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

MICHAEL C. VOELTZ,

Plaintiff,

v. Case No.: 2012 CA 03857

BARACK HUSSEIN OBAMA, Winner of the 2012 Florida General Election, KEN DETZNER, Secretary of State of Florida, and FLORIDA ELECTIONS CANVASSING COMMISSION,

Defendants.

_____/

THE SECRETARY AND CANVASSING COMMISSION'S MOTION TO DISMISS COMPLAINT

Defendants, Florida Secretary of State Kenneth W. Detzner ("Secretary") and Florida Elections Canvassing Commission ("Canvassing Commission"), move to dismiss Plaintiff's Complaint Contesting Election of Barack Hussein Obama brought under section 102.168, Florida Statutes, for lack of jurisdiction or, alternatively, failure to state a cause of action. Plaintiff has unsuccessfully brought substantially similar actions twice before. *Voeltz v. Obama, et al.*, No. 2012-CA-00467 (June 29, 2012) (order dismissing complaint with prejudice) [*Voeltz I*][1]; *Voeltz v. Obama, et al.*, No. 2012-CA-02063 (Sept. 6, 2012) (order dismissing complaint with prejudice) [*Voeltz II*][2]. The Court should dismiss Plaintiff's Complaint with prejudice.

INTRODUCTION

Plaintiff's sole cause of action is an election contest under section 102.168, Florida Statutes. Compl. ¶¶ 24-27. Section 102.168, Florida Statutes, provides in pertinent part that "the

[1] A true and correct copy of the Order is attached as Exhibit A.
[2] A true and correct copy of the Order is attached as Exhibit B.

certification of election" of a person "to office" "may be contested" on the grounds that, *inter alia*, the successful candidate is ineligible. § 102.168(1), (3), Fla. Stat. The "successful candidate is an indispensable party" to the challenge. *Id.* at (4). Plaintiff challenges the alleged election on November 6 of "Barack Hussein Obama...as the President of the United States by the state of Florida" on the basis of Mr. Obama's alleged ineligibility to hold the Office of President. Compl. ¶¶ 25-26.

At Florida's general election on November 6, 2012, the "[v]otes cast for the actual candidates for President" were "counted as votes cast for the presidential electors supporting such candidates." § 103.011, Fla. Stat. The presidential electors pledged to Mr. Obama "receive[d] the highest number of votes" and were appointed. *Id.*; *see* U.S. Const. Art. II, § 1 (providing that "Each state shall appoint" its required number of presidential electors "in such manner as the Legislature thereof may direct"); § 103.011, Fla. Stat. (directing the manner of appointment be based upon the votes cast for the presidential candidate who receives the highest number of votes). The Department of State "certif[ied]" the appointment ("election") of the electors on November 20, 2012[3]. § 103.011, Fla. Stat.

On December 17, 2012, the appointed presidential electors will "perform the duties required of them by the Constitution and laws of the United States." § 103.051, Fla. Stat.; 3 U.S.C. § 7 (setting the date as "the first Monday after the second Wednesday in December"). On that date, the presidential electors will meet, "vote by ballot for President...," "certify" the votes, and transmit the certificates to the President of the United States Senate. U.S. Const. amend. XII; *see also* 3 U.S.C. §§ 7-11 (setting forth the procedures in detail). The President of the

[3] A true and correct copy of the certificate is attached as Exhibit C. An amended certificate was executed on December 7, 2012. A true and correct copy of the amended certificate is attached as Exhibit D.

Senate will then, "in the presence of the Senate and House of Representatives," "open all the certificates" from each state "and the votes shall then be counted; -- the person having the greatest number of votes for President, shall be the President." U.S. Const. amend. XII.

ARGUMENT

An election contest is purely a statutory proceeding unknown at common law. *McPherson v. Flynn*, 397 So. 2d 665, 667 (Fla. 1981). Section 102.168 must be strictly construed. *Id.* at 668; *see also Norman v. Ambler*, 46 So. 3d 178, 181 (Fla. 1st DCA 2010); *Levey v. Dijols*, 990 So. 2d 688, 693 (Fla. 4th DCA 2008). Plaintiff is contesting the alleged "election" of Mr. Obama at Florida's November 6 general election, Compl. ¶¶ 25-26, on the basis of Mr. Obama's alleged ineligibility to hold the Office of President, Compl. ¶¶ 8-9.

The Court lacks jurisdiction because section 102.168 does not apply, and even if it did, Plaintiff cannot state a cause of action. Plaintiff lacks standing to bring or otherwise seek declaratory relief under Chapter 86, which makes amendment futile. *See Voeltz I*, at 7; *Voeltz II* at 5-9, 11-12. Plaintiff's Complaint should be dismissed with prejudice.

