue, namely, that persons born within the borders of the United States are "natural born citizens" for Article 11, Section 1 purposes, regardless of the citizenship of their parents. *See United States v. Wong Kim Ark*, 169 U.S. 649, 705 (1898)(holding that a person born to non-citizens for China was a citizen of the United States because [e]very person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizens of the United States"); *Hollander v. McCain*, 566 F. Supp. 2d 63, 66 (D.N.H. 2008) (Those born 'in the United States, and subject to the jurisdiction thereof have been considered American citizens under American law in effect since the time of the founding and thus eligible for the presidency.") (citations

omitted); *Ankeny v. Governor of Indiana*, 916 N.E.2d 678, 688 (Ind. Ct. App. 2009) (citing *Wong Kim Ark*, and holding that both President Obama and Senator John McCain were "natural born citizens" because 'persons born within the borders of the United States are 'natural born [c]itizens' for Article II, Section 1 purposes, regardless of the citizenship of their parents.").

Accordingly, there is no bona fide, actual, present practical need for the declaration concerning whether persons born in the United States are "natural born citizens," as this matter is well settled.

B. There is a no controversy

In order to maintain this action, Plaintiff must first demonstrate some "insecurity and uncertainty as to the Secretary's authority to determine President Obama's eligibility to hold the Office of President. *Martinez v. Scanlan*, 582 So.2d 1167, 1170 (Fla. 1991). Indeed, the elimination of doubt or uncertainty is the "purpose of the declaratory judgment statute . . ." *Id*. It is well-settled, however, that the Secretary has no duty, or even authority, "to inquire into or pass upon the eligibility of a candidate to hold office for the nomination for which he is running?' *Taylor v. Crawford*, 116 So. 41, 42 (Fla. 1928); *see also Cherry*, 265 So. 2d at 57 (stating that nothing "places a duty upon or empowers the Secretary of State to conduct an independent inquiry with respect to circumstances or fact dehors the qualifying papers"); *Hall v. Hildebrand* 168 So. 531, (Fla. 1936) (finding that the filing officer "has neither the responsibility nor the authority to pass judgment upon the supposed ineligibility of candidates for office").

Plaintiffs allegation that the Secretary's oath to "support the U.S. Constitution" "creates an absolute ministerial duty" to determine the eligibility of presidential candidates is also incorrect.. "The duties that fall within the scope of mandamus are legal duties of a specific, imperative, and ministerial character as distinguished from those that are discretionary." *Cherry v. Stone*, 265 So. 2d 56, 57 (Fla. 1972). An oath to "support the U.S. Constitution" is not a "specific, imperative" duty to do anything of a ministerial character, let alone a specific imperative to verify the eligibility of presidential candidates. *Id.*

Contrary to the Plaintiffs assertions, Florida law does not impose a clear, present, or ministerial duty on the Secretary of State to determine whether a presidential candidate meets the eligibility criteria of the United States Constitution.

C. Plaintiff has no standing

"To sustain an action for declaratory relief the complaining party must demonstrate that he has a judicially cognizable, bona fide and direct interest in the result sought by the action." *McNevin v. Baker*, 170 So. 2d 66, 68 (Fla. 2d DCA 1964), Plaintiff alleges that he is "a registered member of the Democratic Party, voter, and taxpayer in Broward County" and has "taken an oath to 'protect and defend' the U.S. Constitution and the Constitution of Florida." *See Complaint* at 1 3. These allegations fail to demonstrate that Plaintiff possesses the requisite standing to bring a declaratory judgment action.

Plaintiffs right to a declaration must be "different in kind than those of all citizens" who may share Plaintiffs alleged doubt. *See McNevin*, 170 So. 2d at 68 (holding that an "attorney has no particular or special

interest" in the validity of statute creating the jurisdiction of small claims courts). Indeed, the standing requirement is "explicit in the statement that proceedings under the [Declaratory Judgment] Act are appropriate when some immunity, power, privilege or right *of the complaining party* is dependent upon the facts or the law applicable to the facts'" *Id*. (citing and adding emphasis to the statement in *May v. Holley*, 59 So. 2d at 639).

Plaintiff does not have a particular or special interest that is different from any other elector, member of the Democratic Party, or taxpayer. Plaintiffs oath to defend the constitution does not set him apart from any other person who took the same oath upon registering to vote.

Because Plaintiff lacks standing, the Court is without subject matter jurisdiction to consider his complaint for declaratory relief.

D. Plaintiffs claim as to the 2012 presidential preference primary is moot and his claims as to the 2012 general election are not ripe.

Plaintiff alleges and seeks a declaration that the Secretary must determine President Obama's eligibility at multiple occasions throughout the election process. Specifically, "before he [President Obama] is placed on the 2012 Presidential Primary and General Election Ballots," and after the "2012 General Election" but before the "Presidential Electors for the state of Florida [sic] cast their votes," "should Barack Hussein Obama 'win' the Florida General Election." See Complaint at 23-28. Plaintiffs claim as to the 2012 presidential preference primary is moot and his claims as to the 2012 general election are not ripe.

A "trial court must ensure that the controversy," if any, is "definite and concrete," and not moat. *Rhea v. The District Board of Trustees of Santa Fe College*, So. 3d No. 11)11-3049, 2012 WL 2924068, *7 (Fla. 1st DCA 2012). The action may not be based on some "hypothetical state of facts which have not arisen and are only contingent, uncertain, and rest in the future." *Santa Rosa County v. Administration Comm'n*, 661 So. 2d 1190, 1193 (Fla. 1995) (internal citation and quotation omitted); *see also American Indemnity Co. v. Southern Credit Acceptance, Inc.*, 147 So. 2d 10, 11 (Fla. 3d DCA 1962) (holding that "courts may not be required to answer a hypothetical question or one based upon events which may or may not occur").

The 2012 presidential preference primary occurred over six months ago on January 31, 2012. Plaintiffs claim that the Secretary should determine President Obama's eligibility "before he [President Obama] is placed on the 2012 Presidential Primary... Ballot [ ]" is therefore moot. *See Complaint* at 40.

Plaintiff's claim that the Secretary has the duty to determine President Obama's eligibility "should., . [he] 'win' the Florida General Election" is not ripe. *See Complaint* at ¶ 40. Whether President Obama will receive the most votes in Florida in the 2012 General Election is, at this time, purely a matter of conjecture. The declaratory judgment Plaintiff seeks would amount to an "advisory opinion" based on "a hypothetical state of facts..." *See Santa Rosa*, 661 So. 2d at1193.

Granting a declaration regarding President Obama's eligibility with respect to the 2012 presidential preference primary, or premised on the contingency should President Obama "win" the general election thus entitling his presidential electors

to vote for him, would amount to an advisory opinion, which is not within the jurisdiction of this Court.

III. Secretary's Motion for Summary Judgment

'The Secretary asked this Court grant summary judgment in the event that this Court determined that it had subject matter jurisdiction to entertain Plaintiff's request for a declaratory judgment. As noted herein, this Court has concluded that it lacks jurisdiction under Chapter 86, Florida Statutes, to entertain the Plaintiffs request for declaratory judgment. Thus, the Court cannot grant summary judgment as requested by the Secretary.

Notwithstanding, the Court finds that the Secretary's argument that Plaintiffs complaint is barred by *res judicata* and collateral estoppel is well founded and is an alternative basis for relief in his favor. "The doctrine of *res judicata* bars relitigation in a subsequent cause of action not only of claims raised, but also claims that could have been raised." *Topps v. State*, 865 So.2d 1253, 1255 (Fla. 2004); *Youngblood v. Taylor*; 89 So. 2d 503, 505 (Fla. 1956) (explaining prior precedent establishing that "under res judicata a final judgment or decree not only bars a later suit between the same parties based upon the same cause of action' but also upon matters that 'could have been raised'"). The doctrine applies "when four identities are present; (1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of persons and parties to the action; and (4) identity of the quality of the persons for or against whom the claim is made." *Topps*, 865 So. 2d at 1255. The "test of the identity of the causes of action" is not however, "simply whether a different statutory ground . . is asserted," but whether there is "identity of the facts essential to the maintenance of

the actions." *Gordon v. Gordon*, 59 So. 2d 40, 43-44 (Fla. 1952); *Youngblood*, 89 So. 2d at 505.

The doctrine of collateral estoppel "is a related but different concept? *Topps*, 865 So. 2d at 1255. This doctrine "bars relitigation of the same issues between the same parties in connection with a different cause of action." *Id*. [T]hat is to say points and questions . . . common to both causes of action" "estops the parties from litigating in the second suit [those] issues." Gordon, 59 So. 2d at 44; *M.C.G. v. Hillsborough County School Rd*, 927 So. 2d 224, 226 (Fla. 2d DCA 2006) (decision by then-Judge Canady). A dismissal with prejudice is an adjudication on the merits and sufficient to estop a second suit under res judicata and collateral estoppel. *See Terminello v Alman*, 710 So. 2d 728 (Fla. 3d DCA 1998) (affirming dismissal of second action with prejudice because it was essentially the same as the first, which was also dismissed with prejudice).

Plaintiff's complaint relitigates the same issues between the same parties that were dismissed with prejudice in *Voeltz v. Obama*, *et al*., No. 2012-CA-00467 (June 29, 2012) ("*Voeltz I*"). The same issue disposed of in *Voeltz I*- whether the Secretary has the duty to determine President Obama's eligibility—is at issue here. See *Voeltz I*, Order at 4-5 (holding that "[t]he Secretary of State also has no affirmative duty, or even authority," to determine a candidate's eligibility), Plaintiffs allegation in *Voeltz I* "that the Secretary's oath to 'support the U.S. Constitution' creates an absolute ministerial duty' on him to determine the eligibility of presidential nominees" is also the same in this action and was rejected by the Court in *Voeltz I. Voeltz I*, Order at 5.

Additionally, Plaintiffs allegation against the Commission that it certified "the nomination of Barack Hussein Obarna" as the "Florida Democratic nominee to the Democratic National Convention" as a result of Florida's presidential preference primary, See Complaint at 31-32, was also rejected by the Court in *Voeltz I*. *Voeltz I* Order at 4 (holding that "there has not been, and never will be, a nomination by primary election or qualification as contemplated under Florida law").

Moreover, the complaint relitigates the same deregulataratory judgment claim that could have been raised in *Voeltz I* Indeed, the *Voeltz I* court expressly addressed Plaintiffs standing to maintain a declaratory judgment in determining that Plaintiff should be denied leave to further amend his complaint See *Voeltz I* Order at 7 (concluding that the Court could not "see how Plaintiff, as an individual voter, would have standing" to bring a declaratory judgment action). Indeed., Plaintiffs Motion to Stay Proceedings in this action concedes that it "was filed because Judge Lewis refused to grant leave to amend . . .[in *Voeltz I*] to specify a prayer for relief for declaratory judgment" and that if Plaintiffs appeal of *Voeltz I* is "successful," this "instant case [will be] unnecessary." See Motion to Stay Proceedings at 2, 4.

Plaintiff brought, dropped, and attempted to bring again, a claim for declaratory relief in Voeltz I that was the same as his present claim for declaratory relief. Plaintiff argued in *Voeltz I* that the "specific prayer for declaratory relief" in his Second Amended Complaint—which is virtually identical to his prayer for relief here—was admittedly "contained or inherent in the `original' Amended Complaint" that the Court later dismissed with prejudice. *See, Voeltz I*, Pl.'s Opp.

To Defs.' Jt. Mt. To Strike Unauthorized Am. Compl. at Page 2. Plaintiff conceded that amending his Complaint in Voeltz I to state a claim for declaratory relief would "change{] nothing as to. .the Court's deliberations and ultimate rulings concerning Defendant Obama's Motion to Dismiss, and Defendant Secretary of State's Motion to Dismiss and Alternative Motion for Summary Judgment," which were subsequently granted. *See, Voeltz I*; Pl.'s Opp. To Defs.' Jt. Mt. To Strike Unauthorized Am. Comp!. at Page 2.

The parties in this action are the same parties to *Voeltz I* The cause of action is also the same because the "identity of the facts essential to the maintenance of the actions" is the same and because Plaintiff could have brought the same declaratory judgment claim at issue here. This very claim was, in fact, brought in *Voeltz I* before being omitted from Plaintiff's First Amended Complaint in that case.

Even if the cause of action here were different from *Voeltz I*, Plaintiff is estoppel under the doctrine of collateral estoppel because the issue here is the same as that dismissed with prejudice in *Voeltz I*: whether the Secretary must determine President Obama's eligibility. Following Plaintiffs own argument in *Voeltz I*, this action has "changed nothing as to . . . the Court's deliberations and ultimate ruling[ ]" in *Voeltz I* that dismissed Plaintiffs claims with prejudice.

IV. Conclusion

Thus, the Court concludes that it is without subject matter jurisdiction under Chapter 86, Florida Statutes, to grant the declaratory relief sought by the Plaintiff.

It is hereby:

ORDERED AND ADJUDGED that the motions to dismiss filed by President Obama, the Secretary of State, and the Florida Elections Canvassing Commission are GRANTED and the Plaintiffs complaint seeking declaratory relief is dismissed for lack of jurisdiction.[4]

Alternatively, it is ORDERED AND ADJUDGED that the Secretary and Commission's motion for summary judgment as to principles of *res judicata* and collateral estoppel is GRANTED.

DONE and Ordered in Tallahassee, Leon County, Florida, this 6th day of September 2012.

/s/ John C. Cooper
JOHN C. COOPER
CIRCUIT JUDGE

Cc: Counsel of Record

Copies Mailed By
SB on 9-6-12

[4] Separately, President Obama served and filed a motion for attorney's fees pursuant to Section 57.105, Florida Statutes. This order expressly does not rule on that motion. However, the Court expressly reserves jurisdiction to determine the motion at a hearing to be subsequently scheduled by the parties.

APPENDIX E

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

Case No. 2012-CA-3857

MICHAEL C. VOELTZ,
Plaintiff,

v.

BARACK HUSSEIN OBAMA, et al.,
Defendants.

ORDER DISMISSING COMPLAINT

THIS CAUSE comes before the Court upon The Secretary and Canvassing Commission's Motion to Dismiss, filed on December 10, 2012, and President Obama's Notice of Applicability of Title 3 U.S.C. § 5, filed on December 12, 2012. The Court having considered the motion and response from plaintiff finds the following:

Plaintiff brings this action under Florida Statute Section 102.168. He alleges that Barack Obama is constitutionally ineligible to be President of the United States.

This is the Plaintiff's third challenge to President Obama filed in the Circuit Court in and for Leon County, Florida. In *Voeltz I*, Case No. 2012-CA-467 this Court (The Honorable Terry Lewis presiding) dismissed Plaintiffs challenge to President Obama's candidacy asserting that the President was not a

"natural-born citizen" within the meaning of the Constitution of the United States. That action was dismissed with prejudice on June 29, 2012, and is on appeal.

Thereafter, in *Voeltz II*, Case No. 2012-CA-2063, this Court (The Honorable John Cooper presiding) was presented with a complaint that sought to have this Court "*to declare that Barack Hussein Obama is not eligible to serve as president of the United States*". Judge Cooper found that this Court lacked jurisdiction under Chapter 86 Florida Statutes to grant the declaratory relief sought by the Plaintiff. Judge Cooper's detailed 19 page order considering the matter found that "issues concerning President Obama's eligibility to be president of the United States have been committed under the Constitution to the presidential electors and the Congress and, as a consequence, this Court lacks subject matter jurisdiction to consider the issue." No appeal was taken from Judge Cooper's ruling.

We are now presented with *Voeltz III*. This Court notes that President Obama lives in the White House. He flies on Air Force One. He has appeared before Congress, delivered State of the Union addresses, and meets with Congressional leaders on a regular basis. He has appointed countless ambassadors to represent the interests of the United States throughout the world. President Obama's recent appointment of The Honorable Mark Walker, formerly a member of this Court, has been confirmed by the United States Senate. Judge Walker has been sworn in as a United States District Court Judge and currently works at the Federal Courthouse down the street. The Electoral College has recently done its work and elected Mr. Obama to be President once again. As this matter has

come before the Court at this time of the year it seems only appropriate to paraphrase the ruling rendered by the fictional judge Henry X. Harper from New York in open court in the classic holiday film Miracle on 34th St. "*Since the United States Government declares this man to be President, this Court will not dispute it. Case dismissed*."

In conclusion, this Court finds that notwithstanding section 102.168, the Circuit Court of the Second Judicial Circuit, in and for Leon County, Florida does not have jurisdiction to determine the issue of qualification for the Office of President of the United States, particularly at this late date in the process. In accordance with Florida Statute 103.061, the Florida ejectors to the Electoral College met and voted on December 17, 2012. Consistent with the Twelfth Amendment to United States Constitution, this Court cannot now alter the Electoral College process. Plaintiff's remedy, if there is any (and this Court does not suggest there is) lies with the Congress pursuant to Title 3 U.S.C. § 15. *See also Robinson v. Bowen*, 567 F. Supp. 2d 1144, 1147 (ND. Cal. 2008) (concluding that issues regarding Presidential qualification are committed to the Congress). Because the Court finds that Plaintiff cannot amend his complaint to cure this jurisdictional issue, the complaint is DISMISSED with prejudice. All other pending motions are rendered moot. This Court retains jurisdiction to award fees and costs to the Defendants as appropriate.

DONE AND ORDERED this 20th day of December, 2012.

/s/ Kevin J. Carroll
KEVIN CARROLL
Circuit Judge

Copies furnished to:

Larry Klayman, Esq.
Klayman Law Firm
2020 Pennsylvania Avenue, NW, Suite 800
Washington, DC 20006

Mark Herron, Esq.
Joseph Brennan Donnley, Esq.
Robert J. Telfer, Ill, Esq.
Messer, Caparello & Self, P.A.
Post Office Box 15579
Tallahassee, Florida 32317

Stephen F. Rosenthal, Esq.
Podhurst Orseck, P.A.
25 West Flagler Street, Suite 800
Miami, Florida 33130-1720

Richard B. Rosenthal
The Law Offices of Richard B. Rosenthal, P.A.
169 East Flagler Street, Suite 1422
Miami, Florida 33131

James A. Peters, Esq.
Office of the Attorney General
PL 01, The Capital
Tallahassee, Florida 32399

Daniel Nordy, Esq.
Ashley E. Davis, Esq.
Florida Department of State
R.A. Gray Building
500 South Bronough Street
Tallahassee, Florida 323;9

APPENDIX F

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

———

Case No. 1D13-83

———

MICHAEL C. VOELTZ,

Appellant,

v.

BARACK HUSSEIN OBAMA, Florida Democratic Party nominee for President to the 2012 Democratic National Convention; KEN DETZNER, Secretary of State of Florida; FLORIDA ELECTIONS CANVASSING COMMISSION,

Appellee.

———

Opinion filed March 13, 2014.

An appeal from the Circuit Court for Leon County. Kevin Carroll, *Judge*.

Larry Klayman, Washington, D.C., for Appellant.

Mark Herron, Joseph Brennan Donnelly, and Robert J. Telfer III of Messer Caparello, P.A., Tallahassee; Stephen F. Rosenthal of Podhurst Orseck, P.A., Miami, and Richard B. Rosenthal of The Law Offices of Richard B. Rosenthal, P.A., Miami, for Appellee President Barack Obama; J. Andrew Atkinson, General Counsel, and Ashley E. Davis, Assistant

General Counsel for Appellees Florida Secretary of State Kenneth W. Detzner and The Florida Elections Canvassing Commission.

PER CURIAM.

AFFIRMED.

THOMAS, RAY, and SWANSON, JJ., CONCUR.

APPENDIX G

SUPREME COURT OF FLORIDA

Case No.: SC14-715

Lower Tribunal No(s).:
1D13-83; 2012-CA-03857

MICHAEL C. VOELTZ

Petitioner(s),

vs.

BARACK HUSSEIN OBAMA, ETC., et al.

Respondent(s).

WEDNESDAY, APRIL 16, 2014

Having determined that this Court is without jurisdiction, this case is hereby dismissed. *See Jackson v. State*, 926 So. 2d 1262 (Fla. 2006); *Jenkins v. State*, 2d 1356 (Fla. 1980).

No motion for rehearing will be entertained by this Court.

A True Copy
Test:

/s/ John A. Tomasino
John A. Tomasino
Clerk, Supreme Court

[SEAL] Supreme Court of the State of Florida

kb

Served:

LARRY ELLIOT KLAYMAN
STEPHEN F. ROSENTHAL
MARK HERRON
JAMES AARON PETERS
JOSEPH BRENNAN DONNELLY
ROBERT J. TELFER, III
RICHARD BRIAN ROSENTHAL
ASHLEY DAVIS
DANIEL ELDEN NORDBY
N. BOB INZER, CLERK
HON. JON S. WHEELER, CLERK
HON. KEVIN JOHN CARROLL, JUDGE