A. Section 102.168 Does Not Apply

The eligibility of presidential candidates and the election of the President have been committed under the Constitution to the presidential electors and the Congress. "The Twentieth Amendment and 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." *Voeltz II* at 7; *see id.* at 5-9 (holding that the court "lacks subject matter jurisdiction to consider the issue"); U.S. Const. Amend. XX, § 3 (setting forth the procedure "if the President elect shall have failed to qualify"); 3 U.S.C. § 15 (setting forth the procedure for raising and resolving objections). As for the *election* of the President, the Twelfth Amendment sets forth the

procedure for the presidential electors of each state to meet and vote for President, for the electors' votes to be counted, and for determining who is elected President based on those votes. U.S. Const. Amend. XII; *see* 3 U.S.C. § 15 (providing greater detail as to how the electors' votes are counted). Indeed, the "electors shall vote for President...in the manner directed by the Constitution." 3 U.S.C. § 8. Section 102.168, Florida Statutes, does not apply to presidential elections. The Court lacks jurisdiction and Plaintiff's Complaint should be dismissed.

B. Assuming *Arguendo* That Section 102.168 Applied, Plaintiff Cannot State A Cause Of Action

Even if section 102.168 did apply, Plaintiff cannot state a cause of action. A presidential candidate is not elected by Florida at the general election; Florida's presidential *electors* are appointed. § 103.011, Fla. Stat.; *see* § 103.021, Fla. Stat. (providing for the nomination and qualifications of the electors); U.S. Const. Art. II, § 1. Thus, there was no "election" of Mr. Obama at the November 6 general election to contest. As to the appointment of presidential electors, Plaintiff has not joined those indispensable parties or challenged their eligibility[4].

Additionally, there is no "certification of election" by the Canvassing Commission to contest. The Department of State "certifies" the appointment of the presidential electors. § 103.011, Fla. Stat. The presidential electors then "certify" their own votes for President. U.S. Const. Amend. XII; 3 U.S.C. § 9. The Canvassing Commission does not and has not "certified" the election of either the presidential electors or the electors' votes for President and cannot therefore "de-certify" such results or "certify the electors for Mitt Romney[5]" as Plaintiff contends. Compl. at 6.

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[4] Because Plaintiff has not brought such an action, the Court does not need to resolve the question of whether section 102.168 applies to the appointment of presidential electors.

[5] If section 102.168 applied to the appointment of presidential electors and if any electors were found to be ineligible, there would merely be a vacancy to be filled at the meeting of the electors,

For each of these reasons, Plaintiff *cannot*, even after amendment, state a cause of action under section 102.168, Florida Statutes, if it applied. Plaintiff lacks standing to bring the action under Chapter 86 making any amendment futile. *See Voeltz I*, at 7; *Voeltz II* at 5-9, 11-12.

WHEREFORE, the Secretary respectfully requests that the Court dismiss Plaintiff's Complaint with prejudice.

Respectfully submitted,

/s/ Ashley E. Davis
Ashley E. Davis
Assistant General Counsel
Florida Bar No. 48032
Florida Department of State
R. A. Gray Building
500 South Bronough Street
Tallahassee, FL 32399-0250
(850) 245-6536
(850) 245-6127 facsimile

Counsel for Kenneth W. Detzner Secretary of State and the Florida Elections Canvassing Commission

not the certification of the presidential electors pledged to Mr. Romney. 3 U.S.C. § 4; § 103.061, Fla. Stat.; *see also* 3 U.S.C. § 5 (providing that "such determination shall have been made at least six days before…the meeting of the electors" on December 17).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by email this 10th day of December, 2012 to the following:

Mark Herron
mherron@lawfla.com
Joseph Brennan Donnelly
bdonnelly@lawfla.com
Robert J. Telfer, III
rtelfer@lawfla.com

Stephan F. Rosenthal
srosenthal@podhurst.com

Richard B. Rosenthal
rbr@rosenthalappeals.com

Counsel for Defendant Barack Obama

Larry Klayman, Esq.
leklayman@gmail.com

Counsel for Plaintiff Michael Voeltz

/s/ Ashley E. Davis
Attorney

20120044408 ELECTRONICALLY RECORDED IN THE PUBLIC RECORDS OF LEON COUNTY, FL
BK: 4388 PG: 61 07/02/2012 at 08:59 AM BOB INZER, CLERK OF COURTS

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

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.
_____/

CASE NO. 2012-CA-00467

FILED
2012 JUN 29 P 3:42
BOB INZER
CLERK CIRCUIT COURT
LEON COUNTY, FLORIDA
C-04

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:

EXHIBIT A

IN COMPUTER

> (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 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.

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[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 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.

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 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 filing 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 are 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 lacks 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.

TERRY P. LEWIS, Circuit Judge

cc: Copies to Counsel of Record

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

Defendants.

FILED
2012 SEP -6 P 3:19
BOB INZER
CLERK CIRCUIT COURT
LEON COUNTY, FLORIDA

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.

EXHIBIT
B

IN COMPUTER

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 Obama "is not a natural born citizen as set forth in the U.S. Constitution because he was not born 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, he 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 fide, 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. Holley*, 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 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,

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

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:

> 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

[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.

> 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 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

[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.

> 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 qualifications 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 Obama. 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:

> [T]he 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 II, 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,

364 (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").

Plaintiff's 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 Plaintiff's 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 ¶ 3. These allegations

fail to demonstrate that Plaintiff possesses the requisite standing to bring a declaratory judgment action.

Plaintiff's right to a declaration must be "different in kind than those of all citizens" who may share Plaintiff's 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. Plaintiff's 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. Plaintiff's 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. Plaintiff's 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 moot. *Rhea v. The District Board of Trustees of Santa Fe College*, _ So. 3d _, No. 1D11-3049, 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. Plaintiff's 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 Plaintiff's 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 Plaintiff's 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 Bd.*, 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). Plaintiff's 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, Plaintiff's allegation against the Commission that it certified "the nomination of Barack Hussein Obama" 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 declaratory judgment claim that could have been raised in *Voeltz I*. Indeed, the *Voeltz I* court expressly addressed Plaintiff's 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, Plaintiff's 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 Plaintiff's 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. Compl. 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 estopped 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 Plaintiff's own argument in *Voeltz I*, this action has "changed nothing as to...the Court's deliberations and ultimate ruling[]" in *Voeltz I* that dismissed Plaintiff's 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 Plaintiff's 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.

[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.

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

JOHN C. COOPER
CIRCUIT JUDGE

Cc: Counsel of Record

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SB on 9-6-12

State of Florida
Department of State

CERTIFICATION OF ELECTION OF PRESIDENTIAL ELECTORS

WHEREAS, Section 103.011, Florida Statutes, provides that the Department of State shall certify as elected the presidential electors of the candidates for President and Vice President who receive the highest number of votes;

WHEREAS, according to the returns certified by the Elections Canvassing Commission pursuant to Section 102.111, Florida Statutes, Barack Obama and Joe Biden, Democratic Party candidates for President and Vice President of the United States, respectively, received the highest number of votes at the election held on November 6, 2012;

THEREFORE, I hereby certify that the following candidates for presidential electors from the Democratic Party were elected at the election held on November 6, 2012:

Lynette Acosta	Joe Faulk	Jean Monestime
Burt Aaronson	Rita Fernandino	Susannah Randolph
Scott Arceneaux	Joe Gibbons	Rod Smith
T. Wayne Bailey	Audrey Gibson	Justin Spiller
Carol Bartleson	Dina Heffernan	Bob Troy
Leon Belton	Vonzelle Johnson	Kirk Wagar
Tim Bottcher	Luis Lauredo	Ashley Walker
Alan Clendenin	Elena McCollough	Alan Williams
Ana Cruz	Amy Mercado	Jeanette Wynn
Buddy Dyer	Vivian Mitchell	

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of Florida to be affixed, at Tallahassee, Florida, this 20th day of November, 2012.

KEN DETZNER
SECRETARY OF STATE

EXHIBIT
C

State of Florida
Department of State

CERTIFICATION OF ELECTION OF PRESIDENTIAL ELECTORS
(Amended)

WHEREAS, Section 103.011, Florida Statutes, provides that the Department of State shall certify as elected the presidential electors of the candidates for President and Vice President who receive the highest number of votes;

WHEREAS, according to the returns certified by the Elections Canvassing Commission pursuant to Section 102.111, Florida Statutes, Barack Obama and Joe Biden, Democratic Party candidates for President and Vice President of the United States, respectively, received the highest number of votes at the election held on November 6, 2012;

THEREFORE, I hereby certify that the following candidates for presidential electors from the Democratic Party were elected at the election held on November 6, 2012:

Lynette Acosta
Burt Aaronson
Scott Arceneaux
T. Wayne Bailey
Carol Bartleson
Leon Belton
Tim Bottcher
Alan Clendenin
Ana Cruz
Buddy Dyer
Joe Falk*
Rita Fernandino
Joe Gibbons
Audrey Gibson
Dina Hefferman
Vonzelle Johnson
Luis Lauredo
Elena McCullough*
Amy Mercado
Vivian Mitchell
Jean Monestime
Susannah Randolph
Rod Smith
Justin Spiller
Bob Troy
Kirk Wagar
Ashley Walker
Alan Williams
Jeanette Wynn

* Corrects spelling of last name

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of Florida to be affixed, at Tallahassee, Florida, this 7th day of December, 2012.

KEN DETZNER
SECRETARY OF STATE

EXHIBIT
